Articles

Code vs Code
Nationalist and Internationalist Images of the Code Civil in the French Resistance to a European Codification

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Abstract: French academics reacted to 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 therefore 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 defences. Rather, they should be understood as expressions of faith–and the discussion over a European Code resembles, in part, a religious war.

Résumé: Les universitaires français ont réagi aux annonces sur un possible futur Code civil européen il y a dix ans, à la façon dont les Américains ont réagi à l'attaque japonaise de Pearl Harbor en 1940: d'abord par un état de choc, puis par le réarmement, et enfin avec des tentatives de contre-attaques. Les métaphores militaires abondent. Et pourtant la défense du Code civil français contre le Code civil européen est délicate : ils doivent défendre un Code contre un autre. C'est pourquoi les images tirées des Codes sont d'un intérêt tout particulier pour notre compréhension à la fois des Codes civils et du nationalisme juridique. Souvent, deux images mutuellement exclusives sont présentées en même temps. En termes culturels, le Code civil est tout à la fois traditionnel et révolutionnaire, à la fois déterminé linguistiquement et indépendant de son langage, à la fois une expression de valeurs et simplement formel et neutre. Politiquement, le Code civil est légitimé à la fois dans la démocratie et dans la technocratie, il exprime tout à la fois l'auto-détermination et l'impérialisme, il est à la fois pluraliste et universaliste. Nécessairement, avec de telles juxtapositions, les mêmes caractéristiques doivent être assignées à un Code européen, rendant les arguments in fine auto-attaquables. Néanmoins, la question n'est pas d'écarter ces défenses. Elles devraient plutôt

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être comprises comme les expressions d'une foi, et la discussion autour d'un Code européen ressemble en partie à une guerre de religion.

Zusammenfassung: Französische Rechtswissenschaftler reagierten auf die Ankündigung einer möglichen Europäischen Zivilrechtskodifikation ähnlich wie die US-Amerikaner auf den Angriff auf Pearl Harbour: erst schockiert, dann durch Aufrüstung, zuletzt mit einem Gegenschlag. Gerne werden martialische Begriffe gewählt. Freilich ist die Verteidigungslinie des französischen Code Civil eine labile: Man muss einen Kodex gegen einen anderen verteidigen. Das Bild, das wir von den Kodices haben, ist daher von hohem Interesse für die Frage, wie wir Zivilgesetzgeber und rechtlichen Nationalismus verstehen. Häufig werden zwei einander ausschließende Bilder gezeichnet. Als kulturelles Phänomen betrachtet ist der Code Civil gleichermaßen ein traditionelles wie ein revolutionäres Werk, gleichermaßen eng mit ihrer Sprache verbunden und sprachunabhängig, gleichzeitig ein Ausdruck von Werten und bloß formal und neutral. Aus politischer Perspektive ist der Code Civil gleichermaßen demokratisch legitimiert wie allein technokratisch motiviert, aus ihm sprechen Selbstbestimmung ebenso wie Imperialismus, Pluralismus ebenso wie Universalismus. Solche Gegenüberstellugen gelten – natürlich – ebenso für einen Europäischen Kodex, so dass Argumente dieser Art in die eine oder andere Richtung sich notwendig selbst widersprechen. Indes geht es nicht darum, diese Position zu widerlegen. Vielmehr sollte sie als Ausdruck eine Glaubens verstanden werden, der Kampf um einen Europäischen Kodex hat – ein wenig – etwas von einem Religionskrieg.

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 people 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:

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

2 Albert, n 1 above, 1. The reference is to J.-E.-M. Portalis, 'Discours préliminaire sur le Code Civil', in J.-E.-M. Portalis, *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 above, 3.

"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 meme 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 euroscepticism 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 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 French Code civil) against another (the European one).

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.

4 E. de Las Cases, *Mémorial de Sainte-Hélène*, vol 7 (Paris: Lecointe, 1828) 353. Cf J. Bart, 'Le Code Napoléon, un Code à vocation européenne?', in J.-P. Dunand and B. Winiger (eds), *Le code civil Français dans le droit européen* (Bruxelles: Bruylant, 2005) 65.

