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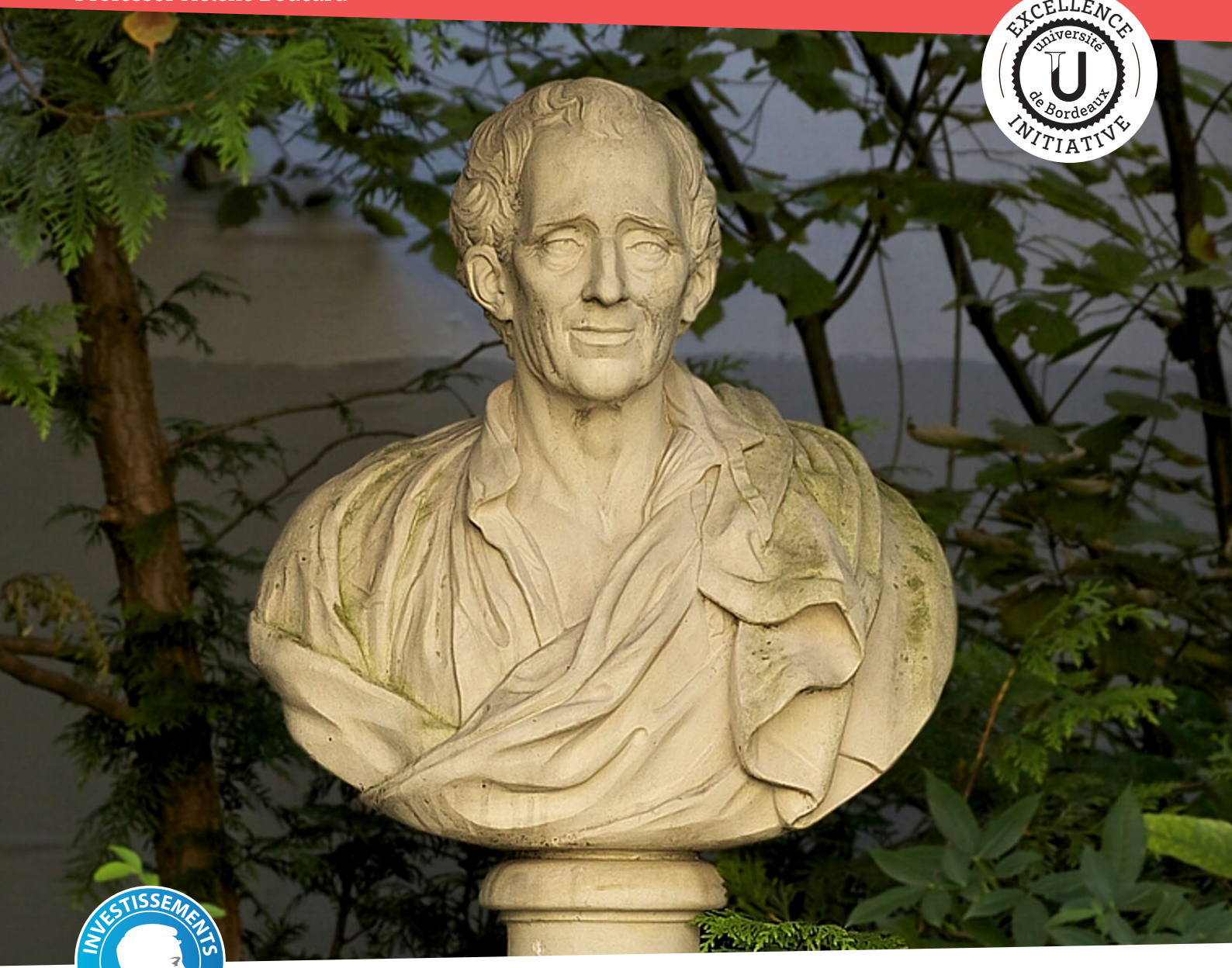

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Contract law:

The curious process of reforming France's law of obligations

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For a long time, the reform of France's law of obligations seemed impracticable. Desired since the centenary of the Civil Code and announced at its bicentenary, the reform – which concerned French legal doctrine, above all – had yet to see the light of day. Unlike Germany, which had already completed out its *aggiornamento* (1), France simply could not manage the modernisation of her own law of obligations when she had succeeded in revising her law of succession, securities law and statute of limitations.

At the time of the Civil Code's centenary, in 1904 (2), Germany's BGB had just come into force (3). In the eyes of certain French scholars, in matters of the law of obligations, the German Code was more modern while their own was already out of date. For decades, however, case law took liberties with legislation; to some extent, it managed to adapt the law with the legislature only having to intervene on an *ad hoc* basis. Come the late 1920s, a draft Franco-Italian Code of Obligations had been drawn up but got no further (4). At the end of the Second World War, a *Commission de réforme du Code civil* (Commission for the reform of the Civil Code) was set up; it toiled for a decade but its efforts proved fruitless too – at least as far as the law of obligations was concerned (5). From the 1960s onwards, entire chapters of the Civil Code were overhauled, particularly in the law of persons and family law. This regeneration (or at least its beginnings) owes a great deal to the alliance forged between legal knowledge and political power: Dean Jean Carbonnier and the then Minister of Justice, Jean Foyer, not to mention Dean Gérard Cornu for the *Code de procédure civile* (Civil Procedure Code). On the other hand, the letter of the law of obligations has essentially remained unchanged. Amendments have been marginal if not minor. There appears to be no sense of urgency in reforming it; legal practitioners and scholars have accommodated the status quo. This, however, amounts to a "*décodification*" (6) as the "living law" of obligations is to be found outside the Civil Code, in the *Bulletin* of Court of Cassation decisions.

