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A CONTROVERSIAL TRANSPLANT? DEBATE OVER THE ADAPTATION OF THE NAPOLEONIC CODE ON THE POLISH TERRITORIES IN THE EARLY 19TH CENTURY

Michał Gałędek,* Anna Klimaszewska†

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ABSTRACT

This article focuses on the attitude of the Polish legal elite regarding the adaptation of French civil law introduced on the Polish territories in the Duchy of Warsaw, established by Napoleon in 1807. While addressing the Polish example, it underscores the universal nature of problems engendered by legal transfer and by the social reactions to foreign solutions. It sheds light on the state of mind of Polish enlightened elites, on their approach toward new legal instruments and on the challenges of adapting them to the socio-economic conditions of a semi-peripheral country. The Polish situation in the early 19th century provides evidence that some representatives of the late-Enlightenment generation remained attached to the universalist, all human vision of civilizational progress and shared natural law instruments for its accomplishment. On the other

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hand, in reaction to this attitude, the opposite view had already started to crystallize. It pointed to the uniqueness of conditions of development in any given country and nation. According to this view, civil law should account for this specificity and be adjusted to the national character.

Keywords: legal transplant, legal transfer, French Civil Code, Polish territories, adaptation, 19th century, civil law, foreign legal solutions and institutions, national identity

I. INTRODUCTION

On May 1, 1808, the French Civil Code (which in its major part remained in force in this region until the end of World War II¹) was implemented in the Duchy of Warsaw established by Napoleon.² It is difficult to overestimate the significance of this event for the development of law and for the socio-economic transformations that occurred in 19th-century Poland. However, a real opportunity to abrogate this legal act in its entirety presented itself soon after its implementation, in the wake of Napoleon's fall.

The objective of this article is to present the attitude of the representatives of Polish legal elites toward the Napoleonic Code during this critical period. Following the defeat of France, once the Duchy of Warsaw was occupied by the Russian army, Polish elites were engaged, starting from 1814, in works over complex transformation of the heretofore existing legal order, in connection with the plans of the victorious Tsar Alexander I, who intended to replace the

1. The Duchy of Warsaw was a Polish state established by Napoleon I in 1807 from the Polish lands ceded by the Kingdom of Prussia under the terms of the Treaties of Tilsit. The Duchy was held in personal union by one of Napoleon's allies—King Frederick Augustus I of Saxony. Following Napoleon's failed invasion of Russia, the Duchy was occupied by Prussian and Russian troops until 1815, when it was formally partitioned between the two countries at the Congress of Vienna. See PIOTR S. WANDYCZ, *THE LANDS OF PARTITIONED POLAND* 43-64 (U. Wash. Press 1974).

2. It was not until 1946 that certain provisions of the Napoleonic Code, which regulated some general issues as well as provisions of substantive and succession law, were repealed.

Duchy of Warsaw with a restituted Kingdom of Poland. During this period, the elites gained considerable freedom to work out and turn into reality, upon the Tsar's approval, their own legal and political vision and to evaluate the legacy inherited from Napoleon.

The discussed circumstances under which the plans to abrogate the Napoleonic Code took shape, and their attendant debate regarding the optimum choice for going through with the legal transformation, were deeply anchored in the specific Polish conditions. They strongly connected with the political turbulences, which affected the Polish-Lithuanian Commonwealth (Kingdom of Poland in union with the Grand Duchy of Lithuania) in the late 18th and the early 19th century. From 1765, during the Age of the Enlightenment, monarch Stanisław August Poniatowski, and the new, reformation-minded, Polish authorities struggled to overcome a multi-layered crisis and chaos that took over the country in the mid-18th century.³ This attempt ended catastrophically, as the forcefully reformed state (especially in the period of activity of the so-called Four-Year Sejm 1788-1792⁴) was first halted in its tracks as a result of the foreign intervention, and subsequently, as an effect of the partitions by neighbouring super powers, wiped off the European map in 1795. Thus, the stub state in the form of the Duchy of Warsaw, established by Napoleon several years later in 1807, albeit dependent on France, restored faith in the restitution of Polish statehood.

In considering the history of Poland, one must bear in mind that the attachment to national identity was particularly strong among Poles. Their country for centuries, especially in its golden age of the late 16th and early 17th century, had existed on the political map of Europe as a superpower, which added to their sensation of national

3. See JÓZEF GIEROWSKI, *THE POLISH-LITHUANIAN COMMONWEALTH IN THE 18TH CENTURY: FROM ANARCHY TO WELL-ORGANISED STATE* (Polska Akademia Umiejętności 1996).

4. See BOGUSŁAW LEŚNODORSKI, *DZIEŁO SEJMU CZTEROLETNIEGO (1788-1792) [THE WORK OF THE FOUR-YEAR SEJM (1788-1792)]* (Wydawnictwo Zakładu Narodowego im. Ossolińskich 1951).

pride. Moreover, this state's specific culture, legal, and political distinctions strengthened the sensation of uniqueness of the Polish nation, especially among the nobility. In the late 17th and early 18th century, on the other hand, as a result of the gradual demise of the state and the socio-economic standing of the country, not only the separateness, but also the civilizational distance between Poland and Western European countries deepened, as the latter had entered a new phase of dynamic development. Despite the foregoing, this distance began to shorten during the Enlightenment era, in connection with the aforementioned reforms of the times of Stanisław August Poniatowski and the world-view transformations of Polish elites. The popularization of the Enlightenment ideology and of occidentalism, once again, following the Renaissance era, began to provide fertile soil for the transfer of Western European ideas, and—consequently—legal institutions.⁵ In considering the issue of transplantation of the Napoleonic Code to the Polish territories, this must be taken into account. Of particular significance was the fact that the legal transfer took place in a special historical moment, in the midst of a liberal world-view revolution that swept across Europe after the era of Enlightenment and following the experiences of the French Revolution. The elites of European countries faced a host of new, 19th century, challenges, which were drastically different from the ones of previous times. Modernization aspirations, expressed primarily in the striving to turn liberal ideas into reality, clashed with the reactionary desire to bring the old order of things back and to prop it up with traditional national institutions. In the Polish circumstance, just as in the rest of Central Eastern Europe, still in the early

5. See Anna Klimaszewska, *Histoire du droit*, in *DROIT DE LA POLOGNE* 12-13 (L.G.D.J. 2016); Michał Gałędek, *The Problem of Non-Adaptability of National Legal Heritage. Discussion on the Reform of Civil Law in Poland in the Course of Work of Reform Committee in 1814*, 8 *ROMANIAN J. COMP. L.* 7, 9-10, 12-13 (2017); Anna Klimaszewska, *La responsabilité civile des associés des sociétés commerciales dans le droit polonais - les influences de la culture juridique française et les influences des autres cultures*, in *LA RESPONSABILITÉ CIVILE EN FRANCE ET EN POLOGNE* 131-35 (Zbigniew Hajn & Dagmara Skupień eds., Wydawnictwo Uniwersytetu Łódzkiego 2016).

stages of capitalist transformation, this would have meant an about-face toward feudalism and maintenance of the formal legal privileges of the nobility. Still, on the Polish territories, the process of socio-economic transformation was temporarily halted by the Napoleonic Wars and the subsequent economic crisis. The situation was unclear, and the choice regarding the future path was still a great unknown.

