DE GRUYTER JETL 2021; 12(2): 185–198

Book Review

J-S Borghetti/S Whittaker (eds), *French Civil Liability in Comparative Perspective* (Hart 2019). 521 pp. ISBN 978-1-5099-2727-2. £ 90.00 (hardback).

Reviewed by **Marta Infantino:** Associate Professor of Private Comparative Law, University of Trieste, Italy, E-Mail: minfantino@units.it

https://doi.org/10.1515/jetl-2021-0010

I Introduction

Under the plain sounding title of this volume, comprising twenty-two complex essays stemming from a colloquium held at St John's College, Oxford, in September 2018, lies a hidden jewel. The overt aim of the book is to gather views of domestic and foreign experts on the *Projet de réforme de la responsabilité civile* released in March 2017 by the French Ministry of Justice (hereinafter, the *Projet*), with the text, in French and in English, provided in the Appendix of the volume.[1] This is a useful and noble aim, especially considering that there is only limited literature available on the *Projet* in English.[2] Such an aim is masterfully accomplished by the group of distinguished professors who participated in the endeavour, thinking about the state-of-the-art of actual and prospective French law, often in comparison with other laws. But the book also stands out as a collection of thoughtful essays on (tort) law, language, history, and culture. As I will try to argue, this attention to the historical, linguistic and cultural dimension of the law makes the book a must-read well beyond the circle of tort lawyers and readers interested in the development of French law.

1 The *Projet* and its translation are also available at <http://www.justice.gouv.fr/publication/Projet_de_reforme_de_la_responsabilite_civile_13032017.pdf> (in French) and at <http://www.textes.justice.gouv.fr/art_pix/reform_bill_on_civil_liability_march_2017.pdf> (in English).

2 The *Projet* has been extensively commented in French literature: see, among the works carried out in a comparative perspective, *C Boillot/AG Castillo* (eds), La réforme du droit de la responsabilité civile : regards croisés actes des journées du 7 et 8 juin 2019 (2019); *B Mallet-Bricout* (ed), Vers une réforme de la responsabilité civile française: Regards croisés franco-québécois (2018); *A-G Castermans et al*, Regards comparatistes sur la réforme de la responsabilité civile: Le rapprochement des responsabilités contractuelle et délictuelle dans l'avant-projet de réforme, abordé sous l'angle du droit comparé (2017) 69(1) Revue Internationale de Droit Comparé (RIDC) 5–44. On the previous phases of the French debate on tort reform, see, in English, *P Brun/C Quézel-Ambrunaz*, French Tort Law Facing Reform (2013) 4(1) Journal of European Tort Law (JETL) 78–94.

In the following pages, I will briefly summarise the actual state and contents of the proposed reform, whose draft is currently pending in Parliament (section II), in order to present what the book is ostensibly about (section III). I will then try to unearth what, in my opinion, the book is also about and why it is important to read it, focussing on the contributors' intended and unintended efforts in delving into the history, language and culture underlying French (and a few other) tort law(s) (sections IV and V).

II Tort law reform in France

The background underlying the book is well-known. Since the 2000s, France engaged in deep reforms of the law of obligations as enshrined in the 1804 *Code Civil*. This notoriously ended up in a re-codification of rules on the statute of limitation and on contract law in 2008 and 2016 respectively.[3] In spite of academic projects proposing also a reform of tort law rules,[4] in 2016 the tort law provisions in the Code were renumbered but remained untouched. In March 2017, however, the *Chancellerie* (that is, the French Ministry of Justice), after a round of public consultations, released the final version of its own proposal for the legislative reform of tort law, containing 83 articles that were meant to replace existing articles from 1231 to 1252 of the *Code Civil*.

In the words of its drafters, the *Projet* aims to restate the law, translating into the Code the most significant legal and judicial developments that occurred in the last two centuries, so as to make French codified law up-to-date, to enhance legal certainty and to provide better protection for victims.[5] In spite of this proclaimed commitment to preserve continuity, however, the *Projet* is innovative in many respects, taking a stance amidst unsettled debates or blatantly introducing rules that do not correspond to existing practice.

Among the most discussed and innovative points is art 1233-1 of the *Projet*.[6] Article 1233–1, while confirming the well-established rule of *non-cumul* of tortious

3 See the loi no 2008–561 of June 2008 portant réforme de la prescription en matière civile and the Ordonnance no 2016–131 of 10 February 2016 portant réforme du droit des contrats, du régime général et de la prevue des obligations.

4 *P Catala* (ed), Avant-projet de réforme du droit des obligations et de la prescription: Rapport remis au garde des Sceaux (2006); *F Terré* (ed), Pour une réforme du droit des de la responsabilité civile (2011).

