

## Introduction

### **Introduction**

**by**

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The word codification comes from Latin *codicem facere*, 'to make a code'. As such, the word appears for the first time in 1815, in a text by Jeremy Bentham. The phenomenon, however, is much earlier. In fact, as we shall see, the first codifications go back to very ancient times. One could even adapt Napoleon's famous words spoken in front of the Pyramids and say that forty thousand years of codification look down on mankind.

There is a great difference, however, between the early written rules of law and the monument whose two hundredth anniversary we are celebrating this year. The act of codification is of course always linked to some political reality, but the French Code Civil goes beyond a simple embodiment of the Emperor's power.

Codes of law have generally been written to back up somebody's power, in most cases, with two objectives, firstly, to achieve territorial unity after conquest through the imposition of linguistic unity, the Hammurabi Code, for example, or to shore up a new dynasty, as in the codification of Leon VI; secondly, to subdue the nobility, often masters of customary law within their own power structures.

The French Civil Code is not a stranger to this rule. On St Helena, Napoleon, looking into the future and thinking of the importance the promulgation of this code could have for a country torn by ten years of revolution, said, "My true glory will not be to have won forty battles, the memory of Waterloo will be enough to efface all those victories. One thing, however, will not be effaced; one thing will live for ever: my Civil Code."

Beyond these often implicitly political objectives, however, jurists assign to legal codification both technical functions (it is a remedy against dispersion and ignorance of the rule of law and a means to legal unity and protection, to normative clarity) and reforming functions, since the systematisation of law often brings with it its own reform. Strictly speaking, you should only talk of codification when a compilation is based on the stated will to organise the legislation, but such semantic rigour would set too many limits on the definition. In the first place, in order to organise rules of law coherently, you must have already granted intellectual autonomy to law itself, a situation not found until Roman times; after that, you need to set up a legal standard, and for that no authoritative body is to be found in France until the modern era. Lastly, there must be a deep desire for change, which does not really come about until the Revolution. If we want to adhere to a strict definition, we would be obliged to conclude that the first true compilation is the French Civil Code itself, but that would be going too far, even if, on account of the clarity of its presentation, its mastery of concepts and the beauty of its language, it has undoubtedly surpassed its sources of inspiration. Another way of classifying types of codification is the J. Vanderlinden system. He separates named ideas from those that are not named, then attaches codes to the former, while placing under the second heading similar concerns to be found in public and

private works but which do not bear the same names. For Jean Gaudemet, those texts "which assemble in an unspecified order rules of different origins and importance" are only compilations (he gives as an example the Alaric Breviary ) while others "place normative measures from the past one after the next" and these he calls collections ( example: papal Decretals) .

Three years after its promulgation, in 1807, the Code changed names to become the Code Napoléon. At the height of his glory the Emperor officially assumed authorship of a work which really did owe him a great deal. Napoleon's personal implication in his legislative work clearly influences the way the book is considered. Held in contempt by some, admired by others, the Emperor contributed to the modelling of French society by giving the essence of its customs and practices a legal framework

It goes without saying that this man of many talents gave priority to solutions which served his own cause, but for a long time few voices were raised against an undertaking which was to outlive the Empire and serve both Monarchy and Republic.

From France, the text crossed frontiers and spread throughout the entire world. It was conveyed not only by the French army, but also by the French language and by the admiration for French ideas. For many peoples in search of political independence, the French Civil Code offered a model of organisation for civil society. The universal character of its concepts enabled it to be transplanted to the most varied of contexts and in the most diverse of ways. These ranged from piecemeal adoption to indirect adaptations with many a faithful translation or direct adaptation in between.

We shall be insisting particularly on this key role played by the Civil Code up to the end of the nineteenth century. From then on, the modifications which we shall refer to up until World War I will not seem of any great import. Even if industrialisation and the necessary evolution of society in consequence led to revisions of rules conceived for a world of property owners, many other corrections were mere detail. The existence both of a school of exegesis and of social stability, in spite of all the revolutions which peppered the century, assured the Code a permanence which was not really questioned until after 1918.

From the end of the nineteenth century onwards, the influence of the Civil Code was undermined by other models. France, which had dominated Europe since the middle of the seventeenth century, now had to contend with England as a colonial and Germany and Switzerland as judicial rivals. The great German codex, the Burgliches Gesetzbuch (BGB), was promulgated in 1900, the last year of the nineteenth century, while the Swiss Civil Code, Zivilgesetzbuch (ZGB), was adopted by the Federal Parliament in 1907.

The French Civil Code, "the real French Constitution" as it is sometimes called, was for France a fortress of stability in the constitutionally troubled nineteenth century and although the political crises of the twentieth were to engender substantial modifications in it, it has survived. This is no doubt due to the fact that from the outset, the philosophy behind it was flexible. The code is based, as we shall see, on notions of freedom and equality and even if both these ideas have been modified in the course of the past two centuries, the basic principles of freedom and equality have never been questioned.

With the development of technology, the twentieth century stressed the importance of economic freedom: private property became its economic instrument, with responsibility its counterweight. With the growth of individualism, freedom also became personal. This tendency may seem to contradict the tenor of the original Civil Code, but it is only an impression. For example, the acquisition of new rights by women or the changes wrought on the 1804 marriage laws by the creation of the PACS (Pacte de solidarité civile: a legal agreement between people of the same or opposite sex who wish to live together) are changes in form and not in substance. In

the revolutionary world of which the Code was an emanation, cut off from "intermediary bodies," the individual constituted the only valid point of reference for the definition of citizen rights. Moreover, once society had broken its ties with the Church and marriage had simply become a contract, nothing could prevent the idea of a marriage taking place, for example, between persons of the same sex.

As for equality, that was also proclaimed in 1804. It was inconceivable at the time that men and women could be equal; today we believe it to be so. With only a few exceptions, legitimate and illegitimate children were not generally considered equal either. But even if these forms of equality were not proclaimed as such, they were foreseeable, just as other developments will surely follow on from the changes which have taken place in the past two hundred years.

The French Civil Code has indeed been gifted in its adaptability; even if habits appear to have evolved, the fundamental ideas of the document have remained unchanged. On the other hand, if any threat does hang over it today, it is the idea, for which there is a certain following, of a European Civil Code.

If one were to draw a dividing line somewhere in the history of the Civil Code, one would have to choose not 1904, the hundredth anniversary being no more than an academic celebration, but 1914. In France as elsewhere, World War I constituted the real end of the nineteenth century and the ideas born of the French Revolution were to alter as the role of France in the modern world was progressively transformed. That is why we shall be considering the Code in two sections, firstly "The Nineteenth Century: the Golden Age of the Civil Code" and then "The Civil Code: Change and Stability in the Twentieth Century."

## **The Nineteenth Century: the Golden Age of the Civil Code**

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### **Sources and Elaboration**

The first legal codes, which were of course quite different from the one whose bi-centenary we are celebrating this year, go back to very ancient times and the present fame of these historical milestones varies. The Code of Hammarabi (1750 b.c.) may be familiar to cultivated people, but few will have heard of the eighth century b.c. Late Egyptian Code of Bocchoris [Wahkare Bakenranef].

The first Roman legal codes, the famous late third century a.d. Codex Gregorianus and the Codex Hermanogenianus, were private in origin. The first imperial legal code, known as the Codex Theodosianus dates from the fifth century. More important is the sixth-century Justinian Code, which is actually a Byzantine code, although embodying earlier Roman law, and which, after resurfacing in twelfth-century western Europe, was to form the basis of a whole European corpus of jus commune.

In the Barbarian kingdoms that succeeded the fall of the Western Empire, attempts at codifying the law did see the light, though specialists disagree as to whether their extent was territorial or personal. To the East, in that part of Romania that the West called the Byzantine Empire, the process of codification set in motion by Justinian continued.

The phenomenon is therefore Mediterranean in origin.

Medieval and Modern Europe gave birth to many so-called legal codes; they were often little more than pre-existing legal provisions set down in writing. They emanated from, or were inspired by, one of two great authorities, the Church or the Monarchy, both of which were attempting to reconstruct the badly shaken *res publica* left by the collapse of the Carolingian Empire. Canon law, a remarkable blend of Roman law and Christian thought, constituted a corpus of decisions and commentaries on which the evolution of law has to a large extent depended ever since. Monarchies, for their part, have used the redaction of a code as a means to unite territories and administer them, but very often they did not succeed in writing down all their laws, let alone organising them into a real legal code.

So, when the French, during and immediately after the 1789 Revolution, reaffirmed their desire to codify the law, they were joining a long tradition which drew inspiration from their Mediterranean culture. Political events, unrest, and the absence of a charismatic figure all prevented the project from taking off and it was not until the Consulate, under the authority of Napoleon Bonaparte, that the idea took shape and the Code civil [French Civil Code] was promulgated.

### **A Mediterranean Phenomenon**

Pharaoh was described by Diodorus of Sicily as a legislator. The first and probably mythical pharaoh, Narmer (Menes in Greek), persuaded people to set down their existing laws in writing. Shepseska, late Fourth Dynasty and Shoshenq, Twenty-second Dynasty, added to them. Bocchoris, Twenty-fourth Dynasty, undertook a thorough legislative reform, which his contemporary and rival, Shabaka, Twenty-fifth Dynasty, opposed. Even if tradition has it that the legislation of Bocchoris [Wahkare Bakenranef] influenced the legislation of Solon and even if the word code is used to refer to it, there is nothing in Ancient Egypt that could really be called a code of law. The sources for legal texts, which really do exist, are scattered, and Egypt, as far as legal codes are concerned, is a distant ancestor.

What we find in the ancient Near East is more familiar. The presence of the Hammarabi Code in the Louvre has long accustomed us to the idea of written legal codes in Mesopotamia. Among the most famous texts are the Ur-Nammu Code (circa 2050 b.c., Ur), the Code of Lipit-Ishtar (circa 1850 b.c., Isin) and the Laws of Eshnunna, likewise pre-dating the Hammarabi Code.

However, none of these documents, any more than the Egyptian ones, contains a word to designate the law, even less one to qualify what we call a code. In both cases, the king ruled according to the notion of justice-truth, (called *maât* in Egypt, either *mesharu* or *kittu* in the Near East.)

The difference lies in the political history of the two regions. Except for a few rare moments in its history, Ancient Egypt had remained independent and, for the most part, united. The Near East, originally governed under a system of city-states, had at times been ruled within an empire in which legislative unification was used as a weapon of government. Hence Hammurabi's desire to draw up his code. Again, in none of these documents do we find what we think of today as a code of law, that is, a complete body of legislation for at least one branch of the law, systematically based on a coherent philosophy and above all written in general terms. Near Eastern legal dispositions are really a succession of individual case studies.

Hittite laws, compiled towards the middle of the second millennium b.c., only deal with rules and regulations that complement customary laws and likewise consider only specific cases. Hebrew legislation, as compiled in the Old Testament, is a mixture of apodictic or casuistic formulations with no attempt at exhaustiveness. It is more a means of clarifying customary law and is similar to other oriental legal systems or sets of laws brought from Egypt at the time of the Exodus.

The historical period we call Early Antiquity made abundant use of laws, sometimes in the form of digests, but they did not have what we could properly call a codified legal system.

The situation was similar in Greece. Draco had criminal laws written down but there was no desire to conceptualise criminal law as such, merely a political wish to remove the weapons of sanction from the hands of an over-egoistic aristocracy. The Laws of Solon by no means covered all forms of legislation; they aimed simply at achieving *eumonia*, social harmony, without which a city would cease to function. It is worth remembering that the Greeks did not have a word to express the notion of law. The French word *droit* sends us back to what was a philosophical concept for the Greeks, that is, the notion of justice. So it is no good looking for a word meaning code.

For a code of law to be written, the law has to be seen as an independent entity, like science, and this was not the case in Rome until the time of Cicero. Even the first major Roman work of legislation, the Law of the Twelve Tables (451 b.c.) was not really a code either, since no code could ever be drawn up without the aid of that mother of invention, necessity.

Until the end of the Late Roman Empire, Mediterranean societies had possessed numerous compilations of laws, but no legal code in the strict sense of the word. In the Roman Empire, the only source of law was the emperor himself. He would proclaim his decisions via different types of official documents, grouped together under the heading "Constitutions". There were edicts, for

orders of a general nature, mandates, for administrative instructions, decrees for judgements made by the Imperial Council, and rescripts for replies written at the bottom of private correspondence from people seeking legal advice from the emperor in person. Paradoxically, in such a well-organised empire, archives were poorly conserved. By the end of the third century, the need was felt, no doubt in part due to the economic and political disorder that had ravaged the empire for several decades, to establish precisely what the imperial constitutions contained. Several jurists had published compilations during the second half of the second century, but they all proved incomplete.

At the turn of the third century, two publications only a few years apart saw the light. The Codex Gregorianus (circa a.d. 291-292) and the Codex Hermogenianus (a.d. 295 or maybe a.d. 314) both proposed to make the rescripts, whether complete or abridged, available for all in the form of a codex, that is to say a book and no longer a collection of papyri. These were selective private works which tried to respond to a need in society. So we still cannot really say that either was a true legal code, even if a new element had now appeared, a material one this time, their presentation in book form.

The first real attempt to write a code dates from the early fifth century, during the reign of Theodosius II. The Emperor wanted to draw up two: one containing all the imperial constitutions issued since Constantine the Great, the other, a compilation of passages assembled from classical jurists, to be added to the constitutions. Theodosius II appointed a commission composed of eight senior palatine civil servants and a professor of law to undertake the work. They accomplished nothing. In a.d. 435, the Emperor appointed a new commission made up this time of fifteen senior Palatine civil servants and a doctor of law. Their remit was to collect all constitutions of a general nature issued since Constantine and to classify them under the headings "Books" and "Titles". The titles were to be organised around a single subject in chronological order of publication of the constitutions. This meant that if one constitution made a ruling in several areas, it had to be divided into as many fragments as there were relevant titles. And that was not all. The Emperor allowed commissioners plenty of leeway to clarify and modernise the texts to be catalogued. Two years later, the work was complete and it was promulgated on 15 February 438 in the Eastern Empire, towards the end of the same year, in the Western Empire.

The Codex Theodosianus contains sixteen books and concerns both private and public law. The risk run by setting down laws in writing is that of making them inflexible. In order to avoid this, Theodosius himself foresaw that future constitutions would have to be binding on publication. They were to be called novels (that is, *novellae constitutiones*). Six collections are extant from the Western Empire, no collection has survived from the Eastern. In fact, less than a century after the promulgation of the Codex Theodosianus, the Codex Justinianus was published and thus superseded previous legislation. It remained unknown for many centuries in the West.

After conquering Italy, Justinian had of course decided, in his Pragmatica sanctio of a.d.554, to implement the Codex, the Digest and the Institutes in the newly conquered territory, but his legislative corpus never really spread beyond Italy to the rest of Europe.

By the sixth century, these laws had become outdated and legal practitioners were poorly acquainted with them. For practical purposes, but also for political reasons, Justinian decided to assemble them and so became a law-giving emperor. In 528 he asked Tribonian, a professor at the Constantinople school of law and master of offices, to preside over a commission of ten consisting of law professors and lawyers, whose brief was to prepare a legal code summarising Roman law. The following year the commission completed the *Novus codex Justinianus*, which has not survived. In order to guide jurists, Justinian cleared up certain important controversies in his *Quinquaginta decisiones*, but it is not for this reason that he is famous; the works that have left their mark on history, in order of publication, are:

- The Digest (533). Called *Pandectes* in Greek, divided into books, titles, fragments and numbered paragraphs. It contains extracts of classical jurisprudence which combine civil and praetorian law. The compilation, for which ten years had been set aside, took the commission three years to complete. The subject matter was based upon quotations ranging from Quintus Mucius Scaevola, who lived at the end of the second century b.c., to Hermogenian, from the end of third century of this era ; the most substantial borrowings came, however, from Gaius, Paul, Papinian and above all Ulpian. The Digest symbolised the triumph of legal schools over practice, and lawyers were naturally sceptical. It stood for an ideology of power as well; in their attempt to steer clear of popular deviations, the schools had created a "learned" law that was supposed to be an intangible incarnation of classical purity. Above all, they created a single body of law to serve the unifying policies of the ruling power.
- The Institutes (533). A legal primer, for use by students. Its plan is not original, it follows that of the Institutes of Gaius, which date from the second century a.d..
- The Codex (534). Set out like a collection of imperial constitutions, it spans the period from Hadrian up to and including Justinian. The material was taken from the Gregorian, Hermogenian and Theodosian Codes. This work comprises twelve books, an unequivocal allusion to the Law of the Twelve Tables. In order to prevent any alterations being made, the material used to compile the Digest and the Codex was destroyed and no further commentaries were authorised.
- The Novellae. Written in Greek for the most part. Here realism triumphed. In the light of changing lifestyles, Justinian was obliged to intervene to clarify points that had been neglected in preceding unalterable compilations.

Justinian law was symbolic. It aimed at modernising antiquity. The compilations, written in Latin, contained nothing innovatory. They were merely a simplified, condensed revision of existing texts, and aimed at better efficiency. Justinian's compilations, however, represent the

triumph of Constantinople and Beirut jurisprudence and not that of daily usage. In addition, the Emperor, claiming to have followed the model of Divine Law, refers to his mission. Men, the children of God, were finally to be recognised as free and equal, and henceforth would be protected on the grounds that a human being was the sacred incarnation of Jesus Christ and, as such, could not be vilified.

Successive emperors of Constantinople continued the work of codifying the law. Justinian II (685-695 and 705-711) promulgated the Agricultural Law which for a long time was wrongfully attributed to the iconoclastic emperors. It was really customary law regulating certain types of contract and breaches committed mostly during seasonal work in agricultural communities. Alongside this law, also known as the Farmers' Code, there was the Military Law and above all the Maritime Law which dealt with the arming of ships according to the customs of Rhodes.

In 726, the eighty titles of the Ecloga were published under the joint authorship of Leon the Isaurian and his son Constantine V. Based on Justinian law, this is more than a simple novel. For family and inheritance law, it constitutes a substantial modification of the Corpus Juris Civilis. Property law, on the other hand, is rather neglected. In spirit, the Ecloga has a more human face, and for this reason, the power of the state is greatly reduced, the rights of women and children increased and the institution of marriage better protected. In criminal law, corporal punishment on occasion replaces capital punishment but at the same time also replaces certain penalties introduced by Justinian.

Basil I undertook a complete revision of the Justinian compilations. Greek was the language to be used, and the text was to be updated to include laws brought in since the sixth-century compilations. This initial enterprise, the Anakatharsis, was neither completed nor published, though two small codes, the Procheiron and the Epanoaga did see the light.

The Procheiron is a practical handbook, addressing under forty headings the most important areas of civil and public law. It must have been widely used in Constantinople until the fall of the Empire and even long after, for its translation into Slavonic made it available to Russians, Serbs and Bulgarians.

The Epanoaga draws even more on the Ecloga of Leon III than does the Procheiron. Its most interesting disposition, instigated by Photius, provides a definition of the relationship between the emperor and the patriarch.

Leon VI also undertook a complete revamping of Roman law, the most ambitious of the whole imperial period: the Basilica. Although the work was no doubt encouraged by the Emperor in person, it was actually drafted by a commission presided over by the protospatharius Symbatios. The sources were of course Justinian law – more the Codex, the Digest or even the Novellae, including those written by Justin II and Tiberius, than the Institutes – and also the

Procheiron. The Basilica, divided into sixty books, each subdivided into six volumes, cover public, civil and canon law. This compendium of Roman law was so successful that it ousted Justinian's own work. The Tipoukeitos, a twelfth-century table of contents, provides us with precious information on the no longer extant volumes.

Leon VI's work was added to in two ways: on the one hand, by commentaries, entitled scholies (the early scholies date from the reign of the Emperor Constantine VII; the new scholies date from the ninth to the thirteenth centuries) and on the other, by novels, new edicts, of which there are a hundred and thirteen. These novels cover all fields and are arranged in random order.

The publication of the Basilica and the Novellae opened the way to the study of law and to the publication of several specialised works, such as the tenth-century law textbook *Epitome legum*, or the re-edition of Leon III's *Ecloga*, which spread throughout Italy, as well as the publication by a Constantinople judge of the *Peira*, a compilation of case studies and reasoned decisions.

By the end of the eleventh century, this judicial energy had petered out in Constantinople. The last great legal work, the *Promptuarium* or *Hexabiblos*, dates from 1345 and was the work of Constantin Harmenopolos, a Thessalonican judge and curator of legal texts known as *nomophylax*. This work encompasses both civil and criminal law and draws on the *Procheiron*, extracts from the Basilica and later novels.

So it can be seen that the earliest attempts to codify laws were made in Mediterranean civilisations and that for this process to be undertaken, not only was it necessary to have an independent legal system and the political willpower to have the work done but a person capable of carrying it out.

## **Political Willpower**

For the Church, the most fundamentally Roman of institutions to have outlived the collapse of the Roman Empire, the Code of Theodosius offered a model of organisation. There are references in Volume XVI, devoted to questions of Christian faith, that continued to be cited in canonical collections from the sixth until the eleventh century.

Eleventh-century Gregorian reform moreover revealed the need for rationalisation in the presentation of ecclesiastical law. The often contradictory compilations of sources were replaced by an organised collection. The instigator of this reform was Gratian. Even if he was not the first to want to classify canonical sources (Anselmo di Lucca and especially Yves de Chartres in his *Panormia* had both tried to present ecclesiastical law methodically), Gratian was the one who laid the foundations of a new system of codification. He proceeded with Church law in the same way as Justinian had with Roman law, by making an inventory of all the disparate canonical sources and classifying them by the opinion he gave on the questions raised. The title of his work, *Concordia discordantium canonum* (The Concord of discordant canons), makes his intentions perfectly clear. From the moment it was published in the middle of the twelfth century, the *Decretum*, as it is usually called, was immensely successful. Its fame spread not only through Italy, but to France, Germany and England and it became the subject of studies and commentaries by decretists (*Decretum* specialists). One of the better-known is Hugh of Pisa's *Summa*, particularly important on account of its declaration that Roman law should supplement canonical sources wherever these were silent. This effectively sealed the alliance between the two bodies of law and was the starting point for the development of *jus commune*.

In the next century, Gregory IX completed the work of Gratian by promulgating the *Decretals*, compiled by Raymond of Peñafort. This was an assembly of *extravagantes* (extra *decretum vagantes*), that is to say, papal decretals issued later than the *Decretum* itself, in the same way as the *Novellae* postdated the compilations of Justinian. *Decretals* in turn became the subject of study by decretalists.

The contribution of canon law to the political construction of southern Europe was far-reaching, since it defined in modern terms the notion of *res publica*, that is to say, a hierarchical system of authority enjoying institutional relationships with other members of the Christian world, an electoral system, a theory of mandate, respect of the will and the development of consensus opinion.

The notion of hierarchy grew out of the reinforced powers granted to the Papacy by the Gregorian reforms on the one hand, from the submission of bishops to the Pope on the other. A whole system of government was thus redefined. Elections and the granting of mandates gave political power a new dimension. Church assemblies and councils were an inspiration to secular

society. The relationship between community members became institutionalised through laws that, thanks to their having been codified, were becoming increasingly familiar. Gratian's *Decretum*, by renewing ties with the great Roman tradition, gave rise to new aspirations in society as a whole.

The contribution of canon law to the process of codifying was thus essential. Not only did it provide a link between legal classification and political organisation, but it also gave fresh impetus to the notion of legal reflection, whilst granting an important place to legal doctrine, which was to become the very foundation of the whole process.

At the fall of the Western Roman Empire, the Barbarian kingdoms inherited its judicial traditions and combined them with their own. There is nothing surprising in the fact that the Code of Theodosius was recopied several times in Gaul. The oldest book of Barbarian law, the Code of Euric, written in conjunction with Roman lawyers including Leon de Narbonne and promulgated in 476 is a manual of popular Roman law peppered with Gothic rulings. It was apparently replaced by the Breviary of Alaric, the sixteenth-century name for a code full of Theodosian regulations promulgated in Toulouse in 506. Whether this legal code was applied territorially or only to Roman subjects is still a mute point among scholars today. The most important thing about the Breviary of Alaric was its philosophy. It was a *lex scripta*, and as such was above the will of the prince.

Theodoric, King of the Ostrogoths, wanted to be a legislator. For this reason, he promulgated an edict known as the Edict of Theodoric, which selected the major prescriptions of Theodosius II and adapted them to the new circumstances. In his coronation speech in Rome in the year 500, Theodoric is supposed to have said, "We rejoice at living under Roman law and we shall take up arms in its defence. What is the point of having put an end to Barbarian confusion, if it isn't to live under the rule of law?"

Frankish Salic law made use of Roman judicial concepts. If its dating is still a subject of scholarly discussion, its purpose is not questioned. It aimed at suppressing the spiral of violent honour killings demanded by the *faida* code and replacing it with something quite acceptable to the Frankish mind, a negotiated settlement.

The first unusual thing about this law is the fact that it is presented like a pact in the Roman sense of the term, but is in fact a vehicle for peaceful Christian ideas. Moreover, Clovis was not the author. He delegated that task to the Frankish people themselves. According to Frankish tradition, the king was not above the rule of law. But nor, from then on, were the people. They were subject both to the rule of law and to public justice. In fact, Salic law was the result of the cultural assimilation of three different worlds. It was Roman by nature, Christian in concept, Frankish in form. This phenomenon of formally setting down the law in writing coincided with

the early years of the first dynasty of Frankish kings.

Although Charlemagne did not draw up any legal codes, he did correct Germanic legislation, and in this was following on the time-honoured Roman tradition by which the emperor was the source of the law. He amended the Salic law, which became the *lex salica emendata*. He sent capitularies to the *missi dominici*, in which he clarified any dispositions that required particular attention. Then, in 785, Pope Hadrian I handed Charlemagne a canonical collection entitled *Dionysio Hadriana*, which was to become the inspiration for imperial legislative reform. This desire to legislate continued throughout the second dynasty of Frankish kings.

Three centuries later, research undertaken by Gregorian reformers with a view to founding the primacy of Rome led, at the end of the eleventh century, to the discovery of a manuscript of the Digest, thought to be a sixth or seventh-century copy. Thanks to this discovery, legal studies were set up in Bologna as early as 1088 under the aegis of Irnerius, who made civil law an independent discipline, quite separate from the liberal arts and with its own specific technique, called glossing. Glossers wrote marginal comments on texts, studied cases, grouped them together and wrote summaries. From Italy, glossing travelled to England, and to the south of Capetian France, to Montpellier and Toulouse, where schools of law or at least legal study centres were set up around teachers of repute. They were followed by another school, that of the post-glossers. Unlike the glossers, who went in for explicit textual study, post-glossers gave preference to the spirit of the law. This form of study, born in France, found its way back to Italy.

This scholastic approach to the law gave birth in turn to legal doctrine, an indispensable condition for drafting a legal code. Its technical prowess ensured the preponderance of Roman law. In the face of the multiplicity of customs and the lack of royal legislation, it encountered few rivals. But it received a different welcome in southern France, where the Roman tradition was strong, from in the north of the country, which was less influenced by the classical legacy. In the thirteenth century, the difference was so striking that one spoke of *pays de coutumes* [customary or common law territory] for the regions north of a line running from the mouth of the Charente to Geneva and *pays de droit écrit* [statute or written law territory] for those to the south.

Certain canonists, Hugh of Pisa for example, found justification in Roman law for the judicial decisions of sovereigns. In the name of *potestas*, a king could repeal a bad custom. Men of law took up this idea and affirmed that the confirmation of good customs or the abolition of bad ones was a kingly duty. So, throughout the twelfth century, kings polished, added to or chipped away at the body of customary law and the meaning to be attributed to it, thus highlighting an aspect of regal power which had become obsolete, namely that of making laws and interpreting the law.

In the thirteenth century, the political repercussions of scholastic law were enormous. In

Orleans, where legal theorists were particularly brilliant, a new vision of legal system order emerged. Their ideas were written down in the *Etablissements* [legislation] of Saint Louis and in the *Livre de justice et de plet*. [The Book of justice and court procedure]. The king had ceased to be a judge and had become a legislator. The thirteenth century was in that respect a watershed. Suger, writing a century earlier, was in no doubt that a king's duty was to preserve a legal system older than the Crown itself. This concept held throughout the twelfth century. But in the thirteenth century, jurists affirmed the king's right to act in judicial matters in the name of *utilitas publica*; this not only clearly staked out the king's field of competence but indicated the limits assigned to him.

In thirteenth-century France the king therefore legislated for the whole kingdom, via ordinances. The idea was growing that royal legislation had to be implemented. The third dynasty Frankish kings continued the work undertaken by those of the two preceding ones. The jurist Philippe de Beaumanoir went further still. Taking his inspiration from Roman law and from the canonists, he affirmed that the king could issue any law he wished if it were for the common good. From an intellectual point of view, Beaumanoir considered this notion to be part of the "general safekeeping of the kingdom," which was the king's responsibility. The time had come when one could say: "The king is the sovereign, he is above everyone." In the first half of the century the king still had to summon a plenary court of vassals and obtain as large a following as possible, if he wanted to pass a legal measure of concern to all. From the second half of the century, a majority decision was sufficient. By the next century, Philip the Fair had replaced the vassals' court with the king's council for the elaboration of normative legislation. Beaumanoir continued to insist that in times of peace only the *grant conseil* was competent to make laws but that in time of war the king could act alone to pass an edict of general importance. Even if these were timid achievements, the foundations had been laid. The king had become a law-making prince, for public law at least. In the field of private law, the scope of royal legislation remained much more limited.

The king was nevertheless efficiently seconded by his agents, in particular by magistrates and stewards who pressed for customary laws to be set down. In the North, *Le très ancien coutumier normand* dates from the end of the twelfth century, *Le grand coutumier normand* from the middle of the thirteenth, as do the *Conseil à un ami* [Advice to a friend] by the magistrate Pierre de Fontaine for the region of Vermand, the *Livre de justice et de plet* for the region of Orleans, the *Etablissements de St-Louis* for Touraine and the Anjou region and the *Coutumes de Clermont-en-Beauvaisis* by Philippe de Beaumanoir.

In southern France the statutes of Avignon and of Arles date from the mid-twelfth century. The customs of Montpellier, the statutes of Marseilles, the customs of Cahors and of Toulouse are all thirteenth-century. Such compilations certainly allowed the law, which was often

sketchily known, to be fixed and rationalised by means of learned techniques, but it also ensured that everything was geared to suit the monarchy. The king could also rely on the competence of certain university-trained officials.

In the Iberian Peninsula, Roman law had been handed down by the Visigoths and the notion of public power had remained, in people's minds, as a reality that only events had prevented from materialising. Nevertheless, as everywhere else, a system of local customs was in use, backed up by *fazañas* [court holdings], which established precedents. Very early on, rulers undertook to write down the law. This resulted in the Barcelona Usatges, [Customs] the *Fuero General* [Spanish *fuero*, Valencian *fur* = law] of Navarre, and the *Fuero Juzgo*. And as everywhere else, Roman law influenced Spanish law, in the *Fuero real* and especially the *Siete Partidas* [Seven-part code], compiled under Alfonso X (the Wise) of Castile, as well as the *Fueros* of Aragon, the *Furs* of Valencia, all dating from the thirteenth century. The *Leies gerais* [General laws] of Alfonso II of Portugal are more interesting, inasmuch as they base power on natural law. In 1413, the Catalan Corts petitioned for Catalan legislation to be codified. Twenty years later, the Madrid Cortes begged King John II to put an end to "the mysteries of the law." By the end of the century (1484) the *Ordenanzas reales* [Royal edicts] of Castile were published, but were never promulgated.

By the fourteenth century the French king disposed of legislative power through edicts that dealt with public law and reform of the kingdom. As for private law, governed by *la coutume*, the king tried to stabilise or at least rationalise it. Many specialists feel that the writing of *coutumiers* [customary law digests] derived from the methodical spirit of Gratian's *Decretum*. One could call these second generation *coutumiers*, always private in origin, and containing many defects in content and form. Examples are *La très ancienne coutume de Bretagne* (circa 1330), the late thirteenth century *Le grand coutumier de France* and *La somme rural* (circa 1392).

In order to compensate for the weaknesses of the preceding century, Charles VII, in his Edict of Montils-les-Tours (1454), ordered his magistrates to write down the customs within their jurisdiction. On account of the uncertainty of customs, legal practitioners actually tended to prefer Roman law. This royal intervention, however, was concerned with customary law and in addition, the edict was poorly thought out. The draft text for each jurisdiction had to be sent back to the king, who was supposed to consult the Parlement before it could be promulgated. The experiment showed that the Parlement, swamped as it was with complaints, was unable to cope. The king altered the system in his 1497 edict. From then on, delegated commissioners from the Parlement drafted the projects proposed in each district by magistrates assisted by local notables.

If the results of this official redaction were rather disappointing, they nevertheless indicated two firmly-rooted tendencies, namely a move towards a definitive version of customary law and a desire for unification of the law. Countries close to France were going in the same

direction. In 1430, for instance, Amadeo of Savoy published his *Decreta seu Statuta*. So it can be seen that the process of codifying laws, born of the Roman Empire, was passed down, in spite of obstacles, by kings who relied more and more on a doctrine born of the Church.

This phenomenon, Mediterranean in nature, found an echo in Scandinavia. In Denmark, three laws, one for each of the three provinces of Skania, Zeeland and Jutland were written down in the thirteenth century and later approved by the king. The Law of Skania is the oldest. It was first written, in a version now lost, in the twelfth century, then drafted again in Danish between 1203 and 1212, then in Latin between 1206 and 1215 by Andres Sunesen, Archbishop of Lund. The Law of Seelund was composed between 1220 and 1250, in Danish, by private citizens. There again, it exists in two versions. The Jutland Law was published at the initiative of King Valdemar II, in 1241, at the general assembly of the kingdom held in Vordingborg, and was enlarged during the fourteenth century.

At the beginning of the thirteenth century, the Swedish regions, separated by immense areas of forest, each had their own customs. These were written down at the initiative of a laghman, a "lawman" who memorised the law. The oldest draft, going back to the early thirteenth century, is the Law of Vestrogothia. Those of Ostrogothia, Upland and the island of Gotland date from the end of the century. Under the aegis of King Eric (1319-1365), all these laws were grouped together in one code, whose official promulgation was prevented by the Church. The Law of Vestmannland, the Law of Småland and the Code of Helsingeland (which was to serve as the model for Finnish legislation) were not written down until the fourteenth century. Lastly, there was the *Codex Christophorianus*, imposed by the nobles on the monarchy in 1442.

After the reign of Harald Fairhair, Norway had four types of customary law: northern customs (*Frostathing*), based at Nidaros (Trondheim); western customs (*Gulathing*) around Bergen; central customs (*Eidsivathing*) and south-eastern customs (*Borgasthing*) for the area between present-day Oslo and Göteborg. These four laws were also written down in the twelfth century at the instigation of the *lögmadr*, the Norwegian equivalent of the Swedish laghman. Two thirteenth-century versions of the *Frostathing* and *Gulathing* laws are well known. King Magnus Magnusson (1263-1280) was asked by the assemblies of the four provinces to reform their laws and to produce a new code for the whole kingdom. Completed in 1274, this code was, with minor modifications, merely a compilation of previous laws.

To begin with, Iceland was a land of unwritten law. The introduction of writing into the country dates from 1117 and at the *althing*, a general assembly of free men, of that year, it was decided to set down the laws adopted during that session. Two texts have survived, a compendium of ecclesiastical law dating from 1123 and *Gragas*, a general compilation of Icelandic law, a sort of common law digest composed when the island pledged allegiance to Magnus of Norway at the end of the thirteenth century. In order to integrate the island better

under the Norwegian crown, Magnus wanted to impose the Jarnsida, a copy of old Norwegian laws, but given the islanders' reticence, Magnus's son, King Erik, allowed them to use the Jonsbok, which both the people and the clergy grudgingly accepted. The Jonsbok, named after Jon Einarsson, the Norwegian lögmadr who introduced it to the island, is a compromise between old Icelandic law and the Magnus code.

In the Holy Roman Empire some people were also asking for laws to be codified, among them Nicolas of Cusa (Cusanus) who called upon the Reichstag to create a single code out of the mass of customs.

At the dawn of the modern era, this vast move towards codifying the law was in need of a shape more in keeping with the times. In France, compilations of customary laws, which had been envisaged in the fifteenth century, were the first step. The *Coûtumes d'Orléans* were completed in 1509, those of Paris in 1510. This drafting had two contradictory consequences. On the one hand, customs of limited geographical application disappeared; on the other, existing differences between customs, now easily identifiable, were exposed to the light of day. For the sake of harmony, the monarchy therefore decided to reform customary law, by unifying a body of regional law around the most preponderant custom. The customs of Burgundy (1575), Paris and Brittany (1580) were reformed in this way. This task of smoothing out the judicial norm allowed the king progressively to oust Roman law, which a number of doctrinal commentators would have liked to see applied in France, in favour of royal French law. Throughout the whole of the modern period, there were two different movements in favour of classifying the law. On the one hand there was legal doctrine, on the other, royal legislators.

Setting down customary texts in writing provided the basis for a corpus that was swiftly and abundantly commented upon by the legal theorists. From the beginning of the sixteenth century, a doctrine of customary law saw the light, written, among others, by Argentré for Brittany, Dumoulin in his *Discours sur la concorde et l'unification des coutumes de France*, Hotman in the *Anti-Tribonien*, Coquille for the Nivernais region. Their work went beyond simple commentaries. Very often, they wrote theoretical treatises that would have a crucial impact on the legal code whose two hundredth anniversary we are celebrating this year, all the more so since it was the Roman law specialists, Alciat and Cujas, who helped sever Roman law from any concrete application. The Edict of Villers-Cotterêts (1539), also called the "*Guillelmine Ordonnance*," after Chancellor Guillaume Poyet who prepared it, laid down the essential conditions for future legal codes. French, not Latin, was to be the language of all judicial and notarial acts. In addition, procedure was reformed, ecclesiastical jurisdiction was limited, priests were obliged by law to keep baptismal registers and craft-based guilds were banned. In other words, it intervened in numerous fields of judicial life. Towards the end of the century, this

move towards codifying the law increased. In Orleans in 1560, then in Blois in 1576, the States-General requested that all applicable laws be assembled. Articles 207 and 208 of the Edict of Blois ordered commissioners, under the direction of Barnabé Brisson, president of the Paris Parlement, to collect all texts in force into a single, organised volume. In February 1587, Brisson presented the King of France with the Code du roi Henri III . Each of the twenty volumes was subdivided into titles and these into numbered articles. In order to become law, the code needed to receive the approval of the Parlement, but both Henri III and Brisson were assassinated two years later and even if the code was updated and reedited between 1601 and 1622, and referred to as a model by the editors of the Encyclopaedia, the Code of King Henry III was never enacted.