Considering all of the above, the research material analyzed by us is to help verify how the representatives of the Polish legal elites (a country of semi-peripheral character) engaged in the process of redevelopment of the binding legal order. We also verify how they assessed the opportunities and threats carried by the transplantation of a foreign law, in this case the Napoleonic Code, which was perceived as a modern law that served the desired modernization objectives.

II. THE CIVIL REFORM COMMITTEE AND THE NAPOLEONIC CODE

The widespread criticism of the French law, heaped at the Code within the few years since its transplantation (reception), stemmed mainly from the fact that its provisions hurt the interests of the privileged groups; more specifically, the clergy and the nobility. The erstwhile Vice-President of Warsaw, Stanisław Węgrzecki, noted this “sonorous scream against the Code.” He observed:

[H]ardly anyone supports it; even those who do not know it at all, who have not read it, clamour that it is not attuned to our climate A nobleman is frightened of the code, so as to not lose his power over the peasants, he is pained by being put in the same tribunal with a townsman and a peasant, by having the same succession laws apply to him and to the townspeople Clergymen suffer over having to relinquish religious rites to freedom of conscience and worship.⁶

6. Stanisław Węgrzecki, Vice-President of Warsaw, *Przestrogi do utworzenia Królestwa Polskiego* [Warnings Concerning the Establishment of the Kingdom of Poland] 126-27 (Mar. 20, 1813) (The Princes Czartoryski Library, National Museum in Cracow, manuscript, ref. no. 5242); STEFAN KIENIEWICZ,

The negative attitude of the public opinion toward the Napoleonic Code stemmed from an emotional rejection of foreign law, which was contrary to native customs and traditions.⁷ This hostility was on the rise, stoked by the gatherings of nobility (especially at Sejms⁸) and by the inimical propaganda of the Catholic Church.⁹ Criticism was fuelled by Code provisions that guaranteed equality before the law, in the area of civil law, regardless of birth, nationality, and religion. The correct implementation of the Code thus required a rearrangement of social relations,¹⁰ especially since the Code was clearly anchored in the principle of primacy of positive law. The landed gentry felt this posed a constant threat to their privileged position.¹¹ This was complemented by the hostile attitude of the Catholic Church. The Church fiercely opposed to the provisions relating to registrar's offices and lay marriages, as what had thus far been a holy union, could now be dissolved contrary to the canon law.¹² Fear of upturning the social relations and of downgrading the position of the nobility and of the clergy translated into a landslide of criticism against the transplanted law.

TADEUSZ MENCEL, & WŁADYSŁAW ROSTOCKI, WYBÓR TEKSTÓW ŹRÓDŁOWYCH Z HISTORII POLSKI W LATACH 1795-1864 [SELECTION OF SOURCE TEXTS ON THE HISTORY OF POLAND IN YEARS 1795-1864] 188 (Państwowe Wydawnictwo Naukowe 1956); *see also* TADEUSZ MENCEL, FELIKS ŁUBIEŃSKI: MINISTER SPRAWIEDLIWOŚCI KSIĘSTWA WARSZAWSKIEGO (1758-1848) [FELIKS ŁUBIEŃSKI: MINISTER OF JUSTICE OF THE DUCHY OF WARSAW (1758-1848)] 64-70 (Towarzystwo Naukowe Warszawskie 1952); WŁADYSŁAW SOBOCIŃSKI, HISTORIA USTROJU I PRAWA KSIĘSTWA WARSZAWSKIEGO [HISTORY OF THE SYSTEM AND LAW OF THE DUCHY OF WARSAW] 203 (Państwowe Wydawnictwo Naukowe 1964); Tadeusz Mencil, *L'Introduction du Code Napoléon dans le Duché de Varsovie (1808)*, 2 CZASOPISMO PRAWNO-HISTORYCZNE 141, 181-82 (1949) [hereinafter Mencil, *Introduction du Code Napoléon*].

7. Gałędek, *supra* note 5, at 16-17.

8. Mencil, *Introduction du Code Napoléon*, *supra* note 6, at 146-47, 167, 185.

9. *Id.* at 182-84.

10. *Id.* at 148, 152, 153.

11. *Id.* at 152, 154-55, 180-81.

12. Piotr Pomianowski, *Z problematyki rozwodów w Księstwie Warszawskim* [On the Problem of Divorces in the Duchy of Warsaw], 2 CZASOPISMO PRAWNO-HISTORYCZNE 103, 108-10 (2013); Michał Gałędek & Anna Klimaszewska, *Prace Komitetu Cywilnego Reformy nad nową regulacją małżeństw katolickich w 1814 r.* [Works of the Civil Reform Committee on the New Regulation of Catholic Marriages in 1814], 3 KRAKOWSKIE STUDIA Z HISTORII PAŃSTWA I PRAWA (2017).

The negative perception of the French law was also the effect of how it had been introduced in the Duchy of Warsaw. The Constitution of 1807, as well as *Code civil des Français*, was octroyed by Napoleon without consultations with the Polish political elites.¹³ As a result, both the satisfaction of this directive through the official acknowledgement of the French Civil Code as the code in force, as well as the organization of the judiciary fashioned after the French one and the subsequent transplantation of the French civil procedure and penal law,¹⁴ took place in an atmosphere of resistance. This resistance was effective in regard to penal law: the Penal Code and the Code of Penal Procedure were never adopted. There were also attempts to undermine the initiative of the government of the Duchy of Warsaw on the part of a significant portion of the Polish political elites. Other circumstances also did not aid the gentle transplantation of French law, the chief circumstances being the difficult socio-economic situation of the Duchy, which was in a virtually permanent state of war, combined with the general ignorance of the rules of French law and the mechanisms of operation of modern codes. Time

13. MICHAŁ GAŁĘDEK, KONCEPCJE I PROJEKTY NOWEGO USTROJU ADMINISTRACJI DLA PRZYSZŁEGO KRÓLESTWA POLSKIEGO [CONCEPTS AND PROJECTS OF THE NEW ADMINISTRATIVE SYSTEM FOR THE FUTURE KINGDOM OF POLAND] 54 (Arche 2017); MARIAN KALLAS, KONSTITUCJA KSIĘSTWA WARSZAWSKIEGO [CONSTITUTION OF THE DUCHY OF WARSAW] 38 (Państwowe Wydawnictwo Naukowe 1970); Marcei Handelsman, *Z dziejów Księstwa Warszawskiego. Geneza Księstwa i jego statutu* [From the History of the Duchy of Warsaw. Genesis of the Duchy and its Constitution], in *STUDIA HISTORYCZNE* [HISTORICAL STUDIES] 130, 195 (E. Wende i spółka 1911); Mencil, *Introduction du Code Napoléon*, *supra* note 6, at 146-48.

