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Worldwide Influence of the French Civil Code of 1804, on the Occasion of its Bicentennial Celebration

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WORLDWIDE INFLUENCE OF THE FRENCH CIVIL CODE OF 1804, ON THE OCCASION OF ITS BICENTENNIAL CELEBRATION

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A - This year 2004 has been marked, in France and abroad, by many ceremonies aimed at celebrating the bicentennial of the French Civil Code. And it is true that we are facing here a sort of unique phenomenon. I do not know of any other Code which can pride itself on having **lived so long**. Of course, there is the U.S. Constitution, which is even a bit older: but a Constitution is different from a Code, because it does not deal with the day-to-day life of the people. And even the fact that our Code is often regarded as "our civil constitution" does not change anything to the problem, since we have had, during the last two centuries, about fifteen Constitutions and only one Code – while you had only one Constitution… and no civil code at all ! Anyway, when we consider the changes which have taken place in society since 1804, we are somewhat puzzled by the idea that our Code has been able to survive such transformations. Still this is the fact. Of course, that does not mean that, during all this period, the Code has remained unaltered. It has been amended on many points, and some chapters have even been completely rewritten to fit our present needs. Its general structure, however, has remained the same and, although we think it is a mistake to label it as "old", since it has been constantly brought up to date, we still look at it as a legacy of the Napoleonic era – and we should not forget that its official name still is "Code Napoleon".

B - But here we are less concerned with the duration of our Code in time than with its **expansion in space**. I have just said that this bicentennial is celebrated in many parts of the world – not only in Belgium, in Quebec or in Louisiana, but even in other countries, whether in Latin America, in Central or Eastern Europe or in Israel. This shows the great interest that the Code is still arousing today on all five continents. I say "**today**" and the word is important, because it means that I am not going to retell the story of the expansion of the Code in the XIXth and XXth centuries and its "reception" in the Western World. The French are often regarded as being too much interested in the glories of the past, and I am not going to fall into that trap ! So I will be very short on history.

- In fact, it is difficult to say whether this extraordinary adventure of the Civil Code had been anticipated **from the very beginning**, in view of the contradictory opinions expressed on the subject. On the one hand, it is clear that the Code was made mostly for the French people (some say : for the French farmers), to give them a modern and unified system of law. But, on the other hand, we can hardly ignore some declarations made at the time, which prove that some of the drafters were deeply convinced that they were legislating for all "civilized" mankind and for many years to come. Napoleon once ordered the Code to be translated into Latin, so that it could become the basis of a new common law for Europe - and everybody knows his famous words at the end of his life (now engraved in the marble at the *Invalides*) : "People will forget about my victories… What will live forever is my Civil Code".

- In any case, the fact remains that, **during the XIXth century** and for a number of reasons – first military conquests and diplomatic successes, then an objective evaluation of its merits and, later, the impact of colonization -, the Civil Code was imposed, adopted, copied or imitated in a number of countries (almost anywhere indeed, except in the common law world). It even exerted some influence in this country, through David Dudley Field, and it was near serving as a model in New York around 1830… This epic has been recounted many times and I will not do it again.

- But this is an old story and, as early as in 1904, when the first **centennial** of the Code was celebrated, a certain sense of worry started to emerge. This was just on the morrow of the coming into force of the BGB in Germany, and some began to deplore a "slow erosion" of the influence exercised by our Civil Code abroad.

- **One century later**, after many new codes have been promulgated throughout the world, and while the movement of law reform is still accelerating, for a number of well-known reasons : establishment of a new international order, trend towards modernization in many countries, etc., the moment seems appropriate to wonder how influential our Code is on the codifications which are taking place **now**. Of course, we shall consider this Code, not as it was in 1804, but in its present state, after two centuries of legislative additions and amendments, judicial construction and academic interpretation. The question is : to what extent is this Code still a source of inspiration for other countries ? Once again, I must emphasize that I am not here to make the apology of the Code, but just an evaluation as true and objective as possible.

