



THE FRENCH CIVIL CODE AFTER ITS BICENTENARY (2004–2023): CATCHING UP WITH MODERNITY

LUKAS RASS MASSON

ABSTRACT

The French Civil Code, enacted in 1804 as the first major result of early 19th-century codification, has now reached a venerable age and is clearly in need of rejuvenation. The latest phase of this process of rejuvenation began in earnest in 2004, the bicentenary year of the code, under various pressures from forces of social and economic modernisation to influences of European community law, and the international human rights law as well. The modernisation of the code, a constant and perpetually ongoing process, has now resulted in the systematic renewal of its major components, such as the law of persons, family law, and the law of obligations (specifically that of contracts), in a process that ensures the progress of the ‘French civil constitution’.

Keywords: legal reforms, recodification, civil law, foundation of the legal system, dynamic and continuous adaptation.

1. INTRODUCTION

The French Civil Code has undergone major reforms over the last two decades. This is the result of the influence of not only foreign and

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European legal systems, but also the sociological and cultural evolution of French society. These evolutions have led to a renewed conception of the legal system, of the role of legal sources, and of the judge. Some reforms of the *Code civil* involved mere harmonisation with foreign legal systems. In others, France was *avant-garde* and expresses the modernity of its civil law. This gave rise to the process of recodification of the *Code civil* from 1804. The evolutions cover the general part of civil law, law of persons and family law, as well as law of obligations. Some long-awaited reforms are still necessary, and probably will not be achieved in the near future, whereas others are expected to be adopted soon. These developments reveal that the Civil Code is a living instrument, based on the creative balance between conserving and reforming. The Civil Code is the foundation of the society in France, a monument of the French culture, and the ‘civil constitution of France’. The Civil Code is also considered a structuring and dynamic pillar and a legal model of the French nation, with a dynamic future ahead of it.

Napoleon declared,

*My real glory is not to have won forty battles; Waterloo will erase the memory of so many victories; what nothing will erase, what will live on forever, is my Civil Code.*¹

Civil law in France is the *Code civil*. Going beyond Napoleon’s words, Jean Carbonnier describes the Civil Code as the ‘civil constitution of France’.² It is a ‘lieu de mémoire’, a realm of memory, ‘through which the presence of the law is guaranteed in the collective memory’.³

Therefore, it is no surprise that French society is attached to the Civil Code for emblematic societal questions,⁴ as recent family law reforms confirm. The possibility for same-sex partners to conclude a marriage needed the symbolic dimension of being codified in the Civil Code,

1 ‘Ma vraie gloire n’est pas d’avoir gagné quarante batailles; Waterloo effacera le souvenir de tant de victoires. Ce que rien n’effacera, ce qui vivra éternellement, c’est mon code civil!’, Badinter, 2004; Tricoit, 2019, pp. 141–146.

2 Carbonnier, 1986, p. 309.

3 ‘[P]ar lui seul qu’est assurée la présence du droit dans la mémoire collective’. Ibid.

4 Mazeaud, 2004, pp. 152–159.

not important protests against the reform.⁵ One of the major points of concerns was to keep the terms of ‘father and mother’ and not replace them by the term ‘parents’ in the Civil Code, in light of the symbolic value of the semantic choices of the Civil Code. Further, when the law created the possibility for a woman alone or a couple of women to use medically assisted procreation while being recognised as legal parents, this possibility also needed incorporation into the Civil Code.⁶

This attachment of the civil society to the Civil Code is quite understandably shared by a large section of French legal scholars as observed from the reactions to the possibility of a European Civil Code supplanting the French Civil Code illustrated in the 2000s.⁷ The Civil Code is also a main source of reference for the judges, whose office it is to apply and enforce the law.⁸

The present chapter focuses on the evolution of the French Civil Code after its bicentenary in 2004. Even though the celebrations around the bicentenary of the code praised the Civil Code as a ‘monument of French law’,⁹ the Code was perceived as being largely outdated. Important legal fields were left aside and subject to special rules developed by case law or sectoral legislations not codified in the Civil Code. Technical deficiencies were also identified, especially in the ‘Doing Business Reports’ of the

5 The Law no. 2013-404 of 17 May 2013 opening marriage to same-sex couples was adopted after large protests that gave rise to the political association *La Manif pour tous* which coordinates associations undertaking demonstrations and actions in opposition to laws enabling same-sex marriage and adoption or use of assisted reproductive technology by same-sex couples in France.

6 Created by Law no. 2021-1017 of 2 August 2021 on bioethics and codified by arts. 342-9 to 342-13 of the Civil Code.

7 Lequette, 2003, pp. 97–126.

8 Hauser, 2005, pp. 139–153.

9 See Catala, Lequette, Audit, 2004; *Le Code civil 1804–2004 – Livre du Bicentenaire*, 2004.

World Bank¹⁰ that caught the attention of French legal scholars and law-makers.¹¹ It was apparent that despite continuous reforms, especially Jean Carbonnier's family law reforms in the 1960s and 1970s,¹² social evolution within the French society made it necessary to adapt the Civil Code to new social and economic realities and trends.

