REFLECTIONS ON THE PROCESS OF RECODIFICATION OF THE QUEBEC CIVIL CODE

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The task of reforming the law is not an easy one. Those who have labored in reform organizations and commissions know that law reform is a long, demanding, sometimes frustrating process that often brings its authors no public recognition, but instead, criticism and reproach. I remember, to take but one example, the uproar brought on by the suggestion, though quite good, that we made to the Canadian Law Reform Commission in 1978, that in criminal trials the prosecution and defense be obliged to communicate to one another the main elements of proof before the trial began. I further remember that an eminent criminal lawyer from Toronto thereafter called us fascists. Indeed, all reform at first instills fear in practitioners (not without reason) as it alters their habits, introduces uncertainty and eliminates achievements, and thereby expertise which they have acquired over the years. It is resisted by doctrine as well, which questions the very validity of rules and the philosophy on which they are elaborated. A good illustration is the recent controversy surrounding the adoption of the proposed law on family patrimony.

Reforming a civil code is even more difficult than attacking an ordinary law. A code is a whole, a coordinated, logical ensemble; an intellectual construction whose internal coherence, abstraction and generality set it apart from other forms of legislative expression. Working on a code is somewhat like working on a delicate timepiece in which each part, no matter how tiny, carries out some function in the whole. Each time the legislator alters provisions of the Civil Code, he must measure the impact his reform will have on the other parts of the law and ask himself whether the reform jeopardizes certain basic principles to which the law ought to remain true.

The reform of the Civil Code of Quebec formally began in 1955 with the adoption of a law authorizing a reform. In reality, however, work truly commenced in 1962 with the first reform of matrimonial regimes. In 1965 it was given renewed vigor when Professor Paul-André Crépau, at the head of the Office for the Revision of the Civil Code (O.R.C.C.), undertook a systematization of revisionary work that ended on June 20, 1978 with the filing in the National Assembly of

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the Report on the Civil Code, the Office's proposed Code with commentary.

It must be admitted that the reform thereafter lost much of its initial vigor. Besides the adoption of certain legislative sections, especially on family law, a new Civil Code or a Projet was never actually filed in its entirety. In fact, the schedule for realizing that goal is only several years old. A Committee was nevertheless appointed to reexamine the texts prepared by the O.R.C.C. and at a rather slow pace, several important sections of the new Code were successively filed. Except for some unforeseen snag, which is always possible, it seems that a new Civil Code of Quebec could come into being in 1991. Indeed, the goal has never been so close. Nevertheless, twenty-five years have elapsed since the beginning of the O.R.C.C.

Much can doubtless be said about the reform of the Civil Code, as much on a historical level as on a methodological or technical one. The subject is vast, interesting and practically inexhaustible. My comments are modest, however. I would simply consider two principal themes. The first is that of the particular difficulties of the reform of a Civil Code in our times. What factors at the end of the twentieth century, in a jurisdiction like Quebec, make so difficult and so complex the revision of a law so fundamental? The second touches upon the problem of the conditions which are indispensable to the success of this undertaking. What are the categorical imperatives which must be satisfied for the success of the recodification?

Before going any farther on these themes, however, it is important, by way of introduction, to ask a fundamental question: was the reform of the Civil Code of Quebec necessary in 1966 and is it still necessary today? Could we not, as some appear to suggest, have simply retained our present Code as elaborated by 125 years of jurisprudence and doctrinal interpretation? Does the reform correspond to a real and felt need, or is it instead mere legal or cultural vanity? To respond to this question, one must indispensably turn to history, for in Quebec, codification and culture are intimately related.

1. Codification and culture

1.1. The original importance

In 1866, when the *Civil Code of Lower-Canada* entered into force, the Code was the result of neither mere historical accident nor political caprice. It was, on the contrary, the logical satisfaction of a deep socio-cultural need. In 1866 what was needed, first and foremost, was to assure the survival of the French legal culture then believed to be threatened by British common law, both because of its

