AN INVITATION TO A SHORT LEGAL JOURNEY FOLLOWING THE INFLUENCE OF THE FRENCH CIVIL CODE IN THE SOUTHERN AND EASTERN HEMISPHERES: SOME COMPARATIVE COMMENTS

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Good Evening, Tēnā Koutou Katoa

I INTRODUCTION

You are probably familiar with Bonaparte's famous statement which he allegedly made during his exile on St Helena:

> My real glory is not in that I won forty battles; Waterloo will erase the memory of so many victories. What will never be erased, what will live forever, is my Civil Code.

As a matter of fact, more than two centuries later, it is impossible to ignore the fact that the 1804 French Civil Code, often referred to as the Code Napoleon, has had an astonishing longevity.[1]

The Civil Code survived two empires, two monarchies and four republican systems. Over this very long period a single Civil Code has been maintained.[2]

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* Maître de conférences (Hdr) Honoraire. This is an edited version of the speech delivered at the Residence of France in Wellington, New Zealand at the Journée du droit, the "Law Day" of France, event on 4 October 2023. The author would like to thank Professor Angelo for his helpful comments on the original manuscript.

1 Blanc-Jouvan Xavier "Worldwide Influence of the French Civil Code of 1804, on the Occasion of its Bicentennial Celebration" (2004). Cornell Law School Berger International Speaker Papers. Paper 3.

2 Halperin JL, Commaille J, Ewald F et al *Le Code civil 1804-2004. Livre du Bicentenaire* (Litec-Dalloz, Paris 2004).

First conceived as a tool for unifying French society under Napoleon's rule, the Civil Code also became the foundation of a new social organisation. And, over time, from being the code of an imperial power it has become the code of a democracy.[3]

Many of the major reforms to the French legal system made by the Napoleonic Civil Code remain part of France's current legal structure, though many provisions been extensively amended or redrafted to address the needs of the modern nation[4].

Broadly speaking, the Napoleonic Civil Code forms the foundation for French private law often known as the civil law.

Marie-France Frisson Roche said "Civil law is a set of values which permeates the legal system as it concerns individuals, the family, relationships between individuals and their relationship with the social group".

It structures relations between individuals and helps to shape the identity of a society.

French private law retains some of the features and characteristics of its origins in terms of both form and content.[5]

As such the Civil Code's legacy represents "the values around which French society was built and in which it continues to find its balance and homogeneity"[6].

This is why the Civil Code is considered as the cornerstone of what is sometimes presented as the "French legal model" or the "French legal tradition".[7]

To say the French legal model or tradition is implicitly to suggest –

(1) firstly, a body of law *identified as French* as opposed to other foreign bodies of law;
(2) secondly, a legal system *recognised as a model* where codes and statutes prevail, and where case law constitutes only a secondary source of law;

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3 David R *Les grands systèmes de droit contemporains* (12e éd. See also Fromont M *Grands systèmes de droit étrangers* (5e éd, Dalloz, Mémentos, 2005) 8; Cuniberti G *Grands systèmes de droit contemporains* (2e éd, LGDJ, 2011) 129, § 214. Précis Dalloz 2016.

4 Clark, NJ *The Code Napoleon, or, The French Civil Code* (Lawbook Exchange, 2004).

5 Amos, Sir Maurice Sheldon *Amos and Walton's Introduction to French Law* (3rd ed, Clarendon Press, Oxford, 1967).

6 Cartuyvels Y « L'idéal de la codification. Étapes et développements avant le 19e siècle » (1993) 31(2) Revue interdisciplinaire d'études juridiques 85-107.

7 Boring Nicolas *The French Civil Code* 2021. Video. https://www.loc.gov/item/webcast-9739/.

(3) thirdly, *a system that can be easily used as a model* and therefore when accepted by a foreign legislator, can be redeployed in that foreign country's legal system.

All these features are certainly of the utmost academic interest, and not only for lawyers. As they require a vast and in-depth study that cannot be reasonably covered within the limited time of this discussion, we have to settle for a less ambitious goal, and accept the risk that the following remarks may sometimes inevitably appear rather superficial.

This cautionary methodology accepted, in order to give some semblance of structure for our discussion, I propose that we first limit the scope of our discussion to the basic components of the Civil Code including the main reasons that explain its expansion, and then in a second part critically assess the place of the "French legal model or tradition" in a selected group of countries or territories of the Southern and Eastern hemispheres (French Polynesia, New Caledonia, Vanuatu, Seychelles and Mauritius) where the Code Civil had been introduced, either voluntarily or by imposition.

II THE BASIC STRUCTURE OF THE CIVIL CODE AND THE MAIN REASONS OF ITS SUCCESS

A A Quick Historical Background to the Rise of Civil Law in France

Some humility must be shown. It has to be acknowledged that civil law codification has a long and honourable tradition which started with the Justinian Code of four books of AD 529-534.

That debt being acknowledged and limiting the discussion only to the period of the French Civil Code, it can be said that it is the product of a long and complex historical movement combined with a political and philosophical process.

Before the French Revolution, diversity of laws was the dominant characteristic of the legal order. Different laws applied in different areas, and not all laws were written down, which made fair application of the law challenging.

Voltaire wrote that a traveller in France "changes his law almost as often as he changes his horses."[8]

8 Voltaire *Dictionnaire philosophique*. Halpérin JL *L'impossible Code civil* (1992) ch 1 - Les lenteurs de l'unification.