The seventeenth century was a century of legal theorists. There was of course Loysel. Facetious by nature, but efficient, he set down the principles of French law in sayings that have survived to this day. Then there was Domat, who in his *Loix civiles dans leur ordre naturel* (1689-1694) investigated the place of natural law equity in Roman law. There were also attempts to find similarities in Roman and French law, by Thomas Cormier, for example, in his *Code du roi Henri IV*. Brosses's *Forenses* (1612), a code of legal decisions, on the other hand, and the *Codex fabrianus* (1605), drawn up for the Savoy Senate, were collections of court holdings and decisions. These doctrinal works confirmed the existence of *droit commun coutumier* [customary common law]. In the reign of Louis XIV, Lamoignon, the first president of the Paris Parlement, wrote a series of articles aimed at "reducing all customs to one." In the first half of the century, the great reformatory edict of Chancellor Michel de Marillac had failed on account of opposition from the parlementaires. It was mockingly referred to as the Michaut Code, after its author. Jacques Corbins' *Code de Louis XIII* (1628) had simply been compilation of Louis XIII's edicts about certain aspects of public law. Colbert was the architect behind major ordinances sometimes referred to as the Code Louis. Dealing first with civil then with criminal procedure (1667 and 1670 respectively), they were drafted by a commission of members of the Conseil d'État together with competent jurists from the relevant fields. Strictly speaking, these were not codes but rather texts aimed at standardising procedure and thus a means of controlling the cunning legal fraternity. Ordinances regulating forests and waterways (1669), trade by land (1673), the merchant navy (1681), the navy (1692) and slavery (the Code Noir of 1685), all aimed at revising the judicial domain over which each had authority and as such are only partial codes.

The last century of the ancien régime stands out, as everyone knows, as an era of enlightenment. It was a period that saw the publication, in 1747, of Bourjon's work, *Le droit commun de la France et la coutume de Paris réduits en principes* [The common and customary laws of France summarised in principles]. This text uses a method analogous to that of Domat, but this time for Parisian customs rather than Roman law. The major work of the century, however, was that of Pothier. A professor of French law, Pothier tried to assemble the customs of

Paris and Orleans and Roman law. Some wanted to go even further: one lawyer, Linguet, in his *Théorie des lois civiques* (1767) suggested using Ottoman law as a counter to the French legal mosaic. The unfortunate man was sent to the Bastille by the King, then executed during the Republic. In 1771, Guyton de Morveau, advocate-general of the Burgundy Parlement, appealed for the creation of a commission of jurists whose remit would be to produce a twenty-chapter synthesis of the law, to be ratified by the King. Another lawyer, Petion, in his *Les lois civiles et l'administration de la justice* (1782 - 1783), grouped together existing laws on divorce, parentage and inheritance. In 1788, yet another lawyer, Picard de Prébois, published his *Introduction à un seul code de lois*. For criminal law, Beccaria's *Traité des délits et des peines* (1764) is often considered to be the point of departure for later criminal codes. Among the philosophers, although Montesquieu was not in favour of codifying the law, Diderot and Rousseau dreamed of it as the very basis of a new order. Rousseau, in his *Considérations sur le gouvernement de la Pologne*, contemplated drafting three codes, political, civil and criminal. Alongside these works by theorists, there were systems of legal classification limited to a specific geographical area. One example is the Code de Lorraine (also called the Leopold Code) which assembled in chronological order the edicts of the Dukes of Lorraine. Another is the Code Corse which, on order of the king, classified edicts proclaimed on the island of Corsica from the date of its incorporation into the French crown in 1768 until 1789. Chancellor d'Aguesseau standardised laws concerning donations (1731), wills (1735) and entailments (1747) for the whole of France. Two undertakings show that things were moving in the direction of a complete classification of the legal system. In 1759, two magistrates, Laverdy and Langlois, both counsellors at the Paris Parlement, suggested the standardisation of customs by legislative process, while at the same time maintaining any "totally contradictory regulations". In 1771, Chancellor Maupeou, in an attempt to reduce differences in customary law, wrote a text on Norman customs, which was never completed.

As in the medieval period, this desire to codify the law spread throughout Europe and even round the whole Mediterranean basin. In 1504, Queen Isabella of Castile, in a codicil to her will, left instructions for the law to be codified. A few years later, similar petitions flourished in Catalonia. William IV of Bavaria likewise set to work. In 1520, he bestowed on his country revised and uniform legislation in the form of the *Gerichtsordnung* and collected administrative legislation in *Der Buch der gemeinen Landrat-Landsordnung*. The *Codex statutum* (the urban code of Alexandria), came out in 1547, and was the earliest in a long line of similar publications throughout the second half of the century in Flanders, Italy, and Spain. In the reign of Christian III, a classification of Danish law was drafted by Eric Krabbe, but it came to nothing. Reginald Pole, in the reign of Henry VIII of England, had seen a system of royal codification as a means of making the law known and had even gone so far as to recommend replacing English law with

Roman law. His son, Edward VI, in his *Discourse on the Reform of Certain Abuses* (1551), suggested that this codification be undertaken by the sovereign. The *Corpus Juris Canonici* was published in 1580.

During the seventeenth century, the first legal codes came out of northern Europe: Maximilian I of Bavaria's *Der Landrecht* (1616), *Der Landrecht des Herzogthums Preussen* (1618), Anselm's *Codex belgicus* (1648), as well as legal compilations in both Denmark (1683) and Norway (1687). But all of these are really only reassembled collections of normative regulations, similar to the *Recopilación de las leyes de las Indias* (1681) for Spanish legislation overseas and the *Recopilación de Guipuzcoa* (1696) concerning regulations to be implemented in that province. Back in England, Sir Francis Bacon, in his *De Augmentis Scientiarum* and other authors in similar works, were calling for the creation of a commission to classify legislation, but major political events in the country prevented this from happening. A few new urban codes saw the light; among them a compilation of the privileges and freedoms of Orange by Philip of Nassau (1607) and Le Mire's *Codex Regularum*, (1638) published in Antwerp. By 1672, Leibniz was planning a *corpus juris*.

The eighteenth century saw the publication in Austria of the *Codex Ferdinando-leopoldinus* by von Weingarten (1701) and three years later the *Codex Austriacus* by von Guarient. In 1704, a military code was published in the Netherlands and other codes followed, namely the *Codex Batavus* by van Zurck for the province of Holland (1711) and the *Codex Gelro-Zuthanicus* by Schrassert (1740) for Zeeland. Victor Amadeo II, King of Piedmont and Sardinia, published his *Leggi e Costituzioni* in 1723, the *Sveriges Rikes Lag* (Law of the Kingdom of Sweden), which groups together legal provisions in civil, criminal and procedural law, appeared in 1734, the same year as a Finnish code. In 1752, the Marquis of Ensenada failed in winning King Ferdinand VI of Spain over to his plans for a legal code. In the same year, Elector Maximilian III Joseph of Bavaria had criminal law codified, followed by procedural law in 1753 and civil law in 1756. The Piedmont of Charles Emmanuel III registered the publication of the *Leggi e Costituzioni de Sua Maesta* (1770). The Duchy of Modena modernised its laws by introducing a general code, the *Codice Estense* (1771). Grand Duke Leopold of Tuscany supervised a hundred and nineteen-article criminal code nicknamed the *Leopoldina* (1786), a blend of property and procedural law. Joseph II's Austrian Criminal Code (1787) contained two hundred and sixty-six articles. The most important work by far was inspired by Voltaire's musician friend, Frederick II of Prussia. Between 1749 and 1751, a first draft bill, entitled the *Frederick Code* was published and translated into French. Chancellor Carmer carried out a revision of the work, which did not see the day till 1794, under the title *Allgemeines Landrecht* (ALR), a gigantic work of 19,000 articles covering the whole of civil, criminal, feudal and ecclesiastical law. At the same time, France was witnessing the flowering of a host of private

codes that dealt with specific points, among them Saugrain's Code de la librairie ( 1744), Laverdy's Code penal (1752), Duchesne's Code de la police (1758) Henriquez's Code des seigneurs haut-justiciers (1761) the anonymous Code des Terriers [Land registry code], the matrimonial codes drawn up by Le Ridant (1766) and Camus (1770) and finally the 1772 Code des parlements, also published anonymously.

### **The French Corpus**

At the outbreak of the French Revolution, there were sixty-five general customs and three hundred local customary variants in the north of the realm, while the south was under Roman customary law, that is, customs based on Roman law, with variations according to the competence of each parlement. This judicial diversity, besides being impractical, no longer corresponded to the spirit of the times. There was a need for uniformity and standardisation, for everything to be under the one rule of law, which in turn would be the cornerstone of the whole edifice. Certain cahiers de doléances contained requests for this rationalisation; there was even a rural community in the Cotentin peninsula that asked for a French civil code. The leaders of the French Revolution, combining dogmatic desires with reason, wanted to create a single code for each branch of the law. Consequently, they decided to have a commercial code. During the ten-year period of the Revolution, nothing was done about it, but it finally saw the light, along with a criminal and a civil code, in 1807, thanks to Napoleon. The 1791 Constitution actually announces, in its first title, that "a code of civil laws common to the whole kingdom shall be drawn up." This firm political intention found expression in an appeal to "all citizens who have pertinent ideas on the improvement of the law" but that is as far as things went. On 2 October 1792, the Convention created a Commission of Civil, Criminal and Feudal Legislation, presided over by Cambacérès.

The classification of criminal law did have a measure of success, for two codes were published: one in 1791, the other in the year IV. As for civil law, it was dealt with in stages. In October 1791, as we have seen, the Legislative Assembly made a universal appeal to French and foreigners alike, to "give the nation a code worthy of its people and of the century in which we live." Public opinion saw in this appeal proof of the absence of ideas on the part of the lawmakers; however, that was certainly not the only possible explanation. Given that the leaders of the French Revolution had just declared the Rights of Man and offered them to the entire world, what could have been more normal than to expect a flood of enthusiasm to converge on them? Totally convinced as they were of their mission, it seemed obvious to them that "enlightened people" the world over would feel concerned in the process and would be flattered to participate in the general regeneration. Target's attitude, as will be seen further on, provides a good illustration of the naiveté of the Enlightenment. No sooner had the monarchy been reversed

in 1792 than Lathenas launched a vibrant appeal: "Let us hurry to reform the code of civil laws under which we live." The wind of change blowing through Paris was really political in nature: morals had to be regenerated, man changed, society metamorphosed. Consequently, new rules had to be proclaimed. This task fell to the constitutions, but the first in particular, as we know, failed. The second, that of year I, was never implemented. For a while, survival was more urgent than philosophy. There was no time for thought, only for action. A lot of talking was done and a lot of hasty executions carried out. In March 1793, Jean Bon Saint André called for a "truly republican code." The Legislative Commission ordered six members to draft a decree to this effect. The need for a civil code was proclaimed, and some set to work with enthusiasm. Cambacérès, sometimes nicknamed the "Sisyphus of codification," introduced three draft bills; Jacqueminot drew up a fourth. All four failed. The time was not yet ripe.

### **The draft bills.**

The first draft bill, called the Cambacérès Bill, was actually drawn up by the Systematic Section of the Convention's Legislative Commission, under the direction of Cambacérès; it was made up of twelve, later sixteen, out of the total of forty-eight members, four new members having joined unofficially. Among them were Oudot, Garan-Coulon and Merlin de Douai. This draft bill, containing seven hundred and nineteen articles, followed the layout of Justinian's Institutes: people, property, obligations, shares. It drew to a large extent on Pothier and on Guyot's *Répertoire de jurisprudence* [Repertory of case law]. It was introduced to the Assembly between 22 August and 28 August 1793 and showcased Republican centralisation in the face of Girondin federalism. Built on the foundations laid by the 1792 Divorce Law, this bill proposed a vision of the family that Bonaparte was not to adhere to. The administration of a couple's property was assured jointly by the spouses; paternal authority was abolished and the family directed by a family council. All illegitimate children recognised by the father (with the exception of those born as the result of an adulterous union) enjoyed the same inheritance rights as legitimate children. Adoption by an adult of either sex, whether married or not and with or without children, was allowed. Inheritances were to be divided equally. The Convention promulgated a part of this code, but not the whole text. A lot has been written about the failure of this civil code bill. The enmity felt towards men of law and legal practitioners in the years 1792 and 1793 is sometimes evoked as the reason. After all, it was Danton who said, "All men of law are revolting aristocrats." In November 1793, when the Terror had become a form of government, it was out of the question to start reflecting on a civil code. So matters were adjourned until such time as peace should return, and like the Constitution of Year I that was locked away in a cedar casket and forgotten, it was never implemented. In fact, Robespierre, the man of the day, never seems to have been in any great rush to adopt a civil code.

The idea of a civil code was again in the air from Germinal Year II, after the passage of the Law of 12 Brumaire Year II (2 November 1793) concerning illegitimate children and the Law of 17 Nivôse Year II (6 January 1794) relating to inheritance, which from Year III came under attack on account of its retroactive character. Saint-Just wanted a code, and members of a commission were chosen to codify more than ten thousand legislative texts that had been drafted by the Constitutive, Legislative and Convention Assemblies. Cambacérès's second draft bill was introduced on 23 Fructidor Year II (9 September 1794). It contained only two hundred and ninety seven articles and was little more than a simple "good conduct manual" (Gaudemet). In it, individual freedom was presented as the foundation of contractual liberty, in accordance with the social contract theories of the time. Society was perceived of as the product of voluntary contracts between individuals. The first ten articles were passed, but political events forced the whole text to be abandoned.

In Brumaire Year IV (October-November 1795), the Conseil des Cinq-Cents [Council of Five Hundred] decided to set up a commission to simplify and classify the laws. This commission drafted the third of Cambacérès's bills, which was read out on 24 Prairial Year IV (12 June 1796). Its one thousand, one hundred and four articles reflected contemporary ideas better. The husband now became the sole administrator of the property of the joint estate again, illegitimate children received a lesser share than legitimate children, with whom they nevertheless competed. Couples with children were barred from adopting, as this was considered only as a substitute for natural descendants. But that was not enough for the bill to become law. The Council of Five Hundred began by axing articles concerning divorce, which had become an inflammatory subject. Cambacérès wanted to obtain a vote on the first articles of his code, concerning parentage. Only two were ever debated. This time, the wind of history had radically changed. The very idea of divorce made people shudder; the term "natural-born child" seemed almost improper.

Jacqueminot's Bill of 30 Frimaire Year VIII (20 December 1799) bore the scars of these profound and rapid changes in public opinion. As early as 1797, Portalis was talking of abandoning "this dangerous ambition of writing a new civil code." Jacqueminot saw things differently. For him, the process of codifying the law had to be carried out in stages, which would allow for enactment section by section.. On 26 Frimaire Year VII (16 December 1798), in the name of "the civil code bill commission responsible for presenting a civil code bill," he wrote a text on the registration of births marriages and deaths. After the coup d'état of the following year, Jacqueminot became a member of the Council of Five Hundred, which some legal historians, Halpérin among them, qualify as "a rump parliament." This body was supposed to sit for as long as it took to draft the Year VIII Constitution. Jacqueminot worked alongside Cambacérès, Tronchet, Favard and others, and we know that Bonaparte appreciated his work. In his introduction to the bill, Jacqueminot denounced "the crazy and fanatical definition of equality"

which was tarnishing the civil laws of the Convention. This text already contained some of the new principles that were to be consecrated by the Civil Code: the institution of marriage was to be safeguarded, divorce restricted, paternal authority restored, property settlements were to be made easier and the rights of natural-born children reduced. This bill did not reach the debating stage, but was to inspire many articles in the Civil Code.

Alongside these official drafts, there were many others by private citizens. The earliest were probably Olivier's *Nouveau code civil* and Philippeaux' *Projet de législation civile*, which both date from 1789. At the same time, numerous less ambitious pamphlets were in circulation on burning issues such as birthright: Lathenas' *Inconvénients du droit d'aînesse* [Disadvantages of the right of primogeniture] and, naturally, divorce, a subject which generated many a clash. Its most famous opponent was the Abbé de Chapt de Rastignac, author of *Accord de la révélation et de la raison contre le divorce* [The joint denunciation of divorce by Revelation and Reason] (1790), while its advocates were led by Hennet ( *Du divorce*, 1790). The years 1789 to 1791 saw the publication of several small private codes containing compilations of decrees passed by the Assembly and methodically arranged under the headings French, feudal and rural codes.

After the fall of the monarchy, partial and even fairly complete codes abounded. Now that the nation had been orphaned by the death of its king, it was almost as if the drafting of a code of laws would lay the foundations of a new system. The innumerable petitions for civil law reform during this period bear this out. One need only mention Durand de Maillane's *Plan de code civil*, read out to the Convention on 8 July 1793; the Convention, infuriated by the slow progress of the Civil, Criminal and Feudal Legislation Commission, had put pressure on the author to produce it; but his eagerness was all in vain, for the bill, like all the others, was set aside.

In Year VII, after having read a manuscript of Bentham's *Principles of Civil Law*, Joseph-Elzéar Dominique Bernardi published his *Institution au droit civil et criminel*. This was not strictly speaking a draft civil code bill, it was more a textbook. Bernardi went on to become the prototype of the Napoleonic jurist, and as early as 1785 had spoken in favour of a code of simple uniform laws. In Year VIII, greatly disturbed by revolutionary events, he drew an apocalyptic picture of them in an anonymously published text: *De l'influence de la philosophie sur les forfaits de la Révolution*. [On the influence of philosophy on the heinous crimes of the Revolution]. In 1801 he was professor of Roman, then civil law in the *Académie de Législation* before being appointed by Napoleon to the Ministry of Justice. Bernardi's ideas, as expressed in his *Institution au droit civil et criminel* are characteristic of what is referred to as the Thermidorian reaction. He believed that Roman law was the best weapon for destroying Revolutionary legislation and he set great store by the notion of patriarchal authority, which he called "the most precious" of Roman institutions. In 1803, he published a *Cours de droit civil*, a course in civil law whose fame spread abroad and which was translated into Italian.

During the Directory, several doctrinal works were published, often inspired by ideas close to Bernardi's. One example was Gouilliard's *Exposition des règles du droit ancien* (Year VII) which proposed a reconstruction of legal science on the basis of Roman law. Similarly, in 1799, Jean Guillemot, a member of the law classification commission before becoming professor of Roman law at the Dijon Law School in 1806, presented a private draft of an inheritance code bill to the Council of Five Hundred. It was written to form part of the Civil Code, and as a sequel to his draft of the Civil Procedure Bill, published two years previously. The Inheritance Code Bill contained two hundred and forty four articles and was preceded by a long "Preliminary Discourse". The spirit of this text, full of the ideas of Bernardi and Bentham, can best be summarised as follows: if there is order at family level, "little needs to be done to establish order in the state." Guillemot was convinced that vanity, the lure of pleasure and the violence of passionate love were the driving forces behind human behaviour. Revolutionary legislation was therefore quite out of step with human nature and there was a definite need to revise the share of inheritance falling to illegitimate children.

Most important of all was the Civil Code Bill drafted by Guy Jean-Baptiste Target, who, before the Revolution, was the Paris lawyer with the highest reputation.. Rumour had it he was a Jansenist or a Gallican. In 1761, during the trial of Père de la Valette, he launched an attack on the Jesuits, arguing that since the Society of Jesus obeyed a general resident in Rome, they were in violation of the principles of French law and order. The expulsion of the Society from the Kingdom of France two years later was beyond a doubt linked with Target's declarations insofar as he considered the Parlements to be guardians of the fundamental laws of the realm and that the Parlement was behind the expulsion. He was an avid reader of Grotius, Pufendorf, Vattel and Burlamaqui, he dabbled in physiocracy, loved things English and American ( he knew Bentham's works well, at least in translation, and was a friend of Franklin) and was interested in the ideas of Locke and Rousseau. For this reason, shortly before the Revolution, he was of the opinion that paternal power should only mean tutelary power over children and should not embody a principle of authority. He tried to promote the emancipation of Protestants. But, maybe as a result of his own bitter personal tribulations, he was very rapidly convinced that man acted only in self-interest. In 1782, he approached the American Congress with an offer to draw up a code of laws for the United States. He never received a reply. Recognition came finally from France, in the form of Lamoignon's request in 1787 to him and five other lawyers to revise civil and criminal law. In 1789, he was elected in swift succession to the Drafting Committee, to the Courts Commission, to the Constitutive Commission and finally to the Criminal Legislation Commission, all of which did not stop him also drafting the bill for the *Déclaration des droits de l'homme* on July 27 of the same year. By 1791, he was president of the Vth Arrondissement Court in Paris, known as the *Cour de Sainte-Geneviève*, since it sat in the refectory of an old

convent. He refused to defend Louis XVI, claiming to be suffering from "nerves, headaches and breathlessness," a state of health which did not prevent him from becoming president of the Revolutionary Commission in May 1793 or from showing all the necessary zeal the function required. It was a period in which he believed in mankind's ability to renew itself. Over and over again he got carried away by fashionable ideas, before finally falling providentially ill in a farmhouse seven leagues outside Paris; this, he would confess later, saved him from prison and death. By 1798, when he became a member of the Cour de Cassation [Court of Higher Appeal], he was no longer the same person. He was disenchanted with his conception of Man; he had grown pessimistic and, by then, convinced that only good legislation can correct man's egoistic tendencies. He was a member of the 1801 Criminal Code Drafting Commission, before becoming professor at the Academy of Legislation and a member of the Institute in 1803.

His draft Civil Code Bill dates from 1798 or 1799 (the manuscript is undated), and comprises two hundred and seventy two articles. The plan imitates Justinian's system of classification, its philosophy relies to a large extent on Montesquieu and Bentham. Stefano Solimano, who uncovered the text, shows how the provisions of the 1804 Civil Code owe a lot to Target's work. One example is the paternal consent needed for the marriage of a son of under twenty-five years old, even though adult majority had been set at twenty-one; this was both in Jacqueminot's and Target's draft bills. The idea that the husband is the head of the family, common to both the Target bill and the Civil Code, derives perhaps from Bentham or Bernardi, but it may well also quite simply come from customary law and Pothier. The concept of a married woman's legal incapacity, which triumphed in the Napoleonic Code, and which was certainly approved by Napoleon himself, descended directly from Jacqueminot and Target's bills. As did the concept of property. Target, once an opponent of la mainmorte [mortmain], fought long and hard against the notion of privilege. Paradoxically, he did not define property in his draft, doubtless because he assigned it a more important rank. Article XV of his *Déclaration des droits de l'homme et du citoyen* [Declaration of the Rights of Man and of the Citizen] are in fact sufficient: "Property is the right of each man exclusively to use and dispose of certain things. The unalienability of this right is guaranteed by the Body Politic." Now Target, like the Americans, considered the Declaration of Rights to have force of law. Inheritance legislation in the Civil Code also owes a lot to Target, who drafted it in accordance with his physiocratic convictions on the need for wealth to circulate. The provisions for divorce and the status of illegitimate children in the 1804 text were likewise influenced by the ideas of this idol of the legal fraternity. The Civil Code legislation on mortgage is probably the furthest removed from Target's draft. Target felt that the Year VII legislation should be implemented, but it was substantially revised in the Code. He had every opportunity to influence the preparation of the Civil Code when listening to the comments presented to the Cour de Cassation, where he sat.

## **The Preparation of the Civil Code**

The Civil Code which Napoleon Bonaparte introduced in 1804 was therefore the fifth official draft code bill. Some contemporary theorists consider that the bill was introduced deliberately after the reading of an inheritance law, passed on 4 Germinal Year VIII ( 25 March 1800), had served as a test. This was to allow, thanks to the introduction of the notion of *quotité disponible* [the portion of an estate which the testator may dispose of at his discretion], a revision of the strictly egalitarian laws of Year II, which were no longer felt acceptable. The preparatory work is well known through the publications of two councillors of state, Locré and Fenet. Locré, secretary general of the Conseil d'État, had attended all the discussion meetings for all the codes; between 1827 and 1832 he published a *Législation civile, commerciale et criminelle de la France*. Fenet compiled a fifteen-volume *Recueil complet des travaux préparatoires* (1827-1828). These works contain the draft bills, the debates in the Conseil d'État and at the Tribunate as well as presentations of reports read to the Legislative Body. Thanks to these publications, we are well informed about the part Bonaparte played in the pre-legislative drafting process. Alongside these two monumental works, other sources (Thibaudeau's *Mémoires*, for example, or papers edited by Favard de Langlade and Portalis) shed a different, sometimes more spontaneous, light on the discussions that took place.

Napoleon wanted his name associated not only with the success of a code of civil law but also with the prestige it gave the Empire; as such, it was part of his propaganda machine. And the propaganda worked well. For if Sédillez, a tribune, wondered whether the Civil Code really could be the product of one person, by 1808 Pastorét was stating that it was the creation of the Emperor Napoleon alone. This version of the facts circulated throughout the whole of the nineteenth century and even during the 1904 centenary celebrations. If it is true to say that Bonaparte wanted to cement the new French society together with clear, well-defined laws which combined those of the ancien régime with those of the Revolution, the Civil Code and later Napoleonic legal codes were also supposed to be works of transition, aimed at bringing peace and reconciliation. After ten years of revolutionary torment, the French aspired for social peace and stability. The strong position of the Germinal franc, created in 1803, gave the bourgeoisie new confidence. And that is why people considered the Civil Code, through the good graces of Napoleon, to be a consecration of the principles of 1789. Things are not quite as clear cut as that. The Code is more a reflection of Thermidorian thought. The optimistic statements on human nature from the early days of the Revolution had become diluted in the bitter waters of the Terror. People had adopted a more circumspect frame of mind. Human nature had lost its glow. Some writers point to the influence of *The Leviathan*, to Bentham's utilitarian vision and to the thinking of the *Idéologues*. After Thermidor, people admitted that paternal authority was the best way to bring up sons. Bonaparte,

by the way, was of the opinion that men "have the feelings that they are inculcated with... It is just a question of starting early enough."

No sooner had the coup d'état been ratified by the Law of 19 Brumaire Year VIII (9 November 1799) than talk began on creating a civil code. Two legislative commissions of twenty-five members each, replacements for the fallen régime's Conseil des Cinq-cents and the Conseil des anciens, were set up to supervise its preparation. Napoleon proceeded in the same manner as before. The process was that of the elaboration of a statute, each code being, legally speaking, a body of written laws. A commission of specialists, called rédacteurs, was chosen by Napoleon to draft the bill. The commissioners presented their draft to the courts, who pronounced an opinion in the form of observations ; the bill and the observations were then submitted to the Conseil d'État, before being debated in the Tribunate and voted on by the Legislative Body. The bill's constitutionality was then verified by the Senate prior to being promulgated by the Emperor.

On 24 Thermidor Year VIII (13 August 1800), Bonaparte appointed the Civil Code Bill Drafting Commission. It was very small, consisting of only four men: Tronchet, Portalis, Maleville and Bigot de Préameneu, chosen each for their specific skills. In their fifties, with the exception of Tronchet, they were all political moderates. Their remit was to produce a transitional text. People were surprised not to find reputedly the best jurist of the time, Merlin de Douai, in the commission, but although he was the author of the *Répertoire universel et raisonné de jurisprudence*, he had been one of the régicides, and a republican with too strong a personality for the First Consul to be able to contain him. Today, however, the part he played has been reassessed. In the early days of the Consulate, Bonaparte offered him a relatively modest post as public prosecutor at the Cour de Cassation, which de Douai accepted. In his St. Helena memoirs, however, Napoleon attributes to Merlin de Douai such a major role in the discussions on the Civil Code, that some wonder if he did not personally coach Napoleon in law. Others consider that Merlin was never enthusiastic about Cambacérès's drafts and that nothing proves he ever influenced the First Consul.

At seventy-five, Tronchet was the president of the Cour de Cassation and president of the Civil Code Commission. He was born in Paris, and for a time worked as a lawyer in the Parlement, where he represented the customary law of Paris and Orleans. During the ancien régime he enjoyed a good reputation, on account of his consultations; in 1789, he was appointed president of the Paris Bar and became a parliamentary deputy for the Third Estate in the States General. In the Constitutive Assembly, he was responsible for the feudal system and for procedural and inheritance law reform. He was of a moderate disposition, and under the Convention showed exemplary courage in accepting to defend Louis XVI. As a member of the Council of Five Hundred during the Directory, he spoke on matters of criminal law and illegitimate children. His support for the Brumaire coup d'état swiftly won him a place in the

Cour de Cassation and, equally swiftly, promotion to its presidency. By 1801 he was a member of the Senate, by 1802 he had become its president. He was a poet in his idle hours, and even published a few poems.

Portalis, who was said to be a Jansenist, was an Aix-en-Provence lawyer. He had acquired a name for himself in connection with certain notorious cases such as the Mirabeau case and championed the cause of Roman law. Outspoken, but with moderate ideas, he was cautiously discreet during the Revolution. He put in an appearance only after the Terror, as Royalist deputy for the Council of Five Hundred. He had just enough time to write up his report on divorce, before going into exile in Switzerland, then Germany, after the Fructidor coup d'état. Thanks to Napoleon, he was finally able to return to France in February 1800, after which he quickly rose to councillor of state. In 1804 he was appointed Minister for Public Worship, but he went blind and died three years later. It is sometimes said that he is the true father of the Civil Code. One thing is certain, Portalis was the philosophical inspiration behind it. He was the one commissioned to write the Code's Preliminary Discourse, in which he emphasised the notion of transaction. According to Portalis, the Civil Code reconciled *droit écrit* with *coutumes*, *ancien droit* with *droit révolutionnaire*, the need for laws with the morality of the period. Today, legal academics minimise his role. Some consider that the Roman law of obligations was already largely in use in the customary law territory and think that family law in the Code should have been brought more in line with northern custom than with southern French usage. It nevertheless must be said that the Civil Code is really much more a reflection of contemporary usage than of any particular ideology, and this is no doubt the reason for its resounding success. Its moderation must be largely attributed to Portalis, a disciple of Montesquieu and Burke and to the influence on him of the new philosophy of history that was coming from Germany.

Maleville, a traditional Catholic and a defender of religious principles, came from the Perigord. His job was to represent the customs of south-west France and Roman law as it was applied there. After having served as a lawyer in the Bordeaux Parlement until 1789, during the Revolutionary period he was elected president of the Directory of the Département of the Dordogne and member of the Council of Five Hundred. He presented a large number of reports to the Council, in particular relating to illegitimate children and inheritance. He was appointed judge to the Cour de Cassation after the Brumaire coup d'état. In 1806 he became a senator, in 1808 he was made count, and under the Restoration was a peer of the realm [ *pair de France* ].

Bigot de Préameneu, who came from Rennes, represented western French customary law. Before the Revolution, he had been a lawyer in the Rennes Parlement; by 1790 he was on the bench of the Paris Tribunal de Première Instance. Suspicion aroused by his lukewarm attitude during the period of the Legislative Assembly (of which he was a member) earned him seven months' imprisonment in Sainte-Pélagie prison in 1794. In 1797, he presided a section of the

Tribunal Civil de la Seine; after the Brumaire coup, he was appointed government commissioner at the Cour de Cassation, then councillor of state. He was made a count of the Empire and replaced Portalis as Minister for Public Worship in 1808.

The sources used by the authors of the Civil Code were very diverse and fall into five categories. They drew on Roman law, for the most part through the writings of the great eighteenth century jurist Pothier, especially for liability, intestate succession and property law; on canon law for certain matrimonial provisions; on customary law for the matters pertaining to the relationship between spouses and especially for everything concerning marital authority as well as joint ownership of property, paternal authority and certain provisions relating to easement [servitudes] and inheritance law. Royal ordinances were also used (including those written by d'Aguesseau) for regulations concerning the registration of births, marriages and deaths, donations and wills, and proof, while Revolutionary law (referred to by historians as *droit intermédiaire*) was the source for matrimony and mortgages, as well as, to a certain extent, divorce and inheritance, since Revolutionary legislation had been considerably modified in that respect. The four draft civil codes naturally stem from this intermediary law. Several doctrinal sources were also used: Pothier, as mentioned above, Domat to a lesser extent, but also Grotius, Pufendorf, Wolff, Barbeyrac, Bourjon, Ferrière, Argou. Four months after the appointment of the commission, the bill had been drafted. It was passed to the Cour de Cassation, where former revolutionary legislators and previous authors of draft bills such as Oudot, Merlin de Douai or Target sat. They came down in favour of divorce "without precise or specific grounds" and of adoption, which had been set aside by the four commissioners; they were opposed to the mortgage system and one judge even criticised the increased amount of the *quotité disponible*. The draft bill was then sent to the appeal courts [tribunaux d'appel] which added a few observations. From there, it passed to the Conseil d'État.

Discussion in the Conseil d'État centred on content and took place before the Legislation Commission. Not all the councillors of state intervened to the same extent; Cambacérès spoke on several occasions, as did Treilhard, a former lawyer and a regicide, and at the time, President of the Département of the Seine Court of Appeal. The debate between advocates of Roman and customary law was lively, as was that between those in favour of maintaining Revolutionary gains achieved in the fields of divorce and equal division of inheritance and the more moderate Brumairians. Several councillors of state revised the draft to fall in with Bonaparte's wishes – Berlier, Thibaudeau, député in the Convention for the Marais, Emmery, former member of the Cour de Cassation, Boulay de la Meurthe, who had approved the anti-royalist coup d'état of Fructidor Year V and so was presumably a republican, Réal, who was public prosecutor for the Paris Commune. The Conseil d'État approved the introduction of adoption and of divorce by consent, it developed marriage settlement provisions further and suppressed the thirty-nine

articles of Portalis's preliminary book which had contained the principles of equity as inspired by Domat's *Traité des lois*.

As we have already seen, the First Consul played a personal role in the drafting of his code. Article 52 of the Constitution of Year VIII read as follows: "Under the direction of the consuls, a Conseil d'État will be commissioned to draw up draft bills and rules of public administration and to resolve any difficulties of an administrative nature that may arise." Bonaparte presided whenever he felt it necessary over the Conseil d'État sittings devoted to the Civil Code. Out of the hundred and six debating sessions, he was present at over about half, fifty-five in fact. This is proof of the personal interest he took in the codification process; the official name of Code Napoléon given to the work in 1807 confirms it. By way of comparison, it is worth noting that he only presided over four sittings for the drafting of the Commercial Code. He knew how to impose his will in those fields which interested him personally or which reflected his vision of society, namely, hostility towards foreigners, paternal authority over the family, the inferiority of women and the exclusion of illegitimate children. The debate on divorce clearly shows the role he played. Portalis most probably wrote the detailed commentaries on the subject in the commission's draft bill. Divorce had been retained for specific grounds only, for a fault committed by one of the spouses. That is to say that divorce on the grounds of incompatibility or by consent was no longer envisaged. Several councillors (Berlier, Thibaudeau, Emmercy and Cambacérès), as well as Bonaparte himself, defended this option however. So Boulay de la Meurthe finally presented another draft, corrected by Cambacérès at Napoleon's dictation, authorising divorce by consent but with strict and distressful conditions attached. The debate on adoption likewise points to Bonaparte's intervention. Tronchet and Maleville were against it; Berlier was in favour of it as a means of consolation for childless couples, as was Bonaparte, but his reasons were political. After six redrafts, and as a result of endless personal interventions, he accepted a compromise. He acted above all as a catalyst; he was no jurist and was unable to speak as an expert, but his exceptional intelligence, his lucidity and his authority enabled him to guide the debates, to make suggestions and above all steered the group clear of that only too common pitfall of team work, getting bogged down. Napoleon definitely played a decisive role and one could say that without him discussion on the Civil Code would have remained at the stage of a fifth draft, even if on occasion, regarding mortgage for example, for which the Year VII legislation was not accepted, although he considered it superior, he failed to impose his views.

Once the draft had been revised by the Conseil d'État, it passed to the Tribunat, which had to debate it and express its opinion. Suddenly the mood changed. Opposition to the bill was violent and it was almost thrown out. The assembly was composed this time of relatively young men, all attached to the ideas of the 1789 Revolution. The major criticism was over form. In the first place, it was reproached for being dull and lacking in originality and for borrowing straight

from Roman and customary law. Criticism was then aimed at the content. The bill was denounced for being a return to the ancien régime and for betraying the Revolution. So criticism was clearly political in nature and was born of hurt susceptibilities. Under previous régimes, even if it had not amounted to much, deputies had at least been associated with the preparation of codes. So the tribunes indulged in niggling on imperfections of form rather than on the content of the text they had before them. They threw out the Preliminary Title of the Code by sixty-five votes to thirteen. Garat-Mailla feared that the possibility given to the courts to deliver a verdict even when the law was silent on a matter would leave the way open to abuse of power on their part. The section devoted to the enjoyment or privation of civil rights was similarly overthrown as deputies feared the possible return to France of the children of émigrés, the re-establishment of the droit d'aubaine [right of reversion to the State of the estate of a non-naturalised alien] and civil death. The title devoted to the registration of birth, marriage and deaths was almost thrown out as well, for Benjamin Constant feared that women of easy virtue would take advantage of the clause enabling a woman to declare the father's name on an illegitimate child's birth certificate. Having nearly caused the bill to fail, the Tribunate was subjected to sanctions. Bonaparte withdrew the draft bills they were debating and by means of a senatus consultum reduced the Assembly by half in Year X. The fifty eliminated tribunes were naturally the most vigorous opponents of Bonaparte. Among them were Andrieux, Chénier and Benjamin Constant. What is more, the Assembly was divided up into sections and forbidden to have plenary meetings. Finally, a semi-official commission was set up before the official one, which enabled the Tribunate's opinion to be known in advance and consultations to take place.

A yes-no vote was held in the Legislative Body. Before actually voting, the members of the Legislative Body listened to three councillors of state appointed as government commissioners, one of whom made a reasoned presentation in favour of the bill, and to three tribunes chosen to defend the opinion of the Tribunate. The tribunes threw the first title of the Civil Code out by 142 votes to 139. After this initial setback, the thirty-six constituent laws of the Civil Code were passed one by one in the course of 1803 and 1804, without any particular problem. After being read in the Senate, the text was promulgated by the First Consul.

The French Civil Code takes the form of a set of thirty-six laws, and so it was these thirty-six texts that were promulgated by Bonaparte before being grouped together into a single code. Its official promulgation was on 30 Ventôse Year XII ( 21 March 1804) and it bore the title Code Civil des Français. The first official edition was brought out on the blue paper reserved for national documents.

### **The French Civil Code**

In 1804, the Civil Code contained 2281 articles (two more than it does today) and was divided in

the following manner:

- Preliminary Title. Of the publication, effect and implementation of laws in general. Six articles containing general provisions concerning laws.

- Book I Of Persons. Divided into eleven titles, dealing with civil rights, civil status, the family and incapacity.

- Book II Of Property and the Different Modifications of Property. Divided into four titles covering property, the division of property and easement.

- Book III Of the Different Modes of Acquiring Property. Twice as long as the others (1570 articles) and with twenty titles; a real rag-bag, containing inheritance, donations and wills, contracts, quasi-contracts and quasi-crimes, marriage contracts, special contracts, mortgages and privileges, prescription.

The Civil Code is often considered to be a work of transition on account of its varied sources of inspiration. Although admired to start with and almost worshipped under the Second Empire, criticism started to make itself heard during the Third Republic. In the 1904 Centenary Book a more scientific attitude was adopted, even if the general mood was still one of glorification. Nowadays, it is often considered politically correct to criticise it severely. One section of contemporary doctrine dwells on the opposition between the Code and Revolutionary principles, pointing to the fact that the drafters held a pessimistic view of human nature and considered personal interest to be the prime motive of human action. It is certainly true that the tenor of the text is far removed from the years of the Revolution, when people believed in the essential goodness of Man and of the ideals that drive him. The Civil Code sprang, as we have seen, from a Thermidorian vision of things. As far as form is concerned, the presentation of civil legislation in units is excellent. Its plan follows that of Gaius. Stendhal claimed that its style, which has been admired throughout the entire world, to be the French language at its purest. As for content, the Code successfully promotes principles relating to the central ideas of the time: secularism, the rights of the individual, freedom, equality and authority.

