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CONTINENTAL LAW CONFRONTED WITH GLOBALIZATION

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ABSTRACT

Continental law and globalization: each of the terms of the subject requires some explanation.

− Continental law first. This is the law that comparatists distinguish from common law and sometimes refer to by the term civil law. So it is a system, a culture, a tradition, a legal family that is said to be Romano-Germanic, Latin, civilistic or… continental. It now has its own Foundation, formed under the laws of France, created in 2007: the Fondation pour le droit continental or Civil law initiative. It is not monolithic: comparatists distinguish principally within it German law and French law, that they willingly present for German law as a professorial law ordered around concepts, and for French law as a legists law ordered around rules. It is about continental law as illustrated by the French tradition that we shall reason here.

− Globalization next. This term denotes roughly a change of scale. In the sense that questions that used to be posed at state level are now posed for much greater areas and often for the planet as a whole. That is a phenomenon that is as plain as day: just look at the financial and stock-market news of recent weeks… The phenomenon prompts various reactions: it worries those who are reassured by their borders; it thrills those whom their borders stifle.

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1. Continental law and globalization: each of the terms of the subject requires some explanation.

− *Continental law* first. This is the law that comparatists distinguish from *common law* and sometimes refer to by the term *civil law*. So it is a system, a culture, a tradition, a legal family that is said to be Romano-Germanic, Latin, civilistic or… continental. It now has its own Foundation, formed under the laws of France, created in 2007: the *Fondation pour le droit continental* or *Civil law initiative*[1]. It is not monolithic: comparatists distinguish principally within it German law and French law, that they willingly present for German law as a professorial law ordered around concepts, and for French law as a legists law ordered around rules[2]. It is about continental law as illustrated by the French tradition that we shall reason here.

− *Globalization* next. This term denotes roughly a change of scale. In the sense that questions that used to be posed at state level are now posed for much greater areas and often for the planet as a whole. That is a phenomenon that is as plain as day: just look at the financial and stock-market news

1. www.fondation-droitcontinental.org
2. B. Fauvarque-Cosson, *La convergence des droits en Europe*, LPA 19 avril 2007, p. 63.

of recent weeks… The phenomenon prompts various reactions: it worries those who are reassured by their borders; it thrills those whom their borders stifle[3].

From a legal perspective it seems to take on two aspects:

− There is first an *economic* aspect to globalization: this is the multiplication of trade on the scale of the planet. Under this aspect, globalization creates a need for the certainty of law in business transactions. Anyone selling, building or investing far from home wants there to be a law there too that is both ascertainable and stable, and compliance with which can be enforced by a swift and impartial system of justice. And, while they are about it, everyone wants – or even demands if their economic clout allows them to – this law to be similar to their own, because it is familiar ground and they feel safe on it for that very reason. And so there arises competition among legal systems which, because of what is at stake (namely, business), leads to legal systems being rated and classified by the yardstick of their economic efficiency. Now, some famous ratings under the aegis of the World Bank, namely the annual *Doing business* reports regularly conclude that common law is superior to continental law and so suggest to those countries eager to attract new investors that they should rally around the common law tradition. Globalization in business would seem to threaten continental law: it seemingly threatens it with eviction by common law.

− Globalization also has a *political philosophy* aspect to it: it is the dynamic of human rights and personal freedom. Under this aspect, globalization is reflected by the assertion of the universal value of fundamental rights, that the individual can invoke against the world, that they can claim against all the communities to which they belong, from their national community to their community of fellow flat owners via their family community. On this side of globalization, there is no opposition *a priori* between the two legal cultures of common law and continental law: France and Britain readily claim to be the 'home of human rights'. The dividing line seems to be rather between Western culture, which sets so much store by the rights of the individual, and Far Eastern culture where, by the Confucian tradition social behaviour obeys rules as to mores or morals[4] that in the name of harmony give precedence to the rights of the group over the rights of individual people[5]. However, this geographical expansion of human rights naturally goes along with strengthening of them with the countries that gave rise to them and champion them in the international arena: we shall have the opportunity to return to the extraordinary dynamic, the over-revving of the engine of human rights powered in Europe by the Court in Strasbourg. Now, some commentators fear that continental law, because of its specific characters that are distinct from those of common law, is vulnerable to the sacralization of human rights. The expansion of fundamental rights supposedly threatens continental law with implosion and so self-eviction.

This twin threat – of eviction and of implosion from the twin fact of globalization of business and expansionism of fundamental rights – is acutely felt in France by those who fear that French law might be

3. This twin perception is well captured in the fashionable expression 'global village': it suggests either that the village is exploding or that the planet is shrinking.

4. J. Sollier, 'Francophonie, système civiliste et développement en Asie', in *La francophonie aux défis de l'économie et du droit d'aujourd'hui* (Beirut: Presses de l'Université Saint-Joseph, 2002), p. 169 ff., especially at 172: 'Asian countries in their very great majority do not have a culture geared to law but give precedence to social relations and the related duties, to the detriment of an abstract and impersonal conception of the law. The use of law in its western sense is therefore a concession to modernity and to the contemporary necessities of development'.
On the case of Japan, see especially J. Robert, in Travaux de l'Association Henri Capitant des Amis de la Culture Juridique Française, t. XLIV, 1993, *La circulation du modèle juridique français*, Rapport introductif sur *La circulation du modèle juridique français en Asie*, p. 514: the author refers to an 'allergy to law' in Japan.
On the case of China, see especially what a reporter very familiar with the country says: 'The polemic between legists, who advocate an adaptation of society to change via objective laws applicable to all and scholars inspired by Confucianism who conceive of no society other than one founded on virtue has being going on in China for twenty-one centuries' (F. Hauter, Planète chinoise, Carnets Nord, 2008, p. 80).