5 *J-J Urvoas*, Présentation du projet de réforme du droit de la responsabilité civile, 13 March 2017, at <http://www.presse.justice.gouv.fr/>.

6 The numbering of articles referred to is the one used in the *Projet*. Where provisions of the current Civil Code are cited, the citation is to the article 'of the Civil Code'.

and contractual liability, introduces an exception in personal injury cases, where extra-contractual liability applies regardless of whether there exists a contract between the parties (art 1281 further adds that liability for personal injury cannot be validly excluded or limited by agreement). Although the *Projet* clearly distinguishes between contractual and tortious liability, it also attempts to unify (as far as possible) the rules applicable to them.[7] Among the provisions that the two forms of liability explicitly have in common, art 1235 makes explicit what for a long time has been implicit in French liability law: a loss (translating the French word *préjudice*) is reparable only 'where it results from harm [in French: *dommage*] and consists of an injury to a lawful interest, whether patrimonial or extra-patrimonial'. Further rules common to contractual and tortious liability include provisions on compensation for lost chances (art 1238), the assessment of causation, including alternative causation in cases of personal injury (arts 1239–1240), defences (from art 1253 to art 1257–1), evaluation of damages (arts 1262–1264), joint and several liability (art 1265), and compensation of losses resulting from personal injury and property damage (arts 1267–1279).

It is with regard to tort liability only, by contrast, that the *Projet* articulates a variety of liability regimes. Tort liability might thus be based upon: fault (arts 1241–1242–1), the action of things (*le fait des choses*: art 1243), nuisance (*troubles de voisinage*: art 1244), harm caused by other persons (such as in the case of vicarious liability of parents, supervisors of adults, and employers, covered by arts 1245–1249), environmental harm (from art 1279-1 to art 1279–6), harm caused by motor vehicles (arts 1285–1288) and by defective products (from art 1289 to art 1299–3). Further, it is only in cases of extra-contractual liability that the plaintiff might apply for an injunction to prevent harm (art 1266) and, after the harm has occurred, for an order of payment of a civil penalty (art 1266–1).

As is well-known, after March 2017 the *Projet* was subject to a new round of public consultations. In July 2020, the Law Commission of the French Senate released a *Rapport d'information*,[8] where it was suggested that some of the *Projet*'s most controversial proposals be dropped and a law on the *Projet*'s least controversial elements be adopted. Following the Law Commission's suggestions, a bill was drafted and is currently pending as *Proposition de loi no 678* before the Senate.[9]

---

7 See the Section 1 of Chapter II of the *Projet*, tellingly entitled 'Provisions common to contractual and extra-contractual liability'.

8 *J Bigot*/*A Reichardt* (au nom de la commission des lois), Rapport d'information n° 663 (2019–2020), 22 July 2020, at <http://www.senat.fr/rap/r19-663/r19-6631.pdf>.

9 See *Sénat*, Proposition de loi no 678, at <http://www.senat.fr/leg/ppl19–678.html>. I am very grateful to Christophe Quézel-Ambrunaz for having pointed out this bill to me and guiding me through the text. All errors are mine.

The *Proposition* largely reproduces the *Projet*, but for a few deviations. For instance, the *Proposition* re-affirms the rule of *non-cumul* in personal injury cases,[10] contains no rule on alternative causation for personal injury cases, does not allow courts to issue civil penalties, and covers neither environmental harms nor harms caused by motor vehicles and by defective products. Apart from these and other minor exceptions, most of the content of the *Projet* is now replicated in the *Proposition de loi no 678* (although sometimes with a different numbering). Digging into the contents of the *Projet* therefore remains as interesting as it is timely.

III The overt contents of the book

Divided into eight parts, the book collects papers from a variety of contributors who comment on the *Projet* in light of the history and experience of the French and other legal systems.

More in particular, after the introductory chapter by the editors,[11] Part I of the volume (Civil Liability, Contractual and Extra-Contractual) with essays by Whittaker, Laithier and Stoffel-Munck, deals with the *Projet*'s attempt to unify contractual and extra-contractual liability. While Whittaker analyses how unitary and separate visions of tortious and contractual liability have historically developed under French and English law,[12] Laithier and Stoffel-Munck investigate the place of tort law within contractual relationships under French law, focussing on the tortious liability of a party to a contract vis-à-vis the other or third parties to the contract, respectively.[13] All the authors also touch upon the *non-cumul* rule and its partial alteration by art 1233-1 of the *Projet*. Parts II ('Fault') and III (Liability without Fault) of the book are devoted to the main liability regimes set up by the *Projet*. In Part II, Dugué and Dyson scrutinise the quandaries of the notion of fault under French and English private (Dugué) and criminal (Dyson) law;[14] in Part III,