If there is a relative decline, let us see rapidly what are the reasons for it before trying to assess the present situation.

I

Among many others, and letting aside for the moment the specific merits of the Code, I will mention only two factors, which combine to explain a certain weakening of the French positions.

A – One is strictly **legal** and lies in the present **abundance of possible models**.

In the early XIXth century, the Civil Code was practically the only model, at least the most advanced. The few other codes which then existed (especially in Prussia or in Austria) could not really compete with it and the common law (I am sorry to say) was just regarded as a local law, which could not aspire to a universal application.

Of course, things are very different today :

- In fact, they started to change at the end of the XIXth century, after the enactment of ***new codes***, which proceeded from a different inspiration and, in turn, gave rise to frequent imitations. The main one was, of course, the BGB of 1896 in Germany, but many others followed, notably the Swiss Civil Code of 1906 and 1911, the Italian *Codice civile* de 1942, the Egyptian Code of 1948 (very influential in the Middle East) and, closer to us, the Civil Code of the Netherlands in 1992 and the Code of Quebec in 1994.

- To the list, we must add some ***international conventions*** (such as the Vienna Convention of 1980 on the international sale of goods) and a number of ***draft laws*** proposed at the international level (such as, for ex., the Unidroit Principles). Also, we must mention the considerable development of the ***common law*** and its transplantation into this country, where it has given rise to such new models as the Restatement and the *UCC*. In fact, the common law has also gained ground in many other countries, even in some which traditionally belonged to the civil law family and which have sometimes become mixed jurisdictions (like Louisiana, Quebec, South Africa, etc.).

All this results in the fact that the French Civil Code has lost the quasi-monopoly it had enjoyed for a long time. It now appears as being just one model among others – a model from which other legislators can, of course, draw their inspiration, but only at the end of a properly comparative process. And, in this sort of competition, our Code has, at the same time, a handicap and an asset :

The **handicap** lies in its age – and this is a defect which is not easily forgiven, even though it does not seem well-founded here, in view of the important reforms which have been made, especially in the last 40 years. Still it is true that, on some points, further revisions are now contemplated even in France, so that we can hardly expect other people to get their inspiration from a document we consider ourselves somewhat outdated…

But age is also an **asset**, to the extent that, being so ancient and having exercised such an influence, our Code cannot be completely forgotten today. Experience shows that, in the legal field, nobody can erase all traces of the past and that, except in very special circumstances, any legislator has a normal tendency to keep what already exists and has become usual practice when there is no special reason to abandon it. This explains the solid positions that our Code retains in many countries, even those which want to take some distance from it. Among many examples, in Europe (especially in the Netherlands) and in Latin America (Peru, Argentina or Brazil), I will stress those of Louisiana and Quebec:

- In Louisiana, the new Civil Code, enacted by pieces since 1968, shows many similarities with the previous codes enacted in 1808, 1825 and 1870, which were very close to the *Code Napoleon*. The result is that, in spite of the official assertions that the new Code should be definitely "modern" (that is the magic word !) and should draw from the most diverse sources, without giving preference to any particular systems, in fact, the French Civil Code continues to a large extent (statistically for about one third) to inspire the new legislation. But it appears that this kinship is due much more to the preservation of prior provisions than to new transplants – so that it can be said that the French influence in Louisiana is more a legacy of the past than a foundation for the future.

- The situation is partly the same in Quebec – although here another factor comes into play.

B – This other factor lies in the **cultural environment**. No doubt, this environment is, generally speaking, **less favorable today** than it was two centuries ago. Here again, I will confine myself to two basic observations:

1) The first one has to do with the question of ***language***. We all know the close connection existing between law and language, so much so that we sometimes come to identify the scope of the common law with that of English-speaking countries. Now the French have some difficulty to admit that their language is no longer the *lingua franca* in the international legal community. This however is a fact, which can be regretted (and I do regret it, and not only because it would make things so much easier for me…), but which cannot be denied. And it is quite obvious that the present expansion of the common law (or even of legal systems which can be part of the civil law family, but which commonly use the vehicle of English) has much to do with the progress of that language.

