ARTICLES

- A Legal System Based on Translation: The Turkish Experience................................. Esin Örücü
- François Gény in Louisiana ...................................................................................... François-Xavier Licari
- Criticism of the Testamentary Undue Influence Doctrine in the United States: Lessons for South Africa? ................................................................. François du Toit
- Inflation in Enrichment Claims: Reflections on the Brazilian Civil Code .................. Aimite Jorge

NOTES

- Neoconstitutionalism, Rights, and Natural Law....................................................... Juan Cianciardo
- Origins of the Division of Servitudes into Natural, Legal and Contractual ............... Carlos Felipe Amunátegui Perelló

CIVIL LAW TRANSLATIONS

- Louisiana Civil Code - Code civil de Louisiane
  Book III, Titles 15 and 16 ................................................................................ Center of Civil Law Studies

CIVIL LAW IN THE WORLD

- France......................................................................................................................... Olivier Morêteau
- Italy............................................................................................................................ Laura Franciosi

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ARTICLES

A Legal System Based on Translation: The Turkish Experience
Esin Örücü 445

François Gény in Louisiana
François-Xavier Licari 475

Criticism of the Testamentary Undue Influence Doctrine in the United States: Lessons for South Africa?
François du Toit 509

Inflation in Enrichment Claims: Reflections on the Brazilian Civil Code
Aimite Jorge 553

NOTES

Neoconstitutionalism, Rights, and Natural Law
Juan Cianciardo 591

Origins of the Division of Servitudes into Natural, Legal and Contractual
Carlos Felipe Amunátegui Perelló 603

ESSAY

Jeneba Barrie 617

CIVIL LAW TRANSLATIONS

Louisiana Civil Code - Code civil de Louisiane
Book III, Titles 15 and 16
Center of Civil Law Studies 653
CIVIL LAW IN LOUISIANA

Martin v. A-1 Home Appliance Center  
Bogdan Buta  679

Bloxom v. City of Shreveport  
Garrett Condon  701

Trahan v. Kingrey  
John H. Leech, Jr.  713

Reed v. St. Romain  
Alexandru-Daniel On  731

Wagoner v. Chevron II  
Michael Wynne  751

CIVIL LAW IN THE WORLD

France  
French Tort Law in the Light of European Harmonization  
Olivier Moréteau  759

Italy  
Trust and the Italian Legal System: Why Menu Matters  
Laura Franciosi  803
A LEGAL SYSTEM BASED ON TRANSLATION: THE TURKISH EXPERIENCE

Esin Örücü*

I. Introductory Overview ............................................................ 445
II. General Problems and Pitfalls Relevant to the Turkish Experience .............................................................................. 450
III. Some Specific Examples of Translation Hurdles as Seen in Turkish Codes and Cases ....................................................... 463
IV. Concluding Remarks ............................................................ 471

I. INTRODUCTORY OVERVIEW

Following the collapse of the Ottoman Empire, the Turkish Republic was founded in 1923, and went through a process of total modernization, westernization, secularization and democratization, with the reform efforts resting solely on import from major continental jurisdictions both as to form and content: the Civil Code of Switzerland, the Commercial Code of Germany, and the Criminal Code of Italy. The French administrative law was already put in place during the time of the Ottoman Empire. This meant that the legal framework was synthetically constructed through voluntary and imposed receptions, imitations, adaptations and adjustments. The outcome, therefore, was “an eclectic” and

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“synthetic” legal system, directly borrowed and translated from, and significantly replicating, foreign models.\(^1\)

Reception—and translation as its vehicle—was used as the sole method of law reform when the ideological and technological decision was made in 1924 to move outside the framework of the endogenous system of laws rather than to integrate and modernize the existing systems; that is, to receive foreign codes. To achieve this end and for the modernization of the civil law, the Swiss Civil Code was chosen. This Code was preferred over the French or the German codes because it was regarded as adapted to the multitude of cantonal customs; it did not use a technical language and therefore would be more easily translatable; it was set out as briefly as possible; it avoided judicial conceptualism; and it favored democratic equality by allowing freedom of contract, freedom of testament, equal rights in intestacy and equality of the sexes. This Code was deemed to be less ambiguous and more practical than the others. In addition, certain leading personalities in the Turkish legal world, such as the then Minister of Justice, were educated in Switzerland.\(^2\)

A commission of twenty-six members was set the task of translating the trilingual Swiss Civil Code from its French version. Subsequently, a number of special commissions translated most of the important commentaries on various branches of law into Turkish. Within the year 1926, Turkish legal experts translated and produced three entirely new codes (civil, criminal and commercial), and there were more to follow.\(^3\)

The main aim of this “purposive use of law” was to demolish the foundations of the old legal system by creating completely new laws. Not only that, but the intention was to regulate, by means of

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legislation, the relationships of the people, not according to existing customs, usages, and religious mores, but to what it was thought these relationships ought to be. To this end, the received codes were accompanied by radical social reform: eight reform laws (İnkilap Kanunları) established secular education and civil marriage, adopted the Latin alphabet and international numerals, introduced the hat, closed the Dervish convents, abolished certain titles and prohibited the wearing of certain garments. These radical reforms were aimed at the basics: a language reform, a new western system of law, a new sense of national identity based on a newly created culture and an exclusion of the unwanted Islamic and Arabic elements of the Ottoman heritage. This whole episode was revolutionary and radically reformist, fulfilling the vision of the founding fathers.

The present reconstituted legal framework of Turkey is the product of law being moved across frontiers from societies and laws that are socially and culturally diverse from its own. Legal evolution, through a succession of imports, has relied solely on major translation work. So, it can easily be said that the initial Turkish legal system is one based on large-scale translations alone. It is not surprising then that there were problems created as a result of the translations, considering that the Turkish translators were not all professional translators but relied instead upon their knowledge of the specific foreign language necessary for translating a code; for instance, knowledge of the French language when translating the Swiss Civil Code from its French version. One feature the translators had in common was proficiency in

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4. The constitutionality of these laws cannot be challenged even today (Art. 174 of the 1982 Constitution), nor can their amendment be proposed. However, change is in the air as a new Constitution is being prepared.

5. The Turkish Constitutions, though not translations, have also been influenced by foreign models. For instance, the 1924 Constitution of the young Republic was inspired by the 1875 Constitution of the Third French Republic and the 1921 Constitution of Poland; the 1961 Constitution made wide use of the Italian and West German Constitutions, with the provisions on economic development being inspired by the Indian Constitution of 1949; the present 1982 Constitution was inspired by the 1958 French and the American Constitutions.
French, though their knowledge of legal French differed. It is possible that none had any training in legal translation, but only in the law.

First, by considering the French version as “the source-law,” the translators failed to follow the rules applicable to the interpretation of the Swiss Civil Code as a trilingual text. If they were to provide a faithful translation of it as a legal text, the translators of such multilingual texts should not have ignored the legal authority of each of the languages. Translating a trilingual code into a fourth language as such creates a serious problem in itself, let alone when only one version is used. As Jimena Andino Dorato points out, it is a requirement to use all of the texts. Translation cannot come exclusively from one official version; all texts (three, in our case) should have been taken into account. In Switzerland all the versions have equal value and the judges, in case of doubt, have to resort to all versions. We know that the French, German and Italian versions of the Swiss Civil Code do not always agree. As an example we can cite article 1, section 1, of that Code, which in its German version states that the law applies to all questions for which it contains provisions “nach Wortlaut oder Auslegung.” The French text says, “la lettre ou l’esprit,” and the Italian one, “la lettera od il senso.” The Turkish Code adopted the French version, “which itself may be, an inadequate expression of the correct meaning.” Again, later on in the same article, section 3, we read that the judge should follow “established doctrine and case law.” However, the German version refers to

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6. For problems encountered when the bilingual Quebec Civil Code was translated into a third language (Spanish), see Jimena Andina Dorato, *A Jurilinguistic Study of the Trilingual Civil Code of Quebec*, 4 J. CIV. L. STUD. 591-630 (2011).
7. Id. at 602.
9. Id.
10. Id.
11. ADAL, *supra* note 2, at 44.
“bewährter Lehre und Überlieferung,” but the French version to “des solutions consacrées par la doctrine et la jurisprudence,” thereby giving undue emphasis to case law to the detriment of customary law, and this is the version that entered the Turkish Code. This, nevertheless, may have turned out to be suitable since it was decided that ancient customary law cannot be resorted to in the Turkish case.

Second, the translators did not have a basic knowledge of the legal system of the language that they were translating from, which is a prerequisite “to properly translate at a scholarly level.” Many Turkish academics thereafter had most of their training at universities in the countries from whence the receptions came. Being so trained, they undertook the “fitting” of the models to the Turkish situation and the “tuning” of them. Language training and translations were extensive. Fortunately, as a consequence of a historical accident, in the early years of the Republic, Swiss, Austrian and German academics also contributed to the new legal system, thus greatly helping the imported system to take root. Professors such as Schwartz, König, Neumark and Hirsch were given sanctuary in Turkey before the Second World War, and held posts at the Turkish universities of Istanbul and Ankara. The presence of such professors in Turkey at the time of reception fuelled the spread of legal ideas in support of the concepts received. With time, many of their Turkish assistant lecturers

13. Supra note 8.
14. Id.
16. On an extensive history and the importance of this event, see HORST WIDMANN, EXIL UND BILDUNGSHILFE: DIE DEUTSCHSPRACHIGE AKADEMISCHE EMIGRATION IN DIE TURKEI NACH 1933. MIT EINER BIO-BIBLIOGRAPHIE DER EMIGRIEREN HOCHSCHULLEHRER IM ANHANG (Peter Lang Int’l Academic Pubs. 1973).
themselves became professors and so helped the “internal diffusion” and subsequent “infusion” of the law.\textsuperscript{17}

Courts and academics still refer to “the source-laws” from time to time, and Turkish civil law is referred to as “İsviçre-Türk Hukuku” (Swiss-Turkish law). In the areas of criminal law and criminal procedure, there are also references to the source-law: the Italian (Criminal Code) and German (Code of Criminal Procedure) laws. We can thus speak of Italian-Turkish and German-Turkish laws as other “hyphenated” designations. As would be expected, over the years a Turkish civil law, a Turkish commercial law, a Turkish criminal law, a Turkish civil procedure and other laws have developed, slowly diverging from the source-laws. However, even today the higher courts, as the interpreters of the law, make use of the models when reaching decisions, though never basing a decision solely on the source-law. The models are still seen as aids to further modernization, as stimuli and correctors, aiding in the interpretation of the translated texts.

II. GENERAL PROBLEMS AND PITFALLS RELEVANT TO THE TURKISH EXPERIENCE

To illustrate the vastness of the task involved in the Turkish endeavor, it is vital at the outset to note three factors. The first factor to be considered is the peculiarity of the Turkish language and its total difference to the source languages from whence the laws were borrowed and translated:

Turkish is a member of the south-western or Oghuz group of the Turkic languages, the other members being: the Turkic dialects of the Balkans; Azeri or Azerbaijani, spoken in north-west Persia and Soviet Azerbaijan; the Qashqai of south Persia; the Turkmen or Turcoman of Soviet Turkmenistan.\textsuperscript{18}

\textsuperscript{17} Esin Örücü, \textit{The Infusion of the Diffused: Four Circles of Diffusion Infusing the Turkish Legal System} in \textit{Diffusion: The Movement of Laws and Norms} (Sue Farran et al. eds.) (forthcoming).

\textsuperscript{18} GEOFFREY LEWIS, \textsc{Turkish Grammar} ix (Clarendon Press 1967).
From the 10th century onwards, the Turks were converted to Islam and adopted the Arabic alphabet; a vast number of Arabic terms related to theology, thought and civilization entered the language. In the 11th century, when the Seljuk dynasty was overrun by Persia, Persian became the language of Turkish administration and literary culture. Thus the “educated Turk’s vocabulary” was formed by “thousands of Persian words [which] joined the thousands of Arabic words.”

By the end of the 13th century, this hybrid language became the official language of the Ottoman dynasty. The speech of the majority of ordinary Turks, however, was Turkish.

Following the birth of the Republic, first, the Arabo-Persian alphabet was replaced by the Latin one in 1928; however, as a result of the nationalist element in the change, the new letters were not called Latin, but in contrast to the old Arabic script, “Turkish.” Since the codes had been translated and promulgated in 1926 into Ottoman Turkish and published in the old script, they had to be rewritten after the change to the new alphabet. The new versions appeared in 1934. Then, a substantial language reform movement began to eliminate the Ottoman Turkish and to use Turkish words to replace Persian and Arabic words. Where no exact translations were to be found, they searched for words from other Turkic languages, and even sometimes invented new ones: new words were coined from Turkish roots, or from western words. This movement also impacted the codes, but, although the script was

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19. *Id.* at xx.

20. The script was changed in 1928, but the terminology remained, which meant that for students of law, to study these texts became more of a problem as years went by (one such student was myself, 1961-1965). The texts became in time virtually incomprehensible; however, there was later an edition of the Civil Code, where the 1934 text was on the left hand page and a translation into the Turkish of 1970s on the right. The new 2002 Code is more accessible to lawyers, though not necessarily to laymen.

21. Today the conservative section of society wants to revitalize the old words; the young do not know or understand these words; and first French, and recently English, words inundated Turkish and are being used even when there are Turkish equivalents.
changed and an effort was made to keep the language simple, the terminology remained mostly unchanged for a long time.

We know that one should not translate from the legal language of the source language into the ordinary words of the target language; the translation must be made into the legal terminology of the target language. It is said that “the language of law is bound to the inner grammar of legal systems, cultures and mentalities, which in turn impede communication in words that are borrowed from another legal system, culture and mentality.”22 However, the existing Ottoman legal language was totally different than the new source languages. French, German and Italian had no connection with Arabic, Persian and the legal target language, Turkish—be it Ottoman Turkish or modern Turkish.23

The second factor to be noted is that this difference was not only due to the fact that the languages were not related in any way, but also that “most” of the existing legal institutions and mentality from the Ottoman times originated from Islamic law—a different culture.24 In addition, the potential users of the translations, judges and lawyers, were not familiar with the source languages or the source-laws either. “The fundamental difficulty in translation of

23. For example, the Dutch unilingual Code has been translated into two languages, French and English, and became a trilingual Code with considerable challenges. See Ejan Mackaay, La traduction du nouveau Code civil néerlandais en anglais et en français in JURILINGUISTIQUE: ENTRE LANGUES ET DROITS—JURILINGUISTICS: BETWEEN LAW AND LANGUAGE 537 (Jean-Claude Gemar & Nicholas Kasirer eds., Bruylant 2005).
24. I say “most” here advisedly, since following the Reformation movement (Tanzimat) in 1839, the Ottoman Empire moved from being an Islamic State to becoming a mixed legal system, by borrowing a number of Codes from France in order to appease the western powers: in 1850, the Commercial Code; in 1861, the Commercial Court Procedure; in 1863, the Maritime Code (also influenced by the Belgian and the Prussian Codes); and in 1879, the Code of Criminal Procedure. These were also translations. The first ever Ottoman Constitution of 1876 was inspired by the Belgian Constitution of 1831 and the Prussian one of 1850.
any kind is how to overcome conceptual difference."25 A concept or institution peculiar to the culture of the source language is said to be “more or less untranslatable,” all else being “more or less translatable.”26 Then the translator can opt for equivalence looking for equivalents in the target language for terms of the source language legal systems.27 This was not possible in all cases in the Turkish situation, as certain terms of art in the source legal traditions did not exist in the Turkish one.

When the legal systems concerned are nearly the same or very similar, equivalents work well since legal terminology has system-specificity. However, even then, “two or more languages cannot signify identically,” given the fact that “each national language continues to signify according to its own structures and continues to express its legal thought by means of a particular vocabulary . . . .”28 In addition, there are “vast networks of associations of a word in one language that cannot all be transposed into the other, such that there must be a loss of connotative significance in the process.”29 In the Turkish case, as indicated, since the source and target languages related to different legal systems, socio-cultures and different vocabulary, equivalents would have been rare, in any case. In addition, some of these equivalents already had other meanings and additional connotations. Although René de Groot seems to think that in cases of reception (and he does give the example of Turkey and Switzerland), there would not be such problems, since the concepts of one legal system have been adopted by the other and function in that system in the same way, he overlooks the factors discussed

27. de Groot, supra note 25, at 539-40.
above. This conclusion is reached in spite of the fact that he accepts that “where the source language and the target language relate to different legal systems . . . virtual full equivalence proves to be a problem.” This would be the case for the ensuing receptions from the same sources, such as the 2002 Turkish Civil Code, but does not apply to the initial receptions. If one were to go for “functional equivalence,” then, similarly, in the Turkish case, one would also come across problems arising from the above differences while looking for “the nearest situationally equivalent concept.” So, “how should translations be elaborated when a legal phenomenon has no exact equivalent in two languages?”

This has been a significant problem in Turkey.

The third factor is that the Turkish language is phonetic in the sense that in the system of writing and pronunciation there is a direct correspondence between symbols and sounds. Foreign words borrowed either in terms of loan-borrowing or calque must be converted into Turkish symbols to be pronounced correctly. Previously, the spellings were changed when words were borrowed from French, German, Italian and English to fit the phonetic Turkish language. For example, French “station” has become “istasyon;” Italian “scala,” “iskele;” German “schlep,” “şilep;”
English “steam,” “istim,” and so on.\textsuperscript{35} Today, this does not seem to happen. Not only that, but English seems to enter the Turkish language at an enormous speed; Geoffrey Lewis calls this “the new yoke.”\textsuperscript{36} In this context, I look later at a new entrant into the Turkish legal system—the word “mortgage”—and discuss arising problems, both those related to “loan-words” and to the phonetic nature of the Turkish language.

Now, turning to other issues, it is true that legal language (legal register) may be regarded as having a system-specific nature, and yet intra-linguistic translations deal with a source language and a target language. In addition, problems that may exist when translating, for instance, frozen metaphors and idioms of one language to another, do not exist in legal language, since such terminology is not used. Obviously one would expect problems when culture-specific institutions, procedures or official bodies are involved. In such cases, the untranslatable can be transcribed or explained, as no two languages are sufficiently similar to be considered as representing precisely the same social reality. In many legal systems, especially those that portray socio-cultural and legal-cultural affinity, the “legal register” may have become naturalized as a result of sufficient similarity. Yet, to translate technical words used by lawyers in France, Germany, or elsewhere on the European continent into Turkish would have been in many cases a nearly impossible task. The best approach may have been to keep the original word and provide an explanation as suggested by Martin Weston, a former translator at the Secretariat of the Council of Europe in Strasbourg and Senior Translator at the Registry of the European Court of Human Rights.\textsuperscript{37} In a case of impossibility of translation, it can be said that a translator’s note may be required. This method, however, could not be considered with ease when translating codes, where there are mostly instances

\begin{flushleft}
\textsuperscript{35} For more examples, see \textsc{Lewis, supra} note 18, at 9.
\textsuperscript{36} \textsc{Lewis, supra} note 34, at 133-39.
\textsuperscript{37} \textsc{Weston, supra} note 25, at 17.
\end{flushleft}
of word-for-word translation and, occasionally, of neologism. We know that code translations are particularly difficult, are full of hazards and create specific problems, and that to obtain accurate results, resorting to the original text might become necessary.

Transcription or borrowing is not translation, but “an alternative way of dealing with culture-specific terms when translation in the narrower sense is not possible.” It may be assumed that between European languages the difficulties may be less pronounced than between European languages and a non-European language such as Turkish, based on the presence or absence of common cultural denominators.

Although it is true that words are an essential vehicle of cultural influence, cultures are not necessarily co-terminous with

38. Here four instances could be noted: The first consists of the three authentic versions of the trilingual Swiss Civil Code. The German, French (remember this is the version used by Turkish translators) and Italian texts, prepared with great care, are all equally authoritative. However, there are various discrepancies between the three texts and the courts in practice have to make a choice between versions. For the second instance, the Spanish Civil Code, see Franklin R. Capistrano, Mistakes and Inaccuracies in Fisher’s Translation of the Spanish Civil Code, 9 PHILIPPINE J. 89-141 (1929). The third instance is the case of the translation of the bilingual Quebec Code into Spanish and its accompanying problems. For this, see Dorato, supra note 6. The fourth instance, which has already been mentioned, is the monolingual Dutch Code being converted into a trilingual Code (Dutch, French, and English). For this, see MacKaay, supra note 23. Further, the nine contributions that appear in the role of legal translation in legal harmonization (C. J. W. Baaij ed., Kluwer Law Int’l 2012) indicate the crucial role of translation in multilingual law-making and alert us to problems to be encountered in developing not a single but a multilingual legal language through the example of EU harmonization. The connection to comparative law becomes more than evident in all the works above.

39. As opposed to the translation of the Quebec Civil Code into Spanish, the Turkish translators did not indicate “with a dagger symbol and notes ‘infelicities in language’ with an asterisk,” in this way outlining difficult or controversial choices in translation. See Dorato, supra note 6, at 595. In fact, in our case, there are no translators’ notes, but following each article in the Turkish Civil Code, the number of the corresponding Swiss article appears, with the aim that scholars and judges may like to consult the original text.

40. WESTON, supra note 25, at 30.

41. However, for the problem of seemingly similar words with different connotations between French and English, see Curran, supra note 22, at 678 and MATTEI ET AL., supra note 15, at 154-62. The same problem exists between Dutch and German, and Austrian and German.
languages, though the language of a particular society is an integral part of its culture. The lexical distinctions drawn by each language reflect the culturally important institutions and activities of that society. In the process of legal translation, therefore, what is sought is functional equivalents. It can also be assumed that there is much “cultural overlap.” There may be no synonymy between words of different languages, but a greater or lesser degree of equivalence can be found in the “application” of the word. However, these can only be intuitive judgments of equivalence in the areas of cultural overlap. The general assumption is that exact equivalence cannot be obtained and that validity can be achieved only through control of factors that affect equivalence. Weston, however, suggests five possible options open to translators facing a culture-bound source language: use of a target language expression denoting the nearest equivalent concept (functional equivalence); word-for-word translation, making adjustments of syntax and function words if necessary; borrowing of the foreign expression and adding a target language explanation if the concept is unlikely to be familiar to the target language readership; creation of a neologism, in the form of a literal translation, a naturalization or a wholly non-formal translation; or, lastly, use of an existing naturalization. In order of precedence, the rules to be followed then are: a word-for-word translation if “this yields a functional equivalent;” “a non-literal translation representing a functional equivalent in the target language;” “a word-for-word or non-literal translation that represents a semantic equivalent, but is not the label of a functionally equivalent referent in the target language culture (because there is none);” “transcription;” and, finally, “neologism.”

Neologism is a subsidiary solution and the last resort in any translation activity in law, and translators generally refrain from creating neologisms. The mandatory test would be that of

42. WESTON, supra note 25, at 19-21.
43. Id. at 31.
necessity. However, a translator choosing his or her own neologism must be aware that this could lead to confusion. As Weston says, “it is no business of the translator’s to create a new word or expression if the source language expression can be adequately and conveniently translated by one of the methods already described.” \footnote{44} Old words may be combined to form new compounds or phrases. Neologisms, if any, are naturalized, and foreign words are either given a word-for-word translation or borrowed and naturalized. Any neologism created must satisfy the requirements of conformity with standard target language grammatical, morphological and phonological patterns; that is, naturalness as well as economy and succinctness.

Now, it could be said that loan-words, borrowed from other languages and being recognizable from their language of origin, may be regarded in Turkey as indications of cultural transformation and therefore less desirable. Although preserving the source term can be an option when languages are related, as underlined by de Groot, “using an untranslated term from the source language in the target language must be avoided in particular where there is little or no etymological correspondence between the two languages.” \footnote{45} Nonetheless, if we look at the example of the word “mortgage,” already mentioned above, this is exactly what happened. In 2007, Law No: 5582, \footnote{46} called the “Mortgage Yasası” (Mortgage Statute), was passed by the Turkish legislator introducing a new possibility for home-buyers. In the body of the statute the word “mortgage” (kept in English) is then explained as “ipotekli konut kredisi” \footnote{47} and a neologism—used here in a very broad sense—also appears: “tutulu satış kredisi.” \footnote{48} None

\footnote{44. \textit{Id.} at 28.} \footnote{45. de Groot, \textit{supra} note 25, at 541.} \footnote{46. \textit{Resmi Gazete} no 26454; 21/02/2007.} \footnote{47. “Housing loan with mortgage.” Mortgage has also been translated at times as “\textit{Tutsan}” (in English “hold and sell”), again meaningless to a Turkish home-buyer.} \footnote{48. “Enslaved or apprehended sales loan.”}
of these concepts mean anything to a Turkish home-buyer. In addition, Turkish being a phonetic language, the word “mortgage” is pronounced by Turks as it is written, in a very amusing fashion!

We must remember that Vivian Grosswald Curran notes: “the appearance of a word or phrase in a foreign language and in italics will alert the reader to the irremediable foreign nature of the underlying concept.”\textsuperscript{49} The fact that an untranslated word is not accessible to the reader without explanatory references is the obvious disadvantage of this technique. As de Groot explains:

If the translator suspects [in our case knows] that the substance of the legal system from which he or she wishes to borrow a term to serve as a neologism—and consequently also its legal terminology—is unknown to the users of the target text, a reassessment is in order or an explanatory footnote must be added to the neologism.\textsuperscript{50}

In our case, the English word “mortgage” is in the name of the statute, it is not in italics, and the explanation is by way of creating new neologisms, meaningless to the reader. As Simone Glanert states, “the recourse to the descriptive method does not offer a way out of the problem of untranslatability, because a legal language is not only the medium of a legal culture but also part of a standard language” and “the concocted sequence of . . . words becomes a vicious circle . . . .”\textsuperscript{51}

Coincidentally, the example de Groot gives in his work is also that of the word “mortgage,” illustrating the translation of the Spanish word “hipoteca” into English as “hypothec” rather than “mortgage,” and he asks the question: “[w]ould this term not look very odd to an English reader of the target text if no explanation is provided?”\textsuperscript{52} In the Turkish case, though some kind of an explanation is provided in the text, the institution still does not

\textsuperscript{49} Curran, supra note 22, at 678.
\textsuperscript{50} de Groot, supra note 25, at 542.
\textsuperscript{51} Glanert, supra note 28, at 203.
\textsuperscript{52} de Groot, supra note 25, at 544. Obviously the word “hypothec” would work well with a Scottish audience!
seem to have taken root and the “fit” did not materialize, since the 1926 Civil Code, based on civilian institutions and terminology translated from the French (and the 2002 Civil Code is no more different), is totally alien to the English language (the new source language in the case of this statute) and contains other concepts. Would this new law also mean that, given time, the English source would affect the style, form and tone of Turkish law? Here a calque—loan translation—using an original word (“konut kredisi,” in our case, though the word “kredi” is also from French, but at least well-established), but giving it a new meaning, may have been more acceptable, as this would only reflect a similar parallel pattern of semantic evolution.

It must be remembered that the reading is related to “conceptual content,” and it is often impossible to give the meaning of a word without “putting it in context.” Therefore, a word-for-word translation—that is, a “literal translation” (formal lexical equivalence)—can be criticized. It is true that if there are source language expressions that defy translation in the narrow sense, literal translation makes no sense, in which case, transcribing or paraphrasing (glossing) can be recommended. Here, the source language term will be given in italics or between inverted commas, and followed in brackets by the target language gloss. This may be a workable method in general, but one cannot clarify the original term by adding a literal translation in parentheses in a code, either.

In a legal text, a word forms part of a sentence and, “sentences are unlimited in their variety of the arrangement of words.”

Language is connected to context and dictionaries cannot be regarded as solving problems of interpretation. “Dictionaries, a grammar book, and precepts of syntax, will not by themselves

yield the contextual meaning of words and sentences.”\textsuperscript{54} In the translation of the various codes into Turkish, though, dictionaries were used and some mistranslations occurred, as will be seen below. However, it is said that, since in the context of statutory interpretation, the instrument is considered “an always speaking statute,”\textsuperscript{55} and the words are given their “natural and ordinary meaning” that reflects the “common sense” proposition, it is difficult “to accept easily that people have made linguistic mistakes in formal documents.”\textsuperscript{56} As will be seen, however, this cannot be always assumed in the Turkish situation.

Many Latin phrases such as \textit{lis alibi pendens, forum non conveniens, ejusdem generis, negotiorum gestio, status de manerio, sine die, sic utere tuo ut alienum non laedas} that could have been retained in Latin, had the basis of the Turkish language been Latin, were not, in spite of the fact that Roman law was taught in law schools in Turkey. Nevertheless, many jurists in Turkey know no Latin, so although Roman law terms may be attractive as neologisms, one cannot assume that lawyers have any such knowledge.

Now to another concept: ambiguity, or double meaning. It is known that there can be two types of double meaning, doubt or uncertainty: “patent ambiguity,” which is obvious on the face of the instrument, and “latent ambiguity,” which becomes apparent only when the surrounding circumstances are known. The general rule is that, to resolve patent ambiguity, extrinsic evidence is admissible to enable the court to ascertain the meaning, but not to give a meaning to a word or phrase capable of being given an ordinary interpretation. Extrinsic evidence is admissible to explain a latent ambiguity. Ambiguities in the meaning of a statute or other legislation are resolved by recourse to rules of construction and interpretation and resort to source-laws by academics or the high

\textsuperscript{54} Steyn, \textit{supra} note 53, at 81.
\textsuperscript{55} \textit{Id.} at 90.
\textsuperscript{56} \textit{Id.}
courts, which in Turkey is mostly the Yargıtay (the Turkish Court of Cassation).

Related to ambiguity, again there is one interesting example worth looking into. The Convention on the Elimination of All Forms of Discrimination Against Women was ratified by Turkey in 1985. It is also now the case that the Turkish Constitution is to be read in the light of International Conventions. The translation of the Convention uses the word “önlenme” meaning “prevention” to correspond to “elimination” rather than “tasfiye” or “ortadan kaldırılma” both of which do correspond to “elimination” or “removal.” These Turkish words have their own connotations. In addition, “her türlü” in the official title means “all kinds,” whereas “her biçimiyle” used in Professor Semih Gemalmaz’s translation means “in all its forms.” Some feminist lawyers are claiming that the title creates an ambiguity on purpose, especially in view of the number of reservations Turkey attached to the Convention. In their opinion, “prevention” implies “from now on,” whereas “elimination” implies looking through existing legislation and cleansing them from such discrimination, and that

58. Kadınlara Karşı Her Türlü Ayrımcılığın Önlenmesi Sözleşmesi (Resmi Gazete 187.92; 25/06/1985). This is the title of the official translation. A translation by Professor Gemalmaz is different: Kadınlara Karşı Her Biçimiyle Ayrımcılığın Ortadan Kaldırılması Sözleşmesi. Gemalmaz also states that in the official Turkish translation of the Convention, there are serious mistakes both in the title and in many of its articles. Mehmet Semih Gemalmaz, Kadınlara Karşı Her Biçimiyle Ayrımcılığın Ortadan Kaldırılması Sözleşmesi: Çekinceler Sorunu Işığında Haklar Analizi (The Convention on the Elimination of Discrimination Against Women in all its Forms: An Analysis of Rights in the Light of Reservations) in Prof. Dr. İlhan Özay’a Armağan, LXIX İSTANBUL ÜNIVERSITESI HUKUK FAKÜLTESİ MECMUASI 139-238, 141 (2011).
59. Amended art. 90, 1982 Constitution.
60. Turkish word.
61. Arabic word.
62. Turkish word.
63. Gemalmaz, supra note 58.
“all kinds” is less effective than “in all its forms.” The claim that this was done on purpose, so that an ambiguity would be created and no clear-cut path could be followed, may be well founded and convincing. Nevertheless, one cannot be sure unless one is privy to the policy behind this choice of words, so I have some doubts about this claim.