The end of the 20th century gave new European and international impetus to the reform of the French law of obligations. A number of phenomena came together to encourage the reform (part I below), including the growing influence of the European Union, the danger of a decline in France's own influence, or even the new wave of national (re)codifications in a context of global competition. Nevertheless, French divisions relative to the various ways for reform are so many obstacles to real recodification (part II below). The doctrinal controversies relating to the direction to be taken by the new law of obligations have long resulted in stagnation.

Political leaders, now impatient to achieve the reform, have opted for a more expeditious process – the ordinance technique rather than resorting to statute – which has itself sparked institutional debate.

I. European and international incitement to reform the French law of obligations

The initial attempts at reform did not relate to the law of obligations as a whole, but focused instead on one aspect of it: sales law, the historic model for the theory of contract. These vague desires to reform the special law of contract sprang from the national transposition of two European directives in the field of consumer protection (see A below). Responsibility for defective goods, then consumer goods guarantees still stand as missed opportunities for France. The need to reform the general law of contract became all the more acute in light of the increased competition between national laws on a European and, beyond that, an international level (see B below).

A. National transposition of directives and the vague desires to reform the special law of contract

The EC Directive of 25 July 1985 on responsibility for defective goods ought to have been transposed by 1988; this was only done in 1998, ten years later, by a statute of 19 May 1998 incorporated into the Civil Code under Title IV *bis* which follows Title III, *Of contracts and conventional obligations in general* and Title IV, *Of undertakings formed without an agreement*.

There are various reasons for this delay. Firstly, the scheme provided in the directive is, in some respects, less favourable to victims than French law, be it legislation or case law (7). The legislature therefore only resigned itself to transposing the directive once the European Court of Justice gave judgment against France. The legislature was in even less of a hurry as the contaminated blood scandal had been unearthed, a matter in which a number of political leaders were likely implicated. Furthermore, the economic and voluntary sectors, together with scholars, clashed over the possible exemption of producers on grounds of "development risks". Finally, from 1988 onwards, a draft bill was produced by a working party chaired by Professor Jacques Ghestin (8). The draft bill went beyond the transposition of the EC directive on responsibility for defective goods, proposing a partial overhaul of the Civil Code in the form of a renewed sales law. This was particularly ambitious, as sales are the model on which the French law of contract is based. The ambitious nature of the draft bill is doubtless one of the reasons for its failure as there was no academic consensus on sales law.

This holds also true for the EU Directive of 25 May 1999 on sale of consumer goods and associated guarantees (9). From the French point of view, this directive again presented the disadvantage of being, in some respects, less favourable to the consumer than the Civil Code and the relevant developments in case law, particularly as the Directive draws on the United Nations Vienna Convention on Contracts for the International Sale of Goods 1980, conceived for international traders. On the other hand, the Directive had the advantage of simplifying those obligations falling to the vendor: from 1804 onwards, case law and doctrine had complicated matters at will, and to such an extent that the subject had become a veritable maze for practitioners. The transposition of the EU Directive was therefore the opportunity to overhaul sales law and perhaps even the law of obligations (10). This was the path successfully taken by Germany, with the "great transposition" brought about by the Act of 26 November 2001. France missed another opportunity, again for various reasons and doctrinal divisions in particular.

Indeed, in 2002 a working party chaired by Professor Geneviève Viney submitted a draft bill to the Ministry of Justice which went beyond the transposition of the EU Directive and aimed to modernize French sales law (11). Professor Olivier Tournafond, who was hostile to the proposed legislation, mobilized members of various professional communities and drafted a counter-

proposal (12). Again, the lack of academic consensus was obvious to France's political power, which consequently opted for a *petite transposition* or small-scale transposition: the directive was not transposed into the "big" code, being the Civil Code, but rather the "little" code, being the *Code de la consommation* or French Consumer Code (by an Ordinance of 17 February 2005, ratified by statute on 5 April 2006 (13)). France therefore did not manage to reform its special law of contract.

Since that time, the *Association Henri Capitant* has set up a working party chaired by Professor Jérôme Huet, with a view to reforming the law of special contracts, but the current status of the group's work is not known.

B. International competition and the need to reform the general law of contract

In 2004, France celebrated the bicentenary of the Civil Code (14), a venerable ancestor naturally considered even more ancient than it had been in 1904. The political power seemed to become aware of the urgent need for reforming the law of obligations. During the conference held at the Sorbonne to mark the bicentenary (15), President Jacques Chirac promised the legal overhaul within a period of five years, by ordinance (16). A number of factors contributed to that sense of urgency.

Firstly, the BGB had taken on a new lease of life with the major legal reform in 2001 (17). Franco-German rivalry being what it is, it was high time that France's Civil Code be updated. Furthermore, after Quebec and the Russian Federation, Europe had witnessed a wave of recodification of national laws of obligations (18); France therefore ran the risk of isolation.

This, secondly, was because international competition between legal systems was intensifying (19). The World Bank published its famous – and fallacious – *Doing Business* reports, which wrongly concluded that the legal tradition in continental Europe was economically inefficient. A very recent impact study conducted by the French government claimed that the sheer age of the French law of obligations harmed the competitiveness of French businesses (20). Aside from the fact that such an assertion is far from convincing (21), it all too prosaically reduces civil law to little more than a servant of the economy.

The European Union likewise put the national laws of its Member States in competition, with France and Germany as frontrunners, be it for negotiating harmonization directives and standardization regulations, or for initiatives with a view to establishing, if not a European Civil Code (22), then a unified European contract law based on sales law (23).

