

# **PERSPECTIVES ON LEGISLATION**

## **Essays from the 1999 Legal Dimensions Initiative**

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# Portalis v. Bentham?

## The Objectives Pursued by the Codification of the Civil and Criminal Law in France, England and Canada

New English version, revised by the author

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## I. Introduction

The perception of codification and jurisprudence in Canada, seemed to us to be an interesting topic for a collection of essays entitled "Perspectives on Legislation", the theme of the "Legal Dimensions Initiative 1999"; "jurisprudence" is given hereafter its civil law meaning, namely "case law" in the common law world. This idea was prompted both by the unsuccessful attempt to recodify the criminal law spearheaded by the Law Reform Commission of Canada in 1986 and 1991, and by a recent lecture given by Professor André Jodouin.<sup>1</sup> It is tempting to assume that certain negative perceptions of codification explain, at least in part, the lack of interest of the powers that be in this project. Such hostility probably dates back to the 19th-century debates surrounding proposals to codify the English criminal law. These criticisms show that the relationship between a code and jurisprudence is often misunderstood. This misunderstanding, in turn, seems to derive from certain remarks ascribed to Jeremy Bentham. The relevant portion of his writings completely distorts the objectives pursued by legislation in a system of codified law. These goals have been superbly described by Jean-Étienne-Marie Portalis; hence the title of this study.

France was the first country to adopt brief codes, consisting of general principles encompassing the whole of the civil or criminal law. At the time, the codifiers firmly believed that courts should be given considerable latitude to take new or unforeseen circumstances into account. They knew full well that an enactment could not provide for all eventualities. The approach they favoured nevertheless allowed for the evolution of jurisprudence and even the development of new rules (I). In England, however, some jurists believed that codification was impossible in a common law system, since judges would lose the power to shape the law. This perception, as one might well imagine, is not consistent with the French experience and no longer seems to be widespread in the United Kingdom (II). In Canada, both the civil law and the criminal law have been codified. The European debates had their counterpart here, although the latter were less intense. For linguistic and cultural reasons, few Quebec francophones were interested in the criminal law, while anglophones in Quebec and Ontario recognized, with time, the benefits of codification. There was therefore a broad consensus on the adoption of the *Criminal Code, 1892*, which seems difficult to recreate at present (III).

## II. The French Notion of Jurisprudence in a System of Codified Law

Codification is the outcome of a period of profound transformation of the French legal system, extending from 1789 to 1800 (A). It is based on a particular notion of the role of jurisprudence that differs slightly, however, in the case of the civil law (B) and of the criminal law. Subsequently, the evolution of French criminal law is reminiscent of the situation that prevails in Canada (C).

## A. Changes in the Legal System During the French Revolution

In 1790, with the restructuring of the French judicial system (1), courts were deprived of the power to interpret legislation. This reform very quickly proved a failure that would have major consequences for French civil law (2).

### 1. The Restructuring of the Courts

In 1789, the French Revolution allowed elected representatives to exercise the Legislative Power according to rules that have varied with various constitutional régimes. Previously, no bill could be adopted without the king's consent. The Revolutionaries therefore truly worshipped legislation, which was viewed as the expression of the common will. They were also hostile towards courts, because of the political role judges had assumed under the *Ancien Régime* in opposing the monarchy. Finally, they fully endorsed the principles of the Age of Enlightenment; its representatives often decried the irrationality of the legal system. In particular, they attacked the cruelty of the criminal law, the disproportion between crimes and punishments, and the excessive use of the death penalty. For the Italian jurist Beccaria, it was even inconceivable that judges should interpret criminal laws.<sup>2</sup>

Beginning in 1789, the institutions of France would be completely overhauled. In November, the *parlements*, the appeal courts of the *Ancien Régime*, were dissolved. In August 1790, a new judicial system was put in place. The jury made its appearance in criminal matters. In civil matters, the parties could appoint an arbitrator; furthermore, they had to go through conciliation proceedings. In 1793-94, arbitration even became mandatory in cases involving succession and communal lands. As of 1790, in family matters, disputes were submitted to a family court. Each party appointed two relatives or friends; if no agreement was reached, they appointed an arbitrator to settle the deadlock. One should not be misled by the term "friend"; quite often, this individual had practiced law as a barrister (*avocat*) or solicitor (*procureur*) before the Revolution.<sup>3</sup> These courts had jurisdiction notably in matters of divorce, filiation and succession; they were abolished in 1796.

The law of 1790 created district courts (*tribunaux de district*). Judges were elected for a six-year term; jurists with a university degree and five years' experience were eligible. In September 1792, the Assembly held new elections; any citizen age 25 or older could be a candidate. From 1793 to 1795, members of the *Convention* gave themselves the right to overturn decisions and punish judges deemed to have rendered bad judgments. During this period, the *Tribunal Révolutionnaire* was authorized to hand down a death sentence without hearing the witnesses or the defence; no appeal as allowed from its judgments. In 1794, the *Convention* entrusted the tasks of filling vacant judicial positions to its Legislation Committee; a law of 1795 authorized the *Directoire* to do likewise if no judge had been elected by an electoral assembly. Article 264 of the Constitution of Year III (August 22, 1795) expressly forbade the *Corps Législatif* to overturn the decisions of the *Tribunal de*

*Cassation*. In 1800, Napoleon Bonaparte did away with the election of judges, who would henceforth be appointed by the government.

In the system established in 1790, a judgment rendered by a district court could be appealed before the neighbouring one. After heated debate, the *Tribunal de Cassation* came into being in November 1790. Its role was to oversee the application of the law by quashing judgments and referring cases to a competent court which could nonetheless decline to follow its opinion. After two unsuccessful referrals, the matter was submitted to the legislative power, which rendered a "decree declaratory of the law." In 1800, Bonaparte did away with the appeal to the neighbouring district tribunal; in its place, he created independent appeal courts whose decisions were appealable before the *Tribunal de cassation*. In 1804, the term "*cour*" (*d'appel* or *de cassation*) replaced the term "*tribunal*."

The Revolutionaries were hostile towards legal professionals. In 1790, the French bar was abolished: the right to present arguments in court was open to everyone; one spoke of unofficial defenders or friends, who were to carry out their functions for free, as a public service. In 1791, solicitors made their appearance: their role was to represent the parties by writing the pleadings; only former judges, prosecutors or lawyers could perform this function, which was abolished in 1793. Then, representatives legally appointed (*fondé de pouvoir*) were, in principle, to act for free. In 1804, lawyers had to register with the courts. To be eligible, a candidate had to hold a licence in law and must have completed three years' training. The writing of pleadings was again reserved for solicitors.

The attempt to do away with legal professionals therefore ended in failure. It attests to a profound aspiration—to entrust the application of the law to the ordinary citizen. However, the existence during this period of an appeal raising legal issues shows that the traditional conception of the role of the courts did not disappear entirely.

## 2. Control Over the Application of Legislation

Under the *Ancien Régime*, in addition to their judicial functions, the *parlements* enjoyed within their district a fairly broad regulatory power provided, however, they did not contradict the texts approved by the king, such as ordinances and edicts. In some instances, after judgment, an *arrêt de règlement* generalized the solution that was chosen for a specific case.<sup>4</sup> In 1790, this regulatory power was expressly abolished. Instead, judges were to seek the advice of the legislative body "whenever they deem it necessary, either to interpret an enactment, or to make a new one" [translation]: this was the *référé législatif* (Law of August 16-24, 1790). The *Ordonnance sur la Procédure Civile* of 1667 contained a similar provision: judges were to refrain from interpreting texts decreed by the king and ask him to put the issue at rest. The *parlements*, however, paid little attention to this rule.<sup>5</sup>

The *référé législatif* very soon proved unsatisfactory, since legislators either did not respond to the requests they received or neglected to do so. In 1795, the *Directoire* screened requests from the courts. The Court of Cassation put an end to this system, because Article 202 of the Constitution of Year III (1795) prohibited the exercise of a judicial function by the two councils that held the legislative power. The court inferred from this that

the *référé* was to be applied only to "future and not to current cases, otherwise this legislation could only be applied to them in a retroactive manner" [translation]. Moreover, the court frequently censured the use of this mechanism on the ground that the legislation before the lower court was clear. It seems, then, that the courts had to render a decision before resorting to this procedure, although the court of cassation sometimes deviated from this rule. In fact, it referred eighteen requests to the *Corps Législatif*, but received only one reply.<sup>6</sup>

In 1800, the legislature abolished the obligation imposed upon the Court of Cassation to refer to it problems of interpretation. The Court continued to carry out the functions that were initially assigned to it. Consequently, the jurisdiction to which a case was referred could refuse to follow its ruling. In such a case, after 1800, the second appeal was heard by the "Joined Chambers", that is, by all the judges, who normally sat in separate chambers. After 1807, if a third court of appeal refused to follow the advice of the Joined Chambers, the matter was referred to the *Conseil d'État*, whose opinion was approved by the Emperor, which put an end to the debate.

In 1828, the Houses of Parliament were required to arbitrate such conflicts by passing an interpretative act; this statute did not affect the judgment in the third appeal court, which became final for the parties. Once again, this experience proved a failure, as it was often difficult to draft a statute of general scope that put an end to the dispute.<sup>7</sup> Consequently, a law of 1837 made mandatory the ruling of the Joined Chambers hearing the second appeal. This procedure has survived to the present day. But since 1967, the second appeal is heard by a plenary assembly composed of, for each of the six chambers, the First President, the President, the most senior and two ordinary councillors. In 1991, the *Cour de Cassation* consisted of 84 *conseillers* and 37 *conseillers référendaires*; at present, it hands down over 30,000 decisions each year.

While the first Revolutionary laws attempted to reserve for legislators the interpretation of legislation, this task very soon had to be turned over exclusively to judges. After 1837, legislators also refused to settle disputes between the *Cour de Cassation* and courts of appeal handing down similar rulings in a given case. After this development, it became evident that judges needed considerable latitude to fully carry out their role. To some extent, this observation made the codification of French civil law possible.

## B. The Civil Code and its Repercussions

In 1804, France adopted a civil code (1). Already the authors of this text could foresee the essential role that jurisprudence would be called on to play until the present day (2).

### 1. The Adoption of the *Code Civil*

Under the *Ancien Régime*, the private law was derived from numerous sources. In the north and central part of the kingdom, some sixty customs applied in as many regions. Initially oral, they were reduced into writing as of the 16th century. In the south, Roman law was the common law, which did not preclude the existence of specific usages. Royal ordinances governed civil and criminal procedure, commercial law and, since the 18th century, gifts and wills. As for obligations and contracts, French jurisprudence initially drew on Roman and canon law; later on scholarly works, notably those of Jean Domat (1625-1696) and especially Robert-Joseph Pothier (1699-1772), synthesized this evolution, using general and concise propositions that earned them an international reputation. In family law, the canon law still applied, notably in matters concerning the validity of marriages and filiation.

In August 1790, the *Assemblée Nationale* announced its intention to undertake the preparation of "a general code of simple and clear laws adapted to the Constitution" [translation]. A decree of September 2, 1791, added: "[t]here will be made a Code of civil laws common to the whole kingdom, to define clearly the laws of liberty, property and free contracts" [translation]. The *Assemblée* doubtless hoped to strengthen its legitimacy and powers. However, it was the criminal law that first held its attention. A complete and well-structured code was first enacted in 1791. It did away with several offences of a religious nature, such as sorcery and homosexual relations between consenting adults. In response to the extremely broad discretion enjoyed by judges under the *Ancien Régime*, sentences were fixed, ruling out any individualization. In 1795, the *Code des Délits et des Peines* (code of crimes and punishments) was enacted; despite its name, it concerned itself with criminal procedure only. That same year, a hypothecary code also came into being; it was revised in 1799.

In civil law, three draft codes were written by Cambacérès: the code of 1793 had 719 articles, that of 1794 had 368, and that of 1797, 1,104. Fairly brief, they were not adopted because of wars and political crises. The first draft, a sign of the times, was deemed too complex by some; the second was described as a "collection of precepts," while the third stirred less opposition at the outset. In all three cases, Cambacérès attempted to co-ordinate the Revolutionary legislation and the rules of the former law still in force.<sup>8</sup> In 1800, Jacqueminot presented a new draft on the law of persons, family and successions, but was no more successful.

Under the *Consulat*, Napoleon Bonaparte had the work resume in 1800. Four prominent jurists were given the task of writing the draft. Two of them were from a region where Roman law was applied (Portalis and Maleville); the other two (Tronchet and Bigot de Préameneu) came from customary law areas. Portalis certainly represented a conservative element; an ardent defender of the traditional family, he fled in 1798, as he was in favour of restoring the monarchy. He returned to France after Bonaparte's *scoop d'état*.<sup>9</sup> On January 21, 1801, the four commissioners submitted the results of their work to the parliamentary assemblies as well as to the various courts of appeal, which were obliged to publish their observations. The study of the draft began soon after. Following an unfavourable vote in the *Tribunat* and the *Corps Législatif* on Title I, a *senatus consultum*



reduced by more than half the number of members of the *Tribunat*, making it possible to exclude the opponents. Napoleon continued to intervene in the debates so that the work would go ahead. These discussions, and the observations of the courts, were published between 1827 and 1832.<sup>10</sup>

An act of Ventôse 30, Year 12 (March 21, 1804), brought together "into a single body of laws, under the title of *Code civil des Français*" [translation] the various acts which had officially sanctioned each of the titles of the code since February 1803. An act of September 3, 1807, prescribed the use of the title *Code Napoléon*, still used today. Other codes were subsequently promulgated: the *Code de procédure civile* (Code of Civil Procedure, 1806), the *Code de commerce* (Code of Commerce, 1807), the *Code d'instruction criminelle* (Code of Criminal Procedure, 1808), and the *Code Pénal* (Criminal Code, 1810). The previous laws were officially repealed by Article 7 of the act of 1804 "in the subject matters covered by the said acts making up the present Code" [translation]. It follows that these laws could still be used to supplement the code.<sup>11</sup> Furthermore, a number of codal provisions repeated the doctrine of the *Ancien Régime*, particularly with regard to obligations and contracts. Thus, these works continued to be cited in the early 19th century, but their use dwindled thereafter.

In many respects, the *Code Napoléon* is a conservative document that revives certain rules of the *Ancien Régime* without entirely renouncing the Revolutionary laws. For instance, Napoleon imposed his vision of marital control; parental control was also reinforced. A sign of the times, Article 1781 stated that the master was to be taken at his word concerning the amount owed to the labourer by way of wages or payment; this provision survived until 1868. The right to divorce was quite limited: fault was the preferred criterion. Moreover, it was abolished in 1816. The right of ownership was fully protected in order to prevent the revival of feudalism or the existence of competing controls over a given plot of land. In matters of succession, the rights of natural children were limited; parents were given back the possibility of increasing the share of a legitimate child.

The *Code Civil* therefore marked a return to the traditional values of France. It established a uniform national law and turned the page on the stirrings of revolution, notably in family law. It also favoured a drafting technique that conferred broad discretionary power on judges. Here too, the Revolutionary ideals were set aside and the importance of jurisprudence was acknowledged.

## 2. The Interpretation of the *Code Civil*

### (a) Portalis' Conception

In 1790, in the early days of the Revolution, some Revolutionaries disputed the utility of jurisprudence. Thus, Robespierre stated:

[Translation] [T]his word jurisprudence must be erased from our language. In a State which has a constitution, a legislation, the jurisprudence of the courts is nothing more than legislation: then there is always identity of jurisprudence.

His objective was clear: "legislation only and no jurisprudence" [translation]. For some Revolutionaries, the new legislation would be so simple that juries would have no difficulty applying it<sup>12</sup> Yet as early as 1790, in the course of parliamentary debates, several speakers maintained that the *Tribunal de Cassation* should ensure the uniformity of jurisprudence so that it faithfully reflected the will of the legislature.<sup>13</sup> After 1795, this notion spread, owing notably to the ineffectiveness of the *référé législatif*, which judges were using less and less before rendering a decision.<sup>14</sup> Nevertheless, in 1801, some courts criticized the preliminary title of the draft civil code; in their view, it allowed too much discretion to judges in the application of legislation.<sup>15</sup> Napoleon himself, on learning in 1805 that Maleville had published an *Analyse raisonnée de la discussion du Code civil* (A Reasoned Analysis of the Discussion of the Civil Code), is said to have cried out "My Code is lost!"<sup>16</sup> [translation]; fortunately, it did not occur to him to ban doctrinal works.

In his famous preliminary discourse of January 21, 1801, Portalis introduced the draft code he had just completed with his colleagues.<sup>17</sup> He seized the occasion to explain, in dazzling language, his view of legislation and jurisprudence: It is incumbent on the legislator to "establish, by broad views, the general maxims of the law, to set down fruitful principles, and not to descend into the details of questions that may arise on every subject.... There are a multitude of details that escape him, or are too contentious or too mutable to be dealt with by an enactment" [translation]. Portalis had no illusions in this regard: a "code, however complete it may seem, is not so soon finished, that thousands of unexpected questions present themselves to the magistrate.... A multitude of things are therefore necessarily abandoned to the empire of common practice, the discussion of educated men, the arbitration of judges.... In this immensity of diverse subjects which make up civil matters, and the judgment of which, in the vast majority of cases, is less the application of a specific provision than the combination of several provisions that lead to the decision rather than encompass it, one can no more do without jurisprudence than without legislation" [translation]. He concluded: "It is to jurisprudence that we leave those rare and extraordinary cases which do not fall within the framework of a reasonable legislation"<sup>16</sup> [translation].

Thus, the legislator must attempt to encompass in general maxims the various situations likely to arise, making the necessary distinctions, but giving up the idea of foreseeing every difficulty: In Portalis' words, "*Tout prévoir, est un but qu'il est impossible d'atteindre*" (to foresee everything is a goal impossible to achieve). The judge, for his part, must apply the principles contained in legislation, using reasoning that enables him to consider all aspects of the problem and, if need be, to make up for a deficiency. If jurisprudence must as a rule be followed, it can change if "the progress of wisdom warrants it" [translation]. The code is therefore the starting point for an analysis, but judges may add to its provisions.

Article 4 of the *Code Napoléon* confirmed the judge's role: "The judge who refuses to judge, on pretext of the silence, obscurity or insufficiency of the law, may be prosecuted as guilty of a denial of justice." The magistrate could no longer refer questions of interpretation to legislators, as was the case since 1790. But this procedure survived until 1837 in the specific case of a disagreement between the *Cour de Cassation* and the appeal courts to which a case had been referred.<sup>19</sup> Article 4 of the *Code Napoléon* was echoed in section 11 of the *Civil Code of Lower Canada* and nowadays in section 42.1 of the

*Interpretation Act*.<sup>20</sup> The judge could certainly conclude that no rule authorized him to allow the claim; but he was obliged to render a judgment. Moreover, according to Article 5 of the *Code Napoléon*, judges were forbidden "to pronounce decisions by way of general and regulative disposition on causes which are submitted to them." The aim here was to prevent the reappearance of the *arrêts de règlement* issued by courts of appeal before the Revolution. The judge's mission was therefore to find the best solution to the dispute before him. If he could not create a general rule, he must, according to Portalis, "study the spirit of an enactment when its letter is silent" [translation] and "not lay himself open to the risk of being by turns slave and rebel and of disobeying out of a sense of constraint"<sup>21</sup> [translation].

#### (b) The Role of Jurisprudence after Codification

Despite Portalis' noble conception, certain factors helped to weaken jurisprudence after the adoption of the *Code Civil*. In France, judgments have always been extremely terse. In fact, the mission of judges was to apply the guiding principles of the codes; they did not need to explain them. The decision was an individual case and had no value as a precedent; therefore, magistrates did not need to concern themselves with them. In this context, doctrinal works were thought by some to be more important than jurisprudence. In the 20th century, there has been a return to a more pragmatic notion. When a given problem occurs a number of times and the courts have continually adopted the same solution, the jurisprudence is described as "constant." In theory, judges are *not obliged* to follow this jurisprudence. In practice, if they go against the trend, they are overturned by a court of appeal or by the *Cour de Cassation*. The *Cour de Cassation*, however, is entirely at liberty to reverse this jurisprudence.

In France, published judgments are often accompanied by doctrinal notes that enable the reader to understand the scope of the decision and the circumstances of a case. These notes point out the existence of a controversy or the germ of a jurisprudential reversal. Similarly, many doctrinal works provide a summary of the relevant jurisprudence and of the rules it applies, when they do not contain a detailed review of its evolution. They isolate the principles that are often implicit in judgments. In these circumstances, there is no need to ascribe to decisions the value of precedents: the authors provide guidance to the courts. It is therefore important to consider the role they may have played over time.

In the 19th century, there seemed to be one dominant work method among legal scholars, which subsequently became known as the *École de l'exégèse* (school of exegesis). These authors shared the notion that a solution could be deduced from the code; to this end, they favoured studying the preliminary works, the wording of the enactment and its underlying principles; they attributed less importance to history or even to jurisprudence. In general, they espoused the values conveyed by the code, such as the importance of the legitimate family, property and freedom of contract. This in no way ruled out doctrinal debates, which were numerous, or even participation by some in political struggles.

At the turn of the century, a new trend appeared with Saleilles, Josserand, and especially François Gény. Gény criticized his predecessors for making the evolution of jurisprudence next to impossible and for not taking into consideration the social problems of the time (the rise of trade unionism or occupational injuries, for example). He called for the

use of a broader range of sources. He refused to acknowledge that for every question, the legislator had a solution in mind. He advocated "free scientific research," which would provide ample room for jurisprudence and the social context surrounding a problem. Rather than consider only the terms of the code and the speeches of 1803-1804, it was preferable to look for a fair solution when this could be done without distorting the texts<sup>22</sup>

Gény's approach eventually took hold. There is scarcely a French legal scholar who thinks it possible to reason solely on the basis of the code. Instead they will consider first of all, jurisprudence and doctrine, as they support diverse views, and then the social context. In the 20th century, judges have proven increasingly bold, notably with regard to *responsabilité du fait des choses* (liability for damage caused by things), abuse of rights and unjust enrichment. They therefore gave effect to principles that appeared nowhere in the code but underlay its provisions. Legislation continued to play a pre-eminent role in this system, but it gave way to other sources.

