

Code vs. Code: Nationalist and Internationalist Images of the Code civil in the French Resistance to a European Codification

Ralf Michaels*

8 European Review of Contract Law ____ (2012)

French academics reacted too announcements about a possible future European civil code ten years ago in the way in which Americans reacted to the Japanese attack on Pearl Harbor 1940: first with shock, then with rearmament, finally with attempted counterattacks. Military metaphors abound. Yet the defense of the French Code Civil against a European civil code is tricky: they must defend one Code against another. The images drawn of codes are therefor of particular interest for our understanding both of civil codes and of legal nationalism. Often, two mutually exclusive images are presented at the same time. In cultural terms, the code civil is both traditional and revolutionary, both linguistically determined and independent of its language, both an expression of values and merely formal and neutral. Politically, the code civil is legitimated both in democracy and technocracy, it expresses both self-determination and imperialism, it is about both pluralism and universalism. Necessarily, in such juxtapositions, the same characteristics must be assigned to a European Code, making the arguments ultimately self-refuting. Nonetheless, the point is not to dismiss these defenses. Rather, they should be understood as expressions of faith—and the discussion over a European Code resembles, in part, a religious war.

I. INTRODUCTION.....	2
II. FRENCH POSITIONS BETWEEN NATIONALISM AND INTERNATIONALISM	4
1. FIRST REACTION: SHOCK AND OUTRAGE.....	5
2. SECOND REACTION: REARMAMENT: REFORM OF THE CODE CIVIL.....	6
3. THIRD REACTION: COUNTERATTACK: FRENCH PARTICIPATION IN EUROPEANIZATION	9
III. CULTURAL IMAGES	10
1. TRADITION VERSUS REVOLUTION	10
2. LANGUAGE: NATIONAL VS. UNIVERSAL LANGUAGE	11
3. VALUES VERSUS NEUTRAL RATIONALITY	12
IV. POLITICAL IMAGES.....	13
1. DEMOCRACY VS. TECHNOCRACY.....	13
2. SELF-DETERMINATION VS. IMPERIALISM	15
3. PLURALISM VS. UNIVERSALITY	16
V. WHAT TO MAKE OF ALL THIS	17

* Professor of Law, Duke University. A much earlier version of this article was presented at Harvard and at the Sorbonne, Thanks to participants in these venues, as well as at the 2012 workshop in Amsterdam.

I. Introduction

Sometimes, the best way into a large subject is through a peripheral text. I choose a brief opening speech by Michel Albert, then President of the Académie des sciences morales et politiques, on the occasion of the bicentenary of the code civil in 2004.¹ In the beginning, Albert emphasizes the intrinsic Frenchness, of the Code civil with a familiar quote from Portalis: “Les lois ... doivent être adaptées au caractère, aux habitudes, à la situation du peuple pour lequel elles sont faites”.² In the end of the talk, just a few lines later, Albert turns around completely and praises the Code as a universal heritage: “le Code civil ne nous appartient pas à nous seuls Français — ... il est une part de l’héritage de bien des nations”.³

This ostensible inconsistency between a nationalist and an internationalist conception of the Code Napoléon is not a novelty. Napoleon himself pushed the Code civil as quintessentially French—and as the model for a European Code, of which he may have been the first proponent:

Pourquoi mon Code Napoléon n’eût-il pas servi de base à un Code européen...? De la sorte, nous n’eussions réellement, en Europe, composé qu’une seule et même famille. Chacun, envoyageant, n’eût pas cessé de se trouver chez lui.”⁴

The Code thus combines, since its beginning, two seemingly incompatible qualities: it is at the same time quintessentially French, and quintessentially European. In this article, I want to take a closer look at this strange dialectic of nationalist and internationalist conceptions of the French civil code. I think this dialectic is more complex and thus more interesting than the frequently invoked dichotomy between euroskepticism and europhilia—a dichotomy that seems to assume that the Europe to be loved or hated is a fixed entity, not an idea to be shaped. And I also think this dialectic suggests a more complex role that

¹ Michel Albert, *Allocution d’ouverture* (2004), http://www.asmp.fr/fiches_academiciens/textacad/albert/code_civil.pdf.

² Albert (n. 1) 1. The reference is to Jean-Etienne-Marie Portalis, *Discours préliminaire sur le Code Civil*, in id., *Discours, rapports et travaux inédits sur le Code Civil* (1844, reprint 2010) 1, 4-5. Cf. Book 19 of Charles Montesquieu’s “*Esprit des lois*”.

³ Albert (n. 1) 3.

⁴ Emmanuel de Las Cases, *Mémorial de Sainte-Hélène*, vol. 7 (Paris: Lecoq 1828), 353. Cf. Jean Bart, *Le Code Napoléon, Un Code à vocation européenne?*, in Jean-Philippe Dunand/Bénédict Winiger (eds.), *Le code civil Français dans le droit européen* (Bruylant 2005) 65.

nationalism plays in the European private law project than as a mere barrier towards Europeanisation.

For a long time, studies on national resistance to Europe focused especially on England and the common law. But the English opposition can easily (though perhaps falsely) be attributed to a clash of cultures or of styles, in particular civil versus common law, suggesting a European Code would be possible amongst the civil law countries.⁵ The fierce French resistance against such a Code suggests that this is not so easy.⁶ Its job is harder, however— it must contrast one Code (the Code civil) against another (the European).

How can French scholars be opposed to something on the European level that they cherish at home? How are arguments against a European Code not at the same time arguments against a French Code? How can arguments in defense of the French Code be protected against appropriation by supporters of a European Code? The result of my analysis is: by flipping arguments. Flipping is a technique favored by critical legal studies: “appropriating the central idea of your opponent's argument-bite and claiming that it leads to just the opposite result from the one she proposes.”⁷ What is remarkable in the French resistance is that French critics appropriate *their own* central ideas and turn them on their heads. The same author, sometimes within one same text makes both opposite arguments, without worrying about the internal inconsistency.

Two caveats are in order. First, although I view the critics I use as quite characteristically French, I do not claim that they are representative of the French position at large, which is more varied and diverse. Second, although I focus disproportionately on the use of hyperbole (which is in general more common in France than elsewhere) and on internal inconsistencies in the arguments, my goal is not to criticize, or even ridicule, the positions expressed. The goal is a different one, and it is twofold. First, I want to demonstrate the internal friction in the idea of

⁵ Mauro Bussani, *Faut-il se passer du common law (européen)? Réflexions sur un code civil continental dans le droit mondialisé*, (2010) 62 RIDC 7.