France was therefore a little late in acknowledging the European Union's tightening hold on her civil law and the phenomenon of international competition between legal systems. If she was to retain or regain her influence, she too would have to breathe new life into her law of obligations.

It is one thing to say it, but quite another to do it: far from becoming less stark, French divisions have resurfaced on the subject of the various ways for reform.

II. French divisions on the ways for reform of the law of obligations

Over the course of almost a decade, the doctrinal hubbub born out of the rivalry between different draft bills led to a stalemate on the reform (see A below). For the last year, the controversial

"eviction" of the French Parliament has aimed to speed up the reform process: opting for the hybrid path of an ordinance rather than a statute would, it is claimed, condition the successful completion of the reform (see B below).

A. Doctrinal hubbub and stalemate on reform

At first, a working party was set up under the chairmanship of Professor Pierre Catala, bringing together a large number of scholars, many of whom were members of the *Association Henri Capitant*. A White Paper titled *Rapport pour une réforme du droit des obligations et de la prescription* (hereinafter referred to as the Catala draft bill) (24) was submitted to the Ministry of Justice in September 2005, a report in which the working party adopted a double standpoint.

From the French perspective, the reform had to be effective: in order to be readily adopted, it had to create consensus; it therefore had to be an evolution rather than a revolution. There was no need to upset everything; it was simply a matter of updating the existing legislation to include the case law *acquis*. Consequently, while there was no shortage of innovation, it was often a recodification of established or almost established law, through the codification of case-law constructs (i.e. by integrating into the Civil Code those new solutions enshrined by the Court of Cassation as guided by the existing legislation).

From an international and European perspective, the reform had to be French. There was no point in systematically discarding what foreign commentators sometimes considered an exception. It was not necessary for the French law of obligations to lose its identity in order to (re)gain its rightful place. It was a matter of making the law clearer, modernising it in the very spirit that nurtures that law. Thus the French legislative model, renewed and revitalized, can continue to influence within the European Union and beyond. For instance, the theory of the "*cause de l'obligation ou du contrat*" or cause of the obligation or the contract, rechristened "*cause de l'engagement*", or the cause of the commitment (25).

This *"offre de loi"* (26) – literally, "offer of law" – made by legal doctrine to the political power was of a particularly high standard, though there was a degree of disagreement with some of the proposed solutions (27). This draft bill had the enormous merit of being in existence; the discussions could then begin in order to refine and amend it. There was hope, finally, that the reform would come to pass.

Secondly, a Court of Cassation working party set up by the then First President of the Court, Guy Canivet, issued a report that painted a mixed portrait of the Catala draft bill (28). One may be led to wonder whether it was fully representative of the Court of Cassation's doctrine as, without any real degree of coherence, the report criticises solutions put forward in the draft bill which draw inspiration from the same court's case law. A number of scholars supported the objections (29), which was more than a little surprising as they were contributors to the Catala draft bill. It is true that Dean Jean Carbonnier died before the bill could be published covered by his authority his passing, which preceded that of Dean Gérard Cornu and then Professor Pierre Catala, also marked the collapse of a rampart.

There was therefore no consensus: neither academic (within the *École*), nor with the Court of Cassation (between the *École* and the *Palais*). Reluctant and ill-informed, the political power dithered. The Catala draft bill was not adopted, and the Government drew up its own in 2008 (30).

There would be more of these government draft bills which would immediately be discussed in French legal doctrine. Conversely, the reform of the statute of limitations was finalised by the Act of 17 June 2008, which has since been codified.

Thirdly, a working party chaired by Professor François Terré under the auspices of the *Académie des sciences morales et politiques*, competed with the Catala draft bill. From 2009 onwards, a counter-proposal (hereinafter referred to as the Terré draft bill) was published in three parts: contract, liability, *"régime général de l'obligation"* (31) or the law of obligations in general (32). The Terré draft bill, which was also of a particularly high standard, challenged the Catala draft bill – obviously, otherwise the whole initiative would have been meaningless. On the one hand, the modernisation of the law of obligations had to be radical, and it had to be European. It was appropriate to erase that which had made French law unique and, if not "denationalise" it, at least make it more "Euro-compatible": neutral enough for it to be understood overseas and particularly within the European Union. For instance, the Terré draft bill strove to do away with the theory of cause (if not the theory of the object), for which it substituted "*the content of the contract*" (33). In doing so, the draft bill sacrificed the French model and its international influence for the sake of European integration, thus abandoning one of the major concerns of the Catala draft bill. On the other hand, the latter was an expression of a constant intention to compensate victims in civil cases; the Terré draft bill showed itself less generous towards them, hinting at the stance adopted in the BGB, which incidentally was not universally popular in Germany.

Consensus seemed impossible: fierce competition between the different doctrinal draft bills was never synonymous with dialogue. Moreover, the situation was further complicated by another division which did not always coincide with the previous one. There were two schools of thought in French doctrine with, on the one side the proponents of liberalism, even ultra-liberalism in the law of obligations; and, on the other side, the supporters of social proactivity, a less economistic and more human conception of the subject.

France's reform of her law of obligations therefore reached a stalemate. The Ministry of Justice either could not or would not choose: all of its draft bills, from the first in 2008 to the last in 2013, sought a third way, a different balance. In the meantime, a bill submitted to the Senate in 2010, looking to reform civil, contractual and extra-contractual liability, fizzled out (34).

B. "Eviction" of Parliament and completion of the reform?

Wishing to bring the reform to a swift conclusion, the Ministry of Justice preferred the hybrid technique of the ordinance over the ordinary legislative process ***(1)***; that choice sparked a symbolic and institutional conflict between the Senate on one side, the Government and the National Assembly on the other ***(2)*** (35).