### C. Jurisprudence in French and Canadian Criminal Law

As early as 1801, the importance of jurisprudence in the civil law was scarcely in question. In the criminal law, considerations of another order were at stake. *A priori*, it was eminently desirable not to leave the accused open to the vicissitudes of jurisprudential debates. Yet from 1810 on, the need to interpret legislation was scarcely in doubt in the minds of legislators (1). With regard to defences, French judges also had considerable latitude, which is somewhat reminiscent of the situation in Canada (2).

#### 1. The French Criminal Code and Jurisprudence

##### (a) The Debates Leading up to the Adoption of the Code

As already mentioned, the first French criminal code dates back to 1791. It repealed offences of a religious nature and the torments imposed under the former law and imposed fixed sentences, thus denying the judge any discretion. In 1808, a code of criminal procedure replaced the code of 1795; it governed procedural matters. The criminal code of 1810 (*Code pénal*) increased the punishments, notably by reinstating branding and amputation at the wrist for parricide. Some of these provisions served the needs of a totalitarian régime. Others reflected the values of a society on the verge of an industrial revolution, such as offences that served to protect property or ban strikes and the formation of trade unions.<sup>23</sup>

The code of 1810 gave back to judges considerable discretionary power by stipulating in several cases minimum and maximum, rather than fixed, punishments, as well as extenuating circumstances allowing for a lighter penalty. Beginning in 1832, the jury enjoyed unlimited discretion in this regard. While it has often been written that the criminal code was inspired by utilitarianism, it was also infused with a spirit of retribution.<sup>24</sup> In the speeches introducing the code, the name of Bentham appears only once. Berlier explains that the classification of this author has not been adhered to. He adds that if there was

something to be gleaned from the "profound meditations of the jurisconsults and public law experts, it is by connecting them to the law by imperceptible dots"<sup>25</sup> [translation].

In this context, what role was devolved to jurisprudence? The preliminary discourse of Portalis, delivered in January 1801 during the presentation of the draft civil code, made a very clear distinction between the criminal law and the civil law. In his view, "there may be foresight in criminal matters to which civil matters are not susceptible" [translation]. Moreover, the release of a citizen must be the necessary outcome of a deficiency of legislation. In fact:

[Translation] The enactment which forms the basis of the charge must precede the act which is impugned by it. The legislator must not strike without warning: if it were otherwise, the law, contrary to its essential purpose, would not propose to make men better, but only to make them more unhappy, which would be contrary to the very essence of things.

Thus, in criminal matters, where only a formal and pre-existing enactment may support the judge's action, there must be specific legislation and no jurisprudence. It is otherwise in civil matters; . . .<sup>26</sup>

In this passage, Portalis refused to acknowledge the very existence of jurisprudence in criminal law, even though it must play a primordial role in civil law. Seventeen days later, his attitude would be dramatically different. A bill stated that certain offences were to be judged by special courts. In the debates leading up to the adoption of this enactment, some speakers argued that the terms in which these offences were described were too vague. Portalis' response returned jurisprudence to the fore:

[Translation] An enactment is not a vocabulary. Good minds are sparing of definition. All the current legislation has spoken of the same things and used the same words, without making new definitions, having reference to the meaning that had always been attached to these words. It is seldom necessary to change the language established by jurisprudence. In legislation, as in sacred things, rarely is novelty not profane.<sup>27</sup>

Portalis therefore seemed to recognize that jurisprudence played an important role in criminal law. Quite simply, if the legislative provision invoked by the public ministry did not clearly encompass the conduct with which the accused was charged, the judge or jury had to acquit. In 1801, Target delivered a preliminary discourse on the occasion of submitting the first draft of the criminal code; he said not a word about the role of jurisprudence.<sup>28</sup>

In 1810, a set of reasons and a report were presented before the adoption of the seven acts that would eventually form the new code.<sup>29</sup> These texts said little about the role of judges and seemed to espouse Portalis' views on this question. Thus, Berlier recalled that there could be no conviction in the absence of a "formal and unambiguous provision"<sup>30</sup> [translation]. These orators lauded the clarity and preciseness of the draft code, and the latitude given judges when imposing a sentence. Noailles recalled that the conciseness of the 1791 code had often resulted in the acquittal of forgers; he hoped that "the wise foresight of the current Code will reach them all"<sup>31</sup> [translation]. Louvet recalled that "clarity,

preciseness, aptness, proper extension to all cases, are indispensable for the application of judgments<sup>62</sup> [translation]; in his opinion, the proposed provisions "do not have an indefinite extension"<sup>63</sup> [translation]. For Nougariède, the purpose of the code was "to obtain, with the revision of the criminal laws, a systematic and consistent assembling of their general principles"<sup>64</sup> [translation].

For these jurists, it seemed obvious that the application of certain legislative provisions might result in the creation of jurisprudence.<sup>65</sup> It was therefore unnecessary to state "this principle predating all Codes, that where there is no intent there can be no crime"<sup>66</sup> [translation]. Of course, it is necessary "to preserve these general rules of equity that have been introduced into criminal jurisprudence with the consent of all civilized peoples; those, for example, that make it necessary always to interpret in favour of the accused the silence and even the obscure expressions of legislation" [translation]. But "these immutable principles need not be proclaimed by the legislator, they are already imprinted in the hearts of all magistrates"<sup>67</sup> [translation]. Judges were therefore invited to rely on certain pre-existing principles not contained in the code.

While Article 4 of the criminal code of 1810 confined itself to prohibiting the imposing of a punishment that was not prescribed by an enactment at the time the offence was committed, Article 8 of the *Déclaration des Droits de l'Homme* (Declaration of the Rights of Man) of 1789 was more specific. It stipulated that "no one may be punished except by virtue of an enactment established and promulgated before the delict, and legally applied." Both the code of 1791 and that of 1810 attempted to abide by the spirit of the *Déclaration* by precisely defining offences. Several articles were rewritten to describe more fully the essential elements of the infraction; certain vague expressions, such as "principles of natural morals," disappeared. Moreover, the Emperor favoured a "dogmatic" style wherever it was possible "to express in a single phrase with greater clarity and energy the legislator's intent" [translation]. Berlier stated that "[o]missions and gaps are never to be so feared as when one wants to go into the particulars" [translation]. By way of illustration, theft was not defined, the term "frauduleusement" (fraudulently) replaced an entire paragraph, and the expression "animal domestique" (domestic animal) was substituted to a list of ten species. As for unintentional injuries, Cambacérès refused to "fetter the conscience of judges"<sup>68</sup> [translation]. In short, "definitions do not at all suit facts whose character is commonly settled"<sup>69</sup> [translation]. Some essential elements of an infraction were therefore broadly worded in order to give the judge and jury considerable discretionary power.

In the end, the phraseology of the civil code and that of the criminal code were therefore fairly similar. The Revolutionary legacy survived, however, through the "Principle of legality" (*Principe de légalité*), which calls to mind certain theories of Canadian constitutional law.

#### (b) The French Principle of Legality and Unconstitutional Vagueness in Canadian Law

Since 1958, the *Déclaration des Droits de l'Homme* of 1789 has been part of the "block of constitutionality" that must be respected by French legislation on pain of being censored by the *Conseil constitutionnel*. Jurisprudence nevertheless continues to play an

essential role in French criminal law; the situation has not been altered by the adoption of either a new code of criminal procedure, in 1959, or a new criminal code, in 1992. In this regard, the scope of the "Principle of legality" has been studied closely by jurisprudence and French doctrine. The authors Merle and Vitu summarize the state of the law as follows:

[Translation] Legality in the strict sense therefore rules out that, in drafting infractions, legislation would allow the creation of what are known as "open" offences, that is, definitions so vaguely worded that in practice they can be made to fit any acts; this would be the case, for example, if a criminal provision made "any act apt to be injurious to the French people" an offence, as did a French act of September 7, 1941, establishing a State tribunal. Similarly, it is appropriate to avoid using vague words, open to several interpretations.

The requirement of a specific technique for drafting texts obviously should not be pushed to the point of absurdity: the legislator can legislate only by means of general definitions and cannot be asked, at any time, to enumerate all the specific instances that one's imagination may suggest; otherwise his task would become impossible. Moreover, the drafters of the current penal code [of 1992] endeavoured to define, better than the 1810 Code did, precisely the infractions they retained, though here and there some wording is quite broad. It is true that some concepts are fairly well known in everyday language or have been sufficiently explained by jurisprudence to obviate the need to define them more precisely: for example, the concepts of homicide, violence, threat or narcotics.<sup>40</sup>

As for the role of jurisprudence, the French position is as follows:

[Translation] To repressive magistrates, the principle of legality makes it necessary, moreover, to interpret an enactment in a non-extensive way. It would be futile for the legislator to establish specific crimes if, through an arbitrary or analogous interpretation, judges could give criminal provisions as broad a scope as they thought desirable: the uncertainty would be the same for those subject to trial as would arise from a complete absence of legislation. It will be noted, however, that the interpretation of legislation is not forbidden: for courts must apply its general and abstract formulas to concrete cases; a declaratory or teleological interpretation, which is in no way contrary to the principle of legality, should be preferred over an excessively literal interpretation.<sup>41</sup>

In many respects, this view of the role of legislation and jurisprudence calls to mind the doctrine of vagueness recognized by the Supreme Court of Canada. This defect renders a statute unconstitutional because it amounts to a violation of the principles of fundamental justice which the State must respect before infringing the right to life, liberty and security of the person.<sup>42</sup> It is not, however, confined to the criminal field and may be relied upon in the context of other Charter provisions.<sup>43</sup> It appears if a law "so lacks in precision as not to give sufficient guidance for legal debate."<sup>44</sup> In fact, "[l]egal rules only provide a framework, a guide as to how one may behave, but certainty is only reached in instant cases, where law is actualized by a competent authority."<sup>45</sup> A statute can do no more than "enunciate some boundaries, which create an area of risk."<sup>46</sup> In criminal law, "the terms of the legal debate should be outlined with special care by the State."<sup>47</sup> Compared to the principle of legality, this last exhortation may seem rather timid.<sup>48</sup> But it is based on an undeniable reality: it is neither possible nor desirable to forbid the legislator from using general terms to which the courts must give effect.

In short, "[t]he judiciary always has a mediating role in the actualization of law, although the extent of this role may vary."<sup>49</sup> The Court adds that provisions that are "framed in general terms may be better suited to the achievement of their objectives. . . ." <sup>50</sup> These principles were applied to section 515(10)(b) of the *Criminal Code*.<sup>51</sup> Under the terms of this provision, the court ruling on the pre-trial release of an accused held in custody must ask itself whether his detention "is necessary in the public interest or for the protection or safety of the public." In this wording, the notion of "public interest" "provides no guidance for legal debate"; this constitutes a violation of the right "not to be denied reasonable bail without just cause" guaranteed by section 11(e) of the *Canadian Charter of Rights and Freedoms*.<sup>52</sup> In this case, Mr. Justice Gonthier disagreed with the Chief Justice, which shows the considerable latitude the State must have in his view; he insists nevertheless on the necessity that "norms which govern conduct, and the contravention of which may result in incarceration, be both promulgated and formulated so as to allow for a high degree of certainty."<sup>53</sup>

These comments show that Canadian and French constitutional law share some similarities concerning the role of legislation; the same may be said of the role of jurisprudence in the field of criminal law.

## 2. Jurisprudence and Defences

The French criminal code of 1810 contained few defences or grounds for exoneration. It stated that there "is no crime or misdemeanor if the accused was in a state of insanity at the time of his actions or if he was compelled to act by a force which he couldn't resist" (Art. 64). The lack of discernment in minors under age 16 was a ground for acquittal (Art. 66). Article 328 exonerated the author of a homicide, wounding or striking when such acts were "compelled by the immediate and actual necessity to defend oneself or another." However, an excuse or a mitigation of punishment had to be expressly provided for by a specific provision (Art. 65). There were no definitions of these expressions and it was left to jurisprudence and doctrine to stipulate their conditions of application.

In the absence of guidance from the legislator, the courts were called on to specify what intellectual or moral element was required by a given offence. They thus developed an elaborate classification in the absence of any provision on this subject. The moral element could consist of a state of mind known as "dol" (deceit or fraud). It could be general or specific. Furthermore, a criminal fault could be the result of simple negligence. Finally, a regulatory offence (*contravention*) was committed as soon as the conduct complained of occurred, regardless of the author's state of mind.<sup>54</sup> Article 121 of the new criminal code codifies these principles.<sup>55</sup> At first glance, the Canadian jurist is tempted to draw a parallel with crimes of general or specific intent, the *mens rea* for crimes of intent or negligence, and absolute liability offences. The analogy need not be perfect to see that jurisprudence plays a fundamental role in both systems.

This comparison can be extended with two examples. First, since the late 19th century, the defence of necessity had been recognized in France in the absence of a specific provision on this matter.<sup>56</sup> In Canada, this defence had also been recognized by the



Supreme Court, again in the absence of a provision on this subject.<sup>67</sup> The French criminal code of 1992 codified this principle in Article 122-7. The second example concerns the notion of consent. It did not appear in either the French code of 1810 or that of 1992. In principle, it was therefore not a defence, for example in a duel. Similarly, in 1921, in the case of a surgeon who caused injuries while performing cosmetic surgery, the *Cour de Cassation* ruled that consent was not relevant when the aim pursued was contrary to public policy; obviously, jurisprudence has evolved since then. In another vein, the courts had no difficulty concluding that the term "rape" presumes the absence of the victim's consent.<sup>68</sup> In the absence of any indication to the contrary, it seems therefore that a husband could commit rape against his wife. Since 1984, the *Cour de Cassation* has set aside the doctrine that used to reject this position, holding instead that the husband had no special immunity.<sup>69</sup>

In Canada, the *Criminal Code* states that consent constitutes a defence to a charge of assault.<sup>60</sup> However, the Supreme Court has found that at common law, a victim cannot validly consent to a fight in which the participants may injure each other.<sup>61</sup> More recently, it rejected a common law rule and stated that consent to unprotected sexual intercourse is vitiated by fraud if the accused does not disclose that he is HIV-positive.<sup>62</sup> These cases clearly show that the courts have considerable latitude where general concepts are used and that they do not hesitate to use to extend the reach of certain articles of the code.

Thus, it appears that in France, certain grounds of defence have been recognized and limited in the absence of a specific provision. In Canada, the scope of a defence mentioned in the code has sometimes been restricted by jurisprudence. More generally, the limited number of grounds of defence recognized by the French penal code of 1810 calls to mind the structure of the Canadian *Criminal Code*. In both cases, the application of a code is dependent on jurisprudence. In France, this situation is the result of a particular notion of codification and the abandonment of the idealistic visions of the Revolutionary period. That is why in 1810, notions as fundamental as insanity, self-defence and discernment were left undefined. The courts thus had a great deal of latitude. These observations may shed light on the failure of the English attempts to codify criminal law.

### III. The English Perception of the Role of Jurisprudence in a System of Codified Law

The difficulties encountered in England during attempts at codification were attributable, at least in part, to the style of statutes that were in favour in that country, of which Jeremy Bentham was highly critical (A). In the 19th century, his followers nearly persuaded Parliament to adopt a code of offences. Several jurists, however, were afraid to take away from the courts the flexibility afforded by the common law. In the 20th century, while the nature of a code is better understood, codification is still a long time coming (B).

## A. The Role of Legislation in England

English legislation presents distinct characteristics whose origins must be recalled (1) in order to gain a better understanding of the revolutionary nature of Bentham's criticism (2).

### 1. The Importance of Style

In England, for a long time access to legislation was problematic. In the Middle Ages, collections of statutes differed from each other. From 1481 on, printing made possible the dissemination of a single text. The first official version of the complete statutes, *Statutes of the Realm*, was published between 1810 and 1822; it ended with the statutes adopted in 1713 and remained incomplete, besides containing texts of doubtful authenticity. It was not until the 19th century that the statutes accumulated since the Middle Ages were repealed, consolidated or reformed. But it should be noted that this was done only by sectors. No general consolidation was completed, although in 1853, a committee, then a commission, were created for this purpose.<sup>63</sup> Between 1870 and 1878, after the repeal of numerous statutes by Parliament, the Queen's Printer was able to publish a collection of eighteen volumes containing the acts of general and lasting interest that were still in force. This "revision" was strictly a chronological ordering. It did not provide a continuous text containing all provisions governing a given question, which would constitute a consolidation. Such an operation was in fact problematic from a stylistic standpoint in a country where some enactments dated back to the 13th century.<sup>64</sup>

The traditions of draftmen also explain certain characteristics of British legislation. At one time, they were often *conveyancers*, experts in the drafting of legal instruments that were paid by the word. Out of professional habit, they used extremely long sentences, which quite often went on for a paragraph or even a page, and in which synonyms were used to excess. In fact, the phrase in which Parliament decreed what was to follow had to be recalled at the start of every new sentence. Also, statutes were not divided into numbered sections. To repeal or amend them, it was necessary to reproduce or paraphrase the relevant passage. It was not until 1850 that a law, known as Lord Brougham's law, abolished these rules and provided for the division of statutes into relatively short sections, though in practice this approach had already been adopted for a while.<sup>65</sup>

In the late 18th century, Jeremy Bentham described the problem posed by the style of English statutes in these words:<sup>66</sup>

It is by the collection of all these defects that the English statutes have acquired their unbearable prolixity, and that the English law is smothered amidst a redundancy of words.

It is not enough that the whole of a paragraph is concise in regard to the number of ideas that it presents: the sentences in which they are presented should have this

same quality. This circumstance is equally of importance whether it concerns the understanding or the retaining the sense of a paragraph: the shorter the distance between the beginning and the ending of each sentence, the more numerous the points of repose for the mind. In the English statutes, sentences may be found which would make a small volume. Pitching blocks are erected in certain places in the streets of London, for porters with their loads: when will English legislators take equal care for the reliefs of the minds of those who study their labours.

In 1879, Chief Justice Cockburn himself expressed a similar view. He deplored "the cumbrous, prolix, inartificial, and bewildering phraseology of our statutes."<sup>67</sup>

Moreover, in the common law system, legal principles have been fashioned by judges. Until the 19th century, statutes merely modified these rules. They borrowed the concepts of the common law and its bewildering terminology without restating general principles that were considered well-known for jurists. Thus the reader was implicitly referred to the decisions of the courts. Judges therefore assumed that the common law survived the statute, except insofar as it was indisputably modified by its provisions. Moreover, a narrow interpretation was especially common in criminal matters, as the life of the accused was usually at stake. Thus, it was deemed that the word "turkey hen" did not include a dead turkey hen and that the prohibition against stealing "horses" excluded the theft of a single animal.<sup>68</sup> In the 19th century, this stratagem made it possible to limit the impact of certain important reforms approved by the British Parliament. In these circumstances, prolixity was definitely a virtue. In 1891, Baron Bramwell summarized this situation in a succinct phrase: "[a] prudent draftsman does not accurately examine whether a word will be superfluous, he makes sure by using it."<sup>69</sup>

## 2. Jeremy Bentham's Conception

In England, the idea of codification is relatively old. In the early 17th century, Chancellor Bacon wished that a Digest would summarize both the statute and the common law. In 1653, under the Commonwealth, members of Parliament abolished the Court of Chancery and hoped to reduce the common law to a pocket "code" that could easily be carried about. But it was Jeremy Bentham (1748-1832) who championed this cause. His very eclectic works left their stamp on the 19th, and even the 20th century, notably his conception of the penitentiary and of utilitarianism. Bentham led a true crusade against the technical knowledge of the legal professions and the common law. In his view, the common law contained no pre-established rules, but was set forth as judges saw fit. The common law, he wrote, is "dog-law":

When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make the law for you and me.<sup>70</sup>

The following quote puts it more exotically:

Multitudes are thus doomed to inevitable ruin, for the crime of not knowing a judge's opinion, some ten or twenty years before the question had ever entered into his

head. This confusion and injustice is of the very essence of what in England is called *common law*—that many-headed monster, which, not capable of thinking of anything till after it has happened, nor then rationally, pretends to have predetermined everything. Nebuchadnezzar put men to death for not finding a meaning for his dreams: but the dreams were at least dreamt first, and duly notified. English judges put men to death very coolly for not having been able to interpret their dreams, and that before they were so much as dreamt.<sup>71</sup>

Consequently, Bentham advocated the adoption of codes based on the principle of utility, which consisted in procuring the greatest possible happiness to the greatest number. His plan began to take shape in 1780. Beginning in 1811, he tried, without success, to convince first American officials, then various rulers in other countries to undertake to examine a draft code he offered to write at no cost. Though he prepared several outlines, he never successfully completed a code. In his own country, his theories had little influence on the academics of the 19th century.<sup>72</sup>

Bentham's opinion of codification seems not to be well known. Quite often, only one of these works, a *General View of a Complete Code of Laws*, is analysed.<sup>73</sup> This is the translation of a chapter contained in *Traité de législation civile et pénale*, a book that was edited and published in French by Étienne Dumont in 1802. Dumont collected disparate manuscripts into a single volume. In a "preface," he stated at the outset that there had been "more to remove than to add, more to abridge than to extend," that he had sometimes "tried to elaborate more on the ideas" and that he had "taken the liberty of adding a few discreet embellishments here and there."<sup>74</sup> One must therefore study this work with caution.<sup>75</sup>

Judging from this text, the general code envisaged by Bentham was to be comprehensive: "whatever is not in the code of laws, ought not to be law."<sup>76</sup> He believed it was possible to foresee every type of problem that was likely to arise. In a code, clearness and brevity were essential, even if the whole of the laws would always be too considerable to become fully fixed in the memory of a citizen. Hence the need to separate it into distinct parts for the use of different classes of people, so that they could have in mind the rules that pertained to them before acting. The father of a family or the farmer would thus be able to become acquainted with his rights and obligations. As far as possible, "terms... such as are familiar to the people" should be used, or technical terms defined. Concerning this future code, the text attributed to Bentham concludes as follows:<sup>77</sup>

A code formed upon these principles would not require schools for its explanation, would not require casuists to unravel its subtleties. It would speak a language familiar to everybody: each one might consult it at his need. It would be distinguished from all other books by its greater simplicity and clearness. The father of a family, without assistance, might take it in his hand and teach it to his children, and give to the precepts of private morality the force and dignity of public morals.