⁶ An excellent collection of early French comments on the codification of European Private Law, both positive and negative, is Bénédicte Fauvarque-Cosson & Denis Mazeaud (eds), *Pensée juridique française et harmonization européenne du droit* (2003).

⁷ Duncan Kennedy, *A Semiotics of Legal Argument*, in *Collected Courses of the Academy of European Law*, Volume III, Book 2 (1994) 309, 335.

a Code itself, between particularity and universalism, that is reflected in this debate. Second, I want to demonstrate how this internal tension mirrors the difficulties of determining the place of the nation state within the European project today. Space constraints prevent comprehensive demonstration of the points made; I hope the imposed brevity at least makes my argument more pungent.

II. French Positions between Nationalism and Internationalism

Parallels between today's situation and that of 1804 are revealing, but they have at least one important limitation. In 1804, when the French Civil Code was enacted, it clearly established France's leading position in European private law. Anniversaries of the Code, however, were less fortunate. When the Code turned 100, in 1904, the German civil code, entered into force just four years earlier, made the French Code look old and antiquated.⁸ In 2004, for the bicentennial, the situation was even worse. In that same year, the World Bank published its first Doing Business Report, which found civil law systems to be inferior to common law systems and ranked the French legal system forty-fourth—behind Jamaica, Botswana, and Tonga.⁹ Closer to home, the project of a European Code threatened to replace the French Civil Code altogether.

The first shock for France had come some years earlier. The EU Commission inquiry on a European contract law in 2001 already created concern in France, where the Europeanization of private law had not been taken too seriously before.¹⁰ In 2002 then Christian von Bar gave his now infamous presentation in Paris, in the

⁸ Yves Lequette, *D'une célébration à l'autre, in 1804-2004: Le Code civil—un passé un présent un avenir* (2004) 9, 11-12.

⁹ *Doing Business in 2004: Understanding Regulation*. On the French reactions, see, in English, Bénédicte Fauvarque-Cosson & Bénédicte Fauvarque-Cosson & Anne-Julie Kerhuel, *Is Law an Economic Contest? French Reactions to the Doing Business World Bank Reports and Economic Analysis of the Law*, (2009) 57 *Am. J. Comp. L.* 811; Catherine Valcke, *The French Response to the World Banks' Doing Business Reports*, 60 *University of Toronto Law Journal* 197 (2010).

¹⁰ Even though the idea of a European private law, or even a codification, had been discussed in France before. See, the references in Bénédicte Fauvarque-Cosson, *Faut-il un code civil européen?*, *RTDCil* 2002, 463 no. 1 note 2. Christian von Bar himself had presented the project before, in French; see Christian von Bar, *Le groupe d'études sur un Code civil*, 53 *REV. INT. DROIT COMP.* 127 (2001).

Cour de Cassation, on the project of European codification.¹¹ The existence of the project alone was a shock. That it was put forward by a German apparently resonated with memories of the German invasions into France in the past; the military language in some of the critiques suggests that much.¹² But the real outrage appears to have been that Prof. von Bar spoke “en anglais, et ce dans la Grand’ Chambre de la Cour de cassation”¹³.

It is hardly an exaggeration to compare the effect of that speech on the French academic establishment to that of the Japanese attack on Pearl Harbor in 1941. An unexpected attack demonstrated that, unbeknownst to the victim, an enemy that had been ignored for a long time had already been arming itself for some time. And it was a dual archenemy from way back: Germany, von Bar’s home country, and England, the country whose language he spoke. The French reacted as the Americans reacted to Pearl Harbor: first with shock, then with their own rearmament, then with a counterattack.

1. First Reaction: Shock and Outrage

Speaking of attacks, rearmament, and archenemies may seem hyperbolic, but it merely reflects the style of the debate. One French scholar compares the project to unify European private law to the identity politics of Nazi Germany, the Soviet Union, and Cambodia under the Khmer Rouge¹⁴ - the European civil code as some kind of cultural genocide. Another scholar teaching in France calls the project

¹¹ Christian von Bar, *Des principes à la codification: perspectives d’avenir pour le droit privé européen*, *Les Annonces de la Seine*, 3 June 2002, no. 33, p. 1-4 ; republished as Christian von Bar, *From Principles to Codification: Prospects for European Private Law*, (2002) 8 *Col. J. Eur. L.* 379.

¹² The discussion is placed in the centuries old relation between France and Germany by Yves Lequette, *De la France et de l’Europe: La nation ou l’empire*, in *Études à la mémoire du professeur Bruno Oppetit* (2009) 411, where *la nation* stands for France, *l’empire* for the Holy Roman Empire, i.e. Germany. See especially *ibid.* 457 ff.

¹³ Albert (note 1) 2; Yves Lequette, *Quelques remarques à propos du projet de code civil européen de M. von Bar*, *Dalloz* 2002 *chron.* 2202 = *Pensée juridique* (n. 6) 69, no. 1. Albert contrasts this to Basil Markesinis “Notons toutefois que notre confrère, lui, s’est exprimé en français.” Albert did not return the favor completely, he managed to misspell both Sir Basil’s first and last name (“Basile Marchesinis”). But then, Markesinis’s own spelling of foreign names is rarely accurate; see the examples in Ralf Michaels, *Book Review*, 10 *ZeUP* 903 (2002). For Markesinis’ own remarks at the Cour de Cassation, including criticism of von Bar, see Basil Markesinis, *Deux cents ans dans la vie d’un code célèbre. Réflexions historiques et comparatives à propos des projets européens*, *RTD CIV.* 2004, 45-60;. English version: *Two hundred years of a Famous Code – What Should We Be Celebrating?*, 39 *Tex. Int’l L.J.* 561 (2004).

¹⁴ Lequette (note 13) 23.