1. The alternative between a hybrid and a legislative process

On 27 November 2013, the Government put a bill before the Senate, under an accelerated procedure, asking Parliament (*inter alia*) to allow it to reform the law of obligations by means of an Ordinance (36). The promise made by Jacques Chirac would finally be kept, during President François Hollande's five-year term of office.

A few points of constitutional law will be useful at this juncture.

Under Articles 34 and 37 of the French Constitution, the Government has statutory competence to adopt regulations (decrees or orders) while Parliament has exceptional competence to vote on statutes. Within the scope of that exceptional competence, firstly Parliament has an exclusive province in which the Government may not intervene. Here, Parliament alone may set the "*exact rules*" applicable, such as the determination of serious crimes, other offences and the penalties these carry. Secondly, there is a province shared with the Government. Here, Parliament only sets downs the "*fundamental principles*" while the exact rules are set by the Government. This is precisely the case for civil and commercial obligations.

Under Article 38 of the Constitution, the Government may also ask Parliament for authorisation to adopt measures by ordinance that would usually fall within the remit of Parliament's competence. Where the latter consents to the request, the Government adopts the ordinance, which is a temporary regulation. On the expiry of the authorisation period, either Parliament ratifies the ordinance and it becomes a statute; or Parliament refuses to ratify the ordinance and the regulation is null and void. Unlike statutes, reform via ordinance therefore amounts to a hybrid process, part regulatory, part legislative.

Coming back to the law of obligations, on 15 January 2014, *Les Echos* (a financial daily newspaper) was the first to publish on its website an incomplete working paper dated 23 October 2013, presented as the Government's draft reform of the law of obligations by ordinance. Proponents of French civil law doctrine had been hoping that the law, drafted in secret by the Ministry of Justice, would finally be revealed – only this was done by the press. Unfortunately, the document was a disappointment, written in a style that was frequently awkward, containing solutions that were sometimes poorly thought out; a patchwork of the Catala and Terré draft bills, the coherence of which left much to be desired as a result. That was regrettable: such a text could not breathe new life into the French law of obligations, especially as it broke the subject matter up: in accordance with the draft enabling law, the draft ordinance concerned contracts, quasi-contracts and the *"régime général de l'obligation"* (37), excluding civil, contractual and extra-contractual liability.

2. Antagonism between the Senate, the National Assembly and the Government

The Senate's resistance: Unlike the National Assembly, the Senate is not directly elected by the people but by the *grands électeurs* or electoral colleges. The political opposition groups are occasionally less at odds, and there are instances where the majority is less submissive to the Government. As with the Assembly, before the Senate votes on a bill, the latter is put before a Committee, the *Commission des lois* or Law Commission, which produces a report (be it positive or negative) and has the power to amend the text that is read before the Senate Chamber. In the present case, in light of the Report (38) dated 15 January 2014, the Law Commission refused to authorize the Government to reform the law of obligations by ordinance. The members of the Commission were unanimous in their refusal, regardless of their political persuasion. Consequently, the request for authorization no longer featured in the text put to the vote in the Senate on 21 and 23 January 2014 (39). During those public debates held on 21 (40) and 23 January (41), the Senators politely but firmly resisted the arguments put to them by the Minister of Justice, Christiane Taubira. The amendment tabled by the Government, intended to reintroduce the authorization, was rejected almost unanimously: only one Senator voted in favour.

The grounds for the Senate's rejection of its arguments prompted the Government to exercise caution and give further consider to the reform.

The Senate, sitting in committee then in plenary session, did not deny the urgent need to reform the law of obligations. It stated, however, that the urgency was not reason enough to bypass Parliament, which had already shown that it could pass laws quickly.

Nor did the Senate deny that the civil law issues were technical and difficult. It stated that Members of Parliament were neither more nor less knowledgeable than the drafters at the Ministry of Justice. Parliament had also shown in the past that it was able to pass good civil laws, as with the statute of limitations or the law governing inheritance – this is doubtless a rose-tinted view of things, when one thinks that those reforms are tinged with defects.

Above all, the Senate stressed that, quite beyond the matter of legal techniques, the law of obligations raised political and economic issues that required Parliament's involvement. Difficult choices had to be made, balances to be struck in matters relating to civil liability, contracts and the *"régime général de l'obligation"*.

It would take time, a mature discussion that only Parliament could conduct. Furthermore, experience shows that ordinances in civil matters are rarely any good. Once the authorization has been granted to the Government, when the ordinance is put before Parliament for ratification, it is too late to make any far-reaching amendments, even where the ordinance proves to be ill-conceived and/or poorly drafted.

In short, according to the Senate, the reform of the law of obligations by ordinance constitutes a denial of democracy.

As a jurist and a citizen, one can feel torn: history does not always repeat itself. The Civil Code of 1804 was drafted by some great legal scholars, such as Portalis, Bigot-Préameneu, Tronchet and Maleville, who surrounded Napoleon on the *Conseil d'État* (or even Merlin de Douai, more controversially). Parliament was "purged" by side-lining opponents, thus allowing a vote within a few months on an unadulterated law. The Civil Code is therefore not a result of the democratic process. However, despite (though perhaps thanks to) that, it is a *"beau droit",* a beautiful law of obligations. After Demolombe, Glasson and Giraud (42), Dean Jean Carbonnier said that the Code was, symbolically, "France's civil constitution" (43). But those times have passed. Foyer, Carbonnier, Cornu and Catala are no more. Who will stand as the heirs of Portalis and his peers now?