In 2004, the need for Civil Code reform was already clear to maintain the central position of the Civil Code as the main reference of French civil law. The drivers of these reforms were both the internal pressure of adapting the code to contemporary social and economic needs and the external pressure. The latter can be divided into horizontal and vertical pressure. Horizontal pressure resulted from comparing the attractiveness of Civil Code to that of foreign legal systems. Foreign law reforms were perceived as a strong incentive to adapt the French Civil law as well.¹³ Vertical pressure is the normative influence exercised by European and international norms, such as the European Convention on Human Rights¹⁴ or the projects of a European Civil Code.¹⁵

This normative pressure, especially the project of a European Civil Code, led to a strong rejection by important parts of French civil law scholars, which translated, interestingly, into a perceived need to reform the national Civil Code in order to protect it from this external

10 The Report to the President expressly states that 'the "Doing business" reports published by the World Bank, which regularly highlight Common law legal systems, have contributed to developing the image of French law as complex, unpredictable and unattractive. Against this backdrop, a written contract law that is easier to read and predict, especially if it is drafted in a simple style and presented in a clearer and more didactic way, is likely to attract foreign investors and operators wishing to link their contracts to French law'. Rapport au Président de la République relatif à l'ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations, 2016; NOR: JUSC1522466P; JORF n°0035 11 February 2016.

11 Canivet, 2018, pp. 31–51.

12 Cornu, 2018, pp. 51–55.

13 According to Fauvarque-Cosson, 2008, pp. 45–51; Witz, 2006; Dunand, Winiger, 2005; Sonnenberger, 2004, pp. 127–130.

14 See Rass-Masson, 2023, pp. 153–165.

15 See Schmidt-Kessel, 2012; von Bar, 2000, p. 1; von Bar, 2001, p. 127; Wurmnest, 2003, p. 714; Riedl, 2004; McGuire, 2006, p. 163; Schulte-Nölke, 2009, p. 9.

pressure.¹⁶ The need to conserve the main national characteristics of civil law therefore expanded to the need to reform the Civil Code.

This tension between conserving and reforming is still emblematic of the living nature of the French Civil Code. The last two decades illustrate the ongoing process of recodification of civil law in France via systemic reforms and sectoral reforms. Actors of this process of recodification are the judges interpreting the Civil Code and its relationship with other legal sources, including the Constitution and international and European law, the government, and within the governmental bodies, the *Commission supérieure de la codification*,¹⁷ and the legislator, even though he frequently intervenes in strong collaboration with the government.¹⁸

All parts of the Civil Code have undergone deep legal changes within the last two decades. The general part of the Civil Code, which is brief and therefore largely subject to case law, has been transformed through new judicial interpretations, without a dedicated legislative reform. Law of persons and family law, as well as law of property, law of obligations, and law on securities, were part of decisive legal reforms, sometimes via reforms that were complete recodifications of the entire legal field. These realised reforms are accompanied by ongoing reforms that are still expected and projected, such as the reform of law on non-contractual obligations.¹⁹ For reforms that are still to come, it remains to be seen whether they will be systemic, in order to respect the general philosophy of codification of civil law, or whether they will be sectoral and fragmented, risking the loss of coherence of the Civil Code.

This coherence of the Civil Code can be seen in the combination of the foundational element of a general methodology and a common framework for French civil law, based on the content and the interpretation of

16 In the context of contract law, see Fauvarque-Cosson, Wicker, 2019.

17 See the description of the competences of the Superior Commission for Codification [Online]. Available at: <https://www.gouvernement.fr/commission-superieure-de-codification> (Accessed: 15 September 2024).

18 Reforms are often taken via *ordonnances*, i.e., governmental decrees for which the government receives special permission by the parliament; in addition, bills passed by the parliament are mostly on bills sponsored by the government.

19 See Borghetti, Whittaker, 2019.

the Civil Code, and the pillars constituted by essential substantive principles, such as individual freedom, equality, and private property.

The evolutions undergone by the French Civil Code since 2004 demonstrate that the Civil Code still is, first, the ‘civil constitution of France’²⁰ and, second, the foundation of the French civil legal order.

2. THE CIVIL CODE, ‘CONSTITUTION CIVILE DE LA FRANCE’

As the ‘civil constitution of France’, the French Civil Code provides the main foundations and pillars of French society since this society is based on the respect of legality and the rule of law. The evolutions of the last 20 years prove that the civil code is an evolving and dynamic instrument, whose content is constantly adapted to the needs and prevailing trends of civil and legal society. This is confirmed by the changes brought to the two first parts of the Civil Code. The general part of the Civil Code provides the main characteristics of the understanding and operation of Civil Law in France. Even though the articles of the Preliminary Title on ‘the publication, effects, and application of legislation in general’²¹ have remained unchanged, except for the introduction of two new articles related to general principles of family law,²² the legal sense of the articles has fundamentally evolved, mainly through evolutions in the judicial interpretation of these articles. Law of persons and family law, enounced in Book I of the Civil Code on ‘Of the Persons’, were subject to major social evolutions that called for legislative reform and led to important reforms of the Civil Code.

20 Carbonnier, 1986, p. 309.

21 Translations are taken from Gruning, Levasseur, Trahan, Roy, 2016; see also Séjean, 2020.

22 Arts. 6-1 and 6-2 reaffirm the principle of equality of marriage and adoption for same-sex and opposite sex marriages and the principle of equal treatment of children regardless of the ways in which parenthood is established.