5. Y. Higuchi, in Travaux de l'Association Henri Capitant des Amis de la Culture Juridique Française, t. XLV, 1994, *Les groupements*, Rapport général sur *Les groupements dans la cité*, p. 26: 'Here [in Japan] membership of a group, above all of a company, prevails over the individual!'

dissolved in a European law inspired on one side by the economic market idolized in Luxembourg and on the other by human rights idolized in Strasbourg[6].

2. To appraise this twin threat we shall consider continental law in its form and substance: in form, because there is an art of continental law[7] (Part 1); in substance because there are values of continental law (Part 2).

1. THE ART OF CONTINENTAL LAW

3. Identifying the art of continental law from its distinguishing features is comparatively straightforward (1.1); measuring the impact that globalization has on it is much less straightforward (1.2).

1.1 The distinguishing features

4. Continental law is defined as a written law in contradistinction to common law which is defined as court-based law: the difference between the two is familiar enough for it to suffice to recall the salient aspects.

This difference is first of all a difference in *sources*. In continental law countries, law is a compendium of statutes or better still a set of codes (hence the pre-eminent position some commentators in recent centuries recognized to be held by French legal culture, with the Napoleonic codifications forming the nineteenth-century model that was so widely imitated or imposed) and the judge is merely, as Montesquieu put it, 'the mouthpiece that utters the words of the law'[8]. It is well known that, at least in France, this view of things stemmed from profound distrust of the courts dating back to the *Ancien Régime*[9] and expressed by the saying 'God preserve us from the fairness of the courts'[10]. In common law countries, by contrast, court-made law reigns, and judges are the most respected of jurists since they appear as the foremost guardians of freedom. One cannot better grasp this contrast than by comparing article 5 of the French Civil Code by which 'Judges are forbidden to decide cases submitted to them by way of general or regulatory provisions' (this is the prohibition on legislative precedent) and the celebrated *Marbury v. Madison* where the US Supreme Court declared that 'It is emphatically the province and the duty of the judicial department to say what the law is'[11].

This difference in sources is naturally reflected by a difference in *content*. Continental law is formed from a set of general and impersonal rules whereas common law is a set of solutions brought to disputed cases. Thus the major victories in the fight against discrimination between men and women are written in France in the great statutes of family law, labour law and electoral law, whereas in the US they are to be found in the great rulings of the Supreme Court[12].

Lastly, these differences extend into the *methods of dispute settlement*. The continental law judge proceeds by a deductive method in that she deduces from statute the solution to the dispute, for that so-

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6. See especially Y. Lequette: *Recodification civile et prolifération des sources internationales*, in *Le code civil 1804-2004*, *Livre du bicentenaire* (Dalloz, Lexis-Nexis, 2004), p. 171 ff; 'Des juges littéralement irresponsables...', in *Mélanges Jacques Héron*, (2009), p. 309 ff.
7. L.-L. Baudouin, 'L'art du droit civil', in *Journée en hommage à Gérard Cornu* (Dalloz, 2009) forthcoming.
8. 'La bouche qui prononce les paroles de la loi' *L'Esprit des lois*, Livre XI, Ch. 6.
9. This guardedness is found very acutely in seventeenth-century literature: Racine makes it the theme of his only comedy *Les Plaideurs*; La Fontaine wrote fables about it like *Le loup plaidant contre le renard par devant le singe*, or *Le chat, la belette et le petit lapin*, or *L'huitre et les plaideurs* (with the moral: *'Mettez ce qu'il en coûte à plaider aujourd'hui; Comptez ce qu'il en reste à beaucoup de familles ; Vous verrez que Perrin* [le juge de la fable] *tire l'argent à lui, Et ne laisse aux plaideurs que le sac et les quilles.'*
10. 'Dieu nous garde de l'équité des Parlements'. See the very well documented paper by N. Kanayama, 'Qu'est-ce que le « civil » ? De la Révolution française au Code civil', in *Mélanges en l'honneur de Philippe Jestaz* (Dalloz, 2006), p. 273.
11. E. Zoller, *Grands arrêts de la Cour suprême des États-Unis* (Coll. Droit Fondamental, PUF, 2000), p. 71.
12. See for example *Reed v. Reed* (1971) which overruled an Idaho statute reserving to the father the right to administer the estate of a deceased child; or *US v. Virginia* (1996) which abolished a program reserving admission to a military institute to men; or *Craig v. Boren* (1976) 'in men's favour' overturning an Oklahoma statute that prohibited the sale of alcoholic beverages to women under 18 years and men under 21 years. For valuable commentaries on these decisions see Zoller, *Grands arrêts de la Cour suprême des États-Unis, p.* 907 ff., 1227 ff.

lution, in appearance at least, can only come from statute;[13] whereas the common law judge proceeds inductively from the facts in that she examines them from multiple sides to ascertain the law. Hence the very different styles of their decisions: the former being short, pithy and sometimes enigmatic; the latter being lengthy, cursive and sometimes prolix.