Using “back translation,” which is a simple technique, though inadequate for dealing with linguistic comparability, may help in writing multilingual texts. It would serve as a detector of problems, however, rather than offering solutions. Comparison of the two texts can show the sources of difficulty and inconsistency. Yet, an item in the source language may give rise to more than one version in a target language and re-translation may create multiple source language versions. In this context, it might be an interesting exercise to compare the earlier version and the later version of the same Turkish Civil Code to detect any changes in meaning in this “inner” translation between the 1934 and the 1970 texts appearing side by side. This approach, valuable in the writing of the texts, may not be so useful in their interpretation.

III. SOME SPECIFIC EXAMPLES OF TRANSLATION HURDLES AS SEEN IN TURKISH CODES AND CASES

Cevdet Menteş, the then President of the Yargıtay (the Turkish Court of Cassation), in his speech to commemorate the 50th anniversary of the Civil Code published in a volume by the University of Ankara, points out that in the preparation of the Civil Code there were obvious translation errors in articles 65, 85, 187/2, 244/2, 507/3, 552 and 923, and that the mistakes in translation

64. Conversation with Ms. Canan Arın, a well-known and assertive practicing lawyer in Istanbul, May 2013. In addition, see Feride Acar, CEDAW ve Türkiye’de Durum, GÜNCEL HUKUK DERGISI 12 (2005).  
65. Id.  
66. Referenced in supra note 20. For some examples from the Code articles, see LEWIS, supra note 34, at 128-29.
were not limited to these only.\textsuperscript{67} There were more “mistakes, inaccuracies and weaknesses of expression.”\textsuperscript{68} He also argues that, although in a decision of 1950 unifying precedents, the Yargı\textit{tay} held that, in cases of mistakes in translation, the source-law Swiss Civil Code would be taken as the basis and the articles interpreted according to their purpose in the source-law; nevertheless, it would be more desirable for the legislator to correct these errors.\textsuperscript{69}

On the same occasion, Professor Necip Kocayusufpaşaoğlu concentrated on a concept unknown in the old law in the area of succession: “\textit{mirasta iade}” (“\textit{rapport successoral}” or “\textit{rapport a succession}” in the French version and “\textit{ausgleichung}” in the German version of the Swiss Civil Code). Not being in use before 1926, this institution, which hailed both from Roman and Germanic laws, was ignored by Turkish lawyers for a long time. In fact, it was already a problematic one in theory and practice in Switzerland, Germany and Italy, in spite of its pedigree. Kocayusufpaşaoğlu also criticizes the choice of terminology, indicating that the word “\textit{iade}” (return) does not cover all instances subsumed under this institution, which he calls “\textit{denkleştirme}” (equalization).\textsuperscript{70} He then goes on to look at other concepts used in article 603 which he believes contain wrong word choices, usually words with established prior meanings and connotations. He is of the opinion that instead of correcting the mistakes in translation, this article, which, according to him, has been very badly translated in the first place, should be rewritten.\textsuperscript{71}

Another publication, this time from İstanbul University, commemorating the 50th anniversary of the Civil Code, also

\textsuperscript{68} Id.
\textsuperscript{69} Id.
\textsuperscript{71} Id. at 133-35.
contains a number of contributions assessing the code and the developments in the law in the Republican period in Turkey. Among these, there is one by Professor Ernest Hirsch, who was one of the foreign professors working in Turkey during the formative years of Turkish law. He talks of his years of teaching commercial law, not using the Turkish Commercial Code since he did not know Turkish, but two unofficial French translations of it, which were not identical. He points out that in the preparation of the Commercial Code (1926-1929) a number of translators used different foreign codes, not just the German. The Code was eclectic and in its translation a variety of terminology was used, depending on the translator. His Turkish colleagues told him jokingly that “the Code is a Russian salad in need of mayonnaise to be put on top by you.” He further admits that since he studied the Code from those inadequate French translations and lectured in German, the lectures then being translated into Turkish, all were partially ambiguous and partially incomprehensible! In fact, according to Hirsch, it was rumored that since most professors, judges and lawyers knew no foreign languages, they were mostly relying on the literal translations of the codes as texts rather than inquiring into the spirit embodied in them.

Let us now turn to some specific examples. One problem surfaced while the Yargıtay was dealing with “arbitration agreements” in a unification of precedents. The Court first determined that a number of different systems of arbitration

73. Id. at 175.
74. Id. at 176.
75. Id.
76. Id.
77. 93/4; 94/1; 28.1.1994; 20 Yargıtay Kararları Dergisi 1994, 519. “Unification of precedents” is the one type of decision of the Yargıtay that is binding on all courts.
agreements were accepted by the laws of Switzerland, Germany, Austria and France, and then said:

Article 533 of the Turkish Code of Civil Procedure is differently arranged to the source-law, the Neuchatel Code of Civil Procedure article 488. Somehow, the words “unless otherwise contracted” in article 488/1 have not been incorporated into article 533. The translation leaves a gap. Neither does article 533 have any indication as to what would lead to an appeal. We therefore think that article 533 should be interpreted anew, as the existing interpretations and practices do not give satisfactory results.78

Then the Yargıtay unified various decisions emanating from its chambers stating: “[d]uring the discussions some judges have said that we cannot follow the source-law. The majority however, is of the view that we can. Thus, an arbitration award not in accordance with the law can be appealed against.”79 One must ask whether this omission was on purpose or by mistake.

Dealing with letters of guarantee, bills of lading and “clear on board,” and the resolution of the question as to whether the carrier is free of liability when the sender enters incorrect information into the bill of lading, the Yargıtay indicated that the topic had been widely discussed in international law, and then referred to letters of guarantee (clear on board) in the French and German Commercial Codes, showing that there is no agreement on the point.80 A dissenting opinion referred to German, Italian and French doctrine, as well as English doctrine, and cases on misrepresentation. It then suggested that:

Since the applicable provision, section 1064/11 of the Turkish Commercial Code, does not exist in “the source German law” (HGB) and neither was it in the Turkish Government Draft Bill when it went to Parliament, then this must mean that the Judicial Committee added this in haste and it went through Parliament without discussion. It is obvious that the provision was badly written and

78. Id. at 526.
79. Id. at 528.
hurriedly. If regarded in this light, the rules of the Hamburg Convention on Carriage of Goods by Sea could apply and section 1064/11 should be thus interpreted. This is also in accordance with legal opinion given by Turkish Maritime law experts.  

An example from family law is also illuminating. In a case related to the inheritance rights of an adopted child, the Yargıtay was critical of the translation of article 257/2 of the 1926 Civil Code. In the case under consideration, the inheritance rights of a child were postponed till after the death of both adoptive parents at the time of the adoption agreement. However, article 257/2 stated that an agreement depriving the adopted child of inheritance rights must be concluded before the adoption agreement. According to the Yargıtay, this is not in keeping with the source Swiss Civil Code, and that this view is also supported by Turkish and Swiss doctrine. The Court went on to say: “Following the unification of precedents 4/10 of 20.9.1950, errors in translation should be understood and interpreted in keeping with the source law.” The authority of foreign doctrine has contributed to the correct interpretation of the Code, Turkish judges being free to resort to foreign documents and texts, where necessary.

Now looking at the area of criminal law, we can briefly consider some further problems. The references in criminal law and criminal procedure to Italian law are mostly in dissenting opinions rather than in the decisions themselves and are resorted to in order to challenge mistaken interpretation of the 1926 Turkish Criminal Code (now replaced by the 2005 Criminal Code) and the 1929 Code of Criminal Procedure, and to point to mistakes in translation at the time of reception. The Yargıtay is called upon to search for the true meanings in the original versions. For instance, in a case concerning “murder to facilitate the committing of

81. Id. at 1789.
83. Id.
84. Id. at 1820.
another crime,“85 the dissenting opinion (Judge Selçuk, well-versed in Italian) claimed that the term “crime” in articles 135, 150 and 163 of the Code of Criminal Procedure was a mistaken translation of the term “act” in the source-law, whereas the term “action,” used in article 257, was the correct translation. It was indicated that when article 135 was amended in 1992, this mistake should have been corrected.86 After pointing to some other discrepancies, the same dissenting judge said, “as can be seen, as a result of giving wrong meanings to terms and concepts, the Turkish practice has become divorced from the laws of the legal systems that inspired it.”87

In another case88 related to causing bodily harm to, and the maltreatment of, members of the family, though there were no references to foreign sources in the decision, again the same dissenting judge referred to mistakes in translation and interpretation. He criticized the established view of the Yargıtay regarding the term “a number of persons” as more than three, and “a few persons” as three.89 According to him these variations do not exist in the Italian source-law, where the term “plu persone” is used to indicate more than two persons. The Turkish Code and the “Majno” Annotations90 use sometimes one, sometimes another word to translate this term, and there is, therefore, some ambiguity and confusion. When articles 480 and 482 were being amended, the legislature followed the mistaken decisions of the Yargıtay and

85. 97/1-76; 97/114; 13.5.1997; 23 Yargıtay Kararları Dergisi 1997, 1608 1616.
86. Id. at 1616.
87. Id.
89. Id. at 620.
90. These annotations (called in Turkish “Manjo Şerhi”) in four volumes were written by the Italian Criminal lawyer Luigi Manjo and published in the early years of the Republic, first in the Ottoman script by the then Minister of Justice Mahmut Esat Bozkurt, including his preface. It was later published in the Latin script. In 1977 it was re-published by the Yargıtay (Yargıtay Yayımlı no:3, Ankara). It is now out of print.
changed the term “a number of persons” to “three.” The dissenting judge said:

While the law was being interpreted, the source-law should have been consulted. It should not have been forgotten that the Turkish Criminal Code is the outcome of a reception and translation. Therefore, it is necessary to correct mistakes in translation by “corrective interpretation.” The only acceptable departure from the source-laws is where the legislature has shown reasons for this departure in debate in Parliament. Therefore, whenever necessary the Italian Code and reasoning must be used.91

Where the right to defense of the suspect was being determined, the Yargıtay was of the opinion that, reminding the suspect that he has the right to employ a lawyer and that he has the right to silence are essential elements of procedure, otherwise the right to defense is to be regarded as limited.92 After stating that laws of all democratic states point in the same direction, two dissenting opinions referred to the source, the German Code of Criminal Procedure articles 243 and 130, which have the same text as the Turkish articles 236 and 135. Both opinions extensively discussed decisions of the German Federal Court (BGH) with further references to foreign doctrine on criminal procedure.93 The Yargıtay was criticized for not applying the aforementioned articles in line with the German Federal Court practice and for not using its discretion in determining the value of such procedural niceties and, instead, taking them as absolutes.94

In a case dealing with “premeditated murder,”95 a dissenting opinion compared the Turkish Yargıtay to its French, German and Italian counterparts. It then pointed out that the word “premeditated” was not defined in the Turkish Criminal Code and that, because in the early years of the Republic it was the practice

91. Supra note 88 at 620.
92. 95/7; 95/302; 24.10.1995; 22 Yargıtay Kararları Dergisi 1996, 103.
93. Id. at 104.
94. Id. at 105.
95. 94/1-167; 94/188; 27.6.1994, 20 Yargıtay Kararları Dergisi 1994, 1829.
to interpret this code according to the French Criminal Code rather than the Italian source-law, a number of problems were created. This was indeed a linguistically easy but mistaken option; it was not possible to transfer the interpretation of one to the other. The 1810 French Criminal Code was no longer in effect and the new Code had yet a different system and defined cases of premeditation as "assassination." The Italian criminal system left this determination to the judge. According to this dissenting judge, the Turkish system seemed to sway between the French and the Italian systems by sometimes using the French conceptual structure "calmness" (cool-headedness), and thus had internal inconsistencies. The Yargıtay should give a final definition of "premeditation" and then use this definition as a criterion when viewing the decisions of the lower courts. The dissenting judge then referred to Spanish teaching and practice, which had also been influenced by the Italian, German and French laws, to show that they did follow this path.

In another case, it was pointed out by the Yargıtay that the Turkish Criminal Code does not define "grafts, tricks and dishonesty," which are the formal conditions for the proof of "swindling." Considering comparative law, the Court discerned two trends. However, it then decided the case according to the system of the Turkish Criminal Code. The aforementioned judge in his dissenting opinion again looked at a number of legal systems and specifically at the source-law. He said that the Italian Criminal Code gives weight to the subjective element, "the decision to commit an offence." He claimed that by adding a condition not foreseen by the Code, the Yargıtay was narrowing the scope of article 80, which can only be done by the legislature. This is

96. Id. at 1832.
97. Id. at 1833.
98. Id. at 1834.
99. Id. at 1834.
100. 98/6-280; 98/359; 24.11.1998; 25 Yargıtay Kararları Dergisi 1999, 238.
101. Id. at 240.
accepted not only in Italian but also in Swiss, Belgian and French laws. 102 He then summarized the position in the Italian source-law by reference to legal writers such as Battaglini, Pannain, Ranieri, Antolesei, Nuvo Lone, Fiandaca, Mantovani, Musco, Padovani and Cavallo. He pointed to a translation error in article 80, and said that a Turkish unification of precedents in 1929 had unfortunately further reinforced this error. 103 In 1941 the section was amended. As before, the judge blamed this unhappy development on the interpretation of the Italian-Turkish Criminal Code in the light of the French Criminal Code, which is incompatible with the Italian one. According to him, “decision to act” and “criminal intention” are not equivalent. 104 In an earlier decision, the General Council of Criminal Law of the Yargıtay 105 compared the Turkish Code with the source-law and pointed to the fact that article 80 had been amended and that “the same intention to commit an offence” was now replaced by “the same decision to commit an offence.” 106

IV. CONCLUDING REMARKS

Modernization and westernization of Turkey’s legal system were not based on any one dominant culture, and the fact that a number of different models were chosen might have given the borrowings “cultural legitimacy.” 107 As stated, the civil law, the law of obligations and civil procedure were borrowed from Switzerland, commercial law, maritime law and criminal procedure from Germany, criminal law from Italy and administrative law from France; all translated, adapted and adjusted to solve the social and legal problems of Turkey and to

102. Id. at 241.
103. Id.
104. Id.
106. Id. at 1811.
interlock. The choice was driven at times by the perceived “prestige” of the model, at other times by “efficiency,” and sometimes by “chance,” or “historical accident.” In recent years the codes have been updated—the Civil Code in 2002, the Criminal Code in 2005 and the Commercial Code in 2011—but the bases have not changed and, though not translated now, they still carry the stamps of the translated laws of the 1920s.

Although Eva Hoffman claims that distortions occur in translation of even a single word in “transporting human meaning from one culture to another” unless “the entire language” around the word or its audience are transported,\(^\text{108}\) and Pierre Legrand that “legislation cannot make mores,”\(^\text{109}\) the entire Turkish legal system, still fully functioning, is built on such institutional transfers and translations, with a different and brand new audience, and has been keeping lawyers, judges and academics active since 1926.

A great believer in receptions as a way forward for legal systems, Alan Watson is of the view that even when misunderstood or mistranslated, a borrowed institution or concept may solve the problems for the solution of which it was borrowed. He says: “. . . a total mistake as to the meaning of the rules which it is thought are being borrowed need not stop the creation of a new doctrine nor prevent it becoming authoritative and important.”\(^\text{110}\)

In addition, “. . . foreign law can be influential when it is totally misunderstood.”\(^\text{111}\) When one looks at the Turkish experience, it can be said that Watson’s views can be endorsed. It is of course true that, as observed by Glanert, “the inevitably violent introduction of a newly created legal terminology causes in every


\(^{111}\) Id. at 99.
national legal language a semantic earthquake.”112 Would all this translation and earthquake have an added meaning today, now that the Turkish language is also being Europeanized? Can the national language be reduced to an instrumental dimension? Can we observe “the adoption of a transnational legal neo-language?”113

One thing is certain, and that is that the Turkish experience defies the romantic view that there is an indissoluble bond between law, language and culture.114 This experience, therefore, can also be studied as a useful empirical work on the relations between language, culture, translation and comparison, and the value of a code in more than one language. Is this relation indeed as profound as is purported? Suffice it to say that the Turkish experience, in my opinion, rightly leads one to ask, “whose law, whose culture, whose language?”

Through creative interpretation, mistakes and inaccuracies in translation (unless they are deliberate) can be either eliminated over time or give a different direction to the law compared to the source-laws. For this, an active judiciary and creative academics are needed, which is what has been happening in the Turkish legal system over the past ninety years.

113. Id.
114. Discussed by Michele Graziadei, Comparative Law as the Study of Transplants and Receptions in The Oxford Handbook of Comparative Law 469 (Mathias Reimann & Reinhard Zimmermann eds., Oxford University Press 2006). In this paper I am not looking at deeper and contentious questions such as:

[I]f law lives in and through language, what happens to it when it is transferred into another language? If the structure of a language influences, or even determines, the mode and content of thought, might it not be that any language can only express certain thoughts, and that these thoughts differ from culture to culture?

See Bernhard Grossfeld, The Strength and Weakness of Comparative Law 101 (Tony Weir trans., Oxford Univ. Press 1990). Other questions can also be raised which jurilinguists will study, such as “how strong is the link between the law or a legal system and the language of its statues?” and “is a ‘neutral legal language’ possible or even necessary?” See Dorato, supra note 6, at 618.
François GÉNY in LOUISIANA

François-Xavier Licari

For the reviewer, Gény's analysis and suggested method was not just an X-ray showing the internal arrangement of the legal system; it was more a sort of stethoscope, catching the living beat of the law in action.¹

I. Factors of a Successful Reception ........................................... 484
A. Portalis in Louisiana .......................................................... 485
B. A Trinity of Learned Judges: Justices Barham, Tate and Dennis ................................................................................ 490

II. The Manifestations of the Reception of Méthode d’interprétation et sources in Louisiana ................................ 495
A. The Influence of Gény on the Methods of Interpretation Applied by Louisiana Courts ............................................. 495

Méthode d’interprétation et sources en droit privé positif,² a manifesto of the free objective search for a rule, has been genuinely received in Louisiana, both by doctrine and by


jurisprudence, to such an extent that an author wrote that in
Louisiana, jurists “live and work with Gény.”

Before turning to Gény’s success story in Louisiana, we think
it not useless to sketch the main ideas of François Gény (1861-
1959). Often cited but rarely read nowadays, Gény’s heritage has
almost sunk into oblivion in the Anglophone world, despite
accessible English material. Gény’s first and most important work
is *Méthode d’interprétation et sources en droit privé positif*, whose
first edition appeared in 1899. Not only was it a milestone in
French legal scholarship but also for the entire Western world.
Luminaries like Benjamin N. Cardozo and Roscoe Pound found
great inspiration in his writings; generally, Gény exercised a
notable influence on American scholarship. For contemporary
legal scholars nurtured with legal realism or critical legal studies, Gény’s ideas will seem commonplace. But one ought to remember that they were formulated at a time when legal formalism ruled supreme in France, in Europe and in the United States. Gény was a sort of proto-legal realist: he asked us to lift the mask of formal logic which hid the reasoning of the courts. One of Gény’s main theses is that judges under the codes are not just automatons applying legislated law with the use of syllogism and other tools of formal logic, but rather are active deciders who weigh interests, apply policies, etc. This reality ought to be admitted and its consequences carried out. The masks that Gény wanted to lift are numerous. First, he wanted his readers to recognize that positive law is more than legislation. Societal relations cannot be regulated by statutes that are often obsolete by the time they are promulgated. Here Gény appears as an heir to Portalis, the chief draftsman of the Civil Code, whom Gény abundantly quotes. Gény fought for the abandonment of the nineteenth-century exegetic positivism that was based on three well-established noxious fictions. The first one is the fiction of the logically necessary completeness of legislation. But this fiction is corrected by another fiction that isolates the statute of the authority of its maker. These fictions lead to the use and abuse of analogy reasoning as a technique of interpretation. Analogy reasoning is legitimated by a third fiction, that of the existence of a legislator’s identifiable intent. This first deconstruction of the decisional process leads Gény to propose a realist method to decide cases.

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10. MIS, supra note 2, at nos. 7-82.
can be summed up as follows: Modern constitutional principles imply that statutes be always fully implemented. Nevertheless, “justice and social utility” require that the one applying the law use all legitimate means when he decides a case. Customary law is the first of these legitimate resources. When no clear and applicable rule is available, the judge must draw from scholarship (la doctrine) and jurisprudence (la jurisprudence). According to Gény, jurisprudence bears only persuasive authority. His refusal to consider jurisprudence as a binding authority, i.e. as a real source of law, has been criticized by many authors. But if no appropriate source is available, the judge must freely search for a rule on which to ground his decision. This search is “free” in the sense that it is of discretionary nature. But it is in no way arbitrary. Gény rejects every path that could lead to the reign of the judge’s subjectivity; hence the vehement attacks directed against the hunch cult of the German Free Law movement12 or to the anarchic experiments of the “bon juge Magnaud.”13 In other words, this search must be objective, that is, grounded in social realities, needs, interests and in the nature of things. Thus, it is a scientific approach comparable to the approach a model legislator would use. But contrary to a legislator’s rule, the rule created by the judge is limited to the case at hand.

At first glance, one could believe that the scope of the free scientific search is limited and that a praetorian rule will seldom

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12. On this school of thought, see MIS, supra note 2, at nos. 205-222; see also James E. Herget & Stephen Wallace, The German Free Law Movement as the Source of American Legal Realism, 73 VA. L. REV. 399 (1987); more generally, see Mathias Reimann, Nineteenth Century German Legal Science, 31 B.C.L. REV. 837 (1990).

appear. To the contrary, Gény offers a definition of interpretation that opens a broad door to the judge’s creativity. In effect, according to him, the only justified principle of interpretation is to determine the scope of the text with reference to the time of its enactment. That means, as we saw before, that the judge must not try or pretend to guess “the” intent of “the” legislator. That also means that analogy reasoning is taken for what it is: one form of the free search and not a technique of interpretation.

After this brief account of Gény’s method, we may turn to its reception in Louisiana.

This reception stems from the combination of various factors, in particular the remarkable translation by Jaro Mayda, a Czech comparatist, and the assimilation of François Gény’s work by out-of-the-ordinary judges. Nevertheless, an excellent translation, enthusiastically received by outstanding judges, is not a sufficient explanation for the fertility of the libre recherche scientifique. An intellectual terrain within which the reception could flourish was also required. Louisiana was probably perfectly suited for this.

However, at a 1991 conference in which he spoke for the last time of François Gény, Jaro Mayda could not hide his bitterness. He regretted that in the United States no one was really interested in Gény, nor in his own works on the professor from Nancy. He had the feeling that his work was in vain: his translation of Méthode d’interprétation et sources en droit privé positif was largely ignored, and his essay, François Gény and Modern Jurisprudence, was not even reviewed in Louisiana, although

14. MIS, supra note 2, at no. 97.
15. In the same vein, see Roscoe Pound, Spurious Interpretation, 7 COLUM. L. REV. 379, 382 (1907).
16. MIS, supra note 2, at nos. 165-168.
18. MIS, supra note 2.
19. MAYDA, supra note 4.
At first sight, this observation can be confirmed today: a recent article about the links between the thinking of François Gény and that of Oliver Wendell Holmes, Jr., does not mention Jaro Mayda’s translation or essays. It may also be noted that *François Gény and Modern Jurisprudence*, a work of incredible depth and richness, is rarely quoted, in France or in the rest of Europe.

However, it is contended that the author’s pessimism was unwarranted. An enthusiastic review of his translation has been made by one of the most influential judges of the 20th century in Louisiana, Albert Tate Jr., who became a driving force in spreading the application of the free objective search for a rule doctrine in Louisiana jurisprudence. Within a few years, as Jaro Mayda had indicated, it was genuinely received in the state, not only by doctrine, but also by jurisprudence. Jaro Mayda’s brilliant translation surely acted as a propellant. Until its publication, *Méthode d’interprétation et sources* was quoted by some authors, but its diffusion was limited because, by the end of the 19th century, in legal practice, the use of French had almost vanished.

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24. FGMJ, *supra* note 4, at 68: “The important point . . . is that, despite the art represented by the current literature, the pragmatic temper of America and of its mixed jurisdictions, such as Louisiana, may well be the environment that will send Gény’s themes toward their integration into a rational, modern jurisprudence.”


French doctrine was no longer cited in the original language.  

Today, great civilians are only known through translations. Since then, it is common to read praises of François Gény’s work in Louisiana scholarship. He has even been said to be “one of the civil law’s crown jewels.” These tributes are not merely made out of propriety by a few nostalgicists of the French Louisiana and the Napoleonic Code. The free objective search for a rule nourishes the Louisiana legal methodology and in particular the fundamental question of the connection between legislation and jurisprudence.

However, assessing the influence of an author on a country’s jurisprudence is not an easy task. An attempt made on the occasion of Gény’s centennial proved to be disappointing, probably because French jurisprudence resists to such an assessment: it is formulated in a laconic or obscure style, with language free from doctrinal reference, therefore seldom permitting the identification of intellectual affiliation, leaving the interpretation open to speculation.

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28. About the immense work carried out under the patronage of the Louisiana State Law Institute, see Joseph Dainow, Civil Law Translations and Treatises Sponsored in Louisiana, 23 AM. J. COMP. L. 521 (1975). Translations of French doctrine from French into English were also made under the patronage of the Center of Civil Law Studies. For an overview of these translation projects, see Alexandru-Daniel On, Making French Doctrine Accessible to the English-Speaking World: The Louisiana Translation Series, 5 J. CIV. L. STUD. 81 (2012).
Switzerland provided a more suitable environment, but revealed judicial reluctance in resorting to the free objective search for a rule, even though the method can be found in essence in article 1 of the Swiss Civil Code.

On the other hand, Louisiana provides an ideal context to conduct these investigations. The judicial style is discursive and gives arguments, following the model of the other U.S. states. Majority, concurring, or dissenting opinions do cite doctrinal sources, whether contemporary or not. This allowed Joseph Dainow to assess with precision the influence in Louisiana jurisprudence of the translation of Planiol’s civil law treatise.

More than thirty cases have been identified, where Louisiana courts cite *Méthode d’interprétation et sources* to solve a delicate legal issue, whether in a majority, concurring, or dissenting

32. Walter Yung, *François Gény et la jurisprudence en Suisse* in *LE CENTENAIRE DU DOYEN FRANÇOIS GÉNY* 85 (Dalloz 1963); FGMJ, *supra* note 4, at 31-64.
33. *CODE CIVIL* [CC] [CIVIL CODE] Dec. 10, 1907, RS 210, art. 1(Switz.):
The law governs matters to which the wording or spirit of one of its provisions are related. In the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would make as a legislator. In doing so, it shall draw inspiration from established doctrine and jurisprudence.
37. There are only two federal court rulings which are based on Gény: Shelp v. Nat’l Surety Corp., 333 F.2d 431 (5th Cir. 1964), per Judge Wisdom; Hulin v. Fibreboard Corp., 178 F.3d 316 (5th Cir. 1999), per Judge Dennis (see infra Part II.B).
38. The first citation of Gény by the Louisiana Supreme Court is to be found in an opinion of Justice Tate: Chambers v. Chambers, 249 So. 2d 896 (La. 1971); Bell v. Jet Wheel Blast, 462 So. 2d 166, 170 (La. 1985); Bergeron v. Bergeron, 492 So. 2d 1193 (La. 1986); Entrevia v. Hood, 427 So. 2d 1146 (La.
opinion. However, a purely statistical approach would be inadequate. It is more suitable to assess Gény’s influence not solely by way of express references, but also through the implementation of the free objective search for a rule, in cases where the author is not cited. This requires the identification of cases where the method is applied.

Marc Desserteaux’s criteria may be used to this end. He focused on “situations in which the interpreter provided a genuine personal contribution, and in which, furthermore, his contribution was followed by a majority of judges, and favored a harmonious customary rule.” Desserteaux identifies two categories of cases; firstly, the resurrection of a historical tradition which was forgotten or erased by the legislature: “the mutilated legal institution tends to be wholly restored . . .” at the courts’ instigation. At least two
Louisiana jurisprudential landmarks meet this criterion: the maxim *contra non valentem agere non currit praescriptio* and enrichment without cause. Another use of the free objective search for a rule is the more typical case where “the interpreter opted for solutions not justified by precise legislative will, and not clearly based on the tradition preceding codification.” In this situation, the “lever” of the interpreter’s creativity, is the new economic or political element “which disrupts the earlier conditions and makes former legal rules difficult to apply.” The jurisprudential construction of a regime of liability for the acts of things undoubtedly meets this criterion. Other examples may also be found.

I will first try to identify sociological, historical, and cultural factors that could have contributed to such a reception (part I). Subsequently, I will study expressions of such successful reception (part II).

I. FACTORS OF A SUCCESSFUL RECEIPT

The reception of the *libre recherche scientifique* in Louisiana stems from two different essential factors: a favorable scientific context developed from Portalis’ ideas (A) and the erudition of

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43. The renaissance of the well-known maxim is almost exclusively owed to French law and to former art. 21 of the Louisiana Civil Code (see infra Part I.A). Its extension and, in particular, the creation of a fourth application by Judge Tate is undoubtedly attributable to the free objective search for a rule: see Benjamin W. Janke & François-Xavier Licari, *Contra non valentem in France and Louisiana: Revealing the Parenthood, Breaking a Myth*, 71 L.A. L. REV. 503, 511 (2011).

44. On the case *Myniard* (1967) and its aftermath as a pertinent situation for the application of the free objective search for a rule, see Albert Tate, Jr., *The Louisiana Action for Unjustified Enrichment: A Study in Judicial Process*, 51 TUL. L. REV. 446 (1976); FGMJ, *supra* note 4, at 76-77. French jurisprudence and doctrine have constantly been a model for Louisiana jurisprudence. Meanwhile, L.A. CIV. CODE Art. 2298, introduced in 1998, codified what at that point was *jurisprudence constante*.