Secularism. There was to be a definitive separation of civil and canon law. Birth marriages and deaths would continue to be registered in municipalities, interest loans, forbidden until then by the Church, were henceforth legal; marriage became a civil contract and the civil ceremony had to precede the religious celebration, on pain of penal sanctions. A religious ceremony therefore became optional, since marriage was no longer considered a sacrament, and divorce was retained for the same reason, since it is a procedure allowing a contract freely entered into by two parties to be ended. It is worth remembering Portalis's definition of what was later to be termed French-style secularism [ laïcité ]: "Citizens can profess any religion they like, but there must be one law for them all."

The rights of the individual. The Civil Code adhered to the philosophy of the 1789 Declaration of Man, whereby society is made up of a conglomerate of individuals who for certain reasons associate voluntarily. This view was translated into legal language in Article 1134: "Legally-made agreements have force of law for those who have entered into them." Since Man is capable of thought, he is free to distinguish good from evil, to enter into agreements and make choices. In the intellectual foment of the turn of the century, this notion of free-will, which in fact comes from canon law, was seen as yet another Revolutionary achievement. At the time, it was tempting to see civil and political contracts as one and the same, but modern analysts no longer do so.

Freedom. Inherited from canon law and Christian thought, this idea was not new, but it was entirely revamped. From now on, freedom was to derive logically from the rights of the individual. It must therefore be protected from encroachments from intermediary bodies or from anything that might appear to be one. As a result, there was mistrust of guilds, of neighbourhoods, even of the family as an entity. Freedom was also economic. At the dawn of industrialisation, liberalism was on the horizon. The titles dealing with contracts and property, as well as the occasional articles on the hiring of labour, are infused with this new philosophy. Freedom is contractual, even where matrimonial contracts are concerned. The logical consequence was that anything connected to the ancient order of things, and in particular to feudal society, was ipso jure rescinded. As Portalis insisted, the individual's rights were obviously not absolute. "When it comes to rights," he would say, "the individual is nothing. Society is all." In other words, man does not really exist unless he is part of society, of which the family is the smallest unit.

Equality. It was also of a new kind and considered all free males (slavery had been re-established in the colonies in 1802) to have equal rights. Of course this was not Procrustes-style equality; it was begging the question to say that the newly proclaimed secular state allowed everyone, on condition that they gave themselves the means, by being a property-owner for instance, to lay claim to the same rights. The model was the *bon père de famille*, the *paterfamilias*, who swept away ancient privileges and special rights. As Berlier wrote, "The law is for everyone, irrespective of class or person." However, the foreigner resident in France remained subject, in the absence of any reciprocal agreement, to the *droit d'aubaine*. There was to be no more inequality within the family. Estates had to be shared out equally, the law of primogeniture could no longer be invoked to acquire a larger portion of a family estate than that allowed by "the land-mincer," as the Code Civil has sometimes been nick-named. The portion of an estate that parents might freely dispose of remained sufficiently restricted to prevent any return to a system of firstborn rights. The social consequence was to be the generalisation of a society of small landowners (the law of primogeniture had not been the general rule at all under

the law of the ancien régime) and was criticised in the nineteenth century by people like Le Play. On this one point, one could say that the Civil Code was the faithful disciple of the vision of the citizen held by the Revolutionary legislators, except of course for that brief moment in Year II when, even if they did not go as far as declaring men and women equal, slavery had been abolished and inheritance laws bringing in total equality had been passed.

Authority. This no doubt owed its important place to Bonaparte's vision of the world and to the aspirations of the period. Authority existed in the relationship between spouses; the husband was the head of the family and had control over his wife (Article 213: "The husband must protect his wife ; the wife must obey her husband.") and over his children, the father having sole paternal authority (Article 371 et sq.). Authority was found in the relationship between employers and employees or employers and servants, and between leaseholders and leasers. This authority was backed up by legal constraint if necessary: physical constraint allowing a creditor to place a debtor in prison or a father to intern a son who was still a minor. Similarly, Articles 1780 and 1781 favoured employers over work contracts: "A master's statements are to be believed." This was only meant in connection with wages but it nevertheless is revealing of the degree of dependence in which an employee found himself. A lot of legal commentaries were written about these two articles, which were finally repealed under the Second Empire. Lastly, authority was invoked in all family relationships. Even if an adult unmarried woman or a widow enjoyed full rights, the same could not be said of a married woman, whose status was that of an incapable adult. Adultery on the part of the husband, moreover, was only punishable by fine, and then only if he maintained a concubine in the family home, whereas adultery on the part of the wife was always punishable and incurred a sentence of up to two years in prison; paternity searches were forbidden; maternity searches allowed. Illegitimate children, even if freely recognised, had fewer rights, children born of an adulterous or incestuous union were cut off from all family ties.

The characteristics of this code have often led people to say that it was a code for rural propertied fathers who kept their hands to themselves.

Property defined the individual in this code. No place was even reserved for those without any; property (in accordance with Article 17 of the Declaration of Man and of the Citizen) was sacred, a fact reaffirmed in Article 544. Henceforth redefined with the three characteristics of quiritary property, the Civil Code endowed the owner with rights of usus, fructus and abusus on his property; the separate notions of propriété éminente [eminent domain] and propriété utile [exploitable property] had gone forever.

In this respect, the Code was the heir of the French Revolution. It also consecrated property acquired by purchasers of national assets, who would thus be reassured they could

benefit peaceably from very recently acquired and precarious rights.

Moreover, property was seen as an exclusive, individual and perpetual right and implied that the proprietor owed nothing to the community. The proprietor's absolute freedom began to be restricted in the second half of the nineteenth century, and was seriously brought into question in the twentieth.

The property referred to in the Code, which reflected the reality of the time, was mostly real estate rather than movable goods. Movables represented only a small proportion of a family estate, stocks and shares probably even less probably. In the course of the nineteenth century, the growth of joint-stock companies changed the nature of middle-class fortunes; however shares in the Banque de France were, by the decree of 1808, legally realty and not movable goods.

In fact the Civil Code dealt more with estates than with persons: more articles were devoted to wills, donations, succession, marriage contracts and the administration of estates than to the relationship between spouses, matrimony, paternal authority or even parentage. The main aim was to settle questions of inheritance and dowries, a major issue for practically the whole rural population of the time. That is why the establishment of majorats [entailed property] in 1808 constituted a real revolution.

### **The Dissemination of the Civil Code Abroad**

" Wherever I planted my Civil Code, I sowed freedom by the handful..... Why couldn't my Napoleonic Code have served as a basis for a European code?" wondered Napoleon on St. Helena.

French law actually served as a model long before the French Civil Code came into existence and in more far-reaching ways. Before referring to the dissemination of the Code abroad, it is worth remembering not only the role of ancien droit, but also the significant part played after the Code's publication by French legal doctrine and case law as well as by French Schools of Law throughout the world. French law became an inseparable part of highly influential French culture, language and thought; and French customs had already spread throughout the American colonies, they had been studied in Scotland as well and common law countries had drawn inspiration from Domat and Pothier. But when French law was seen as the vehicle of universal values, it became a reference for the whole world. It is impossible to separate the Civil Code's influence from the propagation of revolutionary ideas and from the constitutional, administrative and penal model provided by "la Grande Nation". Its clarity, its rigour, its precise language, its style, known as Portalis style, plus the fact that it perfectly reflected the spirit of the times, are all qualities which easily outweigh its imperfections. Its strongest point was the new philosophy it breathed into society. It swept away feudal laws, got rid of religion, abolished family constraints. It was totally different from the more or less

contemporary German-language codes, namely the previously mentioned ALR (published in 1794) and the 1811 Austrian Civil Code, the Allgemeines Bürgerliches Gesetzbuch für die gesamtösterreichischen Erbländer der Österreichischen Monarchie ( ABGB), which stemmed from the Codex Theresianus (1753). This had been an initiative of Maria-Theresa's, which remained unpublished on account of unfavourable criticism. Other draft bills date from the reigns of Joseph II, Leopold II and Franz I, but they all used feudal law regulations.

This new philosophy explains the paradoxical success the French Civil Code had in the wake of Napoleon's advancing armies. How was it possible that so many people from the middle and peasant classes, in countries defeated by the imperial French armies, enthusiastically adopted their conqueror's code as their own? Apart from England, governed as it was by common law, few countries refused the French system. The German school did, however, following in this the position of Savigny and his *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* and rejecting the idea of a legal code with its attendant risk of inflexibility. So did those German-language states with legal systems based on ancient German usage, in the former Prussian states and Westphalia for instance, where local laws were maintained until the drafting of provincial codes based on the ALR had been completed, (in 1802 for East Prussia, in 1844 for West Prussia). In German-speaking countries, hostility to a codified legal system triumphed, and this explains why Germany took so long to set codification in motion. There were nevertheless some ardent admirers of legal codification among German academics; one was Savigny's major rival, Thibaut, like him a descendant from a French family that had emigrated to Germany in the seventeenth century. The basis of the quarrel between the two men stemmed from their totally opposed visions of the law. For Thibaut, the Civil Code was based on reason; for Savigny, the sources of law were to be found in history. But it would be wrong to think that Thibaut was an unconditional admirer of the Civil Code. In the article that set off the famous quarrel between the two lawyers, "Über die Notwendigkeit eines allgemeinen Rechts für Deutschland," the Code is rarely cited, and when it is, it is damned with faint praise. Just like the Prussian and Austrian codes, explained Thibaut, the French Civil Code provided excellent "groundwork." Thibaut actually wanted a national German code that would unite the people in freedom, equality and fraternity and that would allow Reason to triumph over the judicial imbroglio of the time and over Barbarian law which was far removed from the needs of the people. Savigny considered that the Civil Code was not only not inspired by Revolutionary ideas, but showed signs of reprehensible enlightened liberalism; in Napoleon's hands, it represented an instrument for dominating the French. It lacked organic unity, with great confusion reigning between rules taken from Roman law, rules from customary law and others from Revolutionary legislation. It was this last argument that convinced Savigny that, before embarking on any codification of the law, there was a real need for research along historical lines into the sources of both scholarly and

and customary law.

Nicholas Friedrich Brauer, an advocate of codification who had drawn up the Baden Landrecht, published a six-volume commentary of the Civil Code between 1809 and 1812. Carl Salomon Zachariae von Lingenthal, a Heidelberg professor, went further still. In 1808 he published a *Handbuch des französischen Zivilrechts* in two volumes. Three years later, the new edition filled four volumes and continued to be published until the death of its author. The final edition was dated 1894 and was the work of Karl Crome, a Fribourg professor who had already published several books on French law, including the *Grundlehren des französischen Obligationenrechts*. In 1838, Aubry and Rau, keen to make the German contribution available to the French public, set out to translate Zachariae's work. From the second volume onwards, it is obvious that this is far more than a simple translation. The two Strasbourg professors in fact used their German colleague's commentaries on the French Civil Code to write one of the major works of legal doctrine to have come out of nineteenth-century France. It was destined to achieve world-wide fame.

The spread of French law throughout Germany was also due to the publication, over the period 1870-1907, of the review *Puchelts Zeitschrift für das französische Recht*, and of other turn-of-the-century journals such as *Archiv für die Zivilistische Praxis* or *Zeitschrift für das gesamte Handelsrecht*. Moreover, during the preparatory work on the BGB, jurists studied all existing bodies of law, including French law of course, and as a result Crome said that half the BGB was French in inspiration; others, notably Ferid, greatly minimised the French contribution. It is not easy to decide who was right. Given that the Civil Code and the BGB have sources in common, it cannot be denied that there are some similarities; just as it cannot be denied that certain French concepts (civil equality, secular family law, personal property) had become common currency in the course of the nineteenth century. Still, it has to be said that non-Roman sources had little influence on German law. More importantly, there was a considerable lapse of time, almost a century, between the drafting of the two texts. By the end of the nineteenth century, the Napoleonic Code was beginning to come under a fair amount of criticism, even in France. So, might one ask, what would have led the Germans to reproduce ideas that were already being criticised?

Russia was a case apart. They refused to imitate the French system, although some, including Speranski, were in favour. For a long time, but in particular from the second half of the eighteenth century onwards, Russian high society had been both francophile and French-speaking. At the beginning of the nineteenth century Alexander I set up a codification commission, presided over by Speranski in person, to prepare a draft civil code (*oulojenie*) as well as a code of commerce. But the Tsar's feelings towards the Emperor were changing radically as 1812 approached; conservative ideas were gaining territory, along with anti-French feeling.

The draft bills were withdrawn and remained at that stage for ever. A few years later, Nicolas I ordered a compilation of Russian laws. The result was a collection of 60,000 articles that filled over fifteen volumes, entitled *Svod Zakonov* (Body of laws) (1833), which included not only civil law but penal and commercial regulations.

Perhaps the most surprising of all is what happened to the Civil Code after the fall of Napoleon. In certain countries, no doubt as an expression of nationalist revenge and from a desire to turn the clock back, the text was repealed. Another reason was that, mainly on account of the abolition of feudal rights, of the introduction of divorce and the removal of the marriage ceremony from the hands of the Church, the Code had been associated with the ideas of the Revolution. More surprising was its retention in other countries, because of support that came either from the population as a whole, or from an elite that was in favour of Revolutionary ideas. At the turn of the century, the greatest competition came from the influence of the German and Swiss codes, but it has to be borne in mind that they themselves had both been influenced by what had really become a common heritage. This opinion, not shared by any single section of doctrine, was put forward by J.L. Reitemeier in his *Das Napoleonsrecht als allgemeines Recht in Europa, insbesondere in Deutschland betrachtet*. When the two prototypes entered into competition with each other, Latin Europe was on the whole seduced by the style of the French Code, from which the more technical and more detailed German version differed. Only the Italians were attracted by the erudition of the German text, which was based on the Pandects. The frustration felt in Italy over the French occupation of Tunisia, the adhesion of Italy to the Triple Alliance along with Austria and Germany and the election of a left-wing government encouraged the Italians to look for other ties which they found in Bismarck's Germany.

Apart from the quarrel dividing advocates and opponents of codification, it is also interesting to observe the variety of treatments the Code received in its different countries of adoption. Of these, we shall propose a selective survey firstly of the territories annexed by France, then of the satellite countries. After the fall of Napoleon, the Civil Code was retained with a few amendments in both these areas, on account of the qualities which the local populations found in it. As the famous saying goes, the Code was imposed *ratione imperii* (for imperial reasons) and maintained *imperio rationis* (for rational imperatives). This apparent paradox can be easily explained if one considers that the form and the concepts of the Civil Code are not innovatory. They derive from Roman and customary traditions and are therefore easily accessible. The Italian Chironi hailed the triumph of Roman thought in the Code, while the German Schneider even discovered a number of traits of German law! Elsewhere, the introduction of the Civil Code often put an end to cumbersome and disparate legislation. Its modernity – equality for all citizens, an end to the feudal system, the introduction of divorce – pleaded in favour of its survival.

Four further sections will deal with the rest of Europe, Latin America, the Muslim world and the rest of the world.

### **Annexed Territories**

**Some of these were annexed by the Directory, others by Napoleon.**

– The first were composed of Belgium and Luxembourg (nine départements), the left bank of the Rhine (four Rhenish départements), the départements of Léman ( Geneva) and Mont-Terrible ( Bernese Jura), the Piedmont ( six départements, five after 1805) . These territorial conquests took place under the Directory or the Consulate: Belgium and Luxembourg in 1795, Geneva in 1798, the left bank of the Rhine in 1800, the Piedmont in 1802. The introduction of French law therefore preceded the Civil Code. This means that the three great innovations which made the Europe of the time shudder, namely, the abolition of the feudal regime, civil marriage, and divorce, cannot be attributed to Napoleon.

When Dumouriez was preparing to cross the Belgian frontier, he published a manifesto characteristic of the convictions of the day and which was to be the inspiration of a whole style of international relations to come. "We shall shortly be entering your territory; we come to help you plant the tree of liberty, and will not in any way interfere in the constitution you may choose to adopt. On condition that you establish the sovereignty of the people, that you refuse to live under a despotic regime of any sort, we shall be your brothers, your friends, your support. We shall respect your freedom and your laws." We know all too well that declarations of this ilk herald the thunder of arms. Belgium, wishing to differentiate itself from Holland after the 1830 Revolution, decided to retain French law. So the Civil Code continued and continues to be implemented there; there have naturally been amendments, relating to privileges and mortgages (1851 and paternity searches (1908), if we consider only those changes made prior to World War I, but it is true to say that Belgium has remained more faithful to the Civil Code than France itself.

At the signing of the capitulation of the fortress of Luxembourg, after seven months of siege, Marshall Bender requested that Luxembourg be allowed to keep its laws and customs. The request was refused by the French authorities who renamed the Grand Duchy the Département des Forêts. The law that was to be applied was therefore French law and what is of particular interest for us here is that it was the law of the Civil Code. At the fall of the Empire, the Code was maintained, on account of the eminent qualities the Luxembourgers found in the new text, its principles of equal rights and civil liberty in particular, but also the simplicity and clarity of its language. No substantial modifications were made to it until the twentieth century.

At the time of the French occupation, the Republic of Geneva was governed by the Civil Edicts of 1568 – revised in 1713 in the light of the 1539 Berry customs – and for matrimonial matters by the Ecclesiastical Ordinances of 1576. At the fall of Napoleon, the Republic of Geneva was reinstated within the exact frontiers of the Département of Léman (1813) but at the Congress of Vienna, Pictet de Rochemont, the Genevan negotiator, dragged more boroughs out of Talleyrand and the kingdom of Sardinia. Thus enlarged, the new Canton of Geneva entered the Swiss Confederation in 1815.

None of this stopped a law being passed in 1816, whereby French legislation remained provisionally applicable in the former Genevan territory and in the Savoy boroughs that had just become a part of the Swiss canton. On to this already complex situation, a new social philosophy was grafted by the King of Sardinia. He had a clause added to the 1816 Treaty of Turin whereby "laws and customs concerning the Catholic religion in force on 29 March 1815 shall be maintained in all the occupied territories unless ruled to the contrary by the authority of the Holy See." In other words, all Catholics from those boroughs that previously belonged to Sardinia before their attachment to Geneva were only entitled to a Church marriage. Divorce, moreover, was suppressed. This meant that until 1861, the Canton of Geneva had very varied matrimonial legislation, while the Civil Code continued to be implemented until 1911.

The case of the Bernese Jura is typical of the inextricable situation in which Switzerland found itself. Under the ancien régime, the territory fell under the territorial competence of the authority of the Bishop Princes of Basel. In 1792, the Republic of Rauracia was established. It was short-lived and by 1793 had been absorbed into the French Republic under the name Département du Mont-Terrible, before becoming two of the arrondissements (= a sub-division of a département) of the Haut-Rhin département in 1800. When the Civil Code was published, the Jura was therefore French. At the fall of Napoleon, administration of the former lands of the Bishop Princes was ceded to the Austrian Baron von Andlau, and at the Congress of Vienna, the canton passed to Bern, with the exception of a few German-speaking boroughs that went to Basel and a tiny enclave that was given to the principality of Neuchâtel. What law could best be implemented in this territory? In 1816, the decision was made to set up a Jura legislation commission in order to draft a corpus of Jura law based on custom and complemented by the 1761 Judicial Code and the 1787 Consistorial Code. This was no easy undertaking for a people emerging from several years under the rule of the Civil Code. As a result, the decision to create the commission was no sooner made than it was suspended, and the French Civil Code was allowed to continue to exist, along with the Code of Commerce, subject to a few necessary modifications that circumstances demanded. In 1816 the Bernese government finally decided that Bernese law (that is the Consistorial Code of 1787) would be applied in Protestant districts, whilst the canon law of the Bishop Princes would be obligatory for matters of divorce, marriage

and legal separation in the Catholic bailiwicks. The same was true for French legislation relating to mortgages; it was abolished in the Protestant bailiwicks but maintained in the Catholic ones. When Professor Samuel Ludwig Schnell was asked to draft the Bernese Civil Code, he sought inspiration from the Austrian Civil Code, which, as we know, was not without French characteristics. But this Austrian-style code did not find favour with the populations of the Bernese Jura, who were granted the right to continue to use French legislation. In the end, the Bernese Jura, attached to the Canton of Bern in 1815, appeared to have had its Civil Code repealed, only to find the 1846 Constitution allowing it to continue to exist where it was already "naturally in force." And so it survived until the adoption of the Federal Code of 1912, and continues to this day in the form of local custom.

At the fall of the Empire, the Piedmont Territories returned to their old laws. In 1837 the *Codice Civil Albertino* was published. It renewed with regional traditions regarding paternal authority, inheritance and marriage, but it still bore the imprint of the French Civil Code. This state of affairs influenced what happened in the rest of Italy. When the Kingdom of Italy was founded in 1861, it adopted almost spontaneously the system of law in force in Savoy, where there was genuine sympathy for France.

– The second group was composed of pieces of Italian, Dutch and German territory

In Italy, it is generally considered that after the Peace of Campo Formio, the French judicial model was imposed because it was a vehicle for the ideas of the French Revolution. The Napoleonic armies did the rest. Even if there were differences of presentation from one territory to another, the codes were substantially identical and Italian law blossomed, tended by the Gallic neighbour whom it had, deep down, always admired. The Directory of the Ligurian Republic (Genoa) was abolished after the Brumaire coup d'état. Given the alarming military situation, a commission called the *Nomenviri* was appointed to prepare a constitution along the lines of what was supposedly being done in France with the Year VIII text; this came to nothing. Bonaparte therefore decided to send a councillor of state, General Dejean, to organise the setting up of an interim body. In 1802, as the Genoese authorities did not wish to be merged with their neighbour, the recently abolished Cisalpine Republic, Bonaparte granted them a new constitution, a splendid façade to disguise the role played by Salicetti, appointed Minister of France in Genoa a month before the text was even ratified. All this led to the outright annexation of the former state of Liguria, which was promptly divided into three French départements: Gênes, l'Appenin, (Chiavari) and Montenotte (Savona). Although they were later annexed to the Piedmont at the collapse of the Empire, the Genoese territories were not governed by Piedmontese law until 1837, the date of the publication of the *Codice Civil Albertino*. Nevertheless, in Genoa, as in the rest of Italy, the provisions for civil marriage and divorce were immediately repealed, as they were

contrary to the Italian spirit.

The situation of the former Cisalpine Republic was not an easy one. After outwitting Austria, Bonaparte had ridden victoriously into Milan in 1800. The new Cisalpine Republic was first governed by a special commission, then by a three-member government committee. Austria recognised the new Cisalpine Republic in the Treaty of Lunéville in 1801. The Consulta held in Lyon the following year was given the remit of providing the country with a Year VIII-type constitution. Bonaparte then became president of the new republic, now re-baptised "Republic of Italy" and in fact administered by its vice-president, Melzi d'Eril. In 1805, Napoleon had himself crowned King of Italy in Milan, and entrusted the vice-royalty to Eugène de Beauharnais. The Civil Code was proclaimed in the kingdom in 1806, in an official Italian translation with no amendments and against the advice of local jurists who saw the need to suppress articles on divorce and joint estate.

Before its annexation to the Empire, only one text of draft legislation had ever been completed in Italy, namely, the Civil Code of the Roman Republic Bill. Based on principles of civil equality and the liberation of landed property, it still retained certain items (no divorce and the continued use of clergy to register births, marriages and deaths) specifically related to Catholicism. After the Empire collapsed, the Italian départements ceased to be governed by the Civil Code. This took effect immediately in Tuscany, not until 1820 in Parma, and the French Civil Code was only replaced by the Italian Civil Code in the Duchy of Lucca in 1865. All this did not stop Montanelli, a parliamentary deputy, declaring in Tuscany in 1859, "Long live the Kingdom of Italy! Long live Victor Emmanuel, King of Italy! Long live the Napoleonic Code!"

If one were to draw a map showing the influence of the French Civil Code in Italy, one would see that it served as a model everywhere except in Lombardy-Venice (where the Austrian Code was promulgated in 1816), in Tuscany, in the Papal States and in Sardinia, (where no laws were ever codified.) As a matter of fact, the 1865 Italian Civil Code, entitled the Codice Pisanelli, after its author, closely follows its French model. Thus marriage was treated as a contract but divorce was forbidden, as was the case in France in 1865. Nor was the Italian Civil Code by any means the only vehicle for French ideas. Reviews, dictionaries, courses, treatises, repertories, translations from the classical works of the French school all contributed. After the unification of Italy, French law no longer had the appearance of an artificial graft on the national conscience, it had become part and parcel of the nation's cultural history.

In the Rhineland states, leaders asked for the French Civil Code to remain in force, which it did until the promulgation of the BGB. The wisdom of this decision was the subject of much heated debate in these territories, for which Savigny had curiously requested that the Napoleonic Code be maintained. This choice was no doubt partly because the French code was vastly superior to local ancient law but, in addition, many eminent professors had specialised in French

law and as a result had founded a new school of legal doctrine. Zachariae, mentioned earlier, was among them.

### **Satellite States**

The satellite states included the Kingdom of Naples, the Grand Duchy of Warsaw, the former Batavian Republic, the Confederation of the Rhine and Switzerland.

The Grand Duchy of Warsaw was created in 1807 as a result of the Treaties of Tilsit, and given to the King of Saxony, Frederick Augustus I. The following year, Napoleon introduced the Civil Code in French. Polish translations already existed, though none of them was official. The Code was coolly received by the privileged classes. Although the ownership of land remained with the nobility, they feared among other things the effects of the abolition of serfdom. The clergy successfully opposed civil marriage and the introduction of divorce, even if registers, given the lack of literate registrars outside Warsaw, would have been left in their hands anyway. A decree passed in 1808 accordingly gave clergy responsibility for registers in parishes with a Catholic majority. When the Congress of Vienna (1815) created the Kingdom of Poland, also referred to as the "Congress Kingdom," the Russian Tsar became its king, but he maintained existing laws. So the French Civil Code continued to be applied there, with certain minor changes (for example, to the law on mortgages in 1818). In 1825, the Diet passed the first Polish Civil Code. It dealt with individuals and the family, the most significant innovation being the recognition of religious marriage celebrations as being equivalent in law to the civil document drawn up by a registrar. In 1836, marriage again fell under the authority of the Church and divorce was abolished for the Catholic population; marriage rules now depended on the religion of the spouses. The Polish nobles, who had never been favourable to the Napoleonic Code, remained hostile to it throughout the entire century. The French Civil Code was translated into Russian after the national uprising of 1863, but the population actually saw the text as a means of opposition to the Russian powers and many jurists found it superior to the Russian *Svod Zakonov*. At the Faculty of Law in Warsaw, the Napoleonic Code was taught and the French Civil Code was not in fact repealed in Poland until 1946.

Bonaparte wanted to be sure of the loyalty of the Dutch Republic of Batavia, so he suspended the councils and reinforced the executive. The Peace of Amiens (1802) gave maritime trade a boost, but the swift breakdown of relations with England undermined this hopeful start. The French First Consul had thought he could control the Dutch by appointing a plenipotentiary Regent (1803) or Grand Pensionary (1805). but that was not sufficient, so he finally opted for a vassal kingdom, and in 1806 made his brother Louis King of Holland, an appointment which earned him the nickname of "Crowned Prefect". Louis Bonaparte, who wanted to publish a civil code

adapted to the Dutch, entrusted the work to an Amsterdam lawyer by the name of Joannes van der Linden, who had already translated the French Civil Code into Dutch. His bill constituted a blend of French law, Dutch custom and Roman law; the undertaking displeased Napoleon, who threatened his brother with the forcible introduction of the French Civil Code into Holland. Louis therefore appointed a commission to "adapt" the French code to Holland. At the end of 1808, the commission presented its *Wetboek Napoleon ingerigt voor het Koninkrijk Holland* [The Napoleonic Code arranged for the Kingdom of Holland]. It was nicknamed the "Dutch Napoleon" and has been described as a "French bonbonnière full of Dutch pralines"; but it did actually manage to retain a good number of Roman and Dutch legal provisions. When the Kingdom of Holland was absorbed into the Empire, in 1810 for the territories south of the Maas, in 1811 for the Northern territories, the French Civil Code was applied throughout the newly acquired départements.

The Kingdom of the Netherlands that was created after the collapse of the Empire was a reunification of Belgium and the former United Provinces under a new constitution. The codification commission that was set up wanted to limit its brief to an adaptation of the "Dutch Napoleon," but this draft came under attack from University of Leyden professor, Joan Melchior Kemper, who felt such an undertaking in the land of Grotius to be a disgrace. So the Van der Linden bill was taken as a starting-point for the Kemper bill (1816) which was rejected by the Parlement and of several possibilities, the only one retained was to adapt the French Civil Code to Dutch reality. This time Pierre-Thomas Nicolai, from Liège, presided over the new redaction commission. This new draft bill was passed by the Parlement in 1826. In spite of the Belgian-Dutch divide, or rather the antagonism between French and Dutch-speaking provinces, the draft bill did appear to offer a compromise, and had it not been for the Belgian Revolution of 1830, it would have been adopted in 1831.

In 1838, the Dutch-speaking territories, anxious to set themselves apart from the Walloon provinces, chose a new 2030-article civil code which remained in force until 1992; in spite of all the protestations, it was hard to see any significant differences from the despised Napoleonic Code. Certain articles were merely translations, such bad ones that the Dutch themselves even criticised them. One of the most direct borrowings was in matters of liability for which articles 1382 et sq. were lifted piecemeal from the French text. Another revealing aspect is the fact that, for a long time, the Dutch Civil Code made reference after each article to its equivalent in the French original. However, the analogies were not as clear cut as all that. Many fundamental regulations were different; in matters of ownership, for example, one does not legally become the proprietor until transfer of property has taken place. Also, where French law sees marriage contracts as ordinary contracts, and classifies them as a consequence in Book III, whilst placing rules governing marriage in Book I, Dutch Law classifies marriage contracts under marriage,

considered to be a contract *sui generis*. Moreover, Dutch civil matrimony is a communal estate of all property and debts, whereas under French law it is only a joint estate of property acquired after marriage. Finally, the Dutch Code of 1838 ignored the notions of family council and adoption. Other fields were apparently influenced by the French text, but not in the way one might at first suppose. Law governing ownership was taken from Pothier's writing on the subject in his *Traité de la possession*, which was inspired by Roman law. More importantly, up until World War II, French law was used as a source of interpretation for the 1838 Dutch Code.

### **Switzerland**

The state of affairs in Switzerland was particularly complex. The French objective was to unify Swiss law. From 1798, the date of the French invasion of the Confederation of the thirteen former cantons, a system that imitated French fiscal legislation served as the foundation stone for unification. The following year, the 1791 Criminal Code was transferred without a change; then, eight months after the adoption of the Swiss constitution, the decision was made to draw up a civil code. Two drafts, one by Anderwert, from the canton of Thurgau, the other by Carrard from Vaud, both inspired by early drafts of the French Civil Code, were shelved in 1801 for "not being in need of any special decision for the moment." On the other hand, there was no echo whatsoever of the preparatory work in progress on the French Civil Code itself.

The path towards unification was in fact prepared by a variety of texts which brought about the suppression of individual feudal rights. After the 1800 coup d'état, which took place in the midst of struggles opposing federalists and unitarians, German and French speakers, partisans of the former Helvetic Republic and those in favour of a more authoritarian exercise of power, the so-called Constitution of Malmaison was proclaimed. Although introduced in an attempt to reconcile diverging interests, it ended up displeasing everyone. The following year, after a series of ups and downs, a new constitution was finally adopted which granted the Valais [Wallis] the status of an independent republic under French-Swiss-Cisalpine protection and made provisions for a commercial code and a civil code to be drafted. In 1803, Switzerland lost the name of Helvetia and became a federation of nineteen cantons, endowed with a Diet and a Landamann, each with federal competence. Napoleon gave himself the title of Mediator of the Federation. Swiss opinion on this Law of Mediation was divided. Dictated as it was by the First Consul, it represented a humiliation for the Swiss, but it did achieve order and harmony which earlier disruptions had shaken. So the 1803 Law was generally viewed as a compromise agreement. At the collapse of the Empire, the Confederation, then made up of twenty-two cantons, allowed each canton to choose its own legal system, but many in fact chose to retain a French-style system. Moreover, the 1815 pact then in force appeared to be more reactionary than the pact of 1803, which was chosen as a reference for the Federal Bill of 1832, and via that the 1848

Constitution, before being entirely revised in 1874, 1896, 1898 and 1904.

We shall now consider in closer detail the judicial history of the four French-speaking cantons, Valais, Vaud, Fribourg and Neuchâtel.

Valais entered the French sphere of influence in a dramatic way. In 1798, Haut-Valais was invaded by France and incorporated into the Helvetic Republic, despite strong opposition on the part of the Walsers [the inhabitants of Valais]. This obliged Bonaparte to reinforce the occupation two years later. It was only half successful and the First Consul, as we mentioned earlier, had to establish Valais as an independent republic. The Republic of Valais took its orders direct from Paris, but at least appearances were saved. In 1810, Napoleon, unwilling to "sacrifice the interests of Italy and France to this puny population," incorporated Valais into France and renamed it the Département du Simplon . When the Empire collapsed, and the Walsers regained their freedom, they hurried to join the Swiss Confederation. From a judicial point of view, their old common law, that is to say the Landrecht of the Bishop of Riedmatten, which dated from 1571 and was known as the Statuts du Valais, had been in force all along, until the adoption of the Code Civil Valaisan of 1855. This code – drawn up by Professor Cropt, who lived for ninety-three years and taught for seventy-one of them at the Sion Law School – afforded the old laws of Valais a significant place; the text was nevertheless largely inspired by the French Civil Code.

The Pays de Vaud became a French protectorate in 1797, but the Council of the Boroughs of Vaud meeting in Lausanne proclaimed the independence of the Lemanic Republic, soon afterwards absorbed into the Helvetic Republic of Brune. In 1803, the independence of the Pays de Vaud within the Swiss Confederation was recognised, and shortly after that, the Canton of Vaud was created. The fact that the Pays de Vaud had never really been under French domination allowed legislators greater freedom in their attitude towards the French Civil Code, which they considered as "the work of the most competent lawyers of a nation with whom [they had] always entertained excellent relations in matters of manners and language, a work [...] that [...] had been for the most part inspired by Roman law." The drafting commission of the Vaud Civil Code, which was published in 1819, achieved for that reason a blend of the Napoleonic Code and the common law of Vaud. The main points of divergence with French legislation were over inheritance and matrimonial law.

It was not until 1822 that the Grand Council of Fribourg decided to revise laws that dated back to the sixteenth and seventeenth centuries. Their intention was to preserve national laws and to avoid borrowing from foreign legal systems. The principles of natural law would be called on to fill any gaps. However, the drafter of the legislation commission, Samuel Chaillet, used the Vaud Code as his starting point. So the French Civil Code did have an indirect influence.

Until 1806, the small Principality of Neuchâtel belonged to faraway Prussia, which had left control in the hands of a Council of State. It was Prussian protection that had saved Neuchâtel

from French invasion though. In 1809, however, under the Treaty of Schönbrunn, the territory was ceded to Napoleon. He immediately handed it to General Berthier, naming him Duke of Neuchâtel. Both title and land were then lost in the final break up of the First Empire and the Congress of Vienna returned it to Prussia. At that point, the territory became both the property of the King of Prussia and a Swiss canton. In 1857 the King of Prussia finally relinquished his rights over the principality.

The Neuchâtel bourgeoisie, fearing the loss of their privileges, held out as long as they could against the very idea of codification. The principality of Neuchâtel did not possess any written customary law; Chancellor Hory's attempt to draft one at the beginning of the sixteenth century had ended in failure. In 1831, a commission was set up to produce a proper Neuchâtel code; this remained in limbo on account of the 1848 Revolution and the creation of the Swiss Federation. Once these events had passed, codification along French lines was again on the cards. Why, one wonders, was a French model chosen? No doubt on account of its major architect, Alexis-Marie Piaget, who hailed from Lyons and had been trained in France. Another reason was that the ideas of the French Revolution expressed in the Napoleonic Code were well adapted to the spirit of the era. Above all, the other possible models – the Prussian ALR of 1794 and the Austrian AGBG of 1811 – were too different from Neuchâtel law. The Neuchâtel Code, adopted progressively by the Grand Council, came into force between 1853 and 1855. It followed both the plan of the French Civil Code and a number of its provisions; the main differences related to civil death and divorce by mutual consent.

At the end of the nineteenth century, the Confederation drew up a single code. The spirit of this Swiss code depended to a large extent on a scientific study of the system and history of Swiss private law that had been carried out in 1886 by Eugen Huber. He classified into four groups all the different types of cantonal legislation that had been passed in the course of the nineteenth century. The first group included the law of those German-speaking cantons which had not codified their laws prior to the unification of federal law. The second group, also from German-speaking cantons, contained laws inspired by the Austrian Civil Code. A third group of legislation, also from German-speaking cantons, was based on Zurich law. The fourth section grouped together the laws of the five French-speaking cantons plus the Bernese Jura (the French-speaking part of the canton of Bern) and Italian-speaking Ticino [in French: le Tessin], in other words, the Latin tradition cantons. French law undoubtedly had the greatest influence on this latter group. Nevertheless, the entire Swiss code looks very French in form (the expressions used, the progression adopted, the lack of a general section) even if the content (at least for regulations governing private property, with rules on liability standing half way between the French and the German approach) bears an essentially German imprint. By drafting a Code of Obligations (1883) though, and by including civil and commercial matters in the same volume, Swiss law did

depart from its French model. This Code, entitled Book V, was included in the Swiss Civil Code at the beginning of the twentieth century.

The German scene was equally complex. Napoleon, as self-styled Protector of the Confederation of the Rhine, was in favour of sending "unwritten hints" to get his code introduced there. The results of this non-aggressive approach were varied, with greater success in the territories closer to France.

The Kingdom of Westphalia, reigned over by Joseph Bonaparte, introduced an adaptation of the French Code in German translation in 1808. It allowed for births, marriages and deaths to be registered with the Ministry for Public Worship and, so as not to upset the aristocracy, for certain feudal dues to remain in force until they had been paid off. In Hanover, which was attached to Westphalia, the Code was repealed after the defeat of Napoleon.

The measures taken to preserve feudal law were even stronger in the Grand Duchy of Berg. Here the Code was only introduced by decree in 1809 and was not enforced until 1810, after a commission had drafted a text entitled *Napoleon Code mit Zusätzen und Handelsgesetzen als Landrecht für des Grossherzogtum Baden* [The Napoleonic Code with additions and commercial legislation concerning the common law of the Grand Duchy of Baden]. This code continued to be used after the annexation of the Grand Duchy by Prussia in 1814. Vague talk about introducing the Prussian Code (ALR) met with staunch opposition in the form of petitions from the Rheinischer Provinziallandtag. So French law remained in force until the 1870s and even partially up until 1900, with the Prussians, afraid of social reaction, steering well clear of any modification of the French legislation. In fact, jurists were not the main opponents. Hostility came mostly from the bourgeoisie, from the nobility and from enlightened sections of rural society.

In Frankfurt, the French Civil Code was implemented from 1811 onwards, except for matters that conflicted with local convictions. It would have been impossible to introduce divorce, for example. In the Grand Duchy of Baden, even greater latitude was taken with the text. In 1809 the *Badisches Landrecht* was published; this annotated adaptation of the Civil Code remained in force, with a few modifications, until the publication of the BGB. In the States of Anhalt, Hesse and Nassau, drafts drawn up to adapt the Code to local needs came to nothing. In Saxony and Prussia, a large section of public opinion was opposed to the French Code. Only lawyers were theoretically in favour. So it got no further than it did in Bavaria or in Wurtemberg.