It is well documented that the demand for codification preceded the Napoleonic era, but it was only after the French Revolution that codification became not only possible but also almost a necessity.

As the Napoleonic period of political unification was paired with a growing national consciousness, it demanded in turn a body of law that would be uniform for the entire state. This is why the Napoleonic Code was founded on the premise that, for the first time in history, a purely rational law should be created, free from all past prejudices and derive its content from "innate common sense".

Of course, Napoleon did not literally write the code,[9] He simply appointed, in 1800, a team of four experienced legal practitioners to rethink French law.

They created a draft of the Civil Code in just four months. Who the true father of the Civil Code was a matter of historical debate but there is no doubt that Jean-Jacques-Regis de Cambaceres had a central and pioneering role.

As a first step, 36 separate laws were adopted between 1803 and 1804. These laws were consolidated into in a single unit, the Code Civil, on 21 March 1804.

At the time of its enactment, the Civil Code was a blend of revolutionary innovation and nationalist spirit shaped by an Enlightenment belief that rules and principles could be rationally derived and outlined. The French Civil Code was the first to dispense with the sources of law rooted in tradition, so that individuals were no longer subject to any law other than state law.

The Code's official name was originally "Le Code Civil des Français", which translates literally as the "Civil Code of the French".

In 1807, it was officially renamed the Code Napoléon, or Napoleonic Code, to recognise Napoleon's role in passing it. Its name was again changed to simply the Code Civil or Civil Code, after Napoleon's defeat in 1815.

In the 1850s and 1860s, when France was ruled by Napoleon's nephew, who wanted as much as possible to capture the prestige of his uncle's era, the Code was again named the Code Napoléon. Since 1870, it has been referred to simply as the Code Civil, or the French Civil Code.

The Civil Code was the first code to be adopted.

It was followed by four other codes during the Napoleonic era: the Code of Civil Procedure, the Commercial Code, the Code of Criminal Procedure, the Penal Code.

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9 Safatian Saman « La rédaction du Code civil » (2013) 16 Napoleonica La Revue 49-63.

And, by the way, the codification trend did not stop with Napoleon.

Today there are 74 different codes in France. The list includes the Code of Public Health, the Code of Intellectual Property, the Financial and Monetary Code, the Administrative Justice Code, and the Environmental Code. And that is not counting several codes that were both adopted and repealed during the past couple of centuries.[10]

B Basic Structure of the Napoleonic Code

R B Schlesinger described the Civil Code as a "systematic, authoritative, and guiding statute of broad coverage".[11]

Without over simplifying things, let's just say that the Civil Code covers a range of legal interactions between private citizens, including family, property, contracts, sales, leases, and wills. It is common knowledge that the underlying ideology of the French Civil Code was strongly influenced by features such as secularity and individualism.

In other words, when the Civil Code was enacted it was the civilian expression of the Declaration of Human Rights of 1789 and thus promotes three main values: Equality, Freedom, and Individual Will.[12]

It should also be observed that apart from the perceived substantive achievements of the Code Civil and its promise of liberty, equality, and individual will, its success both in France and elsewhere rests also on its concise and succinct linguistic qualities.

The French writer Stendhal, in one of his correspondences with Balzac, claimed to have read daily two or three pages of the Civil Code to train his linguistic proficiency.[13]

From a structural standpoint, the Civil Code contains logically connected concepts and rules, starting with general principles, and moving on to specific rules.

Originally consisting of 2,281 articles, today it is a collection of 2,534 articles, which is broken into five separate sections or books.

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10 Gordley James "Myths of the French Civil Code" (1994) 42(3) AmJCL 459.

11 Ugo Mattei, Teemu Ruskola and Antonio Gidi (eds) *Schlesinger's Comparative Law: Cases – Texts – Materials* (Foundation Press, New York, 2009).

12 Carbonnier J *Essais sur les lois* (2e éd, Répertoire du notariat Defrénois, 1995).

13 Daniel J Kornstein "He Knew More: Balzac and the Law" (2000) 21 Pace L Rev 79.

The Civil Code starts out with a preliminary section of six articles that establish certain basic legal principles. Apart from art 1 these articles remain unchanged since 1803.

In a nutshell what do the different books of the French Civil code cover?

(1) Book I deals with the law of persons: the enjoyment of civil rights, the protection of personality, domicile, guardianship, tutorship, relations of parents and children, marriage, personal relations of spouses, and the dissolution of marriage by annulment or divorce.

Despite the revolutionary spirit that in part motivated codification, the family laws laid out in Book I were largely traditional. Thus, the original version of the Civil Code continued to subordinate women to their fathers and husbands who controlled all family property, determined the fate of children, and were favoured in divorce proceedings.

Thankfully many of those provisions started to be gradually reformed but only in the second half of the 20th century. In 1907, married women were allowed to freely dispose of their own salary. In 1965, women were allowed to manage their own property and to exercise a profession, even without their husband's authorisation. In 1970, the concept of the head of the household was removed from the Civil Code. In 1985, the principle of equality between spouses was adopted. And 1987 saw the principle of equality between parents in the exercise of parental authority. Inheritance law was also amended over time, particularly to expand the surviving spouse's rights. And finally, there was the introduction of the civil union in 1999 and the legalisation of same sex marriage in 2013.