2.1. LEGISLATIVE REVOLUTION WITHOUT LEGISLATIVE REFORM: THE GENERAL PART OF THE CODE CIVIL

The extreme conciseness of the Preliminary Title that forms the general part of the French Civil Code makes it possible to analyse the changes made to each article. If art. 1²³ was updated in 2004 in order to harmonise the enforcement of new statutes and administrative acts within the French territory, in light of the possibility of publishing the official journal electronically, the changes brought to the question of enforcement are minor and do not affect the overall understanding of civil law in France.

Art. 2 on the temporal scope of application of legal rules, which remained unchanged, on the contrary, was subject to new interpretations that reveal a fundamental renewal of the relationship between the legislator and judges. The article states that ‘legislation provides only for the future; it has no retroactive effect’. Since the absence of retroactivity was established at the legislative level, the Court of Cassation traditionally accepted that the Parliament could derogate from art. 2 of the Civil code and provide for the retroactive effect of a statute if this was explicitly provided for by the law. This was justified, in continuation with Montesquieu’s vision of the judge as the ‘*mouth of the law*’,²⁴ by the separation of powers²⁵ and the prohibition on judges to interfere with the exercise of legislative power.²⁶ Just 200 years after the enforce-

23 Art. 1 of the Civil Code:

Statutes and administrative acts, when the latter are published in the *Journal officiel de la République française*, take effect on the date they specify or, if none is specified, on the day following the date of their publication.

Nevertheless, if the enforcement of some provisions of such acts requires an additional enactment, the effective date of the enforcement of these provisions is deferred to the effective date of the additional enactment.

In case of an emergency, statutes whose decree of promulgation so declares and administrative acts for which the Government so orders by special provision shall enter into force immediately upon their publication.

The provisions of this Article do not apply to acts applicable to individuals.

24 Montesquieu, 1799.

25 Sauvé, 2011.

26 Cornu, 2007, pp. 198–199.

ment of the Civil Code, the Court of Cassation broke this decisive *equilibrium* between the legislative and judicial power, strongly influenced by European law, especially the European Convention for the Protection of Human Rights and Fundamental Freedoms. A highly remarked ruling of the Plenary Assembly decided on 23 January 2004 that the judge has to control over whether the retroactive effect of the new law is justified by sufficiently compelling grounds of general interest, regardless of the formal characterisation of the law as interpretative law.²⁷ The result is an entirely renewed understanding of the determination of the temporal scope of application of laws, despite the absence of reform of art. 2 of the Civil Code.

The evolution related to art. 3 of the Civil Code,²⁸ laying down the main principles under which almost the entire French private international law system was construed, more understandably took place outside of the Civil Code. It is a long-established fact that art. 3 is insufficient for providing suitably precise rules on conflict of laws. Therefore, traditional French private international law is considered largely shaped by case law, influenced by leading decisions of the Court of Cassation.²⁹ The major changes affecting private international law over the

27 Cass., ass. plén., 23 janv. 2004, n° 03-13.617, D. 2004. 1108, note by Gautier; *ibid.* 2005, 1090, observations by Rozès; Just. & cass. 2005, 290, note by Canivet; AJDI 2004, 201, observations by Blatter; *ibid.* 175, study by Lassner; RFDA 2004, 224, note by Mathieu; RTD civ. 2004, 341, observations by Théry; *ibid.* 371, observations by Raynard; *ibid.* 598, observations by Deumier; *ibid.* 603, observations by Deumier; RTD com. 2004, 74, observations by Monéger; R., pp. 199 and 429; BICC 15 mars 2004, report by Favre, conclusions by de Gouttes; JCP 2004, II. 10030, note by Billiau; JCP E 2004, 514, note by Monéger; Defrénois, 2004, 525, observations by Ruet; LPA 28 avr. 2005, note by Mecarelli; *ibid.* 22 juill. 2005, note by Chassagnard; RDC 2004, 699, observations by Lardeux; *ibid.* 791, observations by Marais; RJS 2004, Chron. 343, as per Prétot.

28 Art. 3 of the Civil Code:

Statutes concerning public policy and safety are binding on all those living on the territory.

French law governs immovables, even those possessed by aliens.

Statutes concerning the status and capacity of persons govern French citizens even those residing in a foreign country.

29 The strongest illustration hereof is the importance of the *Grands arrêts* (the 'Great Rulings') on private international law, Ancel, Lequette, 2006.

past two decades, mainly due to the Europeanisation of large parts of this legal field, necessarily lead to an even stronger marginalisation of the practical relevance of art. 3 of the Civil Code. There is no doubt that contemporary French private international law has little in common with what it was like in 2004.

Arts. 4 and 5 have undergone a similar process of revolution without a legislative modification of their wording. Art. 4 enounces, ‘A judge who refuses to give judgement on the pretext of legislation being silent, obscure, or insufficient may be prosecuted for being guilty of a denial of justice’. It affirms the fundamental principle that every conflict affecting French society has to be resolved by the French judge if the dispute is brought to him. This idea of universal access to justice is a direct consequence of French revolutionary principles inspired by the philosophy of the Enlightenment. Art. 5 counterbalances Art. 4 by affirming that ‘in the cases that are referred to them, judges are forbidden to pronounce judgement by way of general and regulatory dispositions’. The consequence is a formal prohibition for French judges to edict general rules. There is no binding nature of precedent in the French legal system. Traditionally, French civil law scholars therefore considered case law as no formal source of law, that is, a ruling cannot constitute the basis for a subjective right or entitlement. This traditional acceptance of the role of the judge has been increasingly contested over the past two decades,³⁰ to such a point that the position has been reversed, and it is now accepted that case law forms a source of law.³¹ The Plenary Assembly affirms that a reversal of case law produces a change of a legal norm, and that it is part of the duties of the judge to apply the new norm that is the result of such a reversal.³² This acceptance of the normative power of the judiciary is a profound revolution of the understanding of the role of the judge in relation to the legislator.

