

The Two Faces of the Catala Project – Towards a New General Part of the French Law of Obligations

EWOUDE HONDIUS*

1. Three years ago, the French celebrated the first 200 hundred years of their *Code Napoléon* with great pomp and circumstance. At the official commemoration in Paris, some 1,500 guests – including Ministers of Justice and Supreme Court Justices from various foreign countries – were addressed by the President of the Republic, the President of the Senate, the President of the *Assemblée*, the President of the *Conseil constitutionnel*, the President of the *Conseil d'État*, the *premier président de la Cour de cassation*, the *Garde des sceaux* (Minister of Justice), and a number of other high dignitaries. At the dinner party following the celebration, Associate Justice of the United States Supreme Court Stephen Breyer congratulated the French on behalf of the foreign guests with this masterful piece of work. His words, spoken in French, were echoed in legal writing from abroad.¹ From Italy, Guido Alpa acknowledged Italy's debt to the Code Napoléon.² From England it was observed: 'c'est une merveille!'.³ Why? 'La généralité des termes utilisés, tant redoutée par les juristes allemands, explique la pérennité du Code'.⁴ Equally solid praise came from Germany: 'Insgesamt ist der Code Civil nach 200 Jahren ständigen Wandels ein modernes Gesetzbuch und Ausdruck einer französischen Kulturleistung, die Teil der Entwicklung der französischen Gesellschaft selbst ist'⁵ and: 'Man darf deshalb nicht überrascht sein, wenn den Versuchen, den Code Civil oder wesentliche Teile davon durch europäisches Einheitsrecht zu ersetzen, aus Frankreich entgegenhallt: Der 200. Jahrestag ist sicher nicht der Augenblick, ein Requiem für den Code Civil anzustimmen'.⁶

2. For a requiem it may indeed be too early, but for the French the *bicentenaire* was not just an occasion for jubilation, but also for reflection as to the possible need for recodification. For several parts of the Code, this is not necessary, because the Code has been renovated from within. This is especially apparent where Family law is concerned. Of the 60 original articles on parental authority only three are still in

* Professor of Civil Law, Utrecht University, Co-Editor-in-Chief, European Review of Private Law.

¹ Already at the first *centenaire* it was observed: 'ce sont peut-être les voix des savants étrangers qui ont été les plus élogieuses pour la grande oeuvre de nos législateurs de 1804' – P. BAUTHIER, (Belgian) *Journal des Tribunaux* 2004, p. 345.

² G. ALPA, Le Code civil et l'Italie, *Revue internationale de droit comparé* 3/2005.

³ B. MARKESINIS, Deux cent ans dans la vie d'un code célèbre/Réflexions historiques et comparatives à propos des projets européens, *Revue trimestrielle de droit civil* 2004, p. 45, 60.

⁴ B. MARKESINIS, *Revue trimestrielle de droit civil* 2004, p. 45, 47.

⁵ H.J. SONNENBERGER, Bicentenaire du Code Civil: Ein modernes Gesetzbuch, eine französische Kulturleistung, *Zeitschrift für vergleichende Rechtswissenschaft* 2004, pp. 127, 129-130.

⁶ H.J. SONNENBERGER, *Zeitschrift für vergleichende Rechtswissenschaft* 2004, p. 127, 130.

force, of the 99 on guardianship also three, and of those on divorce, none.⁷ But for the general part of the law on patrimonial law, this is different. Of the 194 original articles on property law, 155 are still in force in their original form; in the law of obligations, of 269 articles no less than 238 have remained unchanged.⁸ It is in this area that Pierre Catala, after a suggestion of Cornu, proposed to undertake an effort to reform the general part. This could then also contribute to the European debate: ‘*la France pourra, si elle met de l’ordre dans ses propres lois, participer utilement à un débat européen sur les principes fondamentaux du droit des contrats*’.⁹ In the same issue, Ghestin likewise points out: ‘*il faut travailler parallèlement à la rédaction d’un Code européen des obligations et réécrire la partie du Code civil français relative aux obligations*’.¹⁰ Mestre as well argues that ‘*le législateur français ne saurait s’endormir en attendant un hypothétique Code européen, il lui appartient d’agir au plus tôt (. . .), avec, en arrière-plan, la perspective de peser plus lourdement si, demain, une harmonisation internationale devait se préciser*’¹¹ and Sériaux adds: ‘*N’ayons crainte: un code européen des contrats ne se fera pas sans les Français. Mais c’est à condition que, le moment venu, nos juristes soient intellectuellement préparés à cette tâche*’.¹² Rémy suggests to do more with the Principles of European Contract Law than with the Gandolfi Code.¹³ Tallon urges to take more lessons from comparative law.¹⁴

