



Original Article

# The Codification of Civil Law in Quebec: An Example for Vietnam?<sup>1</sup>

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Received 10 March 2023

Revised 26 July 2023; Accepted 20 March 2024

**Abstract:** The Quebec legal system is one of the few hybrid legal systems of the world that combines both common law and civil law. While the civil law regime in Quebec is mainly inspired by the Napoleon Code, the Civil Code of France, it still remains being influenced by the common law system, for example for its extensive reliance on jurisprudence. As it is the case for Quebec, the French Civil Code has also been heavily influential on the codification of the Vietnam's Civil Code. Vietnam's use of legal transplants also shows the impact of other legal systems on its own. In this paper, the author aims to brush an overview of the Quebec civil law codification that includes some comparisons with the Vietnam civil law regime.

**Keywords:** Civil law, Codification, Quebec, Canada, Vietnam.

## 1. Introduction

Around 60% of the world's population lives in a legal system that is inspired by or belongs directly to the civil law tradition, while around 35% of it lives in a legal system that belongs to the common law tradition. Where the reasoning

of common law is inductive, that is to derive general rules from specific facts [1], the reasoning of civil law is deductive, meaning that it rather moves from general rules to their specific application. The deductive reasoning is connected somehow to the idea of codification itself, illustrated, for instance, by the importance

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<https://doi.org/10.25073/2588-1167/vnuls.4526>

<sup>1</sup> This work was prepared separately from this author's employment responsibilities at the Public Prosecution Service of Canada. The views, opinions and conclusions expressed herein are personal to this author and should not be construed as those of the Public Prosecution Service of Canada or the Canadian federal Crown.

it gives to legal categories and to the use of general principles [2]. Only around 3% of the world's population is governed by a legal system where the two legal traditions coexist [1]. The province of Quebec in Canada falls in that latter category [1]. In 2008, the former Chief Justice of Quebec described the hybrid nature of the Quebec legal system as follows [3]:

When I asked my researcher, lawyer Sébastien Lafrance, to find me an image to express this reality, he suggested “pâté chinois”! So the pâté chinois (Translator's Note: literally Chinese pie... but called “shepherd's pie” in English) has three ingredients: first the mashed potatoes - you know or you remember Mr. Parmentier; I think he was a Frenchman who popularized the use of potatoes for human consumption. At the bottom of this pie is the minced beef of Lord Sandwich, who invented what we eat every day and which is named after him. And between the two, there is a very American ingredient - the corn - which is the aboriginal contribution to our legal system and which binds both the French part and the English part. So that our French friends from France aren't totally lost with this pâté chinois, because the name isn't common in France, I have reproduced something that is found more commonly in France and which is called hachis parmentier, which is very similar to pâté chinois; however, you will notice that there is no corn in hachis parmentier.

Not only does Quebec fall in the exceptional category of a hybrid legal system, but the Quebec's codification of civil law also represents, more specifically, “a commitment from the legislative body... that far exceeds what has been done elsewhere in the world” [4] in its scope and thoroughness [5]. This should, in and of itself, be enough to convince anyone interested in the issues related to codification to keep the codification of civil law in Quebec under their radar... but there is more that justifies to discuss it and to compare it, to a certain extent, to the Vietnam civil law regime. In her PhD thesis, published in 2022, that is focused on the codification of private international law in

Vietnam and in Quebec, Ly pointed out Quebec and Vietnam share the common ground of having chosen codified law for what pertains to their civil law [5]. Vietnam's reform policies of the *Đổi mới* (Renovation) that were formally adopted in 1995, but that came into force in 1996 [6], triggered, among many other things, the enactment of the first civil law codification in the 1990s, which led to the adoption of the first Civil Code of contemporary Vietnam in 1995 [5].

## 2. Historical and General Legal Background

Being aware of some historical landmarks related to the history of the province of Quebec is helpful to understand better the connection Quebec's civil law has with its French counterpart. In addition, it is also useful to illustrate the reasons why Quebec ended up with a hybrid legal system. Further, it helps to contextualize Quebec's codification of civil law.

