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The bicentenary of the French Civil Code: an international approach

The French Civil Code was enacted in 1804 and renamed the Napoleonic Code in 1807.

The celebration of the bicentenary of this turning point in our country's legal history is an important event, as the Civil Code continues to occupy a unique place in our law: in force from the Empire to the present-day 5th Republic, it is now recognised as being of historical significance to the French nation. It also served as a reference to many a lawmaker beyond our borders throughout the 19th and 20th centuries.

Today once again, the inspired intuition that accompanied its elaboration is about to lead to new developments in the context of European construction.

Laws that regulate relations between citizens

The Civil Code, inspired by Bonaparte, drafted by Tronchet, Portalis, Bigot de Préameneu and Maleville, was originally crafted as a set of laws to regulate relations between citizens. It was divided into three unequal books entitled "On persons", Articles 1 to 515, "On property" and "On the different modifications of property", Articles 516 to 710, and "On the different means of acquiring property", Articles 711 to 2281, but together they formed a system centred on property and the family. Once the Code had been enacted, the law accompanied people from birth to death through a secular civil status registry system. For the first time, civil marriage was recognised as the only legally valid form of marriage. If God was absent from the Civil Code, the paterfamilias was given pride of place, so as to guarantee order within the family. Divorce remained present, but in a much more restrictive manner than under the Revolution, and it was abolished altogether between 1816 and 1884. Property, which the 1789 Declaration of the Rights of Man made an "inviolable and sacred right", was presented by Portalis as "the universal soul of the legislation". As a result, the previous formal separation between property law and the law of obligations barely seemed important any more.

The Civil Code remained almost unchanged for more than a century. Then came a succession of legislative reforms, the most significant of which was the reform carried out by Dean Carbonnier between 1964 and 1975. Attachment to the symbolic value of the Civil Code led to the introduction of the right to respect for privacy in 1970, the principles of the right to

citizenship in 1993, provisions concerning respect for the human body in 1994 and the Civil Solidarity Pact in 2000.

Recent reforms of the Civil Code and changes in judicial practice have also been based on the case-law of the European Court of Human Rights. For example, the judgment delivered on 13 June 1979 in the case of Marckx v. Belgium explained that the respect for family life provided for in Article 8 of the Convention required states to establish **family legislation eliminating all discrimination based on birth**, particularly where pecuniary advantages were concerned. Articles 718 to 892 of the Civil Code, concerning inheritance rights, were revised by a law dated 3 December 2001, in order to comply with this requirement by doing away with the distinction made between legitimate, natural and adulterine children. Rectifications of civil status, governed by Article 99 of the Civil Code, are another example of the influence exercised by the European Court of Human Rights: an about-turn in the doctrine of the court of cassation concerning **transsexuals** occurred on 11 December 1992 following the judgment against France, on 25 March 1992, in the case of B.v. France. The **principles of the unalterability and the inalienability of civil status** had previously been raised against transsexuals wishing to change their civil status. The Court considered that this refusal to rectify civil status had a disproportionate impact on the daily life and psychology of the persons concerned, placing them in a situation incompatible with the respect owed to their private life.

Codification, a factor of equality

The purpose of the Napoleonic codification lay in a vision of the law as a reforming force for society, a unifying force for the nation and a factor of equality. The French Civil Code was the first to do away with the sources of law rooted in traditions, so that individuals were no longer subject to any other than state law. The Prussian code of 1794, for example, superseded suppletive ordinary law, but not provincial customs or city statutes, which it left in force. The reforming dimension of codification, characteristic of Enlightenment philosophy and the age of the birth of the nation-states, prospered throughout the 19th century. After falling out of favour for a while in France, codification once more became a fundamental legal tool. Under the auspices of the codification committee, it now continues on the basis of established law.

This approach sometimes meets with objections, however. There are those who feel that the compilation of texts drawn up in very different times and contexts detracts from the historical character of the law and, in so doing, deprives it of some of its solemnity. Others consider that information technology backed up by some serious indexation and consolidation work could dispense with the need for codification.

In spite of these criticisms, codification fulfils a purpose and "responds to the constitutional objective of accessibility and intelligibility of the law", to quote the Constitutional Council in December 1999. **Codification is effectively synonymous with clarity and orderliness of the law**: the texts cannot simply be compiled; they must be methodically indexed and classified. This approach can lead to the repeal of earlier texts, avoid duplication, rationalise the flow of laws or pinpoint gaps in the law. In grouping together scattered, sometimes contradicting texts, codification can thus contribute to the harmonisation of the law in specific fields, ranging from consumer law to intellectual property rights. Putting the law in order of course means respecting the hierarchy of laws.