As for southern Italy, the Kingdom of Naples fell in the first instance to Joseph Bonaparte. In 1806, Napoleon advised him to establish the Civil Code in the states under his control and, since the idea of divorce posed a problem for so many Italians, Napoleon considered eliminating it from the Code for the south of the Italian peninsula. But by the time Murat became King of Naples, the mood had changed. Napoleon had come to the conclusion that divorce

constituted the basis of the Civil Code and it was therefore out of the question to tamper with it. As a result, the Code was translated into Italian in 1809 for southern Italy, with the exception of Sicily, which was not French. The Italians actually made very little use of divorce; it was foreign to their traditions and they shied away also from the French land ownership laws. No sooner had Napoleon fallen from power than divorce was abolished in the Kingdom of Naples; by 1816 inheritance law had been changed and by 1819 a new code had been introduced. But, just like in Holland, it was hard to distinguish between this new legislation for the Kingdom of the two Sicilies, entitled King Ferdinand's Code, and the original French version.

### **The Rest of Europe**

In Spain, following General Riego's coup d'état, a first civil code bill was drafted in 1821. Significantly different from the French Civil Code, it was stillborn. Spanish émigrés started returning in 1836, and by 1840 significant legal reflection had got underway. A second bill was published in 1851, this time heavily influenced by the French code. In order to cover up this Frenchification which was not to everybody's taste, the authors of the draft bill insisted on the fact that it had essentially been inspired by Spanish historical law. This was blatantly false, as De Castro shows: "Each article is justified by a sort of legislative plebiscite of the French code, of its children and its grandchildren. Spanish laws stand in the wings, like consenting extras, called upon only to solve some specifically Spanish problem." It received a chilly welcome, however, less on account of the model chosen than for the ideas behind it. Contrary to France, Spain has never had a centralising tradition. Speaking up for Catalonia's need to retain loyal ties with its past, Manuel Duran i Bas violently attacked what he saw as the harmfulness of judicial standardisation. As a result, the commission set up to codify the law and prepare the draft bill for the Civil Code of 11 May 1888 recognised the legitimacy of the specific judicial traditions of the *fueros* [regional law codes] in Catalonia, Aragon, Navarre, Vizcaya, Galicia and the Balearic Islands. This meant that the code promulgated in 1889 had to be read at two levels: the Preliminary Title (relating to the working of the laws) and Title IV of Book I (marriage) were to be applied to the whole of Spain; for the remainder, the code merely served as a back-up for existing regional law codes. Nevertheless, 250 out of the 1975 articles were lifted almost word for word from the Napoleonic Code.

Portugal first set about codifying its laws in 1779; another attempt was made in 1820, a further one in 1826, and yet another in 1835. These all came to nothing. In 1845, a commission was appointed to draw up a civil code, but, since work had not even begun in 1850, it was replaced by a different commission, aided by Antonio Luis de Seabra. Both commissions presented their work a few years later. The Portuguese Civil Code saw the light in 1867. It was less influenced by the Napoleonic Code than the preparatory drafts, even if it still bore its

imprint; the aim of the drafters was to preserve old Portuguese law as far as possible, while at the same time favouring industrial evolution. The areas closest to French law were the articles dealing with matrimonial contracts, settlements between spouses, the *pater is est* ... rule, guardianship and a host of articles from a variety of branches of the law. On the other hand, the judicial status of matrimony was quite different and divorce was not introduced into Portugal until 1910. Generally speaking, and in spite of criticism by Cunha Gonçalves among others, the French Civil Code enjoyed great prestige in Portugal as elsewhere, and for the same reasons.

The Romanian Civil Code (1864) also stemmed from the French text. When Prince Alexandre Ion Cuza decided to codify his country's law, he borrowed about two thirds from the Napoleonic Code and Romania was looked upon as a "daughter of France" (Henri Mazeaud) . If the peasant population, which saw the text as a "land.mincer," was definitely hostile to it, the Romanian élite, which was both French-speaking and francophile, welcomed it with open arms.

The Serbian Civil Code (1844) borrowed the provisions of the French Civil Code either directly or indirectly via the Austrian Civil Code of 1811, which in turn, as we know, owed a lot to the Napoleonic Code.

Bulgaria likewise borrowed from the French Code via the Italian one. Many Bulgarian jurists were French-speaking and knew French legal doctrine well. In addition, several seminal French works, such as that of Baudry-Lacantinerie, had been translated into Bulgarian. Following independence in 1878, the Bulgarians were obviously not inclined to search for models in Ottoman legislation; not only had they lived long enough under its yoke, but it was Muslim law. So they had little choice but to look westward. The Bulgarians had long since been won over to the ideas of the French Revolution, either directly or through the Lycée Français in Galatasaray, which had opened in 1868 and was attended by many Bulgarians. But this intellectual fringe of the Bulgarian population was open to other European influences also. Not only Italy but Spain too exerted an influence. The Bulgarian Law of Obligations and Contracts (1893) borrowed from the French Civil Code but also from the Spanish Código Civil. In fact, what the Bulgarians published between 1890 and 1910 is not exactly a civil code, more a body of laws on the principle branches of civil law.

In Greece, civil law stemmed from the Roman law of the Byzantine Empire and commercial law from various European bodies of legislation. After independence, the country's need to delve into history in search of the origins of its laws, led them to turn to German methods. The 1940 Civil Code, which was enforced in 1946, was very close to the BGB. The reason for this was that the first Greek king, Othon I, was a Wittelsbach who had brought with him German jurists, among them, the Munich professor Von Maurer. This is why Greek law contains only a few "French islands in a German sea" (Witz) . Numerous points of civil law do nevertheless resemble French law, Article 914, for example (on civil liability), which was doubly influenced

by Article 1382 of the French Civil Code and Article 41, § 2 of the Swiss Code of Obligations. Law on the direct action of the principal against the person whom the agent had deputed [action directe contre le substitut du mandant] came from Article 1994 section 2 of the French Civil Code. As for the law on liability for the actions of those for whom one is bound to answer [responsabilité du commettant pour la faute de ses préposés], it comes from Article 1384 of the French Code.

On the other hand, the French Code exerted no influence whatsoever on Austria, the principal enemy of France at the time when Austrian law was being codified and which already had a "counter-Civil Code" in the form of the ABGB. A great many Austrians were totally against the French Revolution and its consequences; Zeiller, the main architect of the ABGB, had only very harsh, explicit criticism for the French text. The Code did not make any inroads in Scandinavia either; Roman law was unknown to the region, which when necessary was more receptive to German-speaking culture. From 1872 onwards, Scandinavian jurists were looking for ways to unify their laws, but they did not seek inspiration from abroad. An abstract system of setting down a code in writing was in any case totally alien to them.

In the British Isles, England's position as the forerunner of common law systems, similar in that respect to France's situation in relation to Roman law, naturally prevented any penetration of the French model. However, the political differences that existed between France and England allowed French law to penetrate Scotland for a while.

In England itself, it is hard to speak of a French model of any sort, even if the Kingdom of England was of course built on Norman heritage. One could point to the fact that law French was the legal language of the realm throughout the Middle Ages and was only banned in courts of law on 25 March 1733. But French was also the language of the Court. One could prove that the jurisdiction of the Lord Chancellor descends directly from canon law, or that the notion of equity comes straight from European *jus commune* and that English commercial law is in fact Roman law. In order to do so, a close look at the island's Norman origins would be sufficient. Nevertheless, it is worth noting that Domat was translated into English by W. Strahan in 1722 and that Pothier was studied; so the Civil Code did have an indirect influence on English law, as Gale pointed out in his 1839 work, *Easements*. But this influence was short-lived. By the end of the nineteenth century, all references to Pothier and to the French Civil Code had been removed from English law treatises.

In Scotland, things were not very different. Bell, in his *Principles of the Law of Scotland* (1829) and in his earlier *Commentaries*, quotes not only Domat and Pothier but also the French Civil Code. But the essentially oral system of pleas led, in Scotland too, to a rejection of any foreign and especially French doctrinal influence.

## **Latin America**

Having achieved independence, the Latin American nations turned spontaneously to France, which not only stood for ideas of independence and freedom but embodied the Latin culture of their former colonisers, Spain and Portugal. It was well known that Napoleon, before abandoning the heritage of the Revolution, had embraced it for a while. One only had to open the pages of the Civil Code to breathe in the Enlightenment and the great ideals of the end of the eighteenth century. Moreover, it was written in a language understood by the cultivated élite. The greatest mark on Latin American law was left by French legal doctrine and case law; they directly inspired the legal basis of the new republics. It was not so much the texts themselves, other foreign codes were also imitated, as the spirit of the texts which influenced the former Spanish and Portuguese colonies.

In each of the new Latin-American countries eminent lawyers were appointed to draft a code, and they played a determining role. The move to codify the law followed immediately upon independence, but was completed more rapidly for commercial than for civil law. The Brazilian Code of Commerce was published in 1850, but the Brazilian Civil Code, inspired by the BGB, was not published until 1916. Chile on the other hand already had a civil code in 1857 and a commercial code in 1865. Mexico's civil codes date from 1871 and 1885, its code of commerce from 1890 and a federal civil code was published in 1932. Here the rival model came from the United States.

New Spain declared independence in 1821 and the resulting Mexican state immediately set about organising itself on a federal system. There was much judicial confusion between the laws of the preceding centuries, some of them federal in nature, others not. In addition, there was a whole body of Spanish legal provisions; people were no longer even sure whether these were binding or not. Early Mexican efforts were therefore directed towards determining which system of legislation was actually in force! The next stage involved drawing up a code. The first draft, the Oaxaca Code, was completed in 1828. The next, the Zacatecas Code, reached the debating stage. A third, the Jalisco Code, was published in 1833. At the same time, a prize-winning contest was organised in Guanajuato for the best state civil code. For all these draft bills, the Napoleonic Code was only one of a number of sources.

After the early days of independence, Mexico entered what is called the Central System Period (1835-1846); this was not a favourable context for legislative speculation, but out of necessity a civil code simply had to be adopted. As a result, a host of private bills saw the light. The compilation written by Vicente González Castro was very French in its inspiration; the text by Juan N. Rodríguez de San Miguel, author of a work entitled *Pandectas Hispano-Mexicanas*, was more Spanish. González Castro did recognise that Spanish laws were, to quote J. Sánchez Cordero, "neither totally useless and vicious nor unjust and impracticable," but he wanted to

reorganise the law and, to do so, preferred to assemble and categorise laws "according to the method adopted by the learned authors of French codes."

During the seven-year return to a period of federal government (1846-1853), the Oaxaca Civil Code, largely inspired by the Napoleonic Code, came under discussion again. After the adoption of the 1857 Federal Constitution, the desire for a codified system of laws did not diminish. The most important draft was made by Sierra; it was implemented as positive law in the State of Veracruz in 1868 and was the major inspiration behind the 1870 Civil Code of the State of Mexico. Sierra's text is now recognised as the direct ancestor of all Mexican civil codes. The French Civil Code, in particular in the field of obligations and contract law, was one of its sources of inspiration.

By 1870, Mexico at last possessed a civil code that applied to the whole federation. This one was not as directly inspired by the Napoleonic Code, but it nevertheless owed a lot to it. In 1884 a further code was promulgated, this time modifying inheritance and matrimonial law; it too relied heavily on the Napoleonic Code.

Argentina gained independence in 1816, but had to wait until 1869 to have its own code. The elaboration of the code is generally considered to have had a triple origin – the proposed bill written by Aubry, Freitas and Rau, the Chilean Code and the French Civil Code – and to have been drafted by Dalmacio Velez Sarsfield. The nation's independence had been inspired by the legacy of the French Encyclopaedists and Idéologues and French codes directly inspired the Argentine code. The designer of the national flag, General Manuel Belgrano, was apparently the first in the country to have possessed a copy. The explanatory notes to the Argentine Code includes quotations from French authors.

In Chile, which won independence in 1810, the newly-appointed "Supreme Director" Don Bernardo O'Higgins, in a speech in Congress to the preparatory convention commissioned to draw up the new state's constitution, proclaimed, "You know how necessary it is to reform our laws. Please God that we may adopt the five famous codes, so worthy of the learning of recent times and which reveal the barbarity of the codes that preceded them." The five codes he was alluding to were clearly the French codes of civil, penal, commercial, civil procedure and criminal procedure. O'Higgins simply wanted them translated into Spanish and adapted to Chile.

In 1826, the parliamentary deputy Muñoz de Bezanilla proposed a draft codification bill. It was to be submitted to a five-member commission which "should refer to the civil and criminal codes called the Napoleonic Code, and take from them everything it is possible to adapt." This bill came to nothing. In 1831, another attempt to codify Chilean law was made and this time the Chilean government entrusted the work to an eminent Venezuelan jurist, Don Andrés Bello, who had been living in Chile for two years and whose wisdom had gained him the confidence of the country's leaders.. Bello searched through all published European and American codes for

models, as well as looking at the Code of Justinian and the Siete Partidas. He wanted to provide Chile, like France, with five codes while including as much Chilean law as possible. To arouse popular interest, he translated Portalis' Preliminary Discourse into Spanish and reminded the reader that "we should do well to turn for assistance to the work of French jurists, who have so wisely commented upon modern legislation, which contains a very considerable part of our own fundamental principles." Bello set to work. After his election to the Senate, he appointed a commission to codify civil law. It started by debating Bello's draft. In an attempt to encourage public debate, the commission's work-in-progress was published in the journal *El Araucano*. As a result, discussion on the French Civil Code, which was the basis for several provisions in the draft bill, developed between Bello and Don Miguel María Güemes. The Chilean Preliminary Title is curiously longer than its French counterpart, but this is because Bello had worked from the 1825 revised edition of the 1808 Louisiana Code. This code, as we shall see further on, drew on Jacqueminot's draft bill. His had a longer preliminary title that was later shortened for the 1804 code. As for the laws of persons and of obligations, they were taken from the French Civil Code.

Panama inherited from France indirectly, via the work of Andrés Bello. Panama law is in fact a hybrid of French and American law, and is the result of the geopolitical context created by Ferdinand de Lesseps's construction of the Panama Canal. Except for laws on property acquisition, codified Panamanian law follows French concepts, in particular concerning the status of the individual and foreign-owned real estate. Property held in Panama is subject to Panamanian law, even if it is held by an alien.

In 1831, Marshal Andrés Santa Cruz had a civil code promulgated in Bolivia. Although for the most part a mediocre translation of the Napoleonic Code, it still remained in force until 1977.

The first thing Costa Rica borrowed from France was its red, white and blue flag, though with horizontal lines. The next thing was the law. As the jurist Mario Alberto Jiménez puts it, "Paris had always provided us with hats for ladies' heads and constitutional ideas for men's." Unlike other Latin-American countries, the independence of Costa Rica came about peacefully. In 1841, a civil code was promulgated; it was later called the General Code since it regrouped civil, penal and procedural law. The influence of the Napoleonic Code, even if it came indirectly via the Bolivian Code of 1831, was still considerable. Apart from matrimony, which was regulated by canon law, and succession, which fell within the realm of Castilian (Old Spanish) legislation, all other branches of civil law were French in origin.

The General Code was abandoned at the end of the nineteenth century and replaced by the Civil Code of 1888. With only a few minor changes, this new text followed the structure of the Napoleonic Code. The changes were understandable though, if one looks at the sources: in

addition to the French Civil Code, use was made of the Spanish Civil Code and of Aubry and Rau's textbook on French civil law.

Peru acquired one civil code in the nineteenth century, in 1852, and two in the twentieth, in 1936 and 1984. The first, the only one we shall be referring to, was modelled on the French Civil Code, both for its plan but also for contract law and regulations relating to the transfer of property.

Brazil encountered problems with certain provisions in the Napoleonic Code. In the first place, the notions of equality and freedom had to be approached with caution in this ex-Portuguese colony. Slavery, considered essential for coffee production, was maintained until 1888. Slavery in France, although very much in existence when the Civil Code was promulgated, had been abolished in 1848. The two most eminent Brazilian jurists were Teixeira de Freitas and Clovis Bevilacqua, both from the north-east of the country, where German culture was predominant. Both factors explain the Brazilian preference for German models. Teixeira de Freitas drew up a civil code between 1860 and 1865. It came to nothing, but thanks to Bevilacqua the work was finally published in a record seven months. This time it included some French legislation, with Brazilian law on liability relying almost entirely on Article 1382; and similarly, for the definition of a legal document.

Generally speaking, however, Bevilacqua's 1916 Code stemmed much more from the German system, especially for laws on the transfer of property, than from the French, but the BGB was already familiar to Brazilians in French translation with doctrinal commentaries, by Saleilles in particular. One could say that even if German influence was greater at a technical level, on a philosophical level, French ideas predominated. In concrete terms, out of the one thousand eight hundred articles of the Brazilian code, five hundred came from earlier Brazilian legislation, two hundred were taken from legal doctrine and two hundred came from Teixeira de Freitas's earlier draft bill. For the hundred and seventy articles inspired by the Napoleonic Code, Brazilian legal doctrine stresses that the principles of modern Roman, in other words, French law, have been retained.

The Treaty of Ryswick (1795) recognised the simultaneous claims of France and Spain to the two halves of the island of Hispaniola, site of the earliest Spanish New World settlements. In 1816, the Napoleonic Code was enforced in Haiti, and consequently in the rest of the island in 1822, after the Haitian conquest of Santo Domingo. The Haitian Civil Code of 1826 constitutes a French Civil Code transplant. When, in 1844, the island was again divided, the Republic of Santo Domingo adopted the Napoleonic Code in French. During the brief period of Spanish domination (1861-1864) the French Civil Code was retained, while the other four codes were translated into the language of the occupying forces. The French Civil Code was not translated into Spanish until 1884. Even dispositions clearly in contradiction with local custom were not

modified until much later. Such was the case with legislation on illegitimate children. In a country where the illegitimate birth rate is very high, it was not until 1939 that natural born children were able to enjoy the same rights as legitimate ones. This law in fact goes even further than the French Law of 1972 does, regarding the recognition of a child born of a father's adulterous union. Generally speaking, it is interesting to observe that the strong influence of French law on Santo Domingo meant that laws enacted after the promulgation of the Civil Code were also introduced. Even today, the Dominican Republic and Haiti are governed by Napoleonic codes and possess a judicial organisation similar to that of France. Some people, Federico C. Alvarez Jr. for example, go as far as declaring, "I don't think I would be wrong in saying that the Napoleonic codes which govern Dominican law today are more Napoleonic than in France."

The territories that were governed by the former Spanish Council of the Indies (Cuba, Puerto Rico and the Philippines) were not affected by the codification phenomenon of the 1890s. These colonies fell under the sphere of American influence in 1898 – when Cuba became independent, it became an American protectorate and the other two territories were quite simply ceded to the United States – so European influence was short-lived. The French still left their mark, indirectly it is true, in the form of the Louisiana Civil Code of 1870. Among the modifications to civil laws in force at the time, the most significant were the introduction of divorce, the abolition of religious wedding, the amendment of legislation on guardianship, the abolition of family councils and of some regulations relating to things fixed (droits réels).

### **The Muslim World**

In the nineteenth century, the entire Muslim world witnessed a blossoming of a current of thought known as Reformism. It took the shape of a reflection on society by intellectuals in the various countries concerned, and it brought about an awareness of how backward the Islamic world was in matters of economic, social and technological growth, compared with the western world. Reformism gave birth to a strong desire for the modernisation of society as a whole and of the law in particular. France was a leading influence in this movement.

Encouraged by the French example, the Ottoman Empire of Selim III, the greatest Muslim power in the Mediterranean, consequently undertook to codify its laws, and here the Napoleonic mark is obvious. The point of departure for this legal reform was the Tanzimat Firman [The Reform Edict] of 1839, commonly referred to as the Charter of Gulhane or Charter of Liberties. These reforms, with some major exceptions, were aimed at modernising the state. Everything to do with family law continued to be governed by the Sharia. A section of laws on obligations and procedure was also dealt with by Islamic law in the Medjelle, which was codified in 1877. Total westernisation of the Turkish legal system did not come into effect until 1926, when Mustafa Kemal Ataturk encouraged the adoption of the Swiss Civil Code and the first two books of the

Swiss Code of Obligations. French law did exert an influence in Turkey, but more in the domain of laws of commerce and public law.

French influence in Muslim countries was not only to a large extent due to the spread of French legal doctrine but to the publications and frequent visits of French professors throughout the Mediterranean. This influence would certainly not have existed, if French law had not been perceived as a law of quality; though it might well have had less impact if France had not colonised a part of the Muslim Mediterranean.

It is better to consider the Muslim territories that fell within the French colonial sphere separately. Algeria, an integral part of metropolitan France, was naturally governed by the French Civil Code. Protectorates and mandates like Morocco and Tunisia published several collections of French-inspired legislation.

With the rise of Reformism in the nineteenth century, Tunisia fell under the influence of the French judicial model. The Tunisian Reformist movement stood out from other similar movements for its nationalism, which borrowed many ideals from the French Revolution, among them the idea of a charter of rights, of a written constitution and of a codified system of laws. As a result, the Tunisian Penal Code was published in 1861; the Code of Commerce was drafted along the lines of the Arabic translation of the Napoleonic Code and the Egyptian Civil Code. This codification aimed at the separation of state law and religious law [Fr. *laïcisation*] and entailed the removal of the law from the hands of religious bodies [Fr. *sécularisation*]. It also involved acculturation, since like everywhere else in the Muslim world, the classification of the law imposed its division into unfamiliar titles, chapters and articles. Bourguiba's Tunisia was unique in this respect for having even family law integrated into the rest of civil legislation.

From a technical point of view, the codification process was facilitated by existing Franco-Tunisian links. The Bardo Agreement (1881) and the Marsa Agreement (1883) granted Tunisia the status of a French protectorate. This was not colonisation, and that is why French law was established indirectly, through local laws and by Muslim jurisconsults. French case law prescribed that in Tunisia, in the case of a conflict between French and Tunisian laws, the latter should be applied. This had less of a far-reaching effect than might be imagined, for Tunisian laws were frequently adaptations of French legislation. For that reason, it is often said that under the Protectorate, the implementation of French law gave way to the implementation of a French judicial model.

It was at this time that the great French Civil Code theories on matters such as fault, causality and agreement were introduced. The same symmetry was not always respected: The Tunisian Law of 1885 on property, for example, looks more like a modification of the Muslim conception of property law. The French Civil Code really uses the Roman conception of property, as defined by the three notions of *usus*, *fructus* and *abusus* : a proprietor can exploit his

property, reap benefit from it and freely dispose of it. In Muslim law, even if private property (melk) is guaranteed, the proprietor's rights are relative to and dependent upon the actual use he makes of it. As a result, the Property Law of 1885 is a unique system, influenced by three sources: the French Civil Code, the Australian Torrens Law, which provides for the public not private registration of property transfers, unlike in France, and Islamic law via the notions of shefaâ (preemption) and enzel (right of tenure).

The move towards codification continued into the twentieth century with, among others, the Code of Obligations and Contracts (1906), the Code of Civil Procedure (1910) and the Penal Code (1913). While modelled on French codes, inspiration also came from publications such as André Morel's textbook *Précis de droit civil musulman* (1911), a critical commentary of the Tunisian Code of Obligations and Contracts.

In Morocco in 1913, a great number of judicial dahirs were promulgated. A dahir is a legal text bearing the sultan's seal. Those published on the eve of World War I concerned private law (civil, procedural and commercial). As in Tunisia, the dahir which contained the Code of Obligations (COD), dated 12 August 1913, is a combination of French and Muslim law, crossed with the Swiss Code of Obligations, the Italian Code, the Spanish Civil Code, the BGB and the Tunisian Code. Here the French stamp is greater and derives not only from the Napoleonic Code but from French case law pronounced on the 1804 text in the light of a century of social and judicial change; and also, naturally, from French doctrine.

In other Muslim countries, hand in hand with even the partial adoption of the Napoleonic Code went a desire to modernise. An example is the Mixed Egyptian Code of 1875 which was to serve as a basis for the National Code of 1883. The Mixed Code is very close to the Napoleonic one. Not only was it written in French, but as a Frenchman by the name of Manoury was behind its conception, the style is French too. Nevertheless, the Mixed Code contained only seven hundred and seventy-four items compared with the Napoleonic Code's two thousand two hundred and eighty-one. The Mixed Code could be used in mixed tribunals competent to deal with cases involving parties of different nationalities. The six hundred and forty-one articles of the National Code were drawn up by an Italian lawyer named Mariondo, who had been appointed judge to the Mixed Action Tribunal of Alexandria; the text is written in Arabic and is half-way between a summary and a translation of the French code. The question of property, which is so different in French and Muslim law, nevertheless combines regulations from the French Code with customary provisions. It is true to say therefore, that the Mixed Civil Code is indirectly at the basis of the 1949 Civil Code, which followed on from those of 1875 and 1883.

Why did Egypt turn to France for inspiration? Cultivated Egyptians all spoke French and many of them had been educated in French law faculties. For them, French law constituted a sort

of "written reason", a *ratio scripta* in the medieval sense of the word. Pierre Arminjon, writing in the *Livre du Centenaire*, describes Egypt as "a country under the rule of French law, as French in that respect as Algeria" and recalls how the intellectual ties that link France and Egypt are those of two members of the same family. The role of the French School of Law in Cairo, founded in 1891, has been essential too; nearly all the great Egyptian jurists have trained there. It is also worth remembering that the Egyptians chose to adopt the French model; they were in no way obliged to do so.

The influence of French codes in Egypt obviously does not mean that France was the only close model available. The German, Swiss and Italian codes played their part. Moreover, the French and Egyptian codes are by no means identical. The greatest difference lies in family law, which is strongly marked by the Sharia. In fact the dispositions for family law, many of which were religious in origin, are grouped together in a separate text, the Family Code, which dates from 1955.

This particularity is true of family law in several other Muslim countries, notably in the Lebanon, though here, the influence of French law has not been quite the same as in Egypt. The Law of Obligations is the subject of quite a different civil law code, called the *Medjelle*. The form is that of the Napoleonic codes, the substance is traditional Muslim law, although written in collaboration with or under the guidance of French jurists. The creation in 1913 of a French School of Law in Beirut undoubtedly increased the importance of French law in the Near East.

### **The Rest of the World**

In North America, the French Civil Code left its mark more discreetly, but it did so nevertheless.

In Quebec, the task of drafting a legal code was begun in 1857 and was completed in 1866. The result clearly bore the stamp of French law but one finds more borrowings from the laws of the *ancien régime* than from the Civil Code, which was felt to be revolutionary. In fact the influence of the French judicial tradition went back to the eighteenth century, in other words it pre-dated the promulgation of the Civil Code and French doctrine concerning the Civil Code was paradoxically used in Quebec to retrieve tenets of French *ancien droit*. The Napoleonic Code was even used as an authority for French *ancien droit*, itself a source for local Canadian law, but which lacked irrefutable references. On the other hand, the Law of Obligations, a substratum of Canadian law, stemmed more from Pothier than from the Civil Code. Generally speaking, Quebec is considered to be governed by mixed law.

For a long time, common law countries were thought not to have been influenced by French law; Jenks divided the world into common law and Roman law systems, with France leading the way for the latter. Today, things no longer appear so cut and dried. Several countries (including parts of the North American continent) had been in contact with French law prior to

the Revolution, in particular with the customs of Paris and the writings of Domat and Pothier. During the Enlightenment, French law was considered modern and universal in nature, while common law seemed archaic and limited in application. The publication of the French Civil Code only reinforced this feeling. Especially as, at the beginning of the nineteenth century, relations between England and its former thirteen colonies were difficult. There was even talk at this period of an "inexplicable need for French law." In 1799 in New Jersey and in 1888 in Kentucky, laws were passed forbidding courts to make reference to English law. A similar move was made in New Hampshire. The tendency was so strong that people wondered whether common law was not going to be ousted by French law under the influence of lawyers like Story or Kent, who were using French law to resolve American legal complications. But this excitement over French law did not really upset its rival. The reasons were twofold. Firstly, England and the young American nation were bound in a linguistic community which put the Civil Code at a disadvantage from the outset. Knowledge of French was dwindling and in those areas where there had never been any direct contact with France, the head start gained by common law was increasing. Moreover, nothing one could really call a law school existed in America before the 1870s. American jurists were trained empirically, on the job, far removed from the atmosphere of intellectual discussions their French counterparts were accustomed to, and by the time law schools did finally open, civil law no longer held any sway in that part of the New World. In 1803, Blackstone published his Commentaries ; this was the first systematic presentation of English and common law. In fact by the second half of the nineteenth century the United States were consciously opting in favour of English law; they had just needed time to get over bouts of pre-Independence tension. Not that France put the slightest effort into maintaining its sphere of civil law influence, even in states like Louisiana, which had been previously administered by France.

Louisiana had been ceded to Spain in the 1760s under the Treaty of Fontainebleau (1762) and the Treaty of Paris (1763) and had remained subject to Spanish rule from 1769 until 1800, at which point it was returned to France, who in turn sold it to the United States in 1803. Even if France made no effort whatsoever to replace the current Spanish legislation by French legislation, many people in Louisiana were in favour of adopting a code founded on natural law. The Napoleonic Code was supposed to have been just that and many were in favour of its immediate adoption. The Legislative Council appointed James Brown and Louis Moreau-Lislet to draw up a civil code. The Digest of the Civil Laws now in force in the Territory of Orleans saw the light in 1808. When it not drawing on Spanish law, it was more of a carry over from Jacqueminot's draft bill than from the actual Civil Code. All this makes for lively debate over the sources of the Louisiana Code. The 1825 revision, which gave birth to the Louisiana Civil Code, was founded on the plan of the Napoleonic Code and borrowed from French law as well as from Roman and Spanish, even if the most obvious borrowings were French, Spanish influence being even less

noticeable in the 1825 version than in that of 1808. The 1870 revision in no way effaced the origins of Louisiana law, even if, unlike the 1825 Code which was first written in French then translated into English, that of 1870 was drafted directly in the English language.

For a long time Japan had no codified laws. Its violent feudal society had no national model likely to enable laws to be modernised. When it was finally decided to undertake such a process, the Japanese naturally turned to the West, and in particular towards France, since, according to Boissonade: "There are no doubt laws in England, but they were written five or six hundred years ago [...] The United States, a young country, does not possess a complete code either [...] France is the only one to have a full set of codes published only eighty years ago." This confidently nationalist remark was to be the basis of Boissonade's work in the Far East.

In the long run, the Japanese, faced with a choice between common law and the Germanic Barbarian system inherited from Roman law, chose the latter on the grounds that codified laws seemed simpler to implement. Both systems were in fact equally foreign to the Japanese mind and the first major difficulty was linguistic. The Japanese language does not possess the words needed to designate French legal concepts. Boissonade's job had been prepared in advance by a move away from insularity. The Emperor ordered Rimsho Mitsukuri to translate the French Penal Code into Japanese. The feudal Japanese society of the time found it hard to imagine laws being anything other than criminal. The translation was so good that Mitsukuri was asked to translate the five volumes of the Napoleonic Code. This was carried out, but led nowhere, the challenge of imposing French legislation on the Japanese mentality proving impossible.

In order to carry out his work, Mitsukuri was obliged to invent all sorts of words. For example, movable goods were translated by *dôsan* (from *dô*, 'to move' and *san* 'property') and real estate, *fudôsan*, was created by using the negative prefix *fu-*. Certain French ideas made the Japanese shudder. How, for instance, could one render civil law other than by the "the people's means of disposing"? But this implied that the people possessed power, and could even revolt against authority; this was an incongruous and inconceivable concept in the Land of the Rising Sun.

In order to get out of this impasse, the Japanese government decided to invite foreign advisers, firstly, Georges Bousquet, who founded the French School of Law, then Georges Appert, who taught there for ten years and above all, Gustave Boissonade, who stayed for twenty. Hôsei, Meiji and other major private Japanese universities are descended from this French school, while Chûô is British in origin. In 1890, Boissonade drew up a draft civil code, drawing inspiration not only from the Napoleonic Code, which he added to or clarified when necessary, but also from the Italian and Belgian codes. Basically, what he did was to reproduce the French model except for laws relating to individuals and inheritance. This was promulgated in 1890 and

was due to become law in 1893, but it was suspended under pressure from British-trained jurists who not only doubted the need for a code from a philosophical point of view; from a more pragmatic one, they feared they would make themselves redundant. The idea of codification was not abandoned, but the Japanese code which did finally see the light in 1898 drew its inspiration from the BGB or more precisely from the preparatory volumes, since the Japanese code was actually published before its German counterpart. That does not mean that there was no a trace of French influence in it. The articles dealing with capacity, domicile, prescription, the transfer of property rights and responsibility were French, not German, in spirit. The family law provisions derived from national traditions, but any foreign influence came from the Boissonade code.

The commission set up in 1893 to draft this code was comprised of three jurists: Baron Masaakira Tomii, Kenjiro Ume and Nobushige Hozumi. The first had completed his studies in Lyons. The second had been to the French School of Law in Japan and wished to apply the Boissonade code. The third had trained half in England and half in Germany and was not a passionate admirer of German law. Moreover, the commission's draft bill borrowed to a large extent from the French Civil Code and from Boissonade. They re-examined each of Boissonade's articles in turn. Certain chapters of the Boissonade code had already been distributed to law courts and were being used in cases where a reference to "natural law" was needed, since this is precisely what Japanese judges purported to find in the French text.

It is interesting to note that it is only in the past thirty years or so that Japanese jurists have become aware of the French origin of a large portion of their law. In addition, the penal code and the criminal instruction procedure code, both dating from 1882, followed the French model in similar fashion.

French influence was undermined after World War II by Anglo-Saxon provisions. But in the end, the Japanese found them too pragmatic and they were put off by the excessive place accorded to case law. The Maison Franco-Japonaise, created in Tokyo in 1924 and directed by numerous jurists, has since worked tirelessly towards the dissemination of French culture in the area.

### **Novellae or Extravagantes?**

The question often asked is whether legal codes run the risk of making the law inflexible. Criticism of this kind, as old as the codification process itself, is frequent. What in fact happened in the case of the Napoleonic Code, however, was that the enormous prestige enjoyed by the text dampened any further textual dynamism. Very little civil legislation reform was undertaken during the remainder of the nineteenth century, even if some discordant voices did make themselves heard and some jurists went as far as to publish interpretations on a limited number of subjects. This is the type of criticism one finds levelled at legal life in the century following the publication of the Napoleonic Code.

And yet, some legislative measures were not simply cosmetic. It is not hard to criticise the French Civil Code and say that later texts do nothing but invalidate it. But if one looks at the text from a historical point of view, could we not just say that, in the same way as the Justinian Code gave birth to Novellae and the Decree of Gratian begot Extravagantes, so the Napoleonic Code has its own offspring? The Code survived the turbulence of the century by adapting, in the way that any written legislation is bound either to evolve or die and give way to another more dynamic form of law. That is exactly what happened to Praetorian legislation; which after the codification of the Praetor's edicts, gradually gave way to Imperial constitutions. In the same way, modern Cassandras evoke the idea of a European code that will one day replace the Code that has given birth to so many others.

The Restoration certainly tried to remove from the Code those elements which went against its convictions, and we shall see further on what happened to divorce, but it was not possible to erase all trace of the Revolution. The move to return responsibility for civil status registers to the clergy failed. The fact that the Napoleonic Code, "sullied by the name Napoleon," was henceforth called the Civil Code had symbolic value, as did the fact that it was renamed Napoleon Code during the Second Empire or again returned to Civil Code after the Battle of Sedan. But all this is only emblematic. Even if Louis XVIII's Bourbon Restoration government claimed the Code was no more than a collection of "ancient ordinances and royal customs," it was not repealed. All sorts of jibes were made at its expense. Some said the Code was "compiled by Portalis and Co."; others called it "the Revolution reduced to 2002 articles, by courtesy of the First Consul."

But the world was altering. The Industrial Revolution was turning the country upside down and these upheavals had to be taken into account. The Civil Code had been drawn up for land-owning gentry or peasant families where the husband was sole head. The nineteenth century saw the rise of the urban working-class family whose assets more frequently took the form of earned income than revenue from property. The place of women was evolving. Up until the end of the Second Empire, however, legislators were fairly unreceptive to these developments.

Some major changes did nevertheless occur in family law, property law and in a more general way, in the law of persons. One comes across certain legislative modifications which, without altering articles in the code, introduced measures which contradicted them. This only brought more grist to the mill of those who wanted to see the Civil Code disappear.

### **Family Law**

Two major changes took place, namely, regulations governing marriage and those dealing with the equal apportioning of estates.

As we have seen, both in France and in other countries, marriage was much more than a legal provision for founding a family; the rules which governed it expressed a certain vision of society. When the Bourbons returned to the throne in the person of Louis XVI's brother, firstly in 1814 and again the following year, the question of divorce was on everybody's lips. Since Article 6 of the Charter confirmed that Catholicism was not the state religion [religion d'État] but the majority religion of the state [religion de l'État] – a definition which allowed for freedom of worship (Article 6) – divorce had to be suppressed. From the beginning of 1816 the government had been asking for "the abolition of an institution that was an outrage to public morals and contrary to the religion of our forefathers." On May 8 1816, the Chambre des députés and the Chambre des pairs passed, with practically no opposition, an act which repealed the Civil Code provisions relating to divorce. The concept of indissoluble marriage now applied to everybody, including non-Catholics.

The first feeble attempt to bring back divorce occurred in 1831. It failed. Another attempt was made in 1848. It failed again. It was finally re-established by law on 27 July 1884 and was the culmination of actions undertaken as far back as 1876 by Alfred Naquet. The arguments put forward centred firstly on the notion of freedom of conscience. Since the majority of French people were Catholic, it would be insulting to re-institute divorce. To which those in favour replied that, given that not all French people were Catholics, it was an insult to oblige them to conform to Catholic practice. Moreover, they pointed out that divorce only broke the civil, not the religious bond, which was of greater importance to a Catholic, and that in any case no one would dream of obliging Catholics who did not wish to divorce to do so. A second series of arguments was based on the undermining of the foundations of society. For those against, its introduction would damage the ties that made up the social fabric; for those in favour, social order was being shaken by unlawful relationships and divorce was, in any case, an urban phenomenon in a largely rural society. The third argument was over the fate of children. Children of divorced parents would find themselves in a deplorable situation, argued those against; no more so than the offspring of legally separated couples, came the retort from those in favour. For separation was already legal; and there was no guarantee that domestic quarrels were better for

the well-being of children than a decent separation.

The 1884 Law did not bring back divorce by mutual consent; instances of abuse, of mental or physical cruelty, of serious insult or of a defamatory or dishonourable prison sentence which rendered the marriage bond intolerable were needed to obtain a divorce, at the request of either the husband or the wife. The text was voted in by the left and the centre left. Catholics voted against it. Legal separation was maintained for them. But by the Law of 6 June 1908, voted three years after the separation of Church and State, the divorce court was obliged to convert a separation into divorce after a lapse of three years, even at the request of the guilty partner.

While still on the subject of marriage, the Law of 10 December 1850 added complemented Article 76 in order to "facilitate marriage between people of reduced means, enable them to make their children legitimate and release them from children's homes." In addition, the Law of 20 June 1896 and the Law of 21 June 1907 did away both with the formality of summonses (reduced from three to one in 1896, a simple notification became sufficient in 1907) and the need to enter a caveat to a marriage.