“politically complicitous, inherently oppressive, and fundamentally antihumanistic”¹⁵ and, in naming his article “Antivonbar”, invokes a tradition of polemical ad hominem attacks like Frederic the Great’s Anti-Machiavell, Lessing’s Anti-Goeze or Engels’ Anti-Dühring. The authors of European private law are considered “des individus, dont l’expérience fait apparaître qu’ils sont dépourvus de tout scrupule.”¹⁶ When von Bar suggests that France and Germany were once one, under Charlemagne, he finds the response that the third Reich used the same argument to justify the *collaboration*.¹⁷

2. Second Reaction: Rearmament: Reform of the Code Civil

The shock —sometimes referred to as an electric shock¹⁸—led to action.¹⁹ Scholars presented the Avant-projet Catala, aimed at a reform of the French law of obligations.²⁰ Although the project may look purely domestic, both its origin and its aim are deeply European.²¹ It was spurred by a conference that compared the Lando Principles and the French Code Civil and found important differences.²² The threat of a European Code civil that would differ from French law was thus an important

¹⁵ Pierre Legrand, *Antivonbar*, (2005) 1 *Journal of Comparative Law* 13, 27.

¹⁶ Yves Lequette, *Le Code européen est de retour*, (2011) *Revue des contrats* 1028, 1031 note 15.

¹⁷ Lequette (note 16) 1042, citing to Bernard Bruneteau, “L’Europe nouvelle” de Hitler: Une illusion des intellectuels de la France de Vichy (2003). Charlemagne has always been claimed for both French and German national identity; see, most recently, Robert John Morrissey, *Charlemagne & France: a thousand years of mythology* (2003). For the historical Charlemagne’s role for Europe, see Rosamond McKitterick *Charlemagne: The Formation of a European Identity* (2008).

¹⁸ Bénédicte Fauvarque-Cosson & Sara Patris-Godechot, *Le Code civil face à son destin* (2006) 153.

¹⁹ A useful summary and evaluation in English is Ruth Sefton-Green, *The DCFR, the Avant-projet Catala and French Legal Scholars: A Story of Cat and Mouse?*, (2008) 12 *Edinburgh Law Review* 351.

²⁰ Pierre Catala (ed.) *Avant-projet de réforme du droit des obligations et de la prescription* (La documentation Française, Paris, 2006); English translation by John Cartwright/Simon Whittaker, in John Cartwright/Stefan Vogenauer/Simon Whittaker (eds), *Reforming the French Law of Obligations: Comparative Reflections on the Avant-projet de réforme du droit des obligations et de la prescription* (‘the Avant-projet Catala’) (2009) 445. For a helpful introduction in English, see Stefan Vogenauer, *The Avant-projet de réforme: An Overview*, *ibid.* at 3. The entire book has been published in French, too: John Cartwright/Stefan Vogenauer/Simon Whittaker (eds), *Regards comparatistes sur l’avant-projet de réforme du droit des obligations et de la prescription* (2010).

²¹ Séverine Nadaud, *Codifier le droit civil européen* (2008) 321-36.

²² Pierre Catala, *General Presentation of the Reform Proposals*, in Cartwright/Whittaker (note 20) 9, no 2. See Dominique Fenouillet & Pauline Rémy-Corlay (eds), *Les concepts contractuels à l’heure des principes du droit européen des contrats* (2003).

reason for the response.²³ Catala provides yet another military reference, this one quite stunning: it will not do to say that things are good enough as they are, because that was what the French on the eve of the disaster of 1940.²⁴ Hitler's invasion found the French unprepared; von Bar will find more resistance.

The aim is not just to protect the French code, however, but also to regain influence on Europe:²⁵ "Our hope is that the Reform Proposals serve the purpose which will give France a civil law adapted to its time and a voice at the table of Europe."²⁶ Not least towards that purpose, the commission almost immediately requested translations into five languages (including two different translations into English), thus greatly broadening the potential audience.²⁷

Reactions to the project, both within and outside of France,²⁸ were largely positive, though the project was also lambasted as "franco-français".²⁹ The near-total absence of comparative law influence was one reason for criticism.³⁰ Puzzlement emerged especially over the commission's decision to maintain, and even extend, "in accordance with our legal tradition,"³¹ the role of *la cause*.³² The *cause* in

²³ Denis Mazeaud, Observations conclusives, *Revue des contrats* 2006, 179.

²⁴ Pierre Catala, L'avant-projet de réforme des obligations et le droit des affaires, in Vincent Sagaert (ed.), *La réforme du droit privé en France – Un modèle pour le droit privé européen?* (2009) 85, 85.

²⁵ Sébastien Pimont, À propos du processus de réforme du droit français des contrats, *Revue juridique Thémis* 43 (2009) 439, 443ff.

²⁶ Catala (note 22) no. 9; cf. Catala (note 24) 87: "Qui ne voit que, dans le Concert des Nations, la voix et le poids de la France sortiraient renforcés de son Code civil?" The hope that the French Code civil could provide a model has long accompanied reform projects. Claude Witz, "La longue gestation d'un code européen des contrats – Rappel de quelques initiatives oubliées", (2003) RTDC 447.

²⁷ Collected in Pierre Catala (ed), *L'art de traduction: L'accueil international de l'avant-projet de réforme du droit des obligations* (2011).

²⁸ Summarized by Vogenauer (supra note 20) 15-17.

²⁹ Denis Tallon, Teneur et valeur du projet appréhendé dans une perspective comparative, *Revue des contrats* 2006, 131; Bénédicte Fauvarque-Cosson, "La réforme du droit français des contrats: perspective comparative", *Revue des contrats* 2006, p.147.

³⁰ See Denis Tallon, Teneur et valeur du projet appréhendé dans une perspective comparative, *Revue des contrats* 2006, 132; Christophe Jamin, Vers un droit européen des contrats? (Réflexion sur une double stratégie), (2006) RTD com. 94, 101.

³¹ Jacques Ghestin, Validity—Cause (articles 1124 to 1126-1), in Cartwright/Vogenauer/Whittaker (note 20) 521 (originally in Catala (note 20) 25.