In comparison, the evolution of the interpretation of art. 6 of the Civil Code, even though highly significant, seems a tranquil process. Art. 6

30 Molfessis, 2008, pp. 87–100.

31 Gaudemet, 2022, pp. 791–798.

32 Ass. plén., 2 avril 2021, n° 19–18.814; D 2021, 1164; AJ fam. 2021. 312, note by Houssier; D Actu. 9 avr. 2021, note by Hélaine; JCP S 2021, 1143, note by Asquinazi-Bailleux; B. HAFTEL, D. 2021, 1164.

states that ‘one may not by private agreement derogate from laws that concern public order and good morals’ and enounces the general principle pursuant to which public policy and good morals must be respected by contracts, agreements, and individual commitments. Judges have endorsed a thoroughly liberal interpretation of the article that authors were wondering whether good morals were still part of what needs to be protected by art. 6, with the concept of ‘*respect of dignity*’ as part of public order replacing the reference to ‘*good morals*’, which are considered a reference to outdated moral principles.³³

It is apparent from these changes in the interpretation of the general part of the Civil Code that the role of the judge has been massively renewed in French Civil Law over the last two decades³⁴ despite the lack of legislative reform on the matter. The introduction to the preliminary title of two new articles 6-1 and 6-2 dedicated to the principle of equality in family law, for marriage and for filiation, underlines that the attention of the law maker was directed towards sectoral reforms of the Civil Code, driven by considerations specific to the reformed legal field, but without considering the overall foundations of civil law. In the context of translating social revolutions into the Civil Code, the law of persons and family has clearly demonstrated that the *Code civil* remains the central legal reference within French society.

2.2. SOCIAL REVOLUTION CALLING FOR LEGISLATIVE REFORM: LAW OF PERSONS AND FAMILY LAW

The constant renewal of law of persons and family law confirms that the legal instrument defining the essential principles on which social life is based within French society is the Civil Code. Art. 16 of the Civil Code is particularly meaningful of the ethical dimension of the Civil Code, as it enounces that ‘legislation ensures the primacy of the person, prohibits any infringement of the latter’s dignity, and guarantees respect for the human being from the outset of his life’. Respect for human dignity,

33 Charlin, 2014; Lavaud-Legendre, 2005.

34 See Mission de recherche Droit et Justice, no date.

which is not expressly stated in the French constitution, thus finds in the *Code civil* a particularly strong consecration.

Beyond this fundamental principle of respecting human dignity, the Civil Code also affirms essential principles in relation to ethical considerations around the existence and protection of human life. Created by a legislative package including the first law on bioethics in 1994,³⁵ the rules on how to deal with the human body are specified in the Civil Code and remain a field of constant attention of the law maker in light of the technological evolutions made in the field. Among the most relevant modifications, Art. 16-1-1 of the Civil Code provides this since 2008³⁶:

The respect owed to the human body does not end with death.

The remains of a deceased person, including the ashes of one whose body has been cremated, must be treated with respect, dignity, and decency.

This very detailed approach with regard to bioethical considerations even extends to defining conditions under which brain imaging technologies can be authorised under French law, especially focusing on the type of consent that needs to be given and the intended purpose of the intervention.³⁷

It is unsurprising that the 2021 Law on Bioethics³⁸ made significant changes to several articles of the chapters of the Civil Code dedicated to ‘Respect for the Human Body’³⁹ and ‘Examination of Genetic Characteristics of a Person and the Identification of a Person by Genetic Markers’,⁴⁰ confirming

35 Law no. 94-653 of 29 July 1994 on respect for the human body (*Journal officiel de la République française, Lois et Décrets*, 30 July 1994, no. 175, p. 11056-11059).

36 Law no. 2008-1350 of 19 December 2008 on funerary legislation.

37 Art. 16-4 of the Civil Code affirms as follows:

Brain imaging technology can be resorted to only for medical purposes or scientific research, or within the scope of a court-ordered expert examination, with the exception of functional cerebral imaging. The express consent of the person must be obtained in writing before the examination is conducted, after the person has been duly informed of its nature and its purpose. The consent shall specify the purpose of the examination. It can be revoked without formality and at any time.

38 Law no. 2021-1017 of 2 August 2021 on bioethics.

39 Chapter II of Book I of the Civil Code.

40 Chapter III of Book I of the Civil Code.

that the Civil Code is the receptacle of the essential social values of the French society in relation to respect for human dignity as the foundation of the French legal system.

When analysing the changes brought to the Civil Code in the context of family law, the symbolic dimension of the Civil Code as the foundation of civil society in France is even stronger. There is almost no domain in the context of family law in which there have not been significant changes as a response to the evolved perception of societal questions.