This conclusion finds an easy confirmation in the comparison we can make between two territories where French was once predominant : Quebec and Louisiana.

- In Quebec, the long-standing fight in favor of French has resulted in the preservation of close ties between the jurists of both countries and in a special attention paid to French law during the elaboration of the 1994 Code (which was even written initially in French before being translated into English).

- In Louisiana, on the contrary, the decline in the use of French (in spite of some courageous efforts made by some organizations and notably by the Louisiana Law Institute) has gone on a par with a clear dwindling of the influence exercised by the French Civil Code in the process of revision begun in 1968.

The same thing is true in many other countries. In fact, it is easy to see that, wherever French has remained a common language, like in the Near-East, in many parts of Africa or even in Viet-Nam – all countries where French has become part of the local culture -, our Civil Code has retained strong positions.

2) But there is another aspect of the cultural factor, which lies in the capacity of a country to spread its model abroad, especially through its Universities, and, in particular, to provide a basic ***training for foreign lawyers***. It is clear that, in this respect, we now stand far behind the place where we used to be until World War II. Time has passed since students came from all over the world (especially from Europe and Latin America) to complete in France their legal education and get some knowledge and understanding of our law. Now these students go elsewhere – and, in fact, most of them come here. And American law schools, quite naturally, give them a training which can hardly be expected to be based on the principles of the *Code Napoleon* ! There is little doubt that the growing interest for American law in the world today is in direct relation with the increasing attraction that American Universities exercise in all countries – and the number of LL.M. degrees they deliver each year to those who will be tomorrow, at home, judges or legislators…

All this limits, of course, the influence of French legal culture abroad – and therefore that of our Civil Code. And we can easily make the countercheck by showing that, on the contrary, this Code retains much of its appeal wherever the prestige of our Universities and of our legal culture is still alive.

- We have already mentioned the case of *Quebec*, where it appears that the French Civil Code was the most authoritative source considered by the legislator in 1994. But a similar situation also prevails in many other countries, notably in *Central and Eastern Europe* and in *Latin America*, where new codes have been promulgated recently or are now in preparation, as well as in some parts of the *Middle East*, notably in Lebanon or in Egypt, where the influence of the French model, since the big legal reforms which took place in the middle of the XIXth century under the Ottoman Empire, has always been due to cultural rather than political or economic factors.

- All of these factors, anyway, combine to explain the course of events which took place recently in French-speaking Africa, after many colonies or protectorates, once subject (at least partly) to French law, became independent. One could have feared then a sort of reaction against this law, which had been previously imposed – but this is not at all what happened : and the main reason for it is that most of the elite in those countries had been trained in France in the tradition of our Civil Code. In *North Africa*, of course, French law had always been combined with Islamic law (especially in personal and family matters), but, as a whole, it remains very influential today – as well in the new Civil Code of Algeria, enacted in 1975, more so than in the former legislation still in force in many fields in Tunisia and in Morocco. In *sub-Saharian Africa*, the local customs were too weak and diverse to prevent the setting-up of modern and unified systems of law when fifteen new states were established in the period following the process of decolonization. A number of new codes were then promulgated, which followed very closely the French model – so closely indeed that some difficulties arose as to their actual implementation : they were often regarded as ineffective and ill-adapted to the needs of the population (especially in family and in land law). There was some talk

about a "resistance of African law to modernization" and the old customs, theoretically rejected, re-emerged in practice.

This leads us to consider our Code from another standpoint – which is that of its own merits. We must examine rapidly which features of the Code are still looked out with favor at the dawn of the XXIth century and retain some credit, by contrast with those which now seem outdated and constitute no more than a vestige of the past.

II

Any assessment of a legal system must be made at the two levels that I will roughly call (with Prof. Summers' permission) of form and substance.