Quebec's connection with France goes beyond the mere use of the French language. That being said, French is one of the two official languages of Canada since 1969 [7], and it has been, since 1974 [8], the only official language of the province of Quebec, one of the ten Canadian provinces. Cara noted, “bilingualism is coupled with the co-existence of two different legal systems” [9] in Canada. Nevertheless, it must be specified that “the vast majority of Canadians does not speak French” [10] outside of the province of Quebec, besides some parts of the Canadian provinces of New Brunswick and Ontario where French is widely spoken - but there is no hybrid legal system in the two latter provinces, common law prevails there overall.

In 1534, France took possession of the territory of what is now known as the province of Quebec in Canada. In 1664, King Louis XIV, king of France, decided, by way of a decree, that New France (Nouvelle-France), which were the French colonies of continental North America, that existed from 1534 to 1763, had to be governed by the Coutume de Paris (Customs of Paris) [11]. Coutume de Paris is a French code

that governed the civil rights of individuals, their status, their matrimonial regime as well as the ownership and transmission of their property. In 1759-1760, Great Britain conquered militarily New France. This is commonly called the Conquest of New France, which occurred during the Seven Years' War that opposed France to Great Britain. The Seven Years' War was fought by these two countries not only in North America, but also in Europe and India. In 1763, a royal proclamation from King George III put an end to the application of the Coutume de Paris, and made British law applicable from then on, both for criminal law and civil law matters. However, this was not well received by the civilian population of New France. In 1774, the Quebec Act - 1774 [12], adopted by the British parliament, restored French law in civil law matters [13]. Things did not change much from a legal perspective between 1774 and 1866 [13], year of the adoption of the Civil Code of Lower Canada (hereinafter "C.c.B.C." [14]). Quebec civil law did not stay immune, however, from being influenced by the common law, for example, with the law on evidence [15], and also, prior to 1989 [16], with the concept of testamentary freedom [3], i.e. the concept that each person was free to pass one's property on death by will as one wished. Even though the C.c.B.C. of 1866 finds its main roots in French civil law, it also sometimes found inspiration in the common law [17]. The C.c.B.C. mainly codified the customary law of Lower Canada, based on the Coutume de Paris [17]. It was inspired by - some contend that it was copied from [18], while rather argue that it was not an imitation of [17] - the Napoleon Code, named after Napoléon Bonaparte, emperor (not king) of France between 1804 and 1814.

There was and still is in Canada a dialogue between the civil law and the common law jurisdictions that makes possible, to a certain extent, for these two different legal systems to influence each other mutually [19]. However, it cannot be overlooked that this influence has been asymmetrical in the past. For a long time, the

Supreme Court of Canada did not consider the peculiarities of Quebec civil law [1]. On a more positive note, this dialogue should not be understood, all things considered, as a way for principles or concepts originating from the common law to corrupt, invade or erode the civil law system in Quebec. Borrowing principles or concepts from another legal tradition is not necessarily synonymous with the degradation of the legal system that imports them [20], but they rather may contribute to its development, as it did in the province of Quebec. Judge-made law, or case law that is the basis of common law, has played a significant role in the development of civil law in that Canadian province [21]. Judge-made law is, in principle, more flexible than statutory interpretation. As Tran, Pham and Lu Nguyen noted, "in their role as statutory interpreters, judges have less discretion than they do as developers of caselaw" [22].

In 1955, the Legislative Assembly of the province of Quebec, under the initiative of the premier Maurice Duplessis, adopted the Act respecting the Revision of the Civil Code (Statutes of the Province of Quebec, 1954-1955, chapter 47). This premier is known in the province of Quebec for having brought "dark ages" in it [23]. This is somewhat ironic since the same premier called for the revision of the C.c.B.C., which is obviously a sign of progress, and that corresponds more to the spirit of the "Age of Enlightenment" of the 18th century. This Act provided for the appointment of a jurist to be in charge of preparing a draft amendment to the C.c.B.C. A former Chief Justice of the Supreme Court of Canada, Thibaudeau Rinfret, was the person appointed for that role, but he was involved, alone, in that capacity only until 1961. In 1960, the Act respecting the Revision of the Civil Code was amended to provide for the appointment of four drafters rather than just one [24]. In 1965, the Civil Code Revision Office (hereinafter "O.R.C.C.") was established. Professor Paul André Crépeau, who was a very well-known figure in the academic world, became its head. The mandate that had been given to the drafter for the 1866 C.c.B.C., which