The year 2005 marks the starting point of these law reforms that completely revolutionised the Civil Code on family law matters. Legal rules defining filiation were entirely reconsidered in a systematic reform⁴¹ based on the guiding principle that ‘all children whose filiation is lawfully established have the same rights and the same duties in their relations with their father and mother. They enter into the family of each of them’.⁴² The 2005 reform thus abolished the distinction between ‘*legitimate*’ and ‘*natural*’ children, following a clearly perceptible sociological trend where children in France were and are born when the parents are not married.⁴³ Remarkably, this principle has been shifted in 2021 from the part of the Civil Code dedicated to family law to the general part, enounced in the preliminary title of the *Code civil*.⁴⁴

Further, the overall framework has remained stable since 2005; the 2021 law on bioethics introduced in France led to the possibility of assisted reproduction for women on an individual basis, or couples of women, irrespective of their legal status.⁴⁵ This possibility, which constitutes clearly a profound renewal of the conception of parenthood and the relationship between the State and the use of medically assisted reproduction, led to the introduction of rules specifying how to

41 Ordonnance n° 2005-759 du 4 juillet 2005 portant réforme de la filiation.

42 Art. 310 of the Civil Code in the version adopted in 2005.

43 In 2021, 63.5% of children born alive were born out of wedlock (INSEE, ‘Naissances hors mariage, Données annuelles de 1994 à 2021’, 18 January 2022).

44 Art. 6-1 of the Civil Code, created by Law no. 2021-1017 of 2 August 2021 on bioethics.

45 Law no. 2021-1017 of 2 August 2021 regarding bioethics; see Giovannini, 2022, p. ebac011.

establish filiation in these situations. Art. 342-10 of the Civil Code now provides as follows:

Couples of women, or the unmarried woman, who, in order to procreate, have recourse to medical assistance requiring the intervention of a third-party donor must give their consent beforehand to a notary, who will inform them of the consequences of their act with regard to filiation as well as the conditions under which the child will be able, if he or she so wishes, to access the non-identifying data and the identity of this third-party donor when he or she reaches the age of majority.

Art. 342-11 further enounces:

When the consent provided for in article 342-10 is obtained, the couple jointly acknowledges the child.

Parentage is established, in respect of the woman who gives birth, in accordance with article 311-25.⁴⁶ It is established in respect of the other woman by the joint acknowledgement provided for in the first paragraph of this article. This acknowledgement is given by one of the two women or, where applicable, by the person responsible for declaring the birth to the civil registrar, who records it in the birth certificate.

It is thus evident that the *Code civil* is still the main legal instrument in which societal evolution finds a legal translation and which codifies and enounces the main and foundational values of French society on the most relevant principles of social life. This observation is confirmed by the evolution brought to the concept of marriage. The adherence to principles of pluralism and liberalism has become an evident marker of French society and finds confirmation in the law reforms brought to the possibility of same-sex marriages and divorce without a judge, both reforms attracting a strong public attention, for the former at a very

⁴⁶ Under which ‘filiation is established, with respect to the mother, by the designation of the latter in the act of birth’.

large scale⁴⁷ and for the latter more limited to the community of jurists and legal scholars.⁴⁸ Art. 143 of the Civil Code affirms that ‘marriage is contracted by two persons of different sex or of the same sex’, and the above-mentioned Art. 6-1, created by the law opening marriage to same-sex couples,⁴⁹ specifies that the principle of equality of marriage and of filiation applies regardless of ‘whether the spouses or parents are of different or the same sex’.

A similarly important evolutionary reform was undertaken for divorce in 2016, when the possibility of a private divorce, without the intervention of the judge, was introduced in Civil Code 229-1, which now enounces,

When the spouses agree on the breakdown of the marriage and its effects, they record, each assisted by a lawyer, their agreement in an agreement in the form of a private deed countersigned by their lawyers[...].

This agreement is filed with a notary, who checks that the formal requirements have been complied with [and] also ensures that the draft agreement has not been signed before the expiry of the stipulated reflection period[...].

This filing gives effect to the agreement by conferring on it a definite date and enforceability.

Consequently, divorce does not require the systematic intervention of a judge anymore, but can be a private divorce, assisted by lawyers and registered by notaries. This constitutes an evident revolution in relation to the institutional dimension of marriage, pursuant to which the

47 The Law no. 2013-404 of 17 May 2013 on the marriage of couples of same-sex persons was adopted after wide-scale demonstrations against this law, which gave rise to the political association *La Manif pour tous*. This association coordinated with other such bodies undertaking demonstrations and actions in opposition to laws enabling same-sex marriage and adoption or use of assisted reproductive technology by same-sex couples in France.

48 See Maria, 2020, pp. 87–96; Fautre-Robin, Beranger, 2017, 1/11; Fulchiron, 2016, 1267; Casey, 2016; Brenner, 2017, 262.

49 Law no. 2013-404 of 17 May 2013 on the marriage of couples of same-sex persons.

marriage, as official and public act, can only be dissolved under the control of the judge.