---

10 See art 1233 of the Proposition de loi no 678 (fn 9).
11 J-*S Borghetti*/*S Whittaker*, Introduction, in: J-S Borghetti/S Whittaker (eds), French Civil Liability in Comparative Perspective (2019).
12 *S Whittaker*, A Common Framework for Civil Liability? in: J-S Borghetti/S Whittaker (eds), French Civil Liability in Comparative Perspective (2019).
13 *Y-M Laithier*, The Relationship between Contractual and Extra-Contractual Liability as between Parties to a Contract, and *P Stoffel-Munck*, Liability of Contracting Parties Towards Third Parties, both in: J-S Borghetti/S Whittaker (eds), French Civil Liability in Comparative Perspective (2019).
14 *M Dugué*, The Definition of Civil Fault, and *M Dyson*, Crime, Breach of Legislative Duties and Fault, both in: J-S Borghetti/S Whittaker (eds), French Civil Liability in Comparative Perspective (2019).

Knetsch and Häcker compare French (actual and prospective) rules on liability for the action of things and for harm caused by others with the German and English approaches to strict and vicarious liability.[15] The following Part IV ('Harm') covers other innovations suggested by the *Projet*, such as the introduction of the requirement of *préjudice* as distinct from *dommage*, which is scrutinised through domestic and Italian lenses respectively by Leczykiewicz and Sirena,[16] and the codification of a rule on liability for the *troubles de voisinage*, which is compared by Kennefick with the English law on private nuisance.[17] In Part V (Causation), Pinto Oliveira and Gómez Ligüerre look at the *Projet*'s provisions on uncertain causation and joint and several liability, comparing them with the rules applicable in Austria and Germany (Pinto Oliveira) and several other continental European codifications (Gómez Ligüerre).[18] In Part VI (Defences), Steel explores the role of defences under (actual and prospective) French and English law, while Jacquemin examines the validity of exculpatory clauses in France.[19] In Part VII (Liability beyond Damages), Cappelletti, Combot and Giliker take the analysis to bordering areas of tort law, whether or not covered by the *Projet*: Cappelletti reads art 1266-1 of the *Projet* on civil penalties through the lenses of English and American law; Combot deals with unjust enrichment claims under French, German and English law; Giliker reviews art 1266 of the *Projet* on preventive injunctions in light of French and English legal developments.[20] The last part, Part VIII (Broad Themes),

15 *J Knetsch*, The Role of Liability without Fault, and *B Häcker*, Fait d'autrui in Comparative Perspective, both in: J-S Borghetti/S Whittaker (eds), French Civil Liability in Comparative Perspective (2019).

16 *D Leczykiewicz*, Loss and its Compensation in the Proposed New French Regime (also dealing with the introduction of a formal distinction between patrimonial and non-patrimonial losses and with the regulation of payments made by third parties, such as social security funds and insurance companies) and *P Sirena*, The Concept of 'Harm' in the French and Italian Laws of Civil Liability, both in: J-S Borghetti/S Whittaker (eds), French Civil Liability in Comparative Perspective (2019) 222.

17 *C Kennefick*, Nuisance and Coming to the Nuisance: The Porous Boundary between Torts and Servitudes in England and France, in: J-S Borghetti/S Whittaker (eds), French Civil Liability in Comparative Perspective (2019).

18 *NM Pinto Oliveira*, Liability for Alternative Causation and for the Loss of a Chance, and *C Gómez Ligüerre*, 'Solidary' Liability and the Channelling of Liability, both in: J-S Borghetti/S Whittaker (eds), French Civil Liability in Comparative Perspective (2019).

19 *S Steel*, Defences to Tortious and Contractual Liability in French Law, and *Z Jacquemin*, Contracts Concerning Civil Liability, both in: J-S Borghetti/S Whittaker (eds), French Civil Liability in Comparative Perspective (2019).

20 *M Cappelletti*, Comparative Reflections on Punishment in Tort Law; *M Combot*, Unjustified Enrichment and Civil Liability; *P Giliker*, Injunctions Requiring the Cessation of Unlawful Action, all in: J-S Borghetti/S Whittaker (eds), French Civil Liability in Comparative Perspective (2019).

collects essays by Dubuisson, Bell and Deshayes, as well as a concluding chapter by the editors. Dubuisson compares the French *Projet* with the 2018 draft of Belgian tort law reform,[21] Bell considers the impact that the *Projet* might have on public liability (that is, liability of public authorities before administrative courts), Deshayes delves into the language employed by the *Projet*, while Borghetti and Whittaker endeavour to sum up the results and lift the veil on the many contradictions underlying the *Projet*.[22]