5. The respective merits and advantages with which each of the systems is credited are familiar enough.

The advantage ascribed to continental law is traditionally its material and intellectual ease of access: material because the legal rule is easier to *ascertain* when it is contained in a statute or in a code than when it must be extracted from a welter of decisions; intellectual because it is easier to *understand* when framed in general and abstract terms than when it is bound up in the facts of a specific instance. Written law is therefore supposedly accessible law, if not to laymen at least to a people that are suitably educated[14], whereas court-made law is a law that is reserved to the initiated, to an aristocracy of wigs and gowns. Accordingly the great codifications of the nineteenth century like those of our own time are ordinarily praised as works of democratization: Hubert, the father of the Swiss Civil Code, praised the plain language of the 1804 French Code civil;[15] it was said of the 1994 Quebec Civil Code that its drafters had been eager to set out legal rules in a way that was 'accessible to any educated citizen, as free as could be from any professional jargon'[16].

The advantage attributed to common law is its flexibility, its pragmatism. That judges are not bound by any pre-established general rules or constrained to reason by reference to abstract categories supposedly elaborates and refines the rule continuously to keep abreast of social and economic change[17].

6. Obviously this outline requires a great deal of shading.

First because there are big differences within continental law countries, especially in the style of the statutes and legal rulings: in the drafting of statutes and rulings, the German tradition is more loquacious, more learned and more abstract than the French tradition[18].

Next because the proportion of judge-made law in continental law countries has not stopped growing and in common law countries the share of written law is constantly on the increase: in France the '*grands arrêts*' (milestone rulings) that have contributed to the development of positive law are legion;[19] in common law countries manifold Declarations of law have been adopted[20], and in Britain, a 1994 report bemoaned that the Government was responsible for a 'torrent of legislation'[21].

But such hybridization—which was not spawned by globalization since it pre-dates it—does not preclude us from questioning the impact that globalization may have on the distinction between the two legal cultures and therefore on the art of continental law.

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13. France's *Cour de cassation* does not set out its case law and if it finds no text on which to base its purely judge-made case law, it invokes the principles governing the subject matter (unjust enrichment, family souvenirs, or before order no 2006-346 of 23 March 2006 enshrined it in general terms, the right to retain possession).
14. Kanayama, 'Qu'est-ce que le « civil » ?', p. 279 ff.
15. E. Huber, cited by A. Martin, *Le Code civil dans le canton de Genève*, in *Livre du centenaire*, préc., p. 895.
16. P.-A. Crépeau, *La réforme du droit civil canadien, Une certaine conception de la recodification, 1965-1977* (Montreal, Thémis, 2003), p. 28.
17. Without it being an obstacle to the rule of precedent or of *stare decisis*: for one thing this rule was always nuanced by the doctrine of distinctions; for another, in English law, the Chamber of Lords, reserved the right from 1969 to depart from existing precedent.
18. Fauvarque-Cosson, *La convergence des droits en Europe*, I-A-1.
19. In civil law they are collated in what has become a classic work: H. Capitant, F. Terré and Y. Lequette, *Les grands arrêts de la jurisprudence civile*, 2 vols, (Dalloz, 2008) 12th edn.
20. Thus in Canada, New Zealand, Australia and England (where the European Convention on Human Rights was introduced with the 1998 Human Rights Act): see M.-Cl. Ponthoreau, 'La concurrence entre common law et droit civil. Existe-t-il véritablement une concurrence entre common law et tradition civiliste ? Le point de vue du comparatiste de droit public', in *La concurrence des systèmes juridiques*, J. du Bois de Gaudusson and D. Ferrand (eds), (PUAM, 2008), p. 35 ff.
21. 1994 report by the *Plain language commission*, cited *in L'influence internationale du droit français*, Rapport du Conseil d'État, (La documentation fançaise, 2001), p. 26 : *« Le gouvernement est responsable d'un torrent de législation – plus de 2 000 pages de lois nouvelles en 1991. Mais il n'a rien fait pour rendre la loi nouvelle plus compréhensible. »*

1.2 The impact of globalization

7. Looking at a map of the world, the written law does not seem to be being crowded out by common law. Its area of influence, far from shrinking, even seems to be expanding.

Countries of the civil law tradition seem to remain loyal to written law and especially to codified law. All of them are gaily codifying and recodifying and all of them celebrate the anniversaries of their codes with pomp and circumstance: in Quebec the adoption of a new Civil Code was presented as the expression of 'an indomitable will to ensure the survival of the French legal tradition in Canada'[22] and so a written law tradition. Better still, almost all new, emerging or renascent countries adopt statutes and codes, testifying to their rallying to or loyalty to the continental family: the countries of Eastern Europe, China, Vietnam, not forgetting Africa with the codified law developed in the OHADA (into which it is hoped to entice Nigeria, a common law country). Lastly, among regional laws, European law with its directives and regulations is a written law;[23] and the project for a European Civil Code, were it to be seen through (which is extremely uncertain), would set it squarely in the continental law tradition[24].

8. However, we cannot limit ourselves to this review. A closer look is required to determine whether civil law in extending its reach in this way remains true to itself. More specifically, does globalization not call into question the art of civil law by the impact it supposedly has on its accessibility and its elaboration?

1.2.1 The impact of globalization on the accessibility of continental law

9. The increased mobility of people and capital for one thing and the competition among various legal systems for another mean that access to law is nowadays judged not just nationally but internationally: access must be made easy for investors from elsewhere and for states or institutions on the look out for legislative models.

