5. The French Model (Code Civil, 1804) The French Civil Code of 1804 is unanimously considered the best achievement of the science of legislation in the modern age. This judgment is justified by the fact that this code has known an extraordinary success throughout the world over the last two centuries: It has been adopted in many European countries and been taken as a model of civil codification in America, Asia, Middle East, Africa, among other places (Laquette and Leveneu 2004, 789ff.)

The reasons for this success are usually explained by reference to the code’s formal and material features alike. As far as the formal features are concerned, the language of the Code Civil is plain, concise, and clear, and it retains a proper degree of generality. This avoids a pointless multiplication of legal provisions and makes legislation flexible by enabling the law to regulate cases that could not be foreseen by the legislator. As Portalis pointed out, “the role of legislation is to set […] the general prescriptions of the law, to establish principles which will be fertile in application, and not specify the details of questions which may arise in particular instances” (Portalis 1992, xxxv). As far as the material features are concerned, the French Civil Code outlined a plan for law and society that answered the social needs and tendencies of 19th-century Europe by abolishing the remains of the feudal system, by supporting freedom of contract and individual ownership, by limiting the role of the church within the state, by achieving legal and territorial unification. In brief, the French Civil code helped society to “develop from its traditional to its modern form” (Maillet 1970, 692).

The reasons for the worldwide success of the French Civil Code—and also the code’s philosophical background, normative contents, and political significance—are actually more complex and traditionally disputed by legal scholars. This debate can be summarized here by pointing out three interpretations of the French code that traditionally stand in competition to one another.

(1) The French Civil Code was the final product of the French Revolution (Halperin 2004, 50): It brought into civil law the principle of freedom and equality affirmed by the Declaration of the Rights of Man and Citizen of 1789, and it put individual freedom at the core of the legal regulation of property, contracts, and liability.

(2) The French Civil Code was the legal tool serving to carry out Napoleon’s authoritarian project in society: It unified the civil law system to construct a disciplinary centralized state; it enforced a reactionary regulation of marriage, parental authority, and property, and it subjected individual property to the principle of social interest. All this on the basis of the pessimistic anthropology that characterized French philosophical culture after the “Terror period” (Martin 2003 and 2002).

(3) The French Civil Code amounted, in all respects, to a “law of compromises” (Carbonnier 2004a, 26; Bergel 1988, 1078): A technical compromise between the legal regulation of northern and southern France, the former based on custom and the latter on Roman law; a political compromise between the principles of the revolution and the legacy of the ancien régime; and a philosophical compromise between the idea of law as a guarantee of individual freedom and the idea of law as a means by which to educate individuals in freedom.

It will be useful, in evaluating the several different understandings of this code, to take a look at its philosophical background. We will thus focus on the constitutional plan articulated by French legislators, as well as on the structure of the Code Civil.

5.1. Theoretical Background

None of the three interpretations just outlined really take a global look at the Code Civil; instead, they each lay emphasis on different aspects of its many-sided historical significance. It will accordingly be argued in the
following pages that these interpretations do not necessarily stand in conflict, and that they can in fact be considered as parts of a more comprehensive explanation. This kind of approach seems better suited to the multifaceted nature of the Code Civil, which reflects not only the numerous sources of codified legal material it drew on but also the different philosophical conceptions that converged in it during the tormented period of its gestation. The emphasis here will fall on the philosophical background, of which the following aspects will be considered: (1) French jurisprudence; (2) the relation between the natural law tradition and the French Revolution; (3) the philosophical ideas of the “Ideologues”; (4) the influence of Montesquieu’s science of government on French legislators; and (5) the influence of Jeremy Bentham on them.

5.1.1. The Heritage of French Legal Science

An overview on the theoretical sources of the Code Civil must take into account the systematic approach to law and jurisprudence introduced by Domat and Pothier, who are traditionally considered the “fathers” of the Code Civil. To be sure, neither Domat nor Pothier set out a theory of legislation, nor did they advocate the codification of French law. Still, they strongly influenced the French legal culture of the 18th century by defining the standard methodological approach for legal scholars and the legal profession until Napoleon’s reform of university education in 1806 (Ferrante 2002; Arnaud 1969). Pothier’s works on positive customary and civil law were particularly widespread both in the universities and among legal practitioners, in this way contributing to the technical and cultural training of the drafters of the Code Civil. It bears pointing out, for our purposes, Domat’s and Pothier’s attempt to demonstrate the compatibility and coherence among the different legal materials that make up French law. Although they were each working from different premises, they both considered natural law, French customary law, Roman law, and royal ordinances as different parts of a common body of laws that have to work together in order to set the machinery of the state in motion. This can be achieved if legal materials are sorted out and worked into a legal system by deductively establishing the functions they serve within the entire body of law:

All laws have their source in some first principles, which are at the foundation of human society [société des homes]; and one will understand the nature and use of these different kinds of law only by considering their anchorage to those principles. (Domat 1767, I, 13)

Natural law represents the head of the body of law. It contains the first principle of the legal system, which Domat describes as consisting of “elementary truths that even children know, but that are necessary for discovering further less evident truths” (ibid., 12). But Domat upholds an intuitive natural-law theory based on God’s cosmological plan, and so he rejects the modern natural-law tradition of Grotius, Hobbes, Pufendorf, and Locke. In the result, Domat’s first principles of natural law do not lead him to deduce the concepts of equality and freedom that traditionally justify sovereignty and the establishment of civil order. In this sense, Domat’s idea of the legal system is essentially pre-modern, although inspired by Descartes’ geometrical method. Pothier, by contrast, integrated the modern natural-law tradition into the body of civil law by emphasizing the continuity between French positive law, Roman law, and the principle of secular natural law set forth by Grotius and Pufendorf. This conceptual inclusion attests to an important change in the scientific understanding of civil law, and it finds an analogue in Germany in the second half of the 18th century. This is to say that the modern principles of liberty and equality do not just concern the science of government and the problem of the foundation of the state: They are now considered to be the normative basis of civil law and so of the social organizations within the political community (cf. Pothier 1767). According to Pothier, however, liberty and equality do not legitimize the construction of a new social order among individuals: They simply coexist with Roman law and other sources of legal obligation, even though this may give rise to conceptual inconsistencies, making it necessary to rely on rhetorical devices to carry on with the scientific laying out or arrangement of the legal system. From a conceptual point of view, the inclusion of these principles in the legal system makes it possible to think about society and its legal order in a different way. As Portalis puts it a few years later, private relationships, agreements, obligations—“everything becomes public law” (Portalis 1992, 16). The principle of sovereignty and the art of government invade the
territory of civil law, which had maintained a relative autonomy from politics during the ancien régime. From a conceptual point of view, “civil law” thereby properly becomes “private law” as opposed to “public law,” and political power is finally enabled to reform society through the law.

5.1.2. Natural Law and Revolution

Natural law principles are a further basis of the Code Civil, which strongly influenced the codification process especially after the French Revolution. In fact, the revolutionary movement was decisive not only in giving impetus to legislative reform but also in popularizing the natural-law lexicon. In 1789, Abbé Sieyes observed that a set of ideas and principles that had hitherto been of no interest, for they had been enmeshed in “metaphysics,” were now becoming familiar to everyone. So it was with the idea that legislative power belongs to the nation and not to the king, that citizens are equal and have equal rights, and that the nation needs a written constitution in which the rights of citizens are enshrined, and through which they are protected from encroachment by external powers (Sieyès 1789). The French Revolution, Sieyès goes on to observe, made it possible for these principles to permeate social life: Privileges were largely done away with; the differences between social classes diminished; the nation was self-governed. As Hegel would underscore some years later, the abstract concepts of liberty and equality theorized by modern natural law had thereby become effective: “I am apprehended as a universal person, in which [respect] all are identical. [...] A human being counts as such because he is a human being.” (Hegel 1991, § 209).

The enactment of the French constitution of 1791 was aimed at stabilizing the political situation and at consolidating the effects of revolution within society by means of “a code of civil law common to the entire kingdom.” In sympathy with this idea, Jean Delaire de Cambacérès—who headed the legislative commission which drew up the civil-code projects of 1793, 1794, and 1796—pointed out that “everything has changed in political order, then the same has to happen in civil order” (Fenet 1968, I, 3). Cambacérès’s projects accordingly acknowledged the relevance of liberty and equality in regulating civil society: They introduced important innovations in the areas of marriage, divorce, parental authority, succession, property, contracts, and torts. But these innovations were only partially included in the Civil code of 1804. In fact, the revolutionary events after 1793 concretely exposed the worrisome underbelly of the modern idea of liberty as outlined a moment ago.