A – As to **form**, the qualities of the French Civil Code have often been praised – and they may be those which have been the least worn away by time. In spite of the appearance, since the beginning of the XIXth century, of new types of codification (often inspired by the BGB), the concept of a "*codification French style*" has not vanished, and it remains a sort of reference – even though it is no longer predominant, as can be seen in several respects.

1) One relates to the ***general characteristics*** of the Code, which are often very different today from what they were in 1804.

- The Napoleonic idea of a "**popular**" code, that is, made for the people, simple and easily accessible to all, is now often abandoned to give way to so-called "learned codes", made for lawyers, in the German tradition of a *Professorenrecht* – as, for ex., in Switzerland, Brazil, the Netherlands.

- Instead of giving priority to **general principles**, like in 1804, many new codes, in the wake of the BGB, provide precise and detailed rules, which can be directly applied by the courts (as in the Netherlands) – even if that means sometimes resorting more frequently to those general clauses that the French Code has always regarded with some suspicion, in order to give a minimum of flexibility to the law.

- The quasi-monopoly once given to legislation as a **source of law** is now breached by the larger powers granted to the judge, at least under the disguise of a reference to other sources such as usages, *equite* (Near East, Louisiana, Russia), general principles of law (Lebanon, Quebec) or even case law (Louisiana). This is another departure from the French tradition.

2) There has also been an evolution as to the ***scope of a civil code***. The *Code Napoleon* had set in 1804 the limits of what we call the "*droit civil*", and this remained practically untouched, even in the BGB. But things are changing today.

- On the one hand, some of the **matters once excluded now tend to become part** of the new civil codes. This is the case, notably, for *commercial law*, which was the subject of a separate code, in France as well as in Germany, but is now more and more often included in the civil code, totally or in part (as in Italy, the Netherlands, Quebec, Russia, Brazil, Senegal…), or for the *law of conflicts*, which was not at all codified in 1804 in France, no more than in 1896 in Germany, but it is now included in the civil codes of Egypt, Portugal, Quebec, Louisiana, Russia, etc.

- On the opposite, there are matters which are clearly **part of the French Civil Code**, but now tend, more and more frequently, to **be treated as autonomous subjects**, whether or not codified. The best examples are naturally those of *family law* (mostly for religious or traditional reasons) and of the *law of things*, especially land law (for economic or political reasons) – so that, in some countries, the civil code amounts to nothing more than a mere "code of obligations and contracts".

- Lastly, the problem of the inclusion in the Civil Code is also raised with regard to some of the **special regulations** which constitute exceptions to the ordinary law, and, in particular, to the so-called *consumers' law*. The views vary greatly on this point and, while the matter remains outside the Civil Code in France and in Quebec (in the name of a sort of "purity" of this Code, which should contain only the rules of general and permanent application), a different solution prevails in many European countries (such as the Netherlands and Germany, since the new revision of the BGB in 2001).

3) There is little to say concerning ***other formal aspects*** of our Civil Code. Its **style** is superb, but it can hardly be imitated in other languages. Its **general structure**, with its division into three parts, is not particularly remarkable (although it was inspired by Justinian's *Institutes*…) and it is abandoned by most new codes, except (strangely enough) in Louisiana. Some of these new codes (for ex. in Russia, in Brazil and, partly, in the Netherlands) also contain a "General Part", imitated from the BGB, but very foreign to the French mind. The **internal coherence**, which has also been regarded as a great quality of the Napoleonic work, does not appear as a major feature of most of the recent codes, because of the procedures which are now imposed (with large commissions to prepare the first draft and endless debates before the Parliament) and are so different from those (less democratic, but more efficient indeed) followed in 1804…

B - We can make only short comments from the point of view of **substance**, concerning the main three areas of the Civil Code.