Material access holds no difficulties: it is ensured by the tremendous boom in the means of circulating information. It is intellectual access that is the problem: law is only intelligible to a foreigner if it is especially clear and is expressed in an international language; these two conditions currently call for special effort by civil law countries.

The *clarity* of written law is not what it used to be in the nineteenth century, quantity having grown at the expense of quality. That clarity must be restored if the influence of written law is to be maintained.

As concerns statute, it has become a common place to decry the all too rapid rate of reforms, the lack of coordination among them, which results in a glut of often ephemeral and confused texts. Responding to the 2008 *Doing business* report, Professor Guido Alpa wrote that 'si le droit italien est plus incertain aujourd'hui que jadis, c'est parce que les lois sont mal écrites, et non parce qu'elles sont écrites'[25]. But a reaction has arisen in legal and political communities, which together firmly invite the legislator to be watchful of the drafting of texts and the way they fit together[26]. It is from this spirit that arises the vast

22. S. Lorie, Foreword, in Crépeau, *La réforme...*, préc., p. XIII.

23. For constitutional law, the decision to depart from British style constitutionalism was noted with the assertion by the Luxembourg Court that the Treaty of Rome was 'the basic constitutional charter' (ECJ 294/83, 23 April 1986, *Les verts v. European Parliament*): Ponthoreau, 'La concurrence entre common law et droit civil'.

24. That, without prejudice to what such a Code might be: a code that would supersede national codes or would supplement them (the only reasonable solution today); a full code or a code limited to assets, or even to contract and tort or just contracts; a code limited or not to cross-border relations; a mandatory or an optional code and in that case with an opt-in or opt-out clause, so that it would apply either on request or by default. Of this potential code everything that could be foretold or imagined was said at the bicentenary of the French *Code civil* in 2004.
On this hypothetical European Code see especially G. Cornu, 'Un Code civil n'est pas un instrument communautaire', (2002) 351 *D.*; B. Fauvarque-Cosson, 'Vers un Code civil européen ?', (2002) 463 RTD civ.; Y. Lequette, 'Quelques remarques à propos du projet de Code civil européen de M. von Bar', (2002) 2202 D.; Ph. Malinvaud, 'Réponse – hors délai – à la Commision européenne : à propos d'un code européen des contrats', (2002) 2542 D.; Cl. Witz, 'Plaidoyer pour un Code européen des obligations', (2000) 79 D.; 'L'influence des codifications nouvelles sur le Code civil de demain', in *Livre du bicentenaire*, préc., p. 687 ff.

25. Guido Alpa, '*Why do many Italians live with their parents?' A critique of Doing Business 2008'*, Conference at the London School of Economics, 29 February 2008.

26. And it is in the same spirit that the *Conseil constitutionnel* in France oversees the formal quality of statutes by making their being accessible and intelligible one of the constitutional objectives: Cons. const. 15 nov. 2007, déc. 2007-557 DC : LPA, 14

movement of codification and recodification impelled by countries of written law the benefits of which are already apparent: the recent recodifications of securities law in Quebec, the Netherlands and France have plainly made this branch of law more intelligible not just to nationals but to foreigners too, whether investors or legislators.

As concerns case law, naturally judges, even if they are merely the 'mouthpiece of the law', must state the grounds for their rulings sufficiently to be understood by all those they address[27]. However, this is not always the case in France, where the *Cour de cassation* enters rulings that are sometimes so elliptical that it is no easy matter to understand not only their reasons but their actual meaning[28]. Ever so many non-French people, although French speakers, are puzzled at these rulings that remain a mystery to them. An effort is required here.

There has never been any one language of continental law: continental law has always been expressed in several tongues. But one of them, French, was once the universal language. The universal language is now English and that is the language of common law. Therein lies an obvious advantage for common law in the struggle for influence which, on the world stage, opposes it to civil law.

This reversal of fortunes prompts several reactions: of course, the defence of the use of languages other than English wherever possible and by whatever means (including academic cooperation in the form of undergraduate and graduate exchange programmes from different continental law tradition countries)[29] but translation too. Admittedly the difficulties in legal translation, especially from Romance languages into English (and vice versa) are familiar enough[30]. But however real they may be, they must not divert the undertaking. The experience of many countries—Quebec, Switzerland or Belgium—where language matters, shows that, when it comes down to it, law can be expressed in various languages. Accordingly it is a good thing indeed that the authorities in France have undertaken to conduct the work of codification and the work of translation, which are complementary tasks, equally necessary for ensuring the written law is fully accessible in these times of globalization. The defence and development of their legal languages is a must for continental law countries[31], but something that must be supported by an ambitious policy of translation.

1.2.2 The impact of globalization on the framing of continental law

10. Globalization has naturally prompted aspirations to achieve not just harmonized law but uniform law. Hence the advent of a law written by the several hands of various nations. Examples abound:[32] on the world stage, the Vienna Convention on Contracts for the International Sale of Goods[33], the Hague Convention on the Law Applicable to Matrimonial Property[34] or the Washington Convention on the Form of an International Will;[35] at regional level, European law with its regulations and even its directives

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avril 2008, p. 17, obs. A-LC-V.

27. ...and who, at least for the rulings of a Supreme Court, whose mission is to hear and determine cases, are not just the parties to proceedings.

28. For an example (ruling by France's *Cour de cassation* misunderstood by a Belgian appeal court), see the observations on Cass., ch. mixte, 23 nov. 2004, 4 arrêts, (2005) 434 RTD civ.