The Law of 16 November 1912 took a decisive step in moulding our vision of the family, since it considered concubinage notoire [common-law marriage], Article 340, as one of the instances in which an application to establish the paternity of a natural father could be allowed. It also complemented the Law of July 24 1889, which stripped a father of his authority if found guilty of specific crimes or in the case of indignité manifeste [evident debarment] associated with drunkenness or any sort of ill-treatment. It thus marked the end of a succession of bills drawn up in 1878, 1883, 1895 and 1905, all of which had aimed at modifying Article 340. It can also be seen as the natural conclusion of the Law of 2 July 1907, which granted paternal rights over an illegitimate child to the parent who first recognised the child, or to the father alone if both parents recognised the child simultaneously.

Legislation was moving even further towards a new vision of the family. The Law of 15 December 1904, which authorised the marriage of an adulterous spouse with his co-respondent, totally changed the fate of the children of an adulterous relationship. On paper, it was easier to make them legitimate; however, many people feared a tacit form of bigamy, which would enable a man to father legitimate children with a number of women. As a result, the modification of Article 331, which dealt with the legitimisation of children born out of wedlock, and taken from the Law of 7 November 1907, while according legitimate status to those children born of incest or adultery, contained particularly restrictive clauses for the latter. Likewise, the *pater is est* rule was applied less strictly after the enactment of the Law of 6 December 1850, which altered Article 313. A husband could then disown any child born three hundred days after receipt from the president of the court of an authority for the spouses to live apart pending proceedings, on condition, naturally, that no cohabitation had actually taken place again in the meantime.

This easing of family ties was also at the heart of the 27 February 1880 Law, which modified Article 407 of the Civil Code. In its original draft, the article foresaw the creation of a family council, composed of a stipendiary magistrate and six relatives or relations by marriage, to deal with the personal wealth of minors. In practice, this council meeting never actually took place and only the court, if referred to, could exercise any real control. But one might wonder if that was not already the case with reform of marriage impediments. The original Article 164 had allowed a dispensation, for "serious reasons", from the impediments to marriage between uncle and niece or aunt and nephew; the Law of 18 April 1832 added a further instance, that of marriage between brother-in-law and sister-in-law.

According to the Decree of 1 March 1808 and the Senatus Consult of 14 August 1808, majorats [entailments], based on German and Spanish models, were introduced in paragraph 3 of Article 896. Entailments allowed noble families to block a part of their estate (including shares in the Banque de France) so that it remained attached to the title of nobility and thus, supposedly, fall to the eldest par préciput et hors part [over and above his equal share] with his co-heirs. This facility accorded to the nobility, who did not make excessive use of it, added up to a return to the law of primogeniture and the entailment of nephews and grand-nephews that had existed under the ancien régime. Obviously, this went totally counter to the principle of equality displayed in the rest of the Code.

In 1824, Villèle, having failed in his attempt to restore the law of primogeniture, worked towards the creation of entailments for all forms of nobility, be they ancien régime, imperial or newly created [under the Restoration]. After the 1830 Revolution, France launched into economic free enterprise, so in a country where capital had to circulate, the idea of blocking wealth was no longer in fashion. Consequently, the Law of 12 May 1835 prohibited the creation of any new entailments and already-existing ones could not be passed on for more than two generations. On 11 May 1849, the Second Republic abolished all entailments, with the exception of those benefiting persons alive at the time of the promulgation of the 1835 Law.

In regions where the law of primogeniture had been in use under the ancien régime, the peasantry, unable to have recourse to entailments, used every means possible, in particular the quotité disponible [freely disposable portion of an estate], to avoid equal partition.

The notion of family estate, created by the Law of 12 July 1909 in derogation of Article 815 of the Civil Code, allowed for the constitution by notarial deed of property exempt from seizure (patrimoine immobilier insaisissable) On the decease of the settlor, the magistrate could order that the estate remain undivided until the majority of the youngest heir. This law was greeted with lukewarm enthusiasm.

Again in the field of inheritance, but relating to a different matter, the Law of 25 March

1896 considerably modified the original system. In the 1804 Civil Code, illegitimate children were unable to inherit; Article 756 only granted them a right to their parents' wealth if they had been legally recognised. They could lay no claim to the wealth of their grandparents. As for children born of an adulterous or incestuous union, they could at best hope for maintenance. The 1896 Law gave to recognised illegitimate children the right to inherit and increased the freely disposable portion they were entitled to, as well as granting them a legal share in an inheritance. On the other hand, there was still no provision for those children born of an adulterous or incestuous union.

The fate of widows in the Civil Code of 1804 was no more enviable. According to Article 767, the surviving partner was considered to be an unauthorised heir, and ranked only just before the State. Apparently this was a mistake, for the third draft of Cambacérès' Civil Code had provided for a life tenancy of one third on the real estate of the first deceased. After twenty years of haggling, and thanks to the stubbornness of Delsol – though still two generations after the "mistake" of 1804 – the Law of 9 March 1891 finally conferred on the surviving spouse the life tenancy of a quarter of the wealth of the widowed spouse with children and of a half for a childless spouse. Actually, this legislation reflected the changes in society. Middle-class marriages, through their use of marriage contracts, usually catered for the surviving spouse. In rural areas, aged peasants were cared for by their children; but by the end of the century a new class was emerging in towns and cities, consisting of poor, isolated people without any protection.

### **The Law of Property**

The right to property, which is the right to dispose of things as one thinks fit, changed little in the course of the nineteenth century. A first alteration, through the revival of an ancien droit provision, was enacted on 21 April 1810. This removed the ownership of mines from the hands of landowners and put in place a system of concessions, which created separate property under state control with licence fees payable both to the state and to the landowner. The license-owner was considered to be a landowner but he depended on the General Direction of Mines, in turn attached to the Ministry of the Interior. This 1810 Law was completed in 1840 by another, which also imposed the same system of concessions on salt mines and salt marshes.

The Law of 8 April 1898, which modified Articles 641 and 643 of the Civil Code also restricted the absolute right to property by limiting to those of an ordinary user the rights of proprietors of springs which "form a course of running water accessible to the public."

## **Law of persons**

Several articles were repealed in the second half of the century. Among them were laws relating to civil death, which were removed by the Law of 31 May 1854 and those concerning imprisonment for non-payment of debt [contrainte par corps], which disappeared with the Law of 22 July 1867. The most significant was Article 1781, which vanished with the Law of 2 August 1868, on the grounds that it was contrary to the principle of equality. This article originally read: "The master's word is to be believed for the proportion of wages, the payment of the salary for the year elapsed and for sums paid on account for the current year." Such obvious inequality between master and domestic servant or employee in matters of proof of payment was too much in contradiction with life under the Second Empire.

In 1894, legislation relating to the registration of certificates was altered twice. With the Law of June 8 1894, the birth certificates of French citizens born abroad were to be kept in duplicate. Regulations were set down for death in the armed forces or during a sea voyage and for illegitimate children born in these circumstances. The Law of 17 August 1894 also made it obligatory to transcribe marriage certificate details in the margin of birth certificates, (the Law of 18 April 1886 having already imposed the transcription of divorce certificates). Finally, departing from the principle of the publication of birth, marriage and death certificates, the Law of November 30 1906 drew a distinction between the certified true copy of a registered birth certificate, which can only be requested by a limited number of persons, and a simple extract, which is obtainable by anyone, but which provides very little information.

In social matters, a small number of modifications to the 1804 text were implemented. For example, the Law of 27 December 1890, which completed Article 1780, provided that, where a contract was broken by only one of the contracting parties, this should give rise to the payment of damages and interest accrued. By the same token, it was to be understood that an employer who wrongfully dismissed an employee was guilty of an abuse of power which entitled the dismissed workman to compensation.

The articles concerning aliens underwent many changes in the course of the nineteenth century, the most important being those brought into effect by the Law of 14 July 1819, which repealed Articles 726 and 912. With the abolition of the droit d' aubaine [reversion to the State of an alien's estate on his death], this law enabled a foreigner to inherit, dispose of and receive in exactly the same way as a French citizen. Most important of all was the Law of 26 June 1889 which, by modifying Article 8 of the Civil Code, clarified the conditions necessary for the acquisition of French nationality.

## **Parallel Changes**

A certain number of legislative texts do not actually form part of the Civil Code, even if they do

modify certain civil law regulations. This is the case with laws concerning the world of work, women and historical monuments.

In 1850, the Caisse de retraites pour la vieillesse [Old age pension fund] gave a married woman the right to deposit regular payments on her own and the Law of 20 July 1886 confirmed this possibility. Moreover, a ministerial note of 1857 protected a married woman's right to make use of the household's joint savings account, and under the Law of 9 April 1881, she was allowed to deposit or withdraw funds of up to 1500 francs without the authorisation of her husband, whilst still granting him the right to oppose such a withdrawal. The Law of 20 July 1895, which gave married women the right to contest an unlawful opposition to withdrawal, reinforced their legal capacity of action.

These provisions did not question the articles which placed a married woman in the charge of her husband, but they did herald further changes, namely that of the Law of 13 July 1907 dealing with a married woman's free use of her salary. Camille Sée's 1880 private member's bill (which led to the very controversial creation of lycées for girls) had aimed at reducing the incapacity of married women. Although it was never debated, it nevertheless reflected the existence of a widespread movement in favour of greater recognition of women's place in society. In 1883, Léon Richer published his Code des femmes. In this, he was following in the tradition begun by Olympe de Gouges and Théroigne de Méricourt, who in 1791 had written the Déclaration des droits de la femme et de la citoyenne. This rise of women's rights, clearly present in the 1900 International Congress on the Condition and Rights of Women, led to a direct attack on the authority of the husband and to the elimination of Article 1124 which listed women in the category of "incapable persons" alongside madmen and children. Women's rights supporters burned examples of the Civil Code in the Place Vendôme during the centenary celebrations. The Law of 13 July 1907 was therefore preceded by a whole reform movement which the Law of 7 December 1897 and even that of 6 February had already set in motion. The first allowed a woman to witness the registration of births, marriages and deaths and notarial deeds, the second stipulated that a legally separated woman retrieved her civil rights, that her legal domicile ceased to be that of her husband and that, after the finalisation of divorce proceedings, she retrieved the use of her own name.

New social realities also led to limitations on contractual freedom. The Law of 19 May 1874 fixed the working day for children aged twelve to sixteen at twelve hours and prohibited night-time working; the Law of 2 November 1892 further reduced the working day to ten hours for children aged thirteen to sixteen, to eleven hours for sixteen to eighteen-year-olds and fixed the woman's working day at eleven hours; the Law of 13 March 1900 fixed the working day for industrial workers at eleven hours for both sexes and the decrees of 10 August 1899 provided for a minimum wage to be written into terms of employment in civil engineering companies. The

very idea of a weekly day of rest, introduced in the Law of 18 November 1814, was defeated by the anti-clericalists and the Sunday day of rest was repealed by the Law of 12 July 1880. It was over twenty years later, on 12 July 1906, that, on account of the law's unforeseen side effects, Sunday became a holiday again.

But the major innovation in this field was beyond doubt the Law of 9 April 1898. The only protection in the event of an accident depended until then upon traditional rules of liability (Article 1382). The 1898 Law replaced the notion of wrongful act by the notion of risk. Except in the case of a deliberate transgression of duty on the part of an employee, the employer was now deemed liable for the risk of accident to which his employees were victim. This was a reversal of the responsibility of proof. The employer had henceforth to prove deliberate transgression of duty on the part of a worker. Previously, it had been up to the worker to prove the responsibility of an employer who was often only indirectly responsible. On the other hand, an employer only had to pay a fixed amount based on salary by way of compensation, whatever the circumstances of the accident. This being the case, employers were able to take out insurance to cover the risk. Insurance remained optional, however. Created at the outset for certain sectors of industry, the 1898 Law was extended in 1906 to protect workers and employers in business concerns.

Those early days of social legislation in fact altered the Civil Code very little. The 1898 Law only contributed to the insertion of a sixth paragraph to Article 2101 dealing with the claims of industrial accident victims for medical, pharmaceutical and funeral expenses and temporary compensation.

As far as the law of property is concerned, one could cite the Laws of 1833 and 1841, which, although they did not modify the Civil Code, did add certain provisions to Article 545 by reinforcing the compensation granted to expropriated landowners. On the other hand, case law attenuated the scope of Article 544. The Cour de Cassation defined abuse of title in 1849 and the Colmar Court of Appeal complemented the notion in 1855, the same year as the law on mortgage registration. This law, voted on 23 March, encountered virulent opposition and was passed with difficulty. For the transfer of real estate involving a contract for valuable consideration, obligatory registration was brought back in order to allow for third party opposability. Similarly, a succession of laws, enacted on 30 March 1887, 21 April 1906, 19 July 1909, and above all on 31 December 1913, succeeded, in contradiction to Article 544 of the Code, by providing a definition of national heritage and granting it protection, in prohibiting the sale of certain properties to aliens. In the same vein were the Law of 20 April 1910, prohibiting the posting of bills on monuments and the Law of 13 July 1911 protecting the view of Parisian monuments or the laws of 13 April 1850 and 27 January 1902 which were the first to be introduced in the campaign against insalubrious dwellings.

Several texts departed from the spirit of the Code in other fields. By way of example,

there was the Law of July 21 1881, supplemented by that of 31 July 1895, which prohibited the sale of an animal suffering or thought to be suffering from a contagious disease; the much modified Law of 4 February 1888 aimed at clamping down on fraud in the fertiliser industry; there was the 14 August 1889 Law on wine and the Law of 16 April 1897, which dealt with the butter trade and the manufacture of margarine; the Law of 1 August 1905 concerning the suppression of fraud in the sale of goods and the adulteration of foodstuffs and agricultural produce, as well as the 29 June 1907 Law on wine sweetening. All these laws led directly to consumer protection legislation and gave the 1804 Law of Contract a bit of a rough time.

In matters of liability over the transport of merchandise, Article 1784 of the Civil Code made provision for presumption of fraud by the carrier, while the plaintiff had to prove the amount of damage suffered. As a result, rail companies very early on inserted non-liability clauses; these were denounced by Rabier as contrary to the freedom of contracts on the ground that this made them comparable to membership agreements. They were suppressed under the Law of 17 March 1905.

The earliest environmental legislation also imposed constraints on the notion of absolute freedom that the Code had authorised. For example, the Decree of 16 June 1885, concerning the designation of parts of rivers, streams, navigable and floatable canals as reserves for the reproduction of fish, provided for notices to be posted in January in every town and village in the land indicating clearly those areas where fishing was strictly prohibited. During this period it was forbidden to allow geese, ducks, swans or any other animal likely to destroy fish spawn to wander freely. Under the same wild life protection heading came the Decree of 5 November 1891 which forbade the use of dynamite in fishing. Laws were passed in areas where up till then people would have acted spontaneously. For example, the Law of 23 July 1907 authorised the destruction of rooks and magpies when their number was a threat to sowing or harvesting. Their destruction was carried out by landowners, tenant-farmers and share-croppers who came across their nests; the law applied also to wild rabbits, but not to deer.

Some legislation, on the other hand, reinforced the spirit of the Code. This was the case with the very famous Law of 1 July 1901 on non-profit-making (charitable) associations, which is totally in line with the notion of freedom of contract. This law only saw the light after the drafting of thirty-three bills in the space of thirty years. This was due to republican opposition to religious communities. A system of legal authorisation was finally inserted into the 1901 law, but applicable only to this latter type of association. It is also worth quoting the Law of 18 July 1889 which aimed at "codifying the most universally accepted regulations governing share-cropping [métayage]" and which stated the obvious: that in this type of farming "fruit and produce is to be shared equally, unless contrary to usage or otherwise stipulated"; this had not been clearly stated in the Civil Code. Sometimes very old practices were revived at the end of the nineteenth

century; one example being long leaseholds or emphyteuseis, a law of Ancient Greece that was still in use during the ancien régime. The Law of 25 June 1902 made it clear that this was a perpetual lease, lasting from between eighteen to ninety-nine years, with low rent but an obligation to improve the property.

All this patching-up made the Civil Code look quite bizarre. More and more texts introducing special legislation were not incorporated into it, in spite of the fact that it was their natural place, while the interplay of numerous repeals rendered more and more articles nul and void.

This is the reason why Larnaude, along with other turn-of-the-century jurists, exclaimed, "We no longer have a Civil Code!" One thing was certain; the debate on the revision of the Code had begun long before the celebration of the first centenary. The Société d'études législatives, founded in 1901, had a lot to do with it. The Minister for Justice even created a sixty-one member extra-parliamentary commission in 1904 to study the matter. There was no shortage of proposals. Some were even in favour of equality between the sexes within marriage, along with a duty to love. Nothing concrete came of it. The stakes were in fact political and many people in both the political and the judicial world spoke out against revision. One of the direct consequences of this refusal was the emergence on 28 December 1910 of the Code of Work and State Insurance. It was little more than a compilation of current legislation, but it was symptomatic of a new trend.

A century after those debates, we should be able to see that those nouvelles extravagantes were quite obviously not only necessary but beneficial. It was not because the Civil Code possessed great virtues that it could never be altered. A law always reflects the present needs of the society in which it is drafted. The more needs a society has, the more numerous must be the laws that regulate those needs. This in no way means that the original text was deficient. On the contrary, through the experience gained, it is in a position to provide a framework for new desires, on condition that agreement can be reached to embody them in time-honoured principles.

## **Part II**

**by Jérôme Roux**

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### **The Civil Code: Stability and Change in the Twentieth Century**

Dean Jean Carbonnier, one of the most respected and most authoritative voices among civilistes [experts on the French Civil Code], used to say that France's real constitution was the Civil Code itself. This daring and slightly provocative statement is well worth our attention as we follow the career of the Code civil through the century which has just ended, and consider what remains unchanged, what has evolved and what has even been totally altered by the upheavals in French society since the 1960s. Dean Carbonnier's statement is worth our attention for two reasons. Firstly, on account of its author, whose considerable role in bringing about many important contemporary Civil Code reforms deserves our attention. Secondly, because the second half of the twentieth century, in France in particular, has witnessed a waxing of the impact of constitutional norms on the Law and on Jurisprudence without this actually causing the Civil Code to wane. As a result, there is every reason for us to cast a constitutional glance at the text, just as Dean Carbonnier's famous saying invites us to do.

For Carbonnier, the Civil Code played the part of France's real Civil Constitution in the collective subconscious for a century and a half, maybe longer. There were other Napoleonic codes: the Commercial Code of 1807, the Penal Code of 1810 which was totally redrafted in 1992, the Civil Procedure Code of 1806, completely revised in 1975, and the Code of Criminal Investigation of 1812, replaced in 1959 by the Code of Penal Procedure. Their aims, however, were more specific and shorter-term. They could never claim to overshadow the Civil Code. In any case, for Napoleon, the Civil Code, along with the Constitution of Year VIII, represented from the very beginning one of the pillars of the new political order. The real purpose of the mammoth undertaking was to complete and strengthen as much as possible what R.Cabrillac calls the "geographical, social and political" unity of France. The Revolution of the preceding decade had prevented the work from being carried out. Its initial objective was clearly expressed in Article 7 of the law of 30 Ventôse year XII, which stated that the recently codified civil laws were to replace Roman laws, ordinances, general and local customary law, statutes and regulations. Shortly afterwards, Article 68 of the Constitutional Charter of 4 June 1814, which brought the Napoleonic Empire to a close, still guaranteed the continuity of the Civil Code. This should be proof enough that the apparent distance between the Constitution and the Code is deceptive. The constitutional approach adopted by this monument, not only of private law but of

Law itself, is not the result of some passing and unimportant intellectual fashion. It stems from a longstanding tendency. It was originally seen as such a symbol of unity (J. Carbonnier) that in the nineteenth century "patriotism made a second flag of it" (A. Ensminger). Now, it has been rightly raised to the status of a "national heritage site" (P. Nora), on a level with the Marseillaise and the Château of Versailles.

Even if people used to think of the Civil Code as a constitution, it was really a sort of constitution by default. It made up for the lack of stability, authority and clarity of the successive political constitutions which France had known over the decades. Compared with the succession of over ten constitutions, charters and constitutional laws that have marked the past hundred and fifty years of our history, the Civil Code certainly gave the impression of a monument of stability. It was proof that the legal system continued uninterrupted in spite of the nation's political ups and downs and the consequent transformations these brought to the Constitution. J. Carbonnier even went as far as to say that "the Civil Code has remained the most authentic Constitution of the land, outliving ephemeral political constitutions." The Code did undergo modifications, but substantial reforms in the nineteenth and the first half of the twentieth centuries were few. With hindsight, though, these changes frequently appear, as we shall see, as harbingers of profound changes that were to take place – and still are taking place today – especially in the field of human rights. Since the 1960s in particular, legislation concerning individual and family rights, in contrast to the law of obligations, has entered an ongoing phase of upheaval. Examples are the reforms concerning guardianship in 1964, parental control, from 1970 onwards, parentage [filiation] in 1972, matrimonial property regimes in 1965 and 1985, divorce in 1975 and bioethics in 1994. Even so, the impression of normative continuity that any process of codification is bound to lend to legislation has been retained by the preservation of the old article-numbering system. This has involved all sorts of acrobatics, such as leaving certain articles blank and subdividing others. For Dean Carbonnier, this wish to preserve appearances was politically motivated at heart, and based on the need to maintain a form of continuity that had for so long been absent from the Constitution. Not only have the various French constitutions been short-lived; they have suffered from a blatant absence of legal weight. Since there is no efficient mechanism to guarantee their respect by the powers that be, their supremacy over other legislation, and their consequent effectiveness, have up until now been seriously deficient. The Constitutions simply cannot stand up to comparison with the Civil Code, which can easily impose regulations within its jurisdiction, if necessary through the services of a judge, for any legal transaction in the field of private or public law. Lastly, except for poorly backed up declarations of individual and citizen rights, rarely of duties, to which no penalties were attached, these Constitutions listed a corpus of technical and procedural provisions of interest only to the authorities. The Civil Code, on the other hand, which ruled on a number of practical aspects of

daily life – contracts, compensation for damages, marriage, birth and inheritance – seemed, for people in possession of rights, much more relevant and concrete. So it is hardly surprising that the general public's idea of the Law was associated not with an unstable, theoretical and distant Constitution, but with civil legislation made popular by a successful process of codification, which encouraged the conviction that "one could actually hold the law in one's own hands."

The key question is whether what was true then is still true today. In the past, one could be certain that the Civil Code "was the true Constitution of France" (F. Terré). But can it still lay claim to such a destiny today, now that the Fifth Republic has corrected the three constitutional weaknesses that until then had given the Code a free rein?

In the first place, as we all know, the present constitutional system is founded on a forty-six year-old constitution which – after the Constitutional Laws of 1875 that gave birth to the Third Republic and lasted for sixty-five years – is the second longest-lived in French history. This is partly due to the Constitution's own genius and to its adaptability to political circumstance. This longevity still has to be assessed, though, in the light of the successive revisions of the past ten years. These have had an effect both on the unity of the text's subject matter and on its inspiration. In the second place, the establishment in 1958 of constitutionality control, for laws in particular, has at last allowed the Constitution to acquire the status of a true and effective norm, since its supremacy is now generally guaranteed in most matters. Since 1970 these controls have been developed thanks to the dynamism of the Conseil Constitutionnel judges and to the extension on 20 October 1974 to the parliamentary opposition of the right to refer a matter to the Conseil d'État. Thirdly and lastly, unlike the Constitutional Laws of 1875, the present Constitution is not a mere collection of technical provisions for the distribution of power within the State. It has acquired a Preamble which, in evoking the French people's attachment to "human rights as defined in the 1789 Declaration and as complemented by the 1946 Constitution," immediately confers constitutional status on these two texts from different epochs. The rights referred to may be human or citizen's rights, civil or political rights, economic or social ones, or rights which a constitutional judge, when dealing with a text that lends itself to interpretation on account of its general wording, may hand down in his case law. They certainly draw the Constitution in which they are inscribed closer to the ordinary citizen and people are justified in expecting them to be taken into account by their representatives, under the vigilant control of the Constitutional Council. Citizens are likewise entitled to invoke these rights in administrative and ordinary law courts, which are not afraid to make use of constitutional arguments in their own case law either. The Charte constitutionnelle des droits [Constitutional Charter of Rights] is nevertheless in competition with international conventions with similar aims. This is especially so, to give justice where justice is due, with the Convention for the

Protection of Human Rights and Fundamental Freedoms adopted by the Member States of the Council of Europe on 4 November 1950 and ratified by France on 3 May 1974. The fact that this text is guaranteed by the European Court of Human Rights in Strasbourg has a considerable influence on French law in general and on its civil law in particular.

In any case, the result of this rejuvenating cure given to the Constitution and "to constitutional law in general" – which according to Dean Carbonnier himself, "now prevails over all other sections of the law" – is the fact that the Code has undoubtedly lost a part of its privileged position. But the Code's loss of its claim to fulfil the symbolic function of Constitution-by-default does not mean that the debate is therefore totally closed. Even if we can no longer consider the Code to be the true Constitution of France, that does not mean it does not possess a constitutional dimension, or that such a possibility is not worth scrutiny.

If we want to keep to a purely formal definition of the notion of constitution – the normative expression of the sovereignty of the people or of its equivalent, the nation – there is definitely nothing constitutional about the group of legislative norms which make up the Civil Code. The original text was passed towards the end of the Consulate, in a purely formal vote by a powerless legislative body. Its tongue-tied members – appointed by that wonderfully oligarchic assembly, the conservative Senate – obviously laid no claim to represent the nation, if one could even speak at that time of the nation possessing any sovereignty. Later modifications were simply the result of legislation which, at best – for that dating from the beginnings of democracy in the Republic – effectively expressed the legislative will of the representatives of the sovereign people. They in no way expressed the Sovereign's constitutive will, even during the Third and Fourth Republics, when the Parlement boasted a form of authority to which it had no legal claim. Under the present Constitution, civil matters are for the most part the domain of the law, which "fixes rules concerning [...] nationality, status and capacity of persons, matrimonial property regimes, inheritance and gifts" and which "determines the fundamental principles [...] regarding ownership, real rights and civil obligations" (Article 34 of the Constitution). It is true that this could give the ruling power freedom which it did not previously have to establish secondary rules on the basis of fundamental legislative principles. It is clear, too, that the collection of rules that make up the Civil Code is only likely to be considered constitutional as far as substance is concerned, and if the content bears a likeness to a constitutional norm. It is only in this way that Dean Carbonnier saw the Civil Code as the true Constitution of France, "true, not in the formal, but in the material sense of the word."

This research for essential similarities between the Civil Code and the Constitution will no doubt evoke, for jurists, the question of the so-called constitutionalisation of branches of the law in general and of civil law in particular. There are nevertheless two things that set the

Constitution apart. Firstly, even if the subject of this commemorative study, the Civil Code, also deals above all with civil law, the two texts do not coincide exactly. The Civil Code covers an area that is both wider and narrower than that covered by the Constitution. Its field of reference is narrower, since civil legislation is not found exclusively in the Civil Code. A number of fairly recent texts have not been included in it, either because they have been codified elsewhere, in the Code de la consommation [Consumer Code] for example, or in the Code de l'action sociale et des familles [Code of Social and Family Policy]. Others have simply not been codified. Its field of reference is at the same time wider, for there is more than civil law in the Civil Code. The preliminary title contains general provisions that can be of fundamental importance for the whole judiciary. For this reason alone, the Civil Code is not merely a civil law code. What is more, the very notion of the constitutionalisation of branches of the law is equivocal enough almost to disqualify it. This is because it is seen, maybe wrongly, as the result of a power struggle by constitutionalists for other sectors of jurisprudence. It is true that the Constitution's acquisition of normative powers that we have just described often has the side-effect of giving certain aspects of civil law – via general principles such as the freedom to marry, the right to ownership, contractual freedom or even the principle of the dignity of the individual – what G. Vedel calls constitutional justification. This simply means that one can infer links between many civil law norms and institutions and this sort of constitutional principle. It certainly cannot lead one to the conclusion that they spring from these principles, or that their existence depends on them. Above all, in the same way as the foundations of civil law are tending to become constitutionalised, one could say that the contents of constitutional law are likely to become civilised (C. Atias). This is one aspect of the phenomenon that the expression constitutionalisation of civil law fails to define. An example will illustrate this two-way movement perfectly. In its Decision of 9 November 1999, relating to the *pacte civil de solidarité* (Pacs), a civil union contract between two unmarried persons living together as a couple, the Conseil Constitutionnel not only referred to Article 4 of the Declaration of the Rights of Man and of the Citizen which states that "freedom consists in being able to do anything which does not harm anyone else" but also cited "any action by a person which harms another obliges the person liable for the fault to make amends." In this way, the Council was providing constitutional justification for tortious (non-contractual) liability. By the same token, however, the principle of constitutional freedom gained a liability obligation whose regulations were taken straight from civil law. On the one hand, the Council copied word for word the famous expression, and with it the substance, of Article 1382 of the Civil Code. On the other, by implementing the regime of tortious liability in the case of breakdown for fault in a civil union contract – which is beyond any shadow of a doubt a contract – it was using the rules of civil law. In civil law, a contractual framework does not necessarily exclude tortious liability in general. Abuse of rights, moreover, of which the breakdown for fault in a civil union contract

is an illustration, can incur tortious liability even when the context in which the fault was committed is contractual.

The influence of the substance of the Civil Code on the Constitution and on constitutional law in general could be considerably greater if only the Conseil Constitutionnel could get around to using the various articles of the so-called fundamental laws of the Republic. This is a category of constitutional principles evoked in paragraph I of the Constitutional Preamble of the Constitution of 26 October 1946. Although academics have often called for this move, it has not yet been carried out, in spite of numerous requests by parliamentary deputies during their referrals to the Council. It has to be said that the conditions imposed by the Conseil Constitutionnel for a constitutionally valid fundamental principle to be recognised are so specific that this creates a huge problem when it comes to the Civil Code. The Code is undoubtedly a collection of laws and ordinances, which have force of law. Among the host of technical provisions relating to personal or pecuniary rights that successive legislation has usually confirmed, or at least never contradicted, the Code undoubtedly contains a number of fundamental principles. But for the moment they still have not been recognised by the laws of the Republic. The real problem, however, is that the original provisions of the Code Civil des Français, many of which are still in force, were promulgated on 30 Ventôse year XII, that is, on 21 March 1804, under a regime governed by the Life Consul Napoleon Bonaparte, whom one would naturally hesitate to label a republican. It is also true that this First Republic, upheld by the Consular Constitution of year VIII, was not brought to an end until the senatus-consult of 18 May 1804 at the earliest, so two months after the promulgation of the Civil Code. While this conferred the "government of the Republic" upon the Emperor of the French (Article 1), the Republic itself was never formally abolished. In any case, chronological subtleties apart, not all the original provisions in the Code are foreign to the Republican spirit. They were the result of a compromise between ancien droit [pre-Revolutionary law] and Revolutionary law and these same principles, formulated in the Declaration des droits de l'homme et du citoyen [Declaration of the Rights of Man and of the Citizen], were appropriated by the Republic. All the more reason why successive legislation to reform the Civil Code, in the course of the Second and especially the Third Republic, could, if necessary, serve as a source of inspiration for the Conseil Constitutionnel in its search for constitutionally valid fundamental principles for the Republic. This could not be the case however for the more plentiful and more important legislation passed since 1946. The Council is not allowed to draw inspiration for constitutional principles from Republican laws promulgated before the enforcement of the Constitution of the Fourth Republic and its Preamble. So it is impossible to envisage taking "fundamental principles recognised by the laws of the Republic" from the Code to add to the Constitution. Though it would still be quite amusing to include principles, even if they were no longer valid or original ones, from what – under the First

Empire and again, by virtue of the Decree of 27 March 1852, under the Second Empire – used to be called the Code Napoléon. But even then, there would probably be an insurmountable obstacle to carrying this out. The rather vague constitutional notion of "fundamental principles recognised by the laws of the Republic" can only be invoked in a subsidiary manner by the Conseil Constitutionnel, for the purpose of adding new principles to the Constitution. In any case, the provisions in the Preamble relating to individual rights, ownership and the family, not to mention the infinite references to the cardinal principle of freedom, already provide, and in the future could no doubt provide even more, textual justifications for civil law principles.

So we shall obviously not be attempting to describe or assess any specific phenomenon of constitutionalisation of civil law over the past decades. Our purpose is simply to pick out the points in common between the Civil Code and the notion of Constitution, and in so doing, estimate the constitutional dimension of the Civil Code.

At first sight, the undertaking appears doomed to failure. In theory at least, the notion of Constitution could refuse to fit into any material definition used to describe the Civil Code. The word constitutional can define anything that the initial Constituent Power (or any constituted organism invested with the power to revise the Constitution) has decided is constitutional, by including it – couched in the appropriate language – in the Law of the Constitution. However, today's jurists, moulded by two centuries of steadily expanding constitutionalism, know that any modern constitution has two distinct characteristics. One is the organisation of the exercise of the power of the state along the lines of separation dear to Montesquieu. This is what Dean Maurice Hauriou called the political constitution. The other is its definition of the principles and values of society in whose service, and in respect of which, the power of the State must be exercised within the limitations it imposes – what Hauriou called the social constitution.

It is obvious that in both respects the Civil Code possesses a constitutional dimension, though not to the same extent in each. In the first place, certain provisions, some of them of fundamental importance, extend well beyond the limits of civil law, or are even totally foreign to it. They are of primary interest to the entire judicial and political structure of the State. The second characteristic involves the essential subject matter of the Code – civil law – often called the queen or the mother of all judicial disciplines, or as Y. Lequette puts it, "the heart of every judicial system." The various chapter sections of the Code bear the stamp of society and are even inspired by its values and aspirations, as summed up in the constitutional motto of the Republic. Which amounts to saying that the Civil Code is in certain respects not unlike the Constitution of the State, or better still, the Constitution of Society.

## **The Civil Code and the Constitution of the State**

Although the Civil Code is an admirable text on the workings of the law, it is not simply that. It also has a political dimension. This stems from the fact that several of its articles determine, just as a constitution would do, some of the essential principles of the organisation of the State – itself the personification of the Nation – towards whose unity the Code has in no small way contributed (R.Carré de Malberg). Of course, we would search its pages in vain for any provisions directly concerned with constitutional directives made by a sovereign nation, or relating to a source of power, to the delegation of power or to its exercise by any of the organisms set up for this purpose. For this reason, it is not a political constitution. It distinguishes clearly between political and civil spheres. It states specifically that "the exercise of civic rights is separate from of the exercise of political rights, which are acquired and kept according to constitutional and electoral law" (Article 7). However, even if the Civil Code as a whole is not supposed to govern public entities, and certainly not the State, certain provisions do have a very constitutional appearance. Some deal with the law and judges, both fundamental aspects of the state judiciary, others govern nationality, the element which unites citizens to the Nation-State.

## **The Civil Code and Public Corporations**

Anyone trying to draw a parallel between the Civil Code and the Constitution of the *pouvoirs publics* [State Administration] will come up against one major objection. For the Civil Code to lay claim to a constitutional role, it would have to be applicable not only to private individuals but, first and foremost, to the State and its administration – the secular arm of the executive – as well as to other legal entities governed by public law such as local authorities and public institutions attached either to them or to the State.

In principal, these public legal entities are governed by a different body of law called *droit administratif* [administrative law], which normally dispenses it from civil law – in other words *droit commun* [jus commune, ordinary law, not to be confused with British common law]. This would be the case when, for example, corporations conclude a contract or their liability is incurred or even when their ownership rights are exercised. On 8 February 1873, the *Tribunal des conflits* [Jurisdictional Court] handed down a precedent-setting judgment (the *arrêt Blanco*) whereby "the principles of the Civil Code, which apply to relations between individuals, cannot rule on public liability that may be incumbent upon the State for damages caused to individuals through the acts of parties in State employment. On the contrary, this liability is subject to special rules, which may vary according to administrative necessity and the need to reconcile the rights

of the State with those of the private citizen. This principle – stated in this case in relation to the law of liability but with theoretically many wider-reaching repercussions – was justified in the light of two complementary requirements. Public corporations working for the general interest, especially public services benefiting if necessary from prerogatives of public authority, should not be subjected to the same regime as private citizens who are seeking solely to satisfy their own personal interests. On the contrary, for public corporations, a specially adapted body of law should be applied, containing both prerogatives and constraints which fall outside the jurisdiction of *droit commun*. In case of conflict, this law would be implemented in an administrative tribunal rather than in the ordinary law courts [jurisdiction judiciaire].

It is true that subsequent evolutions have tempered the scope of this founding decree in administrative law. Nowadays, public administration often comes under the jurisdiction of the Civil Code or of regulations springing from it. This is so with acts not carried out in the name of the authorities but accomplished in the same way and with the same means as private citizens would employ.

Firstly, even if contracts concluded between public corporations are in principle administrative in nature (Tribunal des conflits, 21 March 1983 UAP) – and for this reason are not governed by the Civil Code – it is not always so with contracts passed between public entities and private individuals. Of course, some contracts are definitely administrative. This is usually because their clauses fall outside the jurisdiction of civil law or commercial law or *droit commun* (Conseil d'État, 31 July 1912, Case Société des granits porphyroïdes des Vosges). Less frequently the texts governing the contract fall outside this jurisdiction (Conseil d'État, 19 January 1973, Case Société d'exploitation électrique de la rivière du Sant). Sometimes the purpose of a contract excludes it, if it is connected, for example, with civil engineering (Article 4 of the law of 28 Pluiose year VIII) or with the occupation of public property (Article L 84 du Code du domaine de l'Etat) or related, in the case of contracts tendered by public services, to "actually carrying out a job of public utility" (Conseil d'État, 20 April 1956, Case Epoux Bertin). Since they do not come under civil contractual law, contracts of this type are subject to administrative law, both for signature, especially in the case of public tenders, and execution. This law is usually favourable to the contracting administration, which can simply decide unilaterally to breach the financial equality of the contract. It can also be favourable to the private partner who can obtain financial aid from the public body in the case of radical unforeseen changes to the terms of the contract, without which its execution would otherwise be jeopardised (Conseil d'Etat 30 March 1916, Case Compagnie générale d'éclairage de Bordeaux). On the other hand, contracts signed by public corporations, but which are no different from those signed by private individuals – neither in their articles, nor their nature nor their purpose – are governed by civil law and, in the case of

litigation, are dealt with in the ordinary law courts.

Secondly, administrative tribunals do not always mind applying articles from the Civil Code (or rules inspired by it) in relations between the administration and private individuals. They do this in an area close to contracts, when they use Articles 1371 et seq. of the Code, relating to quasi-contracts. These refer to "a man's purely voluntary acts, which can result in an undertaking towards a third party, and sometimes in a reciprocal undertaking by both parties" (Article 1371, Civil Code). The Conseil d'État is no doubt reticent about applying Code Civil rules relating to agency to instances of spontaneous, voluntary intervention by private individuals in the business of the Administration (Articles 1372-1375 of the Civil Code). But it may still seek inspiration from these rules when it accepts to ensure compensatory damages to parties who, in some way or other, have been agents of a Public Administration, and in so doing have become occasional voluntary collaborators of the same. On the other hand, however, the Conseil d'État considers that Article 1376 of the Civil Code – relating to the recovery of mistaken payment and "general in its scope" (Conseil d'État, 1 December 1961, Case Société Jean Roques) – does apply to administrations. Its application can benefit the Administration, for the reimbursement of sums paid in error to its agents or to third parties. It can also be applied to its detriment, when, for example, under the principle of this article, the taxpayer obtains rebate for wrongfully collected tax. The Conseil d'État even goes as far as to oppose "a general principle which can be implemented without reference to a text" (Conseil d'État, 14 April 1961, Case Société Sud Aviation) to public corporations. This principle of unjust enrichment, which comes from equity, is not actually in the Civil Code; it was handed down by the Cour de Cassation over a century ago. On this point, as we shall see, it follows Civil Code case law closely. It can be invoked by a civil engineering contractor seeking compensation from a public corporation for work carried out, which, while there was no legal agreement for it, was nevertheless of utility to them.