5 M. Bussani, 'Faut-il se passer du common law (européen)? Réflexions sur un code civil continental dans le droit mondialisé' (2010) 62 *Revue International de Droit Comparé* 7.

6 An excellent collection of early French comments on the codification of European Private Law, both positive and negative, is B. Fauvarque-Cosson and D. Mazeaud (eds), *Pensée juridique française et harmonization européenne du droit* (Paris: Société de Législation Comparée, 2003).

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

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 disproportionally 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 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, which had 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 Christian von Bar then gave his now infamous presentation

8 Y. Lequette, 'D'une celebration à l'autre', in Y. Lequette (ed), *1804–2004: Le Code civil–un passé un présent un avenir* (Paris: Dalloz, 2004) 9, 11–12.

9 Doing Business in 2004: Understanding Regulation. On the French reactions, see, in English, B. Fauvarque-Cosson and A.-J. Kerhuel, 'Is Law an Economic Contest? French Reactions to the Doing Business World Bank Reports and Economic Analysis of the Law' (2009) 57 *American Journal of Comparative Law* 811; C. Valcke, 'The French Response to the World Bank's *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 B. Fauvarque-Cosson, 'Faut-il un code

in Paris, in the 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 Ger-

civil européen?' *Revue Trimestrielle de Droit Civil* 2002, 463 no 1 note 2. Christian von Bar himself had presented the project before, in French; see C. von Bar, 'Le groupe d'études sur un Code civil' *Revue Internationale de Droit Comparé 53* (2001) 127.

11 C. 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, 1–4; republished as C. von Bar, 'From Principles to Codification: Prospects for European Private Law' 8 *Columbia Journal of European Law* 379 (2002).

12 The discussion is placed in the centuries-old relation between France and Germany by Y. Lequette, 'De la France et de l'Europe: La nation ou l'empire', in B. Ancel (ed), *Études à la mémoire du professeur Bruno Oppetit* (Paris: Litec, 2009) 411, where *la nation* stands for France, *l'empire* for the Holy Roman Empire, *ie* Germany. See especially *ibid* 457 *et seq*.

13 Albert, n 1 above, 2; Y. 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 R. Michaels, 'Book Review' 10 *Zeitschrift für europäisches Privatrecht* 903 (2002). For Markesinis' own remarks at the Cour de Cassation, including criticism of von Bar, see B. Markesinis, 'Deux cents ans dans la vie d'un code célèbre. Réflexions historiques et comparatives à propos des projets européens' *Revue Trimestrielle de Droit Civil* 2004, 45–60. English version: 'Two Hundred Years of a Famous Code – What Should We Be Celebrating?' 39 *Texas International Law Journal* 561 (2004).

many, the Soviet Union, and Cambodia under the Khmer Rouge[14] – the European civil code as some kind of cultural genocide. Another scholar teaching in France calls the project '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 shock[18]– 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

14 Lequette, n 13 above, 23.

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

16 Y. Lequette, 'Le Code européen est de retour' *Revue des contrats* 2011 1028, 1031 n 15.

17 Lequette, n 16 above, 1042, citing to B. Bruneteau, "*L'Europe nouvelle" de Hitler: Une illusion des intellectuels de la France de Vichy* (Monaco: Rocher, 2003). Charlemagne has always been claimed for both French and German national identity; see, most recently, R.J. Morrissey, *Charlemagne & France: a thousand years of mythology* (Notre Dame, Ind: University of Notre Dame Press, 2003). For the historical Charlemagne's role for Europe, see R. McKitterick, *Charlemagne: The Formation of a European Identity* (Cambridge: Cambridge University Press, 2008).

18 B. Fauvarque-Cosson and S. Patris-Godechot, *Le Code civil face à son destin* (Paris: Ministére de la Justice – La Documentation franc*ais, 2006) 153.