(1) Book II is about property, which is defined in art 544 as the right to enjoy and dispose of things in the most absolute manner, so long as the right is not used in a way that is prohibited by legislation. Book II also divides property into two types: immoveable and moveable. Immoveable property is what is usually called real property in Common Law countries. It is basically land and buildings. Moveable property is almost everything else.
(2) Book III deals with the methods of acquiring property: by succession, donation, marriage settlement, and obligations. An important section of Book III has to do with extra-contractual liability.

Two articles, art 1382 (which became art 1240 in 2016) and art 1383 (which became art 1241 in 2016) whose wording has remained unchanged since 1804 constitute the foundation of the French equivalent of English tort law.

In the last chapters of Book III, the code regulates some specific contracts, legal and conventional mortgages, limitation of actions, and the prescription of rights.

(1) A fourth book was added in 2006. It deals with certain types of securities such as collaterals and mortgages.
(2) Finally, there is a Book V which contains only a few articles that are applicable only to the overseas Department of Mayotte in the Indian Ocean.

III THE EXPANSION OF THE CIVIL CODE OF 1804[14]

A leading French scholar, Jean Carbonnier described the code as the 'civil constitution' of France.[15] Its effects reach far beyond France.

The expansion and the unparalleled influence of the Civil Code of 1804 is a major phenomenon in universal legal history.[16]

Far beyond the territories of Napoleonic conquest, no major codification of the 19th century could pass up the need to refer to the Code, either to borrow from it or to distance itself from it.[17]

In the early 20th century, the Code became a model for jurisdictions – countries, territories, provinces, and states – codifying their own laws.[18]

Other great codes came into force in Central and Western Europe at the end of the 18th and the beginning of the 19th centuries, but beyond doubt the French Code Civil is intellectually the most significant and historically the most fertile.

In Europe, of course, as Napoleon Bonaparte conquered countries throughout Europe he took the Civil Code with him and promulgated it in them.

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14 Dauchy Serge *French Law and its Expansion in the Early Modern Period* (Ed Heikki Pihlajamäki, Markus D Dubber, and Mark Godfrey, Oxford University Press, 2018).

15 Jean Carbonnier, « Le Code civil », dans Pierre Nora (dir) *Les lieux de mémoire, t. 2*, « La Nation » (Gallimard, Paris, 1986) 309. Contra voir Rémy Cabrillac « Le Code civil est-il la véritable constitution de la France? » Revue juridique Thémis, 39-2.

16 Xavier Blanc-Jouvan "The Encounter Between Traditional Law and Modern Law in French-Speaking Africa: A Personal Reflection" (2010) 25 Tulane European & Civil Law Forum 198.

17 « L'influence du Code civil dans le monde » (Travaux de la Semaine internationale de droit, Paris, 1950 publié par l'association Henri-Capitant pour la culture juridique française et la société de législation comparée, Paris, Pédone, 1954); *La circulation du modèle juridique français* Travaux de l'Association Henri Capitant (Litec, Paris 1994).

18 S Soleil « Le Code civil de 1804 a-t-il été conçu comme un modèle juridique pour les nations? » (2009) 19 Histoire de la justice 225-241.

In North America, the law of Quebec and Louisiana are both based on the tradition of the *Code aménagé* and on the Common Law.[19] Today Louisiana is the only state in the United States whose system of laws is based on the Napoleonic Code rather than on English Common Law.[20]

In Latin America, the vast majority of the states emerging in the 19th century copied, sometimes word for word, the Code of 1804.

In Africa, the French colonial administration made the French Codes an essential source of law during the colonisation period and the same happened even at the time of national independence. And the influence of the Civil Code has been felt even in the Middle East, Asia, Oceania, and the Indian Ocean.

Today the French system serves as the basis for, or is mixed with, other legal systems in approximately 50 countries.

Although many nations have now distanced themselves from the content of the French Civil Code, they nonetheless remain faithful to the idea of codification.[21]

For example, Brazilian lawyers believe that their new Civil Code, which came into force in 2003, is the pillar of their private law.[22]

The Eastern European states after the fall of the Berlin Wall, wishing to introduce a body of rules compatible with Western European standards of democracy, opted for codification.

Codification has also enjoyed renewed success on other continents as a way of affirming the modernity of a legal system and its commitment to the market economy: this is the case for instance in Vietnam and China.

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19 Ostroukh Asya "Reception of the French Civil Code in Francophone Switzerland, Louisiana, and Quebec: a socio-legal study" (Thesis, University of Edinburgh, 2017) http://hdl.handle.net/1842/25769.

20 Dainow J « Le droit civil de la Louisiane » (1954) 6 Revue internationale de droit comparé 19-38.

21 Glenn Patrick *Legal Traditions of the World: Sustainable Diversity in Law* (2nd ed, Oxford University Press, 2014) 368.

22 Poveda Velasco IM, Tomasevicius Filho E (2023) "The 2002 Brazilian Civil Code" in Graziadei M, Zhang L (eds) *The Making of the Civil Codes* (Ius Gentium: Comparative Perspectives on Law and Justice) vol 104.

Although legal literature on the expansion and the influence of the Civil Code abounds,[23] the more or less detailed analysis here will be confined to selected South Pacific and Indian Ocean countries and territories where it has been introduced.

IV THE CIVIL CODE AND OVERSEAS TERRITORIES

The theory of the movement of legal traditions (French and English) from their European cradles, and their reception in their former colonies provide a good vehicle for understanding the phenomenon.[24] It also indicates the reasons why these legal traditions had to adapt and evolve to these parts of the world. As Professor Angelo rightly points out, "the legal invasion" is only an avatar of the "political and economic invasion".