³² Cf., in English, Judith Rochfeld, A Future for *la cause*? Observations of a French Jurist, in John Cartwright/Stefan Vogenauer/Simon Whittaker (eds), *Reforming the French Law of Obligations: Comparative Reflections on the Avant-projet de réforme du droit des obligations et de la prescription ('the Avant-projet Catala)* (2009) 73; Ruth Sefton-Green, *La cause or the Length of the French Judiciary's Foot*, *ibid* at 101.

particular was deemed unlikely to be influential in Europe.³³ In result, this assessment seems fair: la cause had become a French peculiarity in Europe³⁴ (even though its Aristotelian origins are of course not at all peculiarly French). The authors of the Lando Principles had explicitly rejected it (to the surprise and dismay of French commentators.)³⁵ But the critique misses what the project is about. The goal was to influence European private law, not the other way around. In this sense, differences between the Code and the Lando Principles were not a problem but a potential asset.³⁶ The cause is thus defended precisely because it is un-European:³⁷

Comment pourrait-on, au demeurant, aspirer à ce que la France reste elle-même et cultive son irritante exception alors que sa banalisation et sa dissolution dans le conformisme européen ouvrent à ceux qui en sont les artisans des perspectives si chatoyantes?³⁸

The project was not ultimately successful. The chancellery adopted its own project,³⁹ using more comparative law than the Catala Avant-projet and suggesting abolition of *la cause*.⁴⁰ Academics around François Terré prepared a counter-counterproposal.⁴¹ Whether any one of them will become law is not yet fully certain.

³³ Bénédicte Fauvarque-Cosson, "La réforme du droit français des contrats: perspective comparative", RDC 2006, p.147; Muriel Fabre-Magnan, Entretien, La Semaine Juridique (JCP) éd. Gén. 2008.I.199; Denis Mazeaud, Réforme du droit des contrats: haro, en Hérault, sur le projet!, D. 2008, 2675, nos 9-11.

³⁴ Cf. Vittoria Bassani/Wolfgang Mincke, Europa sine causa?, (1997) ZEuP 599.

³⁵ Jean Beauchard, L'absence de la cause dans les principes européens de droit des contrats, in Jean-Pierre Marguénaud, Michel Massé, Nadine Poulet-Gibot (eds), Apprendre à douter. Questions de droit, questions sur le droit, Études offertes à Claude Lombois (2004) 819.

³⁶ Catala (note 22) no 8.

³⁷ Alain Ghozi & Yves Lequette, La réforme du droit des contrats: brèves observations sur le projet de la chancellerie, D. 2008, 2609.

³⁸ Lequette (note 16) 1031. Similarly Miguel Pasquau Liaño, L'abandon de la notion de "cause" en droit français : un service au droit européen des contrats ?, (2010) 1 Revue de droit d'Assas 68, 69: "cacher la cause pour surmonter l'isolement du droit français n'est pas tellement différent de ce qui supposerait de renoncer à la langue française pour favoriser l'intégration linguistique des peuples européens."

³⁹ Denis Mazeaud, La réforme du droit français des contrats, Revue juridique Thémis 44 (2010) 243.

⁴⁰ Christian Larroumet, De la cause de l'obligation à l'intérêt au contrat, D. 2008, 2441.

⁴¹ François Terré (ed), Pour une réforme du droit des contrats (2008).

3. Third Reaction: Counterattack: French Participation in Europeanization

If the reform of French law has an only indirect impact on French law, other French projects aim at direct participation in the development of European law. Yet another (rather incredible) military argument is suggested in favor of uniformity of law (albeit on the basis of French law): the German-French war of 1870/71 could have been avoided if only Prussia had adopted the French Civil Code.⁴² In particular, two French legal associations joined the European network in 2005: the Association Henri Capitant des Amis de la Culture Juridique Française and the Société de législation comparée. Given how far European projects had advanced with limited French input, not many areas for influence remained, but two were found and published in 2008: “Terminologie contractuelle commune” and “Principes contractuels communs”. The hope was that this could influence the European project even at this late stage:

There are a number of ways in which this work could contribute to the wider European project. The work on the guiding principles could form part of the CFR, in the form of blackletter model rules or of recitals. The work on terminology is, in itself, most useful for the elaboration of the final version of the CFR. It finds its place with the materials which will accompany the model rules. Last but not least : the revised version of the Principles of European contract law (PECL) should be considered, by the European institutions, as an alternative set of model rules on contract law. As PECL, it adopts a simple structure, with clear and concise rules. This revised version includes comments on PECL which are particularly innovative and valuable.⁴³

Their success has been moderate. Granted, the European Parliament singled out these works as relevant; the authors of the Draft Common Frame of Reference reformulated, under their influence, the “principles” underlying their codification.⁴⁴ Their rules however were not changed much, and the Commission seems not to have paid a lot of attention to

⁴² Philippe Malaurie, *Le code civil européen des obligations et des contrats – Une question toujours ouverte*, JCP 2002.1.110 no 11 = *Pensée juridique* (note 6) 219, 224.

⁴³ See also Bénédicte Fauvarque-Cosson, *Droit européen des contrats: les offres sont faites, les dés non encore jetés*, D. 2008, 557.

⁴⁴ For criticism, see Martijn Hesselink, 'If You Don't Like our Principles We Have Others'; On Core Values and Underlying Principles in European Private Law: A Critical Discussion of the New 'Principles' Section in the Draft CFR, in *The Foundations of European Private Law*, pp. 59-72, (R. Brownsword, H. Micklitz, L. Niglia & S. Weatherill, eds., 2011).

them. The French authors of these works are, in the words of one French critic, like Lenin's "useful idiots"⁴⁵.

III. Cultural Images

In defending a French against a European Code, French critics invoke a number of arguments, but they can be grouped, roughly, under two headings: cultural, and political. Among the cultural topics, the most frequent argument holds the culture of a French Code against the lack of culture of a European Code. Closer analysis reveals that the opposite is argued as well: a European Code must be rejected precisely because it represents a culture.

1. Tradition versus Revolution

In one frequent juxtaposition, the French code is the fruit of tradition, while a European Code would represent a break with traditions. Lequette recounts how generations of French professors synthesized the principles of French law, until the code civil could be written in less than four months, based widely on the writings of Pothier⁴⁶. Similarly, the Catala project starts with praise for Portalis and Carbonnier, both of whom "had the same perspective of history, a deep understanding of the customs and traditions which make up the 'spirit of the centuries' and the sense that 'it is right to save everything that it is not necessary to destroy'".⁴⁷ As Portalis said, "The Codes of nations are the fruit of the passage of time; but properly speaking, we do not make them." The European code, this implies, is not just "étranger à la culture française,"⁴⁸ but opposed to all culture: it has no tradition at all – the *ius commune* notwithstanding.⁴⁹ The unity created by the French code had grown over centuries, while the unity created by a European code has not.⁵⁰ The European code project is thus an "utopie ... sans racines historiques ni culturelles,"⁵¹ It breaks, in other words, with existing tradition.