14. ANNA KLIMASZEWSKA, CODE DE COMMERCE – FRANCUSKI KODEKS HANDLOWY Z 1807 R. [CODE DE COMMERCE – FRENCH COMMERCIAL CODE OF 1807] 187-88 (Arche 2011); Anna Klimaszewska, *Francuski Kodeks handlowy w Królestwie Polskim* [French Commerce Code in the Kingdom of Poland], in *SYSTEM POLITYCZNY, PRAWO, KONSTITUCJA I USTRÓJ KRÓLESTWA POLSKIEGO 1815-1830* [POLITICAL SYSTEM, LAW AND CONSTITUTION OF THE KINGDOM OF POLAND 1815-1830] 187-88 (Lech Mażewski ed., Von Borowiecky 2013); Anna Klimaszewska, *Le droit pénal Français sur les territoires polonais – voyage à travers les siècles*, in *LE CODE PÉNAL. LES MÉTAMORPHOSES D'UN MODÈLE 1810-2010* 59-62 (Chantal Aboucava & Renée Martinage eds., CHJ 2012); Anna Klimaszewska, *The Reception of the French Commercial Law on the Polish Lands in the First Half of the 19th Century*, 2 J. EUR. HIST. LAW 48 (2015).

was needed to implement the new law. However, the absence of internal stability and the unreadiness of the state apparatus to apply the new laws did not favour this process.

In this situation, it is not surprising that the collapse of the French protectorate was met with an energetic initiative to repeal altogether the foreign, imposed law, crippled in practical application, for reasons that did not necessarily have anything to do with its maladjustment to the specificity of the Polish society. In 1814, the fate of the French law seemed to have been set in stone. The Napoleonic Code was faced with “a strong and diverse opposition.”¹⁵ The formal procedure, whose intention was to abrogate the French private law, was initiated with a decree of Tsar Alexander, issued on May 19, 1814 by which he established the Reform Committee.¹⁶ In this act, the tsar entrusted selected representatives of the Polish political elites with the task of drafting a complex reform of legal and systemic relationships, which could serve as the foundation for the future Kingdom of Poland. One of the decree’s provisions ordered the undertaking of steps leading to the abrogation of French private law and to its replacement with laws better suited to the national customs and the Polish specificity, inspired in the first place by the pre-partition law of Polish-Lithuanian Commonwealth.¹⁷ The tsar ordered that:

Le Code Napoléon civil et de procédure judiciaire devrait être aboli le plus tôt possible. On pourrait intérimalement y substituer les lois polonaises, le Statut de Lithuanie, ainsi

15. Szymon Askenazy, *Zagrożenie Kodeksu Napoleona przy utworzeniu Królestwa Polskiego* [Threat of Napoleonic Code at the Beginning of Kingdom of Poland], in SZKICE I PORTRETY [SKETCHES AND PORTRAITS] 374 (Biblioteka Polska 1937).

16. Hipolit Grynwaser, *Kodeks Napoleona w Polsce* [The Napoleonic Code in Poland], in 1 PISMA [WRITINGS] 71 (Wydawnictwo Zakładu Narodowego im. Ossolińskich 1951); Anna Zarzycka, *Próby zmian Kodeksu Napoleona w Księstwie Warszawskim w latach 1814-1815* [Attempts at Changing The Napoleonic Code in the Duchy of Warsaw 1814-1815], 1 KRAKOWSKIE STUDIA Z HISTORII PAŃSTWA I PRAWA 175, 175-78 (2004).

17. Rozkaz stanowiący komitet reformy [Decree of Reform Committee Establishment] 6 (May 19, 1814) (The Princes Czartoryski Library, National Museum in Cracow, manuscript, ref. no. 5236).

*que les formes judiciaires usitées avant l'introduction de la procédure française. Le Comité discutera si les codes doivent être abolis entièrement ou en partie, et à quelle époque cette abolition pourrait avoir lieu. Il proposera aussi un plan et la composition d'une Commission séparée à créer qui sera chargée de la rédaction d'un nouveau Code civil, criminel et de procédure, de même que l'organisation définitive de l'ordre judiciaire*¹⁸

The Reform Committee was composed of the representatives of contemporary elites, the majority of whom were well-known for their “hostility toward the French legislation.”¹⁹ Franciszek Grabowski, a Lublin advocate, became involved in the attempts to abrogate the French law as quickly as possible. He headed the Legislative section, responsible, among others, for the reform of civil law. He was supported by a numerous group of other Committee members, representing various fractions that opposed the Napoleonic Code.²⁰ However, even regardless of their personal views, and primarily in the face of the clear directives from the monarch, no one in the Committee questioned the fact that its members were to push toward the complete abrogation of the French law. The field for discussion was open only as regarded the method of performing this operation.²¹

In matters connected to the reform of private law, Antoni Bieńkowski, an adversary of Grabowski and a respected appellate judge in the Duchy of Warsaw, stood out from the rest. He effectively convinced the others that, pursuant to the will of the tsar, the purpose of the Committee is to decide whether the French codes are to be abrogated “in entirety or partially” and to present “a plan to establish a separate committee,” which would take care of drafting

18. Askenazy, *supra* note 15, at 375.

19. Grynwaser, *supra* note 16, at 71.

20. This group included, among others, Fr. Józef Koźmian who represented the clergy and was vehemently committed to fighting the lay Code; Józef Kalasanty Szaniawski, a pro-clerical politician; Stanisław Zamoyski, the conservative Galician magnate; and Tomasz Wawrzecki who represented conservative Lithuanian nobility.

21. Gałędek, *supra* note 5, at 17-21.

the new codification.²² From there, he concluded that the tsar had not ordered the immediate abrogation of the French law. Therefore, the Committee should focus on determining which provisions should be upheld, and which require immediate repeal and ad hoc replacement with other regulations. Also, in the personal opinion of Bieńkowski, cautious and moderate course of action regarding the abrogation of Napoleonic laws was highly recommendable, as it was the model that was supported by the “experience of all other countries.”²³

As succinctly put by Bieńkowski, the Committee’s task was to determine the path “to go from the Napoleonic Code to the new era of jurisdiction” and to establish the general rules, “which must now be laid as regards civil law and procedure.”²⁴ In order to make this objective a reality, Bieńkowski “dissected all the Civil Code titles in order,” dividing its provisions into those, which (1) “as harmless, should be maintained until the date set for the implementation of a different book of laws yet to be drafted,” and into those, which (2) “as inconvenient, opposed by the public opinion and bothersome, should be repealed right away without much further ado, to be replaced by laws more in line with the wishes and interests of citizens.”²⁵

The dissection performed by Bieńkowski showed, however, that there were very few provisions placed in the second category by him. He believed it recommendable to repeal the title *Of Acts Before the Civil Authorities* and regulations pertaining to the institution of legal mortgage, which should be abrogated “as contrary to good

22. Protokół posiedzeń Komitetu Reformy [Minutes of Reform Committee session] 17 (The Princes Czartoryski Library, National Museum in Cracow, manuscript, ref. no. 5233) [hereinafter Minutes of Reform Committee].

23. *Id.* at session 18, 197. The initiator of the entire undertaking, Adam Jerzy Czartoryski, certainly shared this view. See Aleksander Kraushar, *W setną rocznicę Kodeksu Napoleona* [Centenary Anniversary of the Napoleonic Code], 22 GAZETA SĄDOWA WARSZAWSKA 332 (1908).

