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Conférence

La relativité du contrat. Archéologie d'un concept récent.

In L'effet relatif du contrat, Actes de journées Poitiers – Roma TRE, 2013

Certaines propositions connaissent un succès spectaculaire. Nul n'oserait plus présenter le droit sous une autre forme. La distinction de l'effet relatif et de l'opposabilité absolue des conventions, le domaine de la qualification de servitude par destination du père de famille ont donné lieu à de multiples propositions théoriques ; l'une d'entre elles a connu ce sort enviable. D'autres idées demeurent lettres mortes¹.

1. Comment renouveler une problématique ancienne ? En 1999, les participants du formidable et inventif colloque nantais de l'association Henri Capitant² s'interrogeaient sur la relativité en insistant sur les conceptions du contrat et en abandonnant les chemins redondants de l'analyse dogmatique. L'un n'empêche pas l'autre : refaire les gammes et revisiter les classiques, il en sort parfois quelque chose de neuf. Mais l'évidence et l'acquis ne recèlent pas toujours des trésors, et si les découvertes que nous a permis de faire cette enquête archéologique ne prennent pas rang au musée, elles auront au moins donné l'occasion d'une réflexion sur la relativité du temps présent.

2. La littérature contemporaine nous explique que « le principe de l'effet relatif du contrat » a son siège dans l'article 1165³, qu'il faut distinguer « relativité » et « opposabilité »⁴, qu'il s'applique à l'anéantissement en cascade des ensembles contractuels complexes⁵, à la transmission des obligations aux successeurs particuliers⁶, ou encore que les actions obliques et directes sont des exceptions qu'il faut interpréter strictement.

3. La relativité des conventions est l'héritière des « *res inter alios acta aliis neque nocere neque prodesse potest...* », « *Alteri stipulari nemo potest ...* », et des propositions retravaillées par Pothier au *Traité des obligations*, n°85 et 87. « Ce principe est qu'une convention n'a d'effet qu'à l'égard des choses qui ont fait l'objet de la convention, et

¹ ATIAS, *Epistémologie juridique*, Dalloz, 2002, n.304, p.179.

² A lire absolument *La relativité du contrat*, *Travaux de l'association Henri Capitant*, Journées nationales Nantes 1999, LGD, 2000, introduction de Marseille FARRÉ-MAGNIAN.

³ RENEY-CORLAY, « Les effets à l'égard des tiers », in *Projet Terré*, vol 1, Pour une réforme du droit des contrats, Dalloz, 2009, p.291 ; ROLAND et BOYER, *Adages du droit français*, v° *Res inter alios acta aliis neque nocere neque prodesse potest*, LGD, 1992, n°376 ;

⁴ GOUTAL, *Essai sur le principe de l'effet relatif du contrat*, LGD, 1981, pp.33 et sq. ; DUCLOS, *L'opposabilité* [essai d'une théorie générale], LGD, 1984.

⁵ Mais au fait, qu'appelle-t-on cascade ? voy. ERIC SAVATTE, « Les nullités en cascade », in *La théorie des nullités*, LGD, 2008, pp.111-125.

⁶ DUBRAYES, *La transmission de plein droit des obligations à l'ayant cause à titre particulier*, préf. G. Vincy, LGD, 2004.

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