29. On the importance of international student exchanges see X. Blanc-Jouvan, 'La formation au droit comparé : le point de vue d'un universitaire', (1996) RIDC, 347, reprinted in *Le droit comparé aujourd'hui et demain*, SLC, 1996, p. 89.

30. See A. Levasseur, 'Les maux des mots en droit comparé – L'avant projet de réforme du droit des obligations en anglais', (2008) RIDC, p. 819: after translating into English a French draft for reform of tort and contract law and comparing the Louisiana translation with the English translation, the author reviews the snares of translation. See also J. Cartwright, in *La concurrence des systèmes juridiques, op. cit.*, Débats, p. 80: the author emphasizes the difficulties felt by the English jurist in translating the expression '*bonne foi*' used in the European directive on unfair terms (the expression *fair and reasonable* nowadays seeming preferable to that of *good faith* that had been chosen initially).

31. Ch. Leroy, 'De la normativité économique', in *Etudes offertes à Jacques Dupichot*, (Bruylant, 2004), p. 279 ff., especially. p. 296: 'If we wish to avoid systematic bleeding by the economy of cultural pluralism, care must be taken that each still living tongue develops the originality of its legal language and brings the cobbler and the financier within its sway'.

32. We leave aside the Unidroit principles that are not mandatory.

33. Convention of 11 April 1980.

34. Convention of 14 March 1978.

35. Convention of 28 October 1973.

which the Luxembourg Court is tending to make as restrictive as regulations; bilaterally, the draft for a matrimonial regime common to France and Germany.

Now, for the very reason that they are from an international source, these texts are often the outcome of horse-trading or compromises that deprive them of the qualities usually ascribed to written law. Sometimes they are so complex that they are understood only by the initiated;[36] sometimes they lay down rules or create instruments that, being deliberately enlarged from national characterizations and categories, cannot readily be fitted back into the national legal orders[37]. The rule, being complex or stateless, will only take on its true meaning by the interpretation the courts make of it. When the courts remain within their traditional role as interpreters of the law. But sometimes there is more than this: the internationally crafted rule comes down to a rule of conduct the content of which is vague and uncertain because the framers of the rule were able to agree, for reasons of substance or of language, only on standards such as 'reasonable', 'proportionality' or 'good faith'. So it is no longer by the interpretation the court would give once and for all but by its application on a case by case basis that the rule will come to be meaningful. This implicit referral to the courts seems to derive from a form of pragmatism that can be recognized in the spirit of common law.

To combat this threat of degeneracy of continental law, one must not stop up these international sources, the benefits of which, like those of globalization, are undeniable, but simply control and contain them:

− *Control* them by being watchful that the way the rules are formulated fits where possible into the continental tradition. There would be no justification for the OHADA, say, proposing to its member states a uniform law of contract and tort which, inspired by Unidroit rules, was to be a complete break with the civil law tradition[38].

− *Containing* them: the diversity of laws and languages within countries with a continental law tradition is source of wealth and so as a matter of principle must not be reduced: harmonizing law is one thing; uniformizing it is something else entirely. Accordingly in Europe family law and land law, where customs and traditions are so strong, ought to remain within the principal jurisdiction of states, directives (properly understood) ought to be preferred to regulations, and the margin of appreciation of states might be more loosely understood by the human rights court[39].

11. In short, continental law will remain a singular art if it successfully adapts to globalization through an effort of clarification and translation and if it successfully preserves the diversity of its languages and of its rules from excessive uniformization that would make it more obscure and denature it.

This concern for maintaining pluralism also goes, in substance, for the values it vehicles.

2. THE VALUES OF CONTINENTAL LAW

12. The continental tradition conveys many sometimes contradictory values that it attempts to reconcile out of concern for social harmony: this pluralism in respect of values (2.1) is also impacted by globalization (2.2).

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36. Example: the Hague Convention on the law applicable to matrimonial property that is rife with options and exceptions (see Y Lequette, *Le droit international privé de la famille à l'épreuve des conventions internationales*, Rec. Cours La Haye, 1994-II, t. 246, p. 8 ff., especially. p. 146 ff.).

37. Example: the international will, for which it is not clear whether it should be treated in French law, when the convention is silent, as a will drawn up by a notary, a will by the testator's own hand, or a secret will; or the voluntary change of marriage property provided for by the Hague Convention for which it is unclear whether it is has retroactive effect or not.

38. A text directly inspired by Unidroit principles proposed a law of contracts which, through its vocabulary and its spirit, broke with the civil law tradition and of which it might be thought, through its purporting to govern all transactions whether domestic or international and by the considerable import it gave to the courts, that it disregarded the true situation in Africa.

39. G. Cornu, Preface to M.-Th. Meulders-Klein, *La personne, la famille, le droit* (Bruylant, L.G.D.J., 1999): 'Before the temptation to level everything off, respect for cultures is an unforgettable requirement (a precious idea, even for Europe, in the heart of which cultural differences warrant that similar questions being given different answers)'.