This simplistic view is not in keeping with Bentham's other writings. Thus, in the English edition, one finds an additional chapter not included in Dumont's text, entitled "Of the Interpretation, Conservation and Improvement of a Code," in which Bentham stated that after the adoption of a code, it was necessary to forbid the introduction of judicial precedents or doctrinal commentaries. If an unforeseen case arose, the judge could

suggest a remedy that had to be incorporated into the code to have force of law. Generally, the courts were to point out to the legislators any defects they observed. If the terms used did not faithfully express what the legislature had in view, the judge could, in exceptional cases, make up for this shortcoming in the way of interpretation; however, he was to refrain from filling in the blanks of the text. Finally, the code was to be revised after a hundred years, as its terminology would become obsolete with the passage of time.<sup>78</sup>

Other writings of Bentham's stressed the need to attach to the code's provisions a detailed explanation of their import. In a note published in 1789 after the *Introduction to the Principles of Morals and Legislation*, Bentham stated that a precept of a few words (for example, "Thou shalt not steal") would be supplemented by an entire volume explaining the application of the text and its meaning. The classification of offences entailed, as a result, the definition of private rights and the preparation of a complete body of laws, the "Pannomion."<sup>79</sup>

The problems of interpretation would not disappear, however. In 1790, Bentham borrowed from Puffendorf the following example, which he would subsequently use often. In an Italian city, a law decrees that "whosoever draws blood in the streets shall be put to death." But what if a physician, to aid a man struck by apoplexy, bled him? Or what if a murderer strangled his adversary in the street?<sup>80</sup> A manuscript written in 1782, but not published until the 20th century, already provided an answer to this question. If he believed that the legislature had failed to consider a specific problem, the judge was to submit a proposed rule to the legislative authority, which could modify it or reject it. In the event of inaction, it would be presumed to have been adopted.<sup>81</sup> This solution was taken up again in 1790 in a plan for a judicial system for France, as well as in the constitutional code Bentham prepared in about 1822.<sup>82</sup>

After 1811, Bentham remained faithful to this conception, especially with regard to the need to prepare a "perpetual commentary" that must contain a "mass of reasons" to accompany numerous and compact codes (numbering a few sheets), as well as a general code.<sup>83</sup> Bentham was critical of the Napoleonic codes for having no such instruments.<sup>84</sup> In his view, the preliminary speeches attached to these codes contained "a tissue of vague generalities, floating in the air, in the character of *general principles*. In that form it was delivered, and not in the form of reasons,—reasons applied, in the discourse, to the several particular arrangements, to which, in each man's mind, they were respectively meant to apply?" [sic]<sup>85</sup> The motives or reasons of the code must arouse the support of the people and serve as beacons to judges charged with applying its provisions, without necessarily providing them with a ready-made solution.<sup>86</sup>

In open letters to the American authorities, Bentham acknowledged that non-jurists had neither the talent nor the skill to be their own lawyer. The adoption of codes would, however, allow educated people to improve their own knowledge, though it would still be necessary to have judges settle disputes.<sup>87</sup> The problems attributable to social changes would, however, remain the exclusive responsibility of the legislature.<sup>88</sup> In the 1820s, Bentham became interested in the rules of evidence and procedure; in this context, he favoured the use of general principles that required considerable judicial discretion, so that the principle of utility might triumph. According to Gerald Postema, this theory does not readily accommodate a mechanistic conception of the application of the law.<sup>89</sup> Moreover,

Bentham was anything but a Utopian. If he could not accept that a judgment would establish a rule applicable to future cases, he knew very well that the resolution of a dispute would sometimes open up debate.<sup>90</sup>

Bentham agreed with Portalis on one point: the general principles of a code were not enough in themselves; they had to be implemented. According to him, the legislature was to provide reasons explaining the purpose of the code's provisions, defining the terms used and the hypotheses covered, and setting out the links between the various areas of law. The role of judges was thus minimized; problems and unforeseen situations were to be brought to the attention of legislators. According to Portalis, it was the courts and doctrine that were to apply the general principles of the code to particular circumstances. These different viewpoints may have played a role in the failure of the attempts to codify English criminal law.

## B. Attempts at Codification in England

While the draft criminal code of 1854 stirred stringent reactions (1), the same was not true of the text presented in 1878 (2). Today, codification seems better understood, though it is unlikely to ever come about in England (3).

### 1. The Attempt of 1854

In the 1820s, in the midst of the Industrial Revolution, English society felt the need to modernize its legal system. There were critics on all sides and reforms seemed inevitable. Nevertheless, Bentham's radical ideas were quickly dismissed in favour of changes that did not substantially undermine the power of judges. Initially, a debate raged about codification. Discussions centered on the *Code Napoléon*, which had been translated. Some were critical of it for having generated hundreds of works, in the form of commentaries, treatises and collections of jurisprudence; they therefore did not understand that the legislators' aim was not to put an end to these publications. At that time, there was, moreover, a real infatuation with Pothier, who had been translated and had the advantage of having lived before the French Revolution.<sup>91</sup> Traditionally, judges' opinions were perceived as explanations of immanent principles that needed to be adapted to the circumstances of each case. In this sense, the common law was an "unwritten" law, to be deduced from the reasons of judges. Moreover, these reasons took the form of a speech that was transcribed by a publisher serving in a private capacity. In these circumstances, the rules of common law could not be formulated in a definitive way, which ruled out the idea of codification.<sup>92</sup>

In criminal law, the consolidation of statutes, that is, the grouping into a single text of statutes adopted over the centuries, scarcely provoked any objection, nor did the repeal or revision of numerous obsolete and conflicting statutes. This process was successfully completed between 1826 and 1832, and in 1861<sup>93</sup> While these reforms are sometimes referred to as codifications, this is a misuse of language, since they amounted to an

ordering and updating of the statutes in force. True codification would consist in amalgamating into a new text the rules of common law and legislation, in the form of general principles apt to encompass the whole of the subject and to evolve with jurisprudence.

In 1833, a commission was entrusted with the task of codifying the offences contained in both the statute and the common law. This was the result of an initiative taken by Lord Brougham, who shared Bentham's concerns but was prepared to make compromises abhorred by his master. After a few episodes, a draft code was tabled between 1845 and 1847. While it was not as generally constructed as the French criminal code, its phraseology was less dense compared to the legislation of the time. Numerous notes stated the source of its provisions. In an unusual turn, the terms "wilfully," "maliciously" and "accidentally" were defined.<sup>94</sup>

In 1853, Chancellor Cranworth tabled in the House of Lords bills modelled on the reports filed by this commission. The following year, he asked the higher court judges whether these texts were likely to improve the administration of criminal justice "or the reverse." The fourteen answers he received were instructive.<sup>95</sup> Chief Justice Jervis said he was in favour of the idea of codifying the criminal law but regretted that the bill was not complete; he believed, however, that Parliament would not succeed in adopting a code dealing with controversial matters such as sedition and religion.<sup>96</sup> The other judges were opposed to the idea of abolishing the common law, while stressing that the consolidation of the statutes dealing with the criminal law would be eminently desirable.<sup>97</sup> They argued that a statute was more open to interpretation than the rules of the common law, which in their view were well established.<sup>98</sup> Some believed that only the common law contained principles, for which one would look in vain in legislation.<sup>99</sup>

Unknowingly echoing Portalis, the judges recalled that it was impossible to foresee every eventuality.<sup>100</sup> Consequently, someone who committed an offence recognized by the common law might very well be acquitted if the new code made no reference to it. In contrast, the "elasticity" or flexibility of the common law enabled judges to react to "new combinations of circumstances arising from time to time"<sup>101</sup>. This argument was intended to preserve the power to create new offences, namely, *misdemeanours*.<sup>102</sup> The adaptability of the common law therefore allowed judges to broaden the sphere of the criminal law. We might mention in passing that misdemeanours were punishable by imprisonment or a fine, unlike crimes, the felonies of English law, initially punishable by the confiscation of property and the death penalty.

One final argument is interesting, as it anticipates certain current objections. Whom would the new code benefit?, asked Mr. Justice Coleridge. Neither practitioners, nor students, nor the public, he answered. In fact, a number of terms that appeared in the bill were not defined and came from the common law. It would therefore be necessary to consult scholarly works and cases, not to mention the numerous decisions interpreting the new code. The task of lawyers and students would therefore be the same. As for the general public, assuming they received the code free of charge and read it, very few would retain more than what tradition had already taught them.<sup>103</sup> It is possible to see breaking through here the simplistic conception of codification attributed to Bentham.

At that same time, an anonymous commentary was critical of the idea of codifying the common law:

The operation is impossible. A code of common law is a contradiction in terms. The function of a statute is to correct and supply the deficiencies of the common law, but not to replace it; and every statute becomes in the course of time the nucleus of a group of common law precedents, by which it is construed and applied.<sup>104</sup>

On the whole, these jurists criticized the rigidity of English statutes that contained a multitude of synonyms and attempted to specify in detail every conceivable situation. They did not seem to be familiar with the French codes, whose very broad provisions covered an infinity of factual situations. For the inherent flexibility of the general expressions favoured by a civil code was precisely its primordial quality!

## 2. The Attempt of 1878

The idea to codify English law was not, however, abandoned. In India, several codes drafted by English jurists were adopted between 1830 and 1860. The author of the penal code, Thomas Babington Macaulay, also wrote explanatory notes, as Bentham wished; this particularity seems to have contributed to the success of this text, though it must be remembered that it was an imperialist measure designed to repeal the local law.<sup>105</sup> In 1866, a British parliamentary commission invited jurists to submit to it compilations of principles applicable to a given sector. In 1870, the Colonial Office asked R.S. Wright to write a draft penal code for Jamaica. Despite its qualities, it was never adopted in this colony, although it was sometimes used elsewhere.<sup>106</sup> In 1874, this document was revised by James Fitzjames Stephen, who admired the codes of India, where he had served as jurisconsult. He submitted a bill on the crime of homicide in 1874, and another on the rules of evidence, in 1876.

In 1874, a parliamentary committee took note of the opinions of three judges on the bill concerning the crime of homicide; only one of them, Mr. Justice Blackburn, feared that the flexibility of the common law would disappear.<sup>107</sup> Stephen, however, eagerly pointed out that Mr. Justice Bramwell and Mr. Justice Blackburn had expressed before the committee conflicting views about rules of common law of fundamental importance, thus illustrating the need for codification.<sup>108</sup> In a letter sent to the committee, Chief Justice Cockburn said he was very much in favour of codification of the whole criminal law. He was opposed, however, to the bill, which was incomplete, besides having been written in an obscure and overly elaborate style.<sup>109</sup>

In 1877, Stephen published *A Digest of the Criminal Law* that contained abundant notes. His aim was to show that codification was possible. To this end, he simplified the phraseology of the existing statutes considerably; but he refrained from tackling certain general principles, such as *mens rea*.<sup>110</sup> At his request, the government entrusted him with writing a draft code of offences, which was submitted to the House of Commons in 1878.<sup>111</sup> A commission consisting of three judges and of Stephen was formed to study it and make



improvements where necessary. One of the commissioners was Mr. Justice Blackburn, who had accepted in the meantime the merits of such a reform.

In its report of 1879, the commission stated that it had changed nearly every section of the draft of 1878 as well as its outline, notably to give it greater clarity.<sup>112</sup> With regard to theft, forgery and counterfeiting, the draft reiterated Parts of the current legislation, which explains the abundance of distinctions it contained.<sup>113</sup> Generally speaking, the draft was a notable improvement over the statutes of the time, though it deliberately avoided the broad phraseology of the French codes. From the beginning of its report, the commission refuted the criticisms that were generally addressed to codification.<sup>114</sup> It explained that a code would not provide an answer to every question that might arise after its adoption; it was simply impossible to fulfil such a requirement. As for the alleged flexibility of the common law, the common law nearly always provided an answer to the problems posed by new circumstances. The ability of judges to innovate was therefore much reduced. Insofar as a code reproduced rules that already existed, it changed the form of the law rather than its content. In some cases, the draft gave judges and juries more discretionary power. In reality, elasticity was synonymous with uncertainty, but this uncertainty was reduced by the detailed and explicit nature of the rules of common law. It followed that a code reproducing them would be possessed of these same characteristics.<sup>115</sup>

In contrast, in France, where there was no rule of precedent, judges could base their rulings on considerations of justice and expediency while expounding the meaning of an article contained in the criminal code. While they were guided by previous decisions, they were not bound by them. According to the commission, the criminal law of France was therefore infinitely more elastic than that of England. Thus, the *Cour de Cassation* ruled in 1810 that a duel did not amount to murder but it reversed this decision in 1837. Moreover, compared to the English draft, the French and German codes left judges and juries the task of resolving a large number of issues. The commission concluded:

We may observe, that it is this generality of language, leaving so much to be supplied by judicial discretion, which gives to the foreign Codes this appearance of completeness which creates so much misconception as to what can or ought to be effected by a Code for this country.<sup>116</sup>

In proposing the abolition of common law offences, the commission took considerable discretionary authority away from judges. But it considered that this power properly belonged to Parliament, even though an accused would have to be acquitted if a common law offence were inadvertently omitted from the code. On the other hand, if the omission concerned a defence, it would be unacceptable to convict the accused. That is why a provision of the draft preserved the defences, justifications and excuses provided by the common law.<sup>117</sup> The commission added that in applying a principle to new circumstances, judges relied upon its "substance" rather than the exact wording of previous cases. In a given situation, a legislative provision might very well be either too narrow or too broad. That is why the defence of necessity was removed from the draft and that of constraint reformulated; similarly, error of fact and drunkenness were no longer mentioned.<sup>118</sup> In some cases, this omission may have resulted from a disagreement between commission members.<sup>119</sup> Be that as it may, it seems that certain provisions of

Stephen's draft were intentionally removed to preserve the discretion that judges enjoyed under the common law.

In 1879, the trade unions supported Stephen's draft, but their enthusiasm waned when they noted that its provisions left their members open to prosecution.<sup>120</sup> Though he was personally in favour of codifying the whole of English law, Chief Justice Cockburn wrote two lengthy criticisms of the proposed provisions; the first was published in the Parliamentary Papers.<sup>121</sup> In his opinion, the draft contained numerous flaws; its wording often left something to be desired, notably because it contained many provisos. It was therefore preferable to postpone its adoption.<sup>122</sup> On several occasions, he deplored the use of vague terms, such as "blasphemy" or "breach of the peace"<sup>123</sup>. He vehemently opposed the partial abolition of thirty-nine different statutes, part of which the commissioners had left in place to regulate procedural matters. In his view, the code should contain all the rules of the criminal law, notably those concerning summary procedure, which had been omitted.<sup>124</sup> He was astounded to read that defences provided by the common law would remain in force. His comments are worth citing in full, as they have relevance in the Canadian context:

Such a provision appears to me altogether inconsistent with every idea of codification of the law. If it is worthwhile to codify at all, whatever forms a material part of the law should find a place in the Code. The circumstances under which acts, which would otherwise be criminal, will be excused or justified, forms an essential part of the law, whether unwritten or written. If the unwritten law is, as part of the law, to be embodied in a Code, so material a part of it as that in which we are dealing ought certainly to be carried into the Code, and should not be left at large, to be sought for in the unwritten and traditional law, which, the Code once established, it will be worth no one's while to study, and which will speedily become obsolete. We have done with the common law so far as it relates to criminal matters. No one is henceforth to be indicted under it. Why then is this particular part to be kept alive? Why should not its rules, which it is thus proposed to make applicable to offences under the code, be ascertained, as the enactment in question assumes them to be capable of being, and carried into the Code, and thereby this part of it rendered complete?<sup>125</sup>

The parliamentary debates of 1879 show that the abolition of the common law still created some problems.<sup>126</sup> Some argued that a code would inevitably have to be interpreted or amended in the future,<sup>127</sup> moreover, the draft would, according to a few members, introduce into England principles of French criminal law.<sup>128</sup> Others deplored the partial nature of the measure, at least with respect to offences that would still be contained in separate legislation<sup>129</sup> or pointed out the timeliness of such a reform.<sup>130</sup> The rather intransigent attitude of the Attorney General and lack of time prevented adoption of the draft by the Commons. In 1880, the adoption of a new draft seemed imminent. The same arguments resurfaced, notably the concern about the disappearance of the common law,<sup>131</sup> and the idea that a code would not provide all the answers and would have to be interpreted.<sup>132</sup> On the other hand, some stressed the importance and usefulness of this measure.<sup>133</sup>

Before the draft code could be adopted, Parliament was abruptly dissolved because of a crisis involving Ireland.<sup>134</sup> In 1883, the new government took up the provisions of the

draft governing criminal procedure. It immediately met with opposition from Irish members of Parliament, who felt that these changes would allow the government to wrongfully imprison individuals merely suspected of having committed an offence.<sup>135</sup> Others believed it would introduce an inquisitorial procedure in the French style<sup>136</sup> or felt it contained dangerous innovations.<sup>137</sup> The committee charged with studying this bill did not see its task through to completion.<sup>138</sup>

Political events played a decisive role in the failure of these attempts. However, several members of Parliament were reluctant to do away with the flexibility of the common law. The members of the commission formed in 1878 shared some of these concerns, as they had abandoned the idea of defining certain defences. But several members of Parliament stressed that public opinion was calling for codification; others vaunted the merits of this measure. The incompleteness of the draft, which left intact the provisions of several statutes governing punishments or procedure, and its intrinsic flaws, also weighed in the balance. Overall, while the English had a better understanding of what a code could be, they were not yet convinced of the need to adopt one.

The situation was somewhat different for private law, as drafts of sector-based "codification" prepared by renowned jurists were more favourably received. They led to enactments governing bills of exchange,<sup>139</sup> partnerships<sup>140</sup> and the sale of goods.<sup>141</sup> These texts did not contain all of the principles applied in a given sector. Rather, they took up those that were most common and best defined, leaving the others to jurisprudence. Thus, the word "code" had a different meaning, as it referred to an enactment that set out part of the rules applicable to a given sector. The House of Lords reminded judges, however, that they were to give these provisions their full effect, even if that meant changing or refuting the common law.<sup>142</sup>

### 3. The Debates in the 20th Century

In English criminal law, the much vaunted flexibility of the common law left bitter memories. A statute of 1800 prohibited coalitions whose avowed object was to increase the remuneration of employees; it was repealed in 1825. The courts found, however, that at common law, a scheme designed to harm a third party, such as a strike, constituted an offence. This doctrine was done away with by statute in 1875. The courts, however, used their powers in civil matters and issued injunctions when they felt that union members caused a nuisance. Parliament intervened again in 1906 to put an end to this jurisprudence.<sup>143</sup> In another vein, in 1962, the House of Lords decided that an act tending to corrupt the morals of society constituted a crime, because this general principle could be derived from precedents. In the case in point, the accused had published a directory containing the names and addresses of prostitutes, an action which had never before been considered a crime.<sup>144</sup> In 1973, the House declared that this offence extended to the publication of classified ads written by homosexuals seeking a partner.<sup>145</sup> However, in 1975, it maintained that it did not have the authority to create new offences, the 1962 ruling being presumed to have been derived from principles contained in certain precedents.<sup>146</sup>

In the 20th century, the idea of codification continued to gain followers. Thus, in 1901, Courtney Ilbert very effectively described the nature of a code, clearly distinguishing it from a consolidation or revision.<sup>147</sup> A few legal scholars wrote draft codes, without much success. The Law Reform Commission of England, created in 1965, proposed draft codes governing the law of contracts, family law, housing and criminal law (1989). In the absence of political will, nothing came of them, although in 1992,<sup>148</sup> a partial outline of codification was submitted. On the whole, scholars approved of the Draft Criminal Code. However, one British author criticized the Commission for basing itself on a fictitious social consensus, minimizing the amount of reform contained in the draft code and exaggerating its accessibility for non-jurists.<sup>149</sup> The "flexibility of the common law" was no longer an issue; in the United States, there also seems to have been an acceptance of the idea that a code gives courts considerable discretion.<sup>150</sup>

On the whole, it appears that English jurists had two conflicting attitudes about the common law. The first derived from the writings of Bentham, who wanted the legislature to approve detailed reasons specifying the cases to which a code would apply. Codification thus became synonymous with an attempt to eliminate the discretion of judges. This idea was reinforced by the traditionally wordy style of English statutes. All this gave rise to a movement to reject codification, which was especially evident in 1854, but was still present in 1879. Whether they rejoiced in this fact or deplored it, most common law jurists assumed that a code would considerably reduce the latitude enjoyed by judges. Although contemporary scholars have a more accurate view of things, the traditional attitude may explain why English criminal law has yet to be codified. As everyone knows, the situation in Canada is different; we must now turn our attention to the causes of this phenomenon.