In terms of the parent-child relationship, the Civil Code has been very sensitive to social evolutions as well. In 2022,⁵⁰ reforms were undertaken in order to facilitate adoption by broadening the conditions of access through a series of new measures. The most significant among these are the opening up of adoption to all couples. Prior to the reform, adoption was open only to single persons or married couples. The law's key measure is that it is now also open to civil partnerships (Civil Solidarity Pact / *pacte civil de solidarité* - PACS) and cohabitants or de facto relationships.⁵¹ The minimum age for adoption has also been lowered from 28 to 26, and the minimum period of cohabitation has been reduced from 2 years to 1 year.⁵² Full adoption of children⁵³ over the age of 15 is possible up to the age of 21 if the child is the child of one of the members of the couple, a ward of the State, or a child who has been abandoned late in life.⁵⁴

As a final illustration, rules on parental responsibility, still referred to as 'parental authority' (*autorité parentale*) by Title 9 of Book I of the Civil Code, have been updated in 2019 in order to fight against domestic violence,⁵⁵ by specifying that '*parental authority is exercised without physical or psychological violence*'⁵⁶ and by introducing a series of measures allowing the judge to consider the exercised violence or the risk hereof when deciding matters of parental responsibility, including by issuing protective orders.⁵⁷ This segmented adaptation of rules on parental responsibility, although demonstrating a profound change of the way in which parental responsibility is perceived, underlines the need

50 By the Law of 21 February 2022 reforming adoption and the order of 5 October 2022.

51 Art. 343, para. 1 of the Civil Code.

52 Art. 343, para. 2 of the Civil Code.

53 *Adoption plénière*, which breaks the parent-child relationship with the family of origin.

54 Art. 345 of the Civil Code.

55 Loi n° 2019-721 du 10 juillet 2019 relative à l'interdiction des violences éducatives ordinaires.

56 Art. 371-1, para. 3 of the Civil Code.

57 Arts. 515-9 to 515-13 of the Civil Code.

for systematic reform, including the shift from parental authority to parental responsibility and reorganising the different rules on parental responsibility that are, to a certain extent, a patchwork of successive reforms without overall coherence.⁵⁸

The recent evolution of the Civil Code in terms of general rules of civil law and law of persons and family law confirms that, in 2023 as in 1804, this Code is the ‘*civil constitution of France*’. It is a living instrument that holds a strong symbolic value for social evolutions, and the claims for reforms on societal questions include the claims for changes brought to the *Code civil*. Since French society has experienced rapid changes on many sensitive societal revendications, such as same-sex marriage, adoption and assisted reproduction for couples regardless of their marital status and sex difference between the parents, the principle of equality of filiation, and the end of life and death, the Civil Code has been and will be a major focus of attention of French society. However, beyond this foundation of a social order, based on common values enshrined in the rules of the Civil Code, the code also illustrates that the prospect of finding a legal solution to economic operations is among the fundamental values of private relationships in France. The code thus also confirms that social life in France is based on a civil order in which civil law provides the fundamental structure of property, transactions, and operations of exchange.

2.2. THE CIVIL CODE: FOUNDATION OF THE CIVIL ORDER IN FRANCE

The Civil Code is the fundamental instrument of a ‘*civil order*’, understood as the principle pursuant to which every social relationship receives legal signification. Social relationships are therefore shaped by the existence of a legal system applicable to all private relationships. This explains why the main principles and rules applicable to exchanges within the society are defined by the Civil Code. In this context, although the *Code civil* was able to keep pace and adapt to some of

58 Charles, 2018, pp. 45–58.

the main evolving economic needs (2.1), some important reforms are still expected and prepared, and their adoption would be necessary to fulfil the process of recodification of French civil law (2.2).

2.3. CATCHING UP WITH EVOLVING ECONOMIC NEEDS: THE REWRITING OF THE CODE CIVIL

The celebrations of the bicentenary of the Civil Code raised concerns about the modernity of the code, particularly regarding the state of the law governing contracts and extra-contractual liability.⁵⁹ The fear was that French law would be left behind by legal developments widely accepted by other European codifications, such as the reform of the German Civil Code in 2002,⁶⁰ and by common law, to such an extent that French law would be less adapted and attractive to the needs of business.⁶¹ The first attempt to put forward a draft reform was the work done almost completely by academic lawyers under the leadership of Professor Pierre Catala, but with the general support of the French government, and published as the '*Avant-projet de réforme du droit des obligations et de la prescription*' in 2005.⁶² This work was followed by a series of alternative drafts by another group of academics under the chairmanship of Professor François Terré,⁶³ and by the Ministry itself.⁶⁴ The French Government was finally given authority by Parliament to reform the Civil Code's provisions on contract law and certain related

59 See the contributions in Catala, Lequette, Audit, 2004; *Le Code civil 1804–2004*, 2004.

60 Allen, 2017.

61 Société de législation compare, 2006; See also Bienenstock, 2019, pp. 205–234.

62 *Avant-projet de réforme du droit des obligations et du droit de la prescription*, 2005; on this project, see Cartwright, Vogenauer, Whittaker, 2009.

63 For a reform of contract law, see Terré, 2009; for a reform of civil liability law, see Terré, 2011; for a reform of the general regime of obligations, see Terré, 2013.

64 2008 for contract law, 2011 for the general regime of legal obligations and proof of obligations.

areas by *ordonnance*, that is, government decree.⁶⁵ A draft law concerning contract, proof, and obligations in general was published in February 2015, and on 10 February 2016, the final form of the *Ordonnance* was enacted on 1st October 2016, reforming the provisions of the Civil Code on the law of contract, the general regime of obligations, and proof of obligations.⁶⁶

This major reform endorses the systemic approach of codification under many aspects. It covers ancillary matters, such as the question of proof of obligations, in order to embrace the required elements not only for having an abstract right under the law of obligations, but also for having a concrete individual claim that will be recognised by courts and constitute the basis for identifying the material consequences that the legal obligation will produce. The reform also focuses on providing the main concepts for legal discourse on law of obligations, in order to ensure that legal argumentation will be conducted to shared, clearly defined, and predictable terminology and concepts. Therefore, the expected legal outcomes become more precise and foreseeable to economic operators, in whatever capacity they conduct the operation.

