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## Ruminations Around the Dictionary of the Civil Code

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## RUMINATIONS AROUND THE DICTIONARY OF THE CIVIL CODE

Alain A. Levasseur\*

Keywords: avant-projet Catala, legal translation, laws of obligations, civil code

In 2004, Professor David Gruning and I were asked, on behalf of the Association Henri Capitant (AHC), to undertake the translation from French into English of Professor Pierre Catala's *Avant-projet de réforme du droit des obligations et du droit de la prescription (avant-projet Catala)*.<sup>1</sup> This *avant-projet* had received the intellectual endorsement and moral support of the AHC. Our involvement in the translation was justifiably grounded on the long established, yet not well known, fact that the state of Louisiana is the only mixed jurisdiction to have a civil code written directly in the English language; this since 1870. Prior civil codes (1808–1825) were translated from the original French version into English. As a result of some “prophetic” misunderstanding between a few “interested parties,” it happened that the same *avant-projet Catala* was also to be translated in English by two prominent colleagues from the University of Oxford: Professors J. Cartwright and S. Whittaker.<sup>2</sup> One would think that two translations in the same English language of the same French text ought not to be much different one from the other except, obviously, for the selection, here and there, of a few words or a few grammatical constructions.

What happened on April 1, 2008 at a colloquium held in the grandiose Senate building in Paris was as much a “collision” of a

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1. PIERRE CATALA, *Avant-projet de réforme du droit des obligations (articles 1101 à 1386 du Code Civil) et du droit de la prescription (articles 2234 à 2281 du Code Civil)* (2005) available at <https://perma.cc/CCN9-DDFK>.

2. PIERRE CATALA, *PROPOSALS FOR REFORM OF THE LAW OF OBLIGATIONS AND THE LAW OF PRESCRIPTION* (John Cartwright & Simon Whittaker trans., Hart Publ'g 2007) available at <https://perma.cc/Q88D-KYQG>.

cultural and intellectual nature as had happened on the battlefield of Waterloo eleven years after the promulgation of the French Civil Code of 1804. One may wonder, perhaps even be puzzled, by this connection between a battle Napoléon lost to the British and a piece of legislation, the Civil Code, albeit of a very unique nature. Let us remind the reader that history tells us that Napoléon would have said on his deathbed that: “My true glory is not that I have won 40 battles; Waterloo will blow away the memory of these victories. What nothing can blow away, what will live eternally, is my Civil Code.”<sup>3</sup> This is where we found our inspiration and motivation: make “intellectually” eternal (if possible) the Civil Code of the “physically” defeated Emperor by transposing his code in the vernacular language of those who had won on the battle ground meaning, the ordinary and plain English language as contrasted with the English language of the common law. A daunting “challenge” for both of us.

Two translations in English were subsequently published in the same volume next to other translations in other languages. The translation made by our English colleagues is identified as “*Anglais* (O),” or English from Oxford, and our translation is referred to as “*Anglais* (L),” or English from Louisiana. We give here only one illustrative example of the two fundamentally different approaches in translating the same French text:

French text: *Il y a solidarité de la part des débiteurs, lorsqu'ils sont obligés à une même chose, de manière que chacun puisse être contraint pour la totalité, et que le paiement fait par un seul libère les autres envers le créancier.*<sup>4</sup>

*Anglais* (O): There is joint and several liability amongst debtors where they are under obligations to do the same thing such that the totality of it may be enforced against each of them, and satisfaction by only one discharges the others with regard to the creditor.<sup>5</sup>

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3. Alain A. Levasseur, *Code Napoleon or Code Portalis?*, 63 TUL. L. REV. 762, 764 (1969).

4. CATALA, *supra* note 1, art. 1200.

5. CATALA, *supra* note 2.

*Anglais* (L): There is solidarity between obligors when they are all bound to the same performance in such a way that each of them may be compelled to perform the whole performance and when performance by one of them relieves the others towards the obligee.<sup>6</sup>

This example could not be more explicit: what happened to the typical and traditional civil law concept of “*solidarité*”? What is this “joint and several” expression? Does not the word “solidarity” exist in the native, common, and vernacular English language? We can read the following definition of solidarity in the non-legal, Webster’s New World Dictionary: “combination or agreement of all elements or individuals, as of a group; complete unity, as of opinion, purpose, interest, feeling, etc.” Notice the simple, common words—“agreement of all individuals” and “complete unity, as of purpose, interest.” These words surely fit perfectly with the civil law understanding of “*solidarité*”—“solidarity”? So, why resort to the common law words of “joint” and “several,” which refer to concepts that originate from a different legal regime (procedure as opposed to substantive law) and that have different legal effects from “*solidarité*”?