3. Under the chairmanship of Pierre Catala a group of academics – not practitioners – set about recodifying the general part.¹⁵ On 22 September 2005, the results could be presented to the minister of justice.¹⁶ Meanwhile, the *Revue des contrats* has devoted two of its annual meetings to the proposals. In 2005 the provisions on contract were discussed, in 2006 those on tort law. The two discussions were widely divergent as to their outcome. The part on contract law was reviewed rather

⁷ At the occasion of the *bicentenaire* Jean Carbonnier was often praised for this work, so much so that his name was mentioned nearly as often as that of Portalis.

⁸ P. CATALA *et autres*, Faut-il réformer le titre III du livre III du Code civil?, *Revue des contrats* 2004, pp. 1145-1195.

⁹ P. CATALA *et autres*, Faut-il réformer le titre III du livre III du Code civil?, *Revue des contrats* 2004, p. 1145, 1150.

¹⁰ J. GHESTIN, *Revue des contrats* 2004, p. 1145, 1159.

¹¹ J. MESTRE, *Revue des contrats* 2004, p. 1145, 1167.

¹² J. MESTRE, *Revue des contrats* 2004, p. 1145, 1190.

¹³ J. MESTRE, *Revue des contrats* 2004, p. 1145, 1183.

¹⁴ J. MESTRE, *Revue des contrats* 2004, p. 1145, 1191.

¹⁵ See for a general overview (focussing on the contract law provisions) B. FAUVARQUE-COSSON, D. MAZEAUD, Nouvelles de France: vers une réforme possible du droit des contrats . . . , in: A. BRZOZOWSKI, W. KOCOT, K. MICHALOWSKA (red.), *W kierunku europeizacji prawa prywatnego/Księga pamiątkowa dedykowana profesorowi Jerzemu Rajskiemu – Towards Europeanization of private law/Essays in honour of Professor Jerzy Rajski*, Warsaw: Beck, 2007, pp. 497-510.

¹⁶ *Avant-projet de réforme du droit des obligations (Articles 1101 à 1386 du Code civil) et du droit de la prescription (Articles 2234 à 2281 du Code civil, Rapport 1a Monsieur Pascal Clément, garde des sceaux, ministre de la justice, 22 September 2005, <www.justice.gouv.fr>.*

negatively, as basically too conservative; the part on tort law received a very positive reception. In the 2006/1 issue, the *Revue des contrats* presents the outcome of the meeting on contract law.¹⁷ Some of the authors had themselves drafted a part of the project and could therefore not be expected to criticize their colleagues too openly. But an outsider's remarks are quite relevant: Denis Tallon observes: '*Ce projet se veut délibérément franco-français: à beau mentir qui vient de loin. Il reste fermement attaché à des règles qui sont très critiquées dans l'ordre interne et largement abandonnées dans les législations modernes*': only limited use of good faith, no anticipatory breach, no judicial mitigation, no *Nachfrist*, a very limited introduction of *imprévision* (frustration) only.¹⁸ He is supported by Bénédicte Fauvarque-Cosson: '*l'avant-projet fait preuve d'une grande fidélité à la tradition, au risque d'isoler le droit interne français des grandes tendances internationales, européennes ou étrangères: la très emblématique notion de cause est conservée, l'interdiction de la révision juridique pour imprévision subsiste, contre vents et marées*'.¹⁹ The organisers had also invited two foreign celebrities - Hugh Beale and Ole Lando - who within the limits of politeness were also outspoken in their criticism. In his concluding words, Denis Mazeaud therefore is less enthusiastic than Catala and his team may have expected.²⁰