still fragile roots and because it found itself practically cut off from its French source of life. The codification, therefore, took on an extremely important *symbolic* value culturally and linguistically. It afforded the possibility of maintaining a direct intellectual link with France, and assured the survival of the French language and legal thinking on a continent where, with the exception of Louisiana, all was common law and transpired in English. It was then necessary to rationalize and impose some order on the incredible hodgepodge of private law sources which was a merry mixture of Paris Custom and British laws, ordinances of the sovereign Counsel and common law commercial practices, ancient rules of Roman, French and English law, as well as local legislation. Codification was thus also a work of *rationalization* desired and welcomed joyfully in legal and judicial circles. The codification of 1866 was therefore a true and genuine collective work, and not that of a small group of elite. It went beyond mere legal reform and was part of a much vaster cultural and linguistic movement. It was desired, realized and supported by the entire society. It brought together the hopes and fulfilled the expectations not only of legal circles per se, but of commercial and business circles as well, and of those who feared for the survival of the French culture and language. The Civil Code of 1866 was thus a perfect mix of symbolism and reality. Symbolism lent it force; reality, wisdom.

1.2. The present importance

Today's imperatives in recodification are no longer the same. The preservation of French legal culture certainly remains a valid and permanent objective. However, it is no longer a critical objective of the first order, as the codification of 1866 definitively placed Quebec in the romanist law family as well as in the system of codified law. Indeed, no one would dream of suggesting that Quebec adopt a common law system, or "decodify" civil law. Furthermore, in my opinion, the dangers of a so-called mixing of Quebec civil law, or rather of a cross between it and common law, so often criticized by doctrine and case law since 1866, are at present much less worrisome than they were a century ago. Quebec civil law has become, in my view, autonomous and strong enough to assimilate, without too much difficulty, certain elements of common law from which it stands to benefit without, as in the past, remaining dependent on it, not to say subjugated to it for its sources and interpretation. Indeed, it seems sound to me that a system evolves with its time and borrows rules from another system when those rules appear valid and useful. On the other hand, borrowing rules does not necessarily mean borrowing interpretation techniques, any more than it does the indiscriminate imputation of the interpretation given to such texts by foreign courts. There have been several examples of this unfortunate tendency in the history of Quebec civil law, but they are, I think, a thing of the past.

The second objective, that is, the consolidation of rules and the rationalization of sources, is still valid today. However, Quebec of 1989 is not that of 1866 faced with a kaleidoscope of legislative sources and jurisprudential solutions. In 1989 it is certainly fitting to inquire into the reinsertion of several rules into the Code, which had been dispersed in other legislative texts (probably the most striking example being the *Consumer's Protection Act).*

On the other hand, two new imperatives seem to me very present in the current recodification. The first is the readaptation of civil law to modern economic and legal reality. The Civil Code of 1866, because it was perceived as a cultural symbol, was rarely the subject of important reforms. Consequently, certain parts have at times been charged with being somewhat outdated. What is needed therefore is a facelift and an adjustment to put the Code in step with the end of the twentieth century, remove antiquated rules, modernize certain institutions and finish the work left incomplete by the previous codification. The second new imperative is the consolidation of established jurisprudential and doctrinal rules. In 1866, there existed very little jurisprudence and practically no doctrine. In 1989, jurisprudence is not only abundant, but has succeeded in creating important concepts and rules which should be cast in the legislative mold. These include, for example, unjust enrichment and abuse of right. Doctrinal development has been very lively, particularly since the 1950s. It is thus normal in a recodification process to sanction valid solutions established over the years by these two sources.

It therefore seems to me that the preliminary question must be answered in the affirmative. Yes, reform of the Civil Code is necessary in 1989. No, this process is not mere intellectual vanity or a mere stylistic exercise, but a truly necessary action for the practice of law and for those subject to legal action. To reply otherwise is to take a great risk: that of seeing an anachronistic, outdated Civil Code, far from cultural and social reality and that little by little disintegrates, both as a legislative model and as the epicenter of Quebec civil law. I am sure that legal historians who, in centuries to come, will look back on and analyze our time, will see in this work of "recodification" a very important and very significant step in the evolution of Quebec law, as well as of our society and our legal culture.

2. The difficulties of a reform

Although a reform is necessary, it is not, by the same token, easy to carry out nor can its success be guaranteed; which brings me to the heart of my discussion. The difficulties confronting the reform are multiple and represent the sum of a set of complex factors, of which

certain are peculiar to Quebec, while others relate to the model of codification itself.