⁴⁵ Lequette (note 16) 1031.

⁴⁶ Lequette (note 13) no. 24; See also Jean-Louis Halpérin, *L'impossible code civil* (1992).

⁴⁷ Catala (note 22) no 1.

⁴⁸ Philippe Malaurie, "Petite note sur le projet de réforme du droit des contrats", *JCP (G)* 2008.I.204.

⁴⁹ Cf. Jean-Louis Halpérin, *Retour à un droit commun européen*, in *Pensée juridique* (note 6) 15.

⁵⁰ Lequette, (note 8) 31-32.

⁵¹ Philippe Malaurie, *L'utopie et le bicentenaire du Code Civil*, in *1804-2004* (note 8) 1, 7-8.

This is ironic. After all, such breaking with traditions is intrinsic to the French Code civil, too. When the Code civil was established, after the Revolution, one main purpose was to supplant old traditions—legal traditions, especially those of *droit commun* and *droit écrit*, but also, of course, ideological traditions of the *ancien régime*. Tellingly, then, the civil code is today advertised as the proper instrument of legal reform for such countries that lack their own legal tradition.⁵² And now, it is the European Civil Code that is criticized as being stuck in tradition. Christian von Bar is ridiculed for placing the Code in the tradition of Charlemagne, and thus ignoring the 1200 years of subsequent history.⁵³

2. Language: National vs. Universal Language

A related issue concerns language, an issue invoked far more frequently in France than elsewhere. The code civil is intrinsically linked to the French language.⁵⁴ The Code is regularly praised frequently for its style, for its clarity. Stendhal, thus the oft-repeated legend, would read a line from the code before writing any lines, in order to clarify his style.⁵⁵ Moreover, the Code civil itself is like a language. European law, by contrast, has no such language;⁵⁶ it is, in the words of one critic, a legal Babel.⁵⁷ And a European Code would not resemble a grown language but would be artificial—a “volapük juridique,”⁵⁸

⁵² Association Henri Capitant des amis de la culture juridique française, *Les droits de tradition civiliste en question—À propos des Rapports Doing Business de la Banque Mondiale* (2006) 82.

⁵³ Lequette (note 20) no. 11; Lequette (note 16) 1042.

⁵⁴ Gérard Cornu, *L'art d'écrire la loi*, in (2003) 107 *Pouvoirs – Le code civil* 5.

⁵⁵ Stendhal may have been partly in jest; the legend has been used less to praise the Code and more to criticize Stendhal. See M.L. Newman, *Stendhal and the Code civil*, (1970) 43 *The French Review* 434.

⁵⁶ Gérard Cornu, *Un code civil n'est pas un instrument communautaire*, *Dalloz* 2002 *chron.* 351 = *Pensée juridique* 57, 58: “Il n'y a pas de langue européenne.”

⁵⁷ Malaurie (note 12) no 13, p. 225.

⁵⁸ Lequette (note 13) no 13 ; Lequette (note 16) 1044. See for the term already Edmond Picard, *Le droit et sa diversité nécessaire d'après les races et les nations*, *Clunet* 28 (1901) 417, 422 ; Gérard Blandin, *Les interférences de la linguistique et du droit*, in Nicole M. le Douarin & Cathérine Puigelier (eds), *Science, Éthique et Droit* (2007) 33, 58.

an “Esperanto juridique”⁵⁹. It would thus share the fate of other artificial languages with no depth.⁶⁰

Again, however, this pair of images is found reversed. In the reversal, the French code civil itself overcame the “babel juridique”⁶¹ of different laws and languages in France. More, the Code Civil represents a universal language beyond France: Not only has the Code civil provided a model for numerous other codes,⁶² it has been translated numerous times. In the same vein, the Avant-Projet Catala was translated into six different languages to increase immediately its global reception. In this image, the strength of the Code Civil lies not in its close link to French language but rather in the universality of its language, its translatability. And now it is the European code, by contrast, that has its own peculiar language. In one way, this is the technical language of European bureaucracy – a language particular not to one specific country but to one group, and therefore not universal. Or, worse, the peculiar language of the European Code is English—the language of a common law system!⁶³ In response to this universalism, the French no longer oppose a babel juridique; they now insist on linguistic pluralism (by which they mean: the use French in addition to English).

3. Values versus Neutral Rationality

A third pair of images concerns the spirit of the law, especially (cultural) values and neutral rationality. Often, we read that private law concerns, primarily, “la culture, l’identité, la psychologie collective ... de chaque peuple.” The French Code civil represents such values from the beginning, but it has also, in turn, entered into the French

⁵⁹ Nicolas Charbit, *L’esperanto du droit ? La rencontre du droit communautaire et du droit des contrats*, JCP G 2002.1.100 ; Claude Witz, *Remarques conclusives*, Rev. Int. Dr. Comp. 2003, 1033, 1034; Yves Lequette, *Vers un code civil européen ?*, in (2003) 107 *Pouvoirs – Le code civil*, 97, 110. Previously, the Lando Principles had been called an *esperanto du droit* by J. Raynard, *Les principes du droit européen du contrat: une lex mercatoria à la mode européenne?*, Rev. Trim. Dr. Civ. 1998, 1006.

⁶⁰ On these, see Umberto Eco *The Search for the Perfect Language* (1995).

⁶¹ M. de Valroger, *Origines de nos institutions coutumières*, *Revue critique de legislation et de jurisprudence* 10 (1857) 239 247.

⁶² Sylvain Soleil, *Le code civil de 1804 a-t-il été conçu comme un modèle juridique pour les nations?* (2005), <http://fhi.rg.mpg.de/debatte/Code%20Civil/pdf%20files/0503soleil.pdf> with references in note 2.