Had there been scholarly consensus, we could perhaps have imagined that the Government would have reformed the law of obligations by ordinance. It would have saved on postures so vain as the disappearance from the Civil code of the *"bon père de famille"* (44), deemed patriarchal and therefore archaic and an affront to gender equality (45). Insofar as there is no such consensus, however, is it not inevitable that the nation's representative, Parliament, should be called upon to decide on the reforms to be made? No matter what it says, the Ministry of Justice is all too aware of the discord. This is why it excluded civil, contractual and extra-contractual liability from the draft ordinance; incidentally, a bill will soon be put before Parliament – a bill that was apparently fully drafted in the summer of 2012 but never disseminated. A comparison of various draft bills,

whether doctrinal or governmental, reveal a lack of consensus on many more aspects of the law of obligations (46).

The obedience of the National Assembly: Deaf to the Senate's admonition, on 24 January 2014 the Government nevertheless put the bill before the National Assembly (47), which proved to be rather more docile. At the meeting of the Law Commission on 19 February 2014, the rapporteur stated that he had suggested that the Government not present an amendment with a view to reintroducing the authorization only in public session, so as to allow the Minister of Justice to present her arguments (48). This is why it does not feature in the Commission's text that was tabled for reading before the National Assembly (49). Indeed, during the public debate held on 16 April 2014 (50), each objection raised by the Senate was swept aside by Christiane Taubira, asserting that an ordinance would be the only avenue for modernising the law of obligations (liability being excluded), before the end of the five-year term: the reform would therefore be done, or it would not. Consequently, and despite opposition objections, the authorization was granted by the National Assembly (51) – with an indefinite majority, because there was no accurate count of the vote by show of hands.

In accordance with Article 45 of the Constitution, the conflicting votes of the two Houses led to a meeting of a joint committee, without a second reading beforehand as this was an accelerated procedure. Unsurprisingly, at the meeting held on 13 May 2014, the committee failed to reach a consensus (52). The authorisation bill will therefore be subject to a further reading before the National Assembly (53) and the Senate. The Assembly will have the last word and, unless there is some unlikely turnaround on its part (54), so will the Government which will, sooner or later, obtain the authorization necessary to reform the law of contracts, quasi-contracts and the *"'régime général de l'obligation"* by ordinance. Meanwhile, again unless there is some unforeseen about-turn, the overhaul of the law relating to civil, contractual and extra-contractual liability, will remain in Parliament's hands. This dividing up of the law of obligations between the executive and the legislature bodes ill for the coherence of the recodification.

The pangs experienced in reforming the law of obligations are not France's preserve alone: the German *aggiornamento*, to name but one, was not without its issues either (55). The least we could have expected, however, was a modernisation process for a French law of obligations for the 21st century that was more worthy of the stakes involved.

A comparison with other civil recodifications is edifying. The more former are exemplary: over the course of decades, Québec (56) and the Netherlands (57) have cultivated a dialogue between doctrine and practice, Ministry of Justice and Parliament. The quality of the resulting statutes contributes to their international influence. The German method, though not as long, is similar to the previous one. The new Romanian Civil Code, the most recent, also associated Parliament with a Commission of academics set up by the Ministry of Justice (58). For the Russian Federation, the recodification initiative, more closely subject to the presidential influence, has not escaped parliamentary discussion either (59). By contrast, France chose a very curious process of reform of her law of obligations, as disjointed in its substances as in its authors. Is it that a civil recodification?

Notes:

(1) *Schuldrechtsmodernisierungsgesetz*, *Modernization of the Law of Obligations Act*, November 26th, 2001; see, specifically, R. Zimmermann *The New German Law of Obligations* Oxford University Press 2005, p. 30; German Civil Code, *Bürgerliches Gesetzbuch (BGB)* translation and commentary, Juriscope / Dalloz 2010.

(2) *Livre du centenaire du Code civil* Duchemin, Paris, 1904.

(3) See, specifically, R. Saleilles *Étude sur la théorie générale des obligations dans la seconde rédaction du projet de Code civil pour l'Empire d'Allemagne* Cotillon, Paris, 1895; by the same author, *Étude sur la théorie générale des obligations dans le premier projet de Code civil pour l'Empire d'Allemagne* Pichon, Paris, 1901.

(4) See C. Witz "*La longue gestation d'un Code européen des contrats – Rappel de quelques initiatives oubliées*", *RTD civ.* 2003 p. 447.

(5) See *Travaux de la Commission de réforme du Code civil* (années 1948-1949) Sirey 1950, recension *in RID comp.* 1950 p. 568, http://www.persee.fr/web/revues/home/prescript/article/ridc_0035 and references in previous volumes.

(6) On this point, see e.g. P. Remy "*Le processus de dé-codification*", J.-P. Dunand and B. Winiger (ed.) *Le Code civil des français dans le droit européen* Bruylant 2005 p. 197.

(7) See again: *La responsabilité du fait des produits défectueux* (Groupe de recherche européen sur la responsabilité civile et l'assurance, GRERCA) IRJS Éditions 2013.

(8) See J. Ghestin "*L'avant-projet de loi sur la responsabilité du fait des produits défectueux : une refonte partielle du code civil*", *Rev. jurispr. comm.* 1988 p. 201.

(9) See. H. Boucard *L'agréation de la livraison dans la vente, Essai de théorie générale* Université de Poitiers diff. Lgdj 2005 preface by P. Remy.

(10) See e.g. P. Jourdain "Transposition de la directive sur la vente du 25 mai 1999 : Ne pas manquer une occasion de progrès", *Dalloz* 2003, Point de vue, p. 4.

