THE INFLUENCE OF ROMAN LAW ON NAPOLEON'S *CODE CIVIL*

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It seems appropriate to start my exposition with the words Napoleon himself had uttered about his *Code Civil* while exiled on St Helen: "My real glory is not having won forty battles; Waterloo will efface the memory of all those victories. That which nothing can efface and which will live eternally is my *Code Civil*."[1]

The *Code Civil*, although the result of the French Revolution, is not only the product of the spirit of that Revolution which abolished all the institutions of the feudal regime and promoted new values (equality of all citizens, private ownership, freedom of contract, family and family inheritance laws). It contains, it appears, in complete harmony with one another, all the results of the long historical development of the traditional and new legal institutions. The influence of the *droit ecrit*, the law from the south of France based on Roman-law traditions, was not foreign to it; nor was the influence of the *droit coutumier*, the common law from the north of France foreign to it. For instance, from the common law the *Code Civil* took over the transfer of ownership by the contract itself and not the sale, as it was done in Roman law.

Before the Revolution, France did not have a unified legal system. Usually it is said that the common law was applied in the north of the country and the written law in the south. However, the common law in the north of France was also written, as the local customs were recorded from the second half of the 15th century. In the 16th century there appeared a large number of official collections of common law, with the *Parisian Common Law* among them. All these collections were applied locally, with a tendency to arrive at a general principle and to spread the implementation of the *Parisian Common Law*. Still, one should not forget the fact that even in the north Roman law served as a supplement to the common law, most often in the areas not provided for by the common law. Roman law was a subsidiary source of law implemented in the absence of other provisions.

The south of France was under the influence of Roman law. After the fall of the Western Roman Empire, in the newly created early feudal states, the law was applied following the personality principle. The rulers of the newly created

1 M. Planiol, *Traite elementaire de droit civil,* (Paris 1950), p 61.

states published collections of Roman law for the subjugated indigenous citizenry. These collections represent the remnants of a great legal system.

The *Lex Romana Visigothorum* was applied to the indigenous citizens on the territory of present-day Spain and Southern France. By its content, it contained excerpts from the *Codex Gregorianus*, *Codex Hermogenianus*, *Codex Theodosianus*, Paul's *Sententiae* and Gaius' *Institutes*. I should say it was a direct link with Roman law which had helped the survival of certain achievements of Roman law in the south of France.

In contrast, in the territory of Northern France, after the invasion of the Franks and the creation of their state, the Frankish common law prevailed. Roman law was suppressed. From Italy, the study of Roman law spread to the south of France and was studied at the universities of Montpellier, Toulouse and Orléans.

This division, like most of the other divisions, is not absolute. Although under direct influence of the provisions of Roman law, in the southern parts, too, there were provisions under the influence of the common law, just as the law of the north did not completely abandon Roman law. For example, since contracts were not adequately regulated by the provisions of the common law, jurists made use of Roman-law principles. Roman law was used as the *ratio scripta* and applied as such every time the common law lacked solutions or had inadequate solutions. Still, the respect for Roman law in France has never been like that in Germany. The French kings protected their own authority and their jurists were very skillful at stressing that the acceptance of Roman law was not the consequence of the authority of Rome and its state, but because that was the custom and because of its quality – *non ratione imperii sed imperio rationis*.

"The fact that France was saved from the massive reception of Roman Law which took place in Germany is clearly attributable to the King's success in having the customs recorded in the sixteenth century."[2] Logically, the strongest influence on the totality of the legislation was exerted by the customs of Paris which could have been applied rather broadly and where Roman law was used as an additional source of law wherever there were gaps. It is possible to say that the recording of the customs, their supplements from Roman law and the continuous development of Roman law in the south was the subject matter

2 O. Martin, *La Coutume de Paris – Trait d'union entre le droit romain et les legislations modernes*, (Paris 1925), p. 13.

unified by the *Code Civil*. According to Koschaker "the careful and moderate acceptance of Roman law in France, like its rejection in England, is attributable to the fact that in both countries there developed early a well-organized and therefore powerful group of practicing lawyers, allied with the King, interested in the centralization of justice in the royal courts, and devoted to the national law".[3] French law has never lost contact with Roman law, the source of a number of its concepts and institutions. In France, the reception was indirect, thanks to the skills of the jurists who, softening the influence of Roman law, tried to preserve that part of the national law which they considered important.