The problem we are referring to clearly emerges from the philosophical reflection in the modern natural law tradition. Once individuals have been recognized as identical and free, as “the absolute whole which only relates to himself” (Rousseau 1969, 499), a question then arises: Who will interpret and express the “general will,” which for Rousseau is the only source of law within the state? Immanuel Kant cogently argued that “any form of government which is not representative is, strictly speaking, without form, because the legislator cannot be in one and the same person also executor of its will” (Kant 1999b, 324; Duso 2006b). But Rousseau rejected all representative institutions, arguing that they would usurp a nation’s sovereignty. At the same time, the legislator, whose role is to give the law according to the common will, is described as a mysterious figure independent of state and sovereignty, and steeped in a sacred aura: The legislator is “an authority of a different sort, which obliges citizens without violence and persuades them without their firm belief” (Rousseau 1964a, 383). This explains why the representative monarchy championed by Sieyès and enforced with the Constitution of 1791, as well as the codification project it gave rise to, was considered by the Jacobins a usurpation of the political power originally attributed to the nation. According to Saint-Just, Marat, and Robespierre, the general will—entrusted with laying down the law and regulating society—was actually not present in the political activity of the National Assembly and the legislative commissions. The general will reveals itself not through legislation but through the virtuous attitudes of the “friends of the nation,” who encapsulate the best human virtues by keeping alive the spirit of the revolution (Robespierre 2007). The distinction between virtuous and unvirtuous attitudes to freedom conceptually explains the French drift toward the “Terror period,” at the same time as it underscores the educative function attributed...
to legislation: As much as individuals are by nature free and equal, they have not been educated to enjoy equality and freedom. As will be argued in the next section, it is this educative task that legislation is first and foremost assigned as a direct expression of the general will.

The paradoxical aspect of this idea was discussed by Alexis de Tocqueville a few decades later. Citizens' freedom and equality, which the French revolution first aimed at realizing in society, had already become effective at the end of the 18th century (Tocqueville 1952–1953, III). The evolution of the economy and society had already removed most of the personal distinctions and privileges that characterized the ancien régime: nobles, bourgeois, and farmers behaved similarly and enjoyed roughly the same rights; their status (as noble, bourgeois, farmer, and so on) was merely personal and private, designating as it did a profession, and all professions were equal in the eyes of the state (Gordley 1994, 492ff.). According to Tocqueville, freedom and equality, regarded by philosophers as natural human attitudes that had been lost, were actually a product of recent history. But the French Revolution transformed this social reality into a set of abstract ends to be achieved by any means (Biral 1999, 304ff.). The consequences of this drive were pointed out by Hegel as follows:

When these abstractions were invested with power, they afforded the tremendous spectacle, for the first time we know of in human history, of the overthrow of all existing and given conditions within an actual major state and the revision of its constitution from first principles [...]. On the other hand, since these were only abstractions divorced from the idea, they turned the attempt into the most terrible and drastic event. (Hegel 1991, § 258)

The social and political consequences of the French Revolution obviously do not diminish the symbolic force of the Declaration of 1789 and the constitutional process it gave rise to, especially as concerns the cultural dissemination of the principles of liberty and equality Europe. This symbolic force was captured in the Civil code and is one of the main reasons that explain the success it continues to enjoy today across the world (Carbonnier 2004b).

5.1.3. Legislation as Education to Social Morality

This argument introduces a further conceptual element at the basis of the Code Civil, this being the moral function of legislation. In the philosophical context we are considering, legislation took on a moral function, not in the sense that positive law is aimed at enforcing moral rules but in the sense that legislation fulfils a moral role, or rather, it is entrusted with the task of raising and training all citizens to enjoy their freedom and wealth. Rousseau had previously argued that humans often cannot identify their true interests, which in the state lies in the content of general will. Civil laws are designed to guide citizens to an understanding of what they really need and what their real interests are. Which is to say that the civil laws are there “to compel them to be free” (Rousseau 1964a, 376). The laws, in other words, must “change human beings into what they ought to be,” in accordance with their physical nature, which is the only legitimate source of morality (Rousseau 1964b, 260). The moral function attributed to legislation, whose origins lie in the sensistic and mechanistic anthropology of French Enlightenment, imparted a new direction to the process of civil codification after Thermidor, especially through the philosophy of the “Ideologues.” In his Observations on Human Physics and Morality (1802), the physician, moralist, and philosopher Pierre J. G. Cabanis argued that human morality coincides with human physiology as observed from a particular point of view (Cabanis 2006).

In the manner of La Mettrie, d’Holbach, and Helvétius, morality is considered here as a function of perceptions, individual needs, and desires, and these do not reflect the needs of civil society as a whole. This being the case, legislation should not content itself with taking citizens back to their natural state of liberty; instead, legislation must change human nature, so as to bring out a genuine public spirit and forge a national character. In fact, as Voltaire, Montesquieu, and Rousseau had shown, natural-law theory was wrong to assume that the features of human nature are universal and eternal. They are instead subject to history and change, depending on the spirit of a people, as well as on territory, religion, climate, language, tradition, and
so forth. As such, the role of legislation is not only to make natural law effective in society: It is also to improve human nature through legal coercion.