(11) *Rapport général du groupe de travail sur l'intégration en droit français de la directive nº 1999-44 du Parlement européen et du Conseil du 25 mars 1999 sur certains aspects de la vente et des garanties des biens de consommation* (General Report of the Working Party on incorporating Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees into French law) http://www.justice.gouv.fr/art_pix/0000.pdf; see *La transposition en droit français de la directive européenne du 25 mai 1999 relative à la vente* Conference 8 Nov. 2002, Univ. Paris I Panthéon Sorbonne, *Cah. dr. entr.* 2003 n° 1.

(12) *Proposition de transposition de la directive du 25 mai 1999 sur certains aspects de la vente et des garanties des biens de consommation* (Proposal on the transposition of the Directive of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees), in conjunction with the Fédération des Industries Électriques, Électroniques et de Communication (FIEEC – Federation of Electrical, Electronic and Communications Industries) – text no longer available online.

(13) On the concept of ordinance, see *infra*.

(14) See, in particular, *Le Code civil 1804-2004, livre du bicentenaire* Dalloz/Litec 2004; *1804-2004, Le Code civil, un passé, un présent, un avenir* Dalloz 2004.

(15) *Colloque de célébration du bicentenaire du Code civil* Droit In-Situ 2004.

(16) On the notion of ordinance, see infra.

(17) See, e.g. C. Witz "*La nouvelle jeunesse du BGB insufflée par la réforme du droit des obligations*", *Dalloz* 2002 chr. p. 3156.

(18) See R. Schulze and F. Zoll (ed.) *The Law of Obligations in Europe, A New Wave of Codifications* Sellier 2013.

(19) See H. Boucard "*La compétition internationale des systèmes juridiques*", *Les voyages du droit, Mélanges en l'honneur de Dominique Breillat* Université de Poitiers diff. Lgdj 2011 p. 81; *adde* "Les instruments internationaux d'unification : concurrence ou modèle pour les droits nationaux", *Droit européen du contrat et droits du contrat en Europe : quelles perspectives pour quel équilibre ?* LexisNexis 2008 p. 21, and the references cited.

(20) *Projet de loi n° 175 relatif à la modernisation et à la simplification du droit et des procédures dans les domaines de la justice et des affaires intérieures* (Bill n°175 on the modernisation and simplification of the law and procedures in the fields of justice and internal affairs), tabled before the Senate on 27 November 2013, http://www.senat.fr/dossier-legislatif/pjl13-175.html, Impact study dated 26 November 2013 p. 70, http://www.senat.fr/leg/etudes-impact/pjl13-175-ei/pjl13-175-ei.pdf

(21) See C. Pérès « *L'étude d'impact à la lumière de la réforme par ordonnance du droit des obligations* », *RDC* 2014 p. 275.

(22) See Resolution of the European Parliament of 26 May 1989 on action to bring into line the private law of the Member States, *OJEC* C 158 of 26 June 1989 p. 400, French version available at http://www.europarl.europa.eu/comparl/juri/events/20040428/res_1989_fr.pdf; Resolution of the European Parliament of 6 May 1994 on the harmonization of certain sectors of the private law of the Member States, *OJEC* C 205 du 25 July 1994 p. 518.

(23) Including, firstly , the Communication from the Commission to the Council and the European Parliament on European Contract Law, 11 July 2001 COM(2001) 398 final, *OJEC* C 255, 13 Sept. 2001, p. 1; lastly, Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law of 11 October 2011 COM(2011) 635 final 2011/0284 (COD), {SEC(2011) 1165 final}{SEC(2011) 1166 final}, http://ec.europa.eu/justice/contract/files/common_sales_law/regulation_sales_law_fr.pdf; *adde* Communication of the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 11 October 2011, A Common European Sales Law to Facilitate Cross-Border Transactions in the Single Market COM(2011) 636 final, http://ec.europa.eu/justice/contract/files/common_sales_law/communication_sales_law_en.pdf

(24) *Rapport sur l'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)* dir. P. Catala La documentation française 2005, http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/054000622/0000.pdf English translation by J. Cartwright and S. Whittaker available at http://www.justice.gouv.fr/art_pix/rapportcatatla0905-anglais.pdf

(25) See *Exposé des motifs* by J. Ghestin, p. 25, and Articles 1108, 1124 and subsequent. p. 79 of the Catala draft bill; *adde* G. Wicker "La réforme du droit français du contrat : de la cause à la causalité juridique", *Nouveaux défis du droit des contrats en France et en Europe* G. Mäsch, D. Mazeaud and R. Schulze ed., Sellier 2009 p. 53.

(26) As per the expression coined by J. Carbonnier, P. Catala, J. de Saint Afrique and G. Morin *Des libéralités, Une offre de loi* Defrénois 2003 preface by J. Carbonnier.

(27) See, e.g. on contractual damages and interest, H. Boucard *Rép. civ.* Dalloz v° Responsabilité contractuelle, 2014.

(28) *Rapport du groupe de travail de la Cour de cassation sur l'avant-projet de réforme du droit des obligations et de la prescription* (Report of the Court of Cassation Working Party on the draft bill of reform of the law of obligations), 15 June 2007, www.courdecassation.fr/institution_1/autres_publications_discours_2039/discours_22

(29) Some had been formulated in advance; see, in particular, P. Remy « Nouveaux développements de la responsabilité civile, observations critiques sur l'arrêt SA Planet Wattohm (Cass. Civ. 1re, 17 janvier 1995) », *RGAT* 1995 p. 529 ; « Critique du système français de responsabilité civile », *Dr. et cultures* 1996 p. 31 ; « La "responsabilité contractuelle" : histoire d'un faux concept », *RTD civ.* 1997 p. 323 ; « Réviser le titre III du livre troisième du Code civil ? », *RDC* 2004 p. 1169.