As this summary makes clear, the book's chapters differ in scope and approach. Chapters authored by French scholars tend to be exclusively focussed on French law, making great efforts to express in English the depth and reasons underlying domestic debates over tort-related notions, language and rules.[23] Chapters authored by non-French scholars look at the reform from a comparative perspective, mostly confronting French with English and German laws, but also occasionally looking at Belgian, Italian, Austrian and laws of other European countries.[24] While the majority of the essays deal with what the *Projet* is about, a few also tackle issues that the *Projet* does not touch upon, such as unjust enrichment and public (ie, criminal and administrative) forms of liability.[25] Some essays more than others dwell upon the historical foundations of contemporary rules or upon the relationship between substantive and procedural laws.[26] Also varied are

21 See the Avant-projet de loi portant insertion des dispositions relatives à la responsabilité extracontractuelle dans le nouveau Code civil, 6 August 2018, at <https://justice.belgium.be/sites/default/files/voorontwerp_van_wet_aansprakelijkheidsrecht.pdf>.

22 *B Dubuisson*, The Projet de Réforme du Code Civil Belge and the Reform of the French Civil Code: A Comparison of Selected Topics; *J Bell*, The Reform of Delict in the Civil Code and Liability and Administrative Law; *O Deshayes*, The Importance of Terminology in the Law of Civil Liability; *J-S Borghetti*/*S Whittaker*, Principles of Liability or a Law of Torts? all in: J-S Borghetti/S Whittaker (eds), French Civil Liability in Comparative Perspective (2019).

23 See in particular, the contributions of *Laithier* (fn 13), *Jacquemin* (fn 19), *Combot* (fn 20), *Deshayes* (fn 22).

24 See the contributions of *Whittaker* (fn 12), *Dyson* (fn 14), *Knetsch* (fn 15), *Häcker* (fn 15), *Sirena* (fn 16), *Kennefick* (fn 17), *Pinto Oliveira* (fn 18), *Gómez Ligüerre* (fn 18), *Steel* (fn 19), *Cappelletti* (fn 20), *Giliker* (fn 20), *Dubuisson* (fn 22), *Bell* (fn 22), *Borghetti*/*Whittaker* (fn 22).

25 See *Combot* (fn 20); *Dyson* (fn 14); *Bell* (fn 22).

26 A special attention to history emerges in the contribution of English authors, such as *Whittaker* (fn 12) 16–19, 28–32 (on French and English views on contractual and tortious liability from the 17th century onwards); *Dyson* (fn 14) 109–112 (on the understandings of the law of torts in France in the 17–19th centuries); *Kennefick* (fn 17) 229–237 (on the historical rejection in 19th century England and France of the 'coming to nuisance' rule, under which a nuisance action is not available to a claimant who came to the affected land after the defendant had begun to use his land in the way of which the claimant complains); *Bell* (fn 22) 428–440 (on public liability in France since the 19th century); but see also, among the non-English authors, *Knetsch* (fn 15) 131–134 (on the Roman distinction between delicts and quasi-delicts, on Germanic liability laws, and on 19th century scho-

the authors' judgements of the *Projet*. Some contributors put forward detailed proposals for improving the draft reform,[27] while others stress the inconsistencies in the *Projet*, such as the clumsy unification of rules on contractual and tortious liability, the lacking qualification of the notion of *préjudice* and the priority covertly assigned to personal injuries.[28] Some authors wonder whether crystallizing judge-made rules into hard law might constrain judicial creativity too much;[29] others complain that the *Projet*'s rules are too broad or not precise enough.[30] A few authors lament that the *Projet* leaves untouched one of the major problems affecting the development of French tort law, that is, the cryptic judicial style adopted by the *Cour de Cassation* since its inception.[31] Amidst the variety of conclusions about the *Projet* and of the approaches deployed by authors to examine it, the book's breadth goes much beyond the borders of the current reform proposal and is reminiscent of past brilliant works comparing French tort law with English and other European laws.[32]

---

larly debates in Germany over the role of fault versus strict liability); *Häcker* (fn 15) 148–150 (on Roman and Middle Ages rules on liability for the acts of others). The attention to procedure is manifest in the contributions by *Whittaker* (fn 12) 28–29 (on the transmissibility of contract- and tort-based actions on death as a basis explaining the English rule on concurrence of actions); *Stoffel-Munck* (fn 13) 60–64 (on requirements for bringing an action under the French law of civil procedure); *Dyson* (fn 14) 100–104, 110–113 (on the procedural connections between tort and crime); *Kennefick* (fn 17) 237–243 (on the differences, under English and French law, of actions in rem and actions in personam); *Giliker* (fn 20) 378–388 (on the action for injunctive relief in French and English law).