24. See Minutes of Reform Committee, *supra* note 22, at session 14.

25. *Id.* at session 4, 18 (July 10, 1814).

faith and public safety.” Primarily, however, he believed it indispensable to replace the provisions contained in the title *Of Marriage*, as “the title runs contrary to the principles of Catholic faith, according to which a marriage once contracted between Catholics cannot be terminated, and this title allows for such termination by mutual consent,” and in the chapter entitled *Of the respective rights and duties of married persons* as “the legal joint ownership as prescribed in this chapter is contrary to the domestic property relations.”²⁶ No other regulations, according to him, required the immediate legislative interference.

Subsequently, Bieńkowski began his work. On October 23, 1814, the new draft bill of marriage law, which was to replace titles 5 and 6 of Book 1 of the Napoleonic Code, was brought to the agenda of the plenary session.²⁷ Discussion over its provisions lasted throughout the next few sessions and ended with the adoption of the first part of the draft, regulating personal matrimonial law. The debate over the second part, regulating matrimonial property law, was interrupted. The Committee decided that this area of the French law did not require immediate amendments. The sessions finished with the conclusion that:

[S]ince a separate commission is to be appointed to establish anew the general legislation, for the time being only those portions of law are undertaken, which require immediate action, thus in the matrimonial law, only that is changed what runs contrary to the religious relations and allows divorces, while the rest, pertaining only to civil regulations and contracts in marriage, not in breach of this union, may be left to be dealt with by the said commission, as whatever is amended now, could be once again changed by the commission, and such new law would last a short period and leave a lasting trace in the court cases, which would only aggravate

26. Projekt do zniesienia i zmiany niektórych kodeksowych części [Draft to Repeal and Amend Certain Parts of the Code], 251 (Oct. 23, 1814) (The Princes Czartoryski Library, National Museum in Cracow, manuscript, ref. no. 5236); *See also* Minutes of Reform Committee, *supra* note 22 at session 20, 186-87 (Oct. 13, 1814).

27. Minutes of Reform Committee, *supra* note 22 at session 32, 208-09 (Oct. 23, 1814). *See* Gałędek & Klimaszewska, *supra* note 12.

the chaos generated by frequent changes in law. For this reason, the Committee has decided to postpone the second part of the draft until the establishment of general legislation.²⁸

At the November 20 session, Bieńkowski presented yet another document, the “Plan for the Civil Code.” The document was preceded with an introduction, from which it followed that in the future works over the national codification, the Napoleonic Code would serve as one of the auxiliary materials in drafting the new code.²⁹ However, Bieńkowski did not even suggest that this would be of any major significance. The plan that he presented was approved by the Committee and it was to become an action plan for the future codification commission.³⁰

The Committee ceased its activity in June 1815. The opponents of the Napoleonic Code were only able to point out a few legal areas and institutions that, according to them, required immediate amendment “in the national spirit.” In balancing the discussion and the reached arrangements, it may be concluded that the blade of accusations by the Committee members was turned not on civil law, but rather on the French procedure, especially with regard to the enforcement proceedings.³¹ Confronted with the clear dispositions of the tsar, the Committee Members did not try to defend the Napoleonic Code. Despite the absence of a matrix based on which they could build a new code, they did not dare suggest that this role could be fulfilled by the existing code. On the other hand, however, they undermined the possibility of its application in Polish circumstances only in reference to some isolated specific provisions, pointing out mainly the harmful effects of maintaining the norms of personal

28. Minutes of Reform Committee, *supra* note 22 at session 33, 237 (Nov. 3, 1814).

29. Wstęp przy wprowadzeniu planu do Kodeksu Cywilnego [Introduction to the Plan of Implementation of the Civil Code], 288-90 (Nov. 20, 1814) (The Princes Czartoryski Library, National Museum in Cracow, manuscript, ref. no. 5236) [hereinafter Introduction to the Plan of Implementation of the Civil Code]. See Gałędek, *supra* note 5, at 21-26.

30. Minutes of Reform Committee, *supra* note 22 at session 44, 277 (Nov. 24, 1814), and at session 45, 279-80 (Nov. 27, 1814).

31. Grynwaser, *supra* note 16, at 60-62, 67-68, 70.

matrimonial law. Moreover, in support of Bieńkowski's plan, they accepted his concept, according to which the Napoleonic Code could become one of the points of reference in further works over the new codification, although they did not indicate in any way that it deserved special treatment. The analysis of French law was recommended owing to the fact that it was one of the laws that had been binding on the Polish territories and which had been tested in practice. It should also be noted how the works of the Committee had been summarized by one of its members, Andrzej Horodyski:

[T]he entire . . . work of the Civil Committee was rather the effect of joy about the announced change of the domestic matters for the better, rather than [of] cold calculation, and it originated from . . . impatient zeal to bring improvements as soon as possible, and the zeal . . . did not recognize in advance the state of domestic matters, instead opting to work over their complete reform, accordingly to own inspiration and facts drawn from the unreliable memory.³²

III. THE NAPOLEONIC CODE IN MEMOS OF A. WYCZECHOWSKI AND J.W. BANDTKIE

Directly after the discontinuation of the Reform Committee's activity, on September 25, 1815, the Codification Commission was appointed. The Commission was obliged to avail itself of the Committee's output. The fundamental objective of abrogation of the French private law to be followed by the replacement with new national codification was still in place. The members of the Codification Commission included Jan Wincenty Bandtkie, a notary, historian of law, and professor at the Warsaw School of Law (soon thereafter he became Dean of the Faculty of Law and Administration of the University of Warsaw) and judge Antoni

32. See Hubert Izdebski, *Ustawa Konstytucyjna Królestwa Polskiego z 1815 r.* [*The 1815 Constitution of the Kingdom of Poland*], in 1 KONSTYTUCJE POLSKI [CONSTITUTIONS OF POLAND] 190 (Marian Kallas ed., Państwowe Wydawnictwo Naukowe 1990).

Wyczechowski, one of the most renowned and active jurists of the Duchy of Warsaw.³³

Bandtkie and Wyczechowski were first asked to draft memos regarding the possibilities and methods of turning the idea of national codification into reality, and to outline the preparation steps necessary to develop this work. Both tasks were fulfilled in December 1815. The problem faced by both authors of the memos was a formidable one. The political elite, formed previously by the Reform Committee, seemed adamant in its striving to do away forever with French laws, which were to share the fate of Napoleon himself. They were aware that—in the words of Wyczechowski—the “widespread wish” of the (noble) nation was to “return all the way to the old Polish laws.”³⁴ Wyczechowski was seconded by Bandtkie.³⁵ He wrote: “We often hear the passionate pleadings of illustrious men to immediately forgo the laws of today, as overly confused, circuitous and knotty, or else malformed for the nationality, climate and character—and to restore the respect for old, domestic law, or at least for the Lithuanian Statute.”³⁶ In the choir of voices demanding the abrogation of the Napoleonic Code, its fate seemed to be set in stone.