(30) Ministère de la justice, *Projet de réforme du droit des contrats (juillet 2008)* (Proposed reform of contract law – July 2008), http://www.chairejlb.ca/pdf/reforme_all.pdf ; see also Ministère de la justice, *Projet de réforme du droit des contrats (mai 2009)* (Proposed reform of contract law – May 2009), http://droit.wester.ouisse.free.fr/textes/TD_contrats/projet_contrats_mai_2009.pdf Ministère de la justice, *Projet de réforme du régime des obligations et des quasi-contrats* (Proposed reform of the law of obligations and quasi-contracts), http://www.textes.justice.gouv.fr/art_pix/avant_projet_regime_obligations.pdf (May 2011); and *Note de présentation* (Introductory note)

(31) I. e. General rules applying to the relationship of obligation independently of its source, and concerning its modalities (e. g. with term, condition, multiple persons, divisible, alternative), its transfer (e. g. by assumption or subrogation) and its extinction (e. g. by performance, novation or compensation). The concept of *"régime général de l'obligation"*, of doctrinal origin and a little distinct from that of "general law of obligations" inspired by the correspondent general part of Germany's BGB, seems, at least as regards continental Europe, peculiar to French law (see e. g. J. Flour, J.-L. Aubert et É. Savaux *Les obligations* t. 3 *Le rapport d'obligation* Dalloz/Sirey 2013 by É. Savaux); it's literally dedicated only by the Terré draft bill, below, and by the Government draft bill of 2011, above, unlike the Catala bill. *Adde Draft Common Frame of Reference (DCFR)* Full ed. *Principles, Definitions and Model Rules of European Private Law* prepared by the Study Group on a European Civil Code and the Research Group in EC private law (Acquis Group), C. von Bar and E. Clive (ed.), Sellier European Law Publishers 2009, vol. 1 and 2, Book III, about *"Rights and Obligations in general"*.

(32) F. Terré (ed.) *Pour une réforme du droit des contrats* Dalloz 2009 ; *Pour une réforme du droit de la responsabilité civile* Dalloz 2011; *Pour une réforme du régime général des obligations* Dalloz 2013.

(33) Articles 13, 58 and subsequent, *Pour une réforme du droit des contrats,* above.

(34) See *Rapport d'information n° 558, Sénat 15 juill. 2009*, A. Anziani et L. Béteille, http://www.senat.fr/rap/r08-558/r08-5581.pdf; *Proposition de loi n° 657 portant réforme de la responsabilité civile, Sénat 9 juill. 2010, prés. L. Béteille*, http://www.senat.fr/leg/ppl09-657.pdf; C. Juillet « La reconnaissance maladroite de la responsabilité contractuelle par la proposition de loi portant réforme de la responsabilité civile » *Dalloz* 2011 p. 259.

(35) On this point, see e. g. P. Deumier "Le code civil, la loi et l'ordonnance", *RTD civ.* 2014 p. 597 and the references cited.

(36) *Projet de loi n° 175 relatif à la modernisation et à la simplification du droit dans le domaine de la justice et des affaires intérieures* (Bill n°175 on the modernisation and simplification of the law and procedures in the fields of justice and internal affairs), Senate 27 Nov. 2013, section

3, http://www.senat.fr/leg/pjl13-175.pdf. Pour le dossier législatif, v. http://www.senat.fr/dossier-legislatif/pjl13-175.html

(37) See note 29.

(38) *Rapport nº 288 fait au nom de la Commission des lois par T. Mohamed Soihili* (Report n°288 on behalf of the Law Commission, by T. Mohamed Soihili), 15 Jan. 2014, http://www.senat.fr/rap/l13-288/l13-2881.pdf

(39) *Projet de loi nº 289 relatif à la modernisation et à la simplification du droit dans le domaine de la justice et des affaires intérieures* (Bill n°289 on the modernisation and simplification of the law and procedures in the fields of justice and internal affairs), *Texte de la Commission des lois,* 15 Jan. 2014, http://www.senat.fr/leg/pjl13-289.pdf

(40) See http://www.senat.fr/cra/s20140121/s20140121_som.html

(41) See http://www.senat.fr/cra/s20140123/s20140123_4.html#par_548

(42) See P. Remy « *Le processus de dé-codification* », *eod. loc.* p. 200 n. 7.

(43) J. Carbonnier « *Le Code civil* », *Les lieux de mémoire* dir. P. Nora, III, *La Nation* 2. *Le territoire, l'Etat, le patrimoine* Gallimard Paris 1986 p. 293 s.

(44) Translator's note: in French law, the concept of "bon père de famille" – literally "good father" – which succeeded the Roman law concept of *Bonus pater familias*, is the equivalent of the common law concept of the reasonable person.

(45) Article 26 of the Law of 4 August 2014 on real equality between men and women), *JORF* 5 August 2014 p. 12949.

(46) For this comparison, see specifically: J. Flour, J.-L. Aubert et É. Savaux *Les obligations* t. 1 *L'acte juridique* Dalloz/Sirey 2012 par É. Savaux ; t. 2 *Le fait juridique* éd. Dalloz/Sirey 2011 by É. Savaux; t. 3 *Le rapport d'obligation* Dalloz/Sirey 2013 par É. Savaux.