2.1 The pluralism of values

13. The pluralism of values transpires first of all in the *mission* that the continental tradition assigns to law: to prevent disputes as much as to settle them; to promote a peaceful order as much as to arrange an order of battle. Hence one finds, alongside a public service for dispute settlement entrusted to the judiciary, a public service for the prevention of disputes entrusted to the notarial profession which is tasked with pre-establishing proof of agreements by drafting instruments that have exceptional evidential value and, where required, enforceability[40]. Hence too, and more generally, regulatory mechanisms that, operating *a priori*, govern the behaviour of economic agents. The spirit of the common law systems is very different as they are cast as systems of law for dispute settlement, or for bringing legal action, and largely remain so. They do not know the institution of the notarial profession in which they see a cause for delay and added expense in performing transactions. More generally they believe in self-regulation through the free interplay of economic laws, with law stepping in only *a posteriori*, in the person of the judge, to correct any dysfunctions.

This pluralism is found too in the actual *content* of the legal rule. Legal systems of the civil law tradition set as much store by the moral given, the family given and the social given as by the economic given, whereas common law systems are very largely dominated by the concern for economic freedom[41]. Here are a few examples: the question of revising agreements in the event of a complete change of circumstances since the time it was entered into is mainly debated in continental law in moral terms (abiding by one's word versus acting in good faith)[42] whereas it is handled in common law in economic terms (identity of the operation being maintained or lost)[43]; the obligation to negotiate in good faith is accepted in continental law whereas it is dismissed by English law as contrary to each party's right 'to act in their own interest'[44], and as contrary to the freedom to negotiate (including the freedom to break off negotiations)[45]; freedom to dispose of one's estate in one's will is generally subject to a reserved proportion for family members in continental law, whereas it is unbounded in common law countries; lastly considerations of social order, of protection of victims of accidents at work or of road accidents have led to the introduction in continental law countries of no-fault liability schemes or automatic compensation which arose only later or are still unknown in common law countries[46].

14. Naturally, protecting several values implies an *equilibrium*. Yet often balance is achieved only at the price of complex and shifting rules: evidence of this lies in the recurrent disputes over areas of competence between lawyers and notaries[47], difficulties in settling estates caused by the reserved proportion

40. *Conseiller* Réal famously celebrated this complementarity between the notarial profession and the judiciary: 'Alongside state officials who reconcile and adjudicate disputes, peacefulness calls for other state officials who, disinterested advisers to the parties, both impartial drafters of their wishes, making known to them the full extent of the obligations they enter into, drafting those commitments plainly, giving them their officially recorded character and the quality of a ruling in last resort, perpetuating the memory of them and loyally filing the record thereof, preventing disputes from arising between men of good faith, and denying grasping men the desire to raise an unfair challenge with any hope of success. These disinterested advisers, these impartial draftsmen are the notaries' ('Exposé des motifs de la loi relative à l'organisation du notariat', in *Destin d'une loi : « Loi du 25 Ventôse An XI »*, (éd. Conseil Supérieur du Notariat, Institut International d'Histoire du Notariat, 2003) p. 17. See also M. Grimaldi, Rapport de synthèse au colloque de l'Association du Notariat Francophone, *L'efficacité des actes publics dans l'espace francophone en matière civile. Comment concilier souveraineté nationale et mondialisation ?* (2004), p. 153, especially. p. 158; Y. Lequette, Rapport de synthèse du 100e Congrès des notaires de France, *Code civil, Les défis d'un nouveau siècle*, (Defrénois 2004), art. 37991; A. Renteria, *Manuel de droit privé et de justice préventive en Europe* (IRENE, Pampelune, 2007).

41. P. Catala, 'Le nécessaire accompagnement juridique de la nouvelle économie', *in La francophonie aux défis de l'économie et du droit d'aujourd'hui*, préc., p. 63 ff.

42. This is the doctrine of frustration of contract by unforeseen events.

43. This is the doctrine of frustration of contract, which accepts that the agreement is discharged if and only if the operation that the parties intended to perform has, because of new circumstances, been rendered impossible. See R. David and D. Pugsley, *Les contrats en droit anglais* (LGDJ, 1985), no 418.

44. As Lord Ackner put it in *Walford v. Miles*, cited by John Cartwright, 'L'obligation de négocier ? Un domaine de concurrence entre droit anglais et droit français des contrats', *in La concurrence des systèmes juridiques*, p. 49 ff., especially. p. 52.

45. Cartwright, 'L'obligation de négocier ?'

46. The contrast between the two cultures might again be observed in the rather revealing field of author's or performer's rights: literary and artistic property in French law comprises, alongside pecuniary rights to exploit the work, a moral right that is quite foreign to copyright law.

47. Lawyers readily criticize notaries for their *numerus clausus*, their monopoly and their scale of charges (all of which can be

rules, or the subtle regulations on securities reconciling the protection of creditors, who must be provided with effective security, and the protection of debtors, who must be saved from expedient security[48].

Some commentators draw argument from this to denounce the uncertainty of continental law systems which they claim are complicated and unstable. But in doing so they are unaware, or they pretend to be unaware that simplicity is only achieved elsewhere at the price of setting aside interests that then have no other channels of expression than the judicial channel. Thus in the United States, the swiftness of real-estate transactions – with no prior oversight by a notary – results in serious uncertainties as to the origins of title, which may give rise to lengthy and expensive lawsuits;[49] and the freedom to make wills is often tempered after the event by more or less haphazard judicial measures[50].

15. With continental law conveying and reconciling various values in this way, what impact might globalization have on it?