#### IV. The Canadian Experience of Codification

In Canada, the civil law of Quebec was the first to be codified; it is therefore appropriate to recall the conditions in which this reform was carried out (A). Did this experience facilitate the codification of Canadian criminal law? To answer this question, one must examine the reception and implantation of English criminal law in Quebec (B). An attempt must also be made to see how codification was perceived in the 19th century, in order to better understand the consensus surrounding the adoption of the *Criminal Code*, 1892 and the difficulties that lie ahead along the road to recodification (C).

##### A. The Codification of Quebec Civil Law

The evolution of the private law from 1774 to 1857 (1) and the debate surrounding the revision of legislation explain why the the decision to codify the private law of Quebec was greeted with enthusiasm (2). As in France, this measure did not cripple the evolution of the civil law (3).

## 1. The Causes of Codification

In 1774, the Parliament of Great Britain passed the *Quebec Act*. From that point on, in matters of property and civil rights, that is, for private law, the rules followed in New France at the time of the Conquest of 1760 were to be applied anew, except for the fact that the principle of freedom of willing was introduced.<sup>151</sup> The former laws included the edicts and ordinances of the king of France, local regulations, the *Coutume de Paris* (Custom of Paris), drafted in 1580, and jurisprudence and French doctrine governing the law of obligations, of contract and certain aspects of family law. After 1774, various laws or local ordinances were added to this mass; they sometimes referred to, or were inspired by, English law.

After the adoption of the *Code Napoléon*, in 1804, a discrepancy arose between the civil law of France and that of Quebec. Nevertheless, over time, the French code became a working tool for Quebec jurists, since its provisions governing obligations and contracts had made very few changes to the old French law that was applied in New France. While it did not have force of law, this code was regularly cited by the courts, as was French doctrine.<sup>152</sup> It thus became familiar well before the adoption of its counterpart in Lower Canada (the name given Quebec in 1791). In some cases, it conferred a certain legitimacy on the rules of the old law; other rules seemed to have become inconsistent with the liberalism that dominated Lower Canadian society in the middle of the 19th century.<sup>153</sup> Moreover, for unilingual individuals, the absence of translations created a problem, both for texts of French and English law.

In 1857, the accumulation of disparate rules prompted the legislature to order the codification of the private law of Lower Canada. A commission composed of three judges and two secretaries was entrusted with the task of preparing a draft in both official languages. In 1865, this draft was approved by the legislature, with some changes. On August 1, 1866, the *Civil Code of Lower Canada* came into force.<sup>154</sup> That same year, the *Code of Civil Procedure* was enacted; it came into force in 1867.<sup>155</sup> This reform was preceded by debates on the improvement of legislation which are worth recalling.

## 2. Revision of the Statutes and Codification

In the 19th century, the proliferation of statutes caused some difficulty, as the legislature rarely indicated to what extent the previous rules were repealed or amended. In 1831, a debate arose surrounding the revision of the laws of Lower Canada. This operation consisted in printing in chronological order the legislative provisions that were still in force and of general and lasting interest. Some parliamentarians favoured a codification that would include the private law of New France, while others considered this task utterly impossible because of the confusion surrounding this question.<sup>156</sup> That same year, a motion of the Legislative Council proposed that a commission of jurists be charged with this task. Nothing came out of these two initiatives because of the chronic confrontation between the two houses of the legislature. During these debates, the *Code Napoléon* and the *Louisiana Civil Code* were cited as examples, as they would be thereafter. On the other hand, the

description of the English statutes at that same time by "Jean-Paul, ploughman" was quite caustic:

[Translation] These statutes have existed for centuries, they are mummies, antiquities to which each age adds something of its own making, so that there are only very few English statutes against which one might not oppose statutes that order or prohibit precisely the opposite of their content.<sup>157</sup>

Under the *Act of Union*, numerous reforms took place.<sup>158</sup> The legislation of Lower Canada was revised for the first time in 1845; the work was divided into thematic sections within which the statutes were presented chronologically. A true consolidation was carried out in 1861 for Lower Canada; the text of each statute incorporated all the amendments made since its enactment, and the sections were also subdivided and pared down.<sup>159</sup> During this period, several authors called for the codification of the private law and denounced the convoluted style of statutes.<sup>160</sup> In 1857, the legislature decided that the *Civil Code* and the *Code of Civil Procedure* "shall be framed upon the same general plan, and shall contain, as nearly as may be found convenient, the like amount of detail upon each subject, as the French Codes known as the *Code Civil*, the *Code de Commerce*, and the *Code de Procédure Civile*."<sup>161</sup>

The legislature therefore favoured the very general wording of French law. In this regard, Thomas Ritchie believed, in 1863, that the commissioners had properly fulfilled their mission:

A Code should be a comprehensive body of practical rules of law, expressed in language pure, concise and unambiguous. It ought to exclude mere definitions and axioms; for it can never supply the place of scientific treatises upon legal subjects. Nor ought it to be encumbered with more details and examples than are absolutely necessary to a practical understanding of the rules laid down. It is scarcely necessary to add that the subtleties in which many of the authors delight, would be entirely out of place in a body of positive legislation such as a Civil Code.<sup>162</sup>

In general, jurists made very few comments on the role of jurisprudence. The commissioners believed that codification would foster in the courts "harmony of opinion and the growth of a sound and consistent jurisprudence". They warned the legislators against hasty interventions, as the purpose of the code was "to cover, either by express terms or by legal implication, all questions." They suggested that the courts draw attention to the difficulties they faced, so that the legislature could make periodic revisions, having in mind the global structure of the code. In this way, "the evil of conflicting judicial decisions and contradictory interpretations by commentators, although it can never be altogether escaped, will be materially diminished"<sup>163</sup>. The commissioners therefore acknowledged that problems of interpretation would arise, though they hoped the legislature would quickly eliminate them. Sixty-three years after Portalis' preliminary discourse, in a jurisdiction where the reasons for judgments were stated at length, as in common law courts, the importance of jurisprudence scarcely stirred debate; there seems to have been few critics who denounced the excessive importance given to precedents.<sup>164</sup>

### 3. The Civil Law after the Codification of 1865

In Quebec civil law, jurists have often criticized the method of interpretation used by the judges who were called to apply the *Civil Code of Lower Canada*, especially the members of the Supreme Court of Canada and the Judicial Committee of the Privy Council. They argued that the code was treated like an ordinary statute in the common law world, which would not have been the case if its special character had been recognized. More recently, some authors have begun to distinguish different periods and to challenge part of this criticism. On the whole, it appears that after 1970, civil law jurisprudence has been favorably received. It seems fair to say, however, like Demolombe and Carbonnier, that a civil code is a "social constitution." As such, it has authority to govern all relationships of a patrimonial nature, as well as those that relate to personality rights. On the other hand, many civil law scholars rebel against a very widespread tendency to regard the judgments of the Supreme Court of Canada and the Court of Appeal as binding.<sup>165</sup>

Quebec jurisprudence also gave effect to certain principles that appeared nowhere in the text of the code of 1866, such as unjust enrichment,<sup>166</sup> good faith in contractual matters<sup>167</sup> and abuse of rights.<sup>168</sup> In 1991, these rules were given recognition in specific articles of the *Civil Code of Quebec*.<sup>169</sup> These changes show that civil law jurisprudence is not crippled by a code and can draw on it to devise new solutions. It should be noted, however, that these cases pit businessmen or their guarantors against a bank. On the other hand, judges refused to force the State to compensate individuals who became disabled for life after participating in a mandatory vaccination program,<sup>170</sup> they did not come to the aid of the spouse separated from property whose actions enriched the patrimony of her spouse.<sup>171</sup> The legislature had to step in to fill in these gaps.

The reasons for the adoption of the new civil code are complex.<sup>172</sup> The process began in 1955 and ended, after many ups and downs, in 1991. Among the factors that contributed to the completion of this project, one might mention a concern to streamline and simplify and a desire to add certain mechanisms designed to protect less informed or more vulnerable persons. For the purposes of this study, suffice it to note that the Civil Code Revision Office submitted its report in 1977. The legislature therefore took over fourteen years to produce his own code, which shows the virtue of patience in such matters. After this brief overview of the Quebec civil law experience, it is appropriate to examine the circumstances in which English criminal law was received in Quebec.

#### B. The Reception of English Criminal Law in Quebec

*A priori*, the rules of common law on colonial legal systems did not necessarily favour English criminal law (1), even though the latter was applied very soon in Quebec (2). Francophones subsequently idealized this system (3). Yet the criminal law was nearly always practised in the English language and the common law was beginning to come under criticism (4).

## 1. The Rules of Reception in the 18th Century

In recent years, the rules of reception in the British colonial system have undergone a critical re-examination. Too often, legal scholars in the 20th century have relied on concepts that did not even exist in the period they studied. The case of the so-called settlements colonies is revealing in this regard. In the 18th century, this expression was generally used to designate regions where no one, whether of Aboriginal or of European origin, was present.<sup>173</sup> Thus, the American colonies were described as conquests. It is true that in that case the settlers called for the application of the common law, since if there had been a conquest, they would have been descended from the conquering people. They did not, however, seek to impose English law on the Aboriginal inhabitants.<sup>174</sup> In 1713, the cession of Acadia to Great Britain posed this problem, as did that of Canada, in 1760. But it was not until the 19th century that the criminal law was imposed on Aboriginal peoples which did not live close to the settlers.<sup>175</sup> Thus, in British Columbia, the colonial authorities had no hesitation in applying "the Queen's law" to natives accused of crimes.<sup>176</sup>

When a Christian people was conquered, the common law held that the local laws and customs remained in force until they were modified or repealed by the conqueror. The relevant cases made no distinction between the private law and the public law: the whole system was retained.<sup>177</sup> In Canada, the first conquered colony was Acadia, which was ceded to Great Britain by the Treaty of Utrecht of 1713. From 1712, the date the French surrendered, to 1749, justice was dispensed by a British governor and his counsellors at Annapolis Royal. When Acadians were involved in a dispute, the council applied the law in force before the conquest. The situation regarding criminal law was less clear. According to his instructions, the governor was to follow pre-established rules—whose content was not specified—before imposing a corporal punishment or pronouncing a death sentence. However, there were not enough people qualified to sit on a jury. The council therefore proceeded informally, calling offences misdemeanours in order to impose lighter sentences. It is difficult to say whether the rules of the common law, or even of French law, were followed.<sup>178</sup>

In 1749, the governor's commission stated that the new civil courts of Nova Scotia were to apply English Law; furthermore, an elected assembly was to be convened; this was not done until 1758, three years after the expulsion of the Acadians. This colony was then placed on the same footing as a territory populated solely by Britons. In such a case, the colonial courts had no difficulty applying the common law of England. The same did not hold true for statutes, which did not apply to those colonies already in existence at the time of their adoption; however, Parliament could make manifest its intention to settle a colonial problem, in which case the statute would be considered an imperial one applicable *ex proprio vigore* (of its own authority). On the other hand, colonies could borrow en masse English statutes that predated their creation, provided they were suitable to their condition. Obviously, this requirement left the colonial courts with a considerable discretion.

There were therefore many exceptions to the rule of reception of the ordinary statutes of the English Parliament, and this created some uncertainty, notably for the criminal law. In Nova Scotia, New Brunswick and Prince Edward Island, no cut-off date was established by statute. Judges had to decide the issue of the reception of English statutes



on a case-by-case basis, and the situation was not always clear; in 1758, Nova Scotia adopted a series of criminal law statute to remedy this problem. In the 19th century, Newfoundland and Ontario set their own reception dates.<sup>179</sup> The other Canadian provinces, with the exception of Quebec, followed suit.<sup>180</sup>

## 2. The Reception of English Law after the Conquest of 1760

Immediately after the Conquest of 1760, military courts were set up. Courts martial dispensed justice in criminal matters and tried civilians as well as soldiers. The common law was therefore not applied. However, in the summer of 1763, the judge advocate general became aware of this situation and concluded that these courts had excessive powers. But he did not specify how the generals should have proceeded in 1760. On October 7, 1763, the *Royal Proclamation* solved the problem for the future, stipulating that the courts of Quebec were to apply the common law.<sup>181</sup>

Today, it seems self-evident that English criminal law should have applied in Quebec after the Conquest. The opinion of the advocate general, James Marriott, expressed in 1774 on this subject is generally considered conclusive.<sup>182</sup> He stated:

But whatever the criminal law of England is in the great lines of treason, felony &. I conceive it must of course have taken place in the colony of Canada ; and that no other system of criminal laws could exist there at any instant of time after the conquest : because this part of distributive and executive justice is so inherent in dominion, or, in other words, so attached to every crown, and is so much an immediate emanation of every government, that the very instant a people fall under the protection and dominion of any other state, the criminal, or what is called the crown law of that state, must ipso facto and immediately operate : it cannot be otherwise ; for were it otherwise there would be no effective sovereignty on one side, and no dependence on the other.<sup>183</sup>

However, immediately following this passage, Marriott describes the period of transition after the conquest:

Till there was an absolute surrender, military law must prevail in every country and supersede the common law ; but the moment the new sovereign is in peaceable possession, the *merum imperium*, or power of the sword, or the *haute justice*, as the French civilians call it, to be exercised according to the common law, takes place; and this power must extend to all crimes that concern *the peace and dignity of the crown*. These are *mala in se*, crimes in themselves, and universally known in every nation. Those crimes which arise from prohibitions are not known, and therefore they are not governed by penal statutes antecedent to the conquest. The *mixtum imperium*, of personal wrongs and civil property, must be promulged before the ancient law are understood to be altered.

In these views, your Majesty's proclamation [of 1763], declarative of the enjoyment of the laws of England, seems to seem to have been justifiable, and to be rightly understood in regard to all your Majesty's subjects in Canada, without distinction of the places of their birth, so far as it relates to the criminal crown law in greater crimes, such as treason and felony ;

because the proclamation was meant to convey an actual benefit to the Canadians, by putting an end to both, the military law as well as the French criminal law.<sup>184</sup>

At the very end of this quotation, Marriott informs us that although the military had dispensed justice for over three years, it was still necessary to formally repeal French criminal law. Whatever may have been his opinion, this formulation tends to show that the automatic application of criminal law was not taken for granted at the time. The solicitor general, Alexander Wedderburn, did not tackle this question. He merely noted that English criminal law already applied in Quebec; for him, there was no question of restoring French law in this area.<sup>185</sup>

Other jurists felt that the criminal law of a Christian people did not change after a conquest. In 1769, in a criminal law case, Lord Mansfield stated, *obiter dictum*, that "[i]f Jamaica was considered as a conquest, they would retain their own laws, till the conqueror had thought fit to alter them."<sup>186</sup> In 1773, the attorney general, Edouard Thurlow, concurred. After having recalled "that a conquered people retain their ancient customs till the conqueror shall declare new laws"<sup>187</sup>, he argued that the introduction of new rules of procedure in civil matters would lead to a period of uncertainty and result in losses for the conquered peoples. He added:

The same kind of observation applies with still greater force against a change of the criminal law, in proportion as the examples are more striking, and the consequences more important. The general consternation which must follow upon the circumstance of being suddenly subjected to a new criminal law, cannot soon be appeased by the looseness or mildness of the code.

From these observations, I draw it as a consequence that new subjects acquired by conquest, have a right to expect from the benignity and justice of their conqueror, the continuance of all these old laws, and they seem to have no less reason to expect it from his wisdom.<sup>188</sup>

In 1766, Francis Masères had just been appointed attorney general of Quebec. He called on the British Parliament to specify what parts of the English law applied in that province. He wondered what a judge was to do if an act considered criminal in Great Britain was a lawful one by the "Laws of Canada."<sup>189</sup> The question would not have arisen had the criminal law of New France automatically ceased to apply. In short, in reading the opinions written at the time, one notes that this system did not disappear solely because of the conquest. Moreover, in the early 19th century, some British colonies did keep the rules of French criminal law after they were conquered.<sup>190</sup> At present, Scottish criminal law still differs from its English counterpart. In Quebec, there is, however, no doubt that in practice, French criminal law ceased to apply after 1760.

Between 1766 and 1774, various reports proposed restoring in whole or in part the criminal law of New France, although this idea was eventually abandoned.<sup>191</sup> In 1766, attorney general De Grey and solicitor general Charles Yorke spoke of the "certainty" and "lenity" of English criminal law, an expression that would be used time and again thereafter.<sup>192</sup> For at the time, the criminal law of France acted as a repellent in England, for at least three reasons.<sup>193</sup> First of all, by means of *lettres de cachet*, the king could order, at his sole discretion, that an individual be permanently detained. Next, accused persons

could be tortured. This power was strictly controlled; in 1760, several *parlements* of France exercised it very seldom or refused outright to resort to it. But it still existed; it was not abolished until 1780.<sup>194</sup> Finally, the English thought a number of punishments to be cruel, such as torture on the wheel, which consisted in breaking the convict's limbs with an iron bar. One must guard here against concluding that one people has the monopoly on cruelty: in English law, for high treason, a person sentenced to death was to be hanged; before he died, his entrails were to be pulled out and burned before his eyes. Then his head was to be separated from his body, which was to be divided into four parts and presented to the king. In practice, however, the executioner let the hanging do its work before proceeding to dismember the body.<sup>195</sup>

The people of New France had scarcely been exposed to the brutality of French criminal law: There were no *lettres de cachet*, the use of torture was extremely rare (three cases between 1712 and 1748, or less than 1% of cases), as was the wheel (three cases out of thirty-eight death sentences in this same period.)<sup>196</sup> One therefore searches in vain for expressions of admiration consequent upon the introduction of English criminal law. Nor were there any complaints about it, unlike the situation with regard to the civil law. Of course, the grand jury made liberal use of its right to throw off bills of indictment presented by Crown prosecutors, which could have come as a surprise for observers accustomed to the secrecy of proceedings prevalent in French law. However the former system insured a better protection against unsubstantiated charges; the king's attorney generally dismissed vexatious complaints without ever informing the accused. In contrast, after 1764, some individuals in this situation were detained for several months until they were acquitted after a trial.<sup>197</sup>

Also, proceedings and trials were conducted in English, which meant that depositions had to be translated; this must not have played in favour of the new system. Proportionally, it seemed that far fewer francophones brought charges than anglophones. Finally, far more often than in New France, judges were obliged to impose the death penalty. The grand jury and the petit jury tempered this severity. The former could refuse to indict, while the latter could acquit the accused or find him guilty of a less serious offence. In addition, the accused could be pardoned by the governor.<sup>198</sup> All things considered, the percentage of executions seems to have been the same in certain regions of England, New France and Quebec.<sup>199</sup>

But there is no basis for asserting that, in the eyes of contemporaries, the English criminal law was manifestly "milder" than the French one. Of course today, the absence of torture and the trial by jury seem notable advances. But the vast majority of the population was not in a position to make an enlightened comparison of the two systems. Moreover, in Quebec, jurists seem to have endorsed the thesis of Marriott, for whom the application of English criminal law was an unavoidable consequence of British sovereignty.<sup>200</sup> British administrators, for their part, did not hesitate to draw conclusions for the settlers. In the end, their opinion found its way to section 11 of the *Quebec Act*.

