JOURNEE DU DROIT 2023 – SOME REFLECTIONS

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Ce que rien n'effacera, ce qui vivra éternellement, c'est mon code civil![1]

Napoleon may be seen to have been prescient. Like Justinian he knew the significance of what he did.[2]

Napoleon's St Helena statement has two significant aspects: the first relates to the notion of a code generally[3] and the second to the French Civil Code.

I CODIFICATION

The Civil Code of 1804 is well known and has been and is a model for numerous lawmakers around the world. It is not a model that has been followed or accepted in the English Common Law world.

The English dislike for codification is deep-seated. All the enthusiasm of Bentham did not serve to change English attitudes. Nevertheless, the British colonial system developed compendious statutes for export to the Empire: A comprehensive Crimes Act, an Evidence Act, the Indian Contract Act 1872, and a Civil Wrongs Act. What was suitable for the colonies, and primarily for administrative purposes, was

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1 The statement in the epigraph is attributed to Napoleon during his exile in St Helena. It indicates that "the Napolean that really matters was the fellow who held dozens of administrative gatherings from which emanated the laws and institutions that hundreds of millions of people still live by today" (*The Economist* 25 November 2023, 50). This celebratory piece explores aspects of the impact of French Law from a Common Law of New Zealand point of view.

2 F Sarris *Justinian* (Basic Books, London, 2023) 125 "…'this Code, which will endure forever', was to be cited in court" (n 33 C. Summa 2, 3). Further in the same book it is stated by Justinian (at 133) that the laws "lay down the best laws not only for Our own but for every age, both present and future" (n 59 C. Tanta 12).

3 Taking the key features of a Code as being a piece of legislation which is: systematic, general, inclusive and exclusive.

clearly not appropriate for the metropole. Even in England in 2024, torts, contracts and crimes are not the subject of codification legislation.

The absence of codes in the English law system is not for want of trying. In 1921, Jenks produced *A Digest of English Civil Law*[4] which followed a codification pattern. There were five books: General, Obligations, Things, Family Law, Succession. That Digest had 2223 paragraphs. The Sir James Fitzjames Stephen's draft Crimes Act for England was defeated after decades of work; … and it was only a consolidation rather than a codification.

In the field of private law, the next interesting document was the Contract Code that was drawn up for the English Law Commission in the 1960s with the initial support of the Scottish Law Commission. The project was abandoned in 1972 and the draft Code was not published. In 1990, the author Professor Harvey McGregor attended a conference of European law academics in Pavia. Those present were surprised to learn of the existence of the draft Code and, as a result of their interest and insistence, the document drawn up for the English Law Commission was published in Italy.[5] This code of English contract law is in 673 articles which deal in turn with all matters from inception by agreement through to third party rights and duties and to the assignment of contractual rights and duties.[6]

The English cultural pattern has been followed in New Zealand. The reform and codification agenda of the 20th century crimes legislation was met with strong opposition.[7] It was strong to the point that what was regarded by many as a coherent criminal law codification was abandoned. And in the 21st century, a comprehensive statute, albeit a consolidation not a codification, for the main principles of the law of contract was proposed, and in some quarters[8] opposed … but that statute became law: the Contract and Commercial Law Act 2017. Similar attitudes have affected the approach to the Convention on the International Sale of Goods which is code-like,

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4 *A Digest of English Civil Law* (2 ed, Butterworth, London) 2 vols.

5 Harvey McGregor *Contract Code* (Giuffre, Milan, 1993).

6 In 1992, the Law Reform Commission of Victoria in Discussion Paper No 27 published a draft "An Australian Contract Code". Remarkably, this draft code is of 27 articles and moves from the territorial application of the code through contract making, breach, relief and evidence. It presents as a true code whose underlying principle is that of conscionability (art 27).

7 Crimes Bill 1989 (152). For discussion of this Bill, see Neil Cameron and Simon France "The Bill in context" (1990) 20 VUWLR Monograph 3. See also Robin Cooke "The Crimes Bill 1989: A Judge's Response" [1989] NZLJ 235. For a pungent assessment of the failed legislative endeavour, see Roger S Clark "Criminal code reform in New Zealand? A Martian's view of the Erewhon Crimes Act 1961 with some footnotes to the 1989 Bill" (1991) 21 VUWLR 1.

8 David McLauchlan "A Conversation about the Contract and Commercial Law Act 2017" (2019) 50 VUWLR 387.

and has statutory implementation in New Zealand,[9] however it appears to be avoided in practice by the simple device of contracting out.