46. *Id*.


48. *See infra* Part II.
audacious judges who knew how to bring the civil law legacy to fruition (B).

A. Portalis in Louisiana

In Louisiana, Portalis literally prepared the landscape for François Gény. It is worth explaining how. Boulanger allegedly said that Gény was “Portalis one hundred years later.” These words were probably intended to deny Gény’s originality, but still had the merit of emphasizing an intellectual affinity which seems to have been a catalyst for Gény’s reception in Louisiana. François Gény restates Portalis’ main ideas on the relationship between the legislature and the judiciary, but elaborates them, by way of proposing his method. However, it is worth mentioning that Portalis’ legal thinking was not as influential in France as in Louisiana. In France it has a mere doctrinal value, whereas in Louisiana it is part of positive legal precepts. This aspect of Louisiana civil law is not well known abroad.

If, indeed, everyone knows that the project of the year IX has been the model for the first Civil Code of Louisiana (Digest of 1808), few people know that Portalis’ project for the first book of

49. FGMJ, supra note 4, at 136.
50. In MIS, Gény abundantly cites the preliminary discourse and the exposé des motifs: see, e.g., nos. 45 & 57. In Justice Dennis writings, the two major authors are cited together in two Louisiana Supreme Court rulings. In the first one, regarding the custody of a child, the discussion bears on the relations between jurisprudence constante and the law that partly codifies it: Bergeron v. Bergeron, 492 So. 2d 1193, 1198-99 (La. 1986); in the second, the Court restated that judges are not bound to apply code provisions only to situations that were known at the time of their adoption: 9 to 5 Fashions, Inc. v. Spurney, 538 So. 2d 228, 233 (La. 1989).
the code has been copied almost *verbatim* into the Louisiana Civil Code, and it can still be found in the code today with a few minor modifications.52 This text, which appalled French judges53 to such an extent that it was rejected and replaced with a crippled preliminary chapter in the *Code civil des Français*, restates in normative form the ideas expressed by Portalis in his famous discourse.54 This introductory part was particularly needed in a code intended to be applied mainly by judges who were not familiar with the civil law tradition.55

The most remarkable norm in this preliminary title of the code, which simultaneously is an invitation to resort to the free objective search for a rule, could be found in former article 21: "In civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably an appeal is to be made to natural law or reason, or received usages, where positive law is silent."56 The immediate source of article 21,

56. For a commentary on this text, see Mitchell Franklin, *Equity in Louisiana: The Role of the Article 21*, 9 TUL. L. REV. 485 (1935); see also Joseph Dainow, *The Method of Legal Development Through Judicial Interpretation in Louisiana and Puerto Rico*, 22 REV. JUR. U.P.R. 108, 110-11 (1953); Ferdinand Fairfax Stone, *The So-Called Unprovided-For Case*, 53 TUL. L. REV. 93 (1978); MAYDA, supra note 4, at 168. On the importance of equity in general in Louisiana law, see Vernon V. Palmer, *The Many Guises of Equity in a Mixed Jurisdiction: A Functional View of Equity in Louisiana*, 69 Tul. L. Rev. 7 (1994). Talking about this article, Stone (see supra note 55, at 1082) points out that it was feared that article 21 would have become a vehicle for the importation of the common law into Louisiana under the cover of natural law and reason on the pretext that there is no applicable express law. As seen in the following discussion, this threat did not come to fruition.
the gist of which can be found today in article 4,\textsuperscript{57} but without reference to natural law,\textsuperscript{58} is article 11 from the project of the preliminary book of the French Civil Code.\textsuperscript{59}

Several essential points regarding the relation between legislation and the judge emerge from Portalis’ and Gény’s ideas. The legislature cannot foresee everything and, as time passes, the necessity for creative jurisprudence grows. Judges must decide a case as fairly as possible and without any reference to positive law, thus acting as praetors: they recognize a particular interest and provide a remedy. To this end, they have to resort to a number of sources such as analogy, equity or natural law.

It is worth discussing these sources further. What Portalis had in mind was equity. The term is certainly one of the most polysemous in existence, but, for the father of the Civil Code, it was synonymous with justice based on natural law in concrete cases.\textsuperscript{60} As to Gény, he sometimes referred to equity,\textsuperscript{61} but preferred the concept of natural law. Through an allusion to natural law, “the legislature reintroduces roman law, which was renounced during the revolution because it was lumped together with the

\begin{itemize}
  \item \textsuperscript{57} The preliminary title was revised in 1987. Louisiana Civil Code article 4 provides: “When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages.” LA. CIV. CODE art. 4).
  \item \textsuperscript{58} See the surprising comment (b) under article 4 (Louisiana Civil Code, A. N. Yiannopoulos ed., West 2009): “The term “natural law” in article 21 of the 1870 Code has no defined meaning in Louisiana jurisprudence and is not reproduced in this revision.”
  \item \textsuperscript{59} “In civil law matters, where there is no express legislation, the judge decides in equity. Equity is the return to natural law, or received usages where positive law is silent.”
  \item \textsuperscript{60} See Portalis’ Preliminary Discourse Adressed to the national Assembly in 1800, translated by Shael Herman, in Alain Levasseur, \textit{Code Napoleon or Code Portalis?}, 43 TUL. L. REV. 762, 771 (1969): “When the legislation is clear, it must be followed; when it is obscure, we must carefully analyze its provisions. If there is no particular enactment, custom or equity must be consulted. Equity is the return to natural law, when positive laws are silent, contradictory or obscure.”
  \item \textsuperscript{61} MIS, supra note 2, at 100.
\end{itemize}
jurisprudence of the ancien régime . . ." 62 Gény’s concept of natural law was certainly ambivalent, 63 but it seems close to that of Portalis: an uncompromising justice based on the nature of things. It does not really matter that both authors’ conceptions are not exactly the same. The suggestive power of the notion was enough to create a link between the two thinkers. The approach of Louisiana courts actually seems closer to Raymond Saleilles’ and Édouard Lambert’s views, 64 for whom comparative law was quasi-synonymous with natural law. 65 This affinity clearly reveals the main applications of the free objective search for a rule in Louisiana courts: by resurrecting the contra non valentem agere


63. See Eugenio di Carlo, Le droit naturel dans le système d’interprétation de Gény in 1 RECUEIL D’ÉTUDES SUR LES SOURCES DU DROIT EN L’HONNEUR DE FRANÇOIS GÉNY 234 (Recueil Sirey 1934); MAYDA, supra note 4, at 14, 130 et seq.; Michel Villey, François Gény et la renaissance du droit naturel in LE CENTENAIRE DU DOYEN FRANÇOIS GÉNY 39 (Dalloz 1963); Olivier Cayla, L’indicable droit naturel de François Gény, 6 REVUE D’HISTOIRE DES FACULTÉS DE DROIT ET DE LA SCIENCE JURIDIQUE 103 (1988); Bruno Oppetit, François Gény et le droit naturel in FRANÇOIS GÉNY ET LA SCIENZIA GIURIDICA DEL NOVECENTO, 20 QUADERNI FIORENTINI 89 (GIUFFRÈ 1991); Penfold, supra note 5.

64. On these views, which are rather complementary than conflicting, see Christophe Jamin, Saleilles’ and Lambert’s Old Dream Revisited, 50 AM. J. COMP. L. 701 (2002). See also, regarding the various aspects of the latter work: Stephane Caporal, Édouard Lambert. Théoricien de la jurisprudence sociologique, 5 ACTA U. DANUBIUS JUR. 182 (2009).

65. Raymond Saleilles, École historique et droit naturel, REV. TRIM. DR. CIV. 80, 131 (1902); Raymond Saleilles, La fonction juridique du droit comparé, in RECHTSWISSENSCHAFTLICHE BEITRÄGE: JURISTISCHE FESTGABE DES AUSLANDES ZU JOSEF KOHLERS 60. GEBURTSTAG 164, 168-171 (F. Enke 1909). In one of the chapters added to the second edition, Gény mentioned Saleilles’ and Lambert’s thoughts. He recognized that comparative law can constitute a useful aid for the renewal of French law. However, he does not go as far as to consider it as a source of natural law: MIS, supra note 2, at no. 193.
maxim or the *in rem verso* action, and by establishing a system of liability without fault, Louisiana judges have renewed the law of their state, while wearing both the praetor’s toga and the *Lord Chief Justice’s* wig. They found an objective foundation in French doctrine and jurisprudence, which enabled them to go beyond the Louisiana Civil Code, but through the Louisiana Civil Code. All in all, the civil law renaissance has been a re-assimilation of the Civil Code and a rejuvenation of the same, thanks to an authentic civil law method.

The reception of Gény’s work was probably made easier by the reluctance that Louisiana courts have always shown towards positivism.66 This is demonstrated by the interpretation they made of the provisions of the 1808 and 1825 codes which aimed at repealing all laws predating codification, a jungle of customary law, French law and Spanish law. Thus, in the *Reynolds v. Swain* case, Chief Justice François-Xavier Martin stated, without beating around the bush, that the legislature did not repeal unwritten law such as natural law or the law of nations, or even *jurisprudence constante*.67 That is why applying a rule of roman “corporation law” was confirmed in that case and why, in another case, natural law was presented as the foundation for the *contra non valentem*


67. *Reynolds v. Swain*, 13 La. 193, 198 (1839): The repeal spoken of in the code, and the act of 1828, cannot extend beyond the laws which the legislature itself had enacted. . . . It cannot be extended to those unwritten laws which do not derive their authority from the positive institution of any people, as the revealed law, the natural law, the law of nations, the laws of peace and war, and those laws which are founded in those relations of justice that existed in the nature of things, antecedent to any positive precept. *Reynolds v. Swain* has been referred to as François-Xavier Martin’s “most influential contribution.” MARK F. FERNANDEZ, *FROM CHAOS TO CONTINUITY: THE EVOLUTION OF LOUISIANA’S JUDICIAL SYSTEM, 1712-1862* 84 (Louisiana State University Press 2001).
agere non currit praescriptio maxim. 68 This sound resistance to positivism certainly was another expression of the influence Portalis had in Louisiana.

Thus, Louisiana had rules of interpretation incorporated in its code and a suitable method of implementation. Great judges found a way to make the best out of it: the libre recherche scientifique was fully promoted, and Louisiana law was overtly modernized.

B. A Trinity of Learned Judges: Justices Barham, Tate and Dennis

The fruitfulness of the method has been noticed by some learned and audacious judges who made the Métode d’interprétation et sources a preferred tool for completing the rebirth of civil law in Louisiana. 69 Mack Elwin Barham (1924-2006), made the community of jurists realize that in order to strengthen the Louisiana civil law resurgence movement, the implementation of a civil law methodology was necessary: that of François Gény. 70 He set an example by applying it in many of his

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68. The first time a position was taken on the historical origins of contra non valentem by a Louisiana court is to be found in Justice Mathews’ opinion in Morgan v. Robinson, 12 Mart. (o.s.) 76, 77 (La. 1822), affirming his Spanish and natural law origins:

[The plaintiff] relies principally on the maxim, contra non valentem agere, non currit prescriptio as adopted and recognized by the Spanish law, and being an axiom, or first principle of natural law and justice, and therefore applicable to every system of jurisprudence, wherein the contrary is not expressly established by legislative power. In this view of the subject we agree with the counsel of the plaintiff, and, notwithstanding the express terms of limitation in our code, it is thought, that they ought not to be interpreted as to conflict with this universal maxim of justice.

About the parallel development of the maxim in France and in Louisiana, see Janke & Licari, supra note 43.


Judge Albert Tate, Jr. (1920-1986) certainly was one of the greatest Louisiana judges; relying on Gény, but also on his unmatched knowledge of French law, he has developed, in a series of articles, an important reflection on the role of judges in a mixed legal system and gave Louisiana jurisprudence real pieces of anthology. James L. Dennis, another judge of great erudition, followed the footsteps of his illustrious predecessors and has consolidated the position of both doctrine and jurisprudence.

One might wonder why Gény became the cardinal reference in Louisiana, even though American doctrine already had brilliant critics of formalism, amongst the most famous of them being Oliver Wendell Holmes, Jr. (1841-1935), Benjamin N. Cardozo

71. See, e.g., his remarkable dissenting opinion in the case Tannehill v. Tannehill, 261 So. 2d 619, 624-29 (La. 1972).
72. ALBERT TATE, JR., REFLECTIONS ON LAW, LAWYERING, & JUDGING. THE ESSAYS AND ARTICLES OF JUSTICE ALBERT TATE, JR. (Pugh Institute for Justice, LSU Law Center 2006) (with a foreword by Judge Dennis). It is an excellent book, compiling all his writings, with the exception of his judicial opinions. On Albert Tate's doctrine, see Rees, supra note 3.
74. James L. Dennis, Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent, 54 LA. L. REV. 1 (1993). In this remarkable article, Judge Dennis was inspired not only by writings of Portalis and Gény, but also by those of Philipp Heck, founder of Interessenjurisprudenz. In his work, he elaborated upon the significance of weighing conflicting interests as a method for the court to fill the gaps in the law. This method was merely sketched by Gény (regarding this topic, see Guillaume Lazzarin, Le juge administratif et la doctrine de François Gény. Réflexions sur la méthode de la “balance des intérêts”, JCP Adm. 2011. 2222 (Fr.). See also, James L. Dennis, Capitant Lecture, 63 LA. L. REV. 1003 (2003)).
76. Holmes is generally referred to as a forerunner of the legal realism movement (see, e.g., WILLIAM W. FISHER III, MORTON J. HORWITZ & THOMAS A. REED, AMERICAN LEGAL REALISM 3 (Oxford University Press 1993)).
most important work is THE COMMON LAW (Little, Brown, and Co. 1881; reprinted by The Belknap Press of Harvard University Press 2009, with an introduction and annotations by G. Edward White); see also another work of his, The Path of the Law, 10 Harv. L. Rev. 457 (1897), which is, likewise, a canonical text of American realism. The latter has recently been translated by Françoise Michaut. The translation is entitled “La passe étroite du droit” (Clio@Themis, Revue électronique d’histoire du droit, no. 2). The thinking of Judge Holmes continuously inspires American doctrine and jurisprudence. An article of major reference would be G. Edward White, The Rise and Fall of Justice Holmes, 39 U. Chi. L. Rev. 51 (1971). See also, Ruth Gavison, Holmes’s Heritage: Living Greatly in the Law, 78 B.U. L. Rev. 844 (1998).

77. In the United States Judge Cardozo was one of the main authors spreading Gény’s thinking. He cites the latter no less than twenty six times in his book THE NATURE OF THE JUDICIAL PROCESS (Yale University Press 1921).

78. Roscoe Pound, whose influence on American legal science is still considerable, shares various common traits with François Gény, whom he cites in numerous writings of his. The first series of citations can be found in an article criticizing conceptualism, which was the prevailing view at that time: Mechanical Jurisprudence, 8 Colum. L. Rev. 605 (1908). The work of the then future Dean of the Harvard Law School from 1916 to 1936, founder of the Sociological Jurisprudence and spiritual father of Legal Realism, is impressively prolific and deep. It is enriched with history, philosophy and comparative law, and fully reached maturity in a collection of conferences published towards the end of his life and which remained undisclosed for a long time: THE IDEAL ELEMENT IN LAW (University of Calcutta Press 1958, reprinted by Liberty Fund, Inc. 2002). Gény and Pound have different views on natural law: see Karl Kreilkamp, Dean Pound and the Immutable Natural Law, 18 Fordham L. Rev. 173 (1949).


80. K. N. Llewelyn is one of the great characters of American legal scholarship and one of the pioneers of American legal realism. He taught at the University of Columbia and at the University of Chicago. THE BRAMBLE BUSH (Oceana Publications 1930, reprinted by Oxford University Press 2008) became “classic” literature. Another major work of his, which until recently was only a manuscript, has been published: THE THEORY OF RULES (University of Chicago Press 2011) (with an introduction by Frederick Schauer). It proves a relative return to legal classicism.

81. Fred Rodell and Jerome Frank were probably the most radical advocates of legal realism. Rodell’s sharp criticism of academism in law reviews constitutes a piece of anthology: Fred Rodell, Goodbye to Law Reviews, 23 Va. L. Rev. 38 (1936).
The reason for this is probably the fact that Judge Holmes, while brilliantly attacking formalism, by way of formulating general ideas, disseminated in his judicial and extrajudicial works, never proposed an alternative method. Judge Cardozo, in his landmark work, while methodically identifying the flaws of formalism, left “unresolved the basic question of how the judge is to decide cases that fall in the open area (and indeed how to demarcate that area).”

As to Jerome Frank, his fundamental skepticism, his radical criticism of the law and its methods, stimulating as they are, may have been deemed to be of limited utility for a judge confronted with a concrete case. As for Llewelyn and Pound, their influence is present in certain judgments although they are not explicitly cited.

When the translation of Jaro Mayda was published, Gény was already known in America. Méthode d’interprétation et sources had already left a significant mark over American legal science. This changed its perception, the work now being understood the way it was initially designed: as a methodology for judges.

Gény, who was at the same time catholic, conservative and reformer, proposed a compromise which was able to seduce

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83. RICHARD A. POSNER, CARDozo. A STUDY IN REPUTATION 30 (University of Chicago Press 1993).
84. Regarding the attitude of Jerome Frank when he was judge, see GLENNON, supra note 79, at 129-63.
85. Rees, supra note 3.
86. Mitchell Franklin, L’influence de M. Gény sur les conceptions et les méthodes juridiques aux États-Unis in 2 RECUEIL D’ÉTUDES SUR LES SOURCES DU DROIT EN L’HONNEUR DE FRANÇOIS GÉNY 30 (Recueil Sirey 1934); Kennedy & Belleau, supra note 6, at 295; Carlos Petit, A Contributor to the Method of Investigation. Sobre la fortuna de Gény en America in FRANÇOIS GÉNY E LA SCIENZIA GIURIDICA D EL NOVECENTO, 29 QUADERNI FIORENTINI 201 (Giuffrè 1991).
87. Compare to Belleau, supra note 7, at 382-83: “By offering sufficient change, they sought to salvage a rapidly deteriorating situation and to keep social peace.”
elected judges, and therefore in line with a Louisiana society which, although conservative, was also in transition. Gény was a French civilian, by contrast with most of his American peers, who were inevitably common law jurists, focused on, if not obsessed with, the system of binding precedent or stare decisis, as well as on the power of the Supreme Court. He proposed a modern and balanced method, able to favor the rebirth of the civil law in Louisiana. Lastly, or perhaps above all, Louisiana judges saw their creative activity justified for the past and encouraged for the future, by an undisputed master of the civil law. This diminished the risk of giving new arguments to those who saw Louisiana and its system as an unacknowledged common law system.

What now remains to be seen is the expression of this reception of the work of Gény by the Louisiana jurisprudence.

88. For a portrait of the typical Louisiana judge as a magistrate, statesman and politician, see Symeon C. Symeonides, The Louisiana Judge: Judge, Statesman, Politician in LOUISIANA: MICRO COSM OF A MIXED JURISDICTION 89 (Vernon V. Palmer dir., Carolina Academic Press 1999).

89. Since the incendiary article of Gordon Ireland, Bench and Bar: Louisiana’s Legal System Reappraised, 11 TUL. L. REV. 585 (1937), the question of the adherence of Louisiana to the civil law family is of major importance, binding both doctrine and jurisprudence to take positions consistent with the civil law. This attitude is sometimes borderline to ultra-orthodoxy. Thus, the courts regularly and vigorously assert that they are not applying the principle of stare decisis, but that of jurisprudence constante; the corollary is the adhesion to the questionable fiction of non-retroactivity of court decisions (infra Part II). Also, this probably explains why Louisiana jurisprudence is deeply attached to the principle pacta sunt servanda to the point of rejecting the theory of imprevision (revision of contracts in case of hardship) and refusing any idea of judicial control of unreasonable contractual provisions—see Jean-Louis Baudouin, Theory of Imprevisio n and Judicial Intervention to Change a Contract in ESSAYS ON THE CIVIL LAW OF OBLIGATIONS 151, 160 (Joseph Dainow ed., Louisiana State University Press 1969); Jonathan Riley, Embracing the Principle of Growth: A Call for An Expansion of the Doctrine of Fortuitous Event in Louisiana Law, 35 S.U. L. REV. 413 (2008). Regarding abusive clauses, the jurisprudence seems to lean towards a moderate reception of unconscionability: R. Fritz Niswanger, An Unconscionability Formula for Louisiana Civilians?, 81 TUL. L. REV. 509 (2006).
II. THE MANIFESTATIONS OF THE RECEPTION OF MÉTHODE 
D’INTERPRÉTATION ET SOURCES IN LOUISIANA

Most of the judgments citing *Méthode d’interprétation et sources* would deserve a commentary. The most significant reveal the influence of Gény’s doctrine on the methods of interpretation applied by Louisiana courts (A) and on the issue of the retroactive effect of court decisions (B).

A. The Influence of Gény on the Methods of Interpretation Applied by Louisiana Courts

Writing about the Swiss Civil Code, Gény said that “. . . the formula given in article 1 of the Swiss Civil Code of 1907 could be seen as the most accurate summary of my developments.” 90 The provision capturing the essence of Gény’s method is certainly paragraph 2 of the same article according to which: “In the absence of a provision, the court shall decide . . . in accordance with the rule that it would make as legislator.” It is no wonder that its spirit became a real leitmotiv of the Louisiana jurisprudence.

This is how it was implemented: In the context of a very ordinary case, like a divorce where alimony was also sought, the Louisiana Supreme Court had to decide on an issue of principle related both to the constitutionalization of private law,91 and to legal methodology, in particular to courts filling gaps in the law. The Louisiana Civil Code contained an article 160 as follows: “When the wife has not been at fault, and she has not sufficient means for her support, the court may allow her, out of the property and earnings of the husband, alimony which shall not exceed one-third of his income.”

90. MIS, supra note 2, at no. 204; Oscar Gauye, *François Gény est-il le père de l’article 1er, 2e alinéa, du Code civil suisse?*, 92 REVUE DE DROIT SUISSE 271 (1973).
91. Loyacano v. Loyacano, 358 So. 2d 304 (La. 1978). Regarding the constitutionalization of Louisiana private law, see Moréteau, supra note 66, at 25, 27.
There was no provision expressly authorizing a court to grant alimony after divorce to the husband. The husband, who was also the defendant, argued that article 160 was unconstitutional because it violated both the Fourteenth Amendment of the United States Constitution and article 1 § 3 of the Louisiana Constitution of 1973, written in similar language. The reasoning which led Justice Dennis not to annul this provision, while reaching a solution adapted to the evolution of Louisianan society, constitutes a topical application of the free objective search for a rule.

Justice Dennis began by noticing that the arguments based on constitutional law are relevant, because the contested provision established a difference between man and woman which was unreasonable and arbitrary. Then he explained that this provision was justified by the socio-economic context of the time of its adoption:

Although not based solely on sex, such classifications for purposes of entitlement to alimony after divorce probably were founded on the assumption that all former husbands have sufficient means for their support, or that few divorced women have property and earnings out of which alimony could be paid, or upon both. If these propositions were ever true, common experience tells us that the deviations from them are now too numerous for the classifications to withstand equal protection challenge.

Interestingly, Justice Dennis asserts that:

The failure of the legislature to expressly authorize the allowance of alimony after divorce for male citizens, however, does not necessarily invalidate Civil Code article 160. Because Louisiana is a civil law jurisdiction, the

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92. U.S. CONST. amend. XIV, § 1:
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
93. Loyacano v. Loyacano, 358 So. 2d at 307.
absence of express law does not imply a lack of authority for courts to provide relief. In all civil matters, where positive law is silent, the judge is bound by the Civil Code to proceed and decide according to equity, i.e., according to natural law and reason, or to received usages. This Court has recognized its duty to proceed and decide important issues under these circumstances on many occasions.94

Taking his reasoning further, Justice Dennis presented the method employed so as not to annul article 160 of the Louisiana Civil Code, nevertheless deciding that divorced husbands should be granted alimony, even in the absence of an express legal provision. He invoked not only articles 13 to 30 of the Louisiana Civil Code, which offer guidance for interpretation, but also, and above all, legal doctrine:

We are also mindful of the doctrine of reputable scholars, which teaches that civilian judges are not required to depend merely upon a logical analysis of the existing statutes, but may employ other recognized methods of interpretation. They may perform extensive exegesis to discover the original legislative intent; legislative texts may be interpreted so as to give them an application that is consistent with the contemporary conditions they are called upon to regulate; and a particular conflict of interests before the court may be resolved in accordance with the general policy considerations which induced legislative action rather than by reliance on logical deductions from the language of the text.95

The last sentence carries beyond all doubt the mark of François Gény’s thinking. And if Justice Dennis did not explicitly cite him in support of his methodological developments, he relies on a series of doctrinal contributions obviously inspired by the free search for a rule.96 Also influenced by the central idea of Gény’s work is the following assertion:

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94. Id. at 307-08 (citations omitted).
95. Id. at 308.
96. Id. at 308, citing A. N. Yiannopoulos, LOUISIANA CIVIL LAW SYSTEM 89-93 (Claitor's Pub. Division 1977); Barham, supra note 70, at 371; Albert Tate, Jr., Law Making Function of a Judge, 28 LA. L. REV. 211 (1968); Albert Tate, Jr., Louisiana and the Civil Law, 22 LA. L. REV. 727 (1962).
Consequently, when we attribute to Article 160 the meaning that a present day legislator would have attributed to it, we must assume that he would have taken cognizance of the increasing and expanding nature of women’s activities and responsibilities, as well as our constitution’s prohibition of arbitrary or unreasonable gender based legal classifications, and that he would not have intended by the legislation to discriminate against husbands who have not sufficient means for their maintenance by declaring them ineligible for alimony after a divorce.  

In his conclusion, Justice Dennis wrote for the majority that “Equity and our constitution demand that the husband be awarded alimony under the same circumstances in which it can be claimed by the wife.” Thus, the _libre recherche scientifique_ applied by Justice Dennis led him to the conclusion that article 160 did not breach the Constitution, while giving it a sphere of applicability compatible with the Louisiana legal system.

Other developments followed. During a petition for rehearing, the Court reversed its position and, according to a doubtful analysis, concluded that article 160 of the Louisiana Civil Code was not unconstitutional and that the plaintiff could not demand alimony. Then, Mr. Loyacano took the case to the United States Supreme Court which annulled the decision of the Supreme Court of Louisiana and sent the case back to the latter to be retried in the light of the precedent established in _Orr v. Orr_. However, the Supreme Court of Louisiana did not have to reverse its judgment, because, on rehearing, Mr. Loyacano declared his consent to the judgment of the Court. Therefore, according to the Court, there was no longer any reason to rule on the constitutionality of article 160. It was possible to reinstate the judgment previously annulled.

97. Loyacano v. Loyacano, 358 So. 2d at 309.
98. _Id._
99. _Id._ at 314.
101. Loyacano v. Loyacano, 375 So. 2d 1314, 1315 (La. 1979). One of the reasons invoked by Mr. Loyacano was that in the meantime article 160 was amended in a way that made no distinction according to the gender of the one requesting alimony.
by the Supreme Court. Article 160 was eventually reformed, in order to eliminate any reference to gender and to restore equality between spouses, but the Loyacano case continued to have significant repercussions.102

In Loyacano v. Loyacano, Justice Dennis also talks about interpretation and seems reluctant to openly acknowledge the necessary consequence of applying the free objective search for a

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102. In Clausen v. Clausen, 375 So. 2d 1315 (La. 1979), the Supreme Court of Louisiana decided that the husband was not entitled to require alimony on the basis of article 160 given that it is granted solely to the wife. Justice Câlogero, writing for the majority, emphasized the importance of the Loyacano case, but felt that it would be futile for the Court to rule on the constitutionality of article 160. Id. at 1318 n.4. The Court noted that declaring the article unconstitutional would not benefit the ex-husband because “[s]triking Louisiana’s provisions affording wives the right to alimony would not thereby create a corollary right for husbands.” Id. Nonetheless, the Court held that the lower court had to retry the case and apply the revised article 160 for the period subsequent to its entry into force. Id. at 1318. Justice Tate and Justice Dennis wrote concurring opinions on this last point, but dissented as to the applicable law for the period prior to the revision. Id. at 1318-19. They reaffirmed their attachment to the solution reached by the majority in the original Loyacano v. Loyacano case, see 358 So. 2d at 309, i.e., that it was possible to say, on the basis of article 21 of the Louisiana Civil Code, that the husband was also entitled to alimony. Clausen, 375 So. 2d at 1318-19. The issue of constitutionality of article 160 seems to have been eluded in order to avoid deciding the more delicate issue of the validity of judgments which previously granted alimony on the basis of the above-mentioned article. In Lovell v. Lovell, 378 So. 2d 418 (La. 1979), the Supreme Court accepted to confront this problem and end the Loyacano saga. Justice Marcus, writing for the majority, recognized the unconstitutionality of the criticized provision, but also held that the judgment would only produce effects for the future. Id. at 422. In order to reach this decision, he relied on the “test” developed in the leading case decided by the United States Supreme Court, Chevron Oil Company v. Huson, 404 U.S. 97 (1971). See Clausen, 375 So. 2d at 421-22. He wrote:

Upon consideration of each of these factors, we conclude that our decision should not be applied retroactively. Our decision establishes a new principle of law by overruling clear past precedent on which litigants have relied. Innumerable divorced persons, both those paying and receiving alimony, have relied on the constitutionality of art. 160. Loyacano v. Loyacano, upholding the constitutionality of this statute, was decided by this court as recently as last year. Moreover, retrospective application would undermine the objectives of art. 160. Finally, substantial inequity would result if prior judgments awarding alimony were declared invalid. . . . [I]t would subject divorced wives to suits by their former husbands seeking repayment of alimony paid by husbands under art. 160 prior to its amendment. Id. at 422.

On the possible repercussions of Loyacano v. Loyacano in the law of matrimonial regimes, see Burger v. Burger, supra note 38.
rule: the creation of a rule. Several years later, in *Bell v. Jet Wheel Blast*, in a case concerning the issue of whether the fault of the victim can reduce liability (regarding strict liability for defective products), the idea was expressed without ambiguity:

The court’s purpose in an objective search is to discover a rule which will satisfy, as well as possible, justice and social usefulness in the case at hand and in similar cases. Even if the legislature has tacitly authorized the courts to update the statute by including as one of its elements a dynamic concept, such as “fault” or “public policy”, the search for a subsidiary rule more specifically defining the dynamic concept must be objective. The court must eliminate any personal influence or influence related to the specific case and base its decision on objective elements; it should take into account all of the social, moral, economic and other considerations that an objective rule-maker would consider in forming a rule to govern the case.