And whereas the Certainty and Lenity of the Criminal law of *England*, and the Benefits and Advantages resulting from the Use of it, have been sensibly felt by the Inhabitants, from an Experience of more than Nine Years, during which it was uniformly administered ; be it therefore further enacted by the Authority aforesaid,

That the same shall continue to be administered, and shall be observed as Law in the Province of *Quebec*, as well in the Description and Quality of the Offence as in the Method of Prosecution and Trial ; and the Punishments and Forfeitures thereby inflicted to the exclusion of every other Rule of Criminal law, or Mode of Proceeding thereon, which did or might prevail in the said Province before the year of our Lord One thousand seven hundred and sixty-four [...].<sup>201</sup>

### 3. The Evolution of the Penal Law from 1774 to 1892

Under the terms of section 11 of the *Quebec Act*, the Legislative Council was authorized to amend the rules of English criminal law. However, any ordinance authorizing a punishment greater than a fine or imprisonment for three months had to be approved by the king rather than by the governor.<sup>202</sup> The rules of the game seemed straightforward: English criminal law applied, subject to any amendment contained in a local ordinance. In practice, the reception of the English system caused problems. Thus, the wording of section 11 seemed to refer to the rules in force in 1764, since English criminal law was to "continue to be administered" . But section 4 of the *Quebec Act* repealed the *Royal Proclamation* and all the ordinances made under its authority. Thus, it could be argued that only the act of 1774 effectively introduced English law. A Quebec judgment accepted this interpretation.<sup>203</sup>

Besides this problem of date, it was still difficult to determine whether an English statute that preceded the date of reception could be applied in the colonial context. For instance, in Quebec, the English statutes governing vagrancy and those governing the selection and qualification of jurors were not received.<sup>204</sup> Similar problems surrounded the writ of *habeas corpus*. From 1777 to 1782, some Quebeckers discovered that this remedy was not among the "benefits" and "advantages" of the English criminal law as applied in Quebec. In 1777, Chief Justice Livius disputed this interpretation; it was partly for this reason that he was dismissed soon after by Governor Carleton.<sup>205</sup> An order of 1784 formally granted the right to *habeas corpus*.<sup>206</sup> However, it was suspended in 1838. The courts again had to determine whether this writ was part of the English law that had been introduced by the *Quebec Act*. Two rulings answered this question in the affirmative, but were neutralized by subsequent judgments. Judges Bédard, Panet and Vallières de Saint-Réal were then dismissed for having opposed the executive branch of the colony.<sup>207</sup>

From 1774 to 1837, the legislators had little interest in the criminal law. Usually, he was content to reenact British statutes, often with a delay of a few years; in general, the new acts were intended to reduce the number of crimes punishable by death, which was quite high in the 18th century.<sup>208</sup> In 1836, the right to be represented by a lawyer was finally granted to persons accused of having committed a felony; previously, some ten bills voted by the Legislative Assembly had been rejected by the Legislative Council.<sup>209</sup> On the other hand, an English statute of 1731 remained in force. It required the use of English in "all Proceedings . . . which concern Law and the Administration of Justice" which was held to include legal documents or judgments and hearings.<sup>210</sup> Initially, in Quebec, in criminal matters, trials were therefore conducted in English; over time, this requirement applied only to the indictment.<sup>211</sup>

As for the common law, very few measures were taken to make this system more accessible to francophones. It is true that a translation of Blackstone was available in Quebec as of 1784.<sup>212</sup> The works of Joseph-François Perrault provided some rudiments of criminal law, but they were not likely to clear up the confusion that probably reigned at that time.<sup>213</sup> It was not until 1842 that a well-written introductory work was published.<sup>214</sup> The translation of common law terminology also represented a formidable challenge. It led to the creation of barbarisms borrowed from the English, for example, *'indictement'* instead of *'acte d'accusation'* (indictment) as the former was supposed to be of French origin.<sup>215</sup> The words *'assaut et batteries'*, which mean respectively a military assault and a violent fight or more commonly a set (of guns, pots etc.) were used for assault and battery, instead of *'agression et voies de fait'*; *'les quartiers généraux de la paix'*, which translates as "general headquarters of the peace", referred to quarterly sessions; finally, the term *'burglarieusement'* (burglariously) eloquently attested to the specificity of the vocabulary of the common law.<sup>216</sup>

Despite these linguistic difficulties, francophones had an extremely favourable view of English criminal law, and never demanded its abolition. The French Revolution doubtless had something to do with this. The creation of a parliamentary system and the introduction of trial by jury in France undoubtedly cast in a favourable light the English institutions that existed or were introduced in Lower Canada. Also, the execution of the king and the Reign of Terror helped to turn away from the Republic the province's inhabitants. Throughout the 19th century, Quebec legal scholars could not find terms strong enough to vaunt the merits of the system that eventually was retained in 1774.<sup>217</sup>

The *Act of Union* of 1840 united into a single province Lower Canada and Upper Canada, which became Ontario in 1867; in this colony, the date of reception for English criminal law was 1792.<sup>218</sup> The fact that the criminal law of the two colonies was of English origin made its unification possible within the United Canada. In 1841, the new legislature enacted for the whole province certain statutes of British origin that had already been introduced in Upper Canada. Thereafter, statutes concerning the criminal law applied to the entire province. In 1859, the statutes applicable to both sections of United Canada were consolidated. This compilation signalled progress compared to the previous situation. It contained an updated version of the criminal laws, which were organized according to a general plan. Inspired by the consolidations of the Maritime Provinces and some American states, it marked a break with the style used in drafting British statutes. These consolidations had no counterpart in England; to some extent, they may have prepared minds for a codification. Throughout this period, the common law continued, however, to supplement legislation, in terms of both the definition of offences and defences.<sup>219</sup>

In 1869, the federal Parliament enacted the first statutes concerning the criminal law. They reproduced, with some minor reworking, a series of British enactments adopted in 1861. The government of the day wanted to avoid favouring the criminal legislation of Nova Scotia, New Brunswick or United Canada. According to John A. Macdonald, the imposition of a uniform criminal law would strengthen a sense of Canadian identity. The English statutes offered him a ready-made solution. They also allowed Canadian judges to take advantage of the English cases in which they were discussed, which were relatively abundant. But they were a step backward from the standpoint of legislative draftsmanship. The sections were lengthy and wordy; some of these acts contained special rules of

procedure. The Canadian changes made to the English statutes were sometimes awkward. And so the flaws that had been eliminated or reduced by the legislative consolidations of United Canada or the Maritime Provinces reappeared. Consequently, the laws of 1869 were frequently amended and the volume of criminal legislation grew by leaps and bounds.<sup>220</sup>

#### 4. Criminal Jurisprudence, 1851 to 1891

If one looks at jurisprudence in Quebec, regular publication of the *Lower Canada Reports (Décisions des tribunaux du Bas-Canada)* began in 1850, followed in 1856 by the *Lower Canada Jurist*.<sup>221</sup> Previously, the work of George O'Kill Stuart contained just one criminal case,<sup>222</sup> and one extradition case.<sup>223</sup> In the 1850s, law report editors seemed to become more interested in the criminal law; in 1852, they even reproduced the proceedings of a trial and some commentaries that had appeared in the newspapers.<sup>224</sup>

Since 1842, the judges of the Court of Queen's Bench were to preside over criminal trials and hear appeals in civil matters. They also constituted a "court of error." As such, they collectively ruled on motions to quash a conviction.<sup>225</sup> In this context, the causes of error had to appear on the face of the record, which did not contain a transcript of the evidence or the judge's notes.<sup>226</sup> Also, the Superior Court could be asked to control lower courts judgments through *certiorari*; here again, the record before it was very incomplete.<sup>227</sup> In 1857, a new procedure was created. A Queen's Bench judge could refer to his colleagues questions that arose during a trial over which he was presiding. These questions were said to be "reserved," and were stated in a written report.<sup>228</sup> This system was of English origin; in that country, it had been put in place in 1848.

In order to assess the state of the law before the codification of 1892, we made arrangements for the reproduction of the criminal cases published in Quebec from 1851 to 1891, and added the judgments contained in the *Supreme Court Reports* published from 1877 to 1892. These decisions were rendered as a result of various remedies which sometimes exceeded the scope of the criminal trial and included judicial review, *habeas corpus* petition, or even extradition proceedings. The sample does not seem to be absolutely complete, but it is large enough to draw some conclusions. To this end, the cases in which no reasons for judgment appear have been excluded, leaving only those where the judges expressed an opinion; in the Court of Queen's Bench, several of them usually did so. Finally, we tried to ascertain if the accused was francophone; if he was anglophone, it was of course perfectly legitimate for the judges to express themselves in English.

A first observation concerns language. We counted thirty-eight cases between 1859 and July 1, 1867; of these, seventeen of the accused had a French-sounding name, but it is important to remind ourselves that this subjective assessment often is erroneous. Nonetheless, in these cases, only two opinions were in the French language.<sup>229</sup> It is true that under the terms of an English statute of 1731, court proceedings and pleadings had to be in English; in practice, judges eventually allowed pleadings and depositions to be made in French.<sup>230</sup> Did the judges believe that this statute applied to their reasons? This is a

possibility. A statute of 1849 authorized the use of French in civil proceedings; it said nothing about the language of criminal proceedings.<sup>231</sup> Be that as it may, the law of 1731 was repealed by section 133 of the *Constitution Act, 1867*.<sup>232</sup>

For the years 1867 to 1876, we examined seventeen lower court cases. Six of them seemed to involve a francophone; only one opinion was written in French.<sup>233</sup> In the Court of Queen's Bench, eleven judgments were selected; five applicants were probably francophones. A single judgment was published entirely in French; to our knowledge, two of the judges who gave their opinion had never used French in another case.<sup>234</sup> It is therefore likely that this judgment was translated by the editor. In two other cases reasons were written in French, notably by Mr. Justice Jean-Thomas Taschereau, who sat on the Court of Queen's Bench from 1873 to 1875, then on the Supreme Court from 1875 to 1878.<sup>235</sup> The derisory number of decisions published in French—four out of twenty-eight—must be considered along with the fact that, prior to 1876, the percentage of francophone lawyers acting in criminal cases was much lower than their proportion within the Quebec Bar.<sup>236</sup> For the years 1877 to 1891, thirty-nine lower court decisions were studied, including twenty that, on the face of it, involved a francophone. In this context, seven sets of reasons were written in French. In the Court of Queen's Bench, thirty-five cases were heard, of which only ten seemed to affect a francophone. In this case, three individual opinions and one anonymous opinion were written in French. In other words, even at that point, the jurisprudence of the Court was virtually all written in English, while more and more lower court decisions were being written in French, though these cases were still largely in the minority.

Moreover, francophone judges contributed to this under-representation. In the Court of Queen's Bench, in decisions rendered in criminal cases, Chief Justice Duval (1864-1874) used French only once, and the report may have been composed by the editor.<sup>237</sup> Antoine-Aimé Dorion, who was chief justice from 1874 to 1891, used only English. While his outstanding ability is not in question, it is a pity he did not use it to add to the documentation in French. Mr. Justice Henri-Elzéar Taschereau, who sat on the Supreme Court from 1878 to 1906, also wrote the vast majority of his (published) reasons for judgment in English, regardless of the area of concern. The same is true of the works he published on criminal law.<sup>238</sup> In contrast, Mr. Justice Fournier did not hesitate to express himself in his mother tongue.<sup>239</sup>

In another vein, the attitude of Queen's Bench judges towards the common law is sometimes surprising. Throughout his career, Mr. Justice Mondelet always showed considerable independence of mind.<sup>240</sup> It is therefore not surprising to note that, unlike his colleagues, he had little patience for the absence of precedents. In three dissenting opinions, he pointed out that these necessarily derived from a new decision, however remote it might be.<sup>241</sup> In another dissenting opinion, he stated that he had more respect for principles and justice than for precedents.<sup>242</sup>

Some judges made a distinction between the rules of common law that dated from the time the English criminal law was received in Quebec and the English decisions that had subsequently modified these principles. They did not consider themselves bound by these modifications.<sup>243</sup> Mr. Justice Ramsay stated that in order to be followed, precedents must be consistent or form a trend of indisputable authority.<sup>244</sup> Others accepted the local practice.<sup>245</sup> Mr. Justice Monk even went so far as to rank the contradictions and reversals of

English jurisprudence as "some of the strangest judicial aberrations on record," which explained why colonial judges did not always bother to follow them.<sup>246</sup>

Other judges attached much more importance to English decisions. In their minds, a statute of Lower Canada similar to an English statute could not confer a broader discretion on judges.<sup>247</sup> For others, the English criminal law received in 1774 included the practice followed at that time.<sup>248</sup> Chief Justice Dorion based his refusal to follow a ruling of his own court on English precedents and authors; Mr. Justice J.-T. Taschereau did not consider himself bound by a decision taken by a majority of one.<sup>249</sup> In general, a number of judges refused to admit that the jurisprudence of their court might deviate from that of England.<sup>250</sup>

As might have been expected, the higher courts of appeal approved of this second trend. The main rulings of the Court of Queen's Bench that were critical of English jurisprudence were overturned or disapproved of by the Supreme Court of Canada. However, the judges did not comment on the proper weight to be accorded to these decisions from across the Atlantic.<sup>251</sup> In the Supreme Court, some judges felt bound by a decision in which they had expressed a dissenting opinion.<sup>252</sup> A single English decision was sometimes considered conclusive.<sup>253</sup>

In 1890, three judges stated that faced with two identical statutes, English jurisprudence was to be followed,<sup>254</sup> but their three colleagues were not persuaded by this argument. Moreover, some judges cited the works of James Fitzjames Stephen,<sup>255</sup> and the reports relating to the draft English criminal codes.<sup>256</sup> While not very common, these citations show that these texts had a certain authority in Canada.

The Privy Council refused to accept that the uncertainties and contradictions of jurisprudence allowed judges to form their own opinion. According to Sir R.P. Collier, "all such doubts have been set at rest by a series of recent decisions, not indeed promulgating any new law, but declaring what the law has always been, if properly understood."<sup>257</sup> It was therefore not necessary to assess whether these judgments had moved away from the rules followed when English criminal law was introduced in Quebec.

The attitude of judges towards foreign doctrine evolved over the period in question. In 1860, four judges of the Court of Queen's Bench vehemently protested when a lawyer cited an American author. According to Chief Justice LaFontaine, the government could refuse to execute an accused who had been convicted on the basis of such works! Only Mr. Justice Meredith showed common sense. He stated that in the absence of positive law, when the opinions of English judges were conflicting, he was not disposed to exclude the reasoning of such able jurists . . . particularly as his colleagues consulted these authorities in their chambers.<sup>258</sup> This judicial hostility did not last: from 1867 on, judges cited American authors and decisions.<sup>259</sup> To do so, they obviously required that American law and Canadian law be similar.<sup>260</sup>

The situation was different with respect to French criminal law. Chief Justice Duval refused to even consider its rules, as well as those of European countries or the thirty-one American states; for him, foreign law simply had no place in criminal cases.<sup>261</sup> Mr. Justice Drummond went further: in his view, in a statute of United Canada, the term "bailment"(the



civil law equivalent is "deposit") was to be given the meaning it had in English law; Mr. Justice Aylwin, dissenting, relied on the civil law principles of Lower Canada.<sup>262</sup> In one nuisance case, lawyers complained that the presiding judge had cited a Latin civil law maxim in his charge to the jury. Mr. Justice Aylwin responded that this maxim was also used by common law judges; for him, it was no more Roman than English.<sup>263</sup> The civil code was even cited at times,<sup>264</sup> as was Demolombe, although this is doubtless evidence of the difficulty encountered by a judge not very familiar with the criminal law.<sup>265</sup>

By way of comparison, it is instructive to examine a case in which a municipality was prosecuted for damages caused by police officers during an unwarranted arrest. Justices Caron, Drummond and Monk relied on the principles of the civil law and found the city liable. In his dissenting opinion, Chief Justice Duval favoured the application of the English law to dismiss the action; Mr. Justice Badgley also dissented, but based his opinion on both systems.<sup>266</sup> As a rule, judges therefore showed no hostility towards the civil law. However, no mention is made of the French criminal code of 1810 or of the literature pertaining to it. The wound inflicted in 1760 had therefore healed and there was no thought of opening it up.

On a number of occasions, judges proved fairly critical of the specific characteristics of Canadian legislation. Usually, technical reasons were given.<sup>267</sup> Some dismissed the French version of the enactment, on the ground that the English version reproduced a British statute.<sup>268</sup> Even the consolidation of the federal laws posed problems. Thus, someone was charged with having committed an offence contained in a chapter of the consolidated statutes. This infraction, however, needed to be completed by a definition that was to be found in another chapter. An acquittal was therefore entered by the court.<sup>269</sup>

Judges' comments sometimes were more problematic. Thus, a Canadian statute ordered husbands and parents to provide the necessaries of life for their wife and children; unlike the English statute, it did not require proof of the fact that the life or physical integrity of the dependants had been jeopardized. Mr. Justice Ramsay thought it inconceivable that Parliament would deviate from his English model; in his view, the husband should not be presumed to be in the wrong.<sup>270</sup> The Queen's Bench judges felt obliged, however, to enforce the law, even though they disapproved of it.<sup>271</sup>

The remedies offered after an accused had been found guilty also stirred debate. Thus, if a felony had been committed, a new trial could not be ordered.<sup>272</sup> Subsequently, a statute of 1869 expressly stated that this power did not exist.<sup>273</sup> In the case of a misdemeanour, the judges felt, however, that they could grant this remedy.<sup>274</sup> In Quebec, the system put in place in 1857 was still in force.<sup>275</sup> The judge could therefore refer to his colleagues from the Queen's Bench a question that had arisen during the trial. Moreover, the accused was given the right to challenge his conviction before this same court. However, the federal statute of 1869 imposed a condition not contained in the English legislation: the application had to raise an issue that the trial judge could not have referred, or had refused to refer, to the Court of Queen's Bench.<sup>276</sup>

These provisions posed a problem if an irregularity occurred when empanelling the jury. There was actually an English precedent in which twelve judges were evenly split on the issue of the proper remedy in such a case. Epic debates ensued, culminating in a

decision in which the six Supreme Court judges also were evenly split.<sup>277</sup> The difficulty was as follows: Was the judge obliged to submit to the Court of Queen's Bench the questions concerning the jury selection procedure, or must the accused ask the Court to quash the conviction? In 1888, the Supreme Court decided that events that had occurred after the trial had ended could not be the subject of a reserved question; in that case, after the conviction, it was discovered that a juror had served under his brother's name.<sup>278</sup> Two years later, an accused challenged the procedure followed during jury selection, and requested the quashing of the conviction by means of a writ of error. The Court of Queen's Bench rejected this defence on the ground that this question should have been referred to it by the trial judge. This ruling was upheld in the Supreme Court by a split vote.<sup>279</sup> We might note in this regard that the writ of error was abolished by the *Criminal Code* of 1892.<sup>280</sup>

Of course, the common law sometimes fairly readily allowed certain questions to be settled. Thus, when an indictment identified the victim by a Western name and an aboriginal name, it was sufficient to prove that the victim bore one of these names. In that case the Court applied to the second name the rule concerning indictments in which the true name was followed by the expression "alias" so-and-so.<sup>281</sup> In rape cases, judges considered the right of the accused to question the plaintiff about her sexual relationships indisputable. Some added, relying on English cases, that the judge could allow the witness to refuse to answer the question.<sup>282</sup>

The brief analysis just presented does not cover a good many issues, such as the study of specific offenses, defences or general principles of the criminal law. It also does not examine the use of this system by the establishment and the elite, or sexual offences. Finally, it is limited to the case of Quebec. Nevertheless, in this limited context, some observations concerning methodology can be made. First of all, in Quebec, judges specialized in the criminal law, even those of francophone origin, expressed themselves mostly in English. Documentation in the French language was accordingly limited, which created a psychological barrier for those wishing to work in French. Then, some Quebec judges—all anglophones—seemed prepared to deviate from English jurisprudence, which they criticized as uncertain and random. They soon encountered opposition from their colleagues and the Supreme Court of Canada or the Judicial Committee of the Privy Council. With the exception of one isolated ruling, American doctrine was generally well received, while French doctrine did not seem to be taken into consideration. The works of Stephen and the reports of commissions charged with codifying the English criminal law were occasionally cited. Finally, several cases concerned questions of procedure or arose from the flawed drafting of federal statutes.

All of these factors were, in a way, conditions necessary but not sufficient for the codification of Canadian criminal law. The conditions in which this process was carried out therefore have still to be examined.

### C. The Codification of 1892

The idea of codifying Canadian criminal law is not new (1). Codification itself gave rise to many comments during the 19th century (2) which cleared the way for the

codification of 1892 (3). Since then, the common law has continued to play a fundamental role, which may be an obstacle to attempts at recodification (4).

### 1. The First Plans to Codify the Criminal Law

As early as 1769, Francis Masères advocated the drafting of a code to properly inform the people about the law being applied in Quebec. This idea, however, seemed quite ahead of its time and was not implemented.<sup>283</sup> At that time and later, the English term "code" had another accepted meaning. It often designates a heterogeneous set of laws applied in a given area, especially in criminal law.<sup>284</sup>

In 1847, an anonymous author called for the codification of the law of Lower Canada. While most of his remarks concerned the civil law, he did not ignore the criminal law: concerning "the criminal code, it can be said that the salutary statutes introduced by the Honourable Mr. Black, have provided the main outline of the reform to be carried out" [translation], namely, codification.<sup>285</sup> This may, however, have meant a series of statutes rather than a true codification. The idea nevertheless seems to have been in the air. In 1850, William Badgley submitted a bill for codification of the criminal law and a draft code of criminal procedure. These texts drew on the reports submitted by the commission set up by Lord Brougham in England, as well as on the legislation of the Maritime Provinces and other American States. This member of Parliament from Lower Canada was sitting in the Opposition. He wanted his bill printed and distributed to the members of the bar and the judiciary in order to have it debated during the next session. The House passed a motion to this effect, prompting a brief debate. Louis-Hippolyte LaFontaine, the attorney general of Lower Canada, refused to approve the principle of the bill, as members of Parliament did not have enough time to read it in advance. Robert Baldwin, the attorney general of Upper Canada, stated that the government was not ready to take a position on the wisdom of codification. In his view, where it had been adopted, this measure did not always meet with the success that had been hoped for. Another member of Parliament from Upper Canada, Henry Smith, was in favour of codification, as were Louis-Joseph Papineau and the solicitor general of Lower Canada, Lewis T. Drummond.<sup>286</sup>

The following year, Mr. Badgley resubmitted his two bills. On June 30, 1851, the House agreed to their second reading. A committee was formed to study them. It consisted of Badgley, the solicitors general of each province, Drummond and Macdonald, and House members Macdonald, Cameron, Smith, Chabot, Richards and Ross. On August 8, a brief report was presented to the House, stating that insofar as local conditions made it possible, the legislature had always tried to ensure that the laws of United Canada were consistent with those of Great Britain. The committee went on to say:

The body of this Law in this Province is composed of a vast collection of subsisting as well as obsolete but unrepealed statutory enactments, and of Judicial opinions frequently conflicting, requiring great and laborious research and study for their discovery and comprehension, even by its Professors, and to the same degree difficult to be known by the large class of official persons who are called upon to carry out its requirements, whilst it is utterly unknown to the great mass of the people who are subject to its penalties.

(...)

Your Committee do not consider it necessary to advert to the admitted advantages of the assimilation of the Law, and its administration throughout United *Canada*, or of the perfecting of such a Code as much as possible in its details.

The committee did not recommend the immediate adoption of the two bills. Rather, it suggested that they be revised by a commission of government-appointed experts charged with giving its opinion and proposing changes; a similar commission was to see to the consolidation of statutes. On August 29, a motion to this effect was passed.<sup>287</sup> In practice, however, it was not until 1856 that the consolidation commission was established; no commission was ever created to study Badgley's bills. The fact that a parliamentary committee considered them is nevertheless significant. It shows that the idea of codifying the criminal law was favourably received. Of course, a group of jurists would eventually have been charged with studying the matter more closely; in the end, it might have issued a negative opinion. But it must be remembered that at the time, codification seems to have had the wind in its sails.<sup>288</sup>

In Montreal, the debates of 1851 drew the attention of Maximilien Bibaud, who had just founded a law school. He submitted to the journal *La Minerve* a critical review of the Badgley Code (*Revue critique du Code Badgley*) which appeared in several issues. Very independent of mind and an ardent Catholic, he took the opportunity to point out the qualities of the Roman law and of criminal law of several European countries, without closing his eyes to the abuses that may have occurred in France's *Ancien Régime*.