All this said, there are examples in New Zealand statutes where the phrase "Act a Code" or similar appears as a sidenote.[10] The precise meaning of the rubric for a New Zealand lawyer may not be clear, but the intention is that previous law thinking should be excluded from the application of the new legislation.[11]

II FRENCH LAW LEGACY

French law influences in New Zealand law can be seen in at least two main forms: substantive rules and terminology. The introduction of the jury system was attributed by Maitland to the Frankish inquest[12] which can be traced back to the Carolingian kings in France. The most celebrated early use of the inquest in England was the compilation of the Domesday book.[13] Indirectly, the influence of French law has been felt strongly in the English common law and therefore on New Zealand law by the effect, inter alia, of persuasive precedent, and by the effect of legislation of the European Union on the law of England.[14]

There was a period when the language of law in England was Law French and many areas of law retain some of the Law French usages. Among the examples listed by Glanville Williams[15] are attorney, autrefois acquit, autrefois convict, detinue, laches, lien, mesne, nonfeasance, feme sole, feme covert, trover, bailment. These usages persist though in the private law domain many such as feme sole and feme

9 Noticeably it has not been acceded to by the United Kingdom.

10 See the Care of Children Act 2014, s 13; the Contract and Commercial Law Act 2017, ss 22, 115, 205 in respect of mistake, minority and international sale of goods respectively; the Property (Relationships) Act 1976, s 4. To be noted is that till 1985, the equivalent of the modern High Court Rules of New Zealand was, as introduced by the Judicature Act 1908 (NZ), known as the Code of Civil Procedure.

11 Eg Care of Children Act 2014, s 13: "…this Act has effect in place of the rules of the common law and of equity as to the guardianship and custody of children".

12 At 240.

13 At 241.

14 The impact of that law was graphically expressed by Lord Denning in *Bulmer (HP) Ltd v J Bollinger* [1974] Ch 401, 418: "…when we come to matters with a European element, the [EEC] Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back. Parliament has decreed that the Treaty is henceforward to be part of our law". Necessarily the effect of EU legislation on English law was similar.

15 See for matters of pronunciation Glanville Williams *Learning the Law* (17th ed, Sweet and Maxwell, London, 2020) ch 5.

covert are obsolete. In the field of New Zealand international law the terms *ordre public* and *force majeur* are well known.

Substantive rules are most apparent in the legacy of the Norman Conquest evident in the current land law. That influence was pervasive.[16] The key New Zealand land law concept is still expressed in feudal terms – the estate in fee simple absolute. In post-revolutionary France, the feudal structures were replaced by notions of allodial ownership but in New Zealand the system has not changed though it has been formalised and given greater security by the adoption of the Torrens land registration system;[17] the feudal terminology remains. In the movable property area key terms are of French origin eg chattels, choses in action and choses in possession.

Hadley v Baxendale[18] is a prime example of a direct adoption by English law of a French law rule, in particular of arts 1149-1151 of the French Civil Code. As stated by Parke B in the discussions during the trial in that case:[19]

> The sensible rule appears to be that which has been laid down in France, and which is declared in their code—Code Civil, liv. iii. tit. iii. ss. 1149, 1150, 1151, and which is thus translated in Sedgwick (page 67): 'The damages due to the creditor consist in general of the loss that he has sustained, and the profit which he has been prevented from acquiring, subject to, the modifications hereinafter contained. The debtor is only liable for the damages foreseen, or which. might have been foreseen, at the time of the execution of the contract, when it is not owing to his fraud that the agreement has been violated. Even in the case of nonperformance of the contract, resulting from the fraud of the debtor, the damages only comprise so much of the loss sustained by the creditor, and so much of the profit which he has been prevented from acquiring, as directly and immediately results from the non-performance of the contract.'

As a result of the operation of the doctrine of precedent, this rule became New Zealand law and remains so.

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16 See A K R Kiralfy *Potter's Historical Introduction to English Law* (4th ed, Sweet and Maxwell, London, 1958) at 487: "The terms on which the Conqueror granted land to his followers would naturally be those familiar on the Continent. The result was that the most immediate tenants (tenants-in-chief) held by military service, as the most honorable, the commonest, and the most necessary service due to a sovereign lord from his vassals. The monumental inquest of Domesday, taken twenty years after the Conquest, embraced all England, and this of itself brought some uniformity into the modes of landholding throughout the country."

17 See now the Land Transfer Act 2017.

18 *Hadley v Baxendale* (1854) 156 ER 145.

19 At 147-148. The original Code provisions were replaced in France by the reform to the law of contract by Ord no 2016-131 of 10 February 2016. See now generally arts 1231-1 and following.

III CONCLUSION

The contributions of French law and doctrine to New Zealand law may be discreet but not unimportant. Aspects of their resonance in the laws of New Zealand are to be celebrated and it is a privilege to be able to participate in that celebration. An enquiry about the contribution of French law to the law of New Zealand may receive a quick and negative response … but first impressions can be misleading as closer inspection discloses that New Zealand law bears the signs of French law influence and some of that influence is deeply embedded.