33. See Stanisław Kutrzeba, *Jan Wincenty Bandtkie*, in *POLSKI SŁOWNIK BIOGRAFICZNY* 258-260 (Polska Akademia Umiejętności 1935); Anna Rosner, *Jan Wincenty Bandtkie 1783-1846*, in *PROFESOROWIE WYDZIAŁU PRAWA I ADMINISTRACJI UNIwersYTETU WARSZAWSKIEGO 1808-2008*, [PROFESSORS OF THE FACULTY OF LAW AND ADMINISTRATION OF THE UNIVERSITY OF WARSAW 1808-2008], 23-25 (Grażyna Bałtruszajtys ed., LexisNexis 2008); see also Wojciech Witkowski, *Warszawa jako ośrodek polskiej nauki prawa w dobie zaborów* [*Warsaw as a Center of Polish Science of Law in the Era of the Partitions*], 1 *KRAKOWSKIE STUDIA Z HISTORII PAŃSTWA I PRAWA* 41, 47-48 (2015); Zarzycka, *supra* note 16, at 176.

34. Antoni Wyczechowski, *Myśli względem prawodawstwa narodowego* [Thoughts on National Legislation] 80 (The Princes Czartoryski Library, National Museum in Cracow, manuscript, ref. no. 5259).

35. See Jan Wincenty Bandtkie, *Myśli o zmianie prawodawstwa krajowego* [Thoughts on the Changes of National Legislation] (Dec. 7, 1815), reprinted in Władysław Sobociński, *Jan Wincenty Bandtkie obrońcą Kodeksu Napoleona* (*Przyczynki biograficzno-naukowe i memorial z 1815 r.*) [*Jan Wincenty Bandtkie As Defender of Napoleonic Code (Biographical and Scholarly Contributions and the 1815 Memo)*], 3 *Rocznik Lubelski* 145, 165-76 (1960).

36. *Id.* at 173. The Lithuanian Statute, last redacted in 1588, was a 16th-century collection of laws that formally remained in force in the Grand Duchy of Lithuania until well into the 19th century. The remarks that it may become one of

Nevertheless, both Wyczechowski and Bandtkie were vehemently opposed to what appeared inevitable. Within the year, the situation seemed to have changed. Former high-ranking officials and judges of the Duchy of Warsaw, heretofore, as in the case of Bieńkowski, rather cautious and reserved in expressing their opinions, began to play an increasingly important role in the Polish authorities. It is without a doubt that many of them had become convinced of the advantages of the Napoleonic institutions. Up until then, however, either they did not have the opportunity to engage actively in its defence, or they were frightened to reveal their attachment to ideas advocated by Napoleon.

We may, therefore, presume that in the latter half of 1815, Wyczechowski and Bandtkie were able to defend the Napoleonic Code to a greater extent than before. In doing so, in their memos, they both pointed out that along with the establishment of the Duchy of Warsaw, the octroyment of its constitution, and the implementation of the Napoleonic Code, a new era that “differed in many aspects” from the former one, had begun.³⁷ The pre-partition Kingdom of Poland as well as Polish territories under Prussian and Austrian rule in the late 18th and early 19th century were still feudal states. Formally, feudalism was not abolished until the introduction of the constitution of the Duchy of Warsaw, which declared all equal before the law. The Napoleonic Code brought this principle to life, and Wyczechowski presented it as a work that had “flown out of the new spirit of philosophy and of the French Revolution.”³⁸ For him, the reform of legal relationships brought by the Napoleonic Civil Code (and, along with it, by the “supplementing” codes, received also on the Polish territories: Code of Civil Procedure and Commercial

the foundations for the future Polish codification must have surely been in connection with the erstwhile plans of the future Kingdom of Poland to once again be united with Lithuania under the sceptre of the Russian Tsar Alexander.

37. Wyczechowski, *supra* note 34, at 75.

38. *Id.*

Code³⁹) was a fundamental one, as it thoroughly changed social relations. At the same time, it was at odds with the organization of the private law sphere under Prussian and Austrian partitions, and even more so with the Polish pre-partition feudal reality. Yet, it nonetheless responded to the spirit of the new times, and it bore the mark of progressive codification in the universal dimension. Wyczechowski made it clear that the transformations connected to the introduction of new ideas to Polish territories had taken root and that there was no going back, and that the knowledge of the French Civil Code after a few years since its implementation became “most widespread” among the Poles.⁴⁰ He believed there was no return to the old laws because he could not imagine that it would be possible to restore the feudal and estate relations in the same shape in which they functioned in the pre-partition legal space. He observed that even in France “the principles from times before the Revolution are not being brought back.”⁴¹

Thus, Wyczechowski asserted that the modernity of the Napoleonic Code as compared to all other legal systems that had been known in the Polish territories, “consisted mainly in its system of generalization,”⁴² that is in being a universal law. He fully supported a reform that recognized only one code in the country, with uniform principles applicable to all, and agreed for “the provincial law, statutes and customs [to] disappear [as well].”⁴³ Moreover, the reception of the French Civil Code caused the revolutionary and Enlightenment “maxims” to “diffuse throughout all the details of legal relationships.”⁴⁴ He listed the following:

Officials of the vital records registry office were introduced, as well as civil marriages and divorces. A change of relationships between owners of land assets and peasants took place. The succession rights based on old feudalism disappeared.

39. *Id.* at 78.

40. *Id.*

41. *Id.* at 76-77.

42. *Id.* at 76.

43. *Id.*

44. *Id.* at 75.

The inhabitants of the country who used to have separate rights were made equal in legal relationships with all other people. At first, all these changes were reflected more visibly in internal relationships than in the Prussian and Galician laws, which, although different in detailed solutions from the old Polish laws, stemmed from a common system.⁴⁵

In the opinion of Wyczechowski it was “the part which deals with the law of persons” that “is an emanation of new ideas of philosophy and a result of the French Revolution.”⁴⁶ It did not have to mean its automatic discrediting, as, according to Wyczechowski: “it does not signify that the current order of things is . . . contrary to all the principles of the Code [of Napoleon] on law of persons.”⁴⁷ He cunningly suggested that, since they were upheld even in France, despite the restoration of the House of Bourbon, they should not be rejected, but “rather explored and better understood.”⁴⁸ Moreover, Wyczechowski held up the German states as an example, indicating that:

[They] universally boast of knowing how to put the principles of the French Revolution to use, but without falling prey to revolutionary events. In the North, the Prussian monarchy adopts into its legislation the principles of this part of code of persons, which it finds of convenience for its country.⁴⁹

Nevertheless, Wyczechowski tried to remain cautious in his overt advocacy of the Napoleonic Code as an embodiment of the heritage of the French Revolution. Still, he presented the view that “the principles so openly and solemnly expressed by the French Revolution, although not all of them may be applied in every country and to the objectives of each government, must not be rejected merely because they are fruit of a revolution, but rather explored and understood better.”⁵⁰

45. *Id.* at 75-76.

46. *Id.* at 77.

47. *Id.*

48. *Id.* at 77-78.

49. *Id.* at 77.

50. *Id.* at 77-78.