(47) *Projet de loi n° 1729 relatif à la modernisation et à la simplification du droit dans le domaine de la justice et des affaires intérieures* (Bill n°1729 on the modernisation and simplification of the law and procedures in the fields of justice and internal affairs), *Assemblée nationale,* 24 Jan. 2014, http://www.assemblee-nationale.fr/14/pdf/projets/pl1729.pdf

(48) *Compte-rendu nº 43 de la séance de la Commission des lois du 19 févr. 2014*, p. 19, http://www.assemblee-nationale.fr/14/pdf/cr-cloi/13-14/c1314043.pdf (detail omitted by *Rapport nº 1808 de la Commission des lois par Mme C. Capdevielle, Assemblée nationale* 19 Feb. 2014, p. 13 s., http://www.assemblee-nationale.fr/14/pdf/rapports/r1808.pdf).

(49) *Annexe 0 du Rapport*, http://www.assemblee-nationale.fr/14/pdf/ta-commission/r1808-a0.pdf

(50) *Compte-rendu intégral*, *JORF* nº 35 A.N. (C.R.) 17 Apr. 2014, p. 2626 s., http://www.assemblee-nationale.fr/14/pdf/cri/2013-2014/20140191.pdf

(51) *Texte adopté nº 324, « Petite loi », Projet de loi modifié par l'Assemblée nationale en première lecture* (Adopted text n°324, « Petite loi », Bill amended by the National Assembly at first reading), 16 Apr. 2014, http://www.assemblee-nationale.fr/14/pdf/ta/ta0324.pdf; *Projet de loi nº 478 modifié par l'Assemblée nationale, relatif à la modernisation et à la simplification du droit et des procédures dans les domaines de la justice et des affaires intérieures* (Bill n°478 on the modernisation and simplification of the law and procedures in the fields of justice and internal affairs), tabled 17 April 2014 and referred to the Senate Law Commission.

(52) See *Compte-rendu de la séance*, http://www.senat.fr/compte-rendu-commissions/20140512/cmp.html#toc3; *Rapport nº 1933 et nº 529 fait au nom de la Commission des lois par Mme C. Capdevielle et M. T. Mohamed Soilihi,* (Report n°1933 and n°529 on behalf of the Law Commission, by Mrs. C. Capdevielle and T. Mohamed Soihili) 13 May 2014, http://www.senat.fr/rap/l13-529/l13-5291.pdf

(53) See *Projet de loi nº 1952 modifié, par l'Assemblée nationale, relatif à la modernisation et à la simplification du droit et des procédures dans les domaines de la justice et des affaires intérieures* (Bill n°1952 on the modernisation and simplification of the law and procedures in the fields of justice and internal affairs), tabled 14 May 2014 and referred to the Law Commission, http://www.assemblee-nationale.fr/14/pdf/projets/pl1952.pdf p. 9 s.

(54) A reversal made all the more improbable as on 17 September 2014, the Law Commission reiterated its support: see *Rapport nº 2200 fait au nom de la Commission des lois par Mme C. Capdevielle, 17 septembre 2014, et Annexe 0*, http://www.assemblee-nationale.fr/14/ta-commission/r2200-a0.asp then the authorization was granted in plenary session on October 30th, 2014, again in spite of the criticisms of the parliamentary opposition, see *Compte-rendu de la séance*, http://www.assemblee-nationale.fr/14/cri/2014-2015/20150043.asp *Le Projet de loi relatif à la modernisation et à la simplification du droit et des procédures dans les domaines de la justice et des affaires intérieures, adopté en nouvelle lecture par l'Assemblée nationale le 30 octobre 2014, TA n° 416*, http://www.assemblee-nationale.fr/14/ta/ta0416.asp, was tabled at the Senate on October 31th, 2014 (draft bill nº 76, http://www.senat.fr/leg/pjl14-076.html) and referred to the Senate Law Commission before being submitted for debate in plenary session on 22 January 2015.

(55) See R. Zimmermann *op. cit.* p. 30 and subsequent.

(56) See e. g. P.-A. Crépeau *La réforme du droit civil canadien, Une certaine conception de la recodification (1965-1977)* Centre de recherche en droit privé et comparé du Québec, éditions Thémis Montréal 2003, specifically p. 33 and subsequent.; M.-J. Longtin « *La réforme du Code civil : la gestion d'un projet* », in *Du Code civil du Québec (Contribution à l'histoire immédiate d'une recodification réussie)* éditions Thémis, Montréal, 2005 p. 163 and subsequent; *adde* J.-F. Niort « *Le nouveau Code civil du Québec et la théorie de la codification: une perspective française* », *Droits* 1996 vol. 24 *La codification* p. 135 and subsequent.

(57) See A. S. Hartkamp « *La révision du Code civil aux Pays-Bas, 1947-1992* », *in Nieuw Nederlands Burgerlijk Wetboek, Het Vermogensrecht (Zakenrecht, verbintenissenrecht en bijzondere overeenkomsten), Nouveau Code civil néerlandais, Le droit patrimonial (Les biens, les obligations et les contrats particuliers),* translated to French by P. P. C. Haanappel and E. Mackaay, under the auspices of the Ministry of Justice of the Netherlands and the *Centre de recherche en droit privé et comparé* of Québec, Kluwer Law and Taxation Publishers, Deventer/Boston, 1990 p. XVIII s., nº 5 and subsequent.

(58) See C. M. Predoiu « *Préface : Genèse du nouveau Code civil roumain* », *Nouveau Code civil roumain* (French translation and commentary) Juriscope / Dalloz 2013 p. 14.

(59) See S. Alexeev « *Préface* », *Code civil de la Fédération de Russie* (French translation and commentary), Juriscope 2005 p. 9 s., 10 ; N. Y. Rasskazova « Russian Law of Obligations : Structure, Positioning and Connection with Supranational Law », *in* R. Schulze and F. Zoll (ed.) *The Law of Obligations in Europe, A New Wave of Codifications* Sellier 2013 p. 139 and subsequent.