was “to consolidate the legislation applicable at that time in order to bring about greater certainty of the law” [25], was different than the mandate given to the O.R.C.C., which was more general. Contrary to what happened with the C.c.B.C., nearly 150 jurists worked on the preparation of the first draft of the code, which was used as the basis of the Civil Code of Quebec [5]. In 1980, the Legislative Assembly of the province of Quebec instituted the Civil Code of Quebec, but decided to stagger the adoption of its various parts. In 1994, the Civil Code of Quebec came into force as a whole [26]. Over time, the dependence of Quebec civil law on French sources has diminished due, among other factors, to the emergence of the caselaw in Quebec [27].

### 3. Defining Codification, Its Purpose and (Some of) Its Roles and Effects

#### 3.1. Definition and Methods

Cabrillac, in his seminal masterpiece *Les codifications*, described codification as “the operation of developing a code, including the process and the result, i.e. the code itself” [6]. Both the process and the result of codification are examined in this paper. The spirit of codification was explained in the following terms by the Supreme Court of Canada in the decision *Dell Computer*: “The codification process... entails a reflection on all the principles and on how to organize them in one central document with a view to simplifying and clarifying the rules, and thus making them more accessible. The organization of rules is an essential feature of codification” [28].

Two main methods of codification exist in opposition to each other [6]: the first method being codification compilation that consists of bringing together already existing provisions, and the second method being codification-modification that rewrites existing provisions either by modifying them or by supplementing them [29]. It must be clarified that the

codification in the Napoleonic sense is not a simple compilation of existing provisions [15].

For some, codification in Lower Canada, that resulted in the adoption of the C.c.B.C., resembled the process of compilation because it incorporated the various sources of law into only single source [11], and also because it was the mirror of the existing law as it was in 1866 [11]. In contrast, it is fair to say that the Civil Code of Quebec is not a compilation of scattered provisions, but it is rather a rational and coherent organization of civil law, as it is clearly stated in its preliminary provision: “The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it.” [30] Dean Gérard Cornu also wrote, “To codify is to legislate in an overall spirit... it is this overall spirit that justifies the global character ... of codification.” [31] In addition, about 70%, or about two-thirds [32], of the suggested provisions for the Civil Code of Quebec repeated the previous legislative or the law created by jurisprudence [27]. This shows the continuity of the law, without having an abrupt and complete rupture with the past [33]. On the other side of the spectrum, out of its 3168 sections in total, there were 800 new provisions that came into force with the *Code Civil du Québec* [34]. The substance of the latter is also different from the C.c.B.C. [2]. This initially represented a challenge for the courts since they had to interpret new provisions, then new law.

#### 3.2. Purpose

The purpose of codification has been described as a means to overcoming “an existing fragmentation of law and legal sources in order to create the conditions necessary for legal certainty” [2]. Overcoming legal uncertainty was the main objective of the *Napoleon Code* [35]. The *Napoleon Code* remains an important symbol of codification. It represents the almost-

exclusive source of the codification movement, which spread throughout the world during the 19th century [30]. It strongly inspired several civil codes around the world, including the C.c.B.C., which came in effect in 1866. The C.c.B.C. bears the name of the province of Quebec at that time [15], Lower Canada. The province of Quebec belongs, in terms of private law, to the French civil law tradition [36]. Overcoming legal uncertainty was also the main objective of the codification of civil law in Lower Canada. It became necessary because there was a “patchwork of... incoherent and conflicting laws” in Lower Canada [11]. Codification here served the purpose of stabilizing and clarifying the law, “[n]either the reality nor the importance of these advantages cannot be denied” [30]. Even though it does not pertain directly to civil law, a similar confusion such as the one that existed before the C.c.B.C. also seems to exist nowadays in Vietnam where there are “contradictions, overlaps, and duplications between legal documents” [37] Such confusion may exist in Vietnam because the “legislation is drafted by different agencies, [then] it is very common to find conflicts between sub-law regulations and the legislation” [38].