4. Whereas the reform proposals for contractual obligations met with little enthusiasm, the tort law provisions which were prepared by Pascal Ancel, Philippe Brun, Georges Durry, Patrice Jourdain, Fabrice Leduc and G n v v  Viney, were almost unanimously endorsed at a symposium organised by the *Universit  Paris I* in 2006. The results have also been published in the *Revue des contrats*.²¹ In her opening statement, G n v v  Viney gives an overview of the proposals which in her eyes are a reaction to two European developments. In the first place, the large number of directives and *Principles* has '*mis en  vidence le vieillissement du Code civil fran ais*'. Also, if a member states wishes to be counted with in the harmonisation process, it should rather belong to '*ceux qui ont r form  r cemment leur propre loi, comme l'ont fait notamment les Pays-Bas . . .*'. According to G n v v  Viney, the proposals have three objectives: '*expliciter le contenu de textes aujourd'hui trop elliptiques*', '*clarifier le droit positif en prenant position sur les points qui font actuellement d bat*' and '*modernisation*'.

Then four sections set out the main content of the reform proposal, the criticism which may be brought forward and the experiences abroad. The first section is that of the relationship between contractual and extracontractual liability. Pascal Ancel presents the reform bill,²² which is followed by a critical (or rather jubilant:

¹⁷ Colloque la r forme du droit des contrats: projet et perspectives, *Revue des contrats* 2006, pp. 1-264.

¹⁸ D. TALLON, *Revue des contrats* 2006, pp. 131-132.

¹⁹ B. FAUVARQUE-COSSON, *Revue des contrats* 2006, p. 147.

²⁰ D. MAZEAUD, *Revue des contrats* 2006, pp. 177-195.

²¹ Colloque la r forme du droit des contrats: projet et perspectives, *Revue des contrats* 2007, pp. 1-184.

²² *Revue des contrats* 2007, pp. 19-30.

*'one ne peut qu'être séduit par les propositions contenues dans l'avant-projet au sujet de la distinction des responsabilités délictuelle et contractuelle'*²³) note from Jérôme Huet²⁴ and Eric Savaux.²⁵ The German perspective, proposed by Stephan Lorenz is also very positive: *'Le Code civil sera ainsi, de nouveau, le facteur d'inspiration du développement européen du droit qu'il a toujours été et dont l'Europe a besoin . . . les vrais conservateurs du Code sont les réformateurs'*.²⁶ The second part is *'le fait personnel et le fait des choses'*. Fabrice Leduc presents an overview,²⁷ which is followed by 'critical' notes by François Chabas ('bravo!'²⁸) and Christophe Radé (who does criticize the proposed liability for dangerous activities²⁹). From England, Simon Whittaker considers this part *'un ensemble de propositions extrêmement stimulantes'*.³⁰

'Le fait d'autrui' is the title of the third part. Philippe Brun provides us with the overview,³¹ followed by a comment by Philippe le Tourneau (*'Les dispositions proposées (. . .) sont particulièrement intéressantes'*³²) and Bertrand Fages (who sees some problems for the liability for daughter companies³³). Bernard Dubuisson from Louvain-la-Neuve is full of praise: *'L'examen de ces textes est un exercice particulièrement stimulant pour un juriste étranger (. . .). Il est grand temps en effet que les pays francophones fassent entendre leur voix dans le concert européen'*.³⁴ Part 4 deals with the effects of liability. Patrice Jourdain provides the overview,³⁵ which is followed by a positive evaluation by Denis Mazeaud³⁶ and a less supportive comment by Yvonne Lambert-Faivre (who warns against inconsistencies with the Social Security Code³⁷). Pierre Wessner from Switzerland also has a warning for us: *'ne recherchez la perfection si vous voulez avoir une chance d'aboutir'*.³⁸ The final conclusion by Georges Durry is that *'l'appréciation a été favorable et que les critiques ont été modérées'*.³⁹

5. A third part of the project deals with prescription. This has so far been less in the limelight and I will also refrain from considering it in this paper.⁴⁰ A research

²³ *Revue des contrats* 2007, p. 43.