The 17th and 18th centuries were marked by the efforts of the jurists collecting material for the *Code Civil* and preparing drafts of, and searching for models for, the same. Thus, for instance, Domat, more a philosopher than a practitioner, in his work pointed out new ideas of natural law which, in his opinion, were nothing but the norms of Roman law adapted to the times and needs of the times. This teaching exerted a strong influence on the scientific basis of the *Code Civil*. In contrast, Pothier knew both the common and Roman law well. This made it possible for him to draw selective and better founded conclusions. His comments on obligations, purchase and sale, lease, donation and other institutions are characterized by his brilliant style, lucidity and total conceptual precision. The realization of the idea of unifying French law was promoted by the French Revolution as well as Napoleon's authority and determination to realize the idea. Thus the constituent assembly of 1790 adopted a unanimous resolution providing that "there shall be a code of civil laws common for the entire realm".[4] The *Code Civil* accepts Gaius' tripartite system (*Omne ius quod utimur vel ad personas pertinet, vel ad res, vel ad actiones*).[5] The content of the *Code Civil* is distributed in three volumes. Volume 1, entitled *Of persons*, comprises statute and family laws. Volume 2, with the title *Of things and various manifestations of ownership*, regulates the law of things, although not completely. Volume 3, entitled *Of various modes of acquiring ownership*, contains matters relating to the laws of obligations, succession, a part of the law of things (mortgage), matrimonial property law and the provisions on the statutes of limitation and consumer protection.

A considerable number of articles contain regulations and principles taken over from Roman law:

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3 P. Koschaker, *Europa und das römische Recht*, (München 1953), p. 56.
4 September 4, 1791.
5 Gai. *Inst.* 1,8.

The concept of ownership is defined in article 544: "Ownership is the right to enjoy and dispose of things in the most absolute manner, provided that use is not made of them which is prohibited by laws or regulations." This definition of the concept of ownership stems from a thought of Ulpian about the owner who, on the basis of the law of ownership, may do whatever he desires on his estate, even though he may cause damage to his neighbour by doing so.[6] It also stems from the indirect definition stating that upon the expiration of a right to enjoy the fruits of the land, it becomes an integral part of the right of ownership. The owner who previously had enjoyed only the naked property – *nuda proprietas* – then acquires full ownership of the thing – *plena potestas.*[7]

At the time of defining the concept of a testament, the text of Modestinus was used: "A testament is an act whereby a testator, for when he will no longer be alive, disposes of the totality or a part of his estate, and which he may revoke." This is the way the testament has been defined in article 895, and which is slightly different from Modestinus' definition according to which "a will is a valid statement of our will of what a person would like to be done after his death" – *testamentum est voluntatis nostrae iusta sententia de eo, quod quis post mortem suam fieri velit.*[8]

The strongest influence of Roman law was felt, quite understandably, in the law of obligations.

The *Code Civil*, first of all, determined freedom of contract and liability on the basis of guilt as the basic foundations of civil law. These principles brought such a transformation to the civil law which, from then on, allowed no return to the previous position. Even where, by means of special laws, partial amendments were carried out in certain areas of the law, such as the customary family law, law of succession, law of things and law of obligations, the *Code Civil*, with minor amendments, is still applicable.[9]

The *Code Civil* accepts traditional Roman categorization into obligations created by contracts, quasi-contracts, delicts and quasi-delicts. The contract became the basis for regulating the relationship among the individuals, while the principle of freedom of contract became the basic principle of the law of obligations. In terms of article 6, it is slightly limited by the cogent regulations of the "public law". Consequently, contracts concluded in accordance with the law

6 Ulp. *D*. 39,2,26.
7 J. *Inst*. 2,4,4; Ulp. *D*. 32,73.
8 *D*. 28,1,1.
9 M. Planiol, G. Ripert & J. Boulanger, *Traite elementaire de droit civil*, (Paris 1950), p. 33; K. Zweigert & H. Kotz, *An Introduction to Comparative Law*, (Oxford 1993), p. 94.

became binding upon contracting parties.[10] The opinion that the object of a contract is the thing which a party to the contract is obliged to give, or is obliged to do or not to do, is contained in article 1126, and this statement was not unfamiliar to both Gaius and Paul:[11] The definition of a joint obligation is almost identical with the one we find in Ulpian.[12] There are many of the same and similar examples. It would take much time and space to mention them all. The ones given here should serve merely as an illustration of the opinion that the majority of the institutions of Roman law found their place in the *Code Civil* and thence in contemporary jurisprudence.