In the third place, the regulations governing administrative liability are not unconnected with the principles of civil liability. An administrative judge turns to these principles to decide upon the rules applicable to the Administration. He can, for example, transpose to administrative contracts the civil law principle handed down by the Cour de Cassation, whereby one of the contracting parties can only bring an action against the other party under the terms of contractual liability, since this takes precedence over tortious liability (Cour de Cassation, 11 January 1922). In the same way, the judge may refer to the principles which inspired Articles 1792 and 2270 of the Civil Code relating to a civil engineer's ipse jure liability towards the owner or the purchaser of a structure in the event of damage which could jeopardise its solidity or make it unsuitable for its destined purpose. This enables him to define the rules of the contractor's mandatory ten-year

guarantee, especially for the benefit of a public corporation client. Again, in matters of tortious liability involving public corporations or even private persons running public services, Civil Code rules can on occasion be applied in the extremely complex entanglement of administrative and private law which, especially since the Blanco Decree, has been widely admitted as case law evolves. This is why, for example, by virtue of the Law of 31 December 1957, the liability of public corporations, even in the running of a public service administration, and that of civil engineers for damages caused by a vehicle, both fall within the competence of the ordinary law courts, who pass judgment, as stated by law, according to the rules of civil law.

Finally, the rules of the Civil Code are not totally foreign to the system of public ownership which is ruled by the traditional distinction between the public and the private domain, the first, unlike the second, covering the assets of administrative bodies attached to public services. Of course, the property rights of administrations over their assets are very specific, as demonstrated by the constitutional principle of their non-transferability for less than their value ( Conseil Constitutionnel, 25 and 26 June 1986) and their non-distrainability, which stems from a general principle of law (Cour de Cassation, 1<sup>st</sup> Civil Chamber, 21 December 1987, Bureau de recherches géologiques et minières; Conseil d'État, judgment of 30 January 1992). This is why property rights generally escape the jurisdiction of droit commun as defined by the Civil Code, in particular in Articles 544 et seq. For the most part, they are governed by special rules inspired by principles which stem from case law and which are collected in various codes, in particular in the Code du domaine de l'État [Code of state-owned property] and the Code général des collectivités territoriales [General code for local government]. Although the unfortunate expression state-owned property used in Articles 538 et seq. of the Civil Code might lead one to believe the contrary, the criteria for delimiting state-owned property are definitely defined outside the Civil Code. Similarly, Public Domain property obviously comes under a regime almost totally foreign to civil property law. This is because dependencies on the Public Domain are inalienable; this excludes not only their sale, exchange or expropriation; but also, in principle, unless there are any contradictory legislative provisions, the constitution of real rights on state-owned land. The absence of statutory limitations on public property legislation relating to dependencies nevertheless protects public corporations from any acquisitive or extinctive prescription or from any action for possession against them. As for any private property belonging to public corporations, this is governed for the most part by the rules and regulations of private law, which in principle are distinct from civil law relating to assets.

Nevertheless, certain Civil Code regulations do concern public property for two reasons. For one, some relating to assets can govern the wealth of public corporations as well as of natural persons. Thus, for example, the droit d'accession (Articles 546 et seq.) the right by virtue of

which "the ownership of a thing" can be extended to "everything which is produced by it" and to "what may be joined to it, either naturally or artificially" (Article 546) can as equally be applied to state domains, whatever their status, as to private property. Similarly, even if, by virtue of the principle of inalienability of the public domain, immoveables incorporated in it cannot – as foreseen in the Civil Code for the benefit of neighbouring estates – be burdened with any easements, unless these had been established prior to incorporation and are seen to be compatible with the use made of the publicly-owned land, the same dependencies can very well benefit from such easements, and naturally also from those of "public utility" invoked by Article 649 of the Civil Code. As for dependencies on private domains belonging to public corporations, Civil Code rules can be applied more widely in this case. The delimitation of dependencies on private property in relation to neighbouring tenements can very often be carried out by setting boundaries (Article 646 of the Civil Code). What is more, their alienation, which, unlike Public Domain dependencies, is always possible, may be carried out, subject to a number of restrictions defined by the Civil Code. Sales are possible (Article 1582 et seq.) on the one condition that they are not for less than the property's value and by virtue of a contract which may be administrative in nature; so are exchanges possible (Articles 1702-1707) with the exception of moveables, and usucapion (acquisitive possession). In addition, these dependencies may naturally still be burdened with easements benefiting the dominant tenement and may be the subject of a lease contract (Articles 1790 et seq.).

Other Civil Code prescriptions deal specifically with public corporation wealth and to a lesser extent that of communes, since common property – as defined in Article 542 as being "that to whose ownership or revenue the inhabitants of one or several communes have a vested right" – comes under the heading of their private domain, and concerns above all national property. Civil Code Articles 538-541 list, with no claim to be exhaustive, the public and private assets which fall within the domain of the State. Similarly, Articles 556 et seq., relating to national waterways, watercourses and lakes, regulate what happens to alluvium, sand banks and alluvial deposits which, once formed naturally on Public Domain dependencies, may leave the Public Domain to become part of riparian estates, or may even constitute private domain dependencies. Finally, and this is no trivial matter, the Civil Code rules that "all property without a claimant or a master" (Articles 539, 713), but also "estates for which there is no heir" (Articles 811-814), and which are acquired by right by the State (Articles 768 et seq.), are added to the State's private domain.

The general picture we have just described demonstrates that Civil Code law is far from being inapplicable to public corporations. Is this in itself sufficient to allow comparisons with a State Constitution? The answer is definitely not, for the scope of application of Civil Code provisions for the most part concerns hypothetical circumstances in which the State, and other public

corporations that form a part of it, cast off the mantle of public power and act as any ordinary citizen would. Not that the comparison we have undertaken is doomed to failure, for the Civil Code undoubtedly does have similarities, on two counts, with a Political Constitution. In the first place, some provisions contribute towards defining the status of the law and above all the role of judges within the legal system. Secondly, it harbours a real code of nationality, a sort of "Charter of French Citizenship" (F. Dekeuwer-Defossez).

### **The Civil Code, the Law and the Judges**

The Preliminary Title of the Civil Code, "Of the Publication, Effects and Application of Laws in General", goes far beyond the limits of a mere legal code. It contributes to the constitution of the judicial order and even – if we go along with Hans Kelsen, the Austrian jurist, who considers the State has been assimilated into the Constitution – that of the State itself. In this respect, the Civil Code fulfils the judicial function of a state constitution, with the result that there is nothing surprising about the similarity of subject matter in the Preliminary Title and the constitutional norm.

The first articles of the Code, relating to the execution of promulgated laws, are a logical prolongation of Article 10 of the Constitution, which entrusts the President of the Republic with the task of promulgating legislation within fifteen days of it having been passed to the government following its final adoption. Article 1, in particular, is a useful complement to the Constitution. It clarifies, where the constitutional text is silent, the function and effects of promulgation, which, as far as the Conseil Constitutionnel is concerned, is what brings legislative procedure to a conclusion. By providing that "laws are enforceable throughout the entire French territory, by virtue of their having been promulgated by the President of the Republic," the article actually suggests that a statute is not enforceable as such, but only as a result of promulgation. This somewhat diminishing conception of the law is no doubt defensible if one considers that the enforceable nature of any legislative act depends upon its actually being put into effect, and consequently upon the executive. It nevertheless leads to a curious paradox. The normative expression of the will of the Sovereign's representatives is thus deprived of its "enforceable nature" which, by virtue of "a fundamental rule of public law" (Conseil d'État, 2 July 1982, Huglo), is common to most decisions, however minor, made by any administrative authority. Indeed, in its Commune of Montory decree, 8 February 1974, the Conseil d'État, in ruling that promulgation is proof of the existence of a statute, and in ordering public authorities to observe and enforce the observation of its prescriptions, confirms this conception. Its definition reveals a more complete approach to promulgation than in Article 1 of the Civil Code. Here, a declaratory dimension is added to its prescriptive function. But this addition does nothing to change a

situation in which, according to the highest court of administrative justice – the Conseil d'État, the law is not competent to put itself into operation without an order of execution published by a promulgation decree.

In any case, the statement in Article 1 of the Civil Code, indicating that promulgated statutes are "enforceable throughout all French territory," needs to be considerably tempered in several respects, especially in the light of the incomplete rules in Article 3, but also in the light of certain recent constitutional rulings. Firstly, if French statutes are in principle applicable throughout the national territory, and even beyond, – since those that "concern the status and capacity of persons govern all French persons, even those who reside in foreign countries" (Article 3, sub-paragraph 3, of the Civil Code) – they can at times defer to foreign law. This is certainly not the case for the "police and security laws," in particular those "by which all those who live in the territory are obliged" (Article 3, sub-paragraph 1), whatever their nationality. Nor is it the case for those statutes which govern immoveables situated in France 8 Article 3, sub-paragraph 2). Aliens resident in France may still find themselves subject to their own national legislation, especially for matters concerning personal status, civil status, capacity, matrimony, parentage, and so forth. This will depend on and be defined by the complex rules of private international law relating to conflict of laws of place (*lex loci*), essentially those handed down by case law. In the second place, the standard application of the law to the entire national territory is coming up against an increasing number of adjustments, as a result of special legislation in force in certain areas of the national territory. This has long been the case in the départements of Alsace and of Moselle, where for historical reasons, linked to the loss of these territories by France between its defeat by Prussia in 1870 and its victory over Germany in 1918, a local legal system is in force. It has recently been the case, even in Metropolitan France, with the setting up of *collectivités à statut particulier* [special local authorities] in Corsica which, since the constitutional revision of 28 March 2003, are now recognised by the Constitution (Article 72 sub-paragraph 1). Under this article, the local authorities of the Republic "may, according to circumstances, and when provided for by statute or by regulation, as an experiment and for an undetermined period of time, depart from the legislative provisions which govern the exercise of their competence" (Article 72, sub-paragraph 4). This is similarly the case for France's *départements et territoires d'outremer* [overseas départements and territories] where "the laws and regulations are enforceable *per se* (Article 73, sub-paragraph 1 of the Constitution), but are subject to "adaptations which depend on the specific characteristics and constraints of these authorities." With the exception of La Reunion, these can, by an even more radical derogation to the principle of legislative assimilation, "in order to take their specific characteristics into account in a certain limited number of matters belonging to the domain of the law," be allowed to draw up rules "applicable in their own territory" (Article 73 sub-paragraph 3 of the Constitution). This is

especially the case for former territoires d'outre-mer , now called collectivités d'outre-mer [overseas local authorities], which are governed by a separate statute that takes into account their "own interests.... within the Republic" (Article 74, sub-paragraph 1 of the Constitution) and which, in some cases, "exercise autonomy" (Article 74, sub-paragraph 3). A contrary principle is actually applied here, whereby laws and rules are only applicable if provision has expressly been made for them. What is more, their deliberative assemblies are also endowed with legislative competence by an organic law (Article 74 sub-paragraphs 2 and 3), which allows them to take "measures justified by local needs" in favour of their populations. And as if this rag-bag were not enough, one must add the unique constitutional status of Nouvelle Calédonie [New Caledonia], which has the honour of a Constitutional title all of its own. Title XIII not only consecrates the definitive character of the transfers of competence granted to New Caledonia by the State, especially in matters of legislation and the correlative adoption of lois du pays [local laws] adopted by the New Caledonian Congress, but also the existence of Caledonian citizenship, of a derogatory electoral system and a customary civil status (Article 77). In order to complete the singular patchwork that the French legal system is beginning to resemble, we need to mention the Constitution's recognition of the "personal status" (applicable in New Caledonia and elsewhere) of certain citizens of the Republic. Because they have never renounced this status, they still cannot benefit from common law civil status (Article 75). This is the case for certain inhabitants of Mayotte. However, the Civil Code's new Book Four (Articles 2284-2302), opened by an ordinance of 19 December 2002, which alters it, will mean that the Code will, with a few reservations, be applicable on the island. When it comes to the bottom line, we are obliged to ask ourselves if we have not forgotten that the law "should be the same for all" (Article 6 of the 1789 Declaration). Maybe we are right in fearing that France is on the point of renewing with the tradition of legislative division that the Napoleon Code had finally managed to solve.

The general principle, stated in Article 2 of the Code, that "the law only provides for the future; it has no retroactive effect," is echoed in the constitutional field concerning criminal law. Article 8 of the Declaration of the Rights of Man and of the Citizen, an integral part of positive constitutional law, actually affirms that "no one can be sentenced except according to a law that was established and promulgated prior to the crime." This does not prevent the application of more lenient criminal legislation from being obligatory retroactively ( in mitius), in accordance with the constitutional principle of the need for sentencing (Conseil Constitutionnel, 19 – 20 January 1981). Of course, outside the realm of repressive law, the principle of a law's non-retroactivity has no constitutional value. The Conseil Constitutionnel considers that Article 2 of the Civil Code – on the basis of which the Conseil d'État has handed down a general principle of law confirming the non-retroactivity of administrative acts (Decree of 25 June 1948, Case Société

du journal l'Aurore) – only contains "provisions of legal value" not binding by law ( Decision of 29 December 1986). But since such exceptional departures from Article 2 would only be possible in the general interest and on condition that "rights [...] recognised by a decision of justice carried out with the authority of la chose jugée" (same Decision) are respected, one is obliged to acknowledge that Article 2 of the Civil Code is no longer merely a legislative provision. The Conseil Constitutionnel would only need to take one small step to render this article fully constitutional and grant full authority to a principle of legal security, sanctioned notably by European Community law (CJEC, 10 July 1984, case Kent Kirk). For the moment, that step has yet to be taken.

Likewise, by affirming that "private agreements do not allow one to depart from laws which are in the interest of law and order and morals," Article 6 of the Civil Code reminds us that the preservation of law and order has become "a constitutional objective" (Conseil Constitutionnel, 27 July 1982), or even "a constitutional requirement" (Conseil Constitutionnel, 20 November 2003). This article, taken together with others which apply the same general principle (Articles 900, 1133, 1172, for example), could prove that the most urgent general interest, and the law which is called upon to enforce it, far from having been banished from civil law, have the capital mission of limiting the sovereignty of the individual will. And this is a will whose autonomy, even when put in context in this way, could still be questioned or even purely and simply denied, if one were to go by the accepted interpretation of the very famous Article 1134 sub-paragraph 1 of the Civil Code. Indeed, by proclaiming, that "legally drawn up agreements replace laws for those who draw them up," we need to ask whether this article is not enthusiastically celebrating the autonomy of the will of rightful citizens. Or does it, on the contrary, only establish an agreed departure from the normative power of the legislature to the benefit of partners bound by agreements whose common will would be quite powerless, without this autonomy, to put into effect any judicial operation whatsoever? There may well be no one definitive or decisive answer to such a question. It goes without saying, however, that the will of the individual must give way to the requirements of law and order. The Civil Code very wisely omitted to provide a definition of l'ordre public [law and order], preferring to leave the task of constantly touching up its ever-changing contours not only to the law but to the courts.

In fact, several of the most fundamental provisions in the Code form the basis for giving real status to the function of the law within the State, not only in civil but in all matters. This can be seen, not only in Articles 14 and 15 relating to the competence *rationae personae* and *rationae loci* of French courts, but also in Articles 4 and 5 which lay down two fundamental principles destined to define the place and the role of judges within the State judiciary. These are articles which, by the same token, would have been equally well placed in the text of the Constitution,

since they are inseparable from certain written and unwritten constitutional principles. In the first place, the fact that a judge may not – on pain of incurring legal proceedings, as stated in Article 4 – commit a denial of justice, by refusing "to pass judgment, claiming that the law is silent or obscure or insufficient" on a matter, is the sort of provision which can make a constitutional right more effective, since the right to effective judicial recourse is sanctioned by the Conseil Constitutionnel. This is the same right that guarantees the other rights which ensue from Article 16 of the Declaration of the Rights of Man and of the Citizen (Conseil Constitutionnel 21 December 1999).

This right – also established by the European Court of Justice (CJEC, 15 May 1986, Johnston) – for once goes beyond the requirements stated by the European Convention on Human Rights, for which Article 13 in effect simply guarantees the right to "an effective recourse before a national authority," not necessarily a judge (CEDH 6 September 1978), as long as it is independent and impartial. As for Article 5 of the Civil Code, which bars "judges from referring to general or regulatory provisions when deciding cases which are submitted to them," it expresses a distinct distrust of the courts. It makes it clear that the judiciary, given the constitutional separation of the powers of the State, cannot be drawn into the exercise of duties that belong to the realm of the legislature. This is confirmed by the preceding article, which invites the judge simply to compensate for gaps in the law, not to act in its name. Article 1351 is proof of this same distrust. It is a real breviary of the authority of *la chose jugée*, whose scope is bound to be limited since it "is only applied in respect of matter which has already been the subject of a case." This authority cannot be contested, in the event of a *recours contentieux* [submission for a legal settlement] before the same or any other judge, unless three conditions are met, namely that "the claim is the same", that "the grounds for the claim are the same" and that the submission, made "by the same parties, is brought by them and against them in the same capacity." This same reticence is equally noticeable in the text of the 1958 Constitution. While it devoted its Title VIII to "The Judiciary" – whose independence is placed under the protection of the President of the Republic, merely assisted, in this role, by a *Conseil supérieur de la magistrature* [Supreme council of judges] – the Constitution was careful not to admit the existence of any judicial power at all. And when, the government and the Conseil Constitutionnel set up an organ to control the constitutionality of laws, they did not run the risk of recognising that the Supreme Council of Judges possessed any judicial capacity either.

This distrust felt towards judges, directly inspired by the French Revolution, present in the original version of the Civil Code and still relevant today, needs to be put into context. Compared with the wave of antagonism unleashed against judges during the Revolutionary period, it is undoubtedly true that "Articles 4 and 5 read like a kind of resurrection of the power to pass judgment" (P. Rémy). This distrust still exists however; it stems from a diminished view of the

function of the judiciary, which is placed under the regulating power of statute law and thus deprived of any law-making power of its own. This vision of the role of the judge does not actually correspond to today's judicial reality and most probably never has done.

From a theoretical point of view, one cannot maintain that, to borrow Montesquieu's famous terms, "the nation's judges are no more than mouths which pronounce the words of the law, inanimate beings who can moderate neither its authority nor its rigour," to the extent that their power to pass judgment would be so to speak nil. This conception is born of the idea that, in passing judgment, the judge, in his summing up, should limit himself to mechanically applying to the case before him a general rule which has been totally defined in advance by the State's law-making authorities, and by the legislative body in particular. In actual fact, this general rule, when it does exist, never has a single, objective, predetermined meaning. The terms in which it is couched are always open to a certain number of different interpretations, which will vary according to circumstances. In litigation, it is up to the judge – by means of intellectual reasoning, which leads him firstly to identify all the possible interpretations of this rule, then to choose the one which seems the most pertinent to him – to decide upon the meaning of a rule. The judge's indubitable law-making power is abundantly clear here. His will is expressed not only in the judgment he passes upon the facts of a case, whose truth and significance it is his duty to appreciate, but also and above all, in the determination of the general rule which he has to put into application. Indeed, the most extreme, and no doubt excessive, modern "realist" theories of interpretation affirm that the true, exclusive and independent author of judicial rules is not the person who adopts a text but the one who interprets its terms later on. Without going as far as that, for interpretation still depends on the choice of words in a text under interpretation, it is nevertheless true that the judge obviously participates in the definition of the general rules that he has to apply. The judge is in a similar situation, to borrow a classic metaphor, to a musician faced with a score that is open to various interpretations. By playing the legal text, by making the chords of his reasoning vibrate, the judge adds his own genius to the law and gives it life. One could go even further and see, as J. Boulanger does, that as a result of the continued establishment of new precedents, the original legal text will finally disappear beneath the layers of interpretation like a palimpsest, a parchment whose text has been scraped off in order to write another on it. Of course, the rule-making power of case law often brings the spectre of judge-made law out of the cupboard. At first glance, this can appear incompatible with the principles of representative democracy, even though legislation can always be made to contradict any case law considered unsuitable. But it does correspond to an absolutely unavoidable judicial reality, perfectly identified by Jean Giraudoux, when – in his play *La Guerre de Troie n'aura pas lieu* [The Trojan War will not Take Place] – he has Hector, the hero of the Iliad, say: "The law is the most powerful of school of the imagination [...] no poet has ever interpreted nature as freely as

jurists have interpreted reality," or one might add, as judges have interpreted the law.

What is true of judges in general with regard to any rule of law, is naturally true for the juge judiciaire [ordinary law court judge, as opposed to an administrative tribunal judge] vis-à-vis the Civil Code. It would be a mistake to conclude that civil law – unlike constitutional law, or even less so, administrative law, which originally was entirely and understandably, in the absence of any text specifically applicable to administrations, judge-made – is totally determined by a code so complete as to leave no space for the normative creativity of case law. Portalis never made this mistake. In his Preliminary Discourse, he underlined, from the very outset, the important role judges would have to play in bringing the Code to life. Indeed, for a long time, and especially since the end of the nineteenth century, the Cour de Cassation has proved how fertile the rule-making capacities of its case law could be. As P. Rémy says, case law is such a "rival source of the law" that, "by a spectacular change of perspective, not only is the judge no longer the mouth of the law, but the law – when being formally cited after a judicial interpretation – speaks through the mouth of the judge in order to back up a daring case law decision." The law of obligations alone offers plenty of examples of the varied but very intense impact of legal creativity.

The Cour de Cassation has, for example, substantially added to the law of quasi-contracts without any real textual justification. Where the Civil Code, after a general provision of unjust enrichment, only covered two categories of quasi-contract – agency (Articles 1372 – 1375) and recovery of mistakenly paid monies (Article 1376) – case law, following the Patureau-Boudier Decision of 15 June 1892, conceived of, one might almost say "invented", a third category. Of course, since 1804, the obligation imposed by Article 553 sub-paragraph 3 of the Civil Code on a landowner to pay compensation for plantations or construction carried out on his land by a third party, unless he intends to destroy them, had already constituted the embodiment of an obligation born of an unjust enrichment but devoid of any legal justification. But until the daring creation by the Cour de Cassation in 1892, the idea had never been applied to any other situation. And as often happens, one new precedent led to another. The execution of this new general obligation imposed on a wrongful beneficiary had to be guaranteed, so the Court had once again used its rule-making power to define the entire regime for a *de in rem* transaction. According to the terms of the decision, which reveal the size of the case law construction, and because the ruling "had not been regulated by any law of the land," it follows that the action takes its source from a principle of equity. Among other things, the Cour de Cassation was later obliged to make it clear in its own words that action of this sort can only be brought in a last resort, in the absence of any other legal process open to the deprived party (Judgment of the Third Civil Chamber, 2 March, 1915).

On other occasions, the creative work of case law consists in unfolding the considerable

and unimagined possibilities present in any one of the Code's apparently uncontroversial provisions. The fabulous destiny of Article 1384 sub-paragraph 1 shows this clearly. This article, which provides in particular that "one is responsible not only for damage caused by one's own actions, but also for damage caused by ...things in one's keeping, " had been conceived as an introduction to two specific instances of liability for damage caused by things, specifically covered in the two following articles, namely, liability for damage caused by animals (Article 1385) and by buildings in a poor state of repair (Article 1386). To start with, it did not appear to possess any law-making possibilities. However, referring to a decision of 16 June 1896, and adopting ideas from legal scholarship [la doctrine], the Cour de Cassation deduced from Article 1386 sub-paragraph 1 a general principle of liability for damage caused by things, which allowed for the payment of compensation in cases other than the specific ones provided for by Articles 1385 and 1386. On the tenuous terms of this sub-paragraph, case law has, in the course of time, built itself a considerable edifice, "a real skyscraper on a pin head," as J.Boulanger puts it. This was achieved by giving the found principle the largest field of application possible, in order to cope with the increasing amount of damages incurred by the development of mechanisation. Thus case law decided that it made little difference whether liability was incurred for moveables or immoveables or whether they contained inherent weaknesses, were dangerous, static or mobile, and in the latter case whether they moved spontaneously or depended on man to be set in motion. With these various clarifications, as well as others relating to the meaning of caused by things and the nature of keeping which supposes that one uses, directs and materially controls these things, the Cour de Cassation confirmed the details of a principle of which, for obvious reasons, it appears to be the author. Much later, after a long period of disallowance and after a very similar logical process, the same sub-paragraph 1 of Article 1384, which laconically evokes "liability for actions by those under one's responsibility" provided the Plenary Assembly of the Cour de Cassation with the basis for another judgment. On 29 March 1991, it resolved to hand down a general principle of vicarious liability, to be applied outside the specific instances covered by the following sub-paragraphs. This covered the liability of fathers and mothers for damage caused by their children, of principals for damage caused by their employees and of school teachers and craftsmen for damage caused by their pupils and apprentices.

Article 1382 of the Civil Code lays down the principles of personal liability for damage. Unlike sub-paragraph 1 of Article 1384, its law-making potential was never questioned and it could not have taken shape without the aid of case law. The Code's creative power was yet again demonstrated regarding the definition of *faute* [wrongful act]; without this notion, which is mentioned but not explained by Article 1382, liability cannot be incurred. Case law allows, for instance, that a wrongful act can be constituted by the abuse of a right and, in an even more daring judgment, can be caused by the act of a child who has not yet reached the age of reason

and who therefore cannot understand what he is doing (Judgment Lemaire, Plenary Assembly of the Cour de Cassation, 9 May 1984).

These examples should be enough to show that the strict ban "on judges using general and regulatory provisions to pass judgment" (Article 5 of the Civil Code), which aims at limiting them to ruling on individual cases, and only allows them to supplement what is lacking in the law, is illusory. This considerably reduces what one is obliged to call the judicial power of the State. The autonomy, in its original sense, of case law is such that sometimes the court can free itself, although not always without controversy, from the same legislative rules that it has largely contributed towards updating. This was the case recently, precisely over Article 1382, in the Perruche judgment passed on 17 November 2000 by the Plenary Assembly of the Cour de Cassation. Its ethical and social implications extended so far beyond the austere framework of the workings of the law that it hit not only the legal but the national headlines. Contrary to the conclusions of the Advocate-General, J. Sainte-Rose, the Cour de Cassation ruled that a child born with a severe disability as a result of German measles, contracted – but undetected on account of a mistaken diagnosis – during his mother's pregnancy, was justified in seeking redress for the wrong caused by his disability from the doctor whose error had led the mother not to terminate her pregnancy, as she had expressly wished to do, were German measles diagnosed. If one follows the established rules for personal liability, the doctor's liability should never have been incurred, since there "was not an ounce, not even the least tiny bit of causality" (D. Mazeaud) linking the mistaken diagnosis, which constituted an undeniable medical error [*faute médicale*], with the resulting injury done to the child, namely, his disability. This handicap was in fact exclusively the result, not of the absence of detection of German measles, but of German measles itself. It was obvious that the liberty taken in this case, and other similar cases, in the name of the law of equity by the Cour de Cassation was intended to compensate a victim and make up for the gaps in state welfare provisions for handicapped persons. Even if, either in terms of the law or in actual fact, the medical fault was not the cause of the disability for which redress was being sought, it could at the very most be considered to be the indirect legal cause of the birth, for if the diagnosis had been correct, the pregnancy would have been terminated at the request of the mother. It ensues that the only way to give the court's judicial interpretation the legality it lacks would be to consider that the claim for which compensation was sued against the doctor, was not so much for the child's disability itself as for his life as an invalid. If this is the case, we are faced with an ethical nightmare that has no regard for the dignity of the individual. If any "handicapped life" is considered as an injury, we can take the argument a step further and say that the eminent value attached to any human existence, however painful, is rejected. That is why, in order to overrule the judge's decision in the Perruche case, legislation was rightly passed (Law of 4 March 2002, Article 1) stating that "no one can claim injury solely on account of his

birth." In this way, the representatives of the People, manifesting the ultimate supremacy of their power over the courts, ruled on an issue which had gone far beyond a civil law problem and had laid in the balance the fundamental values of society.

### **The Civil Code and Nationality**

Secondly, the very constitutional link that binds the Civil Code to the State is also given spectacular importance by its Title I bis, "Of French nationality", which alone would justify the original title of Code civil des français passed by the Law of 30 Pluviose year XII. Although nationality is an important element of civil status, it cannot really be limited to this one aspect of private law. It is above all an institution of public law, supposed to represent "the emotional bond which ties an individual to the State," and founded on "an attachment to the nation's way of life, interests and sentiments, which involves exercising reciprocal rights and assuming obligations pertaining to it," to use the terms of the International Court of Justice in its famous *Nottebohm* Judgment of 6 April 1955. By its very nature, and by its effects, nationality – which leads to citizenship of a state and full enjoyment of civil rights (Article 8 of the Civil Code) and political rights – is an eminently constitutional notion, even if the French Constitution actually has very little to say about it. It merely states (Article 3 sub-paragraph 4) that "all adult nationals ... are entitled to vote" and then leaves it up to the law to fix "the rules ... concerning nationality" (Article 34 of the Constitution).

The legislative provisions concerning the acquisition and loss of nationality, whose practical aspects cannot hide their political and symbolic dimensions, were extracted from the Civil Code by a statute passed on 10 August 1927, and constituted, after the publication of the Ordinance of 19 October 1945, the Code of Nationality. The Law of 22 July 1993 integrated them into the Code again, thus renewing with tradition. The text, which is very ideologically charged, and which mixes *droit du sang* [*jus sanguinis*] and *droit du sol* [*jus soli*], has obviously suffered from the pressure of circumstances and the vicissitudes of changing governments. The original supremacy of *jus sanguinis*, first watered down with the Law of 26 June 1889, was again diluted by that of 10 August 1927, which considerably eased access to French nationality after the terrible blood-letting suffered by the population of France during World War I. And even if, following the equally liberal Law of 9 January 1973, there came the more restrictive one of 22 July 1993, the Legislative Reform of 16 March 1998 revived the liberal tradition. This tendency, which has put its stamp on all developments in French nationality law in the course of the twentieth century, and which still characterises it today, therefore proceeds from an undeniable spirit of openness which is as generous as it is reasonably possible.

This liberal approach has made it easier to obtain French nationality (except in some

specific cases involving the acquisition of nationality by marriage) either through marriage with a French citizen, in accordance with fairly strict rules aimed at clamping down on fraudulent abuse; or by a discretionary government decision of naturalisation. In order to ensure that the special emotional bond expressed in the attribution of French nationality is not totally fictitious, acquisition is dependent on the prior-fulfilment of two conditions: "usual residence in France," a notion which has been strictly interpreted in case law as meaning "in the five years preceding the request" (Article 21-17 of the Civil Code) and "assimilation into the French community notably through a sufficient knowledge of the language" (Articles 21-24).

*Jus sanguinis* naturally plays its part in the attribution of nationality. In this respect, the rule in the Napoleon Code that limited the transmission of nationality to male parentage is only a distant memory. Indeed, by concluding the legislative evolution that had been marked firstly by the Law of 10 August 1927, which had allowed the transmission of French nationality via the mother to a child born in France, and secondly by the 1945 Code of Nationality, which suppressed this condition of birth, Article 18 of the Civil Code, which stems from the Law of 9 January 1973, lays down this absolutely egalitarian law: "Any child, whether legitimate or illegitimate, with one French parent, is French."

But the Civil Code also attributes major importance to *jus soli*, even though it is under no legal constraint to do so. In fact, international law recognises, in matters of nationality, the total sovereignty of states (International Court of Justice 6 April 1955, *Nottebohm*) and, on the whole, only lays down very generous principles (Article 24 § 3 of the United Nations Pact relating to Civil and Political Rights of 19 December 1966; Article 7 of the New York Convention of 26 January 1990 on Children's Rights.) Besides, some of these principles are not binding, either by reason of the purely declaratory nature of the instruments in which they are formulated (Article 15 of the Universal Declaration of Human Rights of the General Assembly of the United Nations of 10 December 1948) or by reason of France not having ratified the international conventions in question (United Nations Convention 30 August 1961 on the Reduction of the Number of Stateless Persons; European Convention on Nationality 6 November 1997, signed but not ratified by France.) The French Constitution contains no principle whereby birth in France, even if associated with some residence conditions, would automatically carry with it acquisition of French nationality on reaching the age of majority or whereby any child born in France of an alien parent born in France would be French. If the legislative powers of the Republic have continually laid down such principles in the past, notably with the Laws of 26 June 1889 and 10 August 1927, it was for circumstantial reasons only, usually for military conscription, so the Conseil Constitutionnel refuses to see in them any "fundamental principles recognised by the laws of the Republic" (Decision of 20 July 1993). This shows the extent to which this legislative desire to accept *jus soli* stems from a choice which is as free as it is generous. A few examples

will allow one to judge. Birth in France to foreign parents carries French nationality with it for the child from birth, on the sole condition that at least one of the parents was born in France, in accordance with the principle known as double droit du sol [double jus soli] (Article 19-3 of the Civil Code). For cases in which this condition is not fulfilled, a child born in France acquires this nationality on his majority if he is resident in France and if he has been habitually domiciled for five years, continuously or otherwise, since the age of 11 (Article 21-7). He acquires this by right, he does not even have to express the wish to be French since the requirement to display such a will, laid down by the Law of 22 July 1993 in order to avoid a person adhering unwittingly, or on occasion, unwillingly, to the national community, was purely and simply abolished by the Law of 16 March 1998. In addition, birth on French territory can sometimes be sufficient in itself to confer French nationality on a person who would otherwise be stateless. French nationality is automatically granted to "a child born in France of parents unknown" (Article 19), according to a principle adopted by the Law of 26 June 1889 and reasserted by the Law of 9 January 1973; the same applies to the child born "to stateless parents" (Article 19-1 1°) or even to one born to alien parents neither of whom, by virtue of foreign legislation, has passed his or her nationality to the child (Article 15-1 2°).

This liberal approach has not been contradicted by regulations governing loss of nationality. In many cases, loss of nationality is the result of the wish of the person concerned. In others, where nationality loss is imposed, it would be hard to contest its legitimacy, unlike those cases envisaged by the illegitimate Vichy regime during the dark hours of the Occupation. One case, provided for by the 23 July 1940 Law, was deprivation of nationality for any French person – General de Gaulle included – who had left France between May 10 and June 30 1940. Another statute, as ignoble in its inspiration as in its effects, was enacted on 22 July 1940 to allow nationality acquisitions since 1927 to be revised. Today, anyone who has acquired French nationality can be deprived of it, if, in the ten years since acquiring it (Article 25-1), they have committed one or other of the serious offences covered by Article 25 of the Civil Code. These include crimes and offences which endanger "the fundamental interests of the nation" or acts carried out "in favour of a foreign power" and "harmful to French interests," and which are obviously in contradiction with any bond the person concerned could feel for France, which is the very basis of nationality. Justified in this way, deprivation of nationality, which is now, thankfully, purely personal – its extension to the spouse and children having been abolished in 1973 – and which, incidentally, was also abolished by the 16 March 1998 Law for cases where the condemned person would become stateless, should logically not be limited to those who have acquired French nationality. It is therefore surprising to find that the law cannot be applied to French-born nationals guilty of the same acts. Apart from these cases, enforced deprivation of

nationality can also affect, and again justifiably, the French citizen who refuses, when ordered by the Government, to leave the employment of a foreign power or of an international organisation to which France does not belong (Article 23-8 of the Civil Code) even if this deprivation should make the person stateless. It can also affect a French citizen who "behaves like the national of a foreign country" (Article 23-7), but only "if he is a national of that country," thus excluding any risk of statelessness. Nationality loss can also be the logical consequence, unless stipulated to the contrary, of cessation of territory upon which the persons concerned have settled (Article 17-8), but not, in principle, when a territory becomes independent (Article 32 and 33-3).

Whatever else its purpose may be, the Civil Code is intended not only for the Nation but for Society, whose values it enshrines and whose fruit it is.

### **The Civil Code and the Social Constitution**

One legal stream of thought, known as sociological positivism, is founded on the conviction that the adoption of positive legal standards is always preceded by what G. Burdeau calls a legal idea, that is to say, by a vague representation in the social body of "a desirable social order."

According to this view, the social function of law is to translate these aspirations, which come from the depths of society, into legal standards. To a certain degree, in spite of terminological appearances, this is what Montesquieu was already saying in his *Esprit des Lois*, when he saw in these aspirations "the necessary relationships that come from the nature of things." Closer in time to us, the jurist L. Duguit, influenced by Durkheim's sociology, went as far as to say that the legal standard is really a societal norm perceived by objective law and even that "laws draw their necessary strength, not from the will of governing bodies but from their accordance with social solidarity." Or in other words, with society's aspirations.

Without necessarily going along with such extreme sociological positivism, it is undeniable that a legal rule is influenced by social aspirations. In the long run, it does end up answering them, in some cases belatedly, incompletely or even mistakenly, for the better or for the worse. There is nothing surprising about this, given that, *ubi societas ibi jus*, wherever there is a society, there are laws. This truth is perfectly well illustrated by the Civil Code. Its long line of reforms easily allows us to see the changes in society and morals during the twentieth century. From the outset, the Civil Code was no doubt influenced, not by sociological positivism, whose rapid development is too recent, but by a very different stream of thought, *jusnaturalism*. This philosophy postulates the existence of superior natural laws which pre-date positive laws. Portalis, a passionate believer in natural law, even claimed in his Preliminary Discourse that he "meant to develop the principles of natural law." And it was again Portalis, in Article 1 of the

Civil Code Bill of year VIII, who referred to the existence of "a universal and immutable law, the source of all positive laws." But this original "impregnation by natural law" (B.Oppetit) has not prevented later developments from having been brought about by social necessity.

Moreover, in addition to certain social aspirations which can emanate from just one sector of society or be ill-conceived, the fundamental duty of the law is to translate the values whereby a whole society recognises itself into positive rules. This task is first and foremost the function of a Constitution which, when it comes to the bottom line, is not so much the normative pedestal of the State as of Society itself. This concept is alluded to in the very famous Article 16 of the Declaration of the Rights of Man and of the Citizen which proclaims that: "any society in which rights are not guaranteed or in which the separation of powers is not ensured, does not possess a Constitution." In any case, it is perfectly possible to perceive the Constitution, not so much as an obviously unilateral commandment of the Sovereign, as a pact concluded between members of a social body, a social contract similar to those imagined each in their different ways by Thomas Hobbes, John Locke or, even more so, Jean-Jacques Rousseau. A contract which contains the fundamental values of this society and which, by the same token, and according to a distinction made by Dean Maurice Hauriou, is a social constitution which imposes itself upon the powers established by the political constitution.

Seen from this angle as well, the Civil Code cannot avoid being likened yet again to a constitution. From the very beginning, to borrow Portalis's famous words, it appeared to be "a body of rules aimed at directing and fixing the social, family and business relationships that men belonging to the same society entertain with each other." And even today, as far as Civil Code doctrine is concerned, civil law is an instrument designed to "forge a type of society"(G. Corniu). This is why Dean J. Carbonnier saw the Civil Code as the true French Constitution. "Materially and sociologically speaking, if you like," he wrote, "it really does have the significance of a constitution, since it recapitulates the ideas upon which society was founded after the French Revolution and continues even today to be founded, by developing and maybe transforming these ideas, without ever saying that it renounces them." In fact, the Civil Code, heir in many ways to the French Revolution, also conveys, though at times imperfectly, the essential values established in the Constitution, which have become those of the Republic. This has been the case with the concept of laïcité, so much so that "the silence maintained on the question of religion shows the Code in its most eloquent and decisive light" (J. Carbonnier) and is behind the separation of the powers of the Church and the Law. It is especially true of two of the three values which constitute the motto of the Republic: liberté and égalité. Already in the nineteenth century, Victor Proudhon, Dean of the Faculty of Law of Dijon University, talking about "the constitutional bases of the civil status of French citizens" during his course of lectures on legislation, stated his

belief that "two qualities were fundamental to the Code: freedom and equality." What was true for the original Civil Code is even truer today, especially after the contemporary upheavals in the law of persons in general, and in family law in particular.