⁶³ Cf. Ruth Sefton-Green, *Sense and Sensibilities: The DCFR and the Preservation of Cultural and Linguistic Plurality*, (2008) ERCL 281; id., *How far can we go when using the English language for private law in the EU?*, (2012) ERCL 30.

consciousness.⁶⁴ This emphasis on cultural values includes the law of contracts, which is cultural (and thus necessarily linked to the nation state.)⁶⁵ A European Civil Code, by contrast, has no spirit, no soul; it is “un syncrétisme juridique purement technique, sans racine, sans esprit et sans âme, de nulle part et de nulle époque”⁶⁶ Or, at best, it represents a cold economic rationality—like the common law, which the Doing Business Report appears to prefer, which (it is said) prioritizes efficiency over values.

And yet, in the flip version of the argument, it is the European Code which rests on values—though they are the wrong ones. The authors of the Code are biased—main proponents like Christian von Bar and Bénédicte Fauvraue-Cosson (the French member in the Commission).⁶⁷ By contrast, neutral institutions are opposed to the Code, among them the Fédération bancaire française and the Mouvement des Entreprises de France.⁶⁸ And indeed, in this juxtaposition the quality of the French code civil is precisely how it overcame the various irrational cultures of the ancien régime and replaced them with the rationality of natural law.

IV. Political Images

Related ideas concern not culture but politics. There is no doubt that the French Code civil is a political symbol, and a European Code would aim at the same role. Here, however, I want to focus only on political legitimacy. Legitimacy can refer to a code’s internal legitimacy, and it can refer to external legitimacy towards other countries.

1. Democracy vs. Technocracy

First internal legitimacy. In one pair of images, the code stands for French sovereignty, fought for through revolution and the liberation from feudalism, and thus for democracy and sovereignty. The code civil thus retains an eminently public, even constitutional, character; it is a “constitution civile.”⁶⁹ In particular, the ban on case law in its Article 5

⁶⁴ Cornu (note 56) 59.

⁶⁵ Thomas Genicon, Commission européenne et droit des contrats: “quousque tandem abutere patientia nostra?”, (2011) *Revue de contrats* 1050, 1057-58.

⁶⁶ Malaurie (note 48).

⁶⁷ Lequette (note 16) 1032.

⁶⁸ Lequette (note 16) 1033-34.

⁶⁹ Jean Carbonnier, *Le Code Civil*, in *II Les lieux de mémoire – La Nation* 293 (P. Nora ed.); cf. Yves Gaudement, *Le Code Civil*, “Constitution Civile de la France”, in 1804-2004

is viewed as an expression of democracy⁷⁰—even though of course case law plays a prominent role in France today, and legal systems with a case law like the English one can hardly be called undemocratic. And the code is an emblem of democracy—even if it did not arise from a democratic process, it displays, in the words of Raymond Troplong in the 19th century, an “esprit démocratique.”⁷¹ An EU code, by contrast, has no basis in the Treaties,⁷² and the entire European Union lacks legitimacy, at least beyond economic law.⁷³ The occasional suggestion that a European code could one day become the civil Constitution of Europe⁷⁴ is not popular in France. Moreover, the group developing a European code lacks democratic legitimacy, given that it consists only of experts not appointed by any state⁷⁵. Nor do the EU institutions have the necessary legitimacy in participatory democracy.⁷⁶ Theirs is a product based on technocratic expertise, not popular vote—a project favored by a bureaucracy that wants to extend its powers just because it is there, like the Soviet nomenklatura.⁷⁷

There is, however, again a contrasting pair of images. In this contrasting pair, the French Code stands for the genius not of democracy but of monarchy and imperialism. Monarchism is present in the continued veneration of Napoléon Bonaparte’s active role in the making of the French Code.⁷⁸ Napoléon’s famous quote, according to which his code will be the basis of his fame more than any military victories, is cited incessantly (though abridged).⁷⁹ The code is an imperial code, says Jean Foyer in admiration.⁸⁰ (It is

(note 8) 297; Rémy Cabrillac, *Le Code civil est-il la véritable constitution de la France ?*, (2005) 39 *Revue juridique Thémis* 245.

⁷⁰ Jérôme Huet, *Union européenne et démocratie: prohibition des arrêts de règlement et avis de l’article 5 du Code civil*, (2010) *JCP* 790.

⁷¹ Cf Jean-François Niort, *Le Code civil dans la mêlée politique et sociale—Regards sur deux siècles d’un symbole national*, (2005) *RTD civ.* 257, 281-83.

⁷² Most recently Genicon (note 65) 1056.

⁷³ Lequette (note 16) 1037-38.

⁷⁴ Vlad Constantinesco, *La “codification” communautaire du droit privé, future constitution civile de l’Europe?*, in *De code en code—Mélanges Georges Wiederkehr* (2009) 111.

⁷⁵ Lequette, (note 13) no. 17.

⁷⁶ Cécile Peres, *Livre vert de la Commission européenne: les sources contractuelles à l’heure de la démocratie participative*, (2011) *Revue des contrats* 13.

⁷⁷ Lequette (note 16) 1040.

⁷⁸ Eckhard Maria Theewen, *Napoleons Anteil am Code civil* (1991)); Jean-Louis Sourieux, *Le rôle du premier Consul dans les travaux préparatoires du Code Civil*, in 1804-2004 (note 8) 107 ; cf. *Jean-Louis Halpérin*, *L’histoire de la fabrication du code. Le code: Napoléon?*, (2003) 107 *Pouvoirs – Le code civil* 11.

⁷⁹ The quote is usually given as “Ce que rien n’effacera, ce qui vivra éternellement, c’est mon Code civil.” The original quote continues with rather mundane things that will live on

also a professorial Code—the Avant-projet Catala, like the Lando Principles, was authored by self-appointed professors, not by public vote.)⁸¹ And now the problem of the European Code is that it is not imperial enough. It is doubtful that the European project can succeed unless it is supported by “la magie, un charisme de géant.”⁸² Von Bar may be Pol Pot, but he is no Napoleon.

2. Self-Determination vs. Imperialism

Closely related is the idea that the French Code Civil is an emblem of national sovereignty and self-determination. France, we read, brought the idea of (national) sovereignty to Europe,⁸³ and the French Code is an expression of that sovereignty. The Code is a Code by and for the French. As such, it defies hegemonialist tendencies: “le droit français n’a conçu d’ambition pour autrui, seulement appliqué à se réformer lui-même.”⁸⁴ But if French law is the lamb, European law is the wolf⁸⁵ that will not allow such self-determination. What is aimed for – “un super-Etat qui domine les Etats subordonnés,”⁸⁶ – is hegemonialist. The project for a European Civil Code is a totalitarian one,⁸⁷ directed against such self-determination.