What I would like to call your attention to, although it may be outside the scope of the subject matter, is the Serbian *Civil Code* of 1844. Why, you may ask? It was the fourth code of this type in Europe, believed generally to have been drafted under direct influence of the Austrian civil law. However, little is known about the fact that the first Commission which was appointed was given the task of studying the *Code Civil* prior to drafting a code for Serbia. In view of the fact that in Serbia, at that time, there were few learned men connected with Vienna, it appears strange that the absolute ruler of Serbia, Prince Miloš, had understood the need for passing such a code. What is even stranger, is the fact that Vuk Karadžić, the most learned man of the time, with close ties to Vienna, was entrusted with the duty of translating Napoleon's *Code Civil*. Vuk intended to leave Serbia, study the codes and then return to Serbia and write a Serbian code. However, the Prince ordered the code to be written in Kragujevac (the city I come from), and to follow the example of Napoleon's *Code Civil*.[13] The drafting of the Code was noted and recorded in the letter of the French count Bua-l-Konte who informed Paris of the Prince's intention to submit a code drafted upon Napoleon's *Code Civil* to the Assembly.[14] First, Napoleon's *Code Civil* had to be translated word by word into Serbian, and only then the Commission (elected for that purpose) had to choose what was applicable to the Serbs and leave out what was not.[15] Vuk did not feel like doing this, and, pretending illness, left for Vienna. Thus the civil laws ended up in the hands of a teacher, Georgije Zaharijades, who translated them and returned them to the Prince. The Prince was not satisfied with the work of the Commission and was probably looking for an excuse not to have it passed by the Assembly. The new

10 A. 1134.
11 Gai, *Inst.* 4,2; Paul. *D*. 44,7,3.
12 Ulp. *D*. 45,2,3,1.
13 V.S. Karadžić, "Istorijski spisi" (Historical records), II, *Sabrana dela* (Collected works), Vol XVI, (Beograd 1969), p. 21.
14 *Srbija u godini* 1834 (Serbia 1834), SKA Spomenik XXIV, (Beograd 1894) (the letter of the count addressed to the minister of foreign affairs, dated 4 June 1834).
15 *Vukova prepiska* (Vuk's correspondence), Vol I, (Beograd 1907-1924), p. 353.

advisors to the Prince insisted that these laws were completely foreign to the Serb people, their customs and the social situation of the time. With the arrival in Serbia of Jovan Hadžić, the idea of having the French *Code Civil* as a model for the future Serbian *Civil Code* was abandoned. Although he tried to persuade the Prince that the Serbian *Civil Code* should be based upon Serbian common law, the Prince turned to another foreign model – the Austrian *Civil Code*. In the field of family law and succession, it was possible to preserve and codify the local customs, while in the area of the law of things and the law of obligations, Hadžić took over the ready solutions from the Austrian *Civil Code*. There are no reliable data which can be used to determine whether Hadžić, at the time of drafting, made use of the draft prepared by the Legislative Commission and modeled the Serbian civil law upon Napoleon's *Code Civil*. This type of research is even more difficult because the Austrian *Civil Code* itself had taken many of its solutions from Napoleon's *Code Civil*. Still, one cannot refute the fact that certain provisions of the Serbian *Civil Code* are either similar or identical to Napoleon's *Code Civil*. Examples are article 1121 of the *Code Civil* and paragraphs 531 and 534 of the Serbian *Civil Code*; article 1148 of the *Code Civil* and paragraphs 808, 319 and 590 of the Serbian *Civil Code*.

Finally, I have to mention the theory of professor Alan Watson about legal transplants. Doesn't everything said so far concern taking over or transplanting certain legal institutions? Isn't the taking over of the provisions of Napoleon's *Code Civil* and the Austrian *Civil Code* by the Serbian *Civil Code* an obvious example? The rules of more developed societies, were often transplanted in the past. In fact, every reform in a country implies the introduction of the achievements of some other system. Although it is important to respect the customs and traditions of a people, it is nevertheless sometimes necessary to borrow legal rules which provide good solutions.