It is time, for this subject as well as others, to assume a point of view which is more worthy of a period of regeneration: It is time [...] to dare to renew and correct the work of nature. This is a risky venture, that deserves all our attention! (Cabanis 1799, 298–9)

A code of laws is the means by which to correct human nature on the basis of a perfect rational plan. This plan is provided by the science of government (by politics), a science to which belongs the science of human beings (Helvétius 1968, IV, 46; d’Holbach 1969, 129ff.; Morelly 1970): The rational plan so conceived thus consists in an educative process which leads human beings to become virtuous citizens, and which needs to be carried out, if necessary, even against their will. As Antoine L. C. Destutt de Tracy argued, all human beings, both children and adults, should be taught how to judge and behave wisely, and “legislation [...] is nothing but the education of adults” (Destutt de Tracy 1970, I, 213).

Xavier Martin has recently highlighted that this anthropological vision was widely shared by the French State Council during the discussion of the Code Civil (Martin 2003 and 2002). In particular, Martin characterizes this vision, and the idea of code supported by it, as a form of citizen “infantilization,” and this seems to contradict Kant’s famous representation of the Enlightenment as “the human being’s emergence from his self-incurred minority” (Kant 1999a, 17). However, one should not overestimate the influence of this educative and moralizing conception of legislation on normative contents that went into the code (Halpérin 2004). This is only one aspect of the manifold conceptual background that, during the French codification process, was used to justify the overturning of revolutionary legislation, especially as concerns family law.

5.1.4. Portalis’s Reading of Montesquieu’s Science of Government

It can be appreciated, in light of these considerations, that there is no discontinuity between the revolutionary idea of codification and the final version of the Code Civil drafted by Portalis’s commission from 1800 to 1804, even though the code clearly appears more conservative than the idea behind it. Portalis seems to anticipate Tocqueville’s assessment of the French Revolution by criticizing the abstractness of the idea of liberty and equality upheld by natural law. In his work On the Use and Abuse of the Philosophical Spirit during the 18th Century, Portalis points out that while these principles do capture certain fundamental features of human nature, they have often been misconceived in philosophy, that is, they have been conceived as final ends that justify resorting to violence and imposition. These principles need to be brought back to earth if they are to serve as a basis on which better organize civil society. How can this be done? Portalis acknowledges the natural-law thesis that “the basis of morals has to be sought in the natural faculties of human beings” (Portalis 1834, II, 65), that is, in self-interest, egoism, a propensity for corruption, and the like. Natural-law theorists, by contrast, have used the study of the human faculties to affirm the primacy of society over men: “A false philosophical spirit leads to naturalize [human corruption] in morals and legislation” (ibid., 22 II, 404). When this happens, “the disease becomes incurable, because it affects the remedy itself” (ibid.), and brings about the fall of the state and of civil society. The way out of this situation is to look at the principles of freedom and equality through the lens of “common sense,” by which is meant that these principles ought to be considered as real features of the nation, features dependent on experience and history rather than on “pure reason” (ibid., II, 47 and 403). These principles are already a matter of fact, and it is the task of legislation to bring them into harmony with the characteristics of the nation. The science of legislation is in this sense conceived by Portalis as a branch of the science of government: Its principle is derived not from natural-law theory but from the features of the land and the population. This was entirely in keeping with Montesquieu’s major work, Spirit of Laws, which in fact, in the second half of the 18th century in Europe, was regarded as a veritable “encyclopaedia of human knowledge” (Herdman 1990, 119): It gave the fundamental guidelines in history, anthropology, ethnography, economics, and politics— and so in the
sciences of government in general—and every legislator accordingly turned to it as an essential tool of the trade.

Proceeding on the basis of Montesquieu’s theory of social improvement, and using language much closer to Hugo’s and Savigny’s than to that of the French Exegetical School of the 19th century, Portalis argues that the Code Civil does not need to invent a new civil society but rather to give stability to the existing one by “maintain[ing] whatever does not have to be necessarily destroyed” (Portalis 1992, 20). The code has only to align with the peculiar attitudes of the nation, in harmony with the spirit of the time, and in so doing it will improve the habits, morality, and welfare of the population.