27 Eg *Dugué* (fn 14) 95–97.

28 *Laithier* (fn 13) 52 f; *Borghetti*/*Whittaker* (fn 22) 466–476.

29 *Leczykiewicz* (fn 16) 204 (especially on the requirement of the 'préjudice'); *Pinto Oliveira* (fn 18) 254 f (criticising the rigidity of art 1240 of the *Projet* on alternative causation); *Gómez Ligüerre* (fn 18) 272–277 (criticising the lack of judicial discretion envisaged by the solidarity rules enshrined in art 1265 of the *Projet*).

30 *Giliker* (fn 20) 394 (on art 1266); *Bell* (fn 22) 424, 441 f (on the missing links with administrative liability).

31 *Borghetti*/*Whittaker* (fn 11) 6; *Dugué* (fn 14) 97; *Leczykiewicz* (fn 16) 204. Dissatisfaction with the French style of judgment is well-rooted in France: see *A Touffait*/*A Tunc*, Pour une motivation plus explicite des décisions de justice notamment celles de la Cour de cassation (1974) 78 Revue Trimestrielle de Droit Civil 1974, 487–500.

32 See for instance *P Catala*/*JA Weir*, Delict and Torts: A Study in Parallel (1965); *FH Lawson*/*BS Markesinis*, Tortious Liability for Unintentional Harm in the Common Law and the Civil Law (1982, 2 vols); *E Descheemaeker*, The Division of Wrongs: A Historical Comparative Study (2009).

IV The covert contents: history, language, culture and law

The book has many qualities that go beyond its actual contents. The varied attention paid by contributors to history, the nuances of words and the legal infrastructure as a whole result in a choral attempt to delve into the paradoxes of law as a necessarily historical, language-based and cultural discipline. It might be that French law, with its distinctive conciseness and reliance upon programmatic and emphatic statements,[33] stands as a particularly good subject for such an inquiry; yet the book, as a masterful exercise in legal comparison, offers much food for thought to anyone interested in legal systems other than the French one.

One of the themes running across many chapters (especially, but not exclusively, the ones written by English authors) is the historicity of the law. Law's historicity does not only mean that law is essentially dynamic and built on the past, but also that it lives through a constant reinterpretation of its own past to shape the present. The outcomes of such processes of reinterpretation might vary, and might sometimes lead to the discovery of alleged continuities while at other times may end up in the celebration of perceived discontinuity.

Among the many examples offered in the book, perhaps the best illustration concerns the current arts 1240–1241 (former arts 1382–1383) of the French Civil Code. These provisions are now widely understood as the epitome of the centrality of the fault paradigm under French tort law. But, as many authors highlight, such a reading is based on a more or less conscious oblivion of the interpretation that sustained the drafting and understanding of these provisions in the 19th century. The two articles were originally written, and for a long time perceived, as part of the Roman tradition, as the latter was understood in 17–18th century France. Article 1382 of the Civil code concerning fault was thought as a delictual provision, giving rise to *responsabilité délictuelle*, and art 1383 of the Civil Code concerning negligence was thought to represent the amorphous collection of quasi-delicts, giving rise to *responsabilité quasi-délictuelle* (which, in Roman times, were not united by negligence as a fault

33 This is a feature repeatedly emphasised by editors: see, for instance *Borghetti/Whittaker* (fn 22) 460 ('this tendency to generalise and to bring together different things under a single concept or idea, rather than emphasising their differences, may be seen as a wider intellectual trait of French civil lawyers'). It is perhaps the same trait that makes *Dyson* (fn 14) 119 speak of French law as a 'balance of strength without structure'.

standard at all).[34] It was only in the first half of the 20th century that a different reading of the past and of the present, and consequently a different use of words emerged, under which the expression *responsabilité délictuelle*, as embodied by arts 1382 and 1383 together, became used to refer to tort law in general. During the same century, in another twist and turn of language, the same area began to be increasingly referred to as *responsabilité civile*, a term which was conceived to be more appropriate than *responsabilité delictuelle*, insofar as it also covered forms of liability not based upon fault. Against this context, the *Projet* introduces a new discontinuity in the contemporary legal vocabulary, employing the notion of *responsabilité civile* to indicate both contractual and tortious liability (which, in the *Projet*, is referred to as *responsabilité extracontractuelle*).[35] Each of these linguistic shifts was brought about by, and contributed to expressing, a shift in legal ideas, rules and (self-)narratives, as well as in the way in which law was used, to quote a famous phrase, to re-imagine the real.[36] The illustration shows one of the many paradoxes underlying French tort law, where declared adherence to the same blackletter law coexists with changing scholarly and judicial interpretations, which can be appreciated only against the historical contexts that shaped them. It also shows how self-narratives of continuity and originality (for eg, claiming a continuum with the Roman tradition or overemphasising the revolutionary character of the Code) have supported the constant re-making of French legal identity throughout stability and change. But the illustration also demonstrates how legal words have embedded meanings and are vehicles of unspoken beliefs that are constantly reinforced and reshaped by the community of actors who participate in the legal process. While these meanings and beliefs appear as self-evident truths for those living within a specific time and place, their presence and variability become evident to those who look at these times and places either through historical or comparative lenses.