From the 17th century onwards, island territories were successively dominated by European powers, with France and the United Kingdom exerting the most lasting influence.

As such they transformed this part of the world into a veritable crossroads of cultures, witnessing a remarkable phenomenon of 'legal crossbreeding', not only between common law and continental law, but also between European legal cultures and indigenous traditions.[25]

A New Caledonia

While trying to avoid the political whirlpool of New Caledonia, a short historical and institutional overview of this French overseas territory is necessary.[26]

New Caledonia was annexed by France in 1853, as part of the "second French colonial Empire".

The status of colony of New Caledonia persisted, virtually unchanged, until after World War II, when New Caledonia became an overseas territory (*territoire d'Outremer* or "TOM") within the French Constitution of 1946.

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23 Halpérin Jean-Louis *The influence of the French Civil Code on the common law and beyond* (ed Duncan Fairgrieve, British Institute of International and Comparative Law, London, 2007).

24 Durand B *Introduction historique au droit colonial* (Economica, Paris, 2015).

25 On the influence of the Civil code in the South Pacific, see Jennifer Corrin, Tony Angelo *Legal Systems of the Pacific: Introducing Sixteen Gems* (Intersentia, 2021).

26 David Carine, David Victor "New Caledonia" *Gems of the Pacific*, above n 25. See also A Moyrand and AH Angelo "Administrative Regimes of French Overseas Territories: New Caledonia and French Polynesia" (2010) Hors Serie Volume X Comparative Law Journal of the Pacific.

In 1956, a large degree of autonomy was granted to New Caledonia, as it was to most French overseas territories, but during the 1960s the State went back on its word and reduced the autonomy of New Caledonia.

During a period of about 20 years New Caledonia experienced a dozen different statutes that granted or withdrew various degrees of autonomy, very well summarised by G Agniel with the figurative expression "institutional yo-yo"[27].

After the Matignon Agreements in 1998 and the Noumea Accord in May 1998, New Caledonia became an extremely original self-governed entity within the French Constitution.

Pursuant to art 74 of the French Constitution of 4 October 1958, New Caledonia has a distinctive organisation which takes account of its own interests within the Republic.[28]

While still a part of France, this overseas collectivity is autonomous in many respects, and it will become more and more autonomous as a gradual transfer of state powers to New Caledonia continues in accordance with arts 76 and 77 of the French Constitution New Caledonia has a sui generis legal status.

From a practical standpoint its modus operandi is regulated directly by the French Constitution and by an Organic Law of 19 March 1999.

Considering only the civil law applicable in New Caledonia,[29] it is to be noted that since 1946 the law of persons in New Caledonia is characterised by a form of legal pluralism.

In relation to personal status, two personal statuses co-exist and each is governed by a different legal corpus. The first is called ordinary civil status and is regulated by the Civil Code. The second is called customary civil status and is regulated by Kanak custom. According to s 7 of the 1999 New Caledonia Act, people under customary civil status are governed by their customs for all matters related to civil status, ie filiation, marriage, adoption, divorce, inheritance and matrimonial property regimes.

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27 Quoted by David C, *Gems of the Pacific*, above n 25.

28 Moyrand Alain and Angelo AH "Some Perspectives on the Development of the Status of New Caledonia and French Polynesia to Non-self-governing Territories within the Republic of France" (2022) 28 CLJP. See also Breda Vito and Mihailovic Andreja "New Caledonia: The Archipelago that does not Want to be Freed" (2019) Hors Serie Volume XXIV Small Countries: A Collection of Essays Comparative Law Journal of the Pacific.

29 See in this volume Bouix C « L'emprunt du droit civil français par le droit civil coutumier Kanak ».

The legal regime applicable to persons falling under this status therefore differs depending on the customary rules existing within their clan, the tribe, or the customary area (New Caledonia is divided into eight customary areas, each consisting of several districts where tribes (subdivided into clans) live.

Since 1 July 2013, New Caledonia is competent in civil law, in commercial law and in the rules governing civil status.

The Caledonian Congress is competent to enact its own laws, which are called country laws (*lois de pays*) in almost all areas of civil law.

The 2013 transfer extends to the matters covered by the first four parts of the Civil Code (law of persons, property law, right of ownership, and personal property security law) as well as other matters which, by their object are related in civil law, such as co-ownership, residential or professional leases, rural leases, literary and artistic property or land advertising.

Excluded from the transfer of legislative power were provisions on nationality, as well as art 9 of the Code on the protection of privacy, the principles relating to the respect of human body, arts 544 and 545 on the fundamental character of property rights, the provisions which ensure respect for freedom of marriage and, finally, the rules on freedom of association. All these fields remain in the hands of the French Parliament.

B French Polynesia

Relations between France and Polynesia go back a long way. In 1843, a treaty signed by King Louis Philippe's representative and Queen Pomare IV placed the "Etablissements français de l'Océanie" under a protectorate.

In 1880, Pomare V transferred sovereignty over all the islands under the Tahitian crown to France. The Constitution of 27 October 1946 declared Tahiti an Overseas Territory.

On 25 October 1946, the Territorial Assembly was entrusted with the power to represent "the Territory's own interests", while the Governor remained responsible for drafting and implementing decisions.