First, in the sociological context of Quebec, the Civil Code had lost a large part of its symbolic value. It is no longer a banner behind which all Quebecers rally or a primordial symbol of a legal, linguistic and cultural particularity of Quebec. This probably explains, at least in part, the relatively lukewarm political reception after the filing in 1978 of the projet drafted by the Office for the Revision of the Civil Code.

Next, it must be recognized that, on the judicial level, contrary to what was previously the case, the Civil Code is no longer at the summit of the hierarchy of rules. It was displaced first by Quebec's Charter of Rights and Freedoms of the Person, and later, to a different degree, by the Canadian Charter. There is here a *capitis diminutio* that, while perhaps not yet felt in jurisprudential reality, nevertheless constitutes an important symbolic loss.

Third, even the model of codification itself has evolved. The 1866 Code of Lower-Canada is a perfect example of a nineteenth century Code, the goals of which, like the *French Civil Code*, were to present a simple, complete, universal and abstract legislative discourse in which a judge should find a response to all questions. Indeed, by the time of our own codification, the French experience following the exegetical school of the early nineteenth century and the scientific school of François Gény had already amply demonstrated the error in the postulate that the code should embody *all* the law. Since 1866 however, legal relationships have simply become more complex and have raised difficulties, particularly that of casting a modern and subtle legal reality in a mold that is restrictive from the very start. This exercise is still easily accomplished in certain areas where the generality and universality of rules make them more permeable to changes (for example, the general theory of obligations). But in areas more sensitive to social change, this is not always the case (family law, the law of persons, and security law are examples). Here we find a new constraint with which the code writers of the last century did not have to deal. It is not insurmountable however, but is a challenge, it must be said, that, with rare exceptions, Quebec's legislators generally have met well. It calls for an extra imaginative leap to better adapt the nineteenth century format to the reality of the twentieth century.

Fourth, the mechanisms for elaborating and creating the code have also changed profoundly. Contemporary history of the codification provides us with interesting instruction in this regard. With the exception of the examples provided by the Dutch Civil Code proposal, the principal work of a single jurist, but revised extensively by comparison with the original, the Ethiopian Civil Code of the 1960s and the more recent Seychelles code, it must be noted that a civil code

is no longer the work of one person. It has become a work constructed over years by very large teams which, because they change with time, sometimes experience certain difficulties in maintaining a previously well-determined ideological and philosophical course. This is probably what Quebec authorities felt and is the reason for their recent creation of a special committee to advise them on the definition of legislative orientation and policy.

3. The conditions indispensable to the success of the venture

3.1. Political will

While history thus points to an increased complexity of the task of codification, it also clearly indicates that the fate of codes has always been intimately tied to political will. Had Napoleon not personally tended to and invested himself in the French codification and overcome the hostility of the Tribunat, would it truly have been realized? If Germany in 1871 had not decided that it was time to create a modern law, would the B.G.B. of 1900 have come into being? If the political and doctrinal imperatives had not been constantly present, would communist countries (USSR, Poland, Czechoslovakia, etc.) have witnessed the proliferation of thematic codifications? Codification requires the support of a political will. In our times, and in our country, where no dictator, however enlightened, would ever be accepted, the difficulty is therefore to maintain this will for the duration of the codification process and to gain the backing of different segments of the population.

This is both a major difficulty and the first condition to the success of a recodification. Without this will, which could be justified, analyzed and founded on multiple considerations, which time does not permit me to discuss here, the reform, as desirable and as perfect as if may be, is destined to fail. Probably because this will was not sufficiently present in 1978, the proposal of the O.R.C.C. did not then come into fruition in the months and years immediately following its delivery to the National Assembly. Even with this political will, the work of codification is not without difficulty. Certain other conditions must be fulfilled in the three main stages of the preparation of rules, the adoption of the proposal, and its entry in force.

3.2 Critical reflection

In the first stage, that of the very first elaboration of the proposal, a critical legal reflection is essential to define the precise objectives of the new legislative policy, project a vision of the whole of the work within the framework of a precise and logical intellectual

progression and elaborate individual rules while always keeping in mind that a Civil Code is a whole.

In this regard, even if nothing is perfect in this world, the previous work of O.R.C.C. and the present work of the group of lawmakers who are working on the project offer every assurance for the success of this stage.