### **Freedom in the Civil Code**

Freedom, present everywhere in the Constitution, via the Declaration of the Rights of Man and the Citizen, which proclaims from the very start that "men are born and remain free" (Article 1), filters deep into the Civil Code. It is Man's first "natural and inalienable right" (Article 2); it "consists in being able to do anything which does not cause harm to anyone else (Article 4). In various ways, it reaches to the root of all aspects of the Code, not only the law of property and obligations, but, given the large number of reforms it has had in the course of the twentieth century, it has also permeated large areas of the law of persons and the family.

### **Freedom and the law of property and obligations**

In the first place, the bonds which unite property and freedom are so profound that the Conseil d'État, acting as juge du référé-liberté [judge of urgent cases concerning freedom], recently recognised property as having "the character of a fundamental freedom" (Judgment of 29 March 2002, S.C.I. Stephaur and others). Article 2 of the Declaration of the Rights of Man and the Citizen first mentions freedom, and next property, before security and resistance to oppression even as being "Man's natural unalienable rights," whose preservation is the purpose of any political association. This is because, in the opinion of the Revolutionaries, property, and that means private property, constitutes the economic instrument of freedom. It is only in this respect, and by adhering to Locke's analysis of the question, that freedom appears as a natural right. In every other respect, privative appropriation stems much less from the natural order than from the social order of things. Property was enshrined in the Declaration of the Rights of Man and of the Citizen, and consequently in the Constitution, as "inalienable and sacred." The right was guaranteed, in the Conseil Constitutionnel's Decision of 16 January 1982, as having "plenary constitutional value." This also made it clear that "the protection owing to property concerns not only the private property of individuals, but also, and equally so, the property of the State and of other public corporations" (Decision of 25 and 26 June 1986). This right to property is protected by the European Convention of Human Rights, expressed in the form of the entitlement of any natural or legal person to "the peaceful enjoyment of his possessions" (Protocol 1, Article 1). From the very beginning, property was similarly sanctioned by the Civil Code, a real "Constitution of Entitlement to Property" F. Zenatti calls it. Article 544 of the Code defines

property as "the right to enjoy and dispose of things in the most absolute manner." It insists heavily on every facet of the owner's freedom vis-à-vis the object he owns by right, as does Article 537, which affirms that "private individuals are free to dispose of their possessions," subject, it is true, to "modifications laid down by the law." Even when the possession of a thing is the result of a gift or a legacy, the beneficiary's freedom to exercise his entitlement to property cannot be abusively limited, since Article 900-1 of the Civil Code affirms that "the inalienability clauses relating to a gift or a legacy are not valid unless they are temporary and justified by a true and legitimate interest."

The absolutist conception thus retained for entitlement to property, as well as the protection granted by the Conseil Constitutionnel to this right, should still not make one forget the limits imposed on the prerogatives of owners. Protection is extended, not only in cases of "outright deprivation" or "dispossession" but in the case of encroachment, which may, if sizeable enough, alter the meaning and extent of a property (Decisions of the Conseil Constitutionnel of 17 July 1985 and of 26 July 1994). From the outset, however, the Code also invites the owner not to make use of his entitlement "in a way forbidden by law or by regulations" (Article 544). Similarly, following Article 17 of the 1789 Declaration of the Rights of Man and of the Citizen and in anticipation of the principle of nationalisation laid down in sub-paragraph 9 of the Preamble to the 1946 Constitution, the Code makes provisions for any person, "on condition they receive fair monetary compensation in advance," to be obliged to "cede his property ... for reasons of public utility". This notion incidentally carries less force and therefore less protection for the property than that of public necessity employed in the Revolutionary Declaration. Finally, the Civil Code burdens this entitlement, which is therefore not as absolute as all that, with a certain number of easements (Articles 637 et seq.). Case law has in turn imposed its own constraints on owners, through the notion of neighbourhood disturbances or the theory of the abuse of rights. But it is mostly subsequent legislation and regulations which, in addition to the Civil Code, have contributed to the wearing away of the owner's prerogatives. In addition, the compatibility of these with the provisions laid down by the Constitution and by the European Convention on Human Rights, presupposes that any uncompensated restrictions they impose on the enjoyment of property must be justified by a motive of general interest, in proportion to the motive, and should not lead to a drastic deprivation of the substance of this entitlement. Are we to conclude from this that entitlement to property is on the decline? It would probably be going too far to answer in the affirmative, since, apart from the fact that limitations of enjoyment of property are sometimes aimed at guaranteeing another man's rights to enjoy his own property, the various constraints just mentioned really only affect immoveables. Property law has also now been considerably extended to include moveables, and even immaterial possessions, which are the products of the mind. Consequently, this double evolution in the twentieth century of the

entitlement to property – "characterised both by a significant extension to new domains of its field of application and by limitations in the general interest" (Conseil Constitutionnel, Decisions of 16 January 1982 and 25 July 1989) – invites caution concerning a right which still remains "the backbone of the law of property" (F. Libchaber).

Secondly, freedom is very much the inspiration behind contract law, which is impregnated with the conviction that the mere association of freely expressed wills is enough to beget and determine the content of agreements which have "force of law for those who make them" (Article 1134, sub-paragraph 1 of the Civil Code). The freedom of contracting parties was probably never absolute, for the principle of the autonomy of the will was not the sole source of inspiration of the Civil Code in this matter. In the first place, the Code's famous notion of a mutual agreement has not prevented the existence, alongside these simple contracts which come into being solely through a *contrat consensuel* [consensus agreement], of a host of real contracts, such as loans (Article 1138), for which the signing of a contract is subordinate to the handing over of a thing. There are sealed contracts too, such as donations (Articles 894 and 931), requiring the execution of certain formalities, in particular the writing of a deed. This proves that an expression of mutual agreement alone is not always sufficient to make it enforceable. Finally, and most importantly, it is the function of the law to provide a framework for contracting parties. This is illustrated by Article 1134 sub-paragraph 1 of the Code, which stipulates that agreements cannot be effective unless they have been formally drawn up. The law also provides that: "One cannot depart by private agreement from laws relating to law and order and morals" (Article 6). This explains why "only things that can be traded ... can be the subject of agreements" (Article 1128), and why the validity of an agreement is always subordinate to the lawful basis of its consideration, which cannot be contrary to morals and law and order (Article 1108 and 1131).

In the course of time, contractual freedom has certainly come up against restrictions which have originated from outside the scope of the Civil Code. Successive legislation has been passed to regulate work, insurance, lease and loan contracts, in order to protect the weaker of the contracting parties – an employee with regard to an employer, a purchaser with regard to an owner, a consumer with regard to a member of a trading company. The purpose of this intervention has been to re-establish real equality, even at the cost of straining the quality of freedom. Yet it still would be going too far to start writing out contractual freedom's death certificate. In the first place, the legislative framework of a contract, which can be construed in the first instance as an interference with freedom, often constitutes the only real guarantee of the contract's being put into effect. The theory of lack of agreement proves, just as a burdensome contract partially does, the existence of an imbalance in the services required of the parties. This can in certain cases vitiate the contract (Article 1118 of the Civil Code). Also, despite multiple

legislative intervention, there is still space for unfettered freedom to give free rein to the imagination. This can lead to the conclusion of innominate contracts (Article 1107 of the Civil Code) and consequently the invention of new types of contract. Lastly, the Conseil Constitutionnel did for a time appear reticent about contractual freedom. To start with, it estimated that "no constitutional norm can guarantee the principle of contractual freedom" (Decision of 3 August 1994). Then it stated that this principle was not "inherently constitutional" (Decision of 20 March 1997). And then it laid down even more categorically that there was no such constitutional principle as "the autonomy of the will" (same Decision). Even so, the Conseil has placed limits on legislative interference in contractual relationships. On several occasions it has considered that even if the law can, "in the general interest, modify contracts which are already being executed," it cannot "intervene in the organisation of legally concluded contracts and thereby blatantly fail to recognise freedoms inherent in Article 4 of the Declaration of the Rights of Man and the Citizen" (Decisions of 10 June 1998, 23 July 1999 or even that of 12 January 2002). Besides, since the Conseil Constitutionnel recognised, in its Decision of 19 December 2000, that "contractual freedom [...] ensues" from this article, it is no longer possible to doubt its constitutionality.

Thirdly, in the law of obligations, freedom has its place in regulations governing not only contractual (Article 1147) but tortious liability. This logically follows from Article 4 of the Declaration of the Rights of Man and the Citizen: "Freedom consists in being free to do anything which does not cause another any harm." This definition, the only socially acceptable one, necessarily implies the establishment of rules and regulations to govern redress for harm, whatever the basis of liability retained.

This freedom implies of course in the first place tortious liability for a wrongful act, as defined in Article 1382 of the Civil Code. The Conseil Constitutionnel was therefore proceeding quite lawfully, when, during its control of the statute which created the civil union solidarity pact, it gave constitutional validity, as we have already seen, to the famous article in the Code based on Article 4 of the 1789 Declaration, whereby "any act made by a person which causes damage to another obliges the person who caused the fault to make amends" (Decision of 9 November 1999). In doing this, the Conseil removed an ambiguity. In a decision prior to 22 October 1982, it had already opened the way for including the article in the Constitution. Later it had appeared to be far more reticent over "the principle of personal liability laid down by Article 1382 of the Civil Code" (Decision of 27 July 1994), when it admitted that the law could prevent a child born as a result of medically-assisted procreation obtained through a third party donor from suing that person from damages.

Although it has not yet been anointed in with the same Constitutional oil, civil liability –

no longer founded on the wrongful acts of the person who causes the harm, but on the risk to which that person's actions expose another – is none the less equally tied up with the idea of freedom. For a person who undertakes an activity, with the likely intention of deriving benefit from it – and which necessarily carries the risk of harming another person – is obviously enjoying the use of his freedom; at which point liability then appears to be its natural counterpart. This is why the gradual decline throughout the twentieth century of tortious liability in favour of risk liability could not possibly reduce the notion of freedom inherent in the law relating to civil liability. And for that matter, the decline was only relative. It occurred under the influence of case law (Judgment of the Cour de Cassation, 13 February 1930 *Jean d'Heur*), and of special legislation from the Law of 9 April 1898 onwards covering work-related accidents. Examples are the Law of 3 January 1968, whereby: "He who has caused damage to another person, while of unsound mind" – unintentionally, that is – "is none the less obliged to make amends" (Article 489-2 of the Civil Code); and the Law of 5 July 1985 on traffic accidents, which has not been inserted in the Civil Code.

That is why freedom, whatever its foundation, is not only inseparable from civil liability but present everywhere in the law of persons.

### **Freedom and the Law of Persons and Family Law.**

The list of civil rights enjoyed by French nationals listed at the beginning of Book One of the Civil Code, entitled "Of Persons" – and which are also applicable, dependent on a questionable reciprocity condition, to aliens (Article 11) – has very much the same appearance as all the declarations of rights and freedoms to be found in the majority of constitutions. There is no allusion to *droits creances* [chose in action], or to the so-called second-generation rights which, in order to complement the 1789 rights and freedoms, were sanctioned at the end of the Second World War by the Fourth Republic in the Preamble to its Constitution. Certain freedoms, namely those of opinion and expression are noticeably absent. And yet, Title One of the Civil Code still looks remarkably like our *Charte constitutionnelle des droits* [Constitutional Charter of Rights].

Article 9 of the Civil Code proclaims, "in the delicate shape of an alexandrine" (B. Beignier), that "chacun a droit au respect de sa vie privée" [every person is entitled to privacy] and invites the courts to guarantee this. The insertion of this provision in the Civil Code by statute on 17 July 1970 was all the more valuable since the French Constitution text does not sanction any right to privacy. In 1993 a commission of experts did propose to make up for this obvious gap in the Constitution, by adding a sub-paragraph to Article 66 which is devoted to individual freedom, a sub-paragraph using the exact same words as Article 9 of the Civil Code. The proposal was

never followed up. It was finally thanks to Conseil Constitutionnel case law that the substance of Article 9 clearly became a part of the Constitution. Basing themselves on the Decision of 18 January 1995 and in the wake of the 1993 proposal just mentioned, the Conseil resolved to recognise the constitutionality of the right to respect for privacy. Given the Constitution's silence on the matter, the Conseil deduced this firstly from the notion of individual freedom stated in Article 66 of the Constitution (Decision of 18 January 1995). Then it changed its mind and included it in Article 2 of the Revolutionary Declaration of the Rights of Man and of the Citizen (Decision of 23 July 1999), attaching it more specifically to the general principle of freedom declared in that article. In this way, the Conseil Constitutionnel succeeded in filling a gap in French law with regard to the European Convention on Human Rights, which declares in Article 8 that everyone has the right to respect for his private and family life.

Even if the terms of Article 9 are laconic, they are rich in substance. By basing itself on them, the ordinary court case law can protect many an interest: the copyright of one's own image (e.g. Cour de Cassation First Civil Chamber, 17 November 1987, case A. Delon), the confidentiality of certain aspects of private life, notably correspondence, income, state of health or even religious beliefs. It even guarantees a transsexual's right to have his or her birth certificate rectified in order to take account of a sex change resulting from a surgical operation (Cour de Cassation, Plenary Assembly, 11 December 1992). To start with, the Cour de Cassation did deny transsexuals this right (Judgment of 21 May 1990, Case Jocelyne A. and others). But it has been obliged to come back on its decision, following a ruling of the European Court of Human Rights on 25 March 1992 (Judgment B. v. France) which noted that the impossibility for an operated female transsexual in France to have her civil status corrected put her "daily in a situation that was globally incompatible with the right to respect for privacy." Following that, the Strasbourg Court went even further, in its judgment *Christine Goodwin v. United Kingdom*, 11 July 2002, towards ruling upon the positive obligation of the State legally to recognise transsexual sex changes. Generally speaking, the abundance of ordinary law court case law facilitates a definition of the notion of privacy, which oscillates, according to circumstances, from a narrow definition of personal privacy as referred to in Article 9, sub-paragraph 2 of the Civil Code, to a wider sense of social privacy (J.-P. Marguénaud), which is the one dear to the European Court of Human Rights (ECHR, 16 December 1992, Case *Niemetz v. Germany*).

An evolution in the opposite direction has characterised presumption of innocence, a condition for the respect for privacy in criminal law, since on this occasion the Constitution preceded the Civil Code. Article 9 of the 1789 Declaration clearly proclaims that "every man is presumed innocent until he has been declared guilty." The Conseil Constitutionnel had no difficulty, by founding its reasoning on the Decision of 19 and 20 January 1981, in finding a constitutional requirement in harmony with the European Convention on Human Rights, Article

6, § 2 of which affirms in an equivalent way that "everyone charged with a criminal offence shall be presumed innocent until proved guilty in the eyes of the law." It was fairly logical that the Civil Code should abstain from enshrining a fundamental principle of criminal law. But even the law does manage to shake off the fetters of logic, since, thanks to criminal procedure reform, the Law of 4 January 1993 was then able to add Article 9-1 to the Code, affirming that "everyone has the right to be presumed innocent." The presence of this article in the Code is justifiable in as much as anyone, for example a journalist who violates this right, exposes himself to making amends in the civil courts for the non-contractual liability suffered, as conveniently stipulated in sub-paragraph 2 of Article 9-1.

A year later, with the publication on 29 July 1994 of two statutes on bioethics (one on respect for the human body, the other on the donation and use of elements and products of the human body, medically-assisted procreation, and prenatal diagnosis) a new chapter, entitled "Of the Respect for the Human Body," was added to the Civil Code, which codified the first of the two laws. Of course, the aim of this legislation is to set up protective barriers against all possible types of abuse that the spectacular developments in scientific knowledge and techniques can lead to behind the closed doors of laboratories. Awareness of the rapidity of scientific progress, which could make it necessary to start legislating all over again, had led to a provision for legislation revision within the following five years. This was back in 1994 and the time limit has long since expired. The Parlement got working late on the job and has only just completed the amendments of these laws. It seems that if society, as expressed through its legislation, is seeking to guarantee respect for the human body, it has a confused idea about the sacredness of the person, whose body is less of an attribute than a constitutive element. Evidence for this thinking is the fact that the new chapter of the Civil Code, which "has the axiomatic appearance of a declaration of rights... cast in quasi-constitutional bronze" (J. Carbonnier), begins with the affirmation that "the law insures the prime importance of the person, prohibits any offence against his dignity and guarantees respect for a human being from the beginning of his life" (Article 16). The Civil Code and the Constitution concur over this wording, since the Conseil Constitutionnel, in its important Decision of 27 July 1994 concerning laws on bioethics, stated that "the protection of the dignity of a human being against all forms of enslavement or degradation is a constitutional principle." It was certainly daring of the Conseil Constitutionnel to deduce this cardinal principle – which has since been inscribed in Article 4 of the European Union Charter of Fundamental Rights of 7 December 2000 – from the rather tenuous textual basis of the first words of the Preamble to the 1946 Constitution, which alluded to "regimes which have attempted to enslave and degrade the human being." If the Conseil Constitutionnel turned to various international and foreign source for inspiration, in particular to the Preamble and Article 1 of the Preamble of the United Nations

Charter and to case law of the European Court of Human Rights, as well as to Article 1 of the German Fundamental Law and Article 10 of the Spanish Constitution, it was also directly encouraged by the Government, who precisely wanted to include the principle of dignity in the Civil Code. As it stands, the Civil Code also guarantees the respect for the human being from the beginning of its life just as the 1975 Law had also done, when it decriminalised voluntary termination of pregnancy. In this way, it appears to be indirectly consecrating a "right to life". Although absent as such from the Constitution, this right of rights seems, at least in the judge-made law of the Conseil Constitutionnel, to be the legal guarantee of the principle of protection of the dignity of the person (Decision of 27 July 1994), unless it is merely a legislative principle at the mercy of successive governments (same Decision).

Whatever the case, the scope of these solemn affirmations depends on the definition one retains both for person and for beginning of life. French law has carefully avoided reaching any decision in these ontological matters. It has followed the example of the European Court of Human Rights, which refuses to "determine whether [...] the right to life" recognised by Article 2 of the Convention and which it guarantees, "applies also to the foetus" (ECHR, 29 October 1992, Case OPEN DOOR v. Ireland). One can suppose that it is standing by the saying *infans conceptus pro jam nato habetur quoties de commodis ejus agitur*, in which the child in the womb is considered as having already been born, each time it is in his best interest to do so. That is why the unborn child may inherit when a will is going through probate (Article 725) and why "in order to be able to receive *inter vivos*, it is sufficient to have been conceived at the moment of the donation." It would be tempting to deduce from this that no sooner has the child in the womb been conceived than he is already legally a person. But in reality the recognition of his legal existence is only retroactive, and depends on his actually being born alive and viable before he can benefit from it. The French courts assume responsibility for their indecision by explaining that it is not up to the Law to define either a human being or the closely related beginning of human life. This indecision nevertheless raises many an ethical objection. It is obviously very detrimental to the protection of the unborn child, whose death, for example, if caused by third party negligence, is not considered even as manslaughter (Cour de Cassation, Criminal Chamber, 30 June 1999 and Plenary Assembly, 29 June 2001). From a strictly logical point of view, this drags positive law into an obvious contradiction. On the one hand, the principles of human dignity and respect for human beings from the beginning of life can clearly be applied to human embryos and foetuses, since the need has been felt to refer to them in any legislation concerning, for example, voluntary termination of pregnancy, medically-assisted procreation or pre-natal research on human embryos. The Conseil Constitutionnel has done the same when turning these principles into norms of reference for controlling similar legislative provisions (Decisions of 15 January 1975, 27 July 1994, 27 June 2001). On the other hand, and concurrently, the legislation

that has also been passed to provide a framework – in the name of women's freedom – for practices such as voluntary termination of pregnancy or the destruction of surplus embryos or for pre-implantation selection of embryos conceived by medically-assisted procreation – in the name of the right to a child – obviously trespasses on the principle of respect for the human being from the beginning of life which did seem in principle legally to protect the unborn child well.

Legislation even exceptionally authorises research on embryos. While this research does not, in principle, encroach on the embryo's life, it can, contingent on recent legislation passed in July, be degrading to its dignity – in the case of storage, for example, which is an instance of exploitation. By accepting these various practices, legislation has made a sombre and arbitrary choice for our civilisation. By considering the human embryo as a thing rather than as a person, by denying the embryo – implicitly one must suppose, but unavoidably nevertheless – any human qualities, the law has taken a stand over fundamental issues relating to the beginning of human life and to the definition of a person, a stand contrary to public opinion, which considers this is a matter the law has no business to decide upon.

Human dignity, even if badly treated at the very moment it is being solemnly proclaimed, presupposes legal protection for the body. By affirming that "each person is entitled to respect for his body," Article 16-1 sub-paragraph 1 of the Civil Code clearly defends the inviolability and unavailability of the human body (sub-paragraphs 2 and 3). The earlier prohibition on the invasion of the human body, even with the consent of the interested party, is modified in certain circumstances. These can be a public safety requirement that justifies taking genetic fingerprints, medical needs for an individual whose consent in this case is generally required (Article 16-3 Civil Code), or, in a wider context, public health requirements which give legal backing to obligatory vaccinations, or lastly, and in a very limited way, the needs of medical research. On the other hand, given that any eugenic practice organised to select persons is prohibited (Article 16-4 sub-paragraph 2) in the name of the integrity of the human species which "no one may invade" (Article 16-4 sub-paragraph 1), there is a definite contradiction in allowing, as the Code de la Santé Publique [Public Health Code] does, pre-natal screening of incurable pathologies whose purpose and effects are, if the word is to have any meaning at all, beyond the slightest shadow of a doubt eugenic. As for the principle of the unavailability of the human body, it was first defined by case law, which considered agreements made about the whole or part of the human body to be null and void, an interpretation justified by "only things which can be traded can be the subject of an agreement" (Article 1128 of the Civil Code). But since 1999, the principle has been stipulated in the Civil Code in the following terms: "The body, its parts and its products cannot be the subject of any right having a financial value" (Article 16-1, sub-paragraph 3), and the text goes on to stipulate that "any agreement which aims at giving the human body, its separate parts or its products monetary value is void." (Article 16-5). In the light of these

principles, legislation, confirming the judgment made by the Cour de Cassation ( Plenary Assembly, 31 May 1999), was passed which stipulates that "any vicarious agreement made about procreation or gestation is invalid" (Article 16-7 of the Civil Code). The practice of using surrogate mothers, even where no payment is involved, is rendered doubly invalid by this statute, for not only does the practice involve a woman's body or at least its gestational capacity, but also an unborn child. This principle of unavailability, however important it may be, naturally has numerous exceptions. Allowance is needed for the conclusion of agreements relating to the products of the human body, especially blood, and to organ donations. But they are strictly controlled. The donation must be free of charge (Article 16-6 of the Civil Code) and anonymous (Article 16-8) and freely and knowingly consented to, even though most cases presumably involve the removal of organs from a deceased adult; others may be of definite medical interest for the recipient or of general therapeutic and scientific interest.

At the heart of legislation concerning the individual, family law has not escaped either from the wind of freedom that is blowing through it today as never before, and which is the result of the considerable legislative upheavals that have taken place since the 1960s.

Here, freedom means a child's in relation to his parents or his in loco parentis guardians. By lowering the age of majority to eighteen, the 5 July 1974 Law (Articles 388 and 488 of the Civil Code) obviously liberated children in principle aged between eighteen and twenty-one from parental authority. Exceptions were cases of prolonged minority and the situation of protected adults (Article 488 amended by the Law of 3 January 1968). But even below this age, the wind of freedom has also blown benefits to the capable minor. His supposed legal incapacity is actually quite relative. Not only can he engage his personal responsibility alone, but even if he obviously cannot be party to a valid legal transaction involving his property, he may on the other hand perfectly well make a trust deed. In addition, this relative incapacity has numerous exceptions. Some are customary and allow a sufficiently mature minor to carry out harmless acts of every day life. Most of them are covered by the law, especially since that of 14 December 1964 which reformed the regime governing guardianship (Article 389 et seq.). Minors, in exceptional cases for boys aged fifteen to eighteen years old (Article 145) and as a general rule for girls of the same age, can marry, but only with parental consent (Article 144). In addition, changes to first and last name (Articles 60, 61-2, and 334-2) and adoption (Article 345 and 360) both require the child's consent, if over the age of thirteen. An even greater freedom is the one allowing a child freely to will a portion, though only a portion, of his possessions and, since the law is silent on the matter, they can recognise a natural-born child. They can also exercise a profession, though not a trade, even if they are emancipated (Article 1308), and they may, in this capacity, make a legally-valid

commitment (Article 1308). One patent sign that the capable minor is not totally legally incapable is the fact that the 8 January 1993 Law, derived from Article 12 of the United Nations Convention on Children's Rights, was able to recognise his right to "a hearing in any procedure concerning him" and to temporarily challenge his legal representatives, particularly during a divorce procedure undertaken by his parents (Article 388-1 of the Civil Code). Thirdly, automatic emancipation through marriage (Article 476) or by the decision of the juge des tutelles [judge dealing with matters of guardianship] (Articles 477 and 478) confers practically total capacity upon a minor. This was not the case during the reign of the Napoleon Code, which provided an emancipated minor with a curator responsible for assisting him. But the law of 14 December 1964 has completely altered the status of the emancipated minor. It has endowed him with full legal capacity (Articles 481 and 482), on condition that he obtains his family's consent to marry or to be adopted (Article 481 sub-paragraph 2 Civil Code) and with the proviso, as we have seen, that he does not enter a trade (Article 487).

Freedom also means that of the couple. This is governed by a regime which, with the evolution in morals, has become much more flexible.

Civil marriage, which provides the traditional, legal and most popular framework for the couple, has been regaining favour over the past ten years or so (305, 000 marriages in 2000, nearly 40, 000 more than thirteen years previously). It is an institution so closely linked with freedom that the Conseil Constitutionnel has made the freedom to marry a constitutional principle. It was first deduced from that of individual freedom (Decision of 13 August 1993), and is now presented, more clearly, as "an aspect of individual freedom, as protected in Articles 2 and 4 of the 1789 Declaration" (Decision of 20 November 2003). Freedom prevails from the inception of the marriage, for "there is no marriage without consent" (Article 146 of the Civil Code). This means that the marriage will be declared void unless the required consent of both parties to the marriage is real (that is to say, consciously-made and genuine), freely given (consent must not have been induced by threats) and knowingly (without there being any mistake concerning the other party's identity and, since 1975, any misrepresentation over the type of person he or she essentially is). But this also signifies that, apart from minors and adults in the care of a guardian or a curator, this consent is sufficient. There are certain restrictions of course. Some were set up by the Civil Code: the age of consent of eighteen for men and fifteen for women (Article 144), except with a dispensation (Article 145); provisions aimed at prohibiting polygamy (Article 147 and 172) and incest (Articles 163 et seq.); or rules, judged compatible with the freedom to marry by the European Court of Human Rights (ECHR, 16 October 1996 *Sanders v. France*) and aimed at thwarting marriages of convenience between French citizens and aliens. Their legitimacy is indisputable, for they each respond, at different levels, to obvious

imperatives in the general interest or in the interest of law and order. On the other hand, other restrictions, which take the form of celibacy clauses in agreements or in legacies, seem far more controversial in terms of the freedom to marry, even if case law admits their validity in contracts without consideration (Judgment of the Cour de Cassation, 11 November 1912), as well as in work contracts, on condition that "the requirements of the function imperiously demand it" (Cour de Cassation, Plenary Assembly, 19 March 1978, Dame Roy). Secondly, freedom persists during the marriage, for even if the spouses freely consent, on entering the marriage, to accepting reciprocal duties – especially those of *communauté de vie* [matrimonial obligation to live together](Article 215), of fidelity, succour and assistance (Article 212) – they nevertheless continue to enjoy, within the marriage and in relation to each other, a sphere of autonomy defined by individual freedom rights which mutual conjugal solidarity does not do away with. It is true that for a long time a married woman only enjoyed very limited freedom, but the efficient legislative strides taken towards conjugal equality beginning with the Law of 6 February 1893, relating to the competence of the legally separated woman, and above all the law passed on 18 February 1938, abolishing the husband's authority and the wife's legal incapacity, have finally done away with this flaw in the law, as we shall see.

The unquestioned freedom to marry and freedom within marriage are obviously affirmed by the fact that it is possible to dissolve matrimonial ties through divorce. While it has always been fundamentally contested by the Roman Catholic Church, in the past divorce was also the subject of more technical discussions among those who considered marriage an institution rather than a contract. It is worth emphasising how prudent European Court of Human Rights case law is on the matter. This is quite contrary to its usually swift practice of interpreting the European Convention on Human Rights and of handing down new rights. On the one hand, the European Court, considers it necessary, in cases of marital breakdown, to legally validate the separation of the spouses, since they need to be relieved of their duty to cohabit (ECDH, 9 October 1979, *Airey v. Ireland*.) On the other hand, it refuses to sanction a "right to divorce" (F. Sudre), considering that Article 12 of the Constitution, relating to the right to marry, concerns "the forming of marital relationships and not their dissolution" (ECDH, 18 December 1986, *Johnston and others v. Ireland*). The Conseil Constitutionnel, for its part, has not gone any further towards affirming the existence of any constitutional right to divorce, despite this having been alleged by some scholars (F.Luchaire). Divorce was banned under the *ancien régime*, then was widely accepted by the Revolution, but was less generously treated in the Napoleon Code. It was banned again during the Restoration and was only re-established at the beginning of the Third Republic in cases of *faute caractérisée* [evident, proven wrong] committed by one of the spouses. The Law of 11 July 1975 brought about a vast and very liberal reform of divorce law. It came as a natural reaction to the evolution in morals, which had already been the subject of many sociological studies, and which

both in France and abroad had led to a significant rise in cases of marital breakdown. The new statute maintained divorce for fault, while stipulating that a fault – as it used to be identified by the Naquet Law of 27 July 1884, viz., adultery, a peine afflictive et infamante [an afflictive sentence involving the death penalty, imprisonment, or penal servitude and loss of civic rights], dissolute behaviour, serious physical or mental violence towards the other spouse – was now substituted (contingent on Article 243 of the Civil Code) by a more abstract reference covering "acts constituting a serious and repeated violation of the duties and obligations of marriage and which make continued cohabitation intolerable" (Article 242). But it now provides above all for other types of divorce. Divorce by mutual consent (no fault divorce), which was accepted under the Revolution and maintained with certain restrictions by the Napoleon Code, has now been re-established and can be petitioned jointly by the spouses (Articles 230 – 232). A rather different type of divorce, which is incorrectly presented by the Code as being a variant of a mutual consent divorce, is one petitioned by one of the spouses who, without having to specify the cause, refers to "an accumulation of facts, for which both parties are responsible, which makes cohabitation intolerable." (Article 233). A judge can only pronounce this type of divorce without having to "apportion blame" (Article 234) if the other partner "acknowledges the facts" (Articles 234 and 235). Critics consider that by allowing one of the spouses to start divorce proceedings for "absence of cohabitation" during a period of not less than six years, this law has in fact established a form of repudiation. From a psychological point of view, this is not incorrect. It is worth pointing out, though, that the petitioner in this type of divorce, whether the wife or the husband, has to pay all court expenses (Article 239). Moreover the judge, who alone has the competence to dissolve a marriage in this way, systematically rejects any petition in which "the other spouse can show that divorce would have exceptionally harsh material and moral consequences for him or her... or for the children" (Article 240). Twenty-five years after the 1975 Divorce Law, at a time when divorce concerns one couple out of three in the provinces and twice as many in Paris, a law has been passed in the Parlement which aims at "adapting family law to the evolutions of society". To simplify and take the heat out of divorce procedure, this law plans to reserve divorce for fault, and as a result, appropriation of blame, only for the most serious cases and in particular for domestic violence. Mutual consent (no fault) divorce, meanwhile, continues to be dealt with in the courts, in order to safeguard the interests of the children, but in a simplified form, which will allow the judge to declare a divorce after a single appearance. Lastly, divorce for absence of cohabitation for a minimum of six years, which represents less than two per cent of divorces nowadays, has become "divorce on account of a permanent alteration of the marriage bond" and can be petitioned after only two years' separation. A judge would no longer have the power to oppose the divorce, even if its pronouncement would entail exceptionally harsh consequences for the marriage partner. He will simply be able to

allocate compensation to the innocent party. This second significant divorce reform is not giving rise to as much polemical debate as the 1975 one, not only because the contrast with the preceding reform is not as great as that one was with the previous state of the law, but also because times have changed. It still raises a certain number of questions. In spite of the praiseworthy objective of appeasing divorce procedures, is there not a risk, not only of lessening the necessary protection of the interests of the weaker marriage partner, but also of damaging the stability of marriage, whose merits as the surest way to raise a family cannot reasonably be questioned?

As well as the freedom to marry there is the freedom not to, whose enjoyment has never needed any legislative sanction. Whatever word we choose to use for them, unmarried couples, who have existed since time immemorial, have grown in number since the 1970s. Essentially they are young people living together, a situation which can moreover simply be the prelude to a deferred marriage. For a long time, the law, both in civil matters and relating to individuals, has only marginally taken into account this social fact which is considered in all its various manifestations as incompatible with good morals. And when it has done, it has more often than not drawn unfavourable conclusions for one or both of the cohabitants. The Law of 16 November 1912 provided the first Civil Code mention of the word concubinage in a reference to paternity searches, when it adopted the term concubinage notoire ['acknowledged cohabitation'] (former Article 340 4°). This expression was later replaced, in the Law of 3 January 1972, by a wider notion of "cohabitation implying at least a stable and continuous relationship, even if there is no communauté de vie [jointly run communal residence]" (Article 340-4 sub-paragraph 2). At the same time, the Code makes provision for the partner living "in a state of cohabitation" after a divorce to lose both the benefit of maintenance, if he or she has been receiving any until then (Article 283 sub-paragraph 2), and that of the lease which the judge may have allowed one of the divorced partners on the family dwelling (Article 285 sub-paragraph 5). But nowadays non-marriage partnership has been given real recognition in the Civil Code, since, dating from the passage of the Law of 15 November 1999, Book I now concludes with a chapter entitled "Of Acknowledged Cohabitation", which contains a single article. This article, 515-8, provides that: "Acknowledged cohabitation is a de facto union, characterised by two people of the same or opposite sex living together as a couple, in a stable and uninterrupted relationship." At first sight, it is surprising to see legislation simply referring to a de facto situation in its most complete, stable and acknowledged version and making use of elements of case law to define it, while still attaching no specific judicial consequences to it. One particular point is the absence of any established legal presumption of paternity for couples living together. Nor does the law impose any specific obligations, material – alimentary in particular – or moral, since fidelity is not the required form of stability. But through its recognition of the existence of same-sex cohabitation,

Article 515-8 does have a certain legal scope. Apart from ridding society of a taboo which has in any case been considerably weakened over the past twenty years at least, especially since homosexuality ceased to fall within the jurisdiction of criminal law, the purpose and effect of this new article in the Civil Code is to overturn Cour de Cassation case law. Until then, the Court had limited any acknowledged consequences of cohabitation to heterosexual couples only, considering that "cohabitation can only be the result of a stable and uninterrupted relationship which has the appearance of a marriage; consequently, it can only involve a man and a woman" (Judgment *Vilela v. Weil*, 17 December 1997). In this respect, and in particular by its refusal to allow the transfer of a lease contract to a surviving same-sex cohabitant on the death of the leaser, the case law of the ordinary French courts was in agreement with the position held by the European Commission on Human Rights, as expressed on 15 May 1996 in the *Rööslic v. Germany* case. It was also in harmony with the precedent laid down by the European Court of Justice, which on occasion has underlined the fact that "as things stand presently in the Community, stable partnerships involving same-sex couples are not considered to be the same as marriage or non-marriage partnerships involving opposite-sex couples" (ECCJ, 17 February 1998, *Grant*). This indeed shows how far Article 515-8 of the Civil Code goes.