The French Polynesia institutional development continued with the introduction of a genuine autonomous status by the law of 6 September 1984.

The Organic Law of 12 April 1996 then transferred additional powers to French Polynesia, notably in economic matters, and introduced technical adjustments to improve the functioning of the institutions.

The application of the French Civil Code in the French Establishments of Oceania took place in stages (the Tahitian law of 28 March 1866, the Decree of 18 August 1868, and the Order of 17 March 1874).

Later, the Civil Code was gradually made applicable in the French Establishments of Oceania, following the principle of legislative speciality; the "sovereignty laws" which applied ipso jure were not made applicable.

The most significant feature of the 2004 status is that it vests in French Polynesia the *droit commun* jurisdiction, while the French State retains its powers of attribution.

In the application of this principle, French Polynesia is competent in all matters with the exception of those expressly attributed to the State.[30] As such French Polynesia became competent for the whole of the Civil Code with the exception of the following matters: nationality, civic rights, electoral law, civil rights, status and capacity of persons – in particular civil status certificates, absence, marriage, divorce, filiation, parental authority, matrimonial property regimes, succession and gifts.

C Vanuatu[31]

Vanuatu is one of the most culturally and linguistically diverse countries in the world.

The legal system of the territory of Vanuatu is particularly interesting because it shows that it is possible to articulate a customary law for indigenous peoples with a Western law.

Due to the historical evolution of Vanuatu there is a plurality of sources of law.[32]

Prior to independence in 1980, Vanuatu had been colonised by both the British and the French. They shared power under what was known officially as the Condominium of the New Hebrides and unofficially as the "Pandemonium".

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30 Sage Y-L, Angelo A "The Status of Autonomy of French Polynesia after the Constitutional Amendment of 28 March 2003 and the Organic Law of 27 February 2004" in *L'Autonomie en Polynésie Française/The Concept of Autonomy in French Polynesia* (CLJP, hors-Serie, Volume IV, 2004).

31 Mosses Morsen "Vanuatu Legal System" in *Gems of the Pacific*, above n 25, at 405.

32 Chassot Laurent *Essai sur le pluralisme juridique : l'exemple du Vanuatu* (Presses Universitaires d'Aix-Marseille, Inter-normes, 2014) 166.

With regard to the applicable law, art 95 (2) of the Constitution of Vanuatu provides that French law, among others, as applicable in Vanuatu at the date of independence (1980) shall continue to apply as part of law of the country, irrespective of a person's nationality and whether the person is indigenous ni-Vanuatu or not.

In practice, until the national Parliament passes its own legislation French and English law continue to be applicable in varying degrees. This means that the French Civil Code is in force except where the provisions of the Code had been replaced by a Joint Regulation of the Condominium. In addition to legislation drawn from France, the jurisprudence of the courts based on French law was relevant and remains so today.

Alongside these aspects of law introduced under the influence of the two colonial powers, customary law remains important. This is stressed in the Constitution, which states that customary law shall continue to have effect as part of the law of the Republic of Vanuatu.

In practice however, since independence, reliance on French law has been rare and the Vanuatu legal system has been based predominantly on the principles of the Common Law of England.[33]

D Mauritius

After a brief period of occupation by the Dutch, the French took possession of Mauritius, called Isle de France, in September 1715 to establish a French naval base.

French rule was short-lived, as the United Kingdom gradually asserted its military and commercial supremacy in the area. In 1810, France was forced to relinquish Isle de France to the British who immediately renamed it Mauritius.

Mauritius, along with the Seychelles islands, remained under British administration until their independence in 1968 and 1976 respectively.

As a Decree of 21 April 1808 had extended the Civil Code to the French possessions in the Indian Ocean prior to the shift in colonial authority in 1810, the French Civil Code remained in force after 1810.

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33 Farran Sue "Family Law and French Law in Vanuatu: An Opportunity Missed?" (2004) 35 VUWLR 367.

Although amended several times since then, the Civil Code in French still forms the basis of civil law in Mauritius today. The independence of Mauritius in 1968 marked the beginning of the autonomy of Mauritian law.

In search of its own identity, Mauritius has enacted many new private laws, sometimes just based on adaptation of French or English law to the local context.

Even today, developments in French and English law are closely monitored, and many legislative and regulatory provisions are inspired by French or English law.

F Seychelles[34]

The Mauritius transplantation theory does not fully explain the development of law in Seychelles, but it goes a considerable way to explaining the initial *métissage* of law that occurred.

It took a number of constitutional steps to upgrade the status of Seychelles from a dependency and it was only in 1903 that it became a fully-fledged colony detached from Mauritius, but it was also at this juncture that the erosion of French law would begin and mixing with English law would accelerate more rapidly than in the case of Mauritius whose laws developed separately from Seychelles from then on.

The Civil Code of Seychelles Act (1975 Code) came into force on 1 January 1976, a few months before Seychelles' independence from Britain on 29 June 1976.

Based on the Napoleonic Code introduced in Mauritius and Seychelles in 1808, the 1975 Code was firmly rooted in the civil tradition. In addition to being in English, it contained certain Common Law elements.

On 1 July 2021, the 1975 Code was replaced by the Civil Code of Seychelles Act 2020 which marked the end of a comprehensive and inclusive law reform process which commenced in 2013.

The outcome is a revised Code that better reflects modern Seychelles society and which is consistent with the Constitution and treaty obligations.