19 A useful summary and evaluation in English is R. 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 P. Catala (ed), *Avant-projet de réforme du droit des obligations et de la prescription* (Paris: La documentation Franc*aise, 2006); English translation by J. Cartwright and S. Whittaker, in J. Cartwright, S. Vogenauer and S. Whittaker (eds), *Reforming the French Law of Obligations: Comparative Reflections on the Avant-projet de reforme du droit des obligations et de la prescription (the Avant-projet Catala)* (Oxford: Hart Publishing, 2009) 445. For a helpful introduction in English, see S. Vogenauer, 'The *Avant-projet de réforme*: An Overview', *ibid*, 3. The entire book has been published in French, too: J. Cartwright and S. Vogenauer and S. Whittaker (eds), *Regards comparatistes sur l'avant-projet de réforme du droit des obligations et de la prescription* (Paris: Société de Législation Comparée, 2010).

21 S. Nadaud, *Codifier le droit civil européen* (Bruxelles: Group De Boeck, Éd Larcier, 2008) 321–336.

differences.[22] The threat of a European Code civil that would differ from French law was thus an important 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 particular was deemed unlikely to be influential in Eu-

22 P. Catala, 'General Presentation of the Reform Proposals', in Cartwright and Whittaker, n 20 above, 9, no 2. See D. Fenouillet and P. Rémy-Corlay (eds), *Les concepts contractuels à l'heure des principes du droit européen des contrats* (Paris: Dalloz, 2003).

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

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

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

26 Catala, n 22 above, no 9; cf Catala, n 24 above, 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. C. Witz, 'La longue gestation d'un code européen des contrats – Rappel de quelques initiatives oubliées' *Revue Trimestrielle de Droit Civil* 2003 447.

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

28 Summarized by Vogenauer, n 20 above, 15–17.

29 D. Tallon, 'Teneur et valeur du projet appréhendé dans une perspective comparative' *Revue des contrats* 2006, 131; B. Fauvarque-Cosson, 'La réforme du droit franc*ais des contrats: perspective comparative' *Revue des contrats* 2006, 147.

30 See Tallon, n 29 above, 132; C. Jamin, 'Vers un droit européen des contrats? (Réflexion sur une double stratégie)' *Revue Trimestrielle de Droit commercial* 2006 94, 101.

31 J. Ghestin, 'Validity–Cause (articles 1124 to 1126-1)', in Cartwright, Vogenauer and Whittaker, n 20 above, 521 (originally in Catala, n 22 above, 25).

32 Cf, in English, J. Rochfeld, 'A Future for la cause? Observations of a French Jurist', in Cartwright, Vogenauer and Whittaker (eds), n 20 above, 73; R. Sefton-Green, 'La cause or the Length of the French Judiciary's Foot', *ibid*, 101.

rope.[33] In result, this assessment seems fair: la cause had become a French peculiarity in Europe[34] (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 a` ce que la France reste elle-même et cultive son irritante exception alors que sa banalisation et sa dissolution dans le conformisme européen ouvrent a` 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.

3 Third Reaction: Counterattack: French Participation in Europeanization

If the reform of European 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

33 Fauvarque-Cosson, n 29 above, 147; M. Fabre-Magnan, 'Entretien', *La Semaine Juridique (JCP) éd Gén* 2008.I.199; D. Mazeaud, 'Réforme du droit des contrats: haro, en Hérault, sur le projet!' *Dalloz* 2008, 2675, nos 9–11.

34 Cf V. Bassani and W. Mincke, 'Europa sine causa?' *Zeitschrift für Europäisches Privatrecht* 1997 599.

35 J. Beauchard, 'L'absence de la cause dans les principes européens de droit des contrats', in J.-P. Marguénaud, M. Massé and N. Poulet-Gibot (eds), *Apprendre à douter. Questions de droit, questions sur le droit, Études offertes à Claude Lombois* (Limoges: Presses universitaires de Limoges, 2004) 819.

36 Catala, n 22 above, no 8.

37 A. Ghozi and Y. Lequette, 'La réforme du droit des contrats: brèves observations sur le projet de la chancellerie' *Dalloz* 2008, 2609.

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

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

40 C. Larroumet, 'De la cause de l'obligation à l'intérêt au contrat' *Dalloz* 2008, 2441.

41 F. Terré (ed), *Pour une réforme du droit des contrats* (Paris: Dalloz-Sirey, 2008).

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 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.

42 P. Malaurie, 'Le code civil européen des obligations et des contrats – Une question toujours ouverte' *La semaine juridique (JCP) éd Gén* 2002.I.110 no 11 = in Fauvarque-Cosson and Mazeaud (eds), n 6 above, 219, 224.