²⁴ *Revue des contrats* 2007, pp. 31-43.

²⁵ *Revue des contrats* 2007, pp. 45-55.

²⁶ *Revue des contrats* 2007, pp. 57-63.

²⁷ *Revue des contrats* 2007, pp. 67-72.

²⁸ *Revue des contrats* 2007, pp. 73-76.

²⁹ *Revue des contrats* 2007, pp. 77-88.

³⁰ *Revue des contrats* 2007, pp. 89-99.

³¹ *Revue des contrats* 2007, pp. 103-107.

³² *Revue des contrats* 2007, pp. 109-114.

³³ *Revue des contrats* 2007, pp. 115-123.

³⁴ *Revue des contrats* 2007, pp. 125-137.

³⁵ *Revue des contrats* 2007, p. 148.

³⁶ *Revue des contrats* 2007, pp. 149-162.

³⁷ *Revue des contrats* 2007, pp. 163-170.

³⁸ *Revue des contrats* 2007, pp. 171-180.

³⁹ *Revue des contrats* 2007, pp. 181-184.

⁴⁰ It is analysed elsewhere in this issue by Reinhard Zimmermann.

team of the Universities of *Louvain-la-Neuve* and *Paris I* is at present analysing these provisions. The reform project is indeed far from over. Reactions are still being tabled. The French have been so kind as to invite a number of foreign observers for their views. An English translation is available. Hopefully the Ministry of Justice will also listen to English-language⁴¹ comments.⁴² My personal advice may be summed up as follows:

- a. The non-introduction of provisions on *imprévision*, anticipatory breach, judicial mitigation and *Nachfrist* should be reconsidered.
- b. The introduction of the notion of *cause* should also be reconsidered.
- c. Consumer protection should be brought back into the *Code civil*.
- d. Comparative law should be used to a greater extent.

6. It is to be hoped that the French reform proposals, reformed as suggested above, will meet with success. The proposals on contract law are still in need of a brushing up; those on tort law are virtually ready for take-over. It is in the interests of France that its general part of patrimonial law should once again belong to the avant-garde of European private law. For Europe it is of interest that one of its great legal traditions will participate at full strength - with a modern Civil code - in the ongoing harmonisation debate. Time is not of the essence. Great reform movements have often taken their time. A good example is the reform of the Dutch Civil Code, which was decided upon in 1947. Only in 1992 did the main part enter into force. In Dutch legal writing it is generally believed that the long gestation period has only had negative consequences.⁴³ I do not share this view: the lengthy waiting period did enable practitioners to fully familiarise themselves with the new texts and therefore contributed to the smooth transition. Likewise, it has been suggested that a future European Civil Code should first be offered on an optional basis only, before it enters into force.⁴⁴

⁴¹ A translation by John Cartwright and Simon Whittaker may be found on <www.justice.gouv.fr/publicat/rapport/rapportcatatla0905-anglais.pdf>.

⁴² It is Bénédicte Fauvarque-Cosson who has pointed out that the promotion of French legal culture and of the French language need not be twinned: B. FAUVARQUE-COSSON and S. PATRIS-GODECHET, *Le Code civil face à son destin*, Paris: La documentation française, 2006, 262 p.

⁴³ E.O.H.P. FLORIJN, *Ontstaan en ontwikkeling van het nieuwe Burgerlijk Wetboek*, PhD thesis Maastricht, Maastricht: Universitaire Pers, 1994, p. 570.

⁴⁴ J. BASEDOW, The case for a European Contract Act, in: S. E. ESPIAU, A.V. ALOY (Eds.), *Bases de un derecho contractual europeo/Bases of a European Contract Law*, Valencia: Tirant lo Blanch, 2003, pp. 533-542.