Another illustration of the contextual contingency of legal language and meaning would perhaps help better explain the last point. Many contributors note the centrality, in contemporary French law, of the *principe de la réparation intégrale du dommage* (which might be roughly translated as the ‘principle of full

---

34 See, for all, *J-L Halpérin*, French Doctrinal Writing, in: N Jansen (ed), The Development and Making of Legal Doctrine (2010) 73–85 and *O Descampes*, Les origines de la responsabilité pour faute personnelle dans le Code civil de 1804 (2005) 428f.

35 On these developments, see *Borghetti*/*Whittaker* (fn 11) 1f, fn 3; *Whittaker* (fn 12) 16, fn 3; *Dyson* (fn 14) 109–111.

36 *C Geertz*, Local Knowledge. Further Essays in Interpretive Anthropology (3rd edn 2000) 173 (according to whom, law is a ‘way of imagining the real’).

compensation'[37]). The principle slowly emerged in the 20th century as an unwritten rule of French tort law, and is often described as a corollary of former art 1149 (current art 1231–2) of the Civil Code, according to which, 'damages due to the creditor are for the loss that he has incurred and the gain of which he has been deprived'. But while the principle was originally associated with the idea that reparation should be in full, since the 1980s, the expression started to acquire a different meaning in order to protect the defendant rather than the plaintiff. The meaning of the *principe* has thus shifted to that of 'exact' compensation, inviting courts to check that the plaintiff is not enriched by the compensatory award, and becoming nearly a synonym of the idea that the award should create neither loss nor profit for the plaintiff (*ni perte ni profit pour la victime*).[38] This evolution confirms the substantial degree of creativity of French interpretive formants in spite of their professed idolatry for the legislator, as well as the significance of unspoken, shared attitudes in the understanding of the law and the deep embeddedness of legal rules in culture and context.[39] The same significance and embeddedness emerge when one looks at the *principe de la réparation intégrale* in the comparative perspective. It then becomes clear that apparently equivalent expressions in different languages convey unexpressed diverging meanings and horizons of understanding that are only partially overlapping. Despite appearances, the French notion of *réparation intégrale* might thus turn out to have little linguistic equivalence not only with the idea of 'full compensation' under English law[40] (somewhat hardly surprising), but also with the German *Totalreparationsprinzip*: to say the least, the French expression impliedly covers compensation for non-pecuniary losses, while the German one in principle excludes them.[41] Needless to say, the

37 But for caveats about how to translate in English both 'principe' and 'réparation intégrale', see *Whittaker* (fn 12) 24f, 35f; *Leczykiewicz* (fn 16) 201f; *Borghetti/Whittaker* (fn 22) 459f.

38 *Leczykiewicz* (fn 16) 200–202; *Borghetti/Whittaker* (fn 22) 460; see also *Whittaker* (fn 12) 24f, 35f. Speaking of claimants as 'victims' is another linguistic habit that is telling of a French cultural trait (what some comparative lawyers would call a 'cryptotype': *R Sacco*, Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II) (1991) 39(2) American Journal of Comparative Law (AJCL) 343, 384–387), that is, its being inherently pro-plaintiff and solidarity-oriented: *Borghetti/Whittaker* (fn 11) 3f; but see also *Cappelletti* (fn 20) 345–350; *Bell* (fn 22) 422; *Deshayes* (fn 22) 448.

39 In particular on the cultural embeddedness of legal rules, see *Borghetti/Whittaker* (fn 11) 4f; *Dyson* (fn 14) 108f, 118f; *Häcker* (fn 15) 175–177; *Cappelletti* (fn 20) 329f; *Bell* (fn 22) 425f; *Borghetti/Whittaker* (fn 22) 460–470. The same embeddessness is the key to understanding also the many questions that (are verbalised elsewhere but that) French tort lawyers choose not to ask: *Dyson* (fn 14) 108–109.

40 *Whittaker* (fn 12) 24f, 35f.