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

44 For criticism, see M. 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 R. Brownsword, H. Micklitz, L. Niglia and S. Weatherill (eds), *The Foundations of European Private Law* (Oxford: Hart Publishing, 2011) 59–72.

45 Lequette, n 16 above, 1031.

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 Pothier.[46] 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 francaise,'[48] but opposed to all culture: it has no tradition at all – the ius commune not withstanding.[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.

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]

46 Lequette, n 13 above, no 24; See also J.-L. Halpérin, *L'impossible code civil* (Paris: Presses universitaires de France, 1992).

47 Catala, n 22 above, no 1.

48 P. Malaurie, 'Petite note sur le projet de réforme du droit des contrats' *La semaine juridique (JCP) éd Gén* 2008.I.204.

49 Cf J.-L. Halpérin, 'Retour à un droit commun européen', in Fauvarque-Cosson and Mazeaud (eds), n 6 above, 15.

50 Lequette, n 8 above, 31–32.

51 P. Malaurie, 'L'utopie et le bicentenaire du Code Civil', in Lequette (ed), n 8 above, 1, 7–8.

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* (Paris: Société de législation comparée, 2006) 82.

53 Lequette, n 13 above, no 11; Lequette, n 16 above, 1042.

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 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] 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

54 G. Cornu, 'L'art d'écrire la loi' *Pouvoirs 107 (2003) – 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 G. Cornu, 'Un code civil n'est pas un instrument communautaire' *Dalloz* 2002 chron 351 = in Fauvarque-Cosson and Mazeaud (eds), n 6 above, 57, 58: 'Il n'y a pas de langue européenne.'

57 Malaurie, n 42 above, 225.

58 Lequette, n 13 above, no 13; Lequette, n 16 above, 1044. See for the term already E. Picard, 'Le droit et sa diversité nécessaire d'après les races et les nations' *Clunet* 28 (1901) 417, 422; G. Blandin, 'Les interférences de la linguistique et du droit', in N.M. le Douarin and C. Puigelier (eds), *Science, Éthique et Droit* (Paris: Éditions Odile Jacob, 2007) 33, 58.

59 N. Charbit, 'L'espéranto du droit? La rencontre du droit communautaire et du droit des contrats' *La semaine juridique (JCP) éd Gén* 2002.I.100; C. Witz, 'Remarques conclusives' *Revue International de Droit Comparé* 2003, 1033, 1034; Y. Lequette, 'Vers un code civil européen?' *Pouvoirs 107 (2003) – Le code civil* 97, 110. Previously, the Lando Principles had been called an espéranto du droit by J. Raynard, 'Les principes du droit européen du contrat: une lex mercatoria à la mode européenne?' *Revue Trimestrielle de Droit Civil* 1998, 1006.

60 On these, see U. Eco, *The Search for the Perfect Language* (Oxford *et al*: Blackwell, 1997).

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

62 S. 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 n 2.

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 not particular 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 of 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 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 Fauvarque-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 important 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.

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

64 Cornu, n 56 above, 59.

65 T. Genicon, 'Commission européenne et droit des contrats: "quousque tandem abutere patientia nostra?"' (2011) *Revue des contrats* 1050, 1057–1058.

66 Malaurie, n 48 above.

67 Lequette, n 16 above, 1032.

68 Lequette, n 16 above, 1033–1034.

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 is viewed as an expression of democracy[70]–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 undemocractic. 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 Europe[74] 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 state.[75] Nor do the EU institutions have the necessary legitimacy in participatory democracy.[76] Theirs is a product based on technocratic expertise,

69 J. Carbonnier, 'Le Code Civil', in P. Nora (ed), *Les lieux de mémoire – La Nation, Vol. II*, 293; cf Y. Gaudement, 'Le Code Civil, "Constitution Civile de la France"', in Lequette (ed), n 8 above, 297; R. Cabrillac, 'Le Code civil est-il la véritable constitution de la France?' *Revue juridique Thémis 39 (2005)* 245.