Yet, the Napoleonic Code had another side to it, which was not overlooked by Wyczechowski either. He observed that “[it] is not a new creation, but rather a collection of laws from the previous times.”⁵¹ This seeming contradiction stemmed from the fact, noticed by Wyczechowski, that the Napoleonic Code efficiently reconciled or combined new liberal, lay, and anti-feudal principles and institutions with the substratum of extensive and valuable pre-revolutionary French legislation and legal doctrine. Therefore, in an attempt to neutralize, at least partially, the massive criticism hurled at the works authorized by Napoleon following his debacle, Wyczechowski remarked: “We have previously heard praises of the Code, today we hear words of condemnation. But both the praises and the condemnation are directed at the ruler who is considered the author of the Code, [while] a more thorough exploration of the sources will prove this to be a mistake,” as the roots of the work can be traced all the way back to the Roman law.⁵²

This combination of the old with the new came to the fore in analysis of the Code’s contents. This is why, in relation to “praises and condemnation directed at the contents of the law,” Wyczechowski was of the opinion that the various “main parts” of the Code should be approached differently. He argued that:

the part that deals with the so-called law of things (*Ius Re-rum*) is based partially on the centuries-old maxims of the Roman law, which prevailed in France more visibly than anywhere else, without a mixture of national and foreign laws and customs, maintaining its original shape, and thus cannot entail any great novelties.⁵³

Wyczechowski, similarly to Bandtkie, and Antoni Bieńkowski before him, assumed that there were many common areas in the Polish and French laws, as both legal orders had drawn from the same source. This, in turn, had to lead them to the conclusion that

51. *Id.* at. 76.

52. *Id.*

53. *Id.*

adaptation of the Napoleonic Code on the Polish territories was possible.

In analyzing these issues, Wyczechowski first and foremost noticed that Poles, had become a “Christian nation,” and began to lose their “original laws and customs.” Wyczechowski also noted that “[r]eligion has brought these nations together as one family . . . ushered in from foreign lands, it also ushered [into Poland] foreign laws and customs,”⁵⁴ creating fertile soil for the sensation of common cultural identity. Wyczechowski was of the opinion that the spreading of Christian religion constituted a natural stimulus for the Polish legal system to follow the same path as other European systems. According to him, it was caused by the fact that, along with religion, “Roman law, and partially also canon law” became the “source law for all Christian nations.”⁵⁵ From this, he drew the conclusion that “what we call today the national Polish law” is nothing else but “mere modifications of Roman and canon laws which grew out of the mixture of these laws with national laws and customs; [as well as] out of the influence of neighbouring laws and customs.”⁵⁶ Therefore, the tendency to uniformize legal systems, observed by Wyczechowski, resulted from the shaping of a shared Christian European legal legacy, a certain body of ideas, principles and institutions that emerged from the foundations of Roman and canon laws. Thus, since the Napoleonic Code was based on Roman laws, it had to have certain similarities to the Polish legal culture, which had shaped from the same substrate.

Bieńkowski followed a similar logic. In his document, entitled “Introduction to the Plan of Implementation of the Civil Code,” which he presented at a Reform Committee session on November 20, 1814, he argued that even if it is necessary to abrogate the Napoleonic Code and even if:

54. *Id.* at 62.

55. *Id.* at 62-63.

56. *Id.* at 62.

it is commendable to write a new civil code for our nation, it seems that not to use the tested European code, drawing both from the general principles adapted to our national needs and from their defects to be avoided, would be to show insufficient diligence in such important work.⁵⁷

This is due to the fact that he perceived the “greatness of the Code . . . to stem from the delivery of the general rules,”⁵⁸ which are common for various nations, as they originate from a common source. He asserted that “having read . . . collections of civil acts, one may not deny that they all nearly unanimously contain the same general rules of law; some taken from the Roman law, others from common sense supported by experience.”⁵⁹ It is only “in the more detailed” matters that the perfection of a code “hinges on adjusting them to the national interests” and character.⁶⁰

On the other hand, Wyczechowski most certainly noticed what Bandtkie had stated *expressis verbis*: that “complaints against the Code and yearning for the volumes of law and the Lithuanian Statute” from the conservative noble circles were primarily a reflection of their particular interests to restore the formal legal privileges of the noblemen.⁶¹ They were both of the opinion that this should be opposed, not only owing to the egoistic motivations of the privileged class, but also because to bring back the old order would clash with the desired direction of transformations, in which Poland managed to turn precisely thanks to the Napoleonic reforms.

Wyczechowski also listed other reasons for the antipathy towards the Napoleonic Code, suggesting that they are not determined by its substantive contents nor construction shortcoming, but rather by circumstances stirred by such a deep-cutting structural reform,

57. Introduction to the Plan of Implementation of the Civil Code, *supra* note 29, at 288.

58. *Id.*

59. *Id.* at 288-289.

60. *Id.*

61. JAN WINCENY BANDTKIE, PRAWO PRYWATNE POLSKIE : NAPISANE I WYKŁADANE PRZED ROKIEM 1830 [POLISH PRIVATE LAW WRITTEN AND TAUGHT PRIOR TO 1830] 59 (W Drukarni Banku Polskiego 1851); *See also* Bandtkie, *supra* note 35, at 160.

additionally based on the transfer of a foreign law. In his opinion, the criticism of the French law stemmed from the following reasons: (a) “no law can be fully applicable to a foreign country;” (b) “the laws of the [Napoleonic] Code introducing such a deep reform of personal laws must arise the hesitation of many;” (c) “the laws of the [Napoleonic] Code are enforced by our own countrymen, who have not had sufficient time to thoroughly scrutinize its spirit, and so the errors of execution may be viewed as shortcomings of the legislation itself;” (d) “knowledge of the [Napoleonic] Code laws is the most widespread, and so it is more exposed to attention than all the other foreign laws” (thus, it is easier to identify its shortcomings, with the assumption that other, less known laws, are free of them); (e) “conditions and modifications with all the above mentioned laws [Prussian law, Austrian law, and Polish pre-partition law] are executed,” meaning that depending on the facts of the case as well as the time, and place of events causing legal consequences, they may be subject to different laws taken from various legal orders in force at a given time and in a given territory, pursuant to the rule that “each case must be judged according to the laws under which it occurred;” (f) Polish lawyers come from different schools: Polish, Prussian, or Austrian, as “differences in education influence even matters straight from the Code, as each one likes to interpret and explain things in line with their own principles.”⁶² Therefore, the reasons listed by Wyczechowski for resistance against the French private law may be viewed as universal, accompanying to a greater or smaller extent each transplantation of a new legal system. Yet, French law, even though partially imposed by force, was not met with the same hatred that had once befallen the Prussian and Austrian law after the partitions of Polish-Lithuanian Commonwealth. This is due to the fact that the transplantation of the Napoleonic Code had been sanctioned by Poles themselves, although unwill-

62. Wyczechowski, *supra* note 34, at 78, 80.

ingly and under pressure. Therefore, the situation was different. Because of this, according to Wyczechowski, in 1807—unlike in 1815—it was harder to believe that “our countrymen would agree to accept the laws of the nation from whose rule they were becoming liberated.”⁶³ Moreover, in his opinion, it could not be underestimated that the Polish justice system had had enough time to acquaint itself with the French institutions.⁶⁴

On the other hand, Jan Wincenty Bandtkie, who in a way backed up Wyczechowski, focused on emphasizing the value of the Code, although with the reservation that he did not consider it “a work of superhuman greatness” and admitted that it “had its imperfections,” even in “the general order, that is in the layout and connections of individual matters.”⁶⁵ Regardless of the above, he indicated that “the French legislation is one of the latest ones,” which was to imply that it was the most highly developed, especially since it must be remembered that, as probably the most outstanding Polish historian of law emphasized at the time, “[t]he French nation has excelled in solid teaching of the law” for a long time, “longer even than the Germans, and can still boast of a high level of academic education.”⁶⁶ As a confirmation, Bandtkie cited the names of Jacques Cujas, Hugues Doneau, Denis Godefroy, and Antoine-François Brisson.⁶⁷ Furthermore, in reference to the history of drafting the Civil Code, Bandtkie observed that “its authors . . . put the advisory provisions of Justinian to an excellent use, as well as the legal acts and domestic and foreign legislative books.”⁶⁸ He recommended this work as one of reliable elaboration, based on solid preparation and comprehensively collected and analyzed normative materials. Also, the quality of the

63. *Id.* at 73.