The reform restructures the part of the Civil Code dedicated to the law of contracts such that the overall coherence of the legal field becomes apparent, and the code an excellent tool to understand French contracts law. Remarkably, after having defined ‘*obligations*’ and ‘*judicial acts*’,⁶⁷ the reformed Code starts by defining the concept of contract and directly afterwards lays down, in a hierarchical manner, the general principles and objectives pursued by contract law.

Art. 1101 enounces that ‘a contract is a concordance of wills of two or more persons intended to create, modify, transfer or extinguish obligations’. Art. 1102 consecrates the principle of party autonomy and contractual freedom, while introducing the need to respect rules that

65 By arts. 8 and 27 of Loi n° 2015-177 du 16 février 2015 relative à la modernisation et à la simplification du droit et des procédures dans les domaines de la justice et des affaires intérieures.

66 Ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations, ratified by art. 1 of Loi n° 2018-287 du 20 avril 2018.

67 Arts. 1100 and 1100-1 of the Civil Code.

are an expression of public policy.⁶⁸ Art. 1103, in enouncing that ‘contracts which are lawfully formed have the binding force of legislation for those who have made them’ formulates the principle of *pacta sunt servanda*. Further, Art. 1104 introduces the principle of good faith, applicable to the negotiation, formation, and performance of the contract.⁶⁹ Art. 1105 constitutes the transition from general provisions dedicated to the pursued policy objectives to the technical part of the Code, in identifying the relationship between general contract law and particular rules applicable to specific contracts. The Civil Code continues later with the main definitions and rules applicable to the different aspects of the contractual relationship.⁷⁰

The reform did not limit itself to reorganising the applicable rules in order to make them clearer and more accessible. It also made major changes to the role of the judge, underlining that the modernisation of contract law was not only a formal modernisation, but also a substantive and to a certain extent, institutional modernisation. The power of the judge was strongly reinforced,⁷¹ and the possibility of unilaterally adapting the contract or to dissolving it has been expressly recognised by the new Civil Code.⁷² It appears that the economic analysis of law plays an increasingly important role within the French legal system, under the supervision of a judge who can actively intervene in the determination and restoration of contractual justice.⁷³

The 2016 reform did not mark the end of the process of reform of the Civil Code in the context of the law of obligations. The main confirmation of this ongoing process of recodification of the Civil Code is the 2021

68 ‘Everyone is free to contract or not to contract, to choose the person with whom to contract, and to determine the content and form of the contract, within the limits imposed by legislation. Contractual freedom does not allow derogation from rules which are an expression of public policy’.

69 ‘Contracts must be negotiated, formed and performed in good faith. This provision is a matter of public policy’.

70 Arts. 1106 to 1111-1 of the Civil Code.

71 Revet, 2016, p. 373.

72 Art. 1195 of the Civil Code.

73 Canivet, 2018, pp. 31–51.

reform on securities and guarantees.⁷⁴ This reform aims to modernise and unify the system of securities, particularly by bringing together the rules of securities law, which are dispersed in various codes and laws, within the Civil Code, confirming the central importance of the Civil Code for the French legal system. The reform also strengthens the effectiveness of the law on securities, while finding a renewed balance between the interests of creditors and those of debtors and guarantors. While reforming many securities,⁷⁵ the *ordonnance* repeals certain special securities that have become obsolete or outdated.⁷⁶ A major aspect of the reform is the renewal of rules applicable to the surety bond (*'cautionnement'*) regime.⁷⁷ This reform confirms that the French legislator and government are together continuously aiming to simplify and modernise the Civil Code, with a double focus on both ensuring the consistency of the rules as part of one codified, coherent, and unified system, and proposing solutions that are of high practical and concrete importance, insisting on the methodical realisation of the law.⁷⁸

This continued monitoring of the adequacy of the Civil Code to suit current social and economic needs is ongoing, and civil recodification in France still needs to be completed as illustrated by the projected and outstanding legal reforms.

2.4. OUTSTANDING NECESSARY REFORMS: PROCESSING 'CIVIL RECODIFICATION IN FRANCE'

The Civil Code is considered outdated in many other legal fields as well; therefore, it does not adequately reflect positive French civil law, since

74 Ordinance no. 2021-1192 of 15 September 2021 reforming the law of securities; adopted by the government based on the power granted to it by a law adopted on 22 May 2019, known as the 'loi PACTE'.

75 Mainly surety bond (*'cautionnement'*), movable privileges, common law pledges, pledges of receivables, retention of title, pledges of securities accounts, and guarantees on business assets.

76 As provided for in the Commercial Code, such as commercial pledges, stock pledges, and oil warrants.

77 Simler, 2021, pp. 9–11.

78 Motulsky, 2002.

specific legislation outside of the Civil Code or case law have produced new solutions that implicitly replaced or supplanted the provisions of the Civil Code. In these fields, the Code is still lagging with some major expected reforms.