41 *Knetsch* (fn 15) 137.

opposite phenomenon might occur as well: notions and rules that are expressed differently might turn out to be functionally overlapping concepts and rules in spite of linguistic and legal diversity.[42] This attention for the meaning of words and what they say or do not say surfaces in all the chapters, and particularly emerges in the many discussions about how, and with what limitations, French expressions could be translated into English,[43] also explaining a few, apparently curious choices, such as the translation of *responsabilité civile* as 'civil liability' (rather than tort law) and *manquement contractuel* as 'contractual failing' (rather than breach).

One of the most intriguing outcomes of this collective historical, comparative and linguistic search is the finding of recurring discrepancies between a legal system's (self- and others') image and its daily ways of operating. With specific regard to France, for instance, the editors illustrate the apparently paradoxical divergence between mainstream (domestic and foreign) descriptions of the French tort law process and its concrete life in courts, law firms, and law faculties. French tort law is thus conceived as protecting equally all lawful interests; yet, in practice, priority is given to compensation for personal injury (as the *Projet* itself implicitly confirms). French tort law is said to be based upon the dual pillars of fault and custodial liability; but actually the applicability of both paradigms is much less wide than usual accounts acknowledge.[44] In theory, neither the degree of the defendant's fault nor the nature or intensity of the harm matter in the official legal discourse; but 'the study of the French case law suggests that serious harm or gross fault do attract liability more readily than minor harm or

42 See, for instance, *Whittaker* (fn 12) 24–27, 32–35 (on the similarity between the German and then French notion of positive and negative interests in contract law and the English idea of expectation and reliance interests); *Häcker* (fn 15) 169–172 (on the operative rules applied in Germany about vicarious liability regardless of what the letter of § 831 BGB says and on its close equivalence to French and English rules on the same issues); *Sirena* (fn 16) (on the – debatable – equivalence between the French distinction of 'préjudice' and 'dommage' and the Italian notions of 'danno evento' and 'danno conseguenza').

43 Among the high number of translations discussed in the volume, one could list here the following couple of French/English words: 'responsabilité civile'/'civil liability' (thoroughly explained by *Borghetti*/*Whittaker* (fn 11) 1f, fn 3; *Whittaker* (fn 12) 16, note 3), 'dommage'/'harm' and 'préjudice'/'loss' (on which see *Leczykiewicz* (fn 16) 189–191; *Sirena* (fn 16); *Deshayes* (fn 22) 451; *Borghetti*/*Whittaker* (fn 11) 8), 'manquement contractuel'/'contractual failing' (see *Stoffel-Munck*, fn 13, 55; see also *S Whittaker*/*J-S Borghetti*, Appendix, in: J-S Borghetti/S Whittaker, (eds), French Civil Liability in Comparative Perspective (2019) 480, note 3), 'réparation intégrale'/'full compensation' (*Whittaker* (fn 12) 24f, 35f; *Leczykiewicz* (fn 16) 201f; *Borghetti*/*Whittaker* (fn 22) 460), 'troubles de voisinage'/'nuisance' (*Kennefick* (fn 17) 227), 'enrichissement sans cause'/'unjust(ified) enrichment' (*Combot* (fn 20) 353), 'principe'/'general clause' (*Borghetti*/*Whittaker* (fn 22) 459 f).

44 *Borghetti*/*Whittaker* (fn 22) 462–468; see also *Cappelletti* (fn 20) 347f.

slight negligence'.[45] Similar discrepancies between the law's ideal and its mundane manifestations are not an *exception française*; although in different sizes and shapes, they are ubiquitous in the practice of generating and applying (tort) law.[46] Typically, they are hardly noticeable by those who work within a system; spotting them requires stepping out of the system and looking at it from a distance – which is exactly what legal history and comparative law allow their disciples to do.

V The covert contents: legal mythologies

As said, much of the book's strength stems from the carefulness and rigour of the contributors in delving into the histories and unexpressed beliefs underlying French law and laws of a few other systems, and in dissecting with surgical precision the layered meanings and tensions underlying tort law development.

At the same time, authors are able – and here lies another strength of the volume – to embody a few of these meanings and tensions, thus offering powerful illustrations on how legal myths (ie, pervasive legal understandings or ideologies that bind a community together[47]) might set the bounds within which legal actors behave.

The best example offered by the book concerns the adherence to the dogma about the inherently predominant role of legislation in French tort law.

As many contributors remind, the majority of contemporary achievements of French law have been brought about by courts. Back in the 19th century, French courts established strict liability for nuisance between neighbours,[48] recognised the *res judicata* effect of criminal judgments on subsequent civil courts,[49] held that the *Conseil d'État* had jurisdiction over claims for liability in the administration and that the liability of public persons was governed by a set of rules different

---

45 *Borghetti/Whittaker* (fn 22) 470.