64. It did not happen after the liberation from the Prussian rule. This is because, in 1807, Polish elites were unable to foresee “how greatly the Prussian laws and solutions could still be convenient to us,” since up until then their application had been reserved for Prussian officials only. *Id.*

65. Bandtkie, *supra* note 35, at 145, 169, 171.

66. *Id.* at 168.

67. *Id.*

68. *Id.*

Code's legislative technique, which according to the truly impressed Bandtkie elevated it above other European codes, confirmed the thoroughness of this work. In his opinion, the Code's authors "out-matched with their succinct style all the earlier legislations, often hopelessly wordy."⁶⁹ Bandtkie also praised "the amazing . . . connections and harmony between the detailed and the general" and added that: "there are no useless academic provisions [in the Code], only orders; it is always the voice of the legislator, not of the teacher. Unlike in the Prussian law, there is no mix-up of principles of governing with various other objects of legislation."⁷⁰ Certainly, the Napoleonic Code stood out in comparison with the rambling, digressive, and moralizing Prussian Landrecht, which is its predecessor on the Polish territories. As exemplified by Bandtkie's statement, the style of the Prussian codification and similar acts from the 18th century had already become defunct by the early 19th century, as opposed to the technique of the French legislators of the Napoleonic era. This old fashion, Prussian, style arose the reservations of people such as Bandtkie, representatives of the more notable parts of the Polish legal elites.⁷¹ Bandtkie noted that in confronting the French and Prussian legislations, he was inspired by the evaluations formulated by German scholars. He observed, referring especially to the work of Ernest Wilhelm Reibnitz, "that even the German themselves, [though] sparing with praise, nowadays admit to the superiority of French legislation and will surely avail themselves of it."⁷² For all these reasons, this professor of law summed up his argument by asserting, "it would be haughty to assume that the French law, in its entirety or at least in its majority, is imperfect."⁷³ In his opinion, the Civil Code did not deserve to be abrogated in full.⁷⁴

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 168-69.

73. *Id.* at 168.

74. *Id.*

Wyczechowski, on the other hand, pointed out that the qualities of the Napoleonic Code and other French acts became even more visible in the Duchy of Warsaw owing to the legal chaos that emerged over the previous period of more than ten years. He advertised the French law, presenting it as the bedrock of stability in times when “nearly each family feels the results of upheavals of legal relationships, which occurred repeatedly”⁷⁵ in late 18th and early 19th century. Wyczechowski ventured as far as to assert, perhaps with exaggeration, that “there is not another nation in Europe in which the laws would be changed as often and at such short intervals,”⁷⁶ but he added:

[Not] only all of our legal relationships have become entangled, we lost even more in the confusion of ideas and customs. There is no unity, which represents the feature, soul, and strength of a nation, and which comes with long work and shapes through national education. Each court must have judges educated in different schools: Polish, Prussian, and Austrian. There are virtually none who would be equally well-versed in all of them. All the judges had to study a foreign law, that is: the [Napoleonic] Code and although they have not yet explored it thoroughly in such a short period of time, it became the sole code that could be dubbed national, as all have equal knowledge of it.⁷⁷

This also stirred negative evaluations to the Napoleonic Code, not uniformly interpreted in various regions. For this reason, in the opinion of Wyczechowski, it should not surprise anyone that:

75. Wyczechowski, in balancing the damage caused by Napoleonic Wars which had recently rumbled through the Polish territories, observed that:

As of yet . . . no one has been able to recognize and calculate the extent [of suffering]. It will only reveal itself when everything is back in the ruts of calm and all can get to clarifying and establishing their property relations. At this point, and no earlier, we will finally see the obstacles and hindrances, we will bump into unexpected ruins of private properties; this entire great whirlpool into which we have been hurled by the frequent changes of law [that had occurred in previous years].

See Wyczechowski, *supra* note 34, at 61.

76. *Id.*

77. *Id.* at 79.

[I]n a collection of such divergent forces, interests push forward slowly and with great obstacles. What seems perfectly clear to one, is odd to another, as it does not fit in with the principles of his school. The outcome of nearly all disputes is subject to more uncertainty than anywhere else. If cases originating from Polish, Prussian, and Austrian times were examined by Polish, Prussian, and Austrian lawyers themselves, then we could predict that they will agree with each other on some matters, but the sum total of opinions of members of different schools is difficult to predict.⁷⁸

Bandtkie's view was similar, as he was of the opinion that the Napoleonic Code should be upheld, with only such amendments that would be justified by "imperfections" of some of its institutions. These imperfections fell into two main categories of: (1) ineffective solutions and (2) solutions incompatible with the "teachings of morality and the state of our civilization."⁷⁹ According to Bandtkie, "[f]utile and tortuous formality," favoured the abrogation of the French institution of care (as the example of a first category institution), which should be "returned to the direct competence of courts."⁸⁰ Similarly, the abrogation of the secret mortgage was justified with the harmfulness of this institution which, in the opinion of Bandtkie, was "an advantage to [very few], while to the general population, [it was] a danger and an obstacle to obtaining credits."⁸¹ For this reason, he postulated that it should be replaced with a solution "similar to Prussian laws."⁸² He also believed it would be recommendable to simplify prenuptial agreement provisions, after the Prussian model, "yet with the maintenance of cautionary measures prescribed by the French Code."⁸³

The second group included, in his opinion, the need to abolish divorces, but he also believed that, regardless of the clergy's pres-

78. *Id.* at 79-80.