2.2 The impact of globalization

16. In its *economic aspect*, globalization has put continental law in difficulty. In an atmosphere where market values dominate, as shown by the craze for the economic analysis of law, common law is gaining the advantage for at least two reasons:

− First because, as it has always been impelled by concern for economic efficiency, it is naturally in tune with a market-based legal order. This is illustrated by a decision of Canada's Supreme Court in 2000 which, setting aside any duty to inform in pre-contractual negotiations, held that any such duty would 'hobble the marketplace';[51]

− Next because its historical province being the Anglo-American word, it has been credited with the commercial dynamism of that domain and the economic primacy of the United States[52], whereas it may well be that the true relationship of cause and effect is reversed: it is the common law that owes its influence to US power. Economics comes before law.

And so in this climate some commentators advocate if not a conversion of continental law countries to common law at least wholesale transformations in their legal systems to attune them to market requirements: the notarial system is contested, especially with its expense denounced as a hindrance to the free interplay of supply and demand; the formalism required for entering into certain agreements or providing certain securities is criticized in the name of the requirement for speed at the lowest cost. And in this same climate, one worries at seeing the rules of the European Union prevail, as part of a market order rationale, over national rules that convey values:[53] this is so when an English court, applying the principle of the unrestricted provision of services, authorizes a woman to export to Belgium, for artificial insemination, the sperm collected from her husband hours before his death, whereas, for want of the husband's explicit consent, such insemination was prohibited in England (the freedom to resort to services offered in another member state here overriding the right to tacitly object to *post mortem* paternity[54]); or again when the Luxembourg court, in the name of free access of foreign insurance companies to the Belgian market, rules against the statute which in Belgium placed a duty on insurers to inform

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explained by the public service that the notarial profession provides).

48. Example: the foreclosure clause has just been validated by French law for securities on personal property as on real property, but upon conditions designed to prevent the debtor being despoiled or forced to leave his main residence (ordonnance n° 2006-346 du 23 mars 2006).

49. Whereas in France very few covenants officialized by notaries (4 in 10 000) give rise to disputes.

50. M. Goré, 'L'Estate planning', in *Le droit privé à la fin du XXe siècle*, Etudes offertes à Pierre Catala (LITEC, 2001), p. 383.

51. *Martel Building Ltd v. Canada* 2000 C.S.C. 60, [2000] 2 R.C.S. 860 [67]-[C8]. And back in 1871 an English court ruled that 'whatever may be case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor': *Smith v. Hughes* (1871) L.R. 6 Q.B., p. 607.

52. It is not surprising therefore that common law countries rank highest in the annual ratings by the World Bank in its *Doing business* reports and, as a corollary that common law countries are designated as the most propitious to foreign investment.

53. Ch. U. Schmid, 'Le projet d'un Code civil européen et la nouvelle Constitution européenne', report presented at the conference, préc., *Codes et codification*.

54. *Blood*, cited by Schmid, 'Le projet d'un Code civil européen'.

their insureds that any early termination generally entailed financial losses;[55] and again when that same court ruled it contrary to the requirements of a competitive market for French law to have a provision, by derogation from the directive on product liability, upholding the principle of full compensation for loss, injury or damage[56]. One may – one ought to – be worried about such economic totalitarianism[57].

17. But more recent events have given new colour to the continental law tradition. The unprecedented financial crisis of recent weeks has shown that these law systems, by the scope they give to moral and social values, by the regulations they impose, are not without their qualities[58]. Many observers agree that the subprime financial crisis was largely caused by deregulation of the banking sector and the artifices of insufficiently supervised securitization, and also, more profoundly, by an ideology inspired by nothing other than economic efficiency[59]. This clearly shows that the market, unless it is regulated, is far from ensuring the common good and can lead to economic and social disaster: substantial capital evaporated, indebted owners lost their homes, small savers were ruined. And we also know what it costs the community to make good what no one took care to prevent.

In short, the financial tremors that have shaken the world are evidence that the values of continental law should not be ignored in the age of economic globalization. The economy needs to be 'civilized', one might say[60]. Very recently, the *Observatoire de la finance*[61], after observing that « l'ethos de l'efficacité a eu raison de la plupart des résistances morales et s'est imposé comme le critère ultime de jugement », called for a review that « pourrait bien aboutir à mettre en doute la prééminence dogmatique du souci de l'efficacité économique et financière et à restaurer le bien-fondé de la préoccupation éthique, en particulier celle liée au bien commun »[62]. Bruno Oppetit had said it plainly enough 'There is more to man than efficiency alone'[63].

18. In its *political philosophy* aspect, globalization affects continental law in a different way. It destabilizes it under 'a hail of human rights' to take up Jean Carbonnier's expression.

Civil law is indeed a set of rules of conduct that seek to strike a balance in this or that social relation between the interests of all: those interests are weighed when drawing up the rule and the compromise reached when it is adopted. A proclamation of individual rights, however, does not in itself provide any

55. Schmid, 'Le projet d'un Code civil européen': 'The Court [...] prefers that consumers incur substantial losses rather than reduce the chances of foreign companies gaining access to the Belgian market. It is obvious that in this case, contractual fairness is again sacrificed to market integration'.

56. ECJ, 25 April 2002, case C-52/00, D. 2002.2462, note C. Larroumet: France condemned for removing the 500 excess for damage to property in the statute transposing the directive on product liability.

57. Leroy, 'De la normativité économique', p. 296: 'As the preponderant governing criterion of market democracies is financial profitability, they fairly logically become totalitarian. All the activities of life in society are envisaged by the economic and financial criterion that they must satisfy on pain of losing their legitimacy and eventually disappearing'.