Codification also answers the democratic and economic need for access to the law. By facilitating access to the law, in whatever form - book, computer or CD-rom - codification plays an important part in citizenship and, more generally, in democracy. It is seen as a factor of transparency in political and economic life. When the laws in force are easily accessible, the economic cost of knowing and implementing them decreases, both for government and for private enterprise. The existence of a codified law is one of the factors that can help foreign investors decide to go ahead with a business project. It can also foster competition and international trade.

A federating influence, past and future

The increasingly important role played by the law in a global economy reveals the federating influence of codification. The regional unions often organised for trading purposes are often based on a harmonised law of obligations. The **concept of codification,** inseparable, in contemporary history, from the sovereign state, is now **used in international law**, for example by the United Nations International Law Commission. Its work and that of other UN bodies has led to several major conventions, such as the 1961 Vienna Convention on diplomatic relations. Codified law also **stems from private efforts**, like those of the American Law Institute and the International Institute for the Unification of Private Law (Unidroit). For the time being their project concerns the principles and rules of transnational civil procedure, which could provide a "turn-key" code for those countries which do not yet have one or would like to change theirs.

This example of law production illustrates the search for **certainty of the law** that moves not only the most powerful economic actors, but also more modest economic agents, who are interdependent nowadays on a regional, if not worldwide, scale.
It also shows that **rules of procedure** are crucial, well ahead of the substance of the law. It is the same spirit that justifies **the principle of mutual recognition of judicial decisions** now being promoted at European Union level. This is an extraordinarily fertile principle. In the economic sphere it has led to the introduction of a new instrument: the **European enforcement order**, intended to dispense with the intermediate measures required to obtain an enforceable order in another country in an uncontested cross-border claim. In the battle against cross-border crime, the **European arrest warrant** was designed to accelerate and simplify extradition procedures. In family matters the so-called Brussels II and Brussels II Bis **regulations on matrimonial law and parental responsibility** offer effective procedural solutions in the event of the separation of "transfrontier" couples. The harmonisation and codification of procedures thus appear to be increasingly necessary in a European space where trade and the movement of persons are constantly on the increase.

The harmonisation or even unification of private law in the European Union has become a key legal and political issue. Groups of academics have contributed to the harmonisation debate for some time now: the Lando commission, set up in 1980, drew up the Principles of European contract law, the Academy of European Private Lawyers, founded at the initiative of Professor Gandolfi, published a European code of contracts in 2001 and the study group on the European Civil Code, directed by Professor Von Bar, set to work in 1999. On the institutional level, the European Parliament has expressed interest in harmonising certain sectors of private law, adopting several resolutions on the subject from 1989 onwards. In July 2001 the European Commission, which has no power to reform civil law as a whole, launched a broad consultation on contract law, followed by an action plan on European

contract law in February 2003. The plan revolves around three lines of action: **preparation of a common reference framework**, taking stock of initiatives to prepare and disseminate standard contract clauses and the adoption of an optional legal instrument. If the adoption of a European Civil Code is not on the agenda as such, it would not be surprising if the group of academics responsible for drafting the common principles of European contract legislation, the common reference framework, were one day to consider itself tasked with a mission comparable to that undertaken in their day by Tronchet, Portalis, Bigot de Préameneu and Maleville.

The recurrent references to a European Civil Code are a sign of the symbolism inherent in codification and bring out, in the European Union context, the reforming, unifying dimension that characterised the revolutionary, then the Napoleonic codification projects. Yet the unification of civil law, which is synonymous with a cultural revolution – both private law and particularly family law having their roots in the culture of each country – is not, in principle, necessary to the creation of a federal Europe. The American example demonstrates this: the state governments have jurisdiction in civil law matters, while the federal government only has jurisdiction *ratione materiae*. Similarly, in the United Kingdom, different legal systems coexist in England and Wales on the one hand and in Scotland on the other.

On Saint Helena, Napoleon wondered why his Civil Code should not serve as a basis for a European code. The question is as thought-provoking today as it was two hundred years ago. Yet the stakes have not changed much: to guarantee the unity of a people, beyond the unity of a market, by subjecting them all to the same law. In Europe, therefore, as in the rest of the world, the events organised on the occasion of the bicentenary of our Civil Code offer a new opportunity for stimulating dialogue on a scale much broader than our own national horizons.