Again, this pair can be found flipped as well. The French Code is about French self-determination, but towards others it has also always been about imperialism. The expansion of the Code around Europe and the world⁸⁸ has always been a way for France to impose its power. That this influence has already declined⁸⁹ is deplored because it reduces the power of France over other countries. This leads to an opposite argument for the French Code: the French Code perpetuates also European influence on foreign

as well: “ce sont les procès-verbaux de mon conseil d’État; ce sont les recueils de ma correspondance avec mes ministres; c’est enfin tout le bien que j’ai fait comme administrateur, comme réorganisateur de la grande famille française.” Charles Tristan Montholon, *Récits de la Captivité de l’Empereur Napoléon à Sainte-Hélène I* (1847) 401.

⁸⁰ Jean Foyer, *Le code civil de 1945 à nos jours, in 1804-2004* (note 8) 275.

⁸¹ Sefton-(note 19) 354.

⁸² Jean Carbonnier, *Le Code civil des Français dans la mémoire collective, in 1804-2004* (note 8) 1045.

⁸³ Lequette (note 12) 412.

⁸⁴ Cornu (note 56) 60.

⁸⁵ Cornu (note 56) 60. A similar metaphor can be found in Genicon (note 65) 1053.

⁸⁶ Lequette (note 16) 1040.

⁸⁷ Cornu (note 56) 60; Lequette (note 8) 28.

⁸⁸ Fauvarque-Cosson/Patris-Godechot (note 18) 15 ff.

⁸⁹ Fauvarque-Cosson/Patris-Godechot (note 18) 73 ff; Filippo Ranieri, *L’influence du Code civil sur les codifications du 19^{ème} siècle: essor et déclin d’un modèle européen,* in *Liber Amicorum Guido Alpa. Private Law Beyond National Systems* (2007) 831.

countries.⁹⁰ If the code civil is lost, European influence on the rest of the world will suffer. Even a reform of the French Code alone will reduce this influence if it makes the Code less French by abandoning *la cause*.⁹¹ A European civil code cannot likely flourish in the same way,⁹² not least because the drafters of a European Code forget about the importance of imperialist thought.

3. Pluralism vs. Universality

A last pair of images is that of uniformity and pluralism. The Portalis quote mentioned in the introduction is a frequent reference in France: laws must be made differently for different peoples.⁹³ The French Code is inseparably linked to French identity – it is based on this identity and in turn contributes to this identity. The same is true in theory for other countries (even though French authors do not pay particular attention to those.)⁹⁴ European codification aims at establishing (or reestablishing) a European culture⁹⁵, a European national identity.⁹⁶ But this is futile: A European Code would be a utopia, the law of no place, a false empty universalism. The uniformity brought about by a European Code would be a futile attempt to erase differences between peoples, “un levier permettant d’accentuer et d’accélérer la fusion des peuples de l’Europe en une seule entité.”⁹⁷ Europe is necessarily plural;⁹⁸ its plurality is that of nation states: “le génie de l’Europe tient dans sa profonde diversité”.⁹⁹ Cabrillac suggests that “la nation doit précéder le Code et non l’inverse”

⁹⁰ Lequette (note 13) no. 13

⁹¹ Pierre Catala, Deux regards inhabituels sur la cause dans les contrats, Répertoire du notariat Defrénois 2008, 2365, 2373-2381.

⁹² Jean Foyer, Le code civil de 1945 à nos jours, in 1804-2004 (note 8) 275, 296.

⁹³ Malaurie (note 12) no 12, p. 225.

⁹⁴ Cf. Cornu (note 56) 57.

⁹⁵ On which see Ralf Michaels, Legal Culture, in Max Planck Encyclopedia of European Private Law (2012) 1060.

⁹⁶ Christian Kirchner, A “European Civil Code”: Potential, Conceptual, and Methodological Implications, 31 U.C. Davis L. Rev. 671, 673 (1998).

⁹⁷ Lequette (note 16) 1040.

⁹⁸ Lequette (note 16) 1041.

⁹⁹ Alain Ghozi & Raymonde Vatinet, Response to the 2010 Green Paper, http://ec.europa.eu/justice/news/consulting_public/0052/contributions/164_fr.pdf, p. 5.

And yet this is a strange flip of the old image of the French Code as universalist and antipluralist.¹⁰⁰ Portalis was the first to emphasize how the Code civil overcame regional identities:

Nous ne sommes plus Provençaux, Bretons, Alsaciens, mais Français ... la loi est la mère commune des citoyens, elle leur accorde une égale protection à tous.¹⁰¹

Lequette makes the same point in favor of nations, now against a Europe of Regions:

Les régions qui sont appelées à prendre la suite des nations se définissent, en effet, dans la conception allemande par une communauté, réelle ou plus ou moins fantasmagorique, d'essence ethnique: les Corses, les Basques, les Flamands, les Bretons, les Provençaux, les Occitans, les Savoyards, etc.¹⁰²

In fact, we might say that the French Code civil was not made by the nation; it made the nation—an insight that would mirror Anderson's point that nation states create the nations they embody, not the other way round.¹⁰³ And this universalism works externally as well. From the beginning, the natural law ideas underlying the Code aimed at potential universality.¹⁰⁴ The code is "l'expression d'un droit naturel universel et d'un véritable jus commune valable en tous pays;"¹⁰⁵ this universalism was a core reason for its global success.¹⁰⁶ but this is true only for a grown code like the French one. A European Civil Code, as a mere collection of rules, could not achieve the same universal character.¹⁰⁷

V. What to Make of all This

The main gist of all these arguments may seem obvious. Where a European Code threatens to replace the code civil with something different, it must be opposed. Where, by contrast, the code civil is allowed to become a European Code—whether directly,

¹⁰⁰ Norbert Rouland, *L'État français et le pluralisme: histoire politique des institutions publiques de 476 à 1792* (1995) 332 ff.

¹⁰¹ Portalis, *Motifs*, in *Code civil français: Discours et exposé des motifs IV* (1804) 489 at 497, 498.

¹⁰² See, more extensively, Lequette (note 12) 450-57.