58. It also showed that in terms of sustainable development common law countries may not have the best economy in the world. For it was from the US, although ranked among the highest in the *Doing business* ratings that the crisis spread (which by the way throws a new perspective on the relevance of this ranking and of others such as that of the OECD that rated Iceland, relegated in a few days to the status of a poor country).

59. See the studies collated in *Rapport moral sur l'argent dans le monde 2008*, (éd. Association d'économie financière, Paris 2008), especially: M.-A. Lacroix, 'La crise des subprimes aux États-Unis : crise ponctuelle ou fin d'un cycle', p. 39 ff.; Ch. de Boissieu, 'Premières leçons de la crise. Pour une régulation bancaire et financière', p. 81 ff.

60. So transposing to economics the felicitous expression of Philippe Rémy on fundamental rights: below, no. 19. See also M. Albert, J. Boissonnat and M. Camdessus, *Notre foi dans ce siècle* (éd. Arléa, Paris 2002), p. 121: 'The most daunting legacy that the twentieth century has left to the twenty-first is [...] the complete inconsistency between an increasingly globalized market and the immense deficit of world law, including in respect of social rights. It is this deficit that must be filled'.
And one might mischievously point out a recent US study suggesting as a possible remedy for the ill from which the subprime crisis arose the introduction of a professional comparable to the notary in countries of the civil law tradition, tasked with giving impartial advise to those taking out home mortgages: R.J. Shiller, *The Subprime Solution* (Princeton University Press 2008), chap. 6, p. 130 ('Another possible default option would be a requirement that every mortgage borrower have the assistance of a professional akin to a civil law notary. Such notaries practice in many countries, although not in the United States. In Germany, for example, the civil law notary is a trained legal professional who reads aloud and interprets the contract and provides legal advice to both parties before witnessing their signatures. This approach particularly benefits those who fail to obtain competent and objective legal advice. The participation of such a government appointed figure in the mortgage lending process would make it more difficult for unscrupulous mortgage lenders to steer their clients toward sympathetic lawyers, who would not adequately warn the clients of the dangers they could be facing.').

61. A Geneva-based think tank (www.obsfin.ch)

62. 'Manifeste pour une finance au service du bien commun', in *Rapport moral sur l'argent dans le monde 2008*, préc., p. 118 ff.

63. 'Droit et economie' in *Droit et modernité*, préc., p. 181.

rule of conduct: it stops at guaranteeing rights—and rights of which it generally fails to indicate either the precise substance of each or how they are to fit together[64]. And so when that proclamation is no longer just a guideline for the legislator or a protection against the arbitrary decision of the state but a weapon the citizen can grab to neutralize the written rule for the case he is in, the written law contains within itself two bodies of rules which, one weakening the other, destabilize the whole.

Furthermore, as from when it comes down to the court, made into the umpire of fundamental rights that often clash, to determine the balancing point between individual interests, it is no longer in parliamentary proceedings but in the grounds of rulings that, on a given issue, moral, social, economic and legal considerations are weighed up. One might discern in this a drift towards the common law system, that is particularly prominent in the case law of the European Court of Human Rights[65].

19. And so calls have been made to 'civilize' fundamental rights[66]. At European level, where they are the most virulent, one could cease extrapolating from the Convention, stop constantly finding in it new rights derived from those that the Convention expressly enshrines; one could also better observe particular national characteristics, recognizing that states have sufficient scope for appreciation for their rules of conduct to reflect their cultural diversity.

An example: in contradistinction to what the European Court of Human Rights has ruled, notably in *Mazurek*[67], it may be thought that the reduction of rights that national legislation may inflict on a child born of an adulterous union should not be considered a violation of the Convention: first because there is no right to inherit and entitlement to inherit cannot, without artifice, attach to the law of property, as the Court made it do; next because, even assuming that rights of succession do come within the scope of the Convention, the weighing up of the defence of marriage as the foundation of the family and of the individual interest of the child should be within the states' margin of discretion[68].

20. Finally, continental law certainly has a bright future at the dawn of this 21st century and French law must contribute to preparing that future for it. But that bright future presupposes that continental law remains true to itself, that it remains loyal to its art and its values, which in an age of globalization implies that it remains plural[69], and that, with its wealth of components, it strives not for uniformity but for harmony: harmony that consists in the uniting of differences.

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64. See J. Carbonnier, *Droit et passion du droit sous la Ve république*, (Flammarion, 1996) p. 124 ff., especially p. 125: 'Individual rights drain the law ...'
65. See Carbonnier, *Droit et passion du droit*, p. 55.
66. Ph. Rémy, 'Cent ans de chroniques', in *Un siècle de Revue trimestrielle de droit civil*, (2002) 665 RTD civ., *in fine.*
67. C.E.D.H., 1er févr. 2000: D. 2000.332, note J. Thierry; JCP 2000.II.10286, note Gouttenoire-Cornut and Sudre; Defrénois 2000, art. 37179, obs. J. Massip; RTD civ. 2000.311, obs. J. Hauser, 429, obs. J.-P. Marguenaud and J. Raynard, and 601, obs. J. Patarin; B. Vareille, 'L'enfant de l'adultère et le juge des droits de l'homme' (2000) 626 D.
68. The purpose here is not to defend the inferior status of adulterine children in the law of succession but to defend the freedom of each state to decide for itself.
69. Leroy, 'De la normativité économique', note 31.