70 J. Huet, 'Union européenne et démocratie: prohibition des arrêts de règlement et avis de l'article 5 du Code civil' *La semaine juridique (JCP) éd Gén* 2010.I.790.

71 Cf J.-F. Niort, 'Le Code civil dans la melée politique et sociale–Regards sur deux siècles d'un symbole national' *Revue Trimestrielle de Droit Civil 2005* 257, 281–283.

72 Most recently Genicon, n 65 above, 1056.

73 Lequette, n 16 above, 1037–1038.

74 V. Constantinesco, 'La "codification" communautaire du droit privé, future constitution civile de l'Europe?', in M. Puech (ed), *De code en code–Mélanges en l'honneur du doyen Georges Wiederkehr* (Paris: Dalloz, 2009) 111.

75 Lequette, n 13 above, no 17.

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

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 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-meme.'[84] But if French law is the lamb, European law is the wolf[85] that will not allow such self-determination. What is aimed for – 'un super-Etat qui domine les Etats subordonnés,'[86] – is hegem-

77 Lequette, n 16 above, 1040.

78 E.M. Theewen, *Napoléons Anteil am Code civil* (Berlin: Duncker & Humblot, 1991); J.-L. Sourioux, 'Le role du remier Consul dans les travaux préparatoires du Code Civil', in Lequette (ed), n 8 above, 107; cf J.-L. 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 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.' C.T. Montholon, *Récits de la Captivité de l'Empereur Napoléon à Sainte-Hélène I* (Paris: Paulin, 1847) 401.

80 J. Foyer, 'Le code civil de 1945 à nos jours', in Lequette (ed), n 8 above, 275.

81 Sefton-Green, n 19 above, 354.

82 J. Carbonnier, Le Code civil des Français dans la mémoire collective, in Lequette (ed), n 8 above, 1045.

83 Lequette, n 12 above, 412.

84 Cornu, n 56 above, 60.

85 Cornu, n 56 above, 60. A similar metaphor can be found in Genicon, n 65 above, 1053.

86 Lequette, n 16 above, 1040.

onialist. 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 world[88] has always been a way for France to impose its power. That this influence has already declined[89] 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 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 culture,[95] 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 peo-

87 Cornu, n 56 above, 60; Lequette, n 8 above, 28.

88 Fauvarque-Cosson and Patris-Godechot, n 18 above, 15 *et seq*.

89 Fauvarque-Cosson and Patris-Godechot, n 18 above, 73 *et seq*; F. Ranieri, 'L'influence du Code civil sur les codifications du 19ème siècle: essor et déclin d'un modèle européen', in M. Andenas (ed), *Liber Amicorum Guido Alpa. Private Law Beyond National Systems* (London: British Institute of International and Comparative Law, 2007) 831.

90 Lequette, n 13 above, no 13.

91 P. Catala, 'Deux regards inhabituels sur la cause dans les contrats' *Répertoire du notariat Defrénois* 2008, 2365, 2373–2381.

92 Foyer, n 80 above, 296.

93 Malaurie, n 42 above, 225.

94 Cf Cornu, n 56 above, 57.

95 On which see R. Michaels, 'Legal Culture', in J. Basedow et al. (ed), *The Max Planck Encyclopedia of European Private Law* (Oxford: Oxford University Press, 2012) 1060.

96 C. Kirchner, 'A "European Civil Code": Potential, Conceptual, and Methodological Implications' 31 *University of California Davis Law Review* 671, 673 (1998).

ples, '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'.[100]

And yet this is a strange flip of the old image of the French Code as universalist and antipluralist.[101] 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.[102]

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 fantasmatique, d'essence ethnique: les Corses, les Basques, les Flamands, les Bretons, les Provençeaux, les Occitans, les Savoyards, etc.[103]

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.[104] And this universalism works externally as well. From the beginning, the natural law ideas underlying the Code aimed at potential universality.[105] The code is 'l'expression d'un droit naturel universel et d'un véritable jus commune valable en tous pays;'[106] this universalism was a core reason for its global success.[107] 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.[108]