Bibaud could sometimes be progressive. He emphasized that in trials for rape or adultery, women "well born" [translation] endured the unwholesome curiosity of the public.<sup>289</sup> Badgley's bill proposed punishing drunkenness, as opposed to the offence committed in a state of drunkenness, unless the offence was premeditated.<sup>290</sup> It imposed the death penalty only in cases of murder.<sup>291</sup> Bibaud approved both these suggestions. However, he thought imprisonment far too severe for a crime against nature "at least when there is no bestiality"<sup>292</sup> [translation]. He maintained that the State "is obliged to feed those who are hungry, or to obtain work for them"<sup>293</sup> [translation]. He deplored the sometimes absurd severity of English statutes which were designed to protect the interests of owners,<sup>294</sup> while acknowledging that the situation had improved in England and United Canada.

Bibaud protested against "too slavish an attachment to certain maxims of the old common law" [translation], and was concerned about the small number of statutes reforming the criminal law.<sup>295</sup> He criticized several provisions of the Badgley draft. If they were adopted, "Canadians themselves would soon have to blush at our first attempt at codification where antinomies are the necessary outcome of the complete lack of order"<sup>296</sup> [translation]. In his view, a commission of several jurists should study the matter. We have seen that this solution was adopted by the parliamentary committee that reported on these bills on August 8, 1851. Bibaud also wanted a close examination of the law of the countries of Continental Europe. In conclusion, he clearly favoured a code of the civil law type:

[Translation] A defect of our modern legislation and that of Canada in particular, is that they are too specific, too detailed. They foresee less in their desire to foresee more, they do not lay down, they avoid laying down principles, content to settle

everything, and to bend all to mandatory provisions, and often substituting for these principles, which are elusive, needless rigour. I ask is this not the nature of English legislation?

When it is necessary to strip the new principle of a special provision to decide unforeseen cases, one emerges uncertain from this quest, from this difficult search. The legislature itself, failing to express the principles, has merely badly understood its provision. How can it be thought that the lacunas will not multiply, if no generative principle is brought to light?<sup>297</sup>

## 2. The Perception of Codification Prior to 1892

The debates about codification were not confined to Lower Canada. In the United States, some have spoken of a full-blown "movement" in favour of this reform. In 1826, the lawyer Edward Livingston submitted to the Louisiana legislature a draft code, but it would not be adopted; he stood apart from the other codifiers in proposing the abolition of the death penalty.<sup>298</sup> In other states, the idea of reducing into writing the rules of the common law aroused the hostility of many lawyers. Legislators ended up consolidating their legislation in order to simplify its often verbose phraseology. Through a kind of perverse effect, after this success, pressure to codify the common law dwindled.<sup>299</sup> However, in 1847, the constitution of the State of New York was amended. Judicial procedure was to be reformed; moreover, commissioners were to prepare a code covering all or certain parts of the law of this state. The code of procedure was drafted by three commissioners, including the famous David Dudley Field; it became law in 1848. Made up of brief and very general articles, it was to be amended every year, perhaps because of hostility on the part of practitioners. It was repealed in 1877; by that year, its volume had increased nearly tenfold since 1848. This unfortunate experience would often be cited by those who opposed codification.

For the general codification of the law of New York, the commissioners who had been appointed in 1847 for a two-year term were unable to submit a draft. A statute appointed their successors, but it was repealed in 1849. In 1857, another statute provided for the appointment of three commissioners who were to work for free. One of them was David Dudley Field. At virtually the same time, an enactment decreed the codification of the civil law of Lower Canada.<sup>300</sup> The New York commissioners were to submit their draft to those responsible for the administration of justice before tabling it in the legislature. They completed their work in 1865, having produced a draft political, criminal and civil code. Only a portion of the criminal code was adopted in 1881, but some western states, notably California, adopted the civil code<sup>301</sup>, which had been approved twice by New York legislators before being vetoed by the governor.<sup>302</sup>

The legal periodicals of United Canada, which have been examined in detail by Joanie Schwartz, devoted several articles to the debates surrounding codification.<sup>303</sup> Some jurists of Upper Canada were very well acquainted with the New York initiative.<sup>304</sup> By all appearances, they were also aware of the opposition of English judges to the draft code submitted in 1854. One article published in 1858 attacked head-on the idea attributed to Bentham: it was utopian to expect that a pocket code whose meaning would be apparent to

everyone could be drafted. As proof, the five codes of France had been amended often, not to mention the many laws enacted annually. Moreover, numerous commentaries were published (mentioned here are Touiller, Traplong [sic], Paillet, D'Auvilliers and Teulet). The author wondered what was the advantage of codification. In his opinion, a code could never have the "elasticity" and "omnipotence" of the common law. Moreover, codification was a dangerous experiment, since the wording of existing statutes would be modified. In fact, there was a risk of creating more obscurity and uncertainty than before! Even the consolidation of statutes was a questionable endeavor.<sup>305</sup> The following year, one author asserted that it would be absurd to expect to put an end to the evolution of legislation by adopting a code.<sup>306</sup> On the other hand, the utility of a consolidation was admitted, notably because of the overly elaborate phraseology of statutes.<sup>307</sup>

In another article initially published in England, one can read that: "[w]here the unwritten law is settled, a code is not wanted; where it is unsettled, the formation of a code would be impracticable."<sup>308</sup> While the utility of the codification of the civil law of Lower Canada was not questioned, the codification of the common law was deemed impossible and risky.<sup>309</sup> Apparently these jurists had no idea that French legislators had deliberately chosen general formulas in order to leave to the judge all the desired latitude. At that time, the author of the editorials in the *Upper Canadian Law Journal*, James R. Gowan, was in favour of a consolidation of statutes, but he opposed codification.<sup>310</sup> A decade later, we will see that he had come to support codification of the criminal law.

Law books published prior to 1892 did not seem to discuss codification of the criminal law.<sup>311</sup> Thus, while they did not hesitate to refer to French doctrine, Raoul Dandurand and Charles Lanctôt remained silent on this question.<sup>312</sup> It is therefore necessary to turn the legal periodicals.<sup>313</sup> In 1874, in addressing the grand jury of the district of Richelieu, Mr. Justice Thomas Jean-Jacques Loranger called for the codification of the criminal law. After pointing out the deplorable state of the legislation and the uncertain nature of the rules of common law, he stated: "the criminal law, like the civil law, must be known by everyone, and like the civil law it will never be popularized unless it is codified"<sup>314</sup> [translation]. In his view, codification of the criminal law was to francophones what codification of the civil law and of procedure was to anglophones in Quebec.<sup>315</sup> From 1879 on, the journal *Legal News* published several articles on the English and American codification bills. In 1880, one author quoted Stephen, who felt it would be extremely beneficial to codify the rules of the common law, and went on to say that despite its imperfections, the *Civil Code of Lower Canada* had amply proven its utility.<sup>316</sup>

J.B. Miller, a New York author, believed that codes had destroyed the natural law of the inhabitants of European countries; in his view, if they became accustomed to the forms of the common law, they would find that it was better suited to their needs. The editor of *Legal News*, a Quebec periodical, responded as follows:

If Mr. Miller cares to have our experience of a Code, it may be given in two words,- that in spite of all the dissatisfaction and complaint which its defects and errors have excited, and reference to which may be found scattered through many judicial decisions, we have, nevertheless, found it useful ; we cling to it, and would not willingly be without it.<sup>317</sup>

The idealistic arguments of some supporters of codification were quickly condemned. Various authors reminded their readers that after the adoption of a code, citizens still needed to rely on lawyers; that problems of interpretation continued to surface; that law reports were published; that reversals of jurisprudence could occur; and that, at first glance, the number of lawsuits did not appear to be declining.<sup>318</sup> An editorial in the *Canada Law Times*, in all likelihood written by the publisher, Douglas Armour, summarized this position as follows:

Without denying that many beneficial results must certainly flow from codification where codification is practicable we do not think that those most desirable ends, certainty, cheapness, convenience, and universal knowledge of the law, will ever be attained by simply codifying the law.<sup>319</sup>

Ontarian jurists acknowledged, however, that the common law was often confused or contradictory and that the wording of statutes left much to be desired.<sup>320</sup> They therefore felt somewhat ambivalent about codification. Thus, in 1884, the tabling in the Senate of a draft criminal code prompted a curious comment: the adoption of this text would be a beneficial measure, as the Canadian law, as far as possible, should be identical to that of England, so that the jurisprudence of that country would continue to receive application. The author therefore assumed that England would pass such a bill, which seemed quite unlikely in 1884.<sup>321</sup> If one extends the logic of this argument, Canada should have refrained from codifying the criminal law until England did so. In 1890, on learning that a draft criminal code was in preparation, one author expressed scant enthusiasm: its adoption might be desirable, he wrote, provided Parliament did not continually amend it thereafter.<sup>322</sup>

While these authors were divided with regard to a general codification of the private law, they remained favourable to the adoption of thematic codes, such as the one enacted in Great Britain governing bills of exchange.<sup>323</sup> On this subject, a Quebec author wrote perspicuously that "some of the statutes which exist in countries not under code rule, are in fact sections of a code."<sup>324</sup> The commentaries published in Ontario therefore acknowledged that codification had its advantages, while pointing out that it did not eliminate the disadvantages attributed to the common law; they seem to have admitted the existence of the latter.

In 1893, the *Canada Law Journal* stated that the *Criminal Code* of 1892 was not perfect, as "[t]he age of miracles is past." The author nevertheless felt a sense of pride which he thought could be shared by the entire country.<sup>325</sup> The evolution of the thinking of Ontario jurists could not be better summed up: resolutely hostile in the 1850s, they were prepared to recognize the merits of codification in the 1880s. This balanced view of codification, fuelled by the American debates and the Quebec experience, most likely paved the way for the adoption of the *Criminal Code*, 1892.

### 3. The Adoption of the Code of 1892

One of the initiators of the plan to codify the criminal law was Mr. Justice James R. Gowan, on whom John A. Macdonald often relied to draft bills; he was named a senator in

1885. In 1871, Gowan met in England with Robert Wright, who had written a draft criminal code for Jamaica, and with the daughter of Edward Livingston, a Louisianan who had also written a draft code. He also served on the Royal Commission that investigated the Pacific Railway scandal of 1873 with Charles Dewey Day, one of the three commissioners that drafted the *Civil Code of Lower Canada*. In Canada, after the Conservatives returned to power in 1878, the minister of justice undertook first to consolidate the federal statutes. In this context, the deputy minister of justice, George Wheelock Burbidge, prepared in 1884 a draft criminal code which appeared in the report on the consolidation of statutes tabled in the Senate. In 1889, Henri Elzéar Taschereau, a renowned criminal jurist and a Supreme Court of Canada judge, in turn offered to prepare a code. The minister of justice, John Thompson, may have feared that he would thus be deprived of the credit for this initiative.<sup>326</sup> On October 29, 1890, Thompson wrote to the judges announcing that he intended to table a draft criminal code; he asked them to state whether they were in favour of abolishing the grand jury. In Quebec, Mr. Justice Bourgeois seized the opportunity to state tersely that the "codification of our criminal laws as suggested in the circular is very desirable"<sup>327</sup>. In 1891, a draft code was widely distributed; several proposed changes were then sent to the minister.<sup>328</sup> The decision to codify stirred no opposition; at times, it was even described in laudatory terms.<sup>329</sup>

At the time, the department of justice had some ten employees, only one of whom was francophone; an anglophone jurist had also been educated in Quebec.<sup>330</sup> The influence of civil law specialists therefore seems to have been negligible. According to professor Desmond Brown, Thompson was surrounded by supporters convinced of the need for codification, who did not wish to trail behind England in this area: they were Burbidge, who had been appointed to the Exchequer Court, Senator James R. Gowan,<sup>331</sup> the clerk of this court, Charles Masters, and the new deputy minister of justice, Robert Sedgewick. In 1890, this group drafted a bill that was tabled in the House of Commons in 1891. However, it could not be debated before the end of the parliamentary session. Thompson tried again in March 1892. A joint committee of the Senate and House of Commons was formed. The Commons then studied the report of this committee. After the adoption of the text by the Senate, royal assent was given on July 8, 1892. The *Criminal Code* came into force on July 1, 1893.<sup>332</sup>

Thompson's group seemed to have learned some lessons from the failures that had occurred in England. Thus, all offences created by British statutes were repealed, except those that were made expressly applicable in the colonies by the imperial legislature.<sup>333</sup> The new code defined the crimes and offences that were dealt with by way of summary conviction proceedings, as well as the rules of procedure applicable in this event. Unlike the English drafts, the Canadian code contained no provision repealing en masse the rules of common law; it expressly preserved those that provided a defence, a justification or an excuse.<sup>334</sup> James Gowan wished to codify the latter but considered it more prudent to stick to the text of the English draft.<sup>335</sup>

Usually, the drafters echoed the provisions of the bill of 1880, which had first been written by Stephen in 1878 before being revised by a commission of judges in 1879. Towards the end of the parliamentary debates, Senator Power discovered, however, that some changes made to the English text had not been brought to the attention of the members of the joint committee of the Senate and House of Commons. But the matter went



no further.<sup>336</sup> For the rest, the code often repeated the provisions of Canadian legislation. If one includes the sections that were written or amended in Canada, Brown estimates that 75% of the code did not come solely from English law. In his opinion, Thompson did everything possible to deflect attention from this fact.<sup>337</sup> Robert Sedgwick had quite a different view. In a confidential, and therefore presumably credible, memorandum to Thompson in 1893, he reminded the minister that "you know how careful we were, as well as before the Joint Committee as in the House to point out any change made by the bill, either in the common or in the statute law."<sup>338</sup> In actual fact, the bill of 1880 restated several provisions that had been enacted in England in 1861 and adopted in Canada in 1869. In this regard, it was more like a consolidation than a modification of the law.

Thompson dropped very quickly a controversial part of the bill which would have granted the accused the right to testify, which was denied him by the common law at that time. This change was made the following year, just before the new code came into force.<sup>339</sup> In England, it was not until 1898 that the accused was granted this right, notably because of opposition from Irish members of Parliament.<sup>340</sup>

The debates of the House of Commons were marked by their seriousness; Wilfrid Laurier called for a full reading of each section.<sup>341</sup> Besides Thompson and Laurier, the main protagonists were David Mills and Louis Davies, who would later be ministers in Laurier's government and judges on the Supreme Court of Canada, as well as Thomas Mulock, who would also be a minister in this same government before being appointed to the High Court of Justice for Ontario, and becoming the chief justice of that province. Thompson proved to be a fine tactician. He tried his best to respond to the critics, if possible by recalling that the British parliamentary commission was made up of distinguished judges. When he did not manage to defuse the criticism, he sometimes agreed to amendments proposed by the opposition. If this was not possible, he set aside the disputed provision so that common ground could later be found.<sup>342</sup>

By way of illustration, some Maritime members of Parliament were concerned about the scope of one offence, obstructing a public official in the execution of his duty, which was punishable by ten years imprisonments. In their view, this should not protect all public officers, for example those in the department of fisheries, who could seize, without prior authorization, the nets and boats of fishermen. Mulock declared that this was a case of "bureaucracy gone mad."<sup>343</sup> In the end, the definition of public official was changed.<sup>344</sup>

As a rule, francophones seldom intervened. A legal scholar as eminent as François-Charles-Stanislas Langelier spoke only once. He asked whether the provisions governing the provincial courts fell within the jurisdiction of the federal parliament.<sup>345</sup> The session of June 24 was, however, an exception to the rule: Joseph-Adolphe Chapleau and Joseph-Aldéric Ouimet, both of whom had argued criminal cases, criticized a section that allowed the judge to interrupt a trial before jury if the accused was caught off guard. Wilfrid Laurier did not deem it desirable to move ahead of England on this question; in fact, all but one member present found this innovation unnecessary. In the end, the idea was dropped.<sup>346</sup> Also, the member Choquette asked that Ontario's francophones have the right to be tried by a mixed, bilingual jury made up of six anglophones and six francophones, as was the case in Quebec and Manitoba.<sup>347</sup> Thompson replied that these francophones "speak better English than some of their neighbours". Besides, if there were many in the region, they

would be represented on the jury. In any event, in the other provinces, trials were to be conducted in English.<sup>348</sup>

The justification of the bill proposed by the minister was fairly brief: it consisted in vaunting the merits of the work done in England by the authors of the bills of 1878 to 1880, underlining that they had attempted to simplify the law and eliminate obscurities and technical vocabulary. Thompson explained that the code would replace all statutes creating offences without, however, doing away with the common law. This would preserve the elasticity which was so dear to the opponents of codification. The minister then described the most important changes contained in the bill, notably the elimination of the term "malice" and of the distinction between crimes and misdemeanours, the replacement of the term "larceny" with the word "theft," and the granting to courts of appeal of the power to order a new trial. The idea of abolishing the grand jury, discussed since 1889, was abandoned.<sup>349</sup>

In general, the Liberal Opposition approved codification. However, early on in the debates of the Committee of the Whole, Richard Cartwright refused to adopt a bill that had been rejected by the British Parliament because of its imperfections. Thompson retorted that there had been no opposition to the bill itself. As for Chief Justice Cockburn, he was among those who opposed anything done by anybody but themselves. Wilfrid Laurier then pointed out that the bill would be "transferring our text books into a statute". Thompson replied that this was not entirely true. Nevertheless, where it had seemed useful to the drafters to set out the law in detail, this had been done. At that point, discussion of the precise wording of the section resumed and the question was shelved.<sup>350</sup>

A similar debate took place on the subject of seditious libel. Louis Davies opposed the whole definition of sedition, in order to allow juries to shape this notion over time. In his view, this is what was meant by the "elasticity of the common law". The Minister of Justice allowed himself to be persuaded.<sup>351</sup> In 1951, the rejection of Stephen's definition played a decisive role in the acquittal of Jehovah's Witnesses charged with sedition.<sup>352</sup> The provision governing defamatory libel was also criticized. According to Thompson, the bill simply echoed a rule of common law, which judges would continue to apply as they had in the past. Laurier retorted that incorporating the rule into a legislative provision deprived it of its elasticity. Again, the issue was left unresolved.<sup>353</sup>

The debates in the Senate were much shorter. The first reading took place in April; on this occasion, James Gowan gave a laudatory presentation of the draft, underscoring its innovative and unprecedented nature, the very opposite of Thompson's strategy. The joint committee of the House of Commons and the Senate was then set up.<sup>354</sup> It was not until July 4 that the bill adopted by the Commons and sent to the Upper House. Senator Bellerose immediately protested, as the amendments adopted by the Lower House had not been translated. He explained that he was not in the habit of causing problems in this regard, but that he needed the French version to fully understand the meaning of so important a text.<sup>355</sup> Prime Minister Abbott promised that the text would not be adopted until the French version was ready.<sup>356</sup> On July 6, the translation was still unavailable. Francophones agreed, however, to allow the proceedings to begin. Abbott promised to postpone the study of a provision if they wished to see the French text; the translation would be completed before the adoption of the bill.<sup>357</sup> This illustrates just how little importance was generally accorded to this version.

It was at this time that the leader of the Opposition, Richard William Scott, chose to lead an all-out attack on the code. In his view, it would replace the common law and the wisdom and experience acquired over centuries would be discarded. Moreover, on many points, the bill significantly changed the law. During the parliamentary debates, this was the first sustained criticism of the decision to codify. However, Scott had been appointed to the joint committee of the Commons and the Senate that was to examine and improve the bill. He admitted that he did not have the time to take part in its work. This fact reduced the weight of his arguments considerably. In the end, his attempt to convince his colleagues to postpone the study of the bill ended in failure.<sup>358</sup> Several senators, all anglophones, pointed out, moreover, that the adoption of the code was desired from one end of the country to the other.<sup>359</sup>

The debates took place in the month of July, at a time when the parliamentary session had generally come to an end. Senator Kaulbach maintained that he had never heard a speaker read the provisions of a bill so quickly. He asked that they be read clearly.<sup>360</sup> Despite this fact, the debates on second reading lasted barely three days. Nevertheless, the senators found time to oppose an amendment adopted by the Commons. This last-minute change exempted companies that were specially authorized to set up a lottery by a provincial or federal statute from the prohibition against organizing such an activity. In practice, this exception applied only in Quebec, where the lottery of the Société Saint-Jean-Baptiste stirred up a real frenzy. Senator Abbott asked in vain that the will of the people be respected: the exemption was deleted and the Commons were forced to accept this amendment.<sup>361</sup> At a time when it is least expected, the distinct society suddenly makes a brief appearance ...

Throughout the debates, no mention was made of the *Civil Code of Lower Canada*. The private law concepts on which the members of Parliament sometimes relied derived solely from the common law system; this was the case when they considered whether the holder of an easement had possession of this right or whether the interests of a mortgagee needed to be protected.<sup>362</sup> It is quite paradoxical to note that Wilfrid Laurier feared losing the elasticity of the common law while the vast majority of common law jurists uttered not a word on this question. It seems that francophone jurists had little interest in this reform. In any event, they had no desire to challenge the compromise reached with the *Quebec Act*.

In the end, this reform seems to have been carried out with some indifference. This is evident notably from the lack of in-depth discussion in the newspapers. At most, they criticized or praised the bill, without ever stirring any real debate.<sup>363</sup> This should not come as a surprise, as the minister had stressed the fact that the code would not significantly change the Canadian criminal law. As far as we know, it must be concluded that the very few francophones called for codification of the criminal law; in this regard, their particular needs went unmentioned during the parliamentary debates. However, there seems to have been a consensus throughout Canada on the need for this reform, which may have been at least partly attributable to the desire to get out of the confusion into which England's jurisprudence seemed to be sinking. But this criticism of the common law was confined to legal journals and a few judicial opinions. Parliamentarians could not express it aloud without violating what was still a taboo.