Some of them are well-identified ongoing sea serpents, such as the reform of tort law or the codification of private international law. Regarding the question of civil liability, identified as a major concern in the economic attractiveness of the French legal system,⁷⁹ the above-mentioned project Catala and project Terré included proposals for reforming civil liability, which were not included in the 2016 reform. Therefore, a logical second step of the French civil law modernisation would be a reform of rules on civil liability. On 21 April 2016, the French Ministry of Justice published a preliminary draft of the civil liability reform,⁸⁰ which led to a draft parliamentary bill in March 2017 for the reform of ‘civil liability’, putting together for this purpose liability for contractual non-performance and the general grounds of ‘*extra-contractual liability*’.⁸¹ The draft bill is a compromise between the earlier Catala and Terré proposals and was welcomed well in legal literature. Civil liability law in France is increasingly inaccessible and hard to understand due to its dispersion. As civil liability law is based on few articles unchanged since the codification of 1804, supplemented by case law, reform is necessary to modernise and clarify principles relating to civil liability.⁸² However, if the draft bill was proposed to be adopted by the Parliament, this has not happened, and the legislative proposal has expired.⁸³

A similar situation of the reform process being blocked, if not coming to a dead end, concerns the codification of private international law. In July 2018, the French Minister of Justice invited Jean-Pierre Ancel, a former judge of the *Cour de cassation*, to establish a working group for reflecting on the codification of French private international law,

79 See, in particular, *L’attractivité de la responsabilité civile : le groupe de travail rend son rapport*, 2022.

80 Subject to a three-month public consultation period.

81 Borghetti, Whittaker, 2019.

82 Jourdain, 2021, pp. 277–282.

83 On this proposal, see Cerqueira, Monteillet, 2021.

and this working group handed its work to the Ministry of Justice in March 2022, including a draft code of private international law of 207 provisions and an explanatory report. The reception of the draft has been lukewarm, with a series of critical voices, some considering the idea of a national code in times of Europeanisation of private international law outdated,⁸⁴ others being opposed to codification of private international law in general, due to the strong influence of case law on the matter in France.⁸⁵ Even though there is continuous scientific interest in the project of codification,⁸⁶ the project has not been submitted to the competent authorities for the continuation of the legislative process.

Other reforms are already clearly abandoned, with little prospects of reform in the near future. A significant example hereof is the failed reform of property law, prepared at the initiative and under the auspices and initiative of the Association Henri Capitant.⁸⁷ In 2006, the Association set up a working group to consider reforming property law, and a proposal for reforming Book 11 of the Civil Code (on property law) was submitted to the Ministry of Justice towards the end of October 2008. Even though the draft took account of various comments and reactions, improving the initial text in May 2009, the reform has not been adopted by the Parliament.

However, other reforms seem well on track, such as the reform of French law of specific contracts. The draft bill represents a major piece of modernisation of the French Civil Code. After an initial draft bill in 2017,⁸⁸ and a revised version submitted to the French Ministry of Justice in March 2020 by another working group,⁸⁹ in April 2020, a new working group was set up by the Ministry of Justice, chaired by Professor

84 Lagarde, 2022, pp. 515–520.

85 Presenting the debate, Watt, Bureau, Corneloup, 2022, pp. 473–476.

86 See *La codification du droit international privé français à l'heure européenne*, 2023.

87 Perinet-Marquet, 2009.

88 Prepared by the Henri Capitant Association and a working group it created on the subject in 2013.

89 See Association Henri Capitant des amis de la culture juridique française, 2020; and in particular see Association Henri Capitant des amis de la culture juridique française, 2021.

Stoffel-Munck. The commission published the preliminary draft reform in July 2022.⁹⁰ This reform could be adopted in the near future.

A major actor in this process of ongoing recodification of the Civil Code is the *Commission supérieure de codification*. This ‘Superior Commission for Codification’ reports to the prime minister, as successor, since 1989, of the *Commission supérieure de précodification*, which had been set up in 1948.⁹¹ The *Commission supérieure de codification* is chaired symbolically by the prime minister, and effectively by the vice-president (Bernard Stirn at the time of writing). It plans codification work and, through its opinions and annual public report, establishes the methodology for drafting codes by issuing general guidelines. It leads and coordinates the work of the ministerial departments responsible for drafting new codes. The *Commission supérieure de codification* is consulted for all systematic reforms of codes and can be seized for draft texts amending existing codes. The annual reports of the Commission are a valuable element for measuring the vitality and methodology of codification in France.⁹²

These different reforms of the Civil code that are still expected confirm the awareness of the need to constantly adapt the *Code civil* and to identify it not only as a monument of French law that needs to be conserved, but as a foundation of French society that needs to be dynamically rethought.

3. CONCLUSION: THE CODE CIVIL AS A LIVING INSTRUMENT

Analysing the evolution of the *Code civil* over the last two decades has made it evident that the Civil Code is a living instrument, based on the creative balance between conserving and reforming. This balance is implemented by the interplay among the legislator, government and experts appointed by it, the judges, and practitioners. The *Code civil* thus is not just a text. It is a method at the heart of the understanding and

90 Cerqueira, Monteillet, 2023; Bucher, Daillant, 2023.

91 By Decree no. 48-800 of 10 May 1948.

92 See the *Rapports annuels de la Commission supérieure de codification*.

operation of civil law in France. It is the promise of a national society based on respecting legal expectations, which in turn are respectful of fundamental social values. The last twenty years confirm that the Civil Code has been the foundation of society in France. It is also the structuring and dynamic pillar of the French nation, a legal model. In this sense, the place of the *Code civil* in the French legal system considering its recent evolutions gives the impression that the Code still has a bright future ahead of it: *longue vie au Code civil des Français*,⁹³ and long live the codification of civil law!

93 'Long live the French Civil Code'.

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