

## FRANCE

## Decline, decadence and demise of a legal system: the French example

ANTOINE BULLIER discusses the French legal system.

*My glory is not having won forty battles for all those will be forgotten by the defeat at Waterloo. What will not be forgotten, what will live forever is my civil Code.'*

Napoleon at Saint Helena

In the common law world, the French Civil Code is called the Napoleonic Code. In many ways it is right to name it so. We can appreciate the importance of this piece of legislation for the defeated Emperor in exile.

At Les Invalides in Paris, the sculptor Simart who designed the low relief around the sarcophagus added this sentence from the Emperor: 'My Code because of its simple approach has done more good in France than the many laws which preceded me'.<sup>2</sup>

It is not possible to dissociate Napoleon from his Code though in France we only refer to it as the Code. The Civil Code is the absolute reference, the *fons legum*, the *origo juris*. Napoleon did want not any commentary to be made on the Code. When the first treatises on the Code were published, he exclaimed: 'My Code is lost'.<sup>3</sup>

In the English-speaking world, we all remember Marlon Brando (Stanley Kowalski), explaining to his wife Stella (Kim Hunter) in the movie version by Kazan of the play by Tennessee Williams, *A Streetcar named Desire*, the intricacies of the Civil Code in Louisiana. It is one of the few general public references to the Civil Code that can be found in the English-speaking world.

Last year, the French republic celebrated the bicentennial of the Code. There was a ceremony in the old Sorbonne building, a stamp was issued, law professors and judges heaped praises on the impact of the Code on French law but the whole thing was low key. Perhaps the French public is not interested in legal commemorations.

The Civil Code of the French (its official name) was not drafted by Napoleon but just like the Justinian Code, the Emperor put his stamp on the whole work. Because of this monument of legal scholarship France is still at the centre of the civil law system today. When we look at the civilist world, Italy, because of her history and the legacy of Rome, should have been the heiress of this famous legal tradition. Germany should also have been on the list because of her extraordinary jurists of the 19th century like Savigny and Ihering. It was not to be because of the French Civil Code.

The French Code was not the first. Other codifications happened in Bavaria in the form of the *Codex Maximilianus Bavaricus Civilis* in 1756; in Prussia in the

form of the *Preussisches Allgemeines Landrecht* in 1794 as well as the General Austrian Civil Code in 1811 and of course the famous *Bürgerliches Gesetzbuch* in 1900.

In their introduction to *Comparative Law* published in 1998, Zweiger and Kötz can say: 'Other great Codes came into force in Central and Western Europe at the end of the eighteenth and the beginning of the nineteenth centuries, but beyond doubt the French Civil Code is intellectually the most significant and historically the most fertile'.<sup>4</sup>

The Code was exported in three ways:

- *Force of the arms*: what was to become Belgium, the Netherlands and parts of Germany received the Code. Napoleon conquered Italy and imposed the Code.
- *Force of the spirit*: countries like Romania adopted the Code because of French influence. In Latin America most countries adopted and adapted the Code namely: Bolivia, Chile, Colombia, Argentina, Paraguay and Ecuador. In North America Quebec and Louisiana adopted the code.
- *Force of unity*: in the 19th century the Civil Code was a model for those who wanted to codify. Japan tried to imitate the Code. Italy promulgated a code in 1865, Switzerland in 1883 (a code of obligations) and in 1900 the *Bürgerliches Gesetzbuch* was promulgated in Germany. The external success of the Civil Code was due to the clarity of its language, the conciseness of the French idiom and its liberal ideology.