The revised Code retains the three-book structure of the Code Napoléon and reproduces, in modern drafting form, approximately 90 per cent of the 1975 Code.

The 2021 code signals a desire on the part of Seychelles to retain its French Law heritage as the '*droit commun*' for its private law.

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34 AH Angelo and Sarah Mead "A New Civil Code in Seychelles" (2021) 26 CLJP. See also Mathilda Twomey *Legal Metissage in a Micro- Jurisdiction: The Mixing of Common Law and Civil Law in Seychelles* in CLJP Collection 'Ex Professo' Volume VI (2017).

V A CRITICAL ASSESSMENT OF THE FRENCH CIVIL CODE

The following comments are broad generalisations which, I admit, could themselves meet with objections.[35] There are six usual criticisms of the Civil Code.

(1) Dean Jean Carbonnier, who drafted numerous family law laws, and who is usually regarded as one of the greatest French jurists of the 20th century,[36] took a very harsh view of the state of civil law at the end of the 20th century.

One of his most famous criticisms is that of "legislative inflation" that he described as "the obsessive need to generate new laws all the time and about everything in increasingly long and fussy texts".[37]

So from a stylistic point of view it can be argued that the purity of style of the 1804 Civil Code is long gone.

(2) There is also the argument that once an aspect of the law is captured within a code, the principles that underpin that particular area of law become entrenched and do not permit of any variation or exception without further legislative intervention. Therefore according to this rationale, once a code is promulgated it prevents flexibility.[38]

(3) By the same token, if government seeks to add to the law in the field and fails to ensure that the new law is enacted as an integral part of the existing code, the code itself loses its principal benefit of inclusiveness.

(4) A more compelling criticism is that nowadays, the French legal model starting with the Code Civil is subject to competing influences that require it to improve, to reform and to adapt to the modern world. As such the evolution of French law, and in particular French civil law, is today the result of several cross-fertilising influences which undermine its original core values.

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35 Mazeaud, Pierre « Le code civil et la conscience collective française » (2004) 110(3) Pouvoirs 152-159.

36 Perrin, Jean-François « Jean Carbonnier et la sociologie législative » (2007) 57(2) L'Année sociologique 403-415.

37 J Carbonnier "L'inflation des lois", in *Essai sur les lois* (2ième éd, Répertoire du notariat Defrénois, 1995) 307-313.

38 Symeon C "Symeonides, Codification and Flexibility" in (Private International Law, General Reports of the XVIIITH Congress of the International Academy of Comparative Law/Rapports, Généraux du XVIIIeme Congrès de L'Academie Internationale de Droit Comparé, KB Barown and DV Snyder, eds, Springer, 2011).

The phenomenon is not new, but the strongest contemporary influences are from European law which, in certain areas, are binding on France, which must implement the measures required to incorporate European regulations into national law. For example, several provisions of the Civil Code have had to be amended to guarantee equal rights regardless of parentage.

(5) From an ideological standpoint the underlying values promoted by the 1804 Civil Code are no longer a reflection of society's values. It is well known that the Civil Code in its original version was above all the expression of an ideology which conceived property only as individual. As such, the Civil Code of 1804 is first and foremost a 'property code'. Ownership is itself conceived as an attribute of the private person, and art 544 of the Civil Code defined ownership solely in terms of the power of the owner.

Closer analysis reveals that the individual is not really protected by ownership. Two main reasons can be given for this.

Firstly, an individual can in fact be dispossessed.

Secondly, the mere fact that individuals have the freedom not to contract does not make a contract balanced and fair.

Actually, many people enter into contractual relationships that are unfavourable to them, either because they have no choice, or because they do not realise what they are committing themselves to. The legislator has therefore created consumer law, the aim of which is to protect the consumer against the power of the professional, relying on case law that interprets the articles of the Civil Code in favour of the weaker party to the contract against the stronger party.

Another example of the obsolescence of some of the Civil Code's original foundations can be found in family law.

According to the codifier of 1804, there was no social bond other than the family group which was conceived of as a group outside society.

Today, Western-style societies suffer from the pre-eminence of individualism and the absence of social ties. So the ideology of the French Revolution with which the Civil Code is impregnated, which deprived social groups of any existence, is out of sync with current society.

Central to the codification process are two conceivable definitions of the term "codification" which are not mutually exclusive. The first, called "administrative codification", a "consolidation" in Common Law terms, consists of bringing together in a single material volume scattered texts so that they become accessible to the

public and more easily manageable for legal technicians. The second conceivable definition goes beyond merely gathering laws into a single volume, as it requires that the those in charge of the codification must have the authority to express the shared values of a social group. As these two definitions are not mutually exclusive, they can lead to a mishmash of laws with no real consistency.

In spite of the above six criticisms, it remains that by and large codification fulfils a purpose and responds to the constitutional objective of accessibility and intelligibility of the law.

VI CRITICAL ASSESMENT OF THE LEGAL HYBRIDITY MOVEMENT IN THE SOUTH PACIFIC AND INDIAN OCEAN COUNTRIES

The legal systems of the selected South Pacific and Indian Ocean countries and territories have their complexities and they are still evolving.[39]

That special mixing of civil law with Common Law and customary law was achieved in at least 17 countries.[40]

In the context of constant hybridity,[41] it is not surprising that this mixing is subject to endless debate within the legal community and in the political sphere.[42] It is possible to highlight some underlying features of these debates.