These general principles account for the method adopted by Portalis’s commission in drafting the Code Civil. In fact, the French Civil Code is a selection of French customary law, Roman law, and Revolutionary legal provisions, collected into a single code and unified by a common language and disposition. Natural law did not really contribute any legal provision to the code but rather gave a new sense to codification in general, which was now conceived as a means by which to establish a unified civil society. This process was justified on different bases, among which was the Ideologues’ sensistic and mechanistic anthropology, which sought to legitimize government through law as a form of education in social morality and citizenship. The selection of legal materials to be used in the code, however, was essentially guided by the principle of Montesquieu’s science of government and not by any theories of natural law, which remained in the background of the codification process. In summary, the Code Civil of 1804 was not just a consequence of the French Revolution, or just a reactionary instrument by which to govern the masses, or just a legislative compromise between past and future. Rather, one can appreciate from its philosophical background that these elements were all in the code, coexisting as aspects of a common historical and conceptual development.

5.1.5. Did Bentham Influence the French Path to Codification?

A further aspect of the philosophical background of the Code Civil traditionally considered by legal scholars is the relation that Bentham’s science of legislation bore to French codification. Bentham’s thought was still quite popular during the late 18th century in Europe. In 1796, the journal Biblothéque Britannique published the translation of some selected excerpts from his Introduction to the Principles of Morals and Legislation, and a year later the schemes Bentham worked out in his Theory of Criminal Punishments were included as a supplement to the 5th French edition of Beccaria’s Treatise (Solimano 1998, 69ff.). Moreover, there are evident analogies between Bentham’s thesis on the nature of interest, the calculability of moral action, and the primacy of utility, on the one hand, and the thought of the French Ideologues, on the other, which infused vim and vigour into the discussion on civil codification, as can be appreciated from the preliminary works on the Code Civil (Martin 2002). This justified Karl Marx in polemically considering the French code as dominated by “liberty, equality, property, and Bentham” (Marx 1991, 160), and so in counting Bentham among the fathers of French codification. These theoretical analogies have been used by legal scholars to support two opposite theses. According to the first thesis, Bentham influenced the French debate on legislation and thereby affected both the Civil Code of 1804 and the Criminal Code of 1810 (Solimano 1998, 69ff. and 147ff.). This influence could be appreciated especially in the statutory regulation of wills, marriage, and parental authority, which Bentham conceived as a means by which to govern domestic society under the principle of utility. Bentham, on this thesis, also contributed to crafting the regulation of property in the code: He did so by framing property not as a presocial natural right, as Locke did, but as a creation of society by which to guarantee security and peace—a view conceived in the manner of Hobbes, Pufendorf, and Hume. On the second thesis, by contrast, Bentham did not influence the content of French codes (Martin 2003, 287–337). The theoretical analogies just considered might actually have to be read in the opposite direction, that is: It was French Enlightenment that influenced Bentham, not the other way around. As Bentham himself admitted in 1782, he took the idea of considering the good as decomposable in a certain number of pleasures from Helvétius (Gillardin 1987, 554), Helvétius being the French thinker who had conceived, before Bentham,
that the "moral universe is subjected to the rule 24 of interest" (Helvétius 1967, 59) and that "self-love makes us what we are" (Helvétius 1968, IV, 337). At the same time, it was a widely held view of European Enlightenment that the morality of action can be predicated on the sensible, or perceptible, advantages and disadvantages resulting from such action: This principle had been expressed, before Bentham, by Locke, Voltaire, d'Holbach, Condorcet, and Turgot, among others. The same can be said of the principle calling for "the greatest happiness for the greatest number," which Hutcheson introduced in his Inquiry Concerning Moral Good and Evil (1725), and which Maupertuis, Helvétius, Verri, and Beccaria took up and espoused before Bentham embedded it into a more articulated and incisive philosophical framework. According to the second thesis, therefore, the statutory regulation of family law and property provided by the Code Civil is a genuine product of French legal thought, which had all the resources it needed to draft the code of 1804.

Apart from the philological and theoretical problems arising in connection with the relation between Bentham and French codification, there is no reliable answer that the available documental evidence affords as concerns the previously formulated question, which therefore remains an open question. Still, it might be argued that the question is itself ill-framed. The analogies between Bentham's theory of legislation and French Enlightenment show once more that philosophical discourse in the 18th century was communitarian in a way that prevents legal scholars from positing or identifying a causal relationship between one author's thesis and a cultural artefact such as the Code Civil. Codes in general are the product of a complex intellectual process that involves the legal tradition as a whole. As Portalis declared, "codes are made as time goes by; but, properly speaking, they are not made at all" (Portalis 1992, 15).