By relying on the reputation of certain English jurists, the minister was able to successfully bring about in Canada a reform that had failed in England. In the long term, the code was sure to strengthen the Canadian identity; in the short term, it was presented as a borrowing, even though in actual fact, a fair number of its provisions simply restated the existing legislation.

#### 4. Codification From 1892 to the Present

##### (a) The Role of the Common Law

In 1892, Mr. Justice Henri-Elzéar Taschereau published a letter to the minister of justice harshly critical of the new code. Besides many inconsistencies regarding punishments, formulation or the plan that was followed, he protested against the incompleteness of the text:

That our code of 1893 is deficient, in respect of completeness, to a still greater degree than that one in reference to which the Lord Chief Justice [of England] so expressed its views on the essential requisites of a codification, must, it seems to me, be conceded, when it is taken into consideration that, whilst the latter superseded all the common law, the former leaves all of it in force, with, besides, a number of important enactments, scattered over all the statute book. So that, in future, any one desirous of ascertaining what is, on a given point, the criminal law of the country will have to refer first, to the common law, secondly, to our unrepealed statutory law, thirdly, to the case law, fourthly, to the Imperial special statutory enactments on the subject in force in Canada, not even alluded to in the code, and fifthly, to the code.<sup>364</sup>

Taschereau deplored the absence of certain fundamental rules in criminal law, such as the requirement of *mens rea*.<sup>365</sup> Thus far, he had always believed that the codification would be beneficial; now he had some doubts about this.<sup>366</sup>

Taschereau's criticism did not sway the department's lawyers.<sup>367</sup> According to Robert Sedgwick, a code could not contain the whole of the law applicable in a given sector.<sup>368</sup> Moreover, the Canadian Parliament could not amend imperial statutes that expressly provided for their application to Canada.<sup>369</sup> As for common law offences not covered by the code, according to Sedgwick they "involve such a breach of moral law that the offender knows when he commits the offence that he is doing wrong and violating the law." What is more, these offences had been deliberately omitted from the code.<sup>370</sup> In some cases, such as champerty and maintenance, it was not deemed desirable to point out the existence of crimes that had become obsolete.<sup>371</sup> In his view, it was desirable that the common law be able to supplement the offences contained in the code.<sup>372</sup> It also must continue to provide the accused with defences in unforeseen circumstances:

It is not every mind that has such a sublime confidence and conceit in its own powers as to feel safe in declaring that a statement of rules of excuses or justification is so complete as to justify the exclusion of the common law.<sup>373</sup>

Sedgwick also pointed out in general that the code was not intended to change the law.<sup>374</sup> Aside from a few drafting errors, he concluded that the judge's criticisms were unfounded.

As everyone knows, after the code came into force, the common law continued to play a fundamental role in Canadian criminal law. It could still be a source of offences independently of any statute.<sup>375</sup> In 1950, the Supreme Court of Canada ruled that only Parliament could create new crimes, as opposed to those which had already been recognized by the common law.<sup>376</sup> When the Code was revised, in 1954, Parliament reformulated section 5 of the code of 1892; it repealed the offences contained in a British statute or a statute that predated the entry of a province or territory into the Canadian Confederation, as well as imperial enactments that extended to British dominions. It also did away with common law offences, with the exception of "the power . . . to impose punishment for contempt of court"; this provision became section 9 of the current code. Moreover, the rules of common law which constituted a justification, excuse or defence remained in force.<sup>377</sup>

The definition of a "defence" has created a controversy. Must we speak of a "defence" each time the accused can argue that the requirements of the relevant section of the code are negated by the evidence? Or is it necessary to rely on a rule that is separate and distinct from these requirements, whether *actus reus* or *mens rea*?<sup>378</sup> The question was pointedly raised in the Jobidon case.<sup>379</sup> Section 265(1) provides that a person commits an assault when he applies force intentionally to another without that person's consent, but it does not define that concept; section 265(3) states that no consent is obtained in a number of cases that do not include fistfights. The Supreme Court of Canada held that in such a situation consent was not valid if the participants intended to injure each other.

The majority opinion, written by Mr. Justice Gonthier, considered absence of consent to be a defence, even though it was an element of the *actus reus* that the crown had to prove beyond a reasonable doubt.<sup>380</sup> Such being the case, the principles of the common law could still be relied upon to decide whether this notion was limited on grounds of public policy. In listing exceptions in section 265(3) of the *Criminal Code*, Parliament did not clearly evince an intention to exclude the common law.<sup>381</sup> The minority opinion of Mr. Justice Sopinka argued that in dispensing with the requirement that absence of consent be proven, contrary to the text of the relevant section, the majority in effect created an offence that derived solely from the common law, running afoul of section 9(a) of the code. Moreover, this undermined "the importance of certainty in determining what conduct constitutes a criminal offence," which is the justification for codification.<sup>382</sup> But the minority seems to equate the *actus reus* with the elements that must be proven by the crown. Yet the circumstances in which no offence is committed can still be considered a defence even if the crown must disprove their existence. The fact that they appear next to the elements of the *actus reus* is hardly conclusive. If the rule concerning consent appeared in a separate paragraph and the burden of proof rested on the accused, would it be possible to deny that this was a defence? It would seem then any set of circumstances that negate the existence of an offence is in reality a defence, whatever its location within the code.

This case shed light on the special role of statutes in a common law system. The code can always be supplemented by principles of common law which maintain no

apparent connection with its provisions. In a civil law system, the articles of the code can be considered an application of broader principles to which judges may decide to give effect when no provision clearly applies.<sup>383</sup> In this regard, the *Jobidon* decision is at the crossroads. Section 265(3) does not state that the list of cases of nullity of consent it provides is exhaustive. One can therefore attempt to find a common denominator to these exceptions—that is the civil law method—or abandon the text to analyse the rules of common law antecedent to its adoption, even if it means recognizing an exception that had not been foreseen by the legislature.<sup>384</sup> Mr. Justice Gonthier seems to combine both these methods.<sup>385</sup>

There is, however, another approach: some decisions have found that the wording of the code deviates from the principles of common law and constitutes a fresh start.<sup>386</sup> In this context, the English term "codification" may refer to the process that consists in transforming a rule of common law into a legislative provision; it therefore differs from a change of the law. In French, the term "codification" encompasses at once the enunciation and the improvement of the rules followed in a given area; it is not readily used when referring to a single section.

The Supreme Court has also been called to consider the rule of common law that allows courts to punish criminal contempt; this power is expressly preserved by section 9 of the current code. Criminal contempt occurs when a person's refusal to comply with a court order amounts to public defiance. In this case, there are no limits to the sentence that may be imposed. However, the mere fact of violating such an order also constitutes a civil contempt; in such a case, the punishment is set by provincial laws. In 1992, a court confirmed an order prohibiting a nurses' union from going on strike. The union members flouted the law and two convictions of criminal contempt were handed down; fines of \$250,000 and \$150,000 were imposed, in contrast to the maximum of \$1,000 stipulated by provincial law. The Court of Appeal of Alberta upheld these convictions.

Before the Supreme Court, the union cited "the principle that there must be no crime or punishment except in accordance with fixed, pre-determined law." Only the majority judges ruled on this question. In their opinion, "the absence of codification does not mean that a law violates this principle." Two reasons were cited in support of this assertion: for centuries, common law crimes were not viewed as violating this rule; and recourse to the common law was sometimes necessary to determine the scope of codified crimes. In short, the absence of codification alone is not fatal, as the common law has played and continues to play an important role in the criminal law.<sup>387</sup> This puts little store by the many English or Canadian jurists who, since the 19th century, have criticized the arbitrariness of offences arising from the common law. Were his embalmed body not being well cared for by London's *University College*, Jeremy Bentham would have turned in his grave.

The Court's finding is, however, justified by section 11(g) of the *Canadian Charter of Rights and Freedoms*. According to this provision, a finding of guilt must not be based on any act or omission "unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations."<sup>388</sup> It follows that an offence may derive solely from the common law, since it is obviously part of the "Canadian law," and need not be covered by an enactment.<sup>389</sup>

As for vagueness, criminal contempt requires that the accused must have defied or disobeyed a court order with knowledge of the fact that this public disobedience will tend to depreciate the authority of the court.<sup>390</sup> Criminal contempt is therefore said to be "neither vague nor arbitrary", since it would be possible to predict in advance whether a particular conduct constituted a crime.<sup>391</sup> With respect to contempt of court, the area of risk referred to by Mr. Justice Gonthier in *Nova Scotia Pharmaceuticals* is certainly quite broad. Overall, the jurisprudence of the court has clearly recognized that an offence may be derived solely from the common law, as in the case of criminal contempt. The scope of the constitutive elements of an offence may also be broadened by the common law. The *Criminal Code* thus appears to be a collection of principles whose scope the common law may modulate according to the circumstances, as jurisprudence is able to do in a system of codified law.

(b) Towards a Recodification of the Canadian Criminal Law?

Today, the phraseology and organization of the current code, inherited from the text of 1892, are quite widely disparaged.<sup>392</sup> This is the result partly of the many changes made over a century, which from the outset have taken on a markedly repressive bent.<sup>393</sup> Moreover, proportionally far fewer francophones have called for amendments in the decades that followed the adoption of the code.<sup>394</sup> No less than legislation, jurisprudence plays a fundamental role in Canadian criminal law, but it also doubtless increases its complexity. In these circumstances, no one argues any more that codification has crippled the evolution of the law.

What became of the plan to recodify the Canadian criminal law? It is known that the Law Reform Commission of Canada prepared a draft code<sup>395</sup> in the hopes of rendering the criminal law more accessible, clear and coherent.<sup>396</sup> Parliament did not pursue this plan for complex reasons.<sup>397</sup> Without discussing its merits, one might ask whether there has been in Canada a hostility similar to the one encountered in England in the 19th century.<sup>398</sup> We might also point out that for some feminist legal scholars, recodification is not advisable because the criminal law is too insensitive to the problems encountered by women.<sup>399</sup>

The idea of including a definition of defences sometimes causes disconcerting reactions. There is a fondness for repeating Portalis' saying "*Tout prévoir, est un but qu'il est impossible d'atteindre*"<sup>400</sup> (to foresee everything is a goal impossible to achieve) without mentioning the fundamental importance of jurisprudence in a system of codified law. Yet it does play an essential role in French criminal law. Thus, with regard to the mental element of an offence, the French code of 1810 and the Canadian code of 1892 were equally incomplete. Yet judges developed rules in this regard.<sup>401</sup> The same is true for the defence of necessity. In England, Stephen wanted to include it in his code, but his colleagues were opposed to it<sup>402</sup>; the *Criminal Code* therefore made no provision for it. In France, the *Code Pénal* of 1810, which was just as silent on the subject, expressly declared that "an excuse or a mitigation of punishment must be expressly provided for by legislation" [translation]. Yet French and Canadian judges came to recognize this defence.<sup>403</sup>

In Canada, it would perhaps be unconstitutional to prohibit the recognition of a ground of defence not provided for by the code.<sup>404</sup> Attempting to list them exhaustively is actually a very risky endeavour.<sup>405</sup> This in no way changes the fact that it would be

beneficial to codify those defences recognized in jurisprudence, employing general formulas likely to encompass a very large number of cases. In this regard, can it be said that the resort to "vague" standards will be done at the expense of completeness and accessibility, and that it would have been desirable to be more specific in the draft of the Law Reform Commission of Canada, in order to limit the need to consult other sources?<sup>406</sup> Yes, if one believes that the reader must have information that is as detailed as possible; no, if one thinks that general information in the form of a principle is sometimes preferable, even if jurisprudence and scholarly opinion will have to specify the extent of its application.<sup>407</sup> It is not self-evident that non-jurists want to have access to all the criminal law, even if it were possible for experts themselves to acquire this knowledge.

The main users of the code are jurists and, to a lesser extent, law enforcement officials. For these individuals, the readability of an enactment is not a negligible benefit, even though jurisprudence and legal literature play an essential role. Non-jurists also get something out of it, for example if they serve on a jury or wish to obtain information for themselves. In this latter case, a codified general principle is always a helpful starting point; moreover, a code whose outline and provisions are easy to grasp can, in some cases, quickly yield an answer. Although it does not happen often, such a concern is legitimate. It would be appalling to dismiss it out of hand.

## V. Conclusion

Jurists' perception of the phenomenon of codification varies depending on the system in which they operate. In civil law, jurisprudence plays a fundamental role both in applying the code's general principles as in creating solutions when unforeseen circumstances arise. That is Portalis' view, echoed in French criminal law, subject to the rule that offences must be created by legislation. In England, legal scholars have long adhered to Bentham's view, whether they approved or rejected his solution. From this perspective, the purpose of codification is to eliminate or considerably limit judicial discretion, as a statute does in the common law system. It then becomes necessary to enumerate in detail the situations contemplated by the legislator. To some extent, the draft prepared by Stephen in 1878 moved away from this model, but we know that it was not adopted by Parliament. In Canada, the idea of codifying the criminal law was favourably received by civil law experts in Quebec, both anglophone and francophone. The same was true of the majority of Ontario and Canadian jurists, who may have sought thereby to promote a sense of Canadian identity.

Thus, in the late 19th century, influential members of the Canadian government adhered to the philosophy of the English codifiers. The *Criminal Code, 1892* which resulted from their activities reserved a large place for jurisprudence, whose role was somewhat limited in 1954, when common law offences were repealed. If we examine the French criminal code of 1810, the summary treatment of defences in the Canadian code is not surprising. However, in the late 20th century, this shortcoming seems abnormal in the Western world; it is difficult to justify when we know that in the United States, many states have adopted a more complete criminal code.<sup>408</sup> Of course, the Supreme Court of Canada



has ruled there is no obligation to codify. It is also true that judges charged with interpreting a new code would still rely on certain common law concepts, provided they did not conflict with the new act. Without doing away with jurisprudence or the problems of interpretation, recodification would, at the very least, have the advantage of simplifying the task of individuals who must be familiar with the criminal law.

In 1975, Mr. Justice Pigeon criticized the changes made to the *Criminal Code* by the drafters of the *Revised Statutes of Canada* of 1906. His comments remain valid today:

What those actually responsible for these unfortunate changes—the ill results of which persist to this day—failed to appreciate was that they could not possibly give to the changes they were making the kind of exhaustive consideration that had been given by the framers of the original *Code*. They also did not take into consideration something which the authors of the original *Code* had not overlooked, namely, the importance of having such statutes in readable form. By this I mean enactments that are readily understandable upon hearing them read. This is especially desirable with respect to such provisions as the definitions of crimes which must be read to the juries. For readability, it is necessary that sentences be short and unencumbered by incidentals, lists and enumerations.<sup>409</sup>

In conclusion, we would like to cite the comment of the Attorney General of the United Kingdom, John Holker, to the House of Commons in 1879:

If we do nothing more than make the Criminal Law plain, simple, and easy of comprehension, we may not accomplish anything very heroic, but we shall, I think, do a great good to the community; because it is desirable that all the law, especially the Criminal Law, should be made certain and intelligible to the people, so that they may understand what acts are right, and what acts are prohibited, and what acts, if committed by them, render them liable to punishment.<sup>410</sup>

It is still to be hoped that the idea of recodifying Canadian criminal law will not suffer the fate of the English draft code of 1879.

## Endnotes

- \* The author has completely revised the translation that first appeared in *Perspectives on Legislation, Essays from the 1999 Legal Dimensions Initiative*; he has also made a few very minor modifications or additions to the initial text. Part of the research for this paper was made possible by a grant of the Quebec Bar Foundation for the preparation of a textbook on the legal history of Quebec. The author would like to thank the Law Commission of Canada, Catherine Moroz of the New York and Quebec Bar and Stephane Cliche of the Quebec Bar for their work as research assistants, as well as Dominique Gaurier, André Jodouin, Daniel Jutras, Nicholas Kasirer and Barry Wright for their comments on a previous version, as well as Roderick A. Macdonald, who reviewed the present version. As usual, the author remains entirely responsible for any shortcoming in the final product.

- <sup>1</sup> André Jodouin, "La légitimité des sources du droit pénal (réflexions d'un agnostique sur les certitudes fondamentales du droit répressif)," to be published in *Les certitudes du droit*, Thémis; available on the Internet, <http://www.crdp.umontreal.ca/fr/conferences>.
- <sup>2</sup> Jean-Pierre Boyer, *Histoire de la justice en France*, 2<sup>e</sup> éd., (Paris: PUF, 1996), p. 190.
- <sup>3</sup> Jean-Louis Halperin, *L'impossible Code civil*, (Paris: PUF, 1992), p. 182.
- <sup>4</sup> Boyer, see note 2 above, pp. 61-63.
- <sup>5</sup> Yves-Louis Hufteu, *Le référé législatif et les pouvoirs du juge dans le silence de la loi*, (Paris: PUF, 1965), pp. 14-16.
- <sup>6</sup> Jean-Louis Halperin, *Le Tribunal de Cassation et les pouvoirs sous la Révolution (1790-1799)*, (Paris: LGDJ, 1987), pp. 256-261; Hufteu, see note 5 above, pp. 78-89.
- <sup>7</sup> Hufteu, see note 5 above, pp. 131-133.
- <sup>8</sup> Halperin, see note 3 above, pp. 12-15.
- <sup>9</sup> *Ibid.*, pp. 252 and 267.
- <sup>10</sup> A. Fenet, *Recueil complet des travaux préparatoires du Code civil*, 15 vol., (Paris: Au dépôt, 1827-1832); Jean-Guillaume Locré de Roissy, *La législation civile, commerciale et criminelle de la France*, (Paris: Truettel et Wurtz, 1827-1832), 31 vol.
- <sup>11</sup> Jean-Marie Augustin, "Les premières années d'interprétation du Code civil français (1804-1837)," in Pierre-André Côté (dir.), *Le nouveau code civil, interprétation et application - Journées Maximilien Caron 1992*, (Montreal: Éditions Thémis, 1993), p. 32.
- <sup>12</sup> Adhémar Esmein, "L'originalité du Code civil," in *Le Code civil, 1804-1904, Livre du Centenaire*, (Paris: Rousseau, 1904), p. 5.
- <sup>13</sup> Halperin, see note 6 above, pp. 71-73; Hufteu, see note 5 above, pp. 40-42.
- <sup>14</sup> Jean-Louis Halperin, "Le Tribunal de Cassation et la naissance de la jurisprudence moderne," in Robert Badminter (dir.), *Une autre justice, Contributions à l'histoire de la justice sous la Révolution française*, (Paris: Fayard, 1989), p. 225.
- <sup>15</sup> Marie-Claire Belleau, "Pouvoir judiciaire et codification : perspective historique" (1997-98) 28 R.D.U.S. 67, pp. 81-85 and 115.
- <sup>16</sup> Jean-Louis Halperin, *Histoire du droit privé français depuis 1804*, (Paris: PUF, 1996), p. 57.
- <sup>17</sup> François Ewald, (dir.) *Naissance du Droit Civil*, (Paris, Flammarion, 1989), p. 35.
- <sup>18</sup> Belleau, see note 15 above.
- <sup>19</sup> Hufteu, see note 5 above, pp. 131-133.
- <sup>20</sup> R.S.Q., c. I-16.
- <sup>21</sup> Ewald, see note 17 above, p. 47.
- <sup>22</sup> Marie-Claire Belleau, "The *Juristes Inquiets*: Legal Classism and Criticism in Early Twentieth Century France," [1997] *Utah Law Review* 379; Halperin, see note 16 above; Daniel Jutras, "Louis and the Mechanical Beast or Josserand's Contribution to Objective Liability in France"

- in Kenneth D. Cooper-Stevenson and Elaine Gibson (eds.) *Tort Theory*, (North York: Cactus Press, 1993), p. 315.
- <sup>23</sup> Pierre Lascoumes, Pierrette Poncella and Pierre Lenoel, *Au nom de l'ordre, Une histoire politique du code pénal*, (Paris: Hachette, 1989) pp. 248-261.
- <sup>24</sup> *Ibid.*, p. 208; François Tulkens "Les principes du code pénal de Bentham" in Phillippe Gérard, François Ost and Michel Van de Kerchove (dir.) *L'actualité de la pensée juridique de Jeremy Bentham*, (Bruxelles: Publications des Facultés universitaires de St. Louis, 1987), p. 615.
- <sup>25</sup> Locré, see note 10 above, t. 29, p. 423.
- <sup>26</sup> Ewald, see note 17 above, p. 45.
- <sup>27</sup> Lascoumes *et al.*, p. 226.
- <sup>28</sup> Locré, see note 10 above, t. 29, p. 2.
- <sup>29</sup> *Ibid.*, t. 29-31.
- <sup>30</sup> *Ibid.*, t. 29, p. 423.
- <sup>31</sup> *Ibid.*, t. 30, p. 278.
- <sup>32</sup> *Ibid.*, t. 31, p. 170.
- <sup>33</sup> *Ibid.*, p. 176.
- <sup>34</sup> *Ibid.*, p. 276.
- <sup>35</sup> *Ibid.*, t. 29, p. 216 (Dhaubesart); t. 31, p. 145 (Faure), 274 (Nougarède).
- <sup>36</sup> *Ibid.*, t. 30, p. 524; t. 29, p. 281-282 (Riboud).
- <sup>37</sup> *Ibid.*, t. 31, p. 272 (Nougarède).
- <sup>38</sup> Lascoumes *et al.*, see note 23 above, pp. 114, 236, 241, 245-247, 273.
- <sup>39</sup> Locré, see note 10 above t. 29, p. 428 (Berlier).
- <sup>40</sup> Roger Merle and André Vitu, *Traité de droit criminel, 7e éd.*, (Paris: Cujas, 1997), n° 156, pp. 230-231.
- <sup>41</sup> *Ibid.*, n° 154, pp. 233-234.
- <sup>42</sup> Section 7 of the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982, Canada Act, 1982, 1982, c. 11 (U.K.)*, Schedule B.
- <sup>43</sup> Marc Ribeiro, "Le problème constitutionnel de l'imprécision des lois," (1998) 32 R.J.T. 663.
- <sup>44</sup> *R. v. Nova Scotia Pharmaceutical Ltd*, [1992] 2 S.C.R. 606, 643, (Gonthier, J.).
- <sup>45</sup> *Ibid.*, p. 638.
- <sup>46</sup> *Ibid.*, p. 639.
- <sup>47</sup> *Ibid.*, p. 643.
- <sup>48</sup> Ribeiro, see note 43 above, pp. 742-743.