(1) The common history of the former colonies of the Pacific and the Indian Ocean explains without too much difficulty the heterogeneous nature of their respective current legal systems.

(2) Despite a commonly prevalent idea, the process of colonisation in the Pacific islands never took place in territories that did not already have more or less elaborate legal and institutional systems, ie customs or customary social organisation. This explains why several legal systems still coexist within the same country or territory.

On the one hand there is the formal system which is the product of the colonial period when the colonisers' laws superimposed themselves on those of the native

39 La codification dans les pays de l'océan Indien (La Réunion, 2003), Revue juridique de l'Océan Indien, 4, 2003-2004.

40 Corrin and Angelo, above n 25.

41 BZ Tamanaha "Understanding Legal Pluralism: Past to Present, Local to Global" (2007) 29 Sydney Law Review 375.

42 Miranda Forsyth "Beyond Case Law: Kastom and Courts in Vanuatu" (2004) 35 VUWLR 427.

peoples which coexists with the traditional customary law. The result is a plurality of complex rights.[43]

(3) Customary laws are recognised as part of the mixed legal system.[44] It is undeniable that countries in the course of development feel strongly the need for a modern specific law as a condition of the development; but they cannot deny the force of local traditions and the fact that today, those often better respond to the specific needs of the people.

The post-colonial period has seen the development of new hybrid legal systems reflecting specific cultures. The preambles to the independence constitutions, or in their respective status documents as far as New Caledonia and French Polynesia are concerned, generally reflect a desire for laws which will encapsulate local values and local objectives to be respected.[45]

There are many examples in Pacific constitutional documents of statements as to the significance of customary law.[46]

These statements are often framed in very broad terms and can be divided into two main types: the first kind of statement is one that refers to the concept of "existing law", which could (and possibly should) be interpreted as including customary law and practice; the second form of constitutional statement that relates to the significance of customary law and practice is one that makes express reference to the status of "custom".

(4) There are difficulties in defining precisely the notion of customary law[47]. The direct incorporation of custom into the corpus of contemporary law is conditioned by the assumption that custom can be redefined from a little-known oral

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43 Vanderlinden J, (1972), « Le pluralisme juridique, essai de synthèse », in *Etudes sur le pluralisme juridique* (Bruxelles, Editions de l'Institut de Sociologie, 1993) 19-56. « Vers une nouvelle conception du pluralisme juridique » Revue de la Recherche juridique n° 2, Droit prospectif, p 573-583.

44 Thomas Burelli « R. Lafargue, La Coutume face à son destin. Réflexions sur la coutume judiciaire en Nouvelle-Calédonie et la résilience des ordres juridiques infra-étatiques » (2011) 61 Droit et cultures 287-298.

45 Sage Y-L *Emergence et évolution du droit dans les petits Etats insulaires du Pacifique Sud anglophone* (2001) Revue Juridique Polynésienne, Hors-série Volume 2, 23-46

46 Paterson DE "South pacific customary law and common law: Their interrelationship" (1995) 21(2) Commonwealth Law Bulletin 660–671.

47 Corrin Care, Jennifer "Wisdom & Worthy Customs: Customary Law in the South Pacific" (2002) 80 ALRCRefJl 7.

norm to a norm that is structured in writing and enshrined in normative texts (a constitution or *loi de pays*).

(5) Because custom is oral, multifaceted and constantly being re-formulated, it is not immediately accessible to those who have to comprehend, interpret and apply it. In addition, customary laws are usually allotted an inferior status in the hierarchy laid out by the constitution. Importantly, even where state law assigns a major role to customary laws in the state system, this mandate is, in practice, often ignored by the courts. Under these circumstances, miscommunication and confusion over the notion of customary law is inevitable.

(6) The accession to independence or autonomy of these small island countries or territories was not accompanied by a movement towards clarification and unification of the applicable law. Colonial laws and received legislation, in force prior to independence, were "saved" up to a specified date and remained in force to be utilised and developed by domestic courts. However this transitional arrangement is even today still in place and has resulted or will result in sometimes competing legal systems.

(6) Is legal pluralism really a legal tradition similar to the French or Common Law legal traditions?[48] The extent and depth of the pluralism concept, or, in some instances, whether it amounts to pluralism at all, is a matter of contention. A look at the literature invoking the notion of legal pluralism covers a broad spectrum, from postmodernism, to human rights, to feminist approaches to customary law, to international trade, and much more.[49]

In the late 1980s, legal pluralism emerged as a central theme in the re-conceptualisation of the law/society relation, and the key concept in a post-modern view of law.

Since then, its popularity has steadily spread, penetrating comparative law, political science, international law, and even legal philosophy.

Despite its apparent success, the notion of legal pluralism has been and is still marked by deep conceptual confusion and unusually heated disagreement.

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48 John Griffiths "What is Legal Pluralism" (1986) 24 (1) Journal of Legal Pluralism & Unofficial Law 39, on the concept of pluralism.

49 Laurent Chassot « Juridicité et internormativité: les défis des droits pré-européens entre exception et globalisation : L'application au Vanuatu » (Phd Thesis 2009 Paris 1, Prof. Horatia Muir Watt, Director).

One factor that contributes to the continuing disagreement is that participants come from several disciplines and bring different concepts and orientations to the subject[50]. An international lawyer who invokes legal pluralism has something very different in mind from a legal anthropologist who talks about legal pluralism. People using the concept also have different motivations and purposes.