79. Bandtkie, *supra* note 35, at 170.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

sure, marriage annulment should remain an option (based on premises established in accordance with the relevant religious laws) available to lay courts, “as the opinion of clerics will always be one-sided in this respect.”⁸⁴ Bandtkie also believed that, if need be, clergymen should be entrusted with the task of running the vital records, as long as it would be considered their public law duty.⁸⁵

With this, he closed the catalogue of justified amendments, which shows that Bandtkie was a vehement advocate of maintaining the French Civil Code with just some minor modifications of its contents. He thought that the national codification was a pipe dream, a mirage. Yet, he was careful not to make his opinion too obvious in his memo. He stated, however, that if: “for national honour, in order to avoid [at any price] the rule of foreign laws, the need to draft entirely new codes were recognized, in such case it would be more recommendable to take example from the Austrian and Bavarian legislations, subsequent to the French legislation.”⁸⁶ In this approach, progressiveness seemed to impose foregoing national legal tradition as a relic, even though only a quarter of a century old, since it was already completely incompatible with the expectations of the new world. Bandtkie left no illusions, though the work on this code “would perhaps take a number of years of work of people unburdened with any other duties.”⁸⁷ First and foremost, however, Bandtkie recommended the return to formal legal perfection of the Napoleonic Code, next to which the Bavarian and Austrian codes could only play “an auxiliary and secondary role.”⁸⁸ He was clearly enchanted with the “succinct, supple, and noble style of the French legislation,” which should always “be held up as the standard, the model” for new codes.⁸⁹

84. *Id.*

85. *Id.*

86. *Id.* at 173.

87. *Id.*

88. *Id.*

89. *Id.*

It is very telling that he did not refer to them as “national.” Thus, letting it be known that he did not believe in such a reconstruction of the pre-partition law, which would result in the final outcome of a truly national codification. It is also of significance that in the proposed amendments, he never brought up the usefulness of any institutions of Polish pre-partition law. His considerations also avoided even the symbolic mention of the national legal tradition. With the exception of lay marriage, he focused on those fragments of the Napoleonic Code, which he considered objectively ineffective, and proposed their replacement with other solutions, but not drawn from the old Polish law, but rather from other foreign legal systems known to him, that is Austrian or Prussian. Just as in the case of Wyczechowski (born in 1780), it could be influenced by the fact that Bandtkie (born in 1783) never had any practical contact with Polish pre-partition law. Moreover, it should be noted that Bandtkie did not hesitate to propose combinations of solutions of different origins, such as in mortgage law fashioned after the Prussian institution with some French solutions. Therefore, the Napoleonic Code was to him a universal work, fitting for transplantation onto the Polish territory without having to adapt it to the specifically Polish conditions, with the exception of lay marriages, which he thought a Catholic country was not ready to accept.

IV. SUMMARY

Summing up, both memos were mutually complementary. Wyczechowski’s remarks focused on showing the reasons for the uselessness of the Polish legal tradition in drafting codification suitable for the 19th century standards, while, at the same time, both lawyers explained why the liberal progressiveness of the Napoleonic Code had its advantage over other codes. Simultaneously, Wyczechowski attempted to convince the readers of his memo, that despite the few years that had passed since the introduction of the Napoleonic Code in 1808, a deep social transformation had already

occurred, and, in its wake, assimilation of the French civil law. For all intents and purposes, there was no going back. Bandtkie, in turn, complemented this argument by pointing to the technical superiority of the Napoleonic Code over other comparable collections. Subsequently, he tried to prove that the French civil law was unconditionally fit for transplantation onto the Polish territory owing to its universality and objectively high quality. Importantly, to document these statements, he cited the opinions of German scholars, considering them an authoritative source of evaluation.⁹⁰ On the other hand, Wyczechowski answered the question of why transplantation was possible by indicating the shared European legal tradition, rooted—both in the case of Poland and France—in Christianity, canon law, and Roman law, and adding that although the Napoleonic Code is indeed imbued with certain revolutionary ideas, it skillfully reconciled them with the Roman legal heritage common for France and for Poland.

The described debate was only the beginning of works on replacing the Napoleonic Code with new national codification, which ultimately were not a success. Works on the national codification lasted the entire period of existence of the constitutional and relatively autonomous Kingdom of Poland, that is until the uprising of 1830-1831.

The adaptation problem of the transplanted French law, considered in this article in the light of the presented remarks, may also be regarded in a broader dimension. The analysis of the situation as done by Wyczechowski and Bandtkie depicted not only the state of awareness of the erstwhile Polish legal elites, but it also showed their view of contemporary determinants in Poland of the early 19th century. The analysis also shed light on the universal nature of problems associated with legal transfers to peripheral countries whenever the transplanted legal system is more advanced than the social

90. *Id.* at 171-72.

relations in the recipient country, resistance ensues.⁹¹ The Napoleonic Code, as a modern work serving the implementation of new ideas, may be held up as a paragon of an instrument which, when transplanted onto a different cultural substratum, may be viewed differently by the broad society and by the elites.⁹² The latter—people like Bieńkowski, Wyczechowski, and Bandtkie—enjoyed a broader perspective, and this is precisely what made their evaluation of the Code incompatible with that of the other part of the society.⁹³ In the traditionalistic circles, a foreign instrument, no matter how perfect, gives rise to resistance, and the greater the number of incidental, circumstantial adaptation problems, the greater this resistance. Fear of upturning the social relations and of downgrading the position of the nobility and the clergy translated into a landslide of criticism against the transplanted law. The struggle to fossilize social relations resulted in an idealization of the pre-partition law.⁹⁴ In “progressive” circles, on the other hand, such an instrument is enthusiastically welcomed if it may be applied to furthering the desired transformation—of legal and socio-economic modernization.⁹⁵ Within this context, the statement by Juliusz Bardach that transplantation of

91. See Juliusz Bardach, *Recepcja w historii państwa i prawa* [*Reception in the History of State and Law*], in THEMIS A CLIO CZYLI PRAWO A HISTORIA [THEMIS AND CLIO OR LAW AND HISTORY], 88-89 (Liber 2001); see also concluding remarks of Michał Gałędek, *Legal Transfers and National Traditions: Patterns of Modernization of the Public Administration in Polish Territories at the Turn of the 18th and 19th Century*, in CULTURE – IDENTITY – LEGAL INSTRUMENTALISM (Michał Gałędek & Anna Klimaszewska eds., Brill-Nijhoff, forthcoming 2019).

92. Bogusław Leśnodorski, *U progu nowego stulecia. Księstwo Warszawskie* [*On the Brink of a New Century. The Duchy of Warsaw*], in HISTORIA I WSPÓŁCZESNOŚĆ [HISTORY AND CONTEMPORANEITY] 209-211 (Państwowe Wydawnictwo Naukowe 1967).

93. Bogusław Leśnodorski, *Prawnicy – pierwsi profesorowie i studenci Uniwersytetu Warszawskiego* [*Lawyers - The First Professors and Students of The University of Warsaw*], in LUDZIE I IDEE [PEOPLE AND IDEAS] 184 (Państwowy Instytut Wydawniczy 1972).

94. Bardach, *supra* note 91, at 80-81.

95. Michał Gałędek & Anna Klimaszewska, *The Implementation of French Codes on the Polish Territories as Instruments of Modernization – Identifying Problems with Selected Examples*, in COMPARATIVE LAW AND... / LE DROIT COMPARÉ ET... 75-84 (Alexis Albarian & Olivier Moréteau eds., Presses Universitaires d’Aix Marseille 2016).

law constitutes “primarily an effect of specific needs and the desire to satisfy them” rings true.⁹⁶ In this case, the needs of the landed gentry and clergy were contrary to the needs of other social classes, particularly of the rising Polish intelligentsia (primary legal elites), creating a rift in the political elites that represented the society.

96. Bardach, *supra* note 91, at 96.