### 3.3. *Some of Its Roles*

Codification can have various roles, including a role of simplification and predictability.

#### 3.3.1. Simplification

Crépeau wrote that “[a] civil code is a work of simplification. A code wants to give itself a vocation of accessibility which naturally tends to simplify the presentation of the legal system” [18] in terms of the nature of language that is used. The reform of a code, as it was the case for the Code civil du Québec that reformed the C.c.B.C., is the occasion to ensure the renewal of the legal vocabulary: “a new wording is an opportunity to isolate what can and what should no longer be stated the same way. A code is, for the language of law, a bath of youth” [39]. Since the adoption of the C.c.B.C, the legal vocabulary

has changed [30]. A legal code must use either the terms of the common language or technical terms that are used at the time of the codification [18]. Nevertheless, in spite of the efforts to update the language used by the drafters, there are still different levels of language in the Civil Code of Quebec when it comes, for example, to certain technical terms that are used interchangeably in their legal sense and with the meaning of everyday language [2]. The importance of the precision, conciseness and sobriety of the language used in a code is crucial [36]. Without it, there may be issues of stability in the understanding and interpretation of this or that legal term provided by a code, both for judges, but also for the general population.

Simplification of a legal code also implies that the (non-legally trained) common people should be able to understand it. This was a major concern of the drafters of the Civil Code of Quebec, who wanted to make it accessible and as far as possible from any legal jargon [30]. Unless they are directly affected by a specific situation that involves the application of the law, it is, however, rare to see citizens with a civil code in their hands or non-legally trained citizens with a keen interest in knowing what the law says and means [30].

#### 3.3.2. Predictability

Ly remarked that predictability is one of the primary objectives of any codification of the law [5]. Not only does it dictate certain solutions offered by codified rules and allows one to foresee, to a certain extent, the legal outcome of a situation, but it also delineates the legal rules that are meant to be expressed in a clear, unequivocal and unambiguous language so that they can be applied smoothly, as much as possible [5].

## 4. **Some of Its Effects**

Codification can have several different effects, including the continuity or rupture with the past and the completeness of the existing law [6].

### 4.1. *Continuity or Rupture with the Past*

Codification is a difficult and complex task [27]. The revision of an existing code may be even more difficult because of the complexification of the law over time since the previous version came into force. That complexification may be caused by the evolution and, sometimes, by the expansion and development of a specific area of the law. During a conference held on bijuralism in 2004, the former Chief Justice of Quebec, Michel Robert, described codification in those terms: “Codification is always situated in time. It is a portrait of the law applicable at a specific time” [3]. It crystallizes the rules in a given society [40]. Keeping this in mind, an area of the law, civil law in particular, may have developed so much, from a jurisprudential point of view for example, that an existing provision, previously deemed to encapsulate this or that legal reality at a certain point in time, may have become irrelevant, or worse, this existing provision may have become, over the years, outdated. The issues that Quebec civil law faces today are certainly not those of a hundred years ago [11]. The C.c.B.C. had become ill-suited to the modern Quebec society, hence the need for a recodification of civil law [41]. An example that can be given of an outdated regulation, although unrelated to civil law, is that it is still illegal in Canada, in principle, to pay with nickels for something that costs more than five dollars [42]. If applied, this regulation would make most Canadian citizens breach the law nowadays, especially with the inflation that never stops increasing the prices of common goods!

Codes begin to age as soon as they are adopted [6]. The C.c.B.C. underwent only a few modifications during its first hundred years of existence, then it is fair to submit, as Perret wrote [15], that it would not have adjusted to modern reality, and that the C.c.B.C. would have become a symbol of immobility and resistance to change. It became the expression of a static [36], stagnant [13] society. This may be explained by the fact that it was considered to be able to escape the grip of time, and it was meant to prevent any influence coming from “abroad”, including that

of common law [18] (but it clearly has not been successful in that regard).

Braibant stated, “One cannot seriously write a code in less than three of four years” [43]. This may explain, at least in part, why it took so long for the Code Civil of Quebec to come to fruition, i.e. thirty years, from 1965 to 1994 [6]. However, it only took seven years to the Codification Commission in Lower Canada to complete their work for the 1866 C.c.B.C. [44]. It took even less time, two years, for Portalis to bring the Napoleon Code to life [44]. Times were different back then, legal customs too, and the law, while not simple at that time, may not have been as complex as it is today.