From our point of view, where differences had to be stressed between an *Anglais* (O) and an *Anglais* (L) translation, we were determined (and unwilling to bend) to emphasize the specificity and uniqueness of the civil law tradition and, therefore, of its traditional and specific language—French in this instance. Since we were carrying on the Louisiana civil law tradition that we can trace back to 1808 and 1825, we had no difficulty or misgivings in our task. As Professor Alain Ghozi stated: “[i]n this domain, a literal [sic] translation has no room; to translate faithfully one must fully grasp the meaning of the rule, often in its *raison d’être*.”<sup>7</sup>

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6. ALAIN LEVASSEUR, LOUISIANA LAW OF OBLIGATIONS IN GENERAL: A PRÉCIS (2d ed., LexisNexis 2009).

7. Pierre Catala (dir.), *L’art de la traduction. L’accueil international de l’avant-projet de réforme du droit des obligations*, RTDCiv 2011, 417.

This first major and stimulating exercise in translation led us to face a major challenge: translate all entries of the *Vocabulaire Juridique*<sup>8</sup> dealing with the subject matters of the French Civil Code. As one of four members of the Scientific Committee of the Dictionary of the Civil Code<sup>9</sup> and lead translator, I was overwhelmed by this monumental task. To find strength and cohesiveness in numbers, I invited several colleagues to tackle Cornu in English!<sup>10</sup>

I had flashbacks of summers I spent with an uncle of mine, a farmer, who acquired several acres of land in the Gers area of France. The land had been fallow and uncultivated for several years and therefore required much hard work to turn it into sunflower, corn, and wheat fields. My uncle and I could see in our imagination those beautiful fields and the satisfaction they would bring one day. One day? My uncle was not one to back off from the task and I was committed to helping him. And so we spent the first summer operating a bulldozer day and night—my uncle at night and I in the daytime—clearing the land, opening paths in the woods, digging ponds, and placing drains in the ground. By the end of that first summer a new creation had emerged from our determination and hard work. Over the following summers, the land was covered with sunflowers swaying in the wind; with wheat pointing straight to the sky; with corn showing its beard. We did it; our hard work had paid off.

I felt also like how a sculptor probably feels when he faces a block of marble out of which he is to carve a statue. Most likely, the

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8. GÉRARD CORNU, *VOCABULAIRE JURIDIQUE* (9th ed., Presses Universitaires de France 2011).

9. GÉRARD CORNU, *DICTIONARY OF THE CIVIL CODE* (Alain Levasseur & Marie-Eugénie Laporte-Lageais trans., LexisNexis 2014) [hereinafter *DICTIONARY OF THE CIVIL CODE*].

10. Translators: Associate Professor Bob Mircea, Universitatea Babeş-Bolyai Cluj-Napoca; Dr. Eleanor Cashin-Ritaine, Senior Associate, Ducrest Heggli Avocats LLC, Geneva; Professor Vivan G. Curran, University of Pittsburg, School of Law, Pittsburg; Professor David W. Grunning, Loyola University, School of Law, New Orleans; Professor Olivier Moréteau, Director of the Center of Civil Law Studies, Louisiana State University, Law Center, Baton Rouge; Professor Randall J. Trahan, Louisiana State University, Law Center, Baton Rouge; Serban Vacarelu, Lecturer and Ph.D. Researcher, Maastricht University, Faculty of Law.

sculptor sees in his mind and feels in his heart far beyond the block of marble. He can touch the silhouette, the curvature, and the profile of the statue before it finds life in his skilled and toned hands. To translate is, in a sense, to practice the art of shaping and carving out all the beliefs, aspirations, ideals, and values that are hidden in a given block of words; it is to transform them into words meant to captivate the awareness of the mind and the sensitivity of the heart of the reader. Words identified with the vernacular language of a people are the outward expression of symbols, images, and icons that their culture conveys in an attempt to bring the reader or listener into its depths, through the use of the reader's or listener's own language. Therefore, it becomes the duty and mission, more than the mere role of the translator-artist, to trust in his talent, permeated with human feelings and guided by his intellectual skill, to shape the culture of one people, the "sender," into a work that another people, the "receiver," may readily understand and appreciate as being worthy of as much respect in its own culture. The translator must use language, on his side of the mirror, that is transparent, not opaque, thoughtful and not dismissive, so that the reader-receiver will be able to see, couched in his own language on his side of the same mirror, the very message the sender meant to convey:

[t]his idea of translation as transportation commits us implicitly to a certain view of meaning, namely, that it is like an object that can be picked up out of the place where it is found and dropped into another place; or, to put it another way, that the meaning of a sentence can be separated from its words—from its language, from its cultural context—and reproduced in another. At the center of law is the activity of translation. To translate at all . . . requires that one learn the language of another, recognize the inadequacy of one's own language to that reality, yet make a text, nonetheless, in response to it. Should it accordingly be a constant and central aim of the translator to bring his own reader to a new consciousness of the limits of his language in relation to another? Not by changing English, say, into some foreign thing, but far more subtly, by reminding the reader that one is always at the edge of what can be done; that beyond it is something unknown

and if only for that reason wonderful; that, like grammar, a translation never be more than a partial substitute for an education . . . . There is no ‘translation,’ only transformation achieved in a process by which one seeks to attune oneself to another’s text and language, to appropriate them yet to respect their difference and autonomy as well, in what Hugh Kenner calls ‘interchanges of voice and personality.’ In making (and reading) translations we should think and speak, then, not about transportable ‘content,’ but about the relations-between texts, between languages, between people-that we establish in our own compositions; about the attitudes towards other people, other languages, that we embody in our expressions.<sup>11</sup>

As Judge Nicholas Kasirer wrote: “[t]ranslation is, inevitably, the occasion for the appropriation and the reinvention of a text according to the views and values of the translator and, as one scholar has recently argued, according to the time and place in which the translator works.”<sup>12</sup>

With respect to translation as a process of “transformation” or “appropriation and reinvention,” I believe that the civil law, as a major legal tradition, has an advantage over the common law as another major legal tradition. That advantage, I believe, is that the civil law is drafted in the language of the “reasonable man,” the language of the “farmer” for whom the law of property, successions, etc., was written.

The language of the civil law has also been described as the language of the man who stands on the back platform of a Parisian bus. In the days of René David, the man who coined this expression, Parisian buses were fitted with a platform, where most bus riders preferred to stand and enjoy the ride.<sup>13</sup>

Ever since its founding years in the eleventh and twelfth centuries, “legal technicians,” mostly judges, have written the common

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11. JAMES BOYD WHITE, *JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM* 234, 252–254 (U. Chi. Press 1990).

12. Nicholas Kasirer, *Portalis Now*, in *LE DROIT CIVIL, AVANT TOUT UN STYLE ?* 22 (Nicholas Kasirer ed., Éditions Thémis 2003).

13. That advantage explains also why the French Civil Code was easily “exported” to vast continents like Latin America.

law for “legal technicians,” not for the “common man.” Because the linguistics can be extremely different, the translator is confronted with the difficult task of having to turn the technical, special, “tailor-made” language of the common law into the average, “common-man” language of the civil law.

The functional importance of translating the culture and the spirit of a legal system into a language that is foreign to it, consists in selecting honest and truthful means of bringing forth the social, spiritual, ethical values of that system so that they will be received and understood in that foreign language without mischaracterization or distortion. The translator must be, therefore, fully ready to accept and endure the headaches and heartaches of his mission particularly when he will be confronted with legal concepts and institutions, which intimately reflect and embody the exclusive identity of the specific features of one legal tradition in contrast with the features of another legal tradition.<sup>14</sup> This is where the translator will have to become a skilled linguist, clothed in a legal scholar’s garment, in addition to being an anthropologist, philosopher, historian, sociologist; an overwhelming endeavor, which should never be undertaken for expediency reasons, practical or material reasons or with the motivation that would amount to saying that, after all, the “receiver” will not check the translation, for a variety of reasons, and will accept the translation as being accurate and faithful to the original foreign legal concept or institution.<sup>15</sup>

When translating concepts into words, and vice-versa, one must be aware that one is also engaged in the practice of an art that requires sensitivity and sensibility, emotion and compassion, understanding and inquisition. Just as the pianist must use his hands and talent to “interpret” or “translate” into sounds a musical composition, with the intent to touch the minds and hearts of an audience, so requires the art and technique of translating. Music critics who hear

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14. Solidarité/solidarity is one of those concepts.