46 Among the many, cf *O Perez/G Teubner* (eds), Paradoxes and Inconsistencies in the Law (2006); *BN Cardozo*, The Paradoxes of Legal Science (1928). But see also, with regard to tort liability, *Sacco* (1991) 39(2) AJCL 343, 358–369.

47 For this notion of the modern myth and its role in shaping institutional (including legal) infrastructures, see generally *R Barthes*, Mythologies (A Lavers trans 1972); *DC North*, Economic Performance Through Time, both in: MC Brinton/V Nee (eds), The New Institutionalism in Sociology (1998) 247, 250.

48 See the two decisions on the case of *Derosne v Puzin*, Cour de cassation, Chambre civile (Cass Civ), 27 November 1844, Dalloz 1845, I, 13; Req, 20 February 1849, Dalloz 1849, I, 148.

49 Cass Civ, 7 March 1855, Dalloz 1855, I 81 (arrêt Quertier).

from those applied to 'private' liability.[50] Between the two centuries, French courts laid the foundations for the invention of strict liability for the acts of things under the first paragraph of former art 1384 of the *Code civil*.[51] In the 20th century, French courts coined the notion of *obligation in solidum* to refer to the joint and several liability of multiple tortfeasors,[52] held that contract terms limiting or excluding fault liability were against public policy and therefore invalid,[53] affirmed collective liability in cases of alternative causation,[54] and admitted recovery for the mere loss of a chance.[55] More recently, French courts imposed strict liability on organisations and individuals for the harm generated by a person over whom they had control[56] and made harsher the (already strict) liability rule applying to parents for harms caused by their children.[57] In 2006, the *Assemblée plénière* of the *Cour de Cassation* further decided that a third party to a contract may invoke the breach by one of the parties to the contract as the basis of that party's tortious liability vis-à-vis her.[58] Unsurprisingly, one of the aims of the *Projet* (and now of the *Proposition de loi no 678*) is to put the French Civil Code in line with the developments that have affected tort law over the last two centuries.

What is interesting and surprising to observe is that, notwithstanding their awareness of the enormous growth and significance of judge-made law in the field of tort law, authors are compelled to re-affirm the pre-eminence of statutory law over other sources of law. One can therefore read, both by French and non-French authors, that 'the French law of civil liability was condemned to a brief exposition of the law because its source is legislative',[59] that 'unusually for French law, though, this basis of liability [for nuisance] is not to be found anywhere in the Code civil',[60] and that 'courts have created new instances of liability of their

50 Tribunal des conflits, 8 February 1873, Dalloz 1873, III, 17 (arrêt Blanco). Still in the 19th century, the Court of cassation recognised a general action, called 'action de in rem verso' or 'enrichissement sans cause', to allow a reversal of an unjustified enrichment: Req, 15 June 1892, Sirey 1893, 1, 28 (arrêt Boudier).

51 Cass Civ, 16 June 1896, Sirey 1897, 1, 17 (arrêt Teffaine); Cass, Chambres réunies, 13 February 1930, Sirey 1930, 1, 121 (arrêt Jand'heur).

52 Cass Civ, 4 December 1939, Sirey 1940, 1, 14.

53 Cass Civ 2, 17 February 1955, Dalloz 1956, 17.

54 Cass Civ 1, 18 May 1955, Dalloz 1955, 520; Cass Civ 2, 11 February 1966, Dalloz 1966, 228f; Cass Civ 2, 5 June 1957, Dalloz 1957, 493.

55 Cass Civ 1, 12 November 1985, Bullettin civil (Bull civ) 1985, I no 298.

56 Cass, Assemblée plénière (Cass Ass plén) 29 March 1991, Juris-Classeur Périodique 1991, II, 21673 (arrêt Blieck).

57 Cass Civ 2, 10 May 2001, Bull civ 2001, II no 96 (arrêt Levert).

58 Cass, Ass plénière, 6 October 2006, Dalloz 2006, 2825 (arrêt Boot Shop).

59 *Dugué* (fn 14) 81.

60 *Kennefick* (fn 17) 224.

own initiative – which is itself remarkable in a system where normally the law is created by the legislator, and not by judges'.[61] Readers are thus reminded of the pervasiveness of the myth of the omnipotence of the legislator in French legal culture and of the delicate balances and contradictions it entails. Revealing the contradictions between the celebrated supremacy of legislative sources and the silent creativity of the French judiciary is another (perhaps unintended, yet impressive) quality of the volume. Whoever is interested in understanding how a legal system operates will deeply enjoy seeing contributors masterfully unveiling and at the same time embodying legal mythologies.

61 *Borghetti*/*Whittaker* (fn 11) 4.