- <sup>49</sup> *R v. Nova Scotia Pharmaceuticals*, see note 44 above, p. 641.
- <sup>50</sup> *Ibid.*; see also *Ontario v. Canadien Pacifique Itée*, [1995] 2 S.C.R. 1031; *Winko v. B.C.(Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625; Ribeiro, see note 43 above, p. 715.
- <sup>51</sup> R.S.C. (1985), c. C-46.
- <sup>52</sup> *R. v. Morales*, [1992] 3 S.C.R. 711, 732.
- <sup>53</sup> *Ibid.*, p. 755.
- <sup>54</sup> Gaston Stefani, Georges Levasseur and Bernard Bouloc, *Droit pénal général*, 13<sup>e</sup> éd., (Paris: Dalloz, 1987), n<sup>os</sup> 211-239, pp. 260-289.
- <sup>55</sup> Merle and Vitu, see note 40 above, n<sup>os</sup> 577-606, pp. 727-761.
- <sup>56</sup> *Ibid.*, n<sup>os</sup> 466-470, pp. 588-594.
- <sup>57</sup> *Perka v. The Queen*, [1984] 2 S.C.R. 232.
- <sup>58</sup> Merle and Vitu *cited above*, n<sup>os</sup> 476 and 478, pp. 600 and 603; Stefani *et al.*, see note 54 above, n<sup>o</sup> 360, p. 402.
- <sup>59</sup> *Juris-classeur pénal*, 2, art. 222-22.
- <sup>60</sup> Section 265 of the *Criminal Code*, R.S.C. (1985), c. C-46.
- <sup>61</sup> *R. v. Jobidon*, [1991] 2 S.C.R. 714.
- <sup>62</sup> Section 265(3) of the *Criminal Code*, *R. v. Cuerrier*, [1998] 2 S.C.R. 371.
- <sup>63</sup> A. H. Manchester, *Modern Legal History*, (London: Butterworths, 1980), p. 42.
- <sup>64</sup> Courtney Ilbert, *Legislative Methods and Forms*, (Oxford: Clarendon Press, 1901), pp. 24 *et seq.*, 111 *et seq.*
- <sup>65</sup> *An Act for Shortening the Language used in Acts of Parliament*, 1850 (U.K.), 13-14 Vict., c. 21
- <sup>66</sup> John Bowring (ed.), *The Works of Jeremy Betham*, 10 vol. (New York: Russel, 1961), Reproduced from the 1838-1843 edition, vol. 3, p. 208.
- <sup>67</sup> A.E Cockburn, "Copy of Letter from the LORD CHIEF JUSTICE OF ENGLAND, dated the 12th day of June 1879, containing Comments and Suggestions in relation to the CRIMINAL CODE (INDICTABLE OFFENCES) BILL.", *British Parlimentary Papers*, 1878-79, LIX, p. 232; Ilbert, see note 64 above, p. 78.
- <sup>68</sup> Manchester, see note 63 above, p. 34.
- <sup>69</sup> *Bank of England v. Vagliano Brothers*, [1891] A.C. 107, 139.
- <sup>70</sup> "Truth vs. Ashurst; or Law, as it is, Constrasted with what it is said to be", in J. Bowring, see note 66 above, vol. 5, p. 235.
- <sup>71</sup> "Bentham's Draught for the Judicial Establishments, Compared with that of the National Assembly, with a Commentary on the Same", in J. Bowring, see note 66 above, vol. 4, p. 315.
- <sup>72</sup> Philip Schofield, "Jeremy Bentham and Nineteenth-Century English Jurisprudence," (1991) 12 *Journal of Legal History* 58.

- <sup>73</sup> Bowring, see note 66 above, vol. 3, p. 155; Ilbert, see note 64 above, p. 322; Manchester, see note 63 above, p. 39.
- <sup>74</sup> Étienne Dumont, (éd.), *Jeremy Bentham - Oeuvres*, 4 t., Scienta Verlag Aalen, 1969, Reproduced from the Brussels edition of 1829, vol. 1, p. 1.
- <sup>75</sup> Gaston Braive, "Jeremy Bentham (1748-1832). L'homme et l'oeuvre, accompagne d'un essai de bibliographie," in Philippe Gérard, François Ost and Michel Van De Kerchove (dir.), *L'actualité de la pensée juridique de Jeremy Bentham*, (Bruxelles: Publications des Facultés universitaires Saint-Louis, 1987), p. 11.
- <sup>76</sup> "A General View of a Complete Code of Laws", in J. Bowring, see note 66 above, vol. 3, p. 205.
- <sup>77</sup> *Ibid.*, p. 209.
- <sup>78</sup> *Ibid.*, p. 210.
- <sup>79</sup> *Ibid.*, vol. 1, p. 152.
- <sup>80</sup> "Draught of a Code for the Judicial Establishment in France with Critical Observations on the Draught proposed by the National Assembly Committee, in the Form of a Perpetual Commentary", *ibid.*, vol. 4, p. 313.
- <sup>81</sup> H.L.A. Hart (ed.), *On Laws in General*, (London: Athlone Press, 1970), pp. 158-167, 235-241.
- <sup>82</sup> "Constitutional Code", in Bowring, see note 66 above, vol. 9, pp. 504-505; Gerald J. Postema, *Bentham and the Common Law Tradition*, (Oxford Clarendon Press, 1986), pp. 434-439.
- <sup>83</sup> "Papers Relative to Codification and Public Instruction: Including Correspondence with the Russian Emperor, and Divers Constituted Authorities in the American United States" (hereinafter "Papers Relative to Codification [...]"), in Bowring, see note 66 above, vol. 4, pp. 454-455, 503, 514-515, 539.
- <sup>84</sup> *Ibid.*, pp. 500 and 543.
- <sup>85</sup> *Ibid.*, pp. 543-544; see also p. 515.
- <sup>86</sup> François Ost, "Codification et temporalité dans la pensée de J. Betham," in Philippe Gérard, François Ost and Michel Van De Kerchove (dir.), see note 75 above, pp. 186-187, 191; Postema, see note 82 above, pp. 450-451; Jacques Vanderlinden, "Code et codification dans la pensée de Jeremy Bentham", (1964) 32 *Revue d'histoire du droit* 45.
- <sup>87</sup> "Papers Relative to Codification [...]", see note 83 above, pp. 482-483, 490; Michael Lobban, *The Common Law and English Jurisprudence 1760-1850*, (Oxford: Clarendon Press, 1991), p. 149.
- <sup>88</sup> "Papers Relative to Codification [...]", in Bowring, see note 83 above, p. 554.
- <sup>89</sup> Postema, see note 82 above, pp. 421-439; Crimmins "The Common Law and Benthamic Praxis" (1990) 3 C.J.L.J. 145.
- <sup>90</sup> Lobban, see note 87 above, pp. 182-183; Ost, see note 75 above, pp. 206 *et seq.*
- <sup>91</sup> Lobban, see note 87 above, pp. 188-197.

- <sup>92</sup> Postema, see note 82 above, p. 290.
- <sup>93</sup> Desmond H. Brown, *The Genesis of the Canadian Criminal Code of 1892*, (Toronto: Osgoode Society, 1989), pp. 14-22.
- <sup>94</sup> "Second Report of Her Majesty's Commissioners for Revising and Consolidating the Criminal Law" [1846], in *Irish University Press Series of British Parliamentary Papers, Legal Administration, Criminal Law*, vol. 5, Shannon, Ireland, 1971, p. 184.
- <sup>95</sup> *Copies of the Lord Chancellor's Letters to the Judges, and their Answers, respecting the Criminal Law Bills of Last Session, British Parliamentary Papers*, 1854, LIII, p. 303.
- <sup>96</sup> *Ibid.*, pp. 5-6.
- <sup>97</sup> *Ibid.*, pp. pages 9-11 (Alderson, J.), 13 (Coleridge, J.), 18 (Maule, J.), 19 (Wightman, J.), 21 (Creswell, J.), 28 (Williams, J.), 37 (Talfourd, J.), 39 (Martin, J.).
- <sup>98</sup> *Ibid.*, pp. 6 (Chief Justice Pollock), 8 (Parke, J.), 9 (Alderson, J.), 12 (Coleridge, J.), 19-20 (Wightman, J.), 23 (Erle, J.), 28 (Williams, J. and Platt, J.), 37 (Talfourd, J.), 39 (Martin, J.) and 43-44 (Crompton, J.).
- <sup>99</sup> *Ibid.*, pp. 12 (Coleridge, J.), 19 (Wightman, J.).
- <sup>100</sup> *Ibid.*, pp. 6 (Chief Justice Pollock), 7 (Parke, J.), 12 (Coleridge, J.), 38 (Martin, J.).
- <sup>101</sup> *Ibid.*, pp. 43 (Crompton, J.), 7 (Parke, J.), 9 (Alderson, J.), pp. 31, 33 and 37 (Talfourd, J.).
- <sup>102</sup> *Ibid.*, pp. 31 (Talfourd, J.), 38 (Martin, J.) and p. 43 (Crompton, J.).
- <sup>103</sup> *Ibid.*, pp. 11-13; see also p. 38 (Martin, J.).
- <sup>104</sup> (1853) 17 *Jur.* 458, 459, quoted in Manchester, see note 63 above, p. 22.
- <sup>105</sup> Sanford H. Kadish, "Codifiers of the Criminal Law: Weshler's Predecessors," (1978) 78 *Colum. L.R.* 1099, pp. 1112-1113.
- <sup>106</sup> Martin L. Friedland, *A Century of Criminal Justice*, (Toronto: Carswell, 1984), p. 1.
- <sup>107</sup> "Special Report from the Select Committee on Homicide Law Amendment Bill", in *Irish University Press Series of British Parliamentary Papers*, see note 94 above, vol. 6, pp. 144-145.
- <sup>108</sup> *Ibid.*, p. 153.
- <sup>109</sup> *Ibid.*, pp. 172-174.
- <sup>110</sup> James Fitzjames Stephen, *A Digest of the Criminal Law*, (London: Macmillan and Co., 1877), pp. xix-xx and xxix.
- <sup>111</sup> Brown, see note 93 above, pp. 27-29.
- <sup>112</sup> "Report of the Royal Commission appointed to Consider the Law Relating to Indictable Offences", in *Irish University Press Series of British Parliamentary Papers*, see note 94 above, vol. 6, pp. 381-382 (herein after "Report of the Royal Commission, 1879").
- <sup>113</sup> *Ibid.*, p. 394. One may note that Stephen's Draft included 282 sections concerning offences or defences (as opposed to procedural rules): see *Criminal Code (Indictable Offences) Bill*, House of Commons, Bills Public, vol. 2, 1878, p. 5; in the Commission's draft, this number rises to 426, although the provisions are at time shorter ("Report of the Royal Commission,

1879", see note 113 above, p. 417-526). By relying on current legislation, the Commission increased the complexity of the draft and retained many superfluous distinctions.

<sup>114</sup> *Ibid.*, p. 369.

<sup>115</sup> *Ibid.*, pp. 374-376.

<sup>116</sup> *Ibid.*, p. 376.

<sup>117</sup> *Ibid.*, pp. 378-379.

<sup>118</sup> *Ibid.*, pp. 378-379 and 386-387.

<sup>119</sup> *Ibid.*, pp. 411-412.

<sup>120</sup> Friedland, see note 106 above, pp. 18-20.

<sup>121</sup> Cockburn, see note 67 above; A. E. Cockburn, "Chief Justice Cockburn's second letter on the Criminal Code," (1880) 15 Law Journal, pp. 184 and 202; Stephen White, "Lord Chief Justice Cockburn's Letters on the Criminal Code Bill of 1879" [1990] Crim. L. R. 315.

<sup>122</sup> Cockburn, see note 67 above, pp. 1-2.

<sup>123</sup> Cockburn 1880, see note 121 above, pp. 185-188, 203, 205-206.

<sup>124</sup> Cockburn 1878, see note 67 above, pp. 6 and 8-10.

<sup>125</sup> *Ibid.*, p. 14.

<sup>126</sup> *Hansard's Parliamentary Debates, 3rd series*, 1879, April 3rd<sup>d</sup>, col. 324-328; May 5th, col. 1751.

<sup>127</sup> *Ibid.*, col. 326.

<sup>128</sup> *Ibid.*, col. 326; col. 1766.

<sup>129</sup> *Ibid.*, col. 325, 333, 346, 1751, 1756, 1762.

<sup>130</sup> *Ibid.*, col. 323, 338, 344, 1756, 1768 and 1770.

<sup>131</sup> *Hansard's Parliamentary Debates, 3<sup>rd</sup> series*, 1880, February 23rd, col. 1242 and 1247.

<sup>132</sup> *Ibid.*, col. 1247.

<sup>133</sup> *Ibid.*, col. 1248.

<sup>134</sup> Brown, see note 93 above, pp. 23-37.

<sup>135</sup> *Hansard's Parliamentary Debates, 3rd series*, April 12-16 1883, col. 112-113, 121, 138-142.

<sup>136</sup> *Ibid.*, col. 113 and 121.

<sup>137</sup> *Ibid.*, col. 138.

<sup>138</sup> *British Parliamentary Papers*, 1883, 26, No. 225.

<sup>139</sup> *Bills of Exchange Act, 1882*, 45-46 Vict., c. 61.

<sup>140</sup> *Partnership Act, 1890*, 53-54 Vict., c. 39.

<sup>141</sup> *Sale of Goods Act, 1893*, 56-57 Vict., c. 71.

- <sup>142</sup> *Bank of England v. Vagliano Brothers*, see note 69 above, pp. 120 (Lord Halsbury), 129-130 (Lord Selborne), 134 (Lord Watson), 144-145 (Lord Hershell), 160-161 (Lord MacNaghton), 161-162 (Lord Morris).
- <sup>143</sup> Manchester, see note 63 above, pp. 327-347.
- <sup>144</sup> *Shaw v. Director of Public Prosecutions*, [1962] A.C. 220.
- <sup>145</sup> *Kneller Publishing (Publishing, Printing and Promotions) Ltd. v. Director of Public Prosecutions*, [1973] A.C. 435.
- <sup>146</sup> *Director of Public Prosecutions v. Whithers*, [1975] A.C. 842.
- <sup>147</sup> Ilbert, see note 64 above, pp. 122 *et seq.*
- <sup>148</sup> George P. Fletcher, "Truth in Codification," (1998) 31 U.C. Davis L.Rev. 765; James Gordley, "Codification and Legal Scholarship," (1998) 31 U.C. Davis L.Rev. 735.
- <sup>149</sup> Celia Wells, "Restatement or Reform," [1986] Crim. L.R. 314.
- <sup>150</sup> Andrew Ashworth, "Editorial," [1990] Crim. L.R. 141; Andrew Ashworth, "Legislating the Criminal Code" [1992] Crim.L.R. 393; Francis Bennion, "(2) The Technique of Codification", [1986] Crim. L.R. 295; David Cowley, "Comment, Codification of the Criminal Law," (1990) 54 J.C.L. 98; Brian Hogan, "Some Reservations on Law Reform," in Patrick Fitzgerald (ed.), *Crime, Justice & Codification*, (Toronto: Carswell, 1986), p. 65; A.T.H. Smith, "Codification of the Criminal Law (1) The case for a Code," [1986] Crim. L.R. 396.
- <sup>151</sup> *An Act for making more effectual Provision for the Government of the Province of Quebec in North America*, 1774 (G.-B.), 14 Geo. III, c. 83, s. 8 and 10 (hereinafter *Quebec Act*).
- <sup>152</sup> Michel Morin, "La perception de l'ancien droit et du nouveau droit français au Bas-Canada, 1774-1866," in Patrick Glenn (dir.), *Droit québécois et droit français: communauté, autonomie, concordance*, (Cowansville: Les Éditions Yvon Blais Ltée, 1993), p. 24.
- <sup>153</sup> Sylvio Normand, "La codification de 1866: contexte et impact" in Glenn, (dir.) see note 152 above, p. 43; Brian Young, *The Politics of Codification, The Lower Canadian Civil Code of 1866*, (Montreal: McGill-Queen's University Press, 1994).
- <sup>154</sup> John E.C. Brierley, "Quebec's Civil Law Codification: Viewed and Reviewed," (1968) 14 McGill L.J. 521; Murray Greenwood, "Lower Canada (Quebec): Transformation of Civil Law, from Higher Morality to Autonomous Will, 1774-1866," (1995) 23 Man. L. J. 132; Evelyn Kolish, *Nationalismes et Conflits de Droits: Le débat du droit privé au Québec, 1760-1840*, (Ville Lasalle: Hurtubise HMH Itée, 1994); Morin, see note 152 above, p. 1; Normand, see note 153 above.
- <sup>155</sup> Jean-Maurice Brisson, *La formation d'un droit mixte: l'évolution de la procédure civile de 1774 à 1867*, (Montréal: Éditions Thémis, 1986).
- <sup>156</sup> Kolish, see note 154 above, p. 138; "Revision and Printing of the Laws," *Montreal Gazette*, February 12, 1831.
- <sup>157</sup> "Correspondance," *Le Canadien*, 6 June 1832.
- <sup>158</sup> *An Act to re-unite the Provinces of Upper and Lower Canada, and for the government of Canada*, 1840 (U.K.), c. 35 (hereinafter "Union Act").
- <sup>159</sup> Pierre Issalys, "La rédaction législative et la réception de la technique française," in Patrick Glenn, (dir.), see note 152 above, p. 119.



- <sup>160</sup> Morin, see note 152 above, p. 9.
- <sup>161</sup> *An Act to provide for the Codification of the Laws of Lower Canada relative to Civil matters and Procedure*, S.P.C. 1857, c. 43, s. 7.
- <sup>162</sup> T.W. Ritchie, *Codifications of the Laws of Lower Canada, Some remarks on the Title "of Obligations," as reported by Commissioners*, (Montreal: John Lovell, 1863), p. 4.
- <sup>163</sup> *Civil Code of Lower Canada, Sixth and Seven Reports and Supplementary Report*, (Québec: Desbarats, 1865), pp. 262-264.
- <sup>164</sup> Morin, see note 152 above, pp. 13-14.
- <sup>165</sup> John E.C. Brierley and Roderick A. Macdonald (dir.), *Quebec Civil Law - An Introduction to Quebec Private Law*, (Toronto: Emond Montgomery Publications, 1993), nos. 32, 51-53 and 61-63, pp. 34, 54-59 and 67-73; Sylvie Parent, *La doctrine et l'interprétation du Code civil*, (Montréal: Thémis, 1997).
- <sup>166</sup> *Compagnie immobilière Viger v. Lauréat Giguère*, [1977] 2 S.C.R. 67.
- <sup>167</sup> *National Bank of Canada v. Soucisse*, [1981] 2 S.C.R. 339; *Bank of Montreal and Gilles Tremblay v. Hydro Québec, Bail Itée*, [1992] 2 S.C.R. 554.
- <sup>168</sup> *National Bank of Canada v. Houle*, [1990] 3 S.C.R. 122.
- <sup>169</sup> *Civil Code of Québec*, S.Q. 1991, c. 64, ss. 6, 7, 1375, 1493-1496.
- <sup>170</sup> *Lapierre v. Attorney General of Québec*, [1985] 1 S.C.R. 241.
- <sup>171</sup> *Lebrun v. Rodier*, [1978] C.A. 380, 381.
- <sup>172</sup> John E. C. Brierley, "The Renewal of Quebec's Distinct Legal Culture: The New *Civil Code of Québec*" (1992) 42 U.T.L.J. 484; Brierley and Macdonald, see note 165 above, nos. 70-83, pp. 82-97; Louise Langevin and Denise Pratte, "Du *Code civil du Bas-Canada* au nouveau *Code civil du Québec*: l'influence de la codification française," in Patrick Glenn, see note 152 above, p. 63; Jean Pineau, "La philosophie générale du nouveau *Code civil du Québec*," (1992) 71 Canadian Bar Review 423.
- <sup>173</sup> Murray Greenwood and Barry Wright, *Canadian State Trials, Law, Politics and Security Measures, 1608-1837*, (Toronto: University of Toronto Press, 1996), pp. 13-14; Michel Morin, *L'Usurpation de la souveraineté autochtone*, (Montréal: Boréal, 1997), c. V.
- <sup>174</sup> P.G. McHugh, "The Common-Law Status of Colonies and Aboriginal *Rights*: How Lawyers and Historians Treat the Past," (1998) 61 Sask L.R. 393.
- <sup>175</sup> Sydney Harring, *White Man's Law: Native People in Nineteenth Century Canadian Jurisprudence*, (Toronto: University of Toronto Press, 1998); Morin, see note 173 above, c. VIII; Russel Smandych and Rick Linden, "Co-existing Forms of Aboriginal and Private Justice: An Historical Study of the Canadian West," in K. Hazelhurst (ed.) *Legal Pluralism and the Colonial Legacy: Indigenous Experiences of Justice in Canada, Australia and New Zealand*, (Aldershot: Avebury, 1995), p. 1; see also Smandych and Linden, "Administering Justice Without the State: A Study of the Private Justice System of the Hudson's Bay Company to 1800," (1996) 11 R.C.D.S. 21.
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