5.2. The Constitutional Plan

The philosophical background of the French codification leads us to focus on the constitutional plan of the Code Civil, which should form the basis of the pacified civilsociety of France in the wake of the revolutionary period.

Along the lines of an interpretive tradition that goes back to the Exegetical School, and is still widespread among legal scholars, the Code Civil is considered a "hymn to the individual" that "extols the power of [his] will" (Cornu 2005, 107) and thus celebrates "the triumph of liberal individualism" (Ghestin and Goubeaux 1994, 99). The foregoing reconstruction suggests that this view should be qualified, and we will accordingly revise it to some extent.

The most relevant technical innovation of the Code Civil consists in unifying the criteria of legal personhood under the state: Each citizen is considered in the abstract as a subject of legal rights and duties independently of his or her station in life, that is, independently of social status and personal circumstances. Individual differences between citizens have any legal bearing only in-sofar as the citizens' legal personality is concerned, and so only as concerns their capacity to assert a claim or enforce a right. In fact, Portalis observed that

[f]ormerly, the humiliating distinctions that political law had introduced among persons had even slipped into civil law. [...] All [those] traces of barbarism are effaced. The law is the common mother of the citizens, and it accords an equal protection to all. (Fenet 1968, I, cii)

This innovation radically simplifies the structure of the legal system: Regulation by law is no longer organized on the basis of the various activities and relations human beings engage in, that is, on the different sets of rights and duties that such engagement implies; the system is instead now based on the equal legal status and personality recognized for all citizens, and then on the relations that each citizen brings into being through the forms typified by the legislator. But is this enough to qualify the Code Civil as a milestone of European liberal individualism? The answer to this question is more complex than one may at first assume.
The technical innovation just considered is the main contribution the French Civil Code received from modern natural-law theory. According to the justification of legislative power offered by natural law, a justification based on the theory of the social contract, positive law (la loi) makes manifest the will of the people, which everyone recognizes as his or her own will within the state. In this sense, positive law makes human beings free, since the ought of law coincides with the will of the individual. Moreover, positive law makes each natural person equal to others, since everybody is equally subject to the law within the state: The status of citizen coincides with a person’s subjection to the law, and hence with the independence of will that positive law guarantees. It turns out that legality, equality, and liberty are mutually connected from a conceptual point of view. Legality is a necessary and sufficient condition of liberty, and this condition is satisfied if those subject to the law are equal. At the same time, human beings are equal in the state if, and only if, positive law qualifies them as such, that is, if the law makes them free.

But this legalistic conception of liberty and equality—the basic premise behind the Code Civil—allowed French legislators to design a model of society that is far from making effective the principle of individual autonomy later affirmed by constitutionalism and European liberalism. In fact, the conceptual sequence this project is based on can be outlined as follows:

positive laws (code) → equality/liberty → individual rights

At the end of the 18th century in France, positive law (la loi) was conceived as a means by which to definitively release citizens from the bondage of the ancien régime and to harmonize their personal activities so as to ensure their common welfare. Individual rights played a derivate and residual role in the legal system: The French Civil Code does not assume a set of natural or fundamental rights limiting the state’s legislative power, nor does it assume that government is subject to the principle of legality. Stated otherwise, the natural rights of liberty and equality are not considered in the code as forming the basis of law and government. Quite the contrary: Citizens have any individual rights only insofar as positive laws attribute such rights to them. This is paradoxically confirmed by Sections 4, 5, and 6 of the 1789 Declaration of the Rights of Man and Citizen. In Section 4, the French National Assembly affirms that “the exercise of the natural rights of each man has no limits except those which assure other members of society the enjoyment of the same rights”; it then goes on to say that “law can only prohibit such actions as are hurtful to society,” and that “law is the expression of the general will. Every citizen has a right to participate personally, or through his representative, in its foundation.” According to the 1789 Declaration, therefore, positive law is not subject to the limit of natural rights; on the contrary, natural rights are subject to the principle of legality. In consequence of the French revolution, then, the basis on which to frame the legal system became the sovereignty of positive law, and this can be said to culminate in the enactment of the Code Civil (Jaume 1989, 60).

The French Civil Code can still be regarded, in this sense, as a “hymn to the individual,” in that its legal authority is legitimized by the conception of political community and government provided by modern natural-law theory, that is, by the science of the nature of the individual. But it cannot be considered a milestone of modern liberalism, because the code conceives individual rights and duties as a means by which to govern society, this in keeping with the legalistic conception of the rule of law (the law laid down by the state) implied by the primacy of the general will. In this sense, positive law is the means given to government for constructing a civil society composed of free and equal individuals; it is not a system of rules aimed at protecting the individual’s freedom and equality from encroachment.