Zweiger and Kötz say:

One must not suppose, however that the Civil Code was received in these countries as a result of a careful evaluation of its merits in the way that a customer in a shop might choose the goods in the way that best suited him. Paul Koshaker has shown in his *Europa und das Römische Recht* that the reception of foreign law is not so much a question of quality as a question of powers: reception occurs when the law being received is in a position of power at least intellectually and culturally as being the law of the country which still enjoys political power or did so until so recently that its strength and culture are still clearly remembered.<sup>5</sup>

There were three degrees in the exportation of the Civil Code: received directly in original version; received through translation; or received indirectly through a third party (for example, the way in which the Chilean Code and the French Code have influenced the Argentinian Code). In the principles of modern codification, it seems that the French Civil Code is acknowledged as one of the most important in legal

## REFERENCES

1. Charles François Tristan de Montholon, *Récits de la captivité de l'Empereur Napoléon à Sainte-Hélène* (Antoine Bullier, trans, 1847) t I, 401.
2. André Palluel, *Dictionnaire de l'Empereur* (1969) 244.
3. Las Cases, *Le Mémorial de Sainte-Hélène* (1956) La Pléiade, t II, 153.
4. K Zweigert and H Kötz, *An Introduction to Comparative Law* (3rd ed, 1998) 85.
5. *Ibid* 100.

scholarship. Even in the United Kingdom the Code had an impact on liberal thinkers like Jeremy Bentham. However, perhaps the most important impact of the Code was that it triggered codification all over Europe and the Latin countries. When the Netherlands, Quebec and Louisiana promulgated new codes in 1992, 1994 and 2001 respectively, although the specific influence of the text of the French Code had waned, a faith in the principle of codification directly inspired from the Code still carried over.

Today there seems to have been a decline of the French system and its influence in the world. In common law countries, the French legal system never had real standing except perhaps in the realm of administrative law. Common lawyers acknowledge that France was key to civil law, although inquisitorial French criminal procedure has always been regarded with suspicion.

Roman law, the *origo juris* of the civilist system, cannot be dissociated from Latin. In the early 1960s, French law students could still read the Institutes of Justinian in the text (with a dictionary). Today few read Latin fluently. The civil law system has been cut off from its roots. The *jus commune* of the Middle Ages cannot be resurrected in Europe. The only lingua franca in Europe is English and its legal vehicle is not civil law but common law. All civil law countries speak a latin language except the German-speaking peoples. All common law countries use the same idiom so all common lawyers have immediate access to all common law cases. Few judges of the French *Cour de cassation* can read the latest cases from the highest courts in Mexico or Brazil.

Because of the decline of the French language, very few common lawyers can still read French today. In the 1930s and 1950s the international law reviews of Central and Eastern Europe have shifted their medium from French to English. The decline accelerated after the First World War and even more after the Second World War.

Despite this the European Common Market, Community and Union have postponed the decline in the influence of the French legal system. In particular, European Union law is still based heavily on the civil law system, and 80% of that on the French legal system. In European Union law, the influence of the French legal system is still manifest in six different fields, namely:

1. the structure of the institution
2. the Court of Justice being based on the French Council of State
3. the administrative law of the Union being very similar to French administrative law
4. most legislation following French techniques
5. interpretations being teleological (purposive)
6. the civil law having undertones of many provisions of Union law.

If all languages in the Union are equal some are more equal than others. English, French and German are the three main languages in the Union. For historical and emotional reasons, German cannot play the key role, although there are 92 million German-speakers in the Union. English and French are the only two possible

languages, although French cannot compete with English as the world's language.

As law in itself is a language, a jargon of a trade, the eminence of the English language and of the common law will be unstoppable. The prestige of the common law system is inextricably tied with its language: English. Its methods, principles and techniques will influence European law because the lawyers, instead of speaking French, will eventually speak English and so will change the law through their use of language.

In this year of commemoration, the Code remains for the French a site of memory which can only be expressed in its original language. They know and feel that it is there that the sources of their law can be found. The French recognise the Code as the most important piece of legal scholarship. They look at it as one looks at a mysterious forest, a sacred wood where they know they can find the origins of their law. This reassures them because it was inspired by ideas which, through osmosis, have already become theirs. The Code is the expression of two memories: the one received as a repository, the other as the basis of a new tradition it founded.

ANTOINE J. BULLIER teaches law at Panthéon-Sorbonne University, Paris.

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