In addition, the Law of 15 November 1999 has gone a lot further towards meeting the demands of homosexuals, by finally setting up for their benefit, though not for theirs alone, a lawful union, in the form of the *pacte civil de solidarité* or *pacs* [civil union solidarity pact], defined as a "contract concluded between two adult natural persons, of the opposite or same sex, for the organisation of their life together" (Article 515-1). Modelled on a Scandinavian pattern – it is a copy of the Swedish institution of registered partnership – the *pacs* is supposed to be an alternative to marriage for opposite-sex couples who do not wish to marry and an *ersatz* marriage for same-sex couples, who cannot. Article 515-1 is quite obviously deliberately ambiguous, and this ambiguity has been cleverly maintained, since – unlike in Article 515-8 mentioned above which refers to cohabitation – the drafters have been very careful not to use the word *couple*, in the vain hope of disarming the pro-marriage monopoly lobby. However, it goes without saying that the communal life of *pacsés*, to use the word that has been rapidly coined to designate "partners in a *pacs*", is far from platonic and quite obviously has a physical dimension. The Conseil Constitutionnel suggested this in its Decision of 9 November 1999, when it stipulated that *vie commune* [communal life] could not be defined as a simple partnership of interests or even simply as cohabitation but presupposed living together as a couple. This is so obviously true. How could one otherwise justify the decree of nullity granted in the case of any *pacs* concluded between ascendants, descendants and direct relatives by marriage as well as between collateral relations up to and including the third degree (Article 515-2 1°) and which, based on the

model of impediments to marriage, exists only in order to prevent incest? And what about the ground for annulment in the case of a pacs concluded with a person who has already entered into a full civil marriage or into another pacs (Article 515-2 2° and 3°)? This can only be explained by the aim both of conserving the obligation of fidelity between spouses and of keeping at bay the spectre of legal, even if distorted, recognition for bigamy, prohibited by Article 147 of the Civil Code. It is clear that the pacs is similar to marriage in that it is registered by the clerk of the Tribunal d'instance [civil court of limited jurisdiction] and that this gives it judicial status as it does to marriage. For all that, given the enormous difference between the communauté de vie [marital obligation to live together] which married couples mutually undertake and the vie commune [living together] that civil union partners organise, the pacs – which is incidentally only available, unlike marriage, for adults (Articles 144, 145 and 148 et seq.) – still cannot really be compared to marriage. In the first place, the mutual and material support (no moral support is mentioned) which, in accordance with the terms of the pact, the partners provide for each other is totally different from the duties of fidelity, succour and assistance that link spouses (Article 212), even if in its ruling of 5 June 2002, the Lille Tribunal de grande instance [civil court of general jurisdiction = UK High Court] considered the infidelity of a registered pact partner to be a fault. Similarly, the financial assistance they owe each other for one third of debts relating to daily living expenses and common lodging (Article 515-4 sub-paragraph 2) is more general than that of spouses who "contribute to the household [...] each according to his capacities" unless otherwise stated by a pre-nuptial agreement (Article 214). Secondly, even if the Civil Code recognises indirectly but clearly that one of the vocations of marriage is the founding of a family through procreation – stipulating among other things that "simply by marrying, the spouses contract the obligation to feed, maintain and raise their children" (Article 203) – which alone justifies the special judicial regime it enjoys, this is far from being the case with the pacs. The civil union pact, unlike marriage, does not include any automatic presumption of paternity, nor does it have any incidence on civil status. Thirdly, and lastly, the conditions required for the dissolution of a pacs could not be simpler, and are quite different even from the simplified 1975 procedure for legally declared divorce (Article 227). This proves that the government did not intend to guarantee the same stability for the pacs as it reserves for marriage. In actual fact, the death of at least one of the partners aside, a pacs can be dissolved in two very simple ways. Either the partners express their mutual agreement to the dissolution in a simple joint written declaration given to the clerk of the Tribunal d'instance, a formality which bears no connection with the judicial procedure for mutual consent divorce; or one of the partners, whether he is marrying another person or not, may decide unilaterally to put an end to the union, by simply informing the other and addressing a copy to the clerk of the Tribunal d'instance. The rough justice of this formality and the discretionary character of the unilateral dissolution bring it closer to repudiation

than to divorce petitioned for absence of cohabitation. The Conseil Constitutionnel (Decision of 9 November 1999) does however stipulate that the innocent party in a breach of pacs for fault can always file for damages. The pacs is therefore not a less solemn equivalent of marriage, even if the relevant chapter has been inserted in Book I of the Civil Code, which is about persons but is implicitly devoted to the family. In fact it could easily have been fitted into Book III, under Contracts, for even if it is a specific type of contract, it remains, as the Conseil Constitutionnel has rightly pointed out, a contract. And it conforms on the whole to common contract law, since it has been registered, contingent, by derogation to Article 1165 of the Code Civil, only on its non-opposability by a third party. The French Law of November 1999 which instituted the pacs now offers same-sex and opposite-sex couples a judicial framework which is materially speaking advantageous, but which could have been accommodated without inventing this new form of union (B. Beignier). Even if it improves the social acceptance of homosexuals, it is still by no means comparable to the Dutch statute of 21 December 2000, which provides for homosexual marriage. This possibility is not only implicitly disallowed by Article 144 of the Civil Code, which stipulates that "a man under eighteen years old and a woman under fifteen may not enter into a marriage," but by Article 12 of the European Convention on Human Rights which sets down that "from marriageable age, a man and a woman have the right to marry and raise a family." The Court of Strasbourg has on occasion made it clear that "by guaranteeing the right to marry, Article 12 is referring to the traditional form of marriage between two persons of opposite sex" (Judgments Rees, 17 October 1986 and Sheffield and Horsham 30 July 1998). The Court thereby recognises the right of transsexuals to marry, (Judgment C. Goodwin, 11 July 2002), but even if this does not alter the requirement that spouses be two persons of different sex, then it simply means that sex can no longer be defined "according to purely biological criteria." In accordance, therefore, with European law relating to human rights, the disallowance by French law and recently also by case law of same sex marriages is likewise in line with the legislation of other countries of the European Union, for, as the European Court of Justice stated, "the term marriage, in the definition commonly admitted in Member States, designates the union between two people of opposite sex." (ECCJ, 31 May 2001, D and Kingdom of Sweden v. Council). It is true that by sanctioning in very general terms the right to marry and raise a family, Article 9 of the European Charter of Fundamental Rights, 7 December 2000, which forms part of the "Proposed Treaty for establishing a European constitution" but which still does not have any legal backing, seems not to be excluding the possibility of same-sex marriages. However, this article could not in any case oblige member states to recognise the validity of such a marriage, since it is up to national legislative bodies to regulate the exercise of the law that it enunciates.

Even if the pacs offers opposite-sex couples the freedom to refuse both marriage and acknowledged cohabitation ( common law marriage) and offers same-sex couples the freedom

not to remain in a de facto union, neither group, contrary to the alarmed and joyful forecasts made immediately after the legislative reform of 1999, appears to have fallen over backwards to enjoy this new freedom. In actual fact, without going so far as to deny or underestimate the importance of this reform, by the third quarter of 2002, that is a year and a half after the 15 November law was enacted, only 44, 000 civil union pacts had been made, of which 40 per cent had been concluded by same-sex couples. This is a low figure, compared with the 300, 000 or so annual marriages and the estimated two million couples who still persist in preferring just to live together. There are probably two further reasons behind this rather modest success. Firstly, the custom of simply living together derives from an " incoercible tendency among people nowadays to privatise their amorous relationships" and "to drive the shadow of Society, the State and, consequently, the Law out of the sphere of their intimacy."(J. Carbonnier). It is only logical that the refusal to marry should be followed by a refusal to enter a civil solidarity union or any other similar institution. And then it is by no means certain, when one thinks about it, that the demands expressed by gay militants – no one knows how representative they really are, but without them the 19 November 1999 Law would never have been passed – are shared by the silent majority in the community.

Whatever the case, looked at as we have just done, from the point of view of freedom, the institution of the pacs undoubtedly constitutes, in the mind of its promoters, the first stage in a march towards equality for heterosexual and homosexual couples, whose next fields of combat, marriage and adoption, have already been marked out.

### **Equality in the Civil Code**

Equality, the second element in the Republican motto, is a cardinal constitutional principle. Like freedom, it predates the Republic, since the Declaration of the Rights of Man and of the Citizen had already proclaimed in 1789 that "men are born and remain with equal rights" (Article 1) and that all citizens are equal in the eyes of the law (Article 6), as article 1 of the 1958 Constitution recalls. It may be an essential quality, it is still not an absolute notion, as case law, in particular Conseil Constitutionnel case law, admits: "The principle of equality does not prevent the Government from treating different situations in a different way; or from derogating from equality in the general interest, on condition that, in either case, the different treatment be directly related to the purpose of the law which establishes it." (Decision of the Conseil Constitutionnel, 7 January 1988).

If this is so, the disallowance of homosexual marriage cannot be considered as detrimental to the principle of equality in the eyes of the law, since, objectively speaking, same-sex and opposite-sex couples find themselves in very different situations with regard to the institution of marriage which is obviously orientated towards procreation. This principle is established by

Article 12 of the European Convention on Human Rights, which closely associates the right to marry with the right to raise a family. Of course, marriage without any intention of having children is perfectly conceivable, so that the Court of Strasbourg (ECHR, 11 July 2002, case C.Goodwin) has easily admitted that a couple's sterility would thankfully not mean the loss of their right to marry. Inversely, nobody could disagree that family life can flourish outside marriage, a fact which has led the same Court to protect the right to respect for family life, as proclaimed in Article 8 of the Convention, whether the family in question is legitimate or natural. But the renewal of generations is sufficiently a matter of general interest for it to justify the stable judicial regime protecting marriage being reserved for heterosexual couples.

In the same way, the question of adoption by homosexual couples cannot be dealt with without first looking objectively at the difference which separates them from heterosexual couples in relation to the interest of children, who no doubt depend on clear sexual distinctions to ensure the harmonious development of their personalities. Besides, the European Court of Human Rights, which is very attached to sexual freedom (ECHR 22 October 1981 case Dudgeon) and is totally hostile to any discrimination based on sexual orientation – in particular, and rightly so, as far as the granting of parental authority is concerned – has nevertheless sanctioned a refusal to allow adoption based essentially on the grounds of the homosexuality of the unmarried applicant. In fact, it ruled that this decision was legitimate in its aim to protect the primary interests of children. Even when considered in the abstract, these are the most important criteria, since, as the Court recalls, adoption consists in "giving a family to a child and not giving a child to a family" (Judgment Fretté v. France, 26 February 2002). If the best interest of the child is considered objectively, this also justifies the rule that only married couples, on account of their generally greater stability, can submit a joint application for adoption. (Article 343 of the Civil Code). In addition, even if, as the law of France provides, a single person may apply to adopt (Article 343-1), the European Court in Strasbourg nevertheless affirms that the right to found a family, guaranteed by Article 12 of the European Convention on Human Rights, presupposes the existence of a couple and, therefore, the right to adopt is not extended to unmarried persons (Judgment Dalila di Lazzaro v. Italy 10 July 1997).

The principle of equality, understood in these terms, has inspired many of the contemporary reforms that, mostly from the 1960s onwards, have made family law much fairer both to the couple and to the children.

### **Equality in the Couple**

The evolution in relations between married men and women has been considerable, both in their role as partners and as parents. Civil Code reform proved all the more necessary as soon as the 1946 Constitution became more explicit over the need for equality by proclaiming that "the

law guarantees women in all domains the same rights as men" (Preamble to the 1946 Constitution, sub-paragraph 3). Protocol 7 of the European Convention on Human Rights is, incidentally, even more precise, stating in Article 5 that "the spouses enjoy equal rights and civil responsibilities towards each other and in their relations with their children both during the marriage and at the moment of its dissolution," contingent of course upon any "measures necessary in the child's best interests." Basing itself on this, the Cour de Cassation disallows the application in France of any foreign legislation that admits repudiation or which establishes discrimination against the wife in the liquidation and the sharing out of the household assets.

Even if, according to the Napoleon Code, a woman was the equal of a man, she was no longer equal in any way once she married. The married woman was placed under the authority of the husband and was afflicted with overall legal incapacity comparable to that of a minor. At the very most she had power over the keys, which allowed her, when delegated to do so by her husband or by the law, to take whatever measures were necessary to run the household. But this subordination, conceived of as a means to ensure household unity, proved unworkable long before it appeared unjustifiable to everyone as a matter of principle. This occurred whenever war sent husbands far from home in large numbers and for long periods. That is why, at the outset of World War II, the Law of 18 February 1938 – enlarged later by the statute of 22 September 1942 in order to cope with the problem of the large number of prisoner-of-war husbands – reduced the authority of the husband and abolished at the same time the legal incapacity of the married woman (former Articles 215 and 216 of the Civil Code). For one thing, the quality of head of the family was transferred to the wife in the absence of her husband. In spite of this evident advance in equality, essentially brought about by the situation at the time and consolidated by the Ordinance of 9 October 1945, the married woman's full legal capacity was still repressed as much by the law as by the marriage contract itself (former Articles 215, sub-paragraph 2, then 216, sub-paragraph 2). In the first place, the law maintained the husband's ascendancy in many areas. The wife was limited to taking part, alongside her husband, in the moral and material running of the family (former Article 213, taken from the Law of 22 September 1942), while the obligation of being the breadwinner lay "principally" on the husband (former Article 214). In the same way, the choice of residence was up to the husband (Article 213, then 215), who could also object to his wife exercising a separate profession (Article 216, then 223). In addition, the matrimonial regulations governing financial relations between the spouses and between them and third parties contributed to reducing the legal capacity of the wife. Under the system of *communauté réduite aux meubles et aux acquets* [joint estate reduced to moveables and acquisitions] – which was the most usual system, applicable in the absence of any marriage contract to the contrary – not only could the husband dispose of and administer the commonly-owned household assets, but he could also administer any goods which had remained the exclusive property of the wife. It is true that

the terms of the 13 July 1907 Law enabled the married woman to continue to administer and even dispose of any earnings and profits obtained through her own professional activity in addition to any reserved assets, which she could obtain in this way. In practice, proving the origin of the revenue and the assets – usually a pre-requirement of interested third parties before she could act independently – was so hard that she considered it more expedient to remain dependent upon her husband.

Very ambitious legislative reform, brought about by changing mentalities, were therefore necessary in order to achieve "a sort of constitutional principle of civil equality between husband and wife" (Carbonnier). The Law of 13 July 1965 recognised the wife's right "to exercise a profession without her husband's consent" (former Article 223). It affirmed that "the spouses may not separately" draw up instruments of disposition for the family dwelling and its furnishings (Article 215, sub-paragraph 3). Either spouse now had the right to conclude contracts for the upkeep of the house or the education of the children" (Article 220, sub-paragraph 1). The same statute gave the wife full rights over her own property. In addition, by adopting the *communauté réduite aux acquets* [joint estate reduced to acquisitions during the marriage only] – that is to say, by removing from the list of commonly-held assets any inherited moveables belonging to either of the spouses, and which, until then, the husband alone could administer or dispose of – the 1965 statute accordingly limited the exclusive powers of the husband. Incidentally, the most important instruments of disposition concerning commonly-held assets, for selling real estate (immovables) or taking out a mortgage, had from then on to be agreed upon by both partners. Then came the Law of 11 July 1975, which stated that the place of residence of the family was to be "decided jointly by the spouses" (Article 215, sub-paragraph 2). And lastly, the Law of 23 December 1985 completed the job of reform begun twenty years earlier. It conferred equally shared rights over the husband's last remaining prerogatives on jointly-held assets and ensured reciprocal equality in the management of the community, by abolishing the notion of assets reserved exclusively for use by the wife.

If one still wants to niggle over the need for equality between husband and wife, there is one area left to conquer and that is the married woman's surname. The custom whereby the married woman uses her husband's name [called in this case *nom d'usage*] is a long-lived one and is indirectly linked with the fact that sub-paragraphs 2 and 3 of Article 264 of the Civil Code allow a divorced woman to continue to use her husband's surname. Relinquishing this custom would deprive the household of a strong symbol of unity, and understandably no government has yet rushed in to break it. Moreover, even if marriage allows the wife to use her husband's name, nothing in the law prevents her from using her maiden name. It is therefore better to allow the custom to continue and maybe change of its own accord.

Even if, for the moment, the law is indifferent to patronymic equality between husband

and wife, it has on the other hand been more concerned in this respect with equality between father and mother, the latter having for a long time been ill-treated by the automatic transmission of the father's name to legitimate children and by the preference given to the father's name in the case of simultaneous recognition of natural parentage by both parents (former Article 334-1). The Law of 23 December 1985 approached the matter cautiously, by allowing children, on reaching their majority, to add their mother's name to their surname as a *nom d'usage*. The least one can say is that they made little use of it. The recent Law of 4 March 2002 is more radical. It has already been modified, and its application has been deferred from 18 June 2003 to 5 January 2005 on account of foreseeable difficulties. On the birth of their first child, parents will be allowed to decide which surname it will be given. They can choose "either the father's name, or the mother's name, or the two one after the other in the order of their choice" (Article 311-21 subparagraph 1), on the understanding that "the name chosen for the first child will be the same for all children born to the couple" (Article 311-21 subparagraph 3). This is the final symbolic compensation for an insurmountable natural inequality, for if, as already taught in Roman law, *mater semper certa est*, the identity of the mother is always certain – though this can depend nowadays on scientific and technical advances applied to procreation – it can never be the same for the father, who, within the marriage, only enjoys presumption of paternity (Article 312), as inspired by the Roman maxim *pater is quem nuptiae demonstrant*.

Finally, the Law of 4 March 2002, and another enacted the same day, relating to parental authority, constitute the last in a long line of evolutive legislation that attempted to establish in law the most perfect equality possible between parents. In the beginning, there was paternal power, inherited from Roman law notion of *patria potestas*, which evoked the almost unconditional powers of a single head of the family over his offspring. The Code clearly accepted from the outset that "the child, whatever his age, must honour and respect his father and mother," according to a formulation inspired by the Ten Commandments (Article 371) and that the "the child remains under their control until he is an adult or marries (former Article 371 substantially repeated in the present Article 371-1 subparagraph 1). But if the two parents consequently exercised this control jointly, it was still understood that during the marriage only the father could make use of it except in cases envisaged by the Law of 23 July 1942, when paternal authority was granted to the mother of a legitimate child. In addition, only the father was responsible for damage caused by minors (former Article 1384 subparagraph 2).

As a result of changing attitudes that were luckily for the better, reform was needed. It was brought about by the Law of 4 June 1970, which suppressed the title of head of the family, until then given to the man in his capacity of husband and father, and replaced the term paternal authority, felt to be too unfair, by parental authority. The most recent legislative expression now defines this as "a set of rights and duties with the interests of the child in view" (Article 371-1

sub-paragraph 1). It is especially destined to "protect the child's safety, health and moral well-being" (former Article 371-2 repeated in the present Article 371-1 sub-paragraph 2) but also, as now stipulated by the Law of 4 March 2002, "to ensure his education and allow his development, while respecting his person" (Article 371-1 sub-paragraph 2). This parental control materialises in a number of important decisions concerning the life of the child, and in a number everyday actions. It is exercised jointly by the parents of legitimate children, and now also by the parents of natural-born children, on condition that the child has been voluntarily recognised [établissement de la filiation] on both sides sufficiently early, within the year following the birth. Nine times out of ten, a parent who has failed to do so is deprived of these rights, either for not having recognised the child voluntarily or for having done so too late ( Article 372 sub-paragraph 2).

The joint exercise of parental control by the father and the mother does not usually pose any problem when they are married or living together in a stable relationship. It is a different matter when the parents have separated, or in cases of divorce, which in two out of three cases involve children under eighteen. For a long time, the law only envisaged one solution, namely sole custody of the children granted to one of the parents who also had sole parental authority, the other parent being entitled only to contact and to a right to supervision of the exercise of this authority. As for the choice of the parent, the criterion of in the child's best interests prevailed. To start with, because the law only recognised divorce for fault, the judge was in practice obliged to confide custody on principle to the innocent spouse; from 1975 onwards, he had new legislation to go by. As custody was most often confided to the mother, the Law of 22 July 1987, backed up by that of 8 January 1993 relating to illegitimate children, intervened to remedy this de facto inequality which for once was to the disadvantage of fathers. Taking inspiration from the increasing number of joint custody measures, the Law of 4 March 2002 concerning parental control shows a definite preference for the common exercise of this authority, which it enshrines as a principle, on condition that it is in the child's best interests. The child's usual residence with one parent – an expression preferred to custody – gives the other parent greater freedom to have visiting and staying contact. This situation has given rise to what is known as garde alternée [alternate custody], which for the moment is the solution retained, according to a Ministry of Justice survey, by only 10% of divorcing couples with children, even if recently this percentage seems to be rapidly on the increase. Besides, even in cases where parental authority is only exercised by one parent, with the obligation to inform the other before any important decision is taken, the other parent still benefits in principle from visiting contact [droit de visite] and these visits may be prolonged, if the judge so decides, by a right to staying contact [droit d'hébergement]. In this way, the right of the parent not living with the child to maintain a relationship with that child, in accordance with the case law of the European Court of Human Rights, is preserved as best as can be.

If the law is evolving towards perfect equality between husband and wife as regards custody orders for children in instances of divorce, is it possible to refuse custody to a parent on the grounds of his homosexuality? The European Court of Human Rights has had the opportunity to judge that since the best interests of the child should be decided in this matter on a case by case basis, it was not licit to deprive such a parent of custody on principle (Judgment 21 December 1999 *Salgueiro da Silva Mouta v. Portugal* ). It is true that the Court has also agreed, as we have seen, upon the disallowance of plenary adoption on the ground of the sexual orientation of the applicant (ECHR 26 February 2002 *Fretté v. France*). But there is no contradiction whatsoever in the two judgments. In the ruling on a custody issue, the parent's homosexuality cannot change the parent-child relationship, which has to weigh in the balance in the appreciation of the interests at stake; in an adoption application, there is no such bond.

### **Equality between children**

Lastly, equality in the Civil Code also had to be established among children themselves, over the establishment of the line of descent [filiation] and its implication for inheritance.

Equality in the capacity of legitimate children to inherit was acquired long ago. It had not been possible, it is true, under the *ancien régime*, which was attached to the right of the firstborn, to the privilege of male heirs and to the father's testamentary choice. After the Revolution, however, which by way of reaction painstakingly established equality, the Napoleon Code maintained it, though adjustments were made to allow the father considerable freedom as to how he could leave his estate. Starting with the Statutory Order of 17 June 1938, a number of reforms over the past century have tried hard, without actually questioning the principle of equality, to allow a few advantages in matters of inheritance., in order to reduce problems arising from the parcelling of family land at the time of its transmission. These are firstly demographic, since parents tend to limit the number of descendants in order to preserve the unity of the family estate. There are economic problems too, caused by the need to ensure the survival of a family business at the time of transmission. But apart from the *quotité disponible* [the freely disposable portion of an estate], which is a ransom paid to the testator's freedom, the principle of equally dividing the estate between legitimate children, in terms of value rather than actual possessions (Law of 3 July 1971), is firmly established, even if it is not carried out with mathematical precision. For a long time, the situation was very different for legitimate and legitimated children compared with illegitimate children; as it was for children born as the result of an adulterous union compared with those born outside marriage.

The considerable increase since the 1960s in the number of children born outside marriage has finally brought into the light of day the injustice they suffered solely on account of their birth.

This was in flagrant violation of the Constitution which proclaims in Article 1 of the Declaration of the Rights of Man and of the Citizen of 1789 that "all men are born ...with equal rights." In addition, sub-paragraph 10 of the Preamble of the 1946 Constitution abstained – when alluding to the necessary conditions for the development of all families rather than of the legitimate family – from establishing any constitutional distinction between families based on marriage and others. Legislative reform appeared inevitable in order to correct the discrimination suffered by illegitimate children in relation to legitimate children, both in proving parentage – in most cases, that of the father – and in their ability to inherit.

Although presumption of paternity in marriage is automatic (even if this has been less strictly applied since the Law of 3 January 1972) and the husband of the mother is designated as being the father of the child, unless cancelled by an action of disavowal of paternity, the onus of proof of the line of descent for illegitimate children, however, had depended, since the Revolution, solely on the father's good will in voluntarily recognising his child. In addition, this type of recognition was forbidden on both sides in cases of adultery or incest. Without recognition, an illegitimate child was powerless on two counts. He could not oblige his putative father to recognise him in the courts, except in the case of the mother's abduction by the alleged father. And case law refused illegitimate children the right to benefit from any *de facto* status which could allow parentage to be presumed either on the basis of evidence of a relationship between the interested parties or by the perception of that relationship by third parties. The Law of 16 November 1912 opened the way for the first time to allow applications to establish paternity by illegitimate children born outside marriage. The law was still careful to limit the admissibility of such actions to a very few cases, namely, abduction and rape, fraudulent seduction, abuse of authority, promise of marriage. Unequivocal proof of paternity had to be based on letters or some other form of writing, on acknowledged cohabitation or participation in the education or upbringing of the child in the way a father would. But the courts often widened the scope of this Law. Then the Law of 3 June 1972, taking this case law tolerance into account, extended to children born of an adulterous union the right to make an application to establish paternity and tried to allow the establishment of natural parentage, to be based on *de facto* status (Article 334-8 sub-paragraph 2 of the Civil Code). This last point was later confirmed by the Law of 25 June 1982. Lastly, the Law of 8 January 1993 allowed that "paternity outside marriage can be declared by the courts" (Article 340 of the Civil Code), without limitation to specific cases. In this respect, French law conforms to the spirit of European Court of Human Rights case law. In the name of the right to information about one's origins, deduced from the right to the respect for privacy (ECHR 13 February 2003 *Odievre v. France*), the Court of Strasbourg has imposed that if proof of paternity is not to be established through genetic testing, the State must make provision for "alternative means allowing an independent authority to make a swift decision on paternity"

(ECHR, 7 February 2002, *Mikulic v. Croatia*). Nevertheless, in order to avoid unnecessary court actions that might in certain cases unduly disturb family harmony, French law wisely lays down that "proof of paternity may only be cited in cases of well-founded allegations or circumstantial evidence."

It is inconceivable to go further than these successive developments have done towards achieving absolute equality between legitimate and illegitimate children. One could of course purely and simply abandon any distinction between these two types of line of descent; that would have the simultaneous effect of depriving civil marriage of one of its *raison d'être*. On the other hand, as far as inheritance rights are concerned, this equality does well and truly exist. The task accomplished has been considerable, especially concerning illegitimate children born outside marriage or from an adulterous union. Ancien droit radically excluded the illegitimate child from inheriting from his parents. Revolutionary law generously considered all children, whether legitimate or illegitimate, as equal when it came to distribution of the estate. The Napoleon Code, aiming at a compromise between the two systems, only granted illegitimate children – when there were rightful heirs – one third of the rights to which they could have laid claim, had they themselves been legitimate. By increasing the proportion of their entitlement from one third to a half, and by recognising their right to inherit which had until then been refused, the Law of 25 March 1896 only attenuated the injustice of the situation. In addition it maintained the injustice of refusing them any rights on the estate of the parents of their putative parents. It was not until 3 January 1972 that legislation gave the illegitimate child born outside marriage inheritance rights equal to those of the legitimate child, by affirming that, "Generally speaking, the illegitimate child, in his relations with his mother and father, has the same rights and the same duties as a legitimate child" (former Article 334). This put an end to inheritance restrictions which penalised a child born outside marriage in relation to a legitimate child. And yet, put this way, this equality is paradoxical, for the latter can in fact be worse off. Unlike the natural-born child, the claim of a child born within marriage has to compete with those of the surviving partner whose right to inherit *ab intestat* has recently been reinforced by the Law of 3 December 2001. In laying down that the illegitimate child "is part of his parent's family" (former Article 334 sub-paragraph 2), the Law of 1972 recognised for the first time the family ties that joined him to his grand-parents, from whom he can legally inherit, in accordance with European case law. The Strasbourg Court imposes equality between legitimate and illegitimate children not only for inheriting from their parents (ECHR 13 June 1979 case *Marcks v. Belgium*) but also from their grandparents (ECHR 29 November 1991 case *Vermeire v. Belgium*).

The equality in inheritance achieved by this legislation still did not cater for children born of an adulterous union. For a long time this group of illegitimate children were even more

discriminated against than those born outside a marriage. In spite of the passion for equality that drove the Revolution, and which led to full recognition of the right to inherit of illegitimate children born outside of marriage, it only granted children born of an adulterous union one third of the rights that they would otherwise have been entitled to, had they been born legitimate. The Napoleon Code went on to deprive them of all inheritance rights, and only granted them maintenance, the same as for children born of an incestuous union (former Articles 762 and 763). These entitlements were enlarged by the Law of 15 July 1955, which allowed them to bring an action through the courts, but only for this reason. An application of this sort could not lead to the establishment of parentage, which was still prohibited under former Article 342 sub-paragraph 2. The Law of 3 January 1972 marked a great historical turning point. By allowing the line of descent to be established for children born of an adulterous union, in the same way as for any illegitimate child, the law made the child a part of his parent's family and consequently recognised his inheritance rights. These rights were still limited, so as not to harm the interests of the surviving spouse or those of the legitimate children. The child born of an adulterous union was in competition with his legitimate half-sisters or half-brothers, and only received a half of what his entitlements as a legitimate child would have been. The maintenance of this discrimination over inheritance can most probably be explained by reticence at recognising de facto polygamy, and in any case by the wish not to undermine the legal security offered by marriage. Although, to start with, this discrimination had been deemed compatible with the European Convention on Human Rights by the First Civil Chamber of the Cour de Cassation (Judgment of 25 June 1996 *Claude M v. Alain R.*) it was then condemned by the European Court in Strasbourg in a judgment dated 1 January 2000 (*Mazurek v. France*), as the result of an appeal brought against France by the child of an adulterous union,. On account of the Court's attachment to the principle of equality between children whatever their parentage, the Court held that, however legitimate the aim to protect the traditional family might be, it could not justify discrimination based on birth resulting from an adulterous union and added moreover that "the child born of an adulterous union could not be reproached with events which were not his fault." Drawing conclusions from this condemnation, as a result of judgments in the French courts (Tribunal de Grande Instance of Montpellier, 2 May 2000, case *Mme Théry, épouse Newby*), the French Parlement repealed legislation that still penalised children born of an adulterous union (Law of 3 December 2001). Henceforth, "All children whose parentage has been legally established have the same rights and the same duties towards their mother and father. They enter the family of each parent." (Article 310-1 of the Civil Code).

It follows that this equality can no longer be refused, except in cases where it is impossible for the child to establish his parentage on either side. This can be due to the prohibition of the establishment of parentage for a child born of an incestuous union whose

parentage has already been established on one side (Article 334-10 Civil Code). It can also be on account of the facility granted to mothers not to reveal their identity when giving birth (Article 341-1). It has to be said that this *droit à l'accouchement anonyme* [right to abandon a child at birth and in secret] is, in Europe at least, a uniquely French curiosity. The Law of 22 January 2002 (Articles 147-1 et seq. of the Code de la Famille) still retains it, since all it does is encourage the mother, if the child so requests, to allow her identity to be revealed, and, without this revelation having any incidence on the child's civil status or parentage. Curiously enough, the European Court of Strasbourg has held that *accouchement sous X* [childbirth by an unidentified person] as this facility is commonly called, is not incompatible with the European Convention of Human Rights, from which it nevertheless deduces, and rightly so, the right to know one's origins (Judgment *Odièvre v. France*, 13 February 2003). This right, as far as this group of children is concerned, will no doubt remain a largely theoretical one, unless more radical legislative reform than that of 22 January 2002 is passed. This may well happen, even if, in this case, European case law is not for once playing its goading role.

Be that as it may, the family law wood will certainly not be hidden by a few anonymous childbirth trees. Taken as a whole, this section of the law, as we have seen, is being increasingly influenced by European Human Rights law. This might mean, if we put the question in more general terms, that after having been perceived as the real French Constitution, our two-hundred year old Civil Code could, in the course of this new century, see its fate sealed by the emergence of European civil law. It is in any case a question worth asking ourselves.

## **Conclusion: The Future of the Civil Code – the European test.**

Having drawn on the varied written and customary sources of *ancien droit*, as well as on the *droit intermédiaire* of the French Revolution, this venerable monument to the French judicial character has crossed the two centuries of its existence in rather contrasting circumstances. The era of relative stability and influence abroad that it enjoyed during the nineteenth century was followed by a contrasting period of declining importance abroad and above all of upheavals which continue to affect the law of persons and the family law today.

Two hundred years on, the time has come for assessment and looking ahead. The Code was the subject of violent criticism in its early days because it satisfied neither those who were nostalgic for the *ancien régime* nor those who held by the tenets of the Revolution, but it was generally praised on the occasion of its first centenary in 1904. We now need to ask ourselves whether the Code still has a future today. Some may applaud its astonishing vitality and its ability to adapt to evolutions in society. Others may consider that it has aged, and aged badly. This is because, in the first place, even if the original framework has been preserved, its presentation has been partially disfigured by contemporary legislation. As a result, much of its beautiful harmony has been somewhat lost. The style of the Civil Code so pleased Stendhal that one day he confided to Balzac, "When I was writing *The Charterhouse of Parma*, I would read a few pages of the Civil Code just to get in tune." Secondly, because the movement to "decode the civil law" (R. Cabrillac) has resulted in a section of civil legislation now being contained in separate statutes or in other codes which fall outside its field of competence, the Code has lost its vocation of being all-embracing, or as A. Bénabent puts it, "Rome is no longer in Rome." The inevitable question then is: does the Civil Code need to be totally overhauled? Of course, the idea is not totally new. It was in the air a century ago, but came to nothing. It resurfaced at the end of the Second World War and in 1953 even led to the elaboration of a partial Civil Code draft bill which, in the long run, again came to nothing. This, as we know, left the field open to a succession of reforms, rather than to a general revision. But now the question is being asked with more urgency. There are calls for a "new Civil Code" and for a "Civil Code for twenty-first century France." It should contain a "simplified and updated version of the learned information, which is presently being stifled by quantity" and would have to avoid the pitfalls of "the technical details [...] of regulation-making". On the contrary, it should provide "the degree of generality needed to guide without constraint"(C. Atias).

We still need to ask ourselves whether, instead of the Code being given a rejuvenating cure from the inside, which might guarantee it a longer life, it is not quite simply going to be swallowed up, along with the legislation of other Member States, by European law, which is making so much headway it could toll the Code's knell. French civil law, like other branches of

the law, already bears a European stamp. The European Convention on Human Rights and Court of Strasbourg interpretations are already influencing French family law, as we have seen. But it is not this Europe in its wider sense, or European law, which, in a worst-case scenario, could bring about the disappearance of the French Civil Code. The danger comes from the smaller Europe of the European Community, whose over-inflation of rules and regulations, derived from its founding treaties, makes the practice of the law of obligations, and in particular contractual obligations, increasingly difficult. It is true that, for the moment, this inflation has not really affected the Civil Code as such. Only eighteen new articles have been inserted, relating to "liability for defective products" (Articles 1386-1 to 1386-18); this is the result of an important Council of the European Community directive dated 25 July 1985, but not adapted to France until its enactment on 19 May 1998. For some years now, however, the daring, though not new, idea has been floated of codifying a European civil law which in the long run would replace Member State civil codes.

Three years ago, in a communiqué addressed to the European Council and the European Parliament, the European Commission invited specialised jurists to study the possibility of drawing up a European code of contracts. Their clearly stated purpose was not merely to harmonise Member State rights in the matter, but to standardise contract law throughout the Community. This initiative, on which several study groups have worked, has received for the most part a less than lukewarm welcome by French Civil Code specialists. As for the occasional partisans of a "Euro-code of Obligations" (C. Witz), they have exhibited reasonable restraint in campaigning just for harmonisation of national legislation, rather than for any real unification, which they consider to be very premature. In fact, one is obliged to admit that the perspective of a European Civil Code, even if it were limited to the law of obligations, or even further restricted to contract law, raises serious objections.

The first is quite simply the probable lack of competence the Community and its institutions have to adopt any such code. There is no actual provision in the Establishing Treaty which would allow them to intervene in civil matters, except in the case of adopting measures in the field of judicial cooperation having cross-border implications (Article 65 of the Treaty establishing the European Community). In order to justify their codifying initiative in law, the Community institutions would at best have to go by Article 95 of the same treaty, which allows the Council, after consulting the European Parliament, to adopt measures relating to the approximation of the laws and regulations of different Member States that directly affect "the establishment and functioning of the internal market." But invoking this very general judicial basis to justify the enactment of a European code of contracts or of a wider-reaching code of obligations, whose purpose would be to standardise Member State legislation, implies that their

present diversity is hindering "trade within Europe." This supposition is open to discussion (Y. Lequette) in the light of the North American experience of a market whose dynamics does not appear to suffer from the difference in civil legislation from one federal state to another or from one province to another. In the absence of any Community competence, only an international agreement concluded between the Member States might lead to the adoption of a European Code.

But even if this first objection were overcome, it still remains to be seen whether there is a fundamental need for standardised contract law for European Union Member States. Seen from this angle, there are many good reasons for preferring the maintenance and coexistence of national legal systems. Any standardisation process would inevitably impose the adoption of compromise solutions of dubious clarity and coherence on national regulations. Their present diversity actually allows contracting parties to choose in each case the contract law best suited to the circumstances and, in so doing, enables national legal systems freely to compete with each other, to use a key expression of Community law and of the European Commission.

It has to be said that the Commission, in the face of the objections its vast initial project raised, seems for the moment to have abandoned the idea of a European code of contracts. It now only appears to be envisaging the enactment of European norms applicable solely in cross-border contract dealings. For the rest, national legal systems, with all their differences, will continue to exist side by side. Any conflict of laws will be resolved by common rules to be applied to contractual obligations as laid down by the Convention of Rome of 19 June 1980, concluded between the Member States and to be included on completion in Community legislation in the form of a statutory regulation. At the very most, it might prove useful to elaborate, along the lines of American restatements (C. Witz), an instrument carrying no normative weight but which would assemble all the various national laws in order to ease comparison and to bring out their points of divergence and agreement.

If the idea of a European code dealing only with the law of contracts and obligations raises serious objections, it is not hard to imagine how difficult it would be to adopt a European civil code embracing all aspects of the law, and in particular the law relating to persons.

From the outset, Community competence would be manifestly lacking, especially for everything concerning family relations. In particular, it would not be possible to make use of the adaptation clause of Article 308 of the Treaty establishing the European Community which allows the Council, acting unanimously, to take the appropriate measures necessary to attain one of the objectives of the Community, if the Treaty has not provided the necessary powers. It remains open to doubt whether civil matters come under any of the heads of any of these objectives. This has still not dissuaded the European Parliament from adopting since 1989 several resolutions calling for such a code or from setting groups of experts to the task.

Fundamentally, the adoption of a European civil code, which visibly has support in Germany (C. von Bar), but has given rise to hostility on the part of French legal experts, would have two sterilising effects which would deprive it of any legitimacy. In the first instance, a choice would have to be made between the Anglo-Saxon and the Roman-Barbarian traditions that Europe has nurtured. The Anglo-Saxon tradition, more inclined to casuistry than to systemisation or to general theories, and naturally hostile to any codifying process, would have to be sacrificed. But that is not all. If the European code were to become the instrument of standardisation of the legal systems of individual Member States and lead to their disappearance, it would in the long term spell the end of "the national identity of Member States" proclaimed by the Treaty on European Union (Article 6 § 3). For each of these legal systems is the fruit of the history of an individual European nation and each reveals and constitutes, especially in the regime applied to the foundations of society, the family, that particular nation's profound sociological and cultural personality. Technical considerations apart, the unspoken aims of a codification project of this sort are highly political: namely, the promotion, through the elimination of the specific characteristics of diverse national societies, of a European society, which would become the human substratum of a future Federal State of Europe ready to take over from the Nation States. No doubt, the argument put forward to establish its legitimacy will be that the emergence of a common civil legal system would simply be a new, though determining, stage in the march towards "an ever closer union among the peoples of Europe" (Preambles to the Treaty establishing the European Community and to the Treaty on European Union), to which the signatories to the founding treaties of the Communities and the European Union mutually exhort each other. But apart from the fact that the deepening solidarity between peoples mentioned in the Preamble to the Treaty on European Union only concerns "respect for their history, their culture and their traditions," the completion of this union at a civil law level could only come about at the end of a long process of evolution towards a hypothetical fusion, which for the moment, is a long way off.

In other words, the birth of a European civil code, for which our two-hundred year old code might well serve as a model, just as Napoleon had envisaged from his St Helena exile, could only legitimately constitute the result and not be the vector of such an evolution. It could only be the consequence, not the cause. For, as Portalis so rightly said, " Only time can draft a people's code."

## **Descriptive Bibliography**

### **Part I**

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This text situates the French Civil Code within a wide-ranging reflection on legal scholarship and demonstrates the French code's superiority over other codes, in particular the Prussian Code and the Frederick Code.

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## **Part II**

### **General bibliographical references**

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In this collective and multi-disciplinary work, J. Carbonnier, explains, by means of a combined historical and sociological approach, how the Civil Code is anchored in the memory of the French nation because it has been "coloured by history" and because, it is "full of symbols" for the France of today.

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- Vol III, *Les biens*, 19th revised edition, 2000

- Vol IV, *Les obligations*, 22nd revised edition, 2000

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### **The relationship between civil and constitutional law**

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The influence of the European Convention on Human Rights on civil law.

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professors, are a certain number which have had an influence on the civil law of member states, including France.

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Fauvarque-Cosson, B., "Faut-il un Code civil des obligations?" *Revue trimestrielle de droit civil*. 2002, pp 463-479. A very critical appraisal of the bases, justifications and method involved in the proposed creation of a civil code of obligations.

Von Bar, C., "Le groupe d'étude sur un code civil européen." *Revue internationale de droit comparé*. 2001, p.131.

Lequette, Y., "Quelques remarques à propos du projet de Code civil européen de M. Von Bar," *Recueil Dalloz* 2002. A very critical study of this project.

Legrand, P., "Sens et non-sens d'un code civil européen." *Revue internationale de droit comparé*. 1996, pp. 779 ff. A very critical study of the notion of a European civil code.

### **Events**

Innumerable events have been planned for the Bicentenary. Each university and many institutions have something programmed.

These two web sites provide information on official events in France:

<http://www.culture.gouv.fr/actualites/celebrations2000/code.civil.htm>.  
<http://www.bicentenaireducodecivil.fr/>