The idea that “it is necessary for the judge . . . to consider the particular situation from the same standpoint as would a legislator regulating the matter,” has been expressed this way many times by Justice Dennis. As seen above, this idea expresses the

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In the absence of any formal directive—a clear statutory or customary rule—the lawyer must scrutinize the essence of the matter and directly investigate the social elements for which he is to find the rule. In the complex of the resulting data . . . [a]s the legislator himself would do, he must [assess the elements according to their own nature and] determine the laws of their harmony, aiming his sight at the ideal of justice and social usefulness . . . .

MIS, *supra* note 2, at no. 183 (trans. note: added text was not included in Mayda’s translation). The *Entrevia* case and its reference to Gény had a great influence, as attested by the multiple citations in subsequent cases: Celestine v. Union Oil Company of California, 636 So. 2d 1138, 1142-43 (La. Ct. App. 1994); Billiot v. State, 654 So. 2d 753, 759 (La. Ct. App. 1995). On the *Entrevia*
quintessence of Gény’s thinking. Its appearance in the field of the purely jurisprudential construction of liability for the act of things is not a surprise.\textsuperscript{106}

In this field, the boundary between common law and civil law is abolished.\textsuperscript{107} The opinion of Judge Dennis was welcomed by

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\textsuperscript{106} The law of liability for the act of things developed similarly to French law, which was openly used as a model. The founding judgment was \textit{Loescher v. Parr}, 324 So. 2d 441 (La. 1975), in which the Supreme Court of Louisiana (A. Tate, Jr., for the majority) decided for the first time that the plaintiff, whose defense was based on Louisiana Civil Code article 2317, did not have to prove the fault of the person who caused the injury. Article 2317 at that point reproduced \textit{verbatim} article 1384, paragraph 1, of the French Civil Code and has been considered until then a mere transition article, without normative effect. After comparing provisions from the French Civil Code and the Louisiana Civil Code, the owner of a tree which was 90% rotten was held liable by the Supreme Court for the damage inflicted on a Cadillac, though the tree was apparently healthy. The thing being in the defendant’s custody, he was held liable because the vice or defect of the tree constituted an unreasonable hazard and because this vice or defect was the cause of the damage. The \textit{Entrevia} case marked a return to the standards laid down in \textit{Loescher} and which had been in the meantime modified by \textit{Kent v. Gulf State Utilities Co.}, 418 So. 2d 493 (La. 1982); for more detail, see Baucum, \textit{supra} note 105. Even though an author convincingly advocates the abandonment of liability for the act of things in French law (Jean-Sébastien Borghetti, \textit{La responsabilité du fait des choses, un régime qui a fait son temps}, \textit{Rev. trim. Dr. civ.} 1 (2010)), one may note that the system stemming from \textit{Loescher v. Parr} and subsequent cases has been abolished by the Louisiana legislature who has reintegrated the liability for the act of things into fault-based liability (LA. CIV. CODE art. 2315). In 1996, Louisiana Civil Code article 2317.1 was inserted:

The owner or custodian of a thing is answerable for damage occasioned by its ruin, vice, or defect, only upon a showing that he knew or, in the exercise of reasonable care, should have known of the ruin, vice, or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Nothing in this Article shall preclude the court from the application of the doctrine of \textit{res ipsa loquitur} in an appropriate case. LA. CIV. CODE art. 2317.1.


\textsuperscript{107} Compare to André Tunc, \textit{La méthode du droit civil : analyse des conceptions françaises}, 27 \textit{Revue internationale de droit comparé} 817, 824 (1975):
Judge Doucet’s dissent in *Adoption of Meaux*. The natural parents of Jason Michael Meaux wished to adopt him. This adoption was denied at trial because the Louisiana Civil Code did not provide for the adoption of a child by single persons when none of them is a legitimate parent. Since there was no legal way to adopt, the judgment was affirmed. In his dissenting opinion, Judge Doucet noted that the judgment disregarded the interest of the child and discriminated against an innocent child. The following paragraph from his opinion constitutes an additional illustration of the free objective search for a rule:

This is an un-provided-for case. Because ours is a free society and Louisiana is a civil law jurisdiction, the absence of express law does not imply a prohibition upon the petitioners or this court. Inasmuch as our adoption laws are designed to protect, not destroy, the natural rights of parents, I do not believe R.S. 9:422 can be construed as providing an exclusive list of remedies. Such an interpretation is consonant with constitutional prohibitions against discrimination based on birth. Thus, the silence of positive law requires we proceed according to equity as we are bound to do under C.C. Art. 21. . . . See also Justice Dennis' concurrence in *Lovell v. Lovell* and his original opinion in *Loyacano v. Loyacano* and Geny (sic), *Method of Interpretation*, § 105. Applying equity I believe that the best interest of the child and due regard for natural rights of the parents dictates that we allow the relief sought.109

[T]he jurisprudence that developed on the basis of art. 1384, par. 1 of our Code . . . is not typical of the relations of the law and the judge in a jurisdiction where the law is codified. We are facing a pure judge-made law, detached from the Code to such an extent that it has been compared to a pyramid constructed on the head of a pin. It evolves in a free, sometimes surprising or contradictory, manner reminiscent of the common law rather than of the jurisprudence in a codified jurisdiction. *See also* René Savatier, *Le gouvernement des juges en matière de responsabilité civile* in 1 *Recueil d'études en l'honneur d'Édouard Lambert* 453 (L.G.D.J. 1938).

109. *Id.* at 523-24.

The case *Hulin v. Fibreboard Corporation* is certainly one of the most remarkable, as it deals with a highly controversial issue among both civilians and common law lawyers: the retroactivity of overrulings. Mrs. Hulin and other plaintiffs sued the *American Tobacco Company* and various manufacturers of products containing asbestos, alleging that the defendants’ products contributed to the development of lung cancer and subsequent death of Mr. Hulin, husband and father of the plaintiffs. They sought recovery under strict liability, ultra-hazardous activities, and negligence. Six weeks after the complaint was filed, in the *Halphen* case, the Louisiana Supreme Court decided that if the plaintiff proves that the product was unreasonably dangerous *per se*, i.e. “if a reasonable person would conclude that the danger-in-fact of the product, whether foreseeable or not, outweighs the utility of the product,” whether because of defective design or another kind of defect, or unreasonably dangerous in construction or composition, “a manufacturer may be held liable for injuries caused by [the] product even though [the] manufacturer did not know and reasonably could not have known of the danger.” The plaintiffs amended their complaint, alleging that tobacco is unreasonably dangerous *per se*, because a reasonable person would conclude that the danger-in-fact of tobacco outweighs its utility.

Then, the case focused on the applicability of the *Halphen* jurisprudence. The plaintiffs argued that this jurisprudence could not apply retroactively to the facts of the case. The district court agreed with the defendant on this issue and, in a separate

110. *Hulin v. Fibreboard Corp.*, 178 F.3d 316 (5th Cir. 1999).
113. *Id.* at 114.
114. *Id.* at 116.
judgment, the same court noted that the plaintiffs relied only on the Halphen jurisprudence and that such jurisprudence could not be applied retroactively; therefore, the case was to be dismissed. The plaintiffs appealed from this judgment before the United States Court of Appeals, Fifth Circuit. The Court reversed the judgment and remanded the case to the district court. In essence, Justice Dennis—the author of the opinion—noted that the Louisiana Supreme Court has always firmly applied the principle that “under the State’s constitution and Civil Code, Louisiana courts cannot make law but are bound to decide cases according to their best understanding of the law established by legislation and custom.”¹¹⁵ Thus, the Louisiana Supreme Court considers that such an interpretation should lead to full retroactivity unless the court specifies otherwise or unless such an application would be impossible due to prescription.

Citing an abundant jurisprudence constante, Justice Dennis reminds that “[t]he law as construed in an overruled case is considered as though it had never existed, and the law as construed in the last case is considered as though it has always been the law.”¹¹⁶ Thus, “the law as construed in the last decision operates both prospectively and retrospectively, except that it will not be permitted to disturb vested rights.”¹¹⁷ This opinion is based on both the Louisania Constitution, which declares that, without exception, the legislative power is vested solely in the Legislature, and the Louisiana Civil Code,¹¹⁸ whereby legislation and custom are the only sources of law. Justice Dennis also pointed out that “[i]n Louisiana and other civil law jurisdictions, the judicial method of applying Civil Code principles by analogy to facts

¹¹⁵. Hulin v. Fibreboard Corp., 178 F.3d at 319.
¹¹⁶. Id. at 320 (citing Norton v. Crescent City Ice Mfg. Co., 178 La. 135 (La. 1933)).
¹¹⁷. Id.
¹¹⁸. Louisiana Civil Code article 1 provides: “The sources of law are legislation and custom.” L A. CIV. CODE ANN. art. 1 (2014). These sources are respectively defined in Louisiana Civil Code articles 3 and 4.
unforeseen by the Code always has been used and considered as judicial interpretation of law and not law making.” Some precedents and Louisianan distinguished authors were cited. Philipp Heck and François Gény were also cited. Among contemporary authors, Justice Dennis also cites François Terré who maintains that court decisions, besides being retroactive, are also declarative. Justice Dennis relied also on article 5 of the French Civil Code and on the spirit of the Louisiana Civil Code.

Subsequently, there is an overview in the case of “the relatively small number of cases in which the Louisiana Supreme Court has limited the retroactive effect of its own decisions.” They mostly concern family matters and matters related to the interpretation of the Constitution. Then, the case considers the situations where some “overriding legal principles” can limit the retroactive effect of court decisions, such as res judicata, prescription, or the theory of vested rights. Afterwards, Justice Dennis mentions how, based on identical provisions to those of the Napoleonic Code, liability for the acts of things and liability for defective products (the Halphen case being the most recent example when Justice Dennis was writing) were developed by jurisprudence. To further consolidate his argument, he also notes that all Louisiana courts applied Halphen retroactively. Finally, Justice Dennis completed his argument by appealing to the common law. He meticulously offered an overview of the jurisprudence of the United States Supreme Court to show that even though the Supreme Court was also tempted for a while by the idea of prospective overruling, this “experience” has been abandoned. Though it has great

120. MIS, supra note 2, at nos. 107, 165, 166.
121. Hulin v. Fibreboard Corp., 178 F.3d at 322.
122. It is interesting to note how Justice Dennis justified his analysis based on the common law.
123. In addition to the discussion contained in the judgment, see Horatia Muir Watt, La gestion de la rétroactivité des revirements de jurisprudence: systèmes de common law in LES REVIREMENTS DE JURISPRUDENCE. RAPPORT REMIS À M. LE PREMIER PRÉSIDENT GUY CANIVET 53 (N. Molfessis ed., Litec 2005).
doctrinal value, this opinion can leave the reader bemused. While not qualified to assert whether the relation made between the position of the Louisiana Supreme Court and the United States Supreme Court regarding the retroactivity of overrulings is valid, this author is of opinion that it may not be the case. Its faithfulness to François Gény in general and to civilian doctrine in particular may be doubted. It is true that Gény always adopted an ambivalent position and never succeeded in offering a theory that would adequately reflect the significance of jurisprudence in French law.124 That being said, contrary to what Justice Dennis wrote, Gény always said, quite clearly, that analogical reasoning did not stem from interpretation, but from free objective search for a rule, and is therefore an act of creation.125 Arguing that judges only declare the law and do not create it, so that jurisprudence is not a source of law, is a position that practically no one takes seriously, neither in Louisiana nor in France.126 Interestingly, this assertion is to be found in a case related to one of the most sophisticated jurisprudential constructions Louisiana law has ever known: that of strict liability. It can be noted that in order to illustrate the place of reasoning by analogy, Justice Dennis mentions the jurisprudence on mineral servitudes, which constitutes one of the most brilliant manifestations of the free objective search for a rule in Louisiana.127

124. See the remarkable developments of Mayda, FGMJ, supra note 4, at 16 et seq.
125. MIS, supra note 2, at no. 165: “Let us first discuss analogy. We have already met it as a proposed procedure of interpretation in the proper sense of the statute law. I could not admit it on that level.”
126. It can be concluded, as a commentator of the judgment previously has, that a lawyer taking Louisiana Civil Code article 1 literally would need to substantially invest in liability insurance: William Reed Huguet, Hulin v. Fibreboard Corp.—In Pursuit of a Workable Framework for Adjudicative Retroactivity Analysis in Louisiana, 60 La. L. Rev. 1003, 1016 n.84 (2000).
127. It comes as no coincidence that a learned lawyer who presided the Louisiana Law Institute chose, in order to summarize the creative work of the Louisianan jurisprudence, to borrow Raymond Saleilles’ famous expression in his foreword to the first edition of MIS: see John H. Tucker, Jr., Au-delà du Code civil, mais par le Code civil, 34 La. L. Rev. 957 (1974).
Had François Gény been aware of article 21 of the Louisiana Civil Code, he would probably have looked at it in the light of article 1 of the Swiss Civil Code. Had he been exposed to subsequent Louisiana jurisprudence, he would have discovered the fertility of his method. It is hard to imagine a better reward for his work.

128. See supra note 33 and supra p. 495.
CRITICISM OF THE TESTAMENTARY UNDUE INFLUENCE DOCTRINE IN THE UNITED STATES: LESSONS FOR SOUTH AFRICA?

François du Toit*

I. Abstract.................................................................................... 510
II. Introduction ............................................................................ 510

III. Testamentary Undue Influence: Criticism of the Doctrine in the United States .......................................................................... 513
A. The “Undue Influence Paradox” ........................................ 513
B. Associated Complexities .................................................... 518

IV. The South African Position .................................................. 521
A. Family Protectionism in South African Inheritance Law .. 521
B. The Conceptualization of Testamentary Undue Influence in South Africa ................................................................. 524
C. Undue Influence and the South African Wills Act ............ 529
D. South African Testamentary Undue Influence Case Law .. 532
  1. Testamentary Freedom Undermined in Instances of Unnatural Bequests ........................................................ 533
  2. Familial Wealth Retention .................................................. 537
  3. Family Protection Devices Curtail the Unorthodox Use of Testamentary Undue Influence ................................. 541
  4. Secondary Undue Influence Findings Are Superfluous .. 543

V. Evaluation and Conclusion .................................................... 545

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I. ABSTRACT

This article analyzes undue influence in the South African law of wills in light of scholarly criticism of the testamentary undue influence doctrine in the United States. The article assesses in particular whether the so-called “undue influence paradox” identified in American scholarship is manifest in the South African law of wills: is testamentary undue influence’s role as guardian of testamentary freedom undermined by the judicial pursuit of family protectionism? The article proceeds, with due recognition of the differences between the American and South African legal traditions, from American scholars’ conceptualization of the paradox and their views on other complexities associated with the doctrine, to an exposition on the conceptualization, the statutory regulation, and the judicial utilization of testamentary undue influence in South Africa. The article determines whether or not the South African legal position conforms to some or all of the assertions made with regard to the undue influence paradox and further complexities associated with the testamentary undue influence doctrine in the American context. The article provides a mixed jurisdiction’s response to the call for the abolition of the testamentary undue influence doctrine in recent scholarship from the United States.

II. INTRODUCTION

Jurisdictions that acknowledge freedom of testamentary disposition recognize generally that a will or testamentary bequest is invalid if it was obtained through influence that destroyed the testator’s free agency and substituted the testator’s dispositive preferences with those of another. The aforementioned constitutes the usual test for testamentary undue influence in such
jurisdictions. Over the past two decades scholars from the United States have voiced various concerns regarding the testamentary undue influence doctrine’s operation in the American context. While some American commentators support the doctrine, a number of others have criticized it and called for reform, with at least one demanding that the doctrine be abolished in the United States.

The South African law of wills, which is a branch of the law of successions, acknowledges that undue influence invalidates a will or testamentary bequest. However, neither South African case law nor South African scholarly texts on succession law typify testamentary undue influence as an independent legal doctrine in the South African legal system. In fact, Scholtens, in his analysis of undue influence in Roman-Dutch law—the civil law component of South Africa’s common law to this day—concludes that apart from the restricted doctrine of metus reverentialis (fear by reason of awe, respect or deference) a general doctrine of undue influence was not part of Roman-Dutch law.

Notwithstanding differences between the South African and American positions on testamentary undue influence at a doctrinal level, both legal systems acknowledge that destruction of a testator’s free agency and displacement of testamentary intent constitute grounds for the invalidation of a will or testamentary bequest. Moreover, both systems have a history of judicial

engagement with these principles. It is submitted, therefore, that an instructive comparative analysis on testamentary undue influence is possible despite dogmatic differences between the South African and American jurisdictions.

South African scholars generally regard testamentary undue influence as a benign construct that protects the testamentary freedom of particularly aged or otherwise vulnerable testators against the importunities of false persuaders or enterprising impostors.6 However, South African judgments in which testamentary undue influence was found to have been present are few and far between. Can this dearth of South African cases be explained by reflecting on the criticism of the testamentary undue influence doctrine in the American context? Do aspects of South African testamentary undue influence judgments conform to the assertions made by critics of the doctrine in regard to its problematic, unorthodox and paradoxical operation in the United States? Are these assertions appropriate to the South African legislature’s treatment of testamentary undue influence? Insofar as American scholarly critique of the doctrine can be distilled into general themes unconfined by jurisdictional or doctrinal peculiarities, is the South African legal position on testamentary undue influence, when measured against such a critical thematic perspective, satisfactory, or in need of reform? Can South Africa learn some lessons from the criticism of the testamentary undue influence doctrine in the United States?

This article attempts to answer these questions. The case against testamentary undue influence, as presented in American scholarship, is analyzed first. In particular, the so-called “undue influence paradox” that negates the traditional view of undue influence as protective of testamentary freedom is outlined. Other

complexities associated with testamentary undue influence raised by American commentators are also highlighted, particularly insofar as these complexities reinforce the paradox. Second, and in light of the centrality of family protectionism in the criticism leveled at the American doctrine, aspects of familial solidarity in South African inheritance law are outlined. Third, the South African legal position on testamentary undue influence is contextualized. It is shown that English law influenced its reception and development in South Africa, but that the South African law on testamentary undue influence is rooted, by and large, in the civil law, particularly Roman-Dutch law. Fourth, an investigation is undertaken to determine whether the undue influence paradox, or aspects thereof, and some of the American doctrine’s associated complexities, are manifest in the South African law of wills. To this end, the South African legislature’s engagement with testamentary undue influence, as well as South African courts’ utilization of testamentary undue influence, is investigated. The article concludes with an assessment, in light of calls for abolition of the doctrine in American scholarship, of the need for reformative measures regarding the South African legal position on testamentary undue influence.

III. TESTAMENTARY UNDUE INFLUENCE: CRITICISM OF THE DOCTRINE IN THE UNITED STATES

A. The “Undue Influence Paradox”

Conventional wisdom casts testamentary undue influence in the role of guardian of freedom of testation through the invalidation of wills or testamentary bequests when the testator’s will is substituted with that of the person who exercised the influence. Madoff calls this the “dominant paradigm” of undue influence in the United States; within this paradigm, undue influence is related to, but distinct from, fraud and duress insofar as all three doctrines protect testators’ rights to dispose freely of
their property. She contends that courts, when invoking the doctrine, invariably do so “with strong rhetoric in support of freedom of testation.” Paradoxically, according to Madoff, the doctrine can, and frequently does, occasion a disregard of testators’ freedom of testation when it is judicially utilized in an unorthodox manner to quash testamentary dispositions. This occurs despite ample evidence that such dispositions represent the testators’ true wishes.

What causes the undue influence paradox? Some American commentators advance judicial pursuit of family protectionism as a principal reason. Courts seek to ensure, ostensibly for the greater social good, that wealth will remain within the testators’ biological family, thus protecting, in particular, intestate heirs against disinheritance. According to this view, a judge or jury will favor, for example, an estranged child’s argument that a will, in which her father instituted as sole heir a caring remote blood relative or a non-consanguineous relation (such as a supportive neighbor or helpful friend), is the product of undue influence exercised by an unscrupulous legacy hunter on a vulnerable testator. Invalidation of such a will on the ground of undue influence secures the child’s intestate inheritance and satisfies society’s normative insistence on wealth transfer upon death between (close) consanguineous relatives. The testator’s probable intention to benefit the remote relative, neighbor or friend, so the argument goes, is effectively negated by a finding that the act of testation was a product of undue influence.

9. Id. at 601. See also Leslie, supra note 3, at 236-37.
10. Leslie, supra note 3, at 236-37; Madoff, supra note 3, at 576-77; Spitko, supra note 1, at 280; Scalise, supra note 7, at 55, 101; Spivack, supra note 4, at 246; Tate, supra note 3, at 143. Even supporters of the doctrine concede that it permits significant leeway for courts to supplant testamentary directions: see, e.g., Frolik, supra note 2, at 261, who admits that the doctrine allows a court to substitute its opinion of the reasonableness of a dispositive plan for that of the
Madoff illustrates the existence of the paradox through a comparison between two American jurisdictions.11 The first jurisdiction, Georgia, affords no statutory protection against disinheription of spouses; the other, Louisiana, not only provides statutory protection against spousal disinheription, but also protects children against disinheription through a statutorily imposed legitime. Madoff’s analysis of undue influence judgments from these two states shows that a will in which a testator disinherited a spouse and children is much more likely to be invalidated on the ground of undue influence by courts in Georgia than by their counterparts in Louisiana. Madoff asserts that these judicial tendencies are indicative of a strong correlation between the existence of family protection devices, on the one hand, and the application of the undue influence doctrine, on the other. She concludes that the doctrine’s dominant purpose is not to protect testators’ autonomy, but rather to protect testators’ families against disinheription.12

Interestingly, Madoff,13 and some of the doctrine’s other critics,14 acknowledge the fundamental changes in patterns of family wealth transmission in the twentieth century described by Langbein in his seminal article on the topic.15 Langbein shows, among other things, that traditional wealth transmission from parents to children through the latter’s inheritance of the farm or firm was supplanted gradually in the twentieth century by parents’ investment in human capital. Inter vivos wealth transfer to ensure that children are well-educated and enjoy a good start in life has

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12. Id. at 612.
13. Id. at 625-29.
14. E.g., Tate, supra note 3, at 163-66.
become the modern trend in intergenerational wealth transfer. This phenomenon occasions significant consumption of wealth during the parents’ lifetimes, leaving children with less of an expectation that they will inherit from their parents upon their death. Notwithstanding this change in wealth transmission practices, many critics of the testamentary undue influence doctrine in America advocate for the introduction of measures to retain wealth within families upon death, either through instituting typically civilian forced heirship devices, or by recognizing judicial discretion to order family maintenance. They argue that such measures will alleviate pressure on courts to use the testamentary undue influence doctrine to attain the goal of family protectionism.

Spivack, who argues for the abolition of the doctrine, is a proponent of this approach:

The unsatisfactory doctrine of undue influence challenges us to decide what we, as a society, care about. If we care about protecting families, let legislatures institute forced heirship. If we value testamentary freedom over protecting families, let courts give it effect.

Scalise similarly advocates that the greater and more significant a legal system’s family protective scheme is, the less necessary a doctrine such as undue influence becomes. In this light, it is interesting that in the Netherlands, a typical civilian jurisdiction with extensive forced heirship devices, a frequently-advanced argument for retaining imperative inheritance law focuses on the adverse consequences that follow from a parent disinheriting, under undue influence, his children in favor of outsiders. The potency of this argument is, however, suspect by

16. Id. at 723.
17. Id. at 740-43.
18. Spivack, supra note 4, at 246.
19. Scalise, supra note 7, at 81.
20. Martin Jan A. Van Mourik, Perspective 5: Comparative Law—the Netherlands in IMPERATIVE INHERITANCE LAW IN A LATE-MODERN SOCIETY
reason of the Dutch Civil Code’s prescripts aimed specifically at eliminating opportunities for testamentary undue influence.\(^{21}\)

It is nevertheless understandable that forced heirship, along the lines decreed in the civil codes of many continental European jurisdictions,\(^ {22}\) appears attractive to American scholars as a cure for the perceived unorthodox judicial utilization of the undue influence doctrine in order to accomplish familial economic protectionism. This is because the introduction of imperative inheritance law will constitute a novel addition to the American legal tradition, with its roots in the English common law (with the exception of Louisiana, a typically mixed jurisdiction, where a *legitime* protects children’s inheritance rights). It must be noted, however, that forced heirship has come under increased criticism in contemporary scholarship from civil law jurisdictions, primarily because of its inflexibility and consequent inability to respond in a refined manner to changing socio-economic realities. Castelein, for example, criticizes mandatory succession in continental European jurisdictions for the constraints it imposes on the freedom to dispose of property, as well as for its limiting effect on human self-

107, 111 (Christoph Castelein, René Foqué & Alain Verbeke eds., Intersentia 2009).

21. *Id.* The Code’s Book 4 on inheritance law prescribes that a testator cannot make a testamentary disposition in favor of, among others, any professional in the field of individual healthcare who attended to the testator during the time of the illness that resulted in death as well as those who provided mental care and support to the testator during that time (art. 4:59), nor in favor of caregivers and nurses at institutions for elders or institutions for those who suffer from mental disorders (in respect of wills made during a stay at such institutions) (art. 4:59). Such dispositions are, however, not void but only voidable in favor of those invoking a ground for nullification (art. 4:62). The aforementioned prohibitions are aimed at negating undue influence occasioned by the relationship between a testator and the indicated persons: see F.W.J.M. Schols, *Wie Uiterste Wilsbeschikkingen Kunnen Maken en Wie Daaruit Voordeel Kunnen Genieten*, in HANDBOEK ERFRECHT 248 (M.J.A. Van Mourik ed., Kluwer 2011).

development. This criticism suggests that imperative inheritance law is, arguably, an imperfect solution to the demand for economic protectionism in the family context. The South African experience, among others, suggests that Spivack’s alternative proposal, namely the override of wills through a family maintenance order, is a more effective way of achieving such a goal.

B. Associated Complexities

A number of other factors that complicate the testamentary undue influence doctrine in the American context are evident from the scholarship under discussion. Spivack argues that the evidentiary difficulties associated with the doctrine are among these factors. Averments of undue influence are invariably adjudicated on circumstantial evidence because the person whose state of mind is at issue is dead at the time of the inquiry. Therefore, the success of a challenge to a will’s validity on the ground of undue influence depends largely on whether the party bearing the burden of proof can establish or refute the existence of undue influence. American jurisdictions generally permit burden-shifting in the course of an undue influence inquiry: initially the onus rests on the party who alleges undue influence, but if this party can raise a presumption of undue influence, the burden shifts to the will’s proponent to disprove the existence of undue influence. In some American jurisdictions, a will’s challenger needs to show no more than the existence of a confidential relationship between the testator and the alleged influencer in order to raise a presumption of undue influence. Therefore, it is

23. Christoph Castelein, Introduction and Objectives in Imperative Inheritance Law in a Late-Modern Society, 1, 38 (Christoph Castelein, René Foqué & Alain Verbeke eds., Intersentia 2009).
24. Spivack, supra note 4, at 305.
27. Madoff, supra note 3, at 582.
28. Id. at 583. See also Leslie, supra note 3, at 245, 253; Spivack, supra note 4, at 263; Tate, supra note 3, at 190.
relatively easy in those jurisdictions for a will’s challenger to effect burden-shifting, particularly if the bequest that the testator is alleged to have made under undue influence does not take the form of a so-called “natural bequest.”

Madoff argues that the undue influence paradox is rendered more pronounced by the “confidential relationship/natural bequest dichotomy.” She explains that, on the one hand, the existence of a confidential relationship between the testator and alleged influencer is often sufficient to raise the presumption of undue influence. If, on the other hand, the will contains a “natural bequest”—one in which, typically, the whole or the greatest portion of the deceased’s estate is bequeathed to the testator’s spouse and/or (close) blood relatives—it generally serves, notwithstanding a confidential relationship between the parties concerned, as a strong indicator that the testator’s will was not displaced by that of the alleged influencer.

Some American scholars are even skeptical of a judicial inquiry into the displacement of a testator’s will by that of someone else. Scalise acknowledges that the concept of undue influence is notoriously difficult, but bemoans the fact that it has frequently degenerated into “nothing more than platitudes about ‘substituting one’s volition for another’ and generalities concerning whether a testator is ‘susceptible’ to a kind of influence considered ‘undue’ by the law.” Spivack questions whether, given the psychology and relational power dynamics at play, judges or juries are best suited to be adjudicators of undue influence. She argues that testamentary capacity (or the lack thereof) is much easier to prove than undue influence and,

29. Madoff, supra note 3, at 602.
30. Id.
31. Madoff, supra note 3, at 602, 607.
32. Scalise, supra note 7, at 43.
33. Spivack, supra note 4, at 268-76.
34. See also, Madoff, supra note 3, at 574, who states that lack of mental capacity and undue influence are the most frequent grounds for invalidating wills in America.
because the two doctrines are closely related, many challenges of wills can be resolved if decided on capacity alone, without the need for adjudication on undue influence. Spivack favors ante mortem capacity determinations to prevent spurious and vexatious challenges of wills on capacity grounds.\textsuperscript{35} Moreover, she regards the few cases that would not be brought before a court if the undue influence doctrine were abolished in America as not constituting sufficient harm to justify the doctrine’s continued existence in the American context.\textsuperscript{36}

Frolik opines that the judicial preference for finding undue influence, rather than declaring a will invalid for want of testamentary capacity, can be explained by judicial reluctance to raise the level of capacity that is required to make a will.\textsuperscript{37} He contends that disqualifying wills with questionable dispositive provisions on the ground of testators’ incapacity will seriously erode freedom oftestation.\textsuperscript{38} Frolik, therefore, supports the testamentary undue influence doctrine because it permits courts to protect vulnerable testators by creating a middle-ground between testamentary capacity and incapacity; one where a testator possesses marginal capacity that renders will-making possible, but leaves the testator, potentially at least, open to undue influence.\textsuperscript{39} Spivack disagrees, contending that the level of capacity required to make a will is generally extremely low (compared to, for example, the capacity required for concluding a contract) and that this suggests that a “safety valve of undue influence” is not required—once minimal capacity has been shown to exist, the testator’s dispositive preferences must prevail.\textsuperscript{40}

\textsuperscript{35} Spivack, \textit{supra} note 4, at 291. \textit{See also} Tate, \textit{supra} note 3, at 144.
\textsuperscript{36} Spivack, \textit{supra} note 4, at 307-308.
\textsuperscript{37} Frolik, \textit{supra} note 2, at 264.
\textsuperscript{38} \textit{Id.}
\textsuperscript{39} \textit{Id.} at 265. \textit{See also} Scalise, \textit{supra} note 7, at 75.
\textsuperscript{40} Spivack, \textit{supra} note 4, at 292-93.
IV. THE SOUTH AFRICAN POSITION

A. Family Protectionism in South African Inheritance Law

American scholarly critique of the testamentary undue influence doctrine, highlighted in the foregoing part of this article, advances American jurisdictions’ general dearth of devices that safeguard wealth retention for a testator’s close consanguineous relatives, and the consequent judicial pursuit of such wealth retention through the testamentary undue influence doctrine at the expense of testamentary freedom, as foundational to the undue influence paradox. In light of these opinions on the interrelationship between the undue influence doctrine and familial wealth retention in the American context, a brief exposition on economic familial solidarity in South African inheritance law is apposite.