#### 4.2. Completeness

Justice Beetz of the Supreme Court of Canada had observed in 1977, writing for a unanimous court, in the decision *Cie Immobilière Viger v. L. Giguère Inc.*, “the Civil Code does not contain the whole of civil law. It is based on principles that are not all expressed there, which it is up to caselaw and to the doctrine to develop” [45]. This does not mean that judges are free, for the sake of the evolution of civil law, to substitute their own understanding of the law for that of the legislator, whose will is expressed in the Civil Code. Generally speaking, judges cannot “rewrite” the law according to their own views [46]. Judicial creativity is not unlimited [47]. Precedents or *stare decisis*, i.e. to stand by things decided, carries more weight in Quebec civil law (because of the influence of common law) than it does in French law, but it carries less weight than it does in classic common law [3], mostly because the letter of the law is usually codified in a civil law system, and it cannot be ignored by the magistrate; there is no civil code in a pure common law country [30]. A code is to the civil law system what *stare decisis* is to the common law system [32].

Before the adoption of the Civil Code of Quebec, civil law flourished outside of the C.c.B.C., and the latter had then been unable to

stem the balkanization of civil law [11]. Thus, the issues caused by the evolution of civil law stemming from the caselaw and from the new legislation, which created in some cases - some would say too many! - redundant and overlapping legislation had to be addressed in one way or another [44]. However, the Civil Code of Quebec did not entirely solve that problem. Its preliminary provision even opens the possibility for civil law to be incomplete when it states that “other laws may complement the Code or make exceptions to it” [30]. In other words, this means that the Civil Code of Quebec cannot foresee everything [32]. A code must express general principles and rules [27], and not fall into the trap of trying to cover every single peculiar detail that would only apply to marginal or exceptional cases. Is this situation, as a whole, really a problem after all? It presents, in fact, the advantage of giving some flexibility, besides the express rules provided by it, to the future evolution of the civil law, and “codifying does not mean [...] bringing together [...] all laws in a single legislative corpus” [15].

As beautifully illustrated by Grimaldi, “around the Civil Code [of Quebec], which does not contain all civil law, special legislation gravitate like satellites.” [30] Grimaldi even went as far as stating, a decade after that the Civil Code of Quebec came into force, that civil law is today, for the most part, outside the Code [30]. This special legislation detract from the generality of code rules [44], and is then autonomous [15]. To give a meaningful example of the parallel existence of civil law outside the C.c.B.C. or the Civil Code of Quebec, let us mention the Consumer Protection Act [48] (hereinafter ‘C.P.A.’) that was adopted in 1971. It aims to protect consumers in their dealings with merchants and businesses. It is still in force and applied by courts today, even though there were several amendments brought to it since 1971. In parallel, there is, since the Civil Code of Quebec came into force, section 1384 that has the exact same objective in spite of a few slight differences with the C.P.A. regarding the core definition of what a “consumer contract” is. In

terms of codification, this situation of overlapping legislation between the C.P.A. and the Civil Code of Quebec, like other similar situations between the latter and other legislation, could have triggered - but it did not happen - the examination of this concurrent legislation in order to determine whether it should or can be brought within the code system entirely [44].

### **5. Quebec’s and Vietnam’s Codification of Civil Law: *Đoàn kết thì sống, chia rẽ thì chết***

Comparative law can be a valuable tool for the development of law [18]. It may be useful to take advantage of the experience of other countries drawing inspiration from solutions, as suggested by Crépeau, advanced by civil law, common law or socialist law countries, but taking care, at the same time, “to make the necessary adjustments [so that it fits] the civil law regime of Quebec” [36]. The 1994 Civil Code of Quebec relies on some concepts coming from abroad, concepts that did not originate either from the direct influence of the Napoleon Code or from the common law [49]. However, the experience of other countries stops being an advantage when foreign law is artificially imported, or imposed, into a legal system that is not ready to receive it [38].