5.3. Structural Features

A brief look at some structural features of the Code Civil can be helpful in illustrating the model of civil society that the code was aimed at bringing into effect.

To begin with, the Civil Code of 1804 does not include any preamble containing theoretical remarks, references to natural-law principles, general rules of government, rules of procedure, and so forth. This
choice was a true innovation for the time: Codes in the 18th century were still conceived, along the lines of Justinian’s Corpus Iuris Civilis, as encyclopaedias of legal knowledge containing all sorts of legal materials, and so as having an informational, educative, and guidance function. The French drafters, by contrast, considered the Code Civil as part of a more comprehensive codification process involving all areas of the law of the state, and based on the constitutional laws of the state (Maleville 1805, I). The Code Civil was regarded as a tool for regulating private relations among citizens, and in this way the code introduced a model that would be adopted by the civil-law systems right up to the present day.

Portalis’s preliminary project included a more broad-gauged preamble containing general legal definitions and classifications that were considered redundant during the revision process and were thus stricken out. Article 1 of Portalis’s preamble stated, in particular, that “natural reason, which governs human beings, is the source of the universal and unchangeable law, and the source of positive law” (Fenet 1968, II, 3ff.). The assumption in this article is not that the French legislators were simply laying down positive precepts derived from natural law. The article should instead be interpreted in light of Montesquieu’s idea of natural-law reasoning as functional to the needs of government and the common welfare: If human reason is to enable us to discover the unchangeable features of human beings, it must also take into account the great legislations of the past; and government, in the effort to guide human conduct toward the common welfare, must accordingly proceed as well on the basis of the characteristics of the nation. Portalis cited natural law as a criterion of legal interpretation, too. In fact, under Article 4 of the code, the judge was bound to pass judgment even if “the law is silent, obscure or not enough to regulate the case.” Article 11, Title 5, of Portalis’s preamble, however, stated that “in civil matters, when the law is vague the judge becomes a minister of equity. Equity is the return to natural law, or to the recognized uses, when the law is silent.” But this last article was stricken out by the State Council in the final version of the Code Civil, and so, in the outcome, the judge was bound to decide the case solely on the basis of the legal resources provided by the code.

The innovative nature of the French Civil Code can paradoxically be appreciated as well from the way its contents are organized. The Code Civil is divided into three books: (1) On Persons; (2) On Goods and Different Modifications of Property; (3) On Different Ways to Acquire Property. As was pointed out in discussing the draft (Fenet 1968, XI, 51, 149–50, 163–4), this division corresponds to the distinction, in Roman law, among personae, res, and actiones, a distinction that traces back to Gaius’s Institutiones. The French drafters took up this classical organization of legal materials by way of signalling a continuity with the European legal tradition, but in doing so they wound up stripping this tradition of its original meaning, because they were proceeding on the basis of Pothier’s Treatises of civil law.

Gaius’s partition, and its use in Justinian’s Corpus Iuris, was essentially meant as a classifying device: It organizes legal materials by on the basis of different types of personal status, of goods, and of transactions. This typification was worked out by means of a process of division (diaresis) that arranged personal, real, and transactional property based on how such property appears in social reality, and so on the differences existing among persons, as well as among things and among transactions. The French Civil Code is structured quite differently: The first book does not deal with personal differences (free man, serf, slave, etc.) but instead regulates certain aspects in the life of an abstract subject under the law—it thus regulates matters of birth, domicile, marriage, paternity and filiation, divorce, death, and so on, as these relate to a subject that identifies every private person in the state. The second and third books regulate a person’s property and patrimony, but it does so following a plan modelled after the Digest and is for this reason unsystematic (Gaudemet 2004). The third book in particular is much larger than the other two and is “a sort of a mixed bag where we can find, pell-mell, successions, donations, the general theory of contracts, delicts and quasi-delicts, matrimonial regimes, special contracts, suretyship, prescription and possession” (Bergel 1988, 1085).

And the second book seems no less incoherent: While it takes as its fundamental principle the distinction between types of goods, it does not regulate the distinction; likewise, it regulates property but most of the
provisions on this subject concern the right of accession, a way of acquiring property that should instead be regulated in Book III.

In brief, the Code Civil lacks structural consistency and coherence and so does not play a systematic function in the legal system: "Paradoxically, the weakness of the systematic plan of the code [...] reveals that the essential aspect was not the order of ideas but the political function that the code pursued" (Gaudmet 2004, 302). In other words, one should not overestimate the systematic spirit that characterized the age of codification. Above all, the function of modern codification was to affirm the political supremacy of sovereignty and of legislative power, so as to unify the state and construct a civil society of free and equal individuals.