¹⁰³ Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (new ed. 2006).

¹⁰⁴ See Soleil (note 62).

¹⁰⁵ Bruno Oppetit, *L'avenir de la codification*, 24 (1996) *Droits* 73, 74.

¹⁰⁶ Frédéric Zenati-Castaing, *L'avenir de la codification*, (2011) *RIDC* 355, 366ff.

¹⁰⁷ *Ibid.* But cf. Bénédicte Fauvarque-Cosson, *Codification et droit privé européen*, in *Études à la mémoire du Professeur Bruno Oppetit* (2009) 179 (suggesting that European law today is more in accordance with Oppetit's suggestions).

through adoption elsewhere, or indirectly, through stronger influence on European lawmaking, Europeanization is supported. The arguments for national particularity and self-determination apply to France, not really to others. The French internationalism is, in reality, a French hegemonialism. If this is so, then nationalism and internationalism are two sides of the same coin and mutually consistent positions—even if the images of code that are used for their support are not.

And yet, this alone does not prove the counterposition right. It does not seem crazy for French critics to view the German position towards a European civil code as an imperialist one.¹⁰⁸ If the Germans are more influential at the moment, this may be all the more reason to oppose them. Moreover, although the positions of critics are internally incoherent, quite likely the same dichotomy could be demonstrated amongst proponents of a European code who face the same problem—to defend one code against another.

It would thus be inadequate to reject the French positions as signs of parochialism and nationalistic arrogance. Of course they are, but not necessarily any more so than those of proponents of a European Code. Nationalism may have a pejorative meaning today. But if Lequette is right and its opposition is empire, then it is not clear which is better.¹⁰⁹ Moreover, we know that nationalism tends to rise in times of turmoil and crises of legitimacy—either after revolutions, or in face of outside pressure. France is experiencing a time of outside pressure, with a growing feeling that French law and the Code Civil are in decline.¹¹⁰ No wonder that people remember fondly the time of the Code's greatest strength.

I believe we gain more if we take the inconsistencies in the French position as representative not just of the French but instead of modern law more generally. What we see is an expression of a general problem of both modern law, especially in the traditional

¹⁰⁸ Christian Joerges, *Europe a Großraum?* Shifting Legal Conceptualisations of the Integration Project, in Christian Joerges & Navraj Singh Ghaleigh (eds), *Darker Legacies of Law in Europe The Shadow of National Socialism and Fascism over Europe and its Legal Traditions*, (2003) 167.

¹⁰⁹ The obvious reference is Michael Hardt & Antonio Negri, *Empire* (2000).

¹¹⁰ Rémy Cabrillac, *L'avant-projet de réforme français du droit des obligations*, in Vincent Sagaert (ed.), *La réforme du droit privé en France – Un modèle pour le droit privé européen?* (2009) 59, 60.

form of codification,¹¹¹ and of nationalism (which of course once *was* modern)—the tension between nationalism and universalism,¹¹² internal peace and external violence, between inclusion and exclusion,¹¹³ rationalism and antirationalism.¹¹⁴ Such tensions can be patched over within one legal system, but where two structurally comparable projects confront each other, they come to the fore. If the critics fail to present a coherent defense of the French code civil, they are nonetheless successful in the critique of a European code, insofar as the inconsistency of their position applies to the latter as well. If the French code falls, so does the European code.

Inconsistency is not necessarily failure—it can, and often is, overcome by an act of faith.¹¹⁵ George Fletcher once referred to the Code as one of three “nearly sacred books” of the Western legal tradition.¹¹⁶ Indeed, its veneration has always had somewhat religious characteristics;¹¹⁷ its support seems a matter not just of rationality but of faith. This matches not only Alain Supiot’s suggestion for a religious basis of our modern law.¹¹⁸ It is also in accordance with Ulrich Wehler’s suggestion that nationalism has a quasi-religious element to it.¹¹⁹ The French code civil, like the French nation, may once have been the essence of modernity. Against the conflicting modernity of the EU and a European Code, it is reinvented as a premodern artefact, worthy of protection just because it is there.

And yet, the frequent invocation of military metaphors are worrying. What we see is reminiscent of a religious war. Different sects within the same religion (the civil law)

¹¹¹ This argument does not necessarily apply to alternative conceptions of Code, be they postmodern (Zenati-Castaing [note 106] 373 ff.) or political (Ugo Mattei, *Hard Code Now!*, [2002] *Global Jurist Frontiers* Vol. 2 Issue 1; Hugh Collins, *The European Civil Code: The Way Forward* [2008]).

¹¹² Zenati-Castaing (note 106) 368-69.

¹¹³ Pierre Legrand, *Codification and the Politics of Exclusion: A Challenge for Comparativists*, (1998) *U.C. Davis L. Rev.* 799.

¹¹⁴ André-Jean Arnaud, *Les origines doctrinales du Code civil français* (1969).

¹¹⁵ Cf. Ralf Michaels, *Rollen und Rollenverständnisse im transnationalen Privatrecht*, in 45 (2011) *Berichte der Deutschen Gesellschaft für Völkerrecht* 175, 216-18.

¹¹⁶ George Fletcher, *Three Nearly Sacred Books in Western Law*, 54 *Ark. L. Rev.* 1 (2001-2002).

¹¹⁷ Paolo Cappellini, *L’Ame de Napoléon: Code civil, Säkularisierung, Politische Form*, in 200 *Jahre Code civil: Die napoleonische Kodifikation in Deutschland und Europa*, edited by Werner Schubert, Mathias Schmoeckel, p. 1 (2005).

¹¹⁸ Alain Supiot, *Homo Juridicus: On the Anthropological Function of the Law* (2007); cf. Paul W. Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty*

¹¹⁹ Hans-Ulrich Wehler, *Nationalismus – Geschichte, Formen, Folgen* (2d ed. 2004) 27-35.

fight aggressively, although—or perhaps because—their positions are so close to each other. And they request two things simultaneously: the freedom to exercise their religion (expressed as nationalism) , and the recognition of their religion as the official one (expressed as internationalism.) Now, Europe has its experience with such religious wars. Perhaps, in due course, the differences between a French and a European Code will look as subtle as those between Protestants and Catholics look to many of us today. Until then, it would be foolish to underestimate their potential.