97 Lequette, n 16 above, 1040.
98 Lequette, n 16 above, 1041.
99 A. Ghozi and R. Vatinet, 'Response to the 2010 Green Paper', http://ec.europa.eu/justice/news/consulting_public/0052/contributions/164_fr.pdf, 5.
100 Cabrillac, n 110 below
101 N. Rouland, *L'État français et le pluralisme: histoire politique des institutions publiques (de 476 à 1792)* (Paris: Éditions Odile Jacob, 1995) 332 *et seq*.
102 J.-E.-M. Portalis, 'Motifs', in *Code civil français: Discours et exposé des motifs IV* (1804) 489, 497, 498.
103 See, more extensively, Lequette, n 12 above, 450–457.
104 B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (revised ed, London: Verso, 2006).
105 See Soleil, n 62 above.
106 B. Oppetit, 'L'avenir de la codification' *Droits 24 (1996)* 73, 74.
107 F. Zenati-Castaing, 'L'avenir de la codification' (2011) *Revue Internationale de Droit Comparé* 355, 366 *et seq*.
108 *Ibid*. But cf B. Fauvarque-Cosson, 'Codification et droit privé européen', in Ancel (ed), n 12 above, 179 (suggesting that European law today is more in accordance with Oppetit's suggestions).

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, 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 counter-position right. It does not seem crazy for French critics to view the German position towards a European civil code as an imperialist one.[109] 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.[110] 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.[111] 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 form of codification,[112] and of nationalism (which

109 C. Joerges, 'Europe a *Großraum*? Shifting Legal Conceptualisations of the Integration Project', in C. Joerges and N. Singh Ghaleigh (eds), *Darker Legacies of Law in Europe The Shadow of National Socialism and Fascism over Europe and its Legal Traditions* (Oxford: Hart Publishing, 2003) 167.

110 The obvious reference is M. Hardt and A. Negri, *Empire* (Cambridge/Mass: Harvard University Press, 2000).

111 R. Cabrillac, 'L'avant-projet de réforme français du droit des obligations', in Sagaert (ed), n 24 above, 59, 60.

112 This argument does not necessarily apply to alternative conceptions of Code, be they

of course once *was* modern)–the tension between nationalism and universalism,[113] internal peace and external violence, between inclusion and exclusion,[114] rationalism and antirationalism.[115] 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.[116] George Fletcher once referred to the Code as one of three 'nearly sacred books' of the Western legal tradition.[117] Indeed, its veneration has always had somewhat religious characteristics;[118] its support seems a matter not just of ratonality but of faith. This matches not only Alain Supiot's suggestion for a religious basis of our modern law.[119] It is also in accordance with Ulrich Wehler's suggestion that nationalism has a quasi-religious element to it.[120] 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.

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

postmodern (Zenati-Castaing, n 106 above, 373 *et seq*) or political (U. Mattei, 'Hard Code Now!' [2002] *Global Jurist Frontiers* Vol 2 Issue 1; H. Collins, *The European Civil Code: The Way Forward* [Cambridge: Cambridge University Press, 2008]).

113 Zenati-Castaing, n 106 above, 368–369.

114 P. Legrand, 'Codification and the Politics of Exclusion: A Challenge for Comparativists' *31 University of California Davis Law Review* 799 (1998).

115 A.-J. Arnaud, *Les origines doctrinales du Code civil français* (Paris: Pichon & Durand-Anzias, 1969).

116 Cf R. Michaels, 'Rollen und Rollenverständnisse im transnationalen Privatrecht' *Berichte der Deutschen Gesellschaft für Völkerrecht 45 (2011)* 175, 216–218.

117 G. Fletcher, 'Three Nearly Sacred Books in Western Law' 54 *Arkansas Law Review* 1 (2001–2002).

118 P. Cappellini, 'L'Ame de Napoléon: Code civil, Säkularisierung, Politische Form', in W. Schubert and M. Schmoeckel (eds), *200 Jahre Code civil: Die napoleonische Kodifikation in Deutschland und Europa* (Cologne: Böhlau, 2005) 1.

119 A. Supiot, *Homo Juridicus: On the Anthropological Function of the Law* (London: Verso, 2007); cf P.W. Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* (New York: Columbia University Press, 2011).

120 H.-U. Wehler, *Nationalismus – Geschichte, Formen, Folgen* (2nd ed, Munich: Beck, 2004) 27–35.

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.