Some are socio-legal theorists interested in developing a sophisticated analytical approach to contemporary legal forms, some are critical theorists who invoke the notion as a means to delegitimise or displace state law and former colonial laws, and some are seeking a useful way of framing complicated situations for their own political purposes.

(7) Mixed jurisdictions need to balance legal certainty with legal rules that deliver simplicity and sustainability on the one hand, with legal flexibility on the other hand. Therefore the principal challenge which legal pluralism in the South Pacific, for New Caledonia and French Polynesia, and for Vanuatu, Seychelles and Mauritius, must face is in rising above the traditional duality of the old and the new at the same time.[51]

VII FINAL CONSIDERATIONS

The Civil Code of 1804 is not a "one-dimensional" piece of legislation.

Instead, it is a social adjustment that enabled the law to align with sentiment deep-rooted in society. This is what has allowed the text to endure to this day (Marie-Anne Frison-Roche).[52]

When one considers the acculturation of codification in former French colonies, and its limits, the strength of tradition stemming from the Code Napoléon must not be neglected nor should one underestimate the Code's capacity of adaptation in this era of globalisation.

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50 Patrick Donlan "To Hybridity and Beyond: Reflections on Legal and Normative Complexity" in Vernon Palmer and Anna Koppel (eds) *Mixed Legal Systems, East and West: Newest Trends and Developments* (Ashgate, 2015)

51 Jennifer Corrin *Customary Land in Solomon Islands: A Victim of Legal Pluralism* Droit Foncier et Gouvernance Judiciaire dans le Pacifique Sud: Essais Comparatistes/Land Law and Judicial Governance in the South Pacific: Comparative Studies, CLJP, Hors Serie Volume XII, 2011.

52 M-A Frison-Roche « Le Transfert Du Droit Civil, Une Opportunité Pour La Nouvelle-Calédonie » (29 March 2012).

Thanks to its apparent flexibility, the Civil Code has been able to adapt and incorporate external influences over the course of its history.[53]

In overseas territories or states of mixed jurisdictions, codification appears to have started life as a means of creating exhaustive and systematised law inspired by the Code Civil structure and its underlying philosophy. In other words, codification and its ramifications represent a continuous journey (Professor P Popelier).[54]

All in all, the lasting success of the Code Civil outside of France shows that it has managed to achieve a stable equilibrium between the conserving of traditional elements and an alignment with the values of freedom and equality.

When we refer to the French civil law tradition based on codification, it is generally to highlight a centrist and somewhat rigid conception of the law. But it is also clear that beyond its unitary structure, the French Civil Code's provisions can allow the emergence of norms capable of developing mechanisms for acknowledging and respecting cultural diversity, through understanding and respecting custom. What is happening in the civil law domain in French Polynesia is a clear illustration of this capacity.

Laws travel and though they may not take the same form where they arrive as they had at origin, they bear characteristics similar to the laws from which they came and to laws in other places where similar transplantation has taken place. In other words, no legal tradition is strictly sui generis. It may well have some unique traits, but it has many underlying characteristics in common with other world traditions.

Further, in the world of increased inter-legality and legal rapprochement created by the diffusion of knowledge and facts across the modern technological platforms, it is no longer possible to have a pure or a strictly uni-juridical legal system. It is extremely unlikely that there exists a legal tradition unsullied by aspects of other traditions. In sum, legal traditions are porous and susceptible to internal and external changes. Legal pluralism has always been a reality and will continue to be so in the contemporary world.

The French Civil Code may well be a model of declining influence in some of its aspects and in its impact on other legal models, but it has not yet been forgotten and it is still one of the legends of modernity. If we are willing to consider one lesson to

53 Rajendra Parsad, Gunputh « Les limites d'adaptation-interprétation du Code civil français dans la synthèse du droit mixte mauricien - Coexistence et influence dans les Mascareignes » (2008) 60 Revue internationale de droit comparé 885-925.

54 Cited in Jonathan Teasdale "Codification: A Civil Law Solution to a Common Law Conundrum?" (2017) European Journal of Law Reform 247-252.

be learned from its diffusion in its export abroad and more precisely in the countries and territories of the Pacific and the Indian Ocean, it is the adaptability of the Civil Code that is apparent.

The French civil law tradition and the Civil Code know how to transform themselves and thus become an essential component of a much-needed legal pluralism that is a source of progress just as it was when enacted in 1804.

We then realise that the French civil law tradition stemming from the Civil Code is, on Wednesday 4 October 2023, less the result of neutral and objective data than of concepts developed in specific environments to achieve better progress.

Maurice Druon wrote that "Tradition is progress that has succeeded"[55] and Jean d'Ormesson added quite wisely that[56] –

> Tradition's highest purpose is to reciprocate the courtesy and the tolerance it owes to progress and to ensure that progress can emerge from tradition in the very same way that tradition has emanated from progress.

Beginning our brief legal journey with Napoleon, it is only fitting that we end our voyage with him, meditating on his opinion expressed in 1808:[57]

> The Civil Code is the code of the century: tolerance is not only preached but also organised. Tolerance is the first good of mankind.

55 *Le pouvoir*, (Hachette, (Notes et maximes), 1964) 42.

56 Jean d'Ormesson "Response to Marguerite Yourcenar's reception speech at the Académie Française" (22 January 1981).

57 See Alpérin, J-L « Deux cents ans de rayonnement du Code civil des Français? » (2005) 46 Les Cahiers de droit 229–251.