Acknowledging the cultural, political and legal differences between Quebec and Vietnam, and also acknowledging that it would be (and was), generally speaking, more difficult to import Western law in Vietnam than to import Chinese law [38], for instance, we submit that a similar general approach could be applied to Vietnam should the country decide to bring further changes to its codified civil law. This suggestion is not revolutionary. Vietnam’s legal system is not foreign to legal transplants and from having been influenced in the past by different legal systems. For example, “the Vietnamese codification perfectly illustrates th[e] Chinese influence”: the Code of Lê, Lê Triều Hình Luật (Criminal Code of Lê Dynasty) [50], drew largely from the Chinese influence

[38]. Despite its name, the *Lê Code* covered different areas, including civil law [51]. Closer to our times, the modern legal system of Vietnam is at the crossroads of several influences [52], and it was largely built on legal transplants coming from China, France [5] and the Soviet Union [53]. Unlike the province of Quebec, the existence of codified law in Vietnam may be explained by its attachment to socialist law [5], but the civil law legacy still played a role in modern codifications in Vietnam [5], and Western-style codification certainly left its mark on the legal culture of the country [5]. However, this does not mean that Vietnam readily imports in its legal system anything and everything that comes from other legal systems. For example, since the new Vietnam's Code of Civil Procedure came into force in 2016, no application of foreign law has been made in the context of the application of this Code by Vietnamese courts [54].

While in Vietnam, the 1995 Civil Code is considered as a symbol of the unity of the country, following the end of successive wars against foreign powers and a fratricide war in the 20th century, wars that tore the country apart [5], Quebec's codification has not been understood exactly in the same way. Rather, the C.c.B.C. has been seen as the expression of a nationalistic sentiment [11]. A bit more than twenty-five years after the publication of Lord Durham's Report in 1839, which "preached the need for the assimilation of the French of Lower Canada on all levels, including that of legal institutions" [11], the codification of customary law of Lower Canada in 1866 may be described as the expression of "a desire on the part of French Canada to protect [their] French cultural heritage on the eve of entering into" [11] the Canadian confederation in 1867. Louis Baudouin, a renowned professor of law, also stated in 1963, that "the codification [in Lower Canada] appeared as a means that made possible the... affirmation of the French fact in this province of purely French origin" [55]. Said differently, "codification... took on a vast symbolic value far beyond the scope of mere legal reform... The

civil law, around which the Civil Code was a rampart, was considered, along with the French language and the Catholic religion, absolutely essential to the survival of the French-Canadian nation" [44]. This seems to remain true with "the new 1994 Civil Code of Quebec that seems to remain the standard bearer of French-speaking culture" [56].

That being said, we submit that both Quebec's and Vietnam's codifications not only have strong (but different) symbolic value, but they also share the common ground of representing a rampart against influences from "abroad" [6]. For the province of Quebec, it was a rampart against influences that threatened the integrity of civil law [13] because its territory is surrounded by common-law jurisdictions, namely the other Canadian provinces, the United States - the Southern neighbor of Canada, and the heavy influence of the United Kingdom on the Canadian legal system as a whole. Even though the British North America Act, 1867, 30-31 Vict., c. 3 (U.K.) gave birth to the Canadian confederation by uniting the three separate territories of Canada, Nova Scotia and New Brunswick, into a single dominion called Canada, Canada acquired only step by step its full sovereignty and independence from the United Kingdom. For example, the Statute of Westminster affected the equality of the United Kingdom and Canada, among other nations, only in 1931 when it came into force. In addition, from a judicial point of view, the Supreme Court of Canada formally became the court of last resort only in 1933 for criminal appeals and in 1949 for all other appeals. Until then, the Judicial Committee of the Privy Council of the United Kingdom was the entity that had the last word on court cases. For Vietnam, it was a means of national assertion.

## 6. Conclusion

The process of codification is a difficult task that can only be approached with "sufficiently trembling hands" [36] because of its complexity. However, the result of codification, or the result



of recodification (when there is an existing civil code), presents advantages that cannot be denied and are worth considering. We submit that the experience of the province of Quebec with the codification of its civil law, done on two occasions, may be beneficial to Vietnam in many respects, including the possibility that Vietnam may decide, one day, to revise its current Civil Code.

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