But what were the fundamental features of this civil society according to the Code Civil? The two innovative pillars of the French Civil Code are usually considered property and contractual autonomy, whereas the conservative and authoritarian conception of family law that characterizes the code represents a step backward with respect to the revolutionary legislation on the relation between husband and wife, as well as on divorce and parental authority, and, more generally, on the condition of women.

Property, in particular, was regarded by the drafters as “the universal soul of any legislation” (Fenet 1968, XI, 133): “All institutions have to guarantee property, all governments have to pursue this special and unique end” (Cambacérès 1999, II, 4). In keeping with this general background, the famous Articles 544 and 545 of the Code Civil state:

544. Property is the right to enjoy and dispose of things in any way you wish with absolutely no limitation, provided they are not used in a way prohibited by the laws or statutes.

545. No one can be compelled to give up his property, except for the public good, and for a just and previous indemnity.

The drafters clearly wrote these articles drawing on Domat and Pothier, but then gave them a different meaning. In principle, owners of property have the right to use their property as they wish, but under Article 544, the state can limit this right in the interest of the common welfare. This means that property can be understood as both an innate right forming the basis of individual autonomy and a social construction affirming the primacy of government over the rights of individuals. The latter interpretation seems borne out by the preliminary works leading up to the code: Chabot de l’Allier argued that “civil society is the only true source of property” (Fenet 1968, XII, 162), and Cambacérès agreed, saying that “property is a social creation, since in general all law should be enacted by public authority” (Cambacérès 1999, II, 4). Portalis’s remarks on law and codification, by contrast, seem to support the opposite thesis. He invokes Locke and states that property “is inherent in the existence of any individual and derives from the constitution of a human being” (Portalis 1834, II, 289): Property originates not in civil society but in human nature, and so civil law need simply enable individuals to enjoy this right fully (ibid., 290). However, as Grotius and Pufendorf had previously shown, even if property is considered a natural right, this does not mean that the government is thereby prevented from using that property to serve the needs of society: “If the prince, in case of necessity, uses the goods of one or many individuals, he acts not as owner of these goods but as the head of society, in favour of which each individual, by engaging in society, explicitly or implicitly committed oneself to make such a sacrifice” (ibid., 301). This conceptual framework, which attempts to combine Locke’s naturalistic understanding of property with Hobbes’s and Bentham’s artificial one, explains the normative content of the codified provisions concerning the right to property. Property is considered, as to its origin, an absolute right that admits no interference; but as to its function, this right can be claimed by the state for the purpose of ensuring the common welfare. From this point of view, therefore, property does not impose a limit on the action of government but does quite the opposite. This ambiguous characterization of the right to property in the French code—which here, too, reflects the two sides of the modern concept of liberty—makes
regulation by law compatible with different social contexts, constitutional frameworks, and political regimes, and this contributes to explain the code’s longevity.

Something similar can be observed in regard to the regulation of contracts. Article 1134 of the Code Civil states that “legally formed agreements have the force of law over those who made them.” This provision is usually considered by legal scholars as affirming the principle of contractual autonomy, a benchmark of the modern idea of liberty affirmed by natural-law theory. This broad interpretation of Article 1134 has to be explained. As can be appreciated from the code’s preparatory works, the drafters’ intention here was to protect commerce and ensure public order by guarding against the consequences of not fulfilling contractual obligations (Martin 2002, 120), and so against the consequences of weakness of will. As Bigot de Préameneau pointed out, “human will [...] is too variable, it is not sufficient to assure the general order that 30 is necessary to the existence of society” (Fenet 1968, XII, 510). “The only way to maintain bona fide is making contracts obligatory from the moment of their drawing up and before their execution” (ibid., XIII, 219–20). The French Civil Code was in this sense designed, through Article 1134, not so much to uphold contractual autonomy in any strict sense as to make it possible to control and organize contractual agreements and to closely regulate contracts (Halpérin 2001, 33).

To sum up, the Code Civil set up a form of socialization of individuals within the state: It did so exploiting the legal tabula rasa of the French Revolution to reinstate several legal institutions of the past. In post-revolutionary France, however, these institutions came to be embedded into a new conceptual framework that endowed them with a new function within the state: Even the institutions of the past and the legacy of Roman law and French customary law were conceived as a means by which the individual could become a genuine citizens, and could thus learn to be free.