15. We have witnessed many of these kinds of uneducated and misleading translations, a recent one from a French pre-nuptial agreement.



the same Mozart concerto will seldom share exactly, or to the same extent, the same views on the pianist's performance because their hearts and minds will not have heard the same sounds nor felt the same emotions with the same intensity. The translator and the pianist are given a "written score," which is not their creation; yet, somehow, they must attempt to immerse themselves into the person and personality of the author-composer so as to allow and entice the reader or listener to do likewise. A musical score is under the fingers of a pianist like the words of a text are under the pen of a translator.

In civil law terms, a translator is under an "obligation of result" and, to a large extent, also under a "strictly personal obligation." He must reach that result with his personal talent, knowledge, and *savoir faire*, as he should be fully aware that "allusions can be missed" and that "a bias can be introduced here and there."<sup>16</sup> It is with this frame of mind and with these motivating guides that we undertook to turn parts of the *Vocabulaire Juridique* into a Dictionary of the Civil Law.

In translating parts of the *Vocabulaire Juridique of Gérard Cornu*, we became very quickly aware of the profound meaning of these words written by Gérard Cornu:

If one accepts the hypothesis that the language of the law presents linguistic markers sufficient to contribute a specialized language, then it must be postulated that every language of this order necessarily grows and develops in the bosom of a language and, therefore, that a French juridical vocabulary does so in the bosom of the French language: a nourishing link that not only invites the comparison of this specialized language with current language or with other technical languages, but also demands that one respect the genius of the language to which it belongs in its norms and its evolution . . . . Monolingual and monolithic, this work draws only from the French language and expresses only the French juridical

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16. See Kasirer, *supra* note 12, at 22 ("allusions are missed; a bias is introduced here and there.").

system. From these limits we nourish the hope of compensating for the loss of extent with depth.<sup>17</sup>

Our translation of excerpts from the *Vocabulaire Juridique* did indeed draw from the French language, but we meant to go far beyond expressing only the French juridical system. The reason was that we intended to extract from the *Vocabulaire Juridique* as many entries as we could identify as being “civil law” in their essence and thus related particularly to the civil law of the state of Louisiana. Hence, the addition of, under a large number of entries and next to articles of the French Civil Code, references to articles of the Louisiana Civil Code. Thereby the reader will be able to relate articles of the French Civil Code<sup>18</sup> to articles of the Louisiana Civil Code, which have been exclusively in English since 1870.<sup>19</sup> Indeed, we wonder which civil code, other than the Louisiana Civil Code, could have been a better source of articles expressing the civil law in English?

The words of Gérard Cornu cited above, “monolingual and monolithic” on the one hand, and “only from the French language” on the other hand, awakened in us a deeply felt concern, namely that the enterprise upon which we had hoped to embark, translate the *Vocabulaire* into English, might be futile, even hopeless. Why had this work of translation not been done before? We ultimately concluded that such an enterprise was not so difficult as to be impossible. However, “we” in Louisiana have spoken and written the civil law in English for centuries. Since the 1870s, although confronted with the dominance of the English language and the increased influence of the common law, we nevertheless succeeded in turning the English language into an instrument for the defense of the civil law.

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17. DICTIONARY OF THE CIVIL CODE, *supra* note 9, at XVII, XX.

18. See the French Civil Code in English on Legifrance, <https://perma.cc/A4PS-MJJM>.

19. For the history of the Louisiana civil codes, see ALAIN A. LEVASSEUR, LOUIS CASIMIR ELISABETH MOREAU-LISLET, FOSTER FATHER OF LOUISIANA CIVIL LAW (LSU Paul M. Hebert Law Center Publications Institute 1996); ALAIN A. LEVASSEUR & VICENÇ FELIÚ, MOREAU LISLET: THE MAN BEHIND THE DIGEST OF 1808 (Claitor’s 2008).

We made ours the words of Gérard Cornu: “the language of the law is, to a major extent, a legacy of tradition.”<sup>20</sup> In undertaking an English translation of the civil law entries of the *Vocabulaire*, we were fully aware of the challenges we had to face. However, we were also extremely confident in our “Louisiana civil law in English,” because we were well aware that our codifiers of the past had wisely and skillfully used the English language of the average, common English speaking layman, rather than the English language of the common law technicians, the judiciary in particular: “[a]fter all, we are and have long been English speaking civilians.”<sup>21</sup> Our voice, however, is only now being heard and we owe it to two of our most skilled lawyers and learned codifiers: Louis Moreau-Lislet and Edward Livingston.

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20. GÉRARD CORNU, *LINGUISTIQUE JURIDIQUE* 19 (3d ed., Montchrestien 2005).

21. *DICTIONARY OF THE CIVIL CODE*, *supra* note 9, at XIII.