3.3 The consensus of those concerned

The adoption of the proposal is the second important stage and requires somewhat more discussion. First of all, like any other legislative work, a proposed civil code must be sold in legal circles. It is unthinkable, in fact, to impose a new code by simple authoritative act based on the will of a Prince (as was done for example by Hailé Sélassié in Ethiopia and Kemal Ataturk in Turkey). The recodification must thus bring together a certain consensus of those concerned. Attempts of authorities to rally the entire legal community behind the new codification are difficult and unrewarding because, by their very nature, all reforms of this magnitude meet ferocious resistance. Resistance comes first from certain intellectuals who disagree with the very philosophy of reform. Resistance also develops among certain practitioners who see the experience they have acquired by the sweat of their brow over many years reduced to naught or who suffer from the insecurity, understandably, involved in relearning new rules of the game. Resistance arises in the legal community which, here again, from one day to the next, in certain cases lose their line of legal thought built through years of accumulation of precedent. Recodification thus generates insecurity and anxiety for many, who may express themselves, with more or less vigor, by starkly refusing to accept any change. The success of the reform therefore depends on the skill used in dissipating the former and appeasing the latter. To do this, one must clearly show that civilian recodification is not a brutal rupture with the past, but a mere restructuring of a complex set of rules. A painstaking comparison, for example, of the recently delivered proposal on the law of obligations and special contracts with present law, shows that the new Code in these areas, in the vast majority of cases, simply adopts current rules or codifies well established solutions of case law. Two things seem particularly important to me in this regard. The first is, whenever possible, to lay down new texts in a form and language that resemble as much as possible the current form and language in order clearly to mark the lines tying the past with the future. The second, which seems even more important to me, is commentaries referring to former rules, showing agreements and pointing out divergences, be published along with new proposals. In this way, all interested parties, including most importantly those in the front line, that is, notaries and lawyers, can quickly identify the contentious areas of the reform without having to undertake a lengthy exegesis of the texts with all of

the uncertainty and intellectual dissatisfaction that such an exercise can cause at this stage.

3.4 Durability and assimilation

Once conceived and realized, in order for the reform to blossom it must resist the passage of time and, above all, be experienced by practitioners as an improvement over the previous system. The period immediately following the recodification is therefore crucial and determinative for its future. An abundant dissemination and penetration of information in the legal community is first necessary. The Bar and the Chamber of Notaries have understood this well, already setting up continuing legal education programs for their members. The legal community must master the reform, at least in its overall structure, and must make it their own as quickly as possible, learning to apply the new rules and thereby quickly integrating it into their daily routine.

The scholarly community must then complete the indispensable task of comment and synthesis in order to provide a guide for practitioners and the judicial community. The spectacular expansion of legal doctrine in Quebec over the past twenty years is a guarantee for the future.

Finally, the judicial community also has an important role to play. It is called upon to draw the main lines of interpretation, to fill the inevitable voids, to resolve conflicts of interpretation and to assure an interpretation conforming to the civilian philosophy, never forgetting, once again, that a code is a whole, a self-contained system, and therefore its interpretation must be broad, liberal and remain true to the general principles at the base of civil law. We are now hopefully at the end of the second stage. We must have confidence in the future.

Conclusion

When its new Code enters into force, Quebec can be proud of having succeeded in an extremely complex undertaking that only a very small number of countries have been able to achieve since the middle of the twentieth century.

Thus the time hardly seems right to cast doubt on the recodification of our law. Besides, no one advocates that option. The process is well under way and is entering its final stage. Rather, the time is right for dialogue and the combination of the efforts of all the elements of the legal community: lawyers, notaries, professors and judges. Such dialogue certainly does not mean the disappearance of critical contributions with respect to the proposed reform. On the contrary, criticism, when it is enlightened, is fundamentally healthy and

stimulates ideas, allows errors to be corrected and also assures that the ideology behind rules is democratically expressed.

What is needed is that all of the elements of Quebec's legal community deeply feel that the reform is *their* business, that they always feel personally involved in the process and work together toward its realization.

A civil code is indeed an important work in the history of a people, a work that merits the attention and effort of everyone. Napoleon understood this well. While in exile on the Isle of St. Helen and, looking back on his past as emperor, he said:

> My true glory is not in having won forty battles. Waterloo will erase the memory of so many victories; what nothing will erase, what will live forever, is my Civil Code.