Family protectionism features in numerous common law constructs of South African inheritance law.\(^{41}\) More pertinent to this article, however, is the South African legal position on imperative inheritance and the provision of family maintenance. Forced heirship was part of Roman-Dutch law introduced by Dutch settlers at the Cape of Good Hope (present-day Cape Town) from the middle of the seventeenth century.\(^{42}\) However, all manifestations of compulsory succession, such as the legitimate

\(^{41}\) E.g., a general presumption, founded thereon that a parent is deemed not to intend the disinheritance of children in favor of remoter relatives or outsiders, operates against disinheritance and in favor of equal treatment of children in parents’ testamentary dispositions; the duty of collation (collatio bonorum), based on the presumption that a parent or grandparent intends an equal division of assets among children and further descendants, is imposed on a deceased’s descendants to account to the estate for certain gifts or advances received from, or debts incurred to, the ascendant during the latter’s lifetime; and one of the principles that governs implied fideicommissa states that a gift-over from a testator’s descendant to a third person is regarded as being subject to an implied condition of si sine liberis decesserit—that the descendant left no issue. This implied condition is founded on the notion that a testator would not pass over grandchildren (or other descendants) in favor of remoter beneficiaries.

portion, the *Lex hac edictali*, as well as the Falcidian and Trebellian fourths, were abolished by statute under English influence in the latter half of the nineteenth and early twentieth centuries.43 Modern South African law is, therefore, devoid of the typical Romanist-Continental forced heirship devices.44

South African law nevertheless recognizes that a person’s indigent minor child, whether born in or out of wedlock, has a common law claim for maintenance against that person’s estate.45 This claim is secondary to those of estate creditors, but is preferred to the claims of legatees and heirs.46 An adult child in need of maintenance can also bring such a claim.47 A child’s maintenance claim against a deceased parent’s estate is lodged, along with all other charges on the estate, with the estate’s executor and does not require judicial confirmation.

A deceased’s indigent surviving spouse enjoys a statutory maintenance claim under the Maintenance of Surviving Spouses Act 27 of 1990. This claim, also lodged with the executor, is for the provision of the surviving spouse’s reasonable maintenance needs until death or remarriage, insofar as the spouse is unable to provide for such needs from his or her own means and earnings.48

The traditional meaning attributed to “survivor” for the purpose of the Maintenance of Surviving Spouses Act, namely that of the surviving spouse to a valid civil marriage concluded under the Marriage Act 25 of 1961, has been broadened by South African courts under constitutional direction. This meaning now includes the surviving spouse of a *de facto* monogamous unrecognized

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43. Act 23 of 1874 (Cape); Law 7 of 1885 (Natal); Proc 28 of 1902 (Transvaal); Law Book of 1902 (Orange Free State).
46. *Ex parte* Zietsman: *In re* Estate Barnard 1952 (2) SA 16 (C).
47. Hoffmann v. Herdan 1982 (2) SA 274 (T).
Muslim marriage;\(^{49}\) the surviving spouse or spouses of a valid customary law marriage concluded by Black South Africans either under customary law or under the Recognition of Customary Marriages Act 120 of 1998;\(^{50}\) and each surviving spouse of an unrecognized polygynous Muslim marriage.\(^{51}\) The South African Constitutional Court nevertheless refused extension of such a claim to the surviving partner of a permanent heterosexual life-partnership.\(^{52}\) However, the Civil Union Act 17 of 2006 provides that the legal consequences of a marriage as contemplated in the Marriage Act apply to all civil unions. The Civil Union Act provides further that any reference to “marriage” in any other law, including the common law, includes a civil union, and that “husband,” “wife” or “spouse” in any other law, including the common law, includes a civil union partner.\(^{53}\) Consequently, a surviving civil union partner, whether heterosexual or of the same sex, fully enjoys the benefits of the Maintenance of Surviving Spouses Act.

In light of the foregoing, De Waal is correct when he lists, in his analysis of the socio-economic underpinnings of South African inheritance law, the support of the family as one of the basic functions of the law of succession. De Waal explains that socially-based restrictions on freedom of testation, such as the aforementioned rules on family maintenance, serve to attain this goal.\(^{54}\) The question arises whether the principles regarding testamentary undue influence—in conformity with the undue influence paradox as described in American scholarship—function as a (further) socially-based restriction on testamentary freedom in

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49. Daniels v. Campbell 2004 (5) SA 331 (CC).
50. Kambule v. The Master 2007 (3) SA 403 (E); Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 (Sch.).
South Africa. Does economic family protectionism underpin statutory engagement with, and judicial utilization of, testamentary undue influence in South African law? Next, before these questions are addressed, the conceptualization of undue influence in the South African law of wills will be explained.

B. The Conceptualization of Testamentary Undue Influence in South Africa

The South African legal system can best be described as mixed or hybrid in nature. It originated as an outgrowth of the interplay between Roman-Dutch and English common law legal traditions. Roman-Dutch law is a legal system which was developed in the Netherlands in the latter part of the fifteenth, through the sixteenth and into the seventeenth centuries. It is the product of the reception of Roman law and its synthesis with Germanic customary law, feudal law and canon law, and it was introduced to South Africa at the Cape of Good Hope by Dutch settlers in the seventeenth century. Roman-Dutch law remains part of South Africa’s law to this day. However, it no longer exists in its pure form because of extensive judicial and legislative adaptation and development. In the aftermath of the second British occupation of the Cape in 1806, the ideas from the English system began to affect Roman-Dutch law. The new English rulers retained Roman-Dutch law, but English legal influence on the existing civilian legal system was unavoidable.\textsuperscript{55} The convergence of Roman-Dutch law and English law is particularly manifest in South African inheritance law, especially its law of wills. Formal aspects of wills, especially their execution, are regulated statutorily in the Wills Act 7 of 1953,\textsuperscript{56}


\textsuperscript{56} The Act commenced on 1 January 1954, but was subsequently amended on a number of occasions. The most significant recent amendment of the Wills
which takes its prescripts largely from legislation that mirrored the English Wills Act of 1837. On the other hand, the majority of typical testamentary institutions and constructs encountered in modern South African wills (such as the *fideicommissum*, the *modus*, and the right of accrual (*ius accrescendi*)) originated in Roman law and were received as such into Roman-Dutch law and ultimately into South African law.57

Freedom of testation is a foundational principle of South African testate succession, and relatively few impediments restrict testators’ dispositive caprice.58 The principles pertaining to testamentary undue influence, ostensibly designed to foster free expression of testamentary wishes, are part of the South African law of wills.

Considering English influence that pervaded the law after 1806, it is unsurprising that early South African jurisprudence on testamentary undue influence relied greatly on English legal authority. In *Finucane v. MacDonald*,59 for example, the court opined that the South African legal position on testamentary undue influence accords with that espoused in the leading English case of *Craig v. Lamoureux*.60 Even earlier, in one of the first South African judgments to find testamentary undue influence, *Executors of Cerfonteyn v. O’Haire*,61 the court cited the English case of *Parfitt v. Lawless*62 in support of its findings that the burden of


59. Finucane v. MacDonald 1942 CPD 19 33-34.

60. Craig v. Lamoureux 1920 AC 349.

61. Executors of Cerfonteyn v. O’Haire 1873 Buch 47.

proof must be borne by the party asserting undue influence, and that no presumption of undue influence arises on the basis of the relationship between the parties. 63

In light of this reliance on English authority, it is equally unsurprising that South African courts initially conceptualized testamentary undue influence, in accordance with the then-prevailing view in English law, as a manifestation of force or coercion. 64 In *Taylor v. Pim*, 65 for example, the court cited the English case of *Wingrove v. Wingrove*, 66 where it was said that, to establish undue influence, it must be shown that “the will of the testator was coerced into doing that which he did not desire to do.” 67 Engagement with Roman-Dutch authority on testamentary undue influence is conspicuously absent from the *Finucane*, Cerfonteyn and Taylor judgments.

Later South African cases moved away from coercion as the hallmark of testamentary undue influence and embraced the notion of substituted volition, although not forsaking entirely the interplay between undue influence and coercion. In *Spies v. Smith*, 68 the *locus classicus* of testamentary undue influence in South Africa, the court said:

[A] last will may in fact be declared invalid if the testator has been moved by artifices of such a nature that they may be equated by reason of their effect to the exercise of coercion or fraud to make a bequest which he would not otherwise have made and which therefore expresses another person’s will rather than his own. In such a case one is not dealing with the authentic wishes of the testator but with a displacement of volition and the will is thus not upheld. 69

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64. See, e.g., Cerfonteyn, *supra* note 61, at 72, 78.
65. Taylor v. Pim (1903) 24 NLR 484.
69. *Id.* at 547 (translation from the original Afrikaans taken from M.J. De WAAL & M.C. SCHOEMAN-MALAN, LAW OF SUCCESSION 44 (4th ed. Juta 2008).
A feature of the Spies case is the court’s contextualization of undue influence within South Africa’s Romanist-Civilian common law, and thus its break from earlier judicial reliance on English authority to resolve undue influence challenges to wills. The court made note of Roman-Dutch legal scholars’ insistence that “the pen of the dying must be free” and that it is contra bonos mores to deprive a testator of this freedom. However, these scholars acknowledged that not all interferences with expressions of testamentary intent occasion nullity—the interference must have negated a testator’s volition and caused the making of a will contrary to the testator’s intent. The scholars used the typical examples of severely ill or dying testators whose resistance to influence is easily overcome by reason of their physical and/or mental infirmity. The Spies court recognized, therefore, that the relationship between the parties is not the only factor to be considered in an undue influence inquiry, but that the mental ability of the testator, as well as the time that elapsed between the making of the disputed will and the testator’s death, are also matters pertinent to such an inquiry.

The court emphasized in Spies v. Smith that the mere existence of a relationship between the testator and the alleged influencer that could occasion, for example, metus reverentialis does not give rise to a presumption of displacement of volition. This is because cum sola potentia metum non arguat (power alone does not prove fear)—a will’s challenger bears the onus throughout, and each instance must be decided on the particular facts at hand.

This finding in Spies v. Smith was confirmed in two commentaries on undue influence in Roman-Dutch law published by South African scholars in the judgment’s aftermath. First,

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70. Spies, supra note 68, at 545-46, relying on Johannes Voet, Commentarius ad Pandectas 29.6.1 (1698-1704) and Cornelius van Bunkershoek, De Captatoris Institutionibus Ch. 10 (1743).
71. Spies, supra note 68, at 547.
72. Id. at 547-48.
73. Id.
Scholtens concluded that, although a leading legal scholar such as Johannes Voet recognized that undue influence invalidates a will, a general doctrine of undue influence (aside from a restricted doctrine of *metus reverentialis*) was not part of pure Roman-Dutch law.74 Joubert went even further and found that “*metus reverentialis* was never in itself a sufficient ground for attacking the validity of a legal act”75—insofar as the legal scholars acknowledged *metus reverentialis* as a ground for nullifying a will, it was “always with the qualification that the law does not recognize any presumption of improper action because of any special relationship existing between the parties.”76

Notwithstanding undue influence’s (and, possibly, *metus reverentialis*’s) lack of doctrinal status in Roman-Dutch law, the conceptualization of testamentary undue influence in *Spies v. Smith* and subsequent academic commentaries provides strong support for the assertion that its role in South African law is *prima facie* to protect testamentary freedom by invalidating testamentary dispositions where the testator’s will was substituted for that of the influencer. In light of South African inheritance law’s firm stance in favor of family protectionism,77 this assertion raises the question: is testamentary undue influence, despite its aforementioned role, primarily applied in the South African context to retain familial wealth and, in so doing, to safeguard the testator’s biological family, particularly those who stand to inherit on intestacy, from disinheretance? Is the undue influence paradox and complexities associated with the American doctrine also manifest in the South African law of wills? These questions will be addressed in the article’s next two parts through a consideration of, first, the single provision dealing with undue influence contained

76. *Id.*
77. *See supra* Part IV.A.
in the South African Wills Act and, second, the engagement of South African courts with testamentary undue influence.

C. Undue Influence and the South African Wills Act

The South African Wills Act regulates testamentary capacity.78 Testamentary undue influence, on the other hand, is governed, for the greater part, by the South African common law.

Article 4A(1) of the Wills Act, imported through the Law of Succession Amendment Act,79 nevertheless disqualifies certain persons who participated in the making or execution of a will from benefiting under that will. People who witnessed a will, or who signed a will as a testator’s amanuensis, or who wrote a will or any part thereof in their own handwriting, and the person who was the spouse of any of the aforementioned people at the time of the will’s execution, are so disqualified. This prescript is not novel to the Wills Act. Article 4A(1) replaced the Act’s former disqualification provisions contained in the now-repealed articles 5 and 6. These two articles prohibited a witness, an amanuensis, the spouse of a witness or amanuensis, or any person claiming under a witness, amanuensis or their spouse, from benefiting under the particular will, or from being nominated as testamentary executor, administrator, trustee or guardian in that will. Significantly, the South African Law Commission (as it was formerly called80), in its report that preceded the Law of Succession Amendment Act,81 recommended that the disqualifications contained in the aforementioned articles 5 and 6 be abolished. The legislature

78. Art. 4 of the Act prescribes that every person of the age of sixteen years or older may make a will unless such person is, at the time of making the will, mentally incapable of appreciating the nature and effect of will-making; moreover, that the burden of proof in respect of mental incapacity rests on the person alleging the same.
79. Art. 4A was inserted into the Wills Act by art. 7 of the Law of Succession Amendment Act.
80. The Commission is now called the South African Law Reform Commission.
rejected this recommendation, and retained these disqualifications, in amended form, under article 4A, to effect disqualification from testamentary benefit of the designated persons who participated in the making or execution of a will.

Article 4A(1) is aimed at preventing fraud and undue influence; this is apparent from article 4A(2)(a), which stipulates that the High Court may order that any person who is disqualified under article 4A(1) is nevertheless competent to receive a benefit from the will concerned if the court is satisfied that such person did not defraud or unduly influence the testator in the execution of the will.82

Article 4A(2)(b) of the Act contains a further exception to the general disqualification in article 4A(1), which exception has a distinct family protectionism flavor:

(2) Notwithstanding the provisions of subsection (1) . . .
(b) a person or his spouse who in terms of the law relating to intestate succession would have been entitled to inherit from the testator if that testator has died intestate shall not be thus disqualified to receive a benefit from that will: Provided that the value of the benefit which the person concerned or his spouse received, shall not exceed the value of the share to which that person would have been entitled in terms of the law relating to intestate succession.

This paragraph is a novel addition to the Wills Act. It negates the disqualification imposed by article 4A(1), and enables a deceased estate’s executor to effect distribution to the testator’s otherwise-disqualified family members despite their involvement in the making or execution of a will. The executor can do so purely on the basis that they are the testator’s intestate heirs; however, they will receive no more than their intestate shares from the deceased’s estate. Significantly, the executor can act independently in this regard;83 alternatively, the Master of the High Court, a

82. See In re Estate Barrable 1913 CPD 364 368 and Smith v. Clarkson 1925 AD 501 503-504, regarding the corresponding common law position.
83. DE WAAL & SCHOEMAN-MALAN, supra note 69, at 124.
judicial officer charged with aspects of the administration of justice, will make a determination.\textsuperscript{84} Therefore, unlike the exception contained in article 4A(2)(a), no court order is required for the executor to effect distribution to the family members mentioned.\textsuperscript{85}

Paragraph (b) has been described as the “central provision” in article 4A(2),\textsuperscript{86} and effects legislative ring-fencing of at least an intestate share of a deceased’s estate in favor of the testator’s spouse and consanguineous relatives. This occurs regardless of their involvement in the making or execution of a will, and notwithstanding the possibility that they might have unduly influenced the testator during those processes. Moreover, the South African Supreme Court of Appeal held in Blom v. Brown that the availability of the relief under article 4A(2)(a) based on the absence of fraud or undue influence is not dependent on the inapplicability of the intestate-inheritance-exception of article 4A(2)(b). The court opined that the legislature did not intend for a testator’s spouse or consanguineous relatives to rely solely on article 4A(2)(b), without recourse to article 4A(2)(a), in order to escape the disqualification imposed under article 4A(1).\textsuperscript{87}

In this light, the statutory attention given to undue influence in the Wills Act, although confined to the narrow aspect of participation in the making or execution of wills, conforms to the familial solidarity paradigm insofar as paragraph (b)—the central provision in article 4A(2)—ensures \textit{ex lege} wealth retention (albeit limited to shares on intestacy) by a testator’s spouse and consanguineous relatives who participated in the making or execution of a will. Moreover, the \textit{Blom} judgment confirms that these persons are free also to invoke the broader protection...

\textsuperscript{84} Mohamed Paleker, \textit{Capacity to Inherit} in \textit{The Law of Succession in South Africa} 111 (Juanita Jamneck & Christa Rautenbach eds., Oxford Univ. Press Southern Africa 2009).


\textsuperscript{86} Paleker, \textit{supra} note 84, at 111.

\textsuperscript{87} Blom, \textit{supra} note 85, at § 19, § 20.
afforded by article 4A(2)(a) in order to escape the legislative limitation regarding the award of intestate shares.

It is submitted, therefore, that the Wills Act’s engagement with testamentary undue influence yields familial wealth protection as a consequence, particularly insofar as a testator’s surviving spouse and biological family members are protected against wealth loss.

**D. South African Testamentary Undue Influence Case Law**

In order to determine whether South African courts’ engagement with testamentary undue influence is susceptible to criticism similar to that raised against the testamentary undue influence doctrine’s application in the United States, it is useful to restate four principal assertions regarding the undue influence paradox and complexities associated with testamentary undue influence gleaned from American scholarly critique of the doctrine:88

1) Courts hail the undue influence doctrine as protective of testamentary freedom, but utilize it in an unorthodox manner to negate that very freedom by quashing *prima facie* unnatural bequests (bequests under which outsiders benefit to the exclusion of a testator’s surviving spouse and (close) consanguineous relatives) (hereinafter “the first assertion”);

2) The courts’ unorthodox use of testamentary undue influence can be explained by a judicial pursuit of wealth preservation for a testator’s surviving spouse and (close) consanguineous relatives, thereby protecting them against disinherirtance (hereinafter “the second assertion”);

3) Courts in jurisdictions where inheritance systems recognize economic familial solidarity through the operation of family protection devices are less inclined to use testamentary undue influence to achieve this goal of wealth retention (hereinafter “the third assertion”); and

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88. *See supra* Parts III.A & B.
4) Other inheritance law doctrines and constructs such as testamentary capacity, fraud, and coercion ensure that testamentary dispositions are made validly and freely, thus rendering the undue influence doctrine superfluous (hereinafter “the fourth assertion”).

It is useful to note that South African courts have found testamentary undue influence in only a handful of cases: *Executors of Cerfontyn v. O’Haire;* 89 *Kirsten v. Bailey;* 90 *Du Toit v. Van der Merwe,* 91 and *Longfellow v. BOE Trust Ltd.* 92 can be counted among them. The extent to which these cases conform to the aforementioned assertions is investigated hereafter by dealing with each assertion in turn.

1. Testamentary Freedom Undermined in Instances of Unnatural Bequests

The “strong rhetoric in support of freedom of testation” that, according to Madoff, 93 emanates from undue influence judgments in the United States, is also apparent in corresponding South African case law. 94 Does this pro-freedom-of-testation stance hold true in instances where South African testators made *prima facie* unnatural bequests to remote relatives or outsiders to the exclusion of spouses and/or close consanguineous relatives? Two of the abovementioned four South African cases were indeed decided in favor of testators’ family members who challenged wills. In

93. See *supra* Part III.A.
94. *E.g.*, in Tregea v. Godart, *supra* note 63, at 22, the court typified undue influence as an “encroachment upon the freedom of the testator”, and in Thirion v. The Master 2001 (4) SA 1078 (T) 1091I, the court cautioned that one is free to dispose of one’s property even in an unreasonable manner, but that the law does not permit undue attempts by exploiters to manipulate dying, ill or otherwise vulnerable persons.
Kirsten v. Bailey\textsuperscript{95} the successful challengers were the testatrix’s sole intestate heirs, and in Du Toit v. Van der Merwe\textsuperscript{96} the testator’s daughters from his first marriage invoked undue influence successfully against the testator’s second wife and a non-consanguineous outsider. On the other hand, in Executors of Cerfonteyn v. O’Haire\textsuperscript{97} the successful challengers were non-consanguineous outsiders—the executors of the testatrix’s estate, and in Longfellow v. BOE Trust Ltd.\textsuperscript{98} the court’s finding that the applicant exercised undue influence with regard to a formally-defective will precedent secured the operation of the testatrix’s existing will in terms of which her former husband was the sole heir.

Of the aforementioned judgments, only the Kirsten and Du Toit cases conform to the first assertion in regard to the undue influence paradox. However, the Cerfonteyn case concerned a fairly unique scenario\textsuperscript{99} and, it is submitted, is not instructive on this point. Moreover, it will be shown below that the Longfellow court’s engagement with undue influence is open to criticism, and it is arguable that this case, despite its outcome, in fact supports the first assertion.

In some judgments where undue influence was alleged but not found, South African courts have made emphatic pronouncements in favor of testamentary freedom. In Thirion v. The Master,\textsuperscript{100} for example, the testator benefited his girlfriend to the exclusion of his biological family. She brought an application to have the formally non-compliant document that contained her appointment as heir condoned under the Wills Act’s condonation (dispensing) provision.\textsuperscript{101} The testator’s mother opposed this application on the

\textsuperscript{95} Kirsten, supra note 90.
\textsuperscript{96} Du Toit, supra note 91.
\textsuperscript{97} Cerfonteyn, supra note 61.
\textsuperscript{98} Longfellow, supra note 92.
\textsuperscript{99} See infra Part IV.D.2.
\textsuperscript{100} Thirion, supra note 94.
\textsuperscript{101} Art. 2(3) of the Wills Act.
ground that the girlfriend had unduly influenced the testator. The court found that undue influence did not occur, and Judge Van der Westhuizen reasoned:

The one thing that is apparent is that he wanted to make the applicant his heir. Even in his earlier will in which he benefited his parents, he made provision for the possibility of meeting and marrying his dream wife . . . and that she would then receive preference over his parents. . . . It is clear that [the testator] did exactly what he intended to do with fervency. Whether his reasons were sensible and morally acceptable to others, and whether it attests to immaturity, is beside the point. . . . The law recognizes a deceased’s disposition of property, even at the expense of others, whether out of respect for death or out of respect for the concept of ownership.102

In this case the testator was party to a confidential relationship with the applicant and made a prima facie unnatural bequest (one to the exclusion of his biological family) in her favor; moreover, no family protection devices were available to his mother (and other family members) to secure wealth retention. If ever a court was intent on conforming to the first assertion, and on invoking undue influence at the expense of freedom of testation to quash the disinherition of consanguineous relatives in order to secure familial wealth retention, Thirion’s case provided the ideal opportunity to do so. The court nevertheless ruled, notwithstanding the testator’s non-conforming dispositive plan, that undue influence did not occur.103

102. Thirion, supra note 94, at 1095H-1096A (author’s translation from the original Afrikaans).

103. A similar approach was followed in the earlier case of Finucane, supra note 59, where a testatrix benefited the defendant—her attorney—to the exclusion of her biological family and her adopted son. The court ruled that “however extraordinary it may seem that [the testatrix] should have passed over her relatives and adopted son for MacDonald . . . the Court cannot deduce from that that MacDonald exercised undue influence over her and that it was by means of the exercise of such influence that he obtained the benefit under the will.” Id. at 35-36.
In *Longfellow v. BOE Trust Ltd.*,\(^{104}\) on the other hand, the testatrix made a natural bequest (one in favor of a close relative and, according to American scholarship, usually a strong indicator of the absence of undue influence) to the applicant, her second husband, in a will precedent completed by the applicant and, according to his evidence, approved by the testatrix. The court found that the applicant had unduly influenced the testatrix. Therefore, this natural bequest yielded before the court’s view on the applicant’s exploitation of his confidential relationship with the testatrix. As a result, the testatrix’s existing will, in terms of which her first husband was the sole heir, remained intact. But the *Longfellow* court’s undue influence ruling is suspect because the facts before the court showed that the testatrix and the applicant were ostensibly happily married for more than a decade; the applicant called on a commercial bank for assistance in drafting the testatrix’s will, and only when the bank failed to respond, did he resort to the will precedent. Furthermore, two persons (the testatrix’s nurse as well as a colleague of hers) were present when the will precedent was completed, and two weeks had elapsed between the completion of the will precedent and the testatrix’s death. This was sufficient time for her, although terminally ill, to express a change of heart in another will. When these facts are measured against the test for undue influence in South African law laid down in *Spies v. Smith*, it is certainly arguable that the court erred in its finding that the applicant had unduly influenced the testatrix. It seems highly probable that the testatrix in fact intended to benefit her (second) husband.\(^{105}\) In this light, it is submitted that *Longfellow*, despite its outcome, supports the assertion that findings of testamentary undue influence can occasion, in South

\(^{104}\) *Longfellow*, *supra* note 92.

Africa as in the United States, the negation of testamentary freedom.

The above exposition shows that, generally, South African cases in which wills were challenged successfully on the ground of testamentary undue influence secured wealth for testators’ consanguineous relatives, thus protecting them from disinheri
tance. However, in *Thirion v. The Master*\(^{106}\) the court rejected an averment of undue influence and upheld a non-conforming bequest to an outsider with emphatic reliance on testamentary freedom. The *Thirion* court’s pro-freedom-of-testation stance is, however, undermined by the *Longfellow* court’s negation of testamentary freedom where, as it was argued above, it erroneously found that undue influence was present based on the facts at hand.

In light of this mixed picture, the next two assertions regarding the undue influence paradox and its associated complexities require investigation: were the South African judgments in which testamentary undue influence was found motivated primarily by the judicial pursuit of familial wealth retention? And does the availability of family protection devices in South African law nullify the (potential) unorthodox use of testamentary undue influence?

2. Familial Wealth Retention

The second assertion posits the unorthodox judicial utilization of testamentary undue influence as a means to secure wealth retention by a testator’s spouse and/or consanguineous relatives through the negation of wealth acquisition at their expense by either the influencer or by a third-party outsider. The South African judgment in *Executors of Cerfonteyn v. O’Haire*\(^{107}\) is somewhat of an enigma on this point. The court opined that “[t]he

\(^{106}\) Thirion, *supra* note 94.

\(^{107}\) Cerfonteyn, *supra* note 61.
nature or quality of the object sought to be attained by the use of the influence does not guide the decision of the Court. The ‘undueness’ . . . of the influence is in the use of it.”

This observation is appropriate in light of the Cerfonteyn case’s unique feature—the fact that the influencer was wholly disinterested. In this case it was alleged that the defendant, a Roman Catholic priest who was the testatrix’s spiritual adviser and who received no benefit under her will, unduly influenced the testatrix to execute a codicil in which he was appointed as guardian and tutor of the testatrix’s minor children. Judge Fitzpatrick said:

I have searched every law book to which I have access, and have not been able to find one case like the present, where the person charged with having exercised undue influence to procure the execution of a will had not a personal interest of one shilling in the transaction, and did not gain one farthing as the result of his influence.

A two-judge majority held, the absence of personal gain on the defendant’s part notwithstanding, that undue influence was present insofar as the “persistent importunity of the defendant, continued for years and culminating on the morning of the death” defeated the testatrix’s resistance and occasioned the execution of the disputed codicil. Therefore, the peculiar Cerfonteyn judgment refutes the second assertion insofar as the court’s finding that undue influence was present did not negate financial gain by the influencer, nor did it prevent wealth loss for, or disinherison of, the testatrix’s consanguineous relatives.

The judgment in Longfellow v. BOE Trust Ltd. also does not fit the familial wealth retention paradigm. The undue influence ruling against the testatrix’s second husband of twelve years in this case secured operation of the testatrix’s will, in terms of which her first husband was the sole heir. Familial wealth retention was

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108. Id. at 73.
109. Id. at 79.
110. Id. at 74.
111. Longfellow, supra note 92.
clearly not achieved through this ruling. However, it was argued earlier\textsuperscript{112} that the \textit{Longfellow} case is susceptible to criticism; and, as it will be shown later,\textsuperscript{113} the undue influence rulings in both \textit{Cerforteyn} and \textit{Longfellow} were secondary to other grounds of invalidity of the respective documents.

\textit{Du Toit v. Van der Merwe}\textsuperscript{114} stands alone among the four South African undue influence judgments under discussion in that the challenge of the will in this case was decided on the common law ground of testamentary undue influence alone (the plaintiffs abandoned lack of testamentary capacity as an alternative ground for the challenge). The challengers were the testator’s three daughters, while the will’s principal proponent—the first defendant—was the testator’s second wife, to whom he was married for more than a decade prior to his death. The testator, seventy-nine years of age and in poor health, executed the disputed will seventeen days after having made a will in which his daughters were appointed as his sole heirs. In the disputed will, the testator appointed \textit{W}—the second defendant—as legatee in respect of, among others, the testator’s farm, and designated the first defendant as sole heir to the estate residue.

The court noted the history of discord between the plaintiffs and the first defendant, which arose primarily because the first defendant convinced the testator that his daughters were not his biological children.\textsuperscript{115} The court further opined that the first defendant and \textit{W} were unreliable witnesses and that their evidence was fraught with lies.\textsuperscript{116} As a result, it held that the evidence pointed strongly to the conclusion that the disputed will came about through the first defendant’s and \textit{W}’s undue influence of the testator, and that the will had to be set aside.\textsuperscript{117}

\textsuperscript{112} \textit{See supra} Part IV.D.1.
\textsuperscript{113} \textit{See infra} Part IV.D.4.
\textsuperscript{114} \textit{Du Toit, supra} note 91.
\textsuperscript{115} \textit{Id.} at 47, 59.
\textsuperscript{116} \textit{Id.} at 50.
\textsuperscript{117} \textit{Id.} at 54.
The bequests in this case conform partly to the confidential relationship/natural bequest dichotomy. The legacy of the farm to W corresponds to the dichotomy in that a confidential relationship of sorts existed between the testator and W (W was the lessee of the testator’s farm for some years prior to the latter’s death), while the legacy to W was not a natural bequest (W was not a consanguineous relative of the testator), thus raising the suspicion that the testator might have acted under undue influence with regard to the legacy of the farm. On the other hand, the natural bequest to the first defendant as the testator’s wife of more than ten years, presented in American scholarship as a strong indicator of the absence of undue influence, yielded before the court’s view on the confidential and exploitive relationship that existed between the first defendant and the testator.