1) The part of this Code dealing with the ***law of persons and family*** has been completely renovated recently and it has been already very influential on the recent

codification in Quebec. But as a general rule, we may say that this branch of the law is so closely linked with the ideological and sociological environment of any particular society that it can hardly be a matter for export. It is easy to understand that, on this particular point, our Code has rarely served as a model, not only in the countries where the "personal status" is founded on religious sources or on old customs, but even in those which share with us the same culture, because the common trends that we can observe in this field are much more due to the evolution of habits and practices than to the imitation of a specific legislation. What code could be regarded at the origin of the current movement towards equality between spouses and children, the loosening of family ties, the weakening of the authority within the family, etc. ? These are only, for better or for worse, facts of civilization…

2) The ***law of things*** is also in direct relation with the social and economic conditions which prevail at a given time. Of course, it has considerably changed in France since 1804, but largely through specific statutes which have not been incorporated into the Civil Code itself – so that this part of the Code now seems a bit theoretical. Still most of its concepts, and many of its solutions, even some of its wording, still survive in modern codes. A number of them, however, are expressly set aside, either to conform to new social values (for ex., as to the right of ownership, which cannot any longer be regarded as "absolute") or for purely technical reasons (as the principle of transfer of property by the mere exchange of consents). Also, we must take into account the more and more frequent intrusion of rules and institutions derived from the common law into the law of many countries which traditionally belonged to the civil law family : and this is notably the case for the **trust**, adopted not only in most of the "mixed jurisdictions" (like Quebec and Louisiana), but even in some others (like Russia : and it was almost to be received in France a few years ago under the name of *fiducie*).

3) Although the ***law of obligations*** is normally the branch of the law which lends itself best to transplantations, because of its abstract character, it appears that this part of our Civil Code does not exert today abroad the strong influence that could be expected. The main reason is that it is also the area where there is the greatest number of possible models – and present-day legislators are understandably inclined to draw from the most recent sources.

- In the field of **contracts**, there have been, of course, in France itself, many amendments to the original *Code Napoleon*, and still more additions. But, here again, most of them appear only in separate statutes, so that our Code in this matter seems somewhat out of touch with reality : it represents little more than a sort of general law, leaving room to a number of exceptions. And to the extent that this general law gives priority to such traditional principles as contractual freedom or stability of the contract over a more "modern" conception of *equite*, which endows the judge with broader powers, we cannot be surprised that it incurs sometimes the reproach of being outdated. And this reproach may seem justified when we come to such matters as *lesion* (unbalance in the contract) or *imprevision* (hardship).

Still there are many concepts of our law of contracts which remain widely accepted abroad, whether they derive from the Code itself (such as the requirement of good faith) or from the works of legal writers (such as the distinction between *obligations de moyens* and *obligations de resultat*). Others, however, tend to be abandoned, such as, for ex., the *causa*, which does not experience a better fate in modern codes that its common law counterpart, the consideration.

- As to the law of **torts**, the very short provisions contained in our Code are so general that any legislator can easily rally to them without taking too many risks : and this is why they are reproduced, almost literally, in a number of new codes. But they are also so vague that they have little meaning by themselves, and it is only at the level of the case law that a comparison could really make sense.

CONCLUSION

I have been too long and it is now more than time to conclude.

Of course, it is difficult to assess the international influence of the French Civil Code without considering the two centuries which have just elapsed. Nobody can dispute the immense role this Code has played in the world. It has represented a great moment in the history of peoples and it remains engraved in their memories.

But the risk is that it appears too much as a monument of the past. And we can hardly deny that, except in some particular instances, it does not play any longer a dynamic part in the process of codification which is taking place in many countries.

Still it would be a big mistake to think that this Code has exhausted all of its virtues or lost all of its capacity of influence. No doubt some important reforms are necessary to give it back its former luster and they are today in progress : a large process of revision has now been launched. But we must look beyond – and maybe the present evolution tending to a rapprochement of the laws at the European or international level can give it a new role. For it brings about a sort of "globalization" of the legal thought, which may be the occasion of giving back to French law, and to the Civil Code which is at its core, their place on the international scene. I am convinced that the present search for a new *jus commune* (whatever we may think about its possible outcome) really opens new prospects to our Civil Code. I feel certain indeed that the process which is now under way constitutes a new chance for the Napoleonic work and the best opportunity to save the authority and the prestige which have been its marks for two centuries.