The Du Toit judgment conforms to the second assertion with regard to the undue influence paradox insofar as the court attached particular weight to evidence adduced on behalf of the plaintiffs that the testator would never have contemplated the disinheritance of his daughters; particularly not to let the farm fall into an outsider’s (W’s) hands.\textsuperscript{118} The judgment leaves the distinct impression that the court was very concerned with the harm caused by the daughters’ loss of the family estate. Judge President Steenkamp opined, for example, that W had forsaken a legal duty that rested on him to correct the testator’s misperceptions regarding his daughters, and said:

\begin{quote}
In this case the inference can be drawn against [W] that . . . [W] should have realized that the deceased, by reason of the misperception, was going to disinherit his children and would nominate him [W] . . . and first defendant as heirs of his estate. \textit{The plaintiffs were consequently prejudiced} and he [W] and first defendant benefited from the misperception.\textsuperscript{119}
\end{quote}

\textsuperscript{118} Id. at 13, 45. 
\textsuperscript{119} Id. at 54 (author’s translation from the original Afrikaans; emphasis added).
This judgment, one of only a handful of South African cases in which testamentary undue influence was established and the only one in which the challenge to the will was decided on undue influence alone, fits the familial wealth retention paradigm. It raises the question, however, whether the dearth of South African judgments in which testamentary undue influence was invoked successfully is attributable to the presence of family protection devices as stated in the third assertion.

3. Family Protection Devices Curtail the Unorthodox Use of Testamentary Undue Influence

The undue influence ruling in *Executors of Cerfonteyn v. O’Haire*120 was handed down prior to the statutory abolition of Roman-Dutch law’s forced heirship devices in the erstwhile Cape Colony—at a time, therefore, when family protectionism was particularly potent. *Cerfonteyn* seemingly disproves the assertion that the availability of family protection devices decreases judicial utilization of undue influence to achieve family protectionism. However, given the disinterestedness of the influencer in this case,121 it is submitted that the *Cerfonteyn* judgment is not instructive on this point. The undue influence ruling in *Kirsten v. Bailey*122 was handed down at a time when only a testator’s children enjoyed maintenance-based protection against disinheritance under South African law. In this case, the undue influence ruling favored the testatrix’s only intestate heirs who, significantly, were not her own children but those of her brother, thus not claimants under the common law maintenance dispensation. Therefore, *Kirsten’s* case conforms to the third assertion in regard to the undue influence paradox insofar as the ruling that undue influence was present secured wealth on intestacy for the testatrix’s only consanguineous relatives, who not

120. *Cerfonteyn*, *supra* note 61.
121. See *supra* Part IV.D.2.
122. *Kirsten*, *supra* note 90.
only fell outside the ambit of existing family protection devices but who were also disinherited under the disputed wills.

*Du Toit v. Van der Merwe*\(^{123}\) also supports the third assertion, if evaluated from the perspective of the court’s ruling in favor of the successful challengers of the will. The plaintiffs were the adult daughters of the testator, born from his first marriage. They had no recourse to the common law maintenance dispensation for dependent minor children and were, moreover, disinherited under the disputed will. The undue influence ruling in their favor undeniably procured wealth for them through the reinstatement of the first will under which they were the testator’s sole heirs.

The judgment in *Longfellow v. BOE Trust Ltd.*,\(^ {124}\) on the other hand, does not conform to assertion three—it was handed down after the enactment of the Maintenance of Surviving Spouses Act which allowed the applicant, if he met the prescribed criteria, a maintenance claim against his deceased wife’s estate (the judgment is silent, however, on whether he instituted such a claim). The court nevertheless made an undue influence ruling against the testatrix’s husband and the potential availability of a family protection device did not deter the court from ruling that the husband unduly influenced the testatrix.

South African judgments in which testamentary undue influence was alleged but not found, paint a different picture. The challengers of the wills in these judgments were, for the greater part, not claimants under any maintenance dispensation and were, therefore, without recourse to family protection devices as means of procuring wealth from the estates of the allegedly unduly influenced testators.\(^ {125}\) Yet, the challenges of the wills were not successful. In some of these cases, the unsuccessful challengers

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125. E.g., Finucane, *supra* note 59 (challenger of the will was the testatrix’s adult child); Spies, *supra* note 68 (challenger of the will was the testator’s stepmother, on behalf of the testator’s minor half-sister); Katz v. Katz [2004] 4 All SA 545 (C) (challengers of the will were the testator’s adult children).
were indeed heirs under earlier wills, but they still could not procure findings that undue influence was present with respect to the disputed wills (which findings would have secured the operation of such earlier wills in their favor). Evidently, neither the unavailability of family protection devices, nor the procurement of wealth through earlier wills swayed courts in favor of undue influence rulings in these cases. South African judgments are, therefore, dichotomous with respect to the third assertion. Judgments in which testamentary undue influence was found conform, by and large, to the third assertion; however, judgments in which testamentary undue influence was not found generally left the unsuccessful challengers of the wills without recourse to family protection devices as a means of wealth procurement.

4. Secondary Undue Influence Findings Are Superfluous

South African testamentary undue influence judgments conform, by and large, to the fourth assertion. In Executors of Cerfonteyn v. O’Haire the two-judge majority found, first, that the testatrix, by reason of pulmonary consumption (tuberculosis) and the taking of opiates, lacked testamentary capacity. Clearly, the case should have rested there. Both judges nevertheless proceeded to a secondary undue influence inquiry, probably because it was pleaded in the alternative. Similarly, in Kirsten v. Bailey the plaintiffs pleaded lack of testamentary capacity on the testatrix’s part, and undue influence in the alternative, in regard to three wills made by the testatrix shortly before her death. The court held that the testatrix lacked the requisite capacity when she made each of the three wills and, as a result, set all three wills aside. The court ruled, moreover, that the first and third wills were “in any event obtained as a result of undue influence exerted upon the

126. E.g., Finucane, supra note 59; Spies, supra note 68.
127. Cerfonteyn, supra note 61.
128. Kirsten, supra note 90.
129. Id. at 111.
testatrix by the first defendant [the sole heir in terms of both these wills] and that they could, for this reason also, be set aside.”

Evidently, this finding was secondary to the capacity ruling and, again, superfluous. As in Cerfonteyn, the case should have rested with the capacity ruling.

This tendency persisted in Longfellow v. BOE Trust Ltd., where the court ruled that a will precedent completed by the applicant did not comply with the Wills Act’s formal requirements, and could not be rescued under the Wills Act’s condonation (dispensing) provision. The court, having made this ruling, proceeded to an undue influence ruling on synoptic evidence regarding the testatrix’s physical and mental state, and did so in two meager paragraphs of the judgment. Such a secondary finding typcasts testamentary undue influence as the “safety valve” that Spivack bemoans—Judge Baartman admitted in Longfellow that she made the undue influence finding to allow for the possibility that she was wrong on the condonation ruling—and fortifies the conclusion that South African undue influence judgments conform, by and large, to the fourth assertion.

A survey of case law reveals that South African courts opt frequently to resolve challenges to wills where undue influence is averred (invariably as one among a number of alternatives) on grounds other than undue influence. The Cerfonteyn and Kirsten cases show that testators’ lack of testamentary capacity is the alternative ground on which such judgments are most commonly based. In another case, the court concluded that testamentary undue influence did not occur, but ruled that the alleged influencer was unworthy to inherit by reason of reprehensible conduct towards the testatrix, which disqualified him from testamentary

130. Id. at 111, 113.
131. Longfellow, supra note 92.
132. Id. at § 24.
133. Id. at § 29-§ 30.
134. See supra Part III.B.
135. Longfellow, supra note 92, at § 29.
benefit.136 This state of affairs leads one to conclude that in South Africa, contrary to the position in the United States, testamentary undue influence is readily averred or pleaded, but, certainly because of evidentiary difficulties of meeting the burden of proof, it is very difficult to procure a ruling that undue influence was in fact perpetrated.137 It is submitted, therefore, that South African courts generally underplay pleas of testamentary undue influence in challenges to wills, thus conforming, by and large, to the fourth assertion insofar as testamentary undue influence is frequently displaced by other inheritance rules or statutory prescripts.

V. EVALUATION AND CONCLUSION

The exposition in Part IV of this article on testamentary undue influence in South Africa showed that some points of contact exist between the South African legislature’s and courts’ engagement with this aspect of the law of wills, on the one hand, and issues raised in scholarly criticism of the testamentary undue influence doctrine in the United States, on the other hand. Do these similarities warrant the conclusion that the undue influence paradox and the American doctrine’s associated complexities are manifest in the South African law of wills? And, even if this question is answered in the negative, can South Africa learn some lessons from scholars’ critical appraisal of testamentary undue influence in the American context?

The South African Wills Act’s engagement with testamentary undue influence, although limited, yields family protectionism through article 4A(2)(b)’s138 ring-fencing of wealth in favor of a testator’s intestate heirs. It is certainly arguable that article

136. Taylor, supra note 65.
137. Roger Kerridge, Wills Made in Suspicious Circumstances: The Problem of the Vulnerable Testator, 59 CAMBRIDGE L. J. 310, 328 (2000), laments a similar state of affairs in England when he argues that “it is too easy in England to coerce, or deceive, a vulnerable testator into making a will and it is not easy enough to challenge a suspicious will when one comes to light.”
138. See supra Part IV.C.
4A(2)(b) functions as a family protection device in South African inheritance law, alongside the devices highlighted in Part IV.A of this article. Critics of the testamentary undue influence doctrine in the United States will undoubtedly register their lack of surprise at the fact that South African courts have issued very few orders in favor of testators’ consanguineous relatives under article 4A(2)(a). Evidently, article 4A(2)(b) protects these relatives adequately against wealth loss; consequently they need not resort to court orders under article 4A(2)(a) to secure wealth on the ground that they had not perpetrated undue influence when testators made or executed their wills. It is submitted, therefore, that the South African legislature’s limited engagement with testamentary undue influence in the Wills Act conforms generally to the familial economic solidarity paradigm that underpins the undue influence paradox in the American context.

South African courts’ use of testamentary undue influence also conforms to elements of the paradox and assertions made with regard to the testamentary undue influence doctrine in the United States. Significantly, such conformity is manifest in Du Toit v. Van der Merwe,139 a case in which the challenge of the will was decided on undue influence alone, and especially insofar as the Du Toit court, in its reasoning on the presence of undue influence, voiced concern regarding wealth loss by the testator’s disinherited daughters.

It is submitted, however, that, notwithstanding the South African legislature’s aforementioned stance in favor of familial solidarity, it is difficult to conclude from the judgments surveyed in Part IV of this article that South African courts are driven primarily by family protectionism in their engagement with testamentary undue influence. Even in Du Toit the undue influence ruling was a two-edged sword: the finding of undue influence made against the testator’s wife indeed prevented wealth loss by

139. Du Toit, supra note 91.
the testator’s daughters through their disinheriance under the disputed will, but denied the wife wealth in spite of her spousal status (of more than a decade) and of the natural character of the bequest to her.

In this light, the first lesson that South Africa must learn from scholarly criticism of the testamentary undue influence doctrine in the United States is that testamentary undue influence lends itself to unorthodox usage that can contort it into a mechanism for familial wealth retention at the expense of its role as guardian of testamentary freedom. It cannot be said definitively that South African courts have followed their American counterparts into what its critics find to be testamentary undue influence’s paradoxical trap. Nevertheless, South African judgments in which testamentary undue influence was found to have been present were generally decided in favor of consanguineous relatives who were disinherited under the disputed wills, and who were, moreover, without recourse to family protection devices to secure wealth retention. The broad contours of a familial economic solidarity paradigm are, therefore, detectable in South African courts’ engagement with testamentary undue influence. Consequently, it is imperative for these courts to be alerted to the dangers associated with the unorthodox and paradoxical judicial utilization of undue influence in the law of wills.

The second lesson that South Africa must learn from American scholars’ criticism of the testamentary undue influence doctrine’s operation in the United States concerns the necessity of affirming testamentary undue influence in its role as guardian of testamentary freedom. Regrettably, South African courts’ engagement with testamentary undue influence has not consistently reinforced this truism. On the one hand, a judgment such as Thirion v. The Master\textsuperscript{140} should satisfy all but the fiercest critics of the undue influence doctrine in the United States: in this

\textsuperscript{140} Thirion, supra note 94.
case the court rejected a claim of undue influence and upheld a bequest to a non-consanguineous outsider; moreover, it founded its ruling on a firm adherence to testamentary freedom, even with regard to the non-confirming dispositive plan that excluded the testator’s biological family. On the other hand, scholars who are critical of the way the undue influence doctrine operates in the United States may share the view that in *Longfellow v. BOE Trust Ltd.*, the court’s ruling that testamentary undue influence was present was artificial on the facts at hand and indeed negated the testatrix’s testamentary freedom in that case. The *Longfellow* judgment shows that South African courts are not immune to derogating from freedom of testation through ill-conceived findings of testamentary undue influence.

The third lesson that South Africa must learn from the criticism of the testamentary undue influence doctrine in American scholarship concerns the condemnation of undue influence to a subsidiary role in challenges of wills. South African courts have made secondary, often superfluous, testamentary undue influence rulings in the past which, as Spivack points out, cast testamentary undue influence in the role of a mere “safety valve”. This unfortunate tendency is exacerbated in South African law by the fact that it is apparently difficult for the challengers of wills to prove that undue influence was in fact perpetrated. Placing the *onus* exclusively on the plaintiff throughout may lie at the heart of this problem.

How can this situation be remedied? The American experience suggests burden-shifting as a possible solution. Although burden-shifting does not accord with the South African common law position on testamentary undue influence, the South African legislature can decree a departure from the common law. Some South African scholars have called for burden-shifting in challenges of wills in the past. For example, Sonnekus proposed

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141. *Longfellow*, *supra* note 92.
142. *See supra* Part III.B.
that the South African legislature should amend the Wills Act’s provision on testamentary capacity by placing the burden of proof on the wills’ proponents in challenges of wills based on lack of capacity if such wills were executed after the testators attained a statutorily-determined age.\textsuperscript{143} In this light, it must be noted that the South African judgments in which testamentary undue influence was found to have been present concerned mostly testators who were of advanced age. Building on Sonnekus’s suggestion, the Wills Act’s testamentary capacity provision could be amended also in the sense of placing the burden of proving the absence of undue influence on wills’ proponents in all undue influence challenges where testators exceeded, at the time of the wills’ execution, a statutorily-determined age. The introduction of such an age-based rule to regulate burden placement is, arguably, preferable to a “confidential relationship rule” or a “suspicious circumstances rule” because an age-based rule would not violate the South African common law’s firm stance that a special relationship or suspicious circumstances do not in themselves raise a presumption of undue influence.

Manipulating burden placement in challenges of wills may, however, not be acceptable to South African law reformers. It is submitted that, in the alternative, Spivack’s assertion that prevention is better than cure points the way for possible South African legal development: ante mortem mechanisms should be instituted to ensure the valid and free expression of testamentary wishes.\textsuperscript{144} Again, South African scholars have proffered solutions akin to those advocated in American scholarship to achieve this goal.\textsuperscript{145} But perhaps an answer lies in South Africa’s common law

\textsuperscript{143} Jean C. Sonnekus, Testeerbevoegdheid en Testeervryheid as Grondwetlik Beskermde Bates (1), 75 Tydskrif Vir Hedendaagse Romeins-Hollandse Reg 1 (2012). Sonnekus proposes seventy-five years of age as appropriate to this end.

\textsuperscript{144} See supra Part III.B.

\textsuperscript{145} E.g., Jean C. Sonnekus, Freedom of Testation and the Ageing Testator, supra note 6, at 88, who advocates for the amendment of the South African Wills Act to require every witness to a will to supplement the attesting signature
insofar as the notarial will was, until its abolition under the current Wills Act, a recognized Roman-Dutch will form. The common law notarial will required the involvement of a notary, either as will drafter or to confirm a will as expressing freely a testator’s final wishes. It is submitted that a statutory reintroduction of the notarial will, particularly if made compulsory in regard to testators who have attained a statutorily-fixed age and/or in regard to wills made in institutions for the mentally and/or physically infirm, would be an important safeguard for South African testators’ free expression of wishes.

The foregoing proposals suggest that the South African legal position on capacity-related and undue influence challenges of wills can be enhanced through relatively simple law reform. And herein lies, arguably, the greatest lesson that South Africa must learn from scholarly critique of the testamentary undue influence doctrine in the United States: South African scholars have subjected the South African law on testamentary undue influence to analysis and criticism only infrequently. American scholars, on the other hand, have highlighted the shortcomings of the testamentary undue influence doctrine in their legal system in a sustained manner, and at least one scholar called for the abolition of the doctrine in the United States. South African scholarship has, for the most part, shied away from a critical appraisal of undue influence in the South African law of wills. While the rules pertaining to testamentary undue influence are integral to South African testamentary succession, these rules can certainly be

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146. See supra Part III.A.
enhanced to provide, as Frolik reasons,\textsuperscript{147} optimal protection to vulnerable testators with marginal capacity. Sustained comparative research by South African inheritance law scholars on the way testamentary undue influence functions in other jurisdictions will contribute significantly to attaining such enhancement.

\textsuperscript{147} See supra Part III.B.
INFLATION IN ENRICHMENT CLAIMS: REFLECTIONS ON THE BRAZILIAN CIVIL CODE

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I. Abstract .................................................................................... 554

II. On Enrichment Law in General ............................................. 554
   A. Introductory Remarks ...................................................... 554
   B. The Adoption of the General Principle against Unjustified
      Enrichment. A Brief Overview of the Changes from the 1916
      Code to the 2002 Code .................................................. 556
   C. Brief Remarks on Enrichment Liability in General ........... 557
      1. Civil Law Systems ..................................................... 558
      2. Common Law Systems .............................................. 560

III. Descriptive Considerations of Article 884 of the Brazilian Civil
     Code .................................................................................. 562
     A. Enriched at Another’s Expense Sine Causa ..................... 562
     B. “After Updating the Monetary Values” (Monetary
        Correction) ..................................................................... 564

IV. Change of Position (Loss of Enrichment) Defence and Inflation
    .......................................................................................... 574

V. Subtle Messages Emanating From the Brazilian Formulation of
   Enrichment Liability ............................................................ 575
   A. General Remarks .......................................................... 575
   B. What Does the Brazilian Approach and Experience Tell Us?
      ....................................................................................... 575
   C. “Updating Monetary Value” and Interest on Money .......... 582

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I. ABSTRACT

Inflation can be one of the risks assumed by the parties to a contract. Notwithstanding, contractual terms may provide for monetary corrections to offset that risk in cases of foreseeable inflation. The same may not hold true, however, for claims based on unjustified enrichment. They may find themselves in the position of innocents because the events that brought about the decline of purchasing power of the currency were unconnected to them. This paper analyses the approach recently favoured in the new Brazilian Civil Code on inflation in enrichment claims. Its focus is on article 884 (headed “enriquecimento sem justa causa”), and it argues that while inflation may be taken into account in certain situations of unjustified enrichment claims (whether falling within the category of “undue payment” or that of “unjustified enrichment”), the application of article 884 should not be automatic in all enrichment claims. An automatic application of the general principle may lead to incongruent outcomes.

II. ON ENRICHMENT LAW IN GENERAL

A. Introductory Remarks

The recently enacted Brazilian Civil Code of 2002, which came into force in 2003, revised the 1916 Brazilian Civil Code (The Beviláqua Code)\(^1\) and added a title to its law of obligations.

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1. The Beviláqua Code largely followed the approach of the French Civil Code, although it was different in many aspects. Consequently, the 1916 Code adhered, as a general rule, to the principle of monetary nominalism. According to this principle, “the nominal identity of money entails an irrefutable presumption of identity of value.” See Ejan Mackaay & Claude Fabien, Civil Law and the Fight Against Inflation—A Legal and Economic Analysis of the Quebec Case, 44 L.A. L. REV. 719, 722 (1984). Nominalism is a practical concept that “allows agreements to be made and judgments to be awarded for fixed sums which do not need to be subsequently revised.” Id. at 722. Therefore, “the certainty or stability of legal relationships, one of the fundamental values of law, is clearly favored.” Id. It is necessary, however, to admit that where depreciation of currency exists this stability is acquired at the price of some injustice. The 2002 Civil Code departed from the principle of nominalism and adopted the principle of valorism. In essence, valorism is an approach under
denominated “Enrichment sine causa” (articles 884-886). Article 884 enacts a general principle against unjustified enrichment in Brazilian law, which was lacking in the previous Code. The provision of article 884 reads as follows:

A person who is enriched at another’s expense without just cause is obliged to restore what was unduly obtained, after making monetary correction (emphasis added).

[Caveat] (parágrafo único): If the object of the enrichment claim consists of a specific thing, the person who received it is under a duty to give it back, and, if the thing no longer subsists, its restitution shall be effected by its value at the time the demand was made.

The reflection that follows explores the meaning and implications of adding the expression “after making monetary correction” to the general principle against unjustified enrichment.

Before dealing specifically with the expression “after making monetary correction,” a quick overview of the provision (article 884) as a whole, and the context in which it appears, is in order. The new Code added three provisions regarding unjustified enrichment, and slightly modified some provisions in the “undue payment” section. The provisions added are: article 884 (general principle against unjustified enrichment), article 885 (general circumstances in which the claim is allowed), and article 886 (subsidiarity rule). The caveat to article 884 also refers to the timing and measure of enrichment where the enrichment consisted of a specific thing and that thing no longer subsists. According to article 884, “if the enrichment consisted in a specific thing, and such thing no longer subsists, restitution shall be effected by its value at the time of the demand.”

Article 884 enacts a general principle against unjustified enrichment. It fills a gap that was identified in the previous Code by several Brazilian writers. Many writers held the opinion that the reasoning by analogy used in the Brazilian jurisprudence to

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6. I will not deal with the few modifications on ‘undue payment’ as they are of no consequence for the purpose of this article, unless the need to make reference to them should arise.
7. See supra Part II.A.
8. Art. 885: “Restitution is due not only when there has been no cause that justifies the enrichment, but also when such a ‘cause’ ceased to exist.”
9. Art. 886: “No enrichment action shall be entertained if the law grants to the aggrieved party other means to redress the loss suffered.”
solve problems that the provisions of the 1916 code on undue payment could not address was an inadequate mechanism. They argued that the procedure was vulnerable to allowing “injustice” to be committed in certain deserving cases. The enactment of article 884 also lends credence to the point made by Pontes de Miranda, a prominent Brazilian writer. He once stressed that in cases of unjustified enrichment the legal system should look not only at what occurs with the creditor, but also at what is happening to the debtor’s assets. This sidesteps the idea that all cases of enrichment are linked to a “payment.” Indeed, enrichment claims go beyond the case of payment of money. This is exactly what the new Code endeavoured to achieve. This paper argues that it has indeed managed to do this.

C. Brief Remarks on Enrichment Liability in General

Before specifically discussing the issue of inflation in unjustified enrichment, a few remarks on liability for unjustified enrichment need to be made. The concept and doctrine of unjust or unjustified enrichment is ancient, but still evolving.

Although there is no single all-encompassing definition for the concept of unjust or unjustified enrichment, the following description is illustrative of what the notion may entail: “enrichment liability is a doctrine stating that if a person receives a benefit (money or other kinds of benefits) through no effort of his own, at the expense of another, the recipient should return what was received to the rightful person, even if such benefit was not obtained illegally.” How do the nuances of this concept and doctrine operate in different legal systems? Some comparative remarks follow below.

11. See Alvim, supra note 10, at 47-50; Pontes de Miranda, supra note 10, at 195.
1. Civil Law Systems

The essence of the civilian approach to unjustified enrichment is to be found in the notion of *sine causa* transfer.\(^ {14} \) *Sine causa* is understood as the “absence of a legal ground”, which implies that either the ground (*causa*) did not exist when the transaction occurred to sustain the validity of the “transfer of the benefit,” or, if it ever existed, it has since ceased to exist (an *actio ob causam finitam*). Civil law countries generally share the “negative approach”\(^ {15} \) as a basis to a claim in unjustified enrichment. “Negative approach” means that it must be proved that there is no *cause* (hence the terminology “*sine causa*” and “unjustified” used in the civilian systems), i.e., a legally recognised ground for the defendant to retain the enrichment “transferred” to him. Put differently, all civilian systems begin from the proposition that all enrichment at another’s expense either has an explanation known to the law (a *causa*) or it does not.\(^ {16} \) Enrichments are ordinarily transferred with the purpose of discharging an obligation or, if there is no such obligation, at least to achieve some other objective

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14. “Transfer” here is used in a very loose sense, to include both active and passive “transfer”. It encompasses not only an actual “transfer of the benefit from one person to another”, but also an acquisition by omission, i.e., the saving of expenses that would have been incurred in the absence of the act complained about. It also includes the increase of liabilities on the part of the plaintiff while the defendant decreases his liabilities due to the fact complained about.

15. The opposite of the “negative approach” is the English common-law “positive approach”—based on the “unjust factor”, which is briefly discussed below.

as, for example, making a gift, the satisfaction of a condition, or
the creation of a new contract.\textsuperscript{17} If these outcomes succeed, then
the enrichment is sufficiently explained, i.e., it is obtained \textit{cum causa}. If the enrichment turns out to have no such explanation, it is
seen as inexplicable; therefore it cannot be retained.\textsuperscript{18} The
recipient is not entitled to it and must give it up. Otherwise, its
retention would be \textit{sine causa}.

The consensus, however, ends here. Civil law countries drift
apart when it comes to defining the measure of the enrichment, and
questions like whether it is the object received itself or its value
that should be returned, or what should be done if the enrichment
ceased to exist, receive different answers. Differences also exist as
to the moment of assessment of the enrichment—whether it is the
moment the object was received or at \textit{litis contestatio}.

At the risk of oversimplification, it can be said that what we
actually find in civil law jurisdictions today is, for convenience
sake, what could broadly be called the “Pothier” and the “Glück-
Windscheid” schools of thought. The issue sometimes goes down
to the structure of enrichment law itself. Those authors who share
the idea that enrichment law should emphasise “value received” as
the “sole” measure of enrichment (thereby denying implicitly or
partially a change of position defence) belong to the Pothier
school. The Glück-Windscheid\textsuperscript{19} school covers all those who

\begin{footnotesize}
\begin{itemize}
\item[17.] Current Canadian law labels all these situations and others as ‘juristic
(4th) 385.
\item[18.] In South African law, Visser poses the following questions: (1) whether
one should only consider the \textit{causa retinendi} or also the \textit{causa dandi}; and (2)
how to categorise the notion of \textit{causa} in the face of the recognition than an
invasion of rights can give rise to enrichment claims? The same problem arises
in cases of contracts discharged by supervening impossibility. \textit{Visser, supra}
\item[19.] Current adherents of the Glück-Windscheid school align with what was
concluded back in time by Christian F. Glück, \textit{Auszufürliche Erläuterung
der Pandekten} ad D 12.6 (§ 835) (Erlangen 1797) and Bernard
Windscheid, \textit{2 Lehrbuch des Pandektenrecht} § 424 (Rütten & Loening
1887) that loss of enrichment applies both to a \textit{genus} and to a \textit{species}, and,
therefore, loss of enrichment can be pleaded in all cases.
\end{itemize}
\end{footnotesize}
defend the idea that enrichment law should concentrate on the value that survives, rather than the value received, save some exceptions.\textsuperscript{20}

Obviously, there are intermediate positions between these two camps. The other school, adopting Pothier’s perspective on the field as a whole, tends to deal extensively with *paiement de l’indue* (undue payment) apart from *negotiorum gestio*. Though there is diversity of thought in the Pothier school as to the place of all other enrichment situations\textsuperscript{21} and the requirement of error, the general trend is that the nature of the enrichment claim does not depend on the type of benefit conferred. The Brazilian law of unjustified enrichment, as structured in the new Code, largely follows the approach of the Pothier school.

2. Common Law Systems

Common law countries are not unitary either in their understanding of unjust enrichment.\textsuperscript{22} While English law generally seeks to determine enrichment liability based on the requirement of “at the expense of the claimant,” there is no specific reference in English law that the claimant must have suffered a loss. However, U.S. law, as presented in the new Restatement (Third) of Restitution and Unjust Enrichment,\textsuperscript{23} seem generally to have a different approach, which to some extent is closer to some civilian systems, whereby the claimant must show an impoverishment. It also requires a connection between loss and gain. On the other hand, where English law would ask what remedy is to be applied,

\textsuperscript{20} Among the limitations generally advocated, one would be that a *mala fide* recipient is always liable for value received, and where the enrichment claim arose as part of an (invalid) reciprocal contract, value received is also the right measure.

\textsuperscript{21} The Brazilian law of enrichment in the new Code has a dual structure: “undue payment” and “enrichment *sine causa*.” The same approach is also followed the Dutch Civil Code (BW), using a similar structure, and many other civil law codes (such as the Italian Civil Code).

\textsuperscript{22} \textit{Restatement (Third) of the Law. Restitution and Unjust Enrichment} at ch. 1 (A.L.I. 2011).

\textsuperscript{23} \textit{Id.}
U.S. systems seek “an absence of a remedy.” This indicates that American law uses unjust enrichment only where no other remedy can be found. It must also be noted that U.S. legal systems are increasingly using the concept of “absence of justification for enrichment liability.”

24 English law, however, continues to employ the approach of inquiring whether the “enrichment was unjust” through the identification of an “unjust factor.” The unjust factors relied on by English courts are generally illegality, mistake, duress, undue influence, total failure of consideration, and miscellaneous policy-based unjust factors such as withdrawal within the *locus poenitentiae*, fiduciary's lack of authority, exploitation of a weakness, and also ignorance and powerlessness. 25 U.S. law also uses the “absence of justification approach” which identifies enrichments with no legitimate explanatory basis, without looking to black-letter legal factors. U.S. law, however, knows the concept of disgorgement, which is not prominent in civil law systems. Nevertheless, in the U.S., the requirement of loss is not as stringent as in other civil law jurisdictions. While requiring some loss, the law of unjust enrichment in the U.S. does not limit the measure of the award to the plaintiff’s loss. Of course, this also means that this difference is of vital importance in practice because the measure of recovery may vary greatly between different jurisdictions.

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III. DESCRIPTIVE CONSIDERATIONS OF ARTICLE 884 OF THE BRAZILIAN CIVIL CODE

A. Enriched at Another’s Expense Sine Causa

The first part of the Brazilian general principle corresponds by and large to the elements recognized in other jurisdictions as well. In order for a claimant to successfully institute an enrichment claim he/she must satisfy three requirements. First, there must be an enrichment; second, such enrichment must have come at another’s expense; and third, there must be an absence of ground for the enrichment (the *sine causa* requirement).

The notion of enrichment generally presupposes a “transfer” of assets or benefits from the patrimony of one party to that of another. “Transfer” here is used in a very loose sense, to include both active and passive transfer. It encompasses not only an actual transfer of the benefit from one person to another, but also an acquisition by omission; that is to say, by the saving of expenses which would have been incurred in the absence of the act that triggered the complaint. It also includes an increase of liabilities on the part of the plaintiff while the defendant decreases his liabilities due to the fact complained about.

There are other ways in which a defendant might be said to have been enriched at another’s expense, but ultimately all of them must lead to the conclusion that the defendant is not entitled to keep that benefit, unless there is a *causa* for its retention. The defendant’s enrichment must be *sine causa*. The concept *sine causa* is understood here as the “absence of a legal ground” which implies that either the ground (*causa*) did not exist at the time of the transaction, or, if it ever existed, it has since ceased to exist (an *actio ob causam finitam*).

It is common knowledge that Brazil is a civil law jurisdiction. Although civil law jurisdictions are not homogenous in their approach to unjustified enrichment, it is nonetheless true that all of them share the negative approach to found a claim in unjustified
enrichment. Brazil is no exception in following that tradition. The enquiry is based on the proposition that all enrichment at another’s expense either has an explanation known to the law (a causa) or it does not. If it has one, then, generally speaking, an enrichment claim is not sustainable. If it has no such explanation, then, the retention of the enrichment would be sine causa. Therefore, it must be disgorged to the person from whom it was acquired without legal ground. The requirement “at the expense of another” does not generally create many problems though there are a few issues to be addressed with respect to the so-called “corresponding impoverishment” approach. Normally, the correlation that the law requires in this regard translates into the fact that any patrimonial advantage acquired by the defendant must result in a corresponding disadvantage suffered by the claimant. This is what elsewhere I have termed as the “mirror-image gain-loss.” An example is when a payment has been made to one who has made a cession, after the cession took place but before the payor is notified of the cession. Another situation is where a debtor has paid a creditor after a guarantor has fulfilled the obligation, but without notifying the debtor. In these cases the value that enters into the patrimony of the enriched party is the same as the value that left the assets of the impoverished party. However, the soundness of the unqualified “gain-loss” requirement is also doubted in Brazilian circles.

If all three requisites described above are satisfied, the enrichment must be given up. The measure of enrichment is generally accepted to be calculated from the time the claim is instituted, or at the time a demand is made, should this be antecedent to the institution of the claim itself. According to the caveat to the general principle, if the enrichment consists of a specific thing, the thing itself shall be restored. If it no longer

exists, the restoration shall be made based on the value of the thing at the time of the demand. How does monetary deterioration due to inflation find its way in assessing the measure of enrichment? The following section will analyze this issue.

B. “After Updating the Monetary Values” (Monetary Correction)

The expression “after updating the monetary values” (feita a atualização de valores monetários) is somewhat confusing in the context in which it is used and its exact meaning has not yet been fully tested in courts. Article 884 was meant to introduce a general enrichment action as a catch-all provision. Yet the provision speaks of “updating or adjusting monetary values” apparently as a fourth requirement of such a general action. The existence of this element seems to indicate that the enrichment claim provided for under this general action embraces money claims alone and any enrichment that does not fit into the monetary mold would not be considered. This observation may be corroborated by the wording of the caveat to the general claim that follows it and which speaks of “if an enrichment consisted in a specific thing.” This expression appears to be there as the opposite of money in the preceding clause. There is a suggestion in the Brazilian legal literature to the effect that such an expression is related to currency devaluation or inflation in the country as a whole, but the context does not seem to fully support such a broad contention. Carlos Gonçalves who advocates this proposition says that:

[T]he determination that restitution of that which was unduly received be done with “adjustment of monetary values” is due to the fact that jurisprudence has for long manifested that the corresponding monetary value constitutes a mere re-establishment of the value of the currency weakened by inflation, and its calculation is to be computed from the moment the “payment” (emphasis added) was made, in order to avoid the enrichment sine causa of the debtor, rendering irrelevant any delay that
might have occurred in the institution of the demand.27

Gonçalves, however, does not cite any authority supporting this contention, save a single reference to one court decision,28 and his discussion of this issue appears in a single paragraph of seven lines. He also does not present the facts of that decision (in which, supposedly, such a proposition might have been made). He does not say how the judge updated the monetary values and the criteria he used to do so. Be that as it may, Claudio Michelon29 has in the meantime also adopted the same view as Carlos Gonçalves, while commenting on article 884 and cross-referencing it to articles 315, 317 and 404 of the Code. Furthermore, the observations of Judge Sena Rebouças in an Appeal Court decision in São Paulo (426.304/1 SP) seem indeed to corroborate Gonçalves and Michelon’s interpretation.30

29. CLÁUDIO MICHELON, DIREITO RESTITUITÓRIO 242 (Revista dos Tribunais 2006). The author says:
   With regard to situation (b) [the situation wherein the value received—which is expressed in money—has suffered a decrease due to currency devaluation. In this case, one must ask whether the obligation to the enriched person also comprises the duty to restore not only the nominal value, but also the real value, i.e. effecting a monetary correction] the provisions of article 884 seem to make an exception to the general rule in the Civil Code. Article 315 of the Civil Code determines that debts (owed) in money must be paid in their nominal value. The automatic monetary correction (not agreed upon) is a consequence that the Code ascribes to the non-performance of a pecuniary obligation, with the aim of preserving the purchasing value correspondent to the nominal value at the time of non-compliance (art. 404). The so-called “nominalism principle” that is opposed to the notion that debts have to be paid by the value of the purchase, admits exceptions, such as the possibility of correction of pecuniary value due to the disequilibrium between performances arising from unforeseen events that have occurred from the time the obligation arose (art. 317). Thus, article 884 makes an exception to the “nominalism principle” because it expressly determines that the value unduly acquired be restored after adjusting the monetary values (author’s translation).
30. The whole issue of currency devaluation leading to the assertion of “adjustment according to inflation” is linked to a period of the economic crisis
Masking the inflationary process (alleging or pretending that it does not exist, institutionalizing the tale of a “strong currency,” but which has always been the same weak currency under a different name), also results in hiding the profits that inflation brings to the State as debtor. The process that once was open is now hidden, but it continues to exist. Inflation is lucrative to the extent that it transfers the assets of the creditors to the debtors. Whenever there is inflation and the fact is ignored for whatever reason (by the law or by the courts’ decisions), there is a transfer of assets. The creditor is impoverished (decreasing his credit in real value), and the debtor is enriched (decreasing his debits), to the extent of the inflation. The profit is exactly what the debtor (in casu, the depositary) has ceased to pay for a while, postponing his debt without any duty of adjusting it (because in effect, inflation continues), which results in an enrichment sine causa, which cannot and must not pass unnoticed by the Judiciary. The institutionalization of a monetary correction (monetary adjustment mechanism) in judicio is an instrument of justice through which judges and courts correct the distortions that, in the face of inflation, legal and contractual norms bring to the rights of the parties.

It is important to correctly establish the concept of monetary correction in judicio (or monetary correction as an instrument of justice), peculiar to the law, although it is of economic origins, or emanating from an economic concept. Monetary correction in judicio is an inherent mechanism to the inflationary process, and for that reason it is only possible to conceive the non-existence of monetary correction in the absence of inflation. It is not only unacceptable, but even contrary to the notion of good faith, to establish a “nominalistic” principle in time of steep inflation. Also, it is objectionable to implement any other idea that could hamper and curb the enforcement of monetary correction in this time of inflation, for, such “fact would impose the transfer of the above mentioned assets to the benefit of the debtors while harming the creditors.” Yet, the worst that comes from this same situation is the effect of transforming the Judicial Power in the process to be an instrument of windfalls, or, in the best of hypotheses, as an

and its main features are embodied in Lei No. 6.899/81, which deals with judicial deposits. This legislative act is also known as “the law of indexation.”
accomplice of what conventionally is called enrichment *sine causa*. The non-implementation of a monetary correction (adjustment) mechanism is a profound shock to the general ethical sentiment, and consequently, the suggestion to return the same genuine deposit unchanged represents the idea of returning nothing at all. It would lead to an absurd result, economically indefensible and judicially an aberration, which cannot be sustained. For this reason, it must be ensured that the rules on the actualization of values of the sums deposited must be the same as those that are used to update judicial calculus (assessments), i.e., the use of IPC (CPI—Consumer Price Index), in periods in which the government plans above-cited have modified the system of “remuneration” of savings, mandating the implementation of indexes that did not reflect the reality of inflation. In these cases, jurisprudence has acquiesced, admitting a real correction. The correction, as a “ceiling,” is aimed at maintaining the currency at its initial level of acquisitive power, and consequently, it is not an “income.” The devolution of an amount deposited must be corrected (adjusted) from the date of the deposit up to the effective date of receiving such deposits.\(^3^1\)

Further support for this position can be drawn from the effect that Law No. 6.899/81 (Indexation Decree) may have in the law as a whole. This law is very complex. It contains relevant aspects for unjustified enrichment which will be discussed here.

It has been held in a case reported at *REsp. 12.591.0/SP*\(^3^2\) that “the systematic monetary adjustment of debits arising from judicial decisions—sanctioned by Law No. 6.899/81—constitutes a real legal principle that is applicable to any kind of legal relationships and in all branches of the law.” The court further said that it is well known that the phenomenon of monetary adjustment “is exclusively aimed at maintaining over time the real value of the debt by means of an alteration in its ‘nominal’ (numeric) expression. It does not generate any increase in the value nor does

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31. Apelação Cível, R Esp 426.304/1 SP. (de Lins, 2a Câmara do extinto Primeiro Tribunal de Alçada Civil de São Paulo, v.u. (june 17.04.91, Relator Juiz Sena Rebouças).
it translate into a punitive sanction. It simply derives from the passage of time under the currency devaluation regime.”

Under the rules sanctioned by such a law in a generally indexed economy, it is said that one must transform any monetary obligations—especially those arising from contractual transactions—into “value-based debts” (dívidas de valores) in which the currency serves as a mere indicator of an amount which changes according to pre-established indexes. It is to be noted that, in regard to the debts arising from judicial decisions, article 1 of Law 6.899/81 clearly encompasses all pending payments arising from unfulfilled obligations, and it mandates monetary adjustments of any pecuniary debt even in the absence of a specific contractual provision. In the case of a liquidated debt, monetary adjustment is to be undertaken from the time the debtor fell in mora, and in all other cases, from the time the judgment was issued. In some instances, i.e., obligations envisaging payment in a foreign currency, the operation itself is usually not invalidated, but the clause that stipulates the foreign currency operation is sometimes nullified, although the sum agreed upon still has to be converted

33. It is debatable to what extent the Brazilian economy can still be considered a generally indexed economy, for, over time, many have argued for its des-indexation to some extent. Therefore, the “adjustment of monetary values” under article 884 of the New Civil Code should be put in perspective with time, if it is indeed correct.

34. GUSTAVO TEPEDINO, TEMAS DE DIREITO CIVIL 110-11 (3d ed., Editora Renovar 2004). There are official indexes for the adjustment of the monetary value of debts emanating from judicial decision. Law No. 6.899/81 itself was the product of the then-highly inflationary Brazilian economy, under the currency known as “Cruzeiro.” For further details on these indexes and related matters, and especially quotations in foreign currencies, see ARNOLDO WALD, OBRIGAÇÕES E CONTRATOS 53 (Editora Saraiva 2006); TEPEDINO, supra, at 111-15.

35. This issue is based on Decree No. 23.501 of 27/11/1933. This decree forbade in all internal contracts (contracts within the territory of Brazil) stipulations and payments in gold (it is to be remembered that in 1933 the world still operated under the gold standard) or in other determined currency, other than local currency. This provision originated from the inflation and the cambial imbalances of the time. These imbalances forced the Provisional Government of 1930 to enact such legislation, following the example of other countries. This legislation is still in force, but it has been modified over time and several exceptions are now included in its provisions.
into the national currency. In these cases the problem that often arises is to determine the value date for the conversion, whether it is the stipulation date or the payment date. In either hypothesis, the possibility of an unjustified enrichment can arise. In these situations, the Federal Supreme Court (Supremo Tribunal Federal (STF)) has decided that the conversion to the national currency is to be considered from the date of the stipulation (i.e., of the judgment), because, according to the court (Rel. Min. Morreira Alves), a conversion based on the date of the payment would result in an unjustified enrichment (inaccurately labelled as enriquecimento ilícito) of the creditor, who would benefit from the adjustment of the foreign currency during the duration of the contract. The adjustment of a contract to be performed in a foreign currency within the territory of Brazil was considered an invalid act by Article 1 of Decree No. 23.501/33. Logically, the appealed decision from the TJRJ (Tribunal de Justiça do Rio de Janeiro) was equally founded on the principle forbidding an enrichment sine causa, but in that decision, the reasoning of the court regarding unjustified enrichment was based on the position of the other party. According to the TJRJ, the conversion of the sum borrowed through a loan contracted in a foreign currency had to be made from the date of payment, in order to avoid an enrichment

36. Foreign readers should take notice that under Brazilian legal terminology the justice (judge) issuing the judgment is commonly referred to as “Relator” (in brief, Rel.) and the judges or justices at the “Supremo Tribunal Federal” (STF) are referred to as “Ministers” (in brief, Min.).

37. It is not infrequent that some writers interchangeably use “enriquecimento ilícito” with “enriquecimento injustificado” (sine causa). Also, the confusion occasionally appears in some court decisions, like the one referred to here.

38. Decree 857/69 replaced Decree 23.501/33. Decree 857/69 envisaged in its art. 1, that “all contracts, titles and other documents as well as all obligations to be performed in Brazil, would be null and without effect, if they stipulated payment in gold or in a foreign currency, or in any other way restricted or rejected the use of Cruzeiro”. But art. 2 of Decree 857/69 made five exceptions. For further references see Judgment in REsp 1.323.219/RJ (Rel. Min. Nancy Andrighi, 3a. Turma). Other related decisions are: REsp 1.212.847/PR, REsp 804.791/MG, AgRg no Ag 1.043.637/MS, REsp 848.424/RJ e REsp 194.629/SP.
sine causa of the debtor in the face of the devaluation of the national currency while the contract was in operation. Thus, however the issue of “monetary adjustment” is seen, it is obvious that it leaves a windfall to one party in the equation, which though it might ultimately be justified (i.e., it is cum causa, because of the application of said Law 6.899/81), it might still be unfair.

Inflation ordinarily is not created by private citizens. It is usually the result of changes in market conditions, and sometimes the effect of government intervention in the economy. How can a provision aimed at all private persons (as well as public bodies) be made dependent upon an action taken by the state (where the state intervenes)? While the above interpretation would be adequate where one party is a public body (e.g., depository institutions such as a bank or the like), stretching that interpretation to cover ordinary private citizens has a penal quality to it, and its universal applicability to any branch of the law is questionable.

In order to capture the possible meaning of the phrase “updating the monetary values,” one must analyse the provision as a whole. It says that “whoever has been enriched at another’s expense without just cause shall restore what he has unduly acquired, after updating the monetary values.” The provision states a general principle and does not refer exclusively to money claims, although its final part speaks of “monetary values.” It refers to any enrichment acquired sine causa, be it a monetary benefit or any kind of a benefit whereby the recipient enriches himself at another’s expense. The caveat (parágrafo único) that follows the provision also indicates that if “updating monetary values” were to refer to currency inflation, it would be incongruent with an enrichment consisting in a specific thing—for which the calculation of the value of the enrichment, if the thing has been lost or no longer exists, is made at the time when the demand is made (litis contestatio), and not the moment when the thing was acquired by the defendant. This assertion—that the enrichment generally is to be considered from the time of litis contestatio—is well
entrenched in Brazilian law, because, as Pontes de Miranda once said: “what is given in the case of unjustified enrichment is not the value of the thing at the time the enrichment occurred, but the value of the defendant’s enrichment as it enriches him at the time the action is brought.” The same author elaborated on this view by adding the following example in respect of a specific thing:

If the thing had remained in the hands of the plaintiff its value would now be ‘a’, but because it remained in the hands of the defendant, its value is now ‘a+x’, then the value to be restored to the claimant is ‘a+x’, save for the cases that fall under article 966 of the Civil Code of 1916.

Article 966, which constitutes an exception in Pontes de Miranda’s analysis, provided as follows: “The provisions of articles 510-519 shall apply to the fruits, accessories, improvements and deteriorations of the thing given in undue payment.” These provisions have not changed that much under the new Code. Rodrigues Filho Eulámpio exemplifies the application of the then article 966 by referring to a São Paulo court decision in which it appears that a disputed salary was fixed in a decision by a lower court. On appeal, the Court of Appeals reduced the quantum to a lower sum, and of course ordered the immediate restitution of the excess. The losing party tried to launch an appeal for a monetary correction of the quantity returned, but the court held the appeal to be inadmissible.

39. PONTES DE MIRANDA, supra note 12, at 176.
40. Id. at 177.
41. Article 966, BRAZILIAN CIVIL CODE of 1916.
42. The new Civil Code, in art. 878, provides the following: “The provisions of this Code dealing with good faith or bad faith possession also apply, as the case may be, to fruits, accessories, improvements and deteriorations of the thing given in undue payment” (Aos frutos, acessões, benfeitorias e deteriorações sobrevindas à coisa dada em pagamento indevido, aplicase o disposto neste Código sobre o possuidor de boa-fé ou de má-fé, conforme o caso).
44. The decision is reported and commented upon at TJSP, RT 613/96.
The example given by Pontes de Miranda does not detract from the general proposition that in an enrichment claim, the measure of the enrichment is calculated from the time of the institution of the action, save some exceptions. In this example he is dealing with an existing thing which is still held by the defendant, and while remaining with the defendant, its value has changed from $x$ to $y$. Because what ought to be restored is the thing itself, the proposition does not create any problem. However, if what ought to be restored is not the thing itself, but its value, and the holder had notice at the time that the thing might have been lost, then the measure can indeed be $(a+x)$, for in such a case the defendant will be precluded from denying the claim because he had knowledge that the thing belonged to another. Therefore, in some circumstances of unjustified enrichment liability, the fungible or non-fungible character of the thing might be relevant.

In any event, the words “after updating the monetary values” added to the general principle seem to reflect the old notion of enrichment liability adopted in the 1916 Civil Code, which only considered “undue payment” and made the whole field look as if it were dependent upon a payment, as earlier stated.⁴⁵ Indeed, that seems to be the message that those words are conveying; that is to say, the general principle of enrichment *sine causa* is seen as though it could only emanate from a performance through payment of money. If that is the meaning ascribed to the general principle, then, if it is not a limited vision of the field as a whole, it might be an oversight of the drafting team. The latter is probably an accurate explanation, because no one today adopts the restrictive view that makes up the first possibility of interpretation. The Italian provision (article 2041 of the *Codice Civile*) that inspired the Brazilian drafters does not mention any sort of balancing of monetary values. The provision there reads:

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⁴⁵. *Supra* Part II.B.
General cause of action for unjustified enrichment. A person who has enriched himself without cause at the expense of another shall, to the extent of the enrichment, indemnify the other for his correlative financial loss. If the enrichment consists of a special thing, the person who received it is bound to return it in kind if it is still in existence at the time of the demand.

In this author's opinion it would have been better not to attach the words “updating monetary values” to the general enrichment principle, but to have inserted a separate clause dealing with the issue. Each case could have been dealt with according to its merits, but with the benefit of having a clause in the Code authorizing such mechanism, thus avoiding the danger of excessive exercise of discretionary powers by the courts.

A further problem that can arise from the fact that those words are attached to the general enrichment principle becomes evident from the fact that the structure adopted for the unjustified enrichment law in the Civil Code clearly separates “undue payment” (the condictio-claim) from the “general enrichment claim” (the versio-claim). Under such a scheme, where a condictio-claim (undue payment) applies, the versio-claim (the general principle) does not. If that is not the case, why were they separated, and why do the undue payment clauses precede the general enrichment clauses? When one looks at the practical application of “adjustment of monetary values”, although this phrase is used in the general enrichment clause, adjustments are applied to scenarios that fall under the concept of “undue payment,” and even beyond. The above-cited quotation in REsp. 12.591.0/SP illustrates this fact. For this reason, it would have

46. Note that similar to Brazilian art. 884 of the Civil Code of 2002, Italian art. 2041 says “senza giusta causa” (“without a just cause”).

47. This Italian general principle is then followed by the subsidiarity rule in art. 2042 which provides: “Subsidiary character of action: An action for unjustified enrichment cannot be instituted if the injured person can exercise another action to obtain compensation for the injury suffered.”

been better if the general principle would have been placed earlier in the structure of the Code, rather than after the heading on “undue payment.”

IV. CHANGE OF POSITION (LOSS OF ENRICHMENT) DEFENCE AND INFLATION

Can change of position (loss of enrichment) be a defence in circumstances of monetary inflation under Brazilian enrichment law? Prima facie, Brazilian law does not directly recognise change of position (loss of enrichment) as a defence to unjustified enrichment claims, save perhaps an application by analogy of article 238 of the new Civil Code, which deals with impossibility of performance in cases of obligations to give a certa res (a specific thing). Article 238 reads as follows: “If the obligation is to restore a certain thing, and this thing, without the debtor’s fault, is lost before the transfer (traditio), the creditor shall suffer the loss, and the obligation will be terminated, save his rights up to the date of the loss.” This provision does not appear in the law of unjustified enrichment. I have discussed elsewhere that, because the caveat to article 884 of the new Civil Code already provides a solution where the thing has been lost (i.e., “it must be restored by its value”), article 238 does not seem to apply to claims arising under article 884 because, if it were otherwise, the mechanism provided for in article 884 would be rendered redundant. There are, however, subtle manifestations of a change of position defence in the formulation of some provisions of the Code. The issue of monetary adjustment in unjustified enrichment law may indeed constitute another subtle manifestation of the need of a change-of-
position (loss of enrichment) defence. This proposition will be discussed below.\textsuperscript{52} For the time being, however, it is enough to say that in loss of enrichment situations, the defendant is saying: “I do not have the enrichment I once had anymore.” In contrast, in situations of monetary correction, the plaintiff, by asking for the monetary value to be adjusted, or by having it done by the court \textit{mero motu}, is really saying that “the defendant has, in fact, more than he seems to have.” If the defendant indeed has more than he seems to have, on what ground is the plaintiff entitled to that “extra amount”?

V. \textsc{Subtle Messages Emanating From the Brazilian Formulation of Enrichment Liability}

\textit{A. General Remarks}

No one doubts today that a general principle is a welcome development. By sanctioning a general principle, the Brazilian legal system has made it easier for the claim to be raised without undue complications. The formulation followed, however, seems problematic. Adding the expression “after making monetary correction” impacts not only the measure of recovery, but also the timing of its assessment and the interlinked issue of interest in money. To what extent is an unjustified enrichment claim amenable to adjustment? Does the new provision sanction a dual interest regime in enrichment claims (if interest is at all claimable), or does it sanction only one regime? These issues are addressed below.\textsuperscript{53}

\textit{B. What Does the Brazilian Approach and Experience Tell Us?}

The general manifestation of the unjustified enrichment doctrine under current Brazilian law is, to some extent, similar or analogous to many other civil law jurisdictions, especially those

\textsuperscript{52} \textit{See infra} Part V.B.
\textsuperscript{53} \textit{See infra} Part V.C.
following the “Pothier School,” varying only in some nuances. However, there are at least two important aspects in which Brazilian law is very peculiar and such aspects relay noteworthy messages to other jurisdictions. The first message that can be extracted from the Brazilian formulation of the unjustified enrichment doctrine is that in whatever way a legal system tries to ward off loss of enrichment as an objective defence in its enrichment law, the system will still need to address the issue. If it cannot do so directly, it will do so by analogy. If a system gives way to a general enrichment action, it is bound to establish not only mechanisms to protect vulnerable receivers, but also to specify to what extent its enrichment law will delimit the right of recovery in “borderline” cases. Notwithstanding, omitting a general enrichment defence and relying on analogy is problematic. That is because the approach may lead to the conception of an enrichment doctrine which is too restrictive and leaves aside many deserving cases in the attempt to protect the integrity of the principle as enshrined in the code.

The need for a change of position defence becomes even stronger if that system also places emphasis on the concept of good faith throughout its private law. That is exactly what happens under current Brazilian enrichment law, because the notion of good faith permeates the civil code; hence, the subtle manifestations of loss of enrichment defence we observe in the Brazilian enrichment law.

The second important message emanating from Brazilian enrichment law is the need to establish the real place and the consequences of inflation within enrichment liability. Generally, in their private law, most legal systems adhere to the “nominal value principle,” and this principle, prima facie, constitutes an obstacle to adapt, say, a contract, on the basis of regular inflation, unless the parties have agreed to do so. While, on the one hand, the creditor normally ought to bear the risk of depreciation of the currency, an
appreciation of the currency seems to favour the debtor.\textsuperscript{54} The situation, however, might be different if inflation is no longer ordinary in so far as contract law in general is concerned. Here we encounter two trends of thought (in some legal systems), one adhering strictly to the “nominal value principle,” while the other advocates adjustment rules. Different reasons are advanced to sustain each contention. It ought to be remembered that, according to the nominalist theory, the extent of monetary obligations is independent of the functional value of money, especially its purchasing power. Equally important is the fact that nominalism favors stability of transactions and offers courts a cushion for expediency. It is impossible to account for every fluctuation in the purchasing power of money. Another difficulty in adopting full-fledged valorism and abandoning nominalism is the possible question as to whether a change in the purchasing power of money

\textsuperscript{54} See, e.g., \textsc{Principles of European Contract Law}, art. 6:111. To the same effect is article 6:258 of \textit{Burgerleijk Wetboek} (the new Dutch Civil Code) [hereinafter BW], and, to some extent, article 6:260 BW. In Dutch legal doctrine, Hartkamp, for instance, remarks that in reverse cases regarding the influence of appreciation of immovable property on marriage settlements, the Dutch Supreme Court disregarded the nominal value principle on the basis of unforeseen circumstances. \textsc{Arthur S. Hartkamp, Asser’s Handleiding tot de Beroefening van het Nederlands Burgerlijk Recht, Verbinstenissenrecht, Algemene Leer der Overeenkomsten n. 338} (2005), cited in Mirella Peletier, \textit{Common Core of European Private Law – Change of Circumstances – Dutch Report} (Research Offices, Supreme Court of The Netherlands), available at \url{http://www.unexpected-circumstances.org/Dutch%20report%20nov.%2006.doc} (last visited September 28, 2013). In other words, the court adjusted the value, taking into account appreciation or depreciation of the currency. Hartkamp refers here to cases reported in HR 10 January 1992, \textit{NJ} 1992, 651; HR 15 September 1995, \textit{NJ} 1996, 616; HR 12 June 1987, \textit{NJ} 1988, 150. For a detailed discussion of the issue in Québec, see Mackaay & Fabien, supra note 1. Other informative sources in a historical perspective may be the following: John P. Dawson & Frank E. Cooper, \textit{The Effect of Inflation on Private Contracts: United States, 1861-1879, 33 Mich. L. Rev. 852 (1935)}; John P. Dawson, \textit{The Effect of Inflation on Private Contracts: Germany, 1914-1924, 33 Mich. L. Rev. 171 (1934)}; \textsc{Proctor, supra} note 1 (who discusses, among other aspects, the impact of the decision in \textit{Sempra Metals} on the right to interest and the nominalism principle); \textsc{Hirschi Berg, supra} note 1; John Swan, \textit{Damages, Specific Performance, Inflation and Interest, 10 Real Property Report 267} (1980) (Can.) and Duncan Wallace, \textit{Inflation and Assessment of Construction Cost Damages, 98 L.Q.R. 406 (1982) (Can.).}
not originating from credit expansion or contraction should be taken into account.\textsuperscript{55} Thus, those adhering to the general application of the nominal principle usually contend that it would be contrary to the “criterion” of reasonableness and equity if, for example, the judge were to adapt a contract in random occurrences (i.e., in the case of one plaintiff), even though many other people in society will equally be affected by the same “exceptional inflation.” However, where regular inflation affects a long-term contract, there is a tendency to consider exceptional cases and allow some judicial intervention to adjust the contract. The underlying idea for such adjustment is that it would be unreasonable if a disproportionately inflationary advantage simply fell into the lap of one of the contracting parties. To avoid that “unjust” outcome, some theorists think that the “disturbed contractual equilibrium should always be restored.”\textsuperscript{56} These considerations, however, fall mostly within contract law, though their ambit can stretch beyond that field.

What is the position under unjustified enrichment law, in which the parties to the claim may not necessarily be linked by an underlying contract denoting voluntary assumption of risks? Can monetary inflation qualify as a form of change-of-position/circumstances? If so, how would it operate? Are there any difficulties in proving this potential aspect of the defence?

The appendage of “monetary correction” to the general principle against enrichment \textit{sine causa} in the new Brazilian Civil Code\textsuperscript{57} indicates that the issue transcends the ambit of contractual obligations. Such an appendage to the general principle was unfortunate, as mentioned earlier, because this appendage throws

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\textsuperscript{56} A few examples of case law leaning in this direction can be found in Dutch law: HR 12 June 1987, \textit{NJ} 1988, 150; HR 30 January 1991, \textit{NJ} 1992, 191; HR 15 September 1995, \textit{NJ} 1996, 616 (all Dutch cases cited here are taken from Peletier, \textit{supra} note 54, at 6).

\textsuperscript{57} Brazilian Civil Code, art. 884 (2002).
the general principle into confusion. But the disapproval of the appendage does not necessarily mean that the issue should not feature within the doctrine of unjustified enrichment. Mention was made earlier that the drafters of the Civil Code should have done so in a separate provision. What is the message that can be extracted from inflation in the context of unjustified enrichment?

The general process of inflation can give rise to a multitude of different problems. For the purpose of this paper the most salient problems would be revalorization and discharge. Once again, it can be seen that there is a need to know how the enrichment came about. While revalorization (of a currency), in this context, presupposes a debt that must be paid or repaid in certain monetary units and, thereby, the possibility of adjustment, discharge of the obligation indicates that the claim arises from a contract and there are underlying cost variations. When inflation is seen from the perspective of discharging a contractual obligation, the concept presupposes a voluntary agreement between the parties, and inflation might be seen as one of the risks voluntarily assumed. When looking at things from the perspective of revalorization, the concept does not necessarily presuppose a contract between the parties. It may also entail a unilateral act.

The issue straddles several areas: third party claims, risk assumption, and termination or modification of contracts, among others. Apparently, in cases of devaluation there is ordinarily no problem of impossibility to restore the benefit received, nor is there any issue of bad faith. The receiver is ready to restore the benefit received, the only problem being that the “purchasing power” of the money has diminished. Restoring the “money” in the same units as received corresponds numerically with restoring the


“value received,” but value-wise, it actually corresponds to the “value remaining.” On what basis, then, can the plaintiff claim the restoration of the “actual value” (adjusted value), without leaving the defendant worse off, as a result of having received an undue/unjust gain? In these cases, why should the loss be shifted from an innocent and “mistaken or unmistaken” party to an innocent party who neither made a mistake nor brought about the event that led to the decline of the value?

The message that can be distilled from the Brazilian enrichment law (the new enrichment *sine causa* under article 884 of the new Civil Code, as discussed above) is that a situation of hyper-inflation can result in involuntary enrichment of one party at the expense of another. The issue, however, is complicated when addressed within the unjustified enrichment doctrine, because the act enriching one party and correspondingly impoverishing the other is ordinarily not done by the parties themselves, but by a third party, generally the government. From the perspective of the parties, such an occurrence (currency devaluation) is more akin to a supervening event outside their control. Both parties would seemingly be innocent. Can a rule favouring the defendant apply to such cases where both parties are innocent? What would be the implications of such an application?

Thus far, it is *prima facie* a moot point in South African law, as well as in English and American law, whether monetary

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60. Inflation is normally the product of government action, but, in the long run, events such as market turmoil in times of global recession, conflicts, or wars, may also lead to inflation. See the example of Germany, which borrowed heavily for the war effort during World War I, and the resulting effect after the Versailles Treaty, when the country had to pay reparations of billions of dollars in gold, leading to the uselessness of the *Reichtmark* and the introduction of the *Rentenmark* in 1924. See generally [GERMAN HYPERINFLATION 1922/23: A LAW AND ECONOMICS APPROACH](https://www.eul-verlag.de/shop/german-hyperinflation) (Wolfgang Chr. Fischer ed., Eul Verlag 2010) [hereinafter GERMAN HYPERINFLATION].

61. In English law, note, however, that a dictum by Lord Roskill in [National Carriers Ltd. v. Panalpina (Northern) Ltd.](https://www.bAILII.org) [1981] 1 AC 675, 712 refers to inflation as one of the “circumstances in which the doctrine of frustration has been invoked, sometimes with success, sometimes without.” So, it is not very
inflation can qualify as relevant for the “change of position” defense to unjustified enrichment claims. Such a situation would be more common where there are steep currency fluctuations or hyperinflation, or total collapse of the currency, as happened in Germany in 1923 and Hungary in 1948, or a near total collapse of the currency, such as the Brazilian “triple digit inflation” of the 1980s-1990s, or the recent hyper-inflation in Zimbabwe. In assessing whether inflation should be considered as a potential basis for change-of-position, a distinction must be made between different degrees of inflation: slight inflation, severe or acute inflation, and a total collapse of the currency. Although the last two might be considered speculative in some economies, we have had a recent example, that of Zimbabwe, where it could not be said that inflation was acute or severe, but rather that it resulted in total

clear whether inflation falls within the former or within the latter group of circumstances.

62. Note, equally, some nuanced references to discharge of contract for inflation in ARTHUR L. CORBIN, CORBIN ON CONTRACTS 488 (§1360) (1962). He says that the “difference in value between the gold and paper currencies could have been taken into account in action for damages” thereby suggesting the possibility of discharging the contract (references to gold and paper currencies are made in relation to the “gold standard” which used to regulate international exchange, and which is more commonly known as the “Breton Wood system”). For related issues on the Gold Standard and possible unjust enrichment in currency devaluation in the U.S.A., see Perry v. United States, 294 U.S. 330 (1935).

63. See generally GERMAN HYPERINFLATION, supra note 60.


65. A basic look at the data in Brazilian statistics in the 1980-1990s offers briefly the following picture: In the second half of the 1980s, and the beginning of 1990s, yearly inflation in Brazil reached the four digit level, with month-to-month inflation reaching 40%. Inflation, however, declined from a peak of 6,821.3% in the early 1990s to 375% within twelve months, on the back of seemingly more coherent macroeconomic policies anchored on a social contract. The launch of the Plano Real in July 1994 saw inflation, which had risen to 4,922%, decline to 33% within a year. In the second half of the 1990s, average inflation remained below 10%. It reached its lowest point in December 1998 at 1.65%. Today Brazil boasts, on average, of inflation below 6%. In September 2013, the recorded inflation rate was at 5.86% (See generally the 2013 edition of the IBGE (Brazilian Institute of Geography and Statistics), IBGE2013, BRASIL EM NUMEROS, BRAZIL IN FIGURES (IBGE 2003), also available at: http://biblioteca.ibge.gov.br/visualizacao/periodicos/2/bn_2013_v21.pdf.
collapse of the currency. It is not unimaginable that the judiciary might be called upon to decide enrichment cases in these circumstances. Where the claim arises from a “functioning” contract, the contract itself might provide for payment to be “indexed.” However, this only works if the inflation is somewhat predictable and manageable, and the remedy is contractual. Where the inflation is so extreme as to amount to a total collapse of currency, an indexation based on criteria pre-established by the parties may not work. The contract is simply “defunct”; performance amounts to near-impossibility, and thus, discharge might be the logical outcome.

It is more likely that in cases of extreme inflation, or total collapse of the currency, such effects on contracts and other private law matters will be dealt with by legislation and, therefore, the questions raised here would not need to be resolved by the courts based on default principles. But should such legislation be wanting, there would still be room for judicial pronouncement and, therefore, the change-of-position defence would be available in these circumstances.

C. “Updating Monetary Value” and Interest on Money

A corollary to “valorism” in the unjustified enrichment doctrine is another important question: that of interest on money. This question, though only incidental for the purpose of this paper, is of great significance because it may influence the whole conception of unjustified enrichment law. Is interest on money recoverable under current Brazilian enrichment doctrine? If it is not, that is the end of the matter. However, if it is, then the following ramifications arise: If interest is due on a sum of money that must be returned, it is obvious that such interest is more likely

66. GUENTER H. TREITEL, FRUSTRATION AND FORCE MAJEURE 277 (Sweet & Maxwell 1994). See also supra note 65.
to be regarded as a fruit\textsuperscript{67} of the principal sum. That being the case, it must also be assumed that such interest is to be earned from the time of receipt of the money,\textsuperscript{68} or at least from the time of \textit{litis contestatio}. Then, for example, if it is assumed that in an undue payment claim the restoration of interest is no less due than the restoration of the principal, the further question that needs to be asked is whether there are two different regimes for the recoverability of interest in enrichment claims under Brazilian law. Or, to frame the question another way, one would ask the following subsequent questions: (i) Is interest recoverable on a claim based on undue payment—the \textit{condictio} version—or not? If it is, from what sum? (ii) Is interest recoverable in a claim based on enrichment \textit{sine causa} or not? And, (iii) if the answer to (ii) is in the affirmative, what are the consequences that the recoverability of interest will have on calculating the measure of enrichment under article 884?

If one takes into consideration the fact that in many cases falling within the ambit of undue payment (the \textit{condictio}-version of the enrichment claim) there is no special agreement between the parties regarding recovery, one should also assume that interest might not be recoverable. That is so because the sum owed on the basis of undue payment is not a commercial loan; even if it were considered a loan (\textit{mutuum}) by way of analogy, the provisions dealing with “\textit{o mútuo}” (articles 586-592) do not attract interest, except where the \textit{mutuum} falls within the provisions of article 591,\textsuperscript{69} which provides that a “\textit{mútuo}” given for economic purposes attracts interest.\textsuperscript{70}

\textsuperscript{67.} For example, art. 878 of the Brazilian Civil Code may implicitly be said to consider interest a fruit, for the article provides that: “The provisions of this Code dealing with good faith or bad faith possession, as the case may be, also apply to fruits, accessories, improvements and deteriorations of the thing given in undue payment.”

\textsuperscript{68.} Other provisions of the Code making reference to interest are art. 591 and arts. 297, 389, 395, 404, 405, 406, 407, 552, 677, 833, etc.

\textsuperscript{69.} Article 591 reads: “If a loan (\textit{mutuum}) is given for economic purposes, interest is presumed to accrue, and such interest may not exceed the rate referred
In taking this view (of the non-recoverability of interest on undue payment), the assumption being made in this paper is that if the party received the money in good faith, believing it was his own, then he must also be free to deal with his money as he deems fit. Were it otherwise, there would be a danger that the defendant, who has not been earning interest on the money that he received, will be bound to make restoration beyond the extent of his enrichment. This would be equivalent to imposing additional liability on people without their knowledge. Put differently, if B had no agreement with A for the receipt of A’s money, B cannot be bound to pay interest to A on that sum, because B is not A’s investor. A probable exception to this, if the receiver is in good faith, would be if the money were directly deposited in an interest bearing account.

Meanwhile, if the word “fruits” in article 878 of the Code is understood to also encompass “interest,” as it would appear to do (unless “thing given in undue payment” excludes money, which does not make sense), then the defendant equated to a mala fide possessor can be liable to the extent he was enriched by the “fruits,” even if they might have been consumed. Should, however, a defendant under a claim falling within such provision be equated to (or assumed to be) a bona fide possessor, he should not be liable, even to the extent that he was enriched by the “fruits” he to in article 406 (of the Code) on annual capitalization, otherwise it will be reduced” (Destinando-se o mútuo a fins econômicos, presumem-se devidos juros, os quais, sob pena de redução, não poderá exceder a taxa a que se refere o art. 406, permitida a capitalização anual). BRAZILIAN CIVIL CODE, art. 591 (2002).

70. The Brazilian Civil Code drafters manifest here an authentic fidelity to Roman law, because interest was not payable on mutuum in Roman law as it was considered a gratuitous loan, normally concluded between friends. In fact, the drafters clearly distinguish two types of loans: the comodato (arts. 579-585) and mútuo (arts. 586-592). Comodato, according to the Code (art. 579), is the loan of non-fungible objects, while mútuo is conceived as the loan of fungible objects (art. 586). The borrower in the case of mútuo “has the obligation to restore to the lender a thing of the same nature, quality and quantity as received. BRAZILIAN CIVIL CODE, art. 586 (2002).
gathered and consumed in good faith. I reiterate that the provision clearly says that “[t]he provisions of this Code dealing with good faith or bad faith possession, as the case may be, also apply to fruits, accessories, improvements and deteriorations of the thing given in undue payment.” It is clear that the Brazilian Legislature, by framing article 878 (in so far as the consequences of the accrued fruits to “a thing received in undue payment” are concerned) to analogously differentiate a defendant who is a *bona fide* possessor from a *mala fide* possessor, directly indicates that the maxim “*bona fide* possessor facit fructose perceptos et consumptos suos” \(^71\) would indeed apply to such cases. This, in turn, implies by inference that a defendant who is equated to a *bona fide* possessor under article 878 of the Brazilian Civil Code has the defence of change of position (or loss of enrichment) in regard to the fruits. That would also imply that the defence which is applicable to the “fruits” is also applicable to the “principal”. For the time being, the question of interest in enrichment law as a whole will be addressed.

What about a case falling within the *actio de in rem versio* aspect of the claim? Does it attract interest and, if so, why? The circumstances giving rise to such a claim may vary from case to case, and there appears to be no unanimity about the contours of the claim. Nonetheless, the provisions of the Brazilian Civil Code (articles 884-886) are silent. For this reason, any conclusion that interest is claimable must be drawn either by inference or by cross-referencing to other provisions of the Code. Nonetheless, *prima facie*, interest seems to be claimable in unjustified enrichment law. \(^72\) According to article 404 of the Code, “losses and damages”,

\(^71\) Translated, the maxim means “The *bona fide* possessor makes the fruits gathered and consumed his own.”

\(^72\) For comparative insight, see art. VII-5:104 of the European Union DCFR (Draft Common Frame of Reference). Art. VII-5:105 there reads:

(1) Reversal of the enrichment extends to the fruits and use of the enrichment or, if less, any saving resulting from the fruits or use.
in case of monetary obligations, are to be paid after adjusting their monetary values in accordance with official indexes regularly established. The payment encompasses “interest, expenses and lawyer’s fees, without prejudice to contractual penalties.” According to article 405 of the Code “interest on mora accrues from the ‘initial citation’”\(^73\) (in some cases, it is probably from the moment of first notification). These two provisions, however, cannot be said to apply to enrichment sine causa, because article 404 speaks of “losses and damages.” This clearly indicates it is not applicable to enrichment claims, because an unjustified enrichment claim is about gains obtained at another’s expense without grounds and not “losses or damages” suffered. “Losses and damages” presuppose contractual or delictual (tort, or civil liability) claims. Likewise, article 405 cannot be said to apply because a defendant in an unjustified enrichment claim is not presumed to be in mora for the payment of money until he has notice of his delay. Until then, the defendant must be able to rely on the money that he received as being absolutely his. By inference, however, article 405 casts some light on the issue. If interest on mora runs from the initial citation, it is implied that from the moment the defendant has notice interest starts to accrue. By implication, this can be extended to an enrichment claim. If, under the enrichment sine causa doctrine, the measure of enrichment is calculated from the time of litis contestatio (or litis pendente), that also means that from that moment the defendant has notice of the claim. Any money “retained sine causa” is due from that moment as a debt,

\(^2\) However, if the enriched person obtains the fruits or use in bad faith, reversal of the enrichment extends to the fruits and use even if the saving is less than the value of the fruits or use.

\(^73\) “Initial citation” is used in a wider sense. In some contexts it would appear that “initial citation” is strictly equated with “court judgment”, as “citation” seems to refer to a judge’s pronouncement. However, if being put in mora were to be understood in that sense alone, it would be too restrictive, even contradictory in some cases. A defendant who has been notified that he owes a sum of money is certainly put in mora from that moment if he knows that the money is not his to keep, even if the court decides so only at a future date.
unless the defendant has a recognised defence. It can analogously be said that from the moment of *litis contestation* the defendant is put in *mora*, and therefore interest would start to accrue, and the sum owed from that moment is the base value (the principal sum) for calculating the interest.

Article 884 provides, however, that the amount to be restored is “known” only “after adjusting monetary values.” If the principal sum is not known until “monetary values have been adjusted,” can it really be said that the defendant has been put in *mora* for that unknown value of the debt? Put differently, if monetary adjustment is to be undertaken, from what date does interest start to accrue and based upon what principal sum? Is the “pre-adjusted value” of the principal taken into consideration for calculating the interest, or the “adjusted value”?

In any event, it is worth noting that the idea of a sum held *sine causa* being susceptible to adjustment according to the level of inflation implicitly embodies a nuanced conception of that sum being analogously considered a commercial loan (a *mutuum*). On this assumption, one might say that interest would accrue as of right, unless the parties “agreed” otherwise. If it does not accrue as of right, then it might be dependent on other factors. Policy considerations might be a candidate here.

If the measure of enrichment is considered as the “value received”, and this value is only “known” with certainty when the sum of money has been adjusted according to the rate of inflation over a given period, there is no “exact amount” to calculate interest on until the adjusted sum is determined. In such cases incongruence can arise between the sum claimed (the amount by which the defendant has been enriched) as “principal value”, and the sum that will serve as a basis for the calculation of interest. For example, if B is enriched *sine causa* at the expense of A for the sum of SR 50,000 on January 29, 2008 and by January 31, 2009

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74. Obviously, if “initial notice” is equated to court judgment, whichever defence the defendant might have had is of no consequence after judgment.
there is a 50% inflation of the currency with the result that the real value of the sum owed ($R 50,000) has now become $R 75,000, by the time judgment is passed, a simple interest of 20% on the principal amount owed from 29 January 2008 to 31 January 2009 would amount to $R 10,000. If, on the other hand, the principal sum for the calculation of interest is now considered $R 75,000, a simple interest of 20% on that sum is $R 15,000, if calculated per annum. However, interest may not be due before the date of the determination of the value (the day the judgment is issued), because there is no principal amount to serve as a basis for the calculation of interest. If the rate of 20% interest is levied on the $R 75,000 now owed, it may not be applicable retrospectively to the date of litis contestatio (the date the claim arises), because no such amount was owed on January 29, 2008. The defendant was never put in mora on that date as owing the sum of $R 75,000. Interest is ordinarily due either ex lege, ex contractu or ex mora. If none of these aspects apply, as a matter of principle, it becomes difficult to levy interest on a sum of money to be paid. One must then find ways to justify the imposition of interest on that sum of money.

In essence, accepting that the “final” proof of the extent of enrichment is only established after “adjusting the monetary values” would be equivalent to saying that any sum to be awarded as interest will be assessed as a “pre-judgment” interest, if it started to accrue from the time of receipt of the money. As a matter of principle, a dilemma emerges. On one hand, it can be said that whenever a defendant receives money and keeps it for a reasonable time, there is a presumption that he is earning ‘fruits’, and therefore he is being enriched sine causa with the plaintiff’s money. On the other hand, it is also uncertain whether the defendant is actually earning any interest, and, therefore, it is uncertain that he is being enriched. Consequently, in the face of uncertainty, to allow relief in any case where actual enrichment has
not been proved is inconsistent with the fundamental principle of
unjustified enrichment.
I. Abstract

Rights are, without a doubt, the most outstanding feature of contemporary legal systems. It can be argued that since the middle of the past century we are immersed in a culture of rights. Neoconstitutionalism is one among other such concepts that has been used to designate and study this phenomenon. The hypothesis we will attempt to address in this paper is that some of the central characters of our culture of rights, here termed as “neoconstitutionalism,” cannot be explained consistently without an explicit reference to natural law.
We will specifically examine the connection between the assertion that there exist natural law principles of justice and the following characteristics of our culture of rights: a) the recognition of rights; b) the reference of state or national legal systems to supranational legal systems; c) constitutions as a result of a network of principles and rules; d) the principle of proportionality; and e) the principle of reasonableness. While the first three characteristics constitute the structure of any neo-constitutional practice, the two latter ones are features of the processes of legal reception and legal allocation of rights in such a legal practice. This paper aims to show that, ultimately, identifying, explaining, and understanding each and all of these five characteristics of contemporary legal culture depends upon the existence of a normative resort that goes beyond the legal culture itself.

II. INTRODUCTION

The recognition of human rights is, without a doubt, the most outstanding feature of contemporary legal systems. It can be argued that since the middle of the past century we are immersed in a culture of rights. Neo-constitutionalism is one among many concepts that has been used to designate and study this phenomenon. The hypothesis we will address in this paper is that some of the central characters of our culture of rights, here referred to as “neo-constitutionalism,” cannot be explained consistently without a reference to natural law.

In order to highlight this general statement, I will address today the conceptual connection between natural law and the following features of neo-constitutional practices: a) the recognition of rights; b) the relationship between state legal systems and supra-state legal systems; c) constitutions resulting from a framework of principles and rules; d) the principle of proportionality; and e) the principle of reasonableness.
The first three features are dimensions to the overall structure of neo-constitutional states, while the two latter are features of the legal determination and judicial enforcement of human rights. This paper aims to show that identifying, explaining, and understanding each and all of these five characteristics of contemporary legal culture depends upon the existence of a normative instance which is beyond the legal culture itself.

III. RIGHTS AND THEIR ACKNOWLEDGEMENT

In an article written thirty years ago, Javier Hervada made some observations that, with the passage of time, have gained interest.¹ Hervada noted that: a) the whole of the International Conventions, Declarations and Treaties on human rights explicitly stated that they “acknowledged” or “recognized” the rights there enumerated, and b) that this explicit “recognition” posed “problems” for the philosophy of law of his time. Hervada was correct in both cases. First, human rights are acknowledged, as is shown in the explicit language used in all legal texts concerning them. This language aims at distinguishing these rights from other kind of rights, whose proximate ground or root is the fact that a competent legal authority has made a decision. Secondly, Hervada maintained that this language of “recognition” posed problems for the philosophy of law, especially for legal positivism which was widely present in Spanish legal philosophy at the moment in which that article was written. If, as positivism asserts, law is fundamentally and exclusively positive law, and if the obligatory nature of positive law is fully based upon its mere existence as a social practice, then there is no room for pre-existing rights. The whole of positive law and therefore of positive rights would be the product of the choice of the person or of the group of persons

¹. Javier Hervada, Problemas que una nota esencial de los derechos humanos plantea a la filosofía del derecho, 9 PERSONA Y DERECHO 243, 256 (1982).
socially empowered with the authority to do so, with no further limit than their imagination.

Therefore, if the positivist approach to the study of law was the only one possible, we would be forced to choose between two alternatives: a) either the assimilation of human rights to positive rights, which is a conceptual contradiction; b) or the assertion that rights are pure fiction and cannot be rationally based. Both ways pose multiple difficulties which cannot be discussed here. Yet, it is worth noticing the existence of an alternative solution, consisting in connecting the concept of human rights with basic human good, and simultaneously preserving the determinative or positive dimension of human rights law (both in the area of legislation as well as in the adjudication process).

IV. THE INTERNATIONAL SCOPE OF THE ACKNOWLEDGEMENT AND PROTECTION OF RIGHTS

In the last thirty years, we have witnessed a process of recognition, promotion, and protection of human rights, both within the boundaries of national states and in the international field. Although these national and international processes are generally converging movements, they sometimes conflict between each other. What should be done when these conflicts emerge? Which of the two should take preeminence? Three answers have been set forth in the history of public international law: for national monism, priority is given to state law; for international monism, on the other hand, priority is given to international law; whereas, with dualism, each system has its own independent criteria for validity or recognition.

2. PEDRO SERNA BERMÚDEZ, POSITIVISMO CONCEPTUAL Y FUNDAMENTACIÓN DE LOS DERECHOS HUMANOS (EUNSA 1990); Pedro Serna Bermúdez, El derecho a la vida en el horizonte cultural europeo de fin de siglo in EL DERECHO A LA VIDA 79 (Carlos I. Massini Correas & Pedro Serna eds., EUNSA 1998).

In the case of Argentina, those who support state monism usually cite two texts from the Constitution itself to support their stance: article 27, which establishes that international agreements should conform to constitutional public law principles, and article 31, which refers to the “Supreme Law of the Nation,” and states its content in the following order: “this Constitution, the laws of the Nation that in its consequence are dictated by Congress, and the treaties with foreign powers.”

Those advocating for the other two perspectives, international monism or dualism, argue on the basis of international law texts. For example, they look at the Vienna Convention on the Law of Treaties, which establishes in article 27 that “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” As Carlos Nino accurately noticed, “the interesting thing about this controversy is that both positions are completely circular, since those who defend the priority of the constitution support their arguments by the constitution itself, and those who defend the precedence of international conventions support their arguments by international conventions.” This shows, the author continues, “that the validity of a specific legal system cannot be founded on rules coming from that same legal system, but should instead be derived from principles which are external to the system. Judges or legislators debating these monist or dualist positions, therefore, cannot flee from extra-legal principles of a moral nature in the wider sense in order to support their positions.”

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7. Id. at 62.
universality of rights. This allows for concluding that neo-
constitutional legal systems do not provide for a “closed system of
justifiable solutions.”  

V. RIGHTS AND IUS-FUNDAMENTAL PRINCIPLES

The constitutionalist and philosopher of law Ronald Dworkin,
towards the end of the 1960s, brought to everyone’s attention the
fact that the United States’ legal system enclosed two categories of
norms: principles and rules. 9 According to Dworkin, the positivist
approach to the study of law had concentrated its analysis on the
rules, without taking into sufficient account the existence of
principles, nor the role they played within constitutional legal
practices. This deficient attention to principles strongly
conditioned, in his opinion, the plausibility of the description of
law proposed by the work of Herbert Hart and his followers. 10

The main argument posed by Dworkin against Hart was that
the rule of recognition, proposed by Hart as criteria for identifying
valid positive law and distinguishing it from other normative
systems, was incapable of detecting principles, whose existence in
a legal system like the North American one is unquestionable. This
is because the existence of principles within legal systems is not
primarily grounded on the fact of their having been positively or
explicitly acknowledged by legal institutions but, instead, on the
fact of having been recognized by these same institutions as
“intrinsic reasonably,” using an expression coined by Joseph
Esser. 11

Avoiding the further and divergent debates raised by this line
of reasoning, especially after the publication of Hart’s most famous

8. Id.
(1967), reprinted in DWORKIN, TAKING RIGHTS SERIOUSLY (Harvard Univ.
11. JOSEF ESSER, PRINCIPIO Y NORMA EN LA ELABORACIÓN
JURISPRUDENCIAL DEL DERECHO PRIVADO 87 (Eduardo Valenti Fiol trans.,
Bosch 1961).
work, *Postscriptum*, the truth is that the acceptance of “intrinsically reasonable” principles only makes sense if these refer to (that is to say, have as reference) goods whose character, as such, does not depend upon the legislator or judge who applies the principles. In other words, the presence of principles with these characteristics can only be explained through references to realities that exist beyond the scope of the positive law which acknowledges them and the constant effort of interpreting them according to the specific case at hand.

VI. THE JUSTIFICATION AND THE SCOPE OF THE PRINCIPLE OF PROPORTIONALITY

The recognition of human rights in constitutions (as fundamental rights or constitutional rights) has gone hand in hand with the spread of the practice known as “judicial review.” The latter is a creation of the United States Supreme Court, which allocates to judges the power to invalidate laws which they deem contrary to constitutional rights. While not denying the existence of important differences with that which different constitutional systems have previously incorporated, it cannot be questioned that judicial review is present in every constitutional practice.

Now then, how is this judicial review put into practice? In other words: how do judges determine that the statutory regulation of a fundamental or constitutional right violates what has been established as lawful in the constitution? Constitutional Law practice has responded to these questions with the principle of

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proportionality. According to this principle, a statutory norm is considered constitutional if it suits three sub-principles: a) it should be adequate and therefore capable of producing its own point or end (sub-principle of adaptation); b) it should be necessary and, therefore, the least restrictive of the equally efficient ones (sub-principle of necessity); c) lastly, it should be proportional *stricto sensu*, that is to say, it should express a proportionate deliberation concerning the benefits and prejudices which might result from the enforcement of the norm.

The principle of proportionality refers without a doubt to evaluative instances that are situated beyond the domain of both the text of the norms under constitutional control, and the text of the constitution itself. This reference to a meta-positive instance is shown, at least, in the following two items: first, in the grounds for justifying the principle itself. Why is proportionality or reasonableness a constitutional principle? How are we to justify this constitutional requirement? Except at the cost of circularity, this question cannot be answered from the perspective of the constitution in question. Second, it becomes apparent in each of the sub-principles that frame the principle, since all of them refer to ends—although from perspectives that do not entirely coincide—whose determination cannot be reduced to an internal analysis of the norms.

VII. THE JUSTIFICATION AND CONTENT OF THE PRINCIPLE OF REASONABLENESS

A second feature of the dynamics of the “culture of rights” in which we are immersed is the principle of reasonableness. In the 19th century, the dominant trend concerning the description of legal interpretation was “legal formalism.” This, in a very short

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15. ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 69, 414 (Julian Rivers trans., Oxford Univ. Press 2002); see also CARLOS BERNAL PULIDO, EL PRINCIPIO DE PROPORCIONALIDAD Y LOS DERECHOS FUNDAMENTALES (Centro de Estudios Políticos y Constitucionales 2003).
synthesis, could be described as a theory which attempts to reduce the adjudication of law to deductive logic. In the 20th century, however, it was soon perceived that in order to establish the facts in each of the cases a judge must resolve and determine the applicable norms, requiring a decision to be made between various alternatives that are, *prima facie*, formally correct.16

In effect, legal operators are compelled, on the one hand, to reconstruct the facts in a case, and this implies choosing: a) the legally relevant facts within a framework of facts, b) the legal means of evidence, and c) the most convincing evidence. On the other hand, judges and lawyers are faced with the need to: a) choose the applicable norms, b) choose the method or methods of interpretation with which they will apply the norms, and c) choose the results towards which these methods of interpretation lead.17

These factual and normative choices raise the obvious question about the right criteria according to which they should be decided. While legal theories in the past century oscillated between, on the one hand, the practical conflation between discretion and unreasonableness,18 and, on the other hand, the practical negation of discretion or reasonableness,19 comparative constitutional analysis has come gradually to answer this question with the principle of reasonableness, as a counterpart to arbitrariness, expressly proscribed by some constitutions, as is the case, for example, of article 9.3 of the Spanish Constitution.20

17. In effect, “the notion of ‘reasonable’ is also used . . . at every stage of judicial reasoning: the determination of the facts, the qualification and interpretation of the applicable laws, the use of various rhetorical and logical formulas.” Oliver Corten, *The Notion of ‘Reasonable’ in International Law: Legal Discourse, Reason and Contradictions*, 48 INT’L & COMP. L. Q. 613 (1999).
20. Article 9.3 of the Spanish Constitution states: The Constitution guarantees the principle of legality, the hierarchy of legal provisions, the publicity of legal statutes, the non-retroactivity of punitive provisions that are not favorable to or restrictive of individual
In accordance with this principle, each and all of the decisions taken by a legal operator must demonstrably surpass the test of “reasonableness.” This means that a legal operator is obliged to give reasons and, particularly, to justify the reason for choosing a certain path from all the alternatives he is faced with. A decision without motivation is considered unreasonable, arbitrary, and thus a violation of the due process of law, or in the terms used in European Constitutional Law, a violation of effective judicial tutelage.21

The justification and content of the principle of reasonableness raises questions analogous to those posed by the principles of proportionality: why reasonableness, and not the lack of reasonableness? How does one justify the use of this principle? Furthermore, which are the reasons that justify the establishment of facts and the determination of norms, and what are the grounds for these reasons? They cannot originate in the norms themselves because, once again, this would be circular. In other words, because the problem that must be dealt with consists of determining that which is not already determined by the norms themselves, the solution cannot lie in them but in something outside them, although connected with them.

VIII. THE SEARCH FOR A SOLUTION: RIGHTS TAKEN SERIOUSLY

A few years ago, Robert Alexy explained that a normative system is not a legal system unless it formulates a “claim of correctness.”22 This occurs when governmental authorities act with

22. See ROBERT ALEXY, BEGRIFF UND GELTUNG DES RECHTS (The Concept and Validity of the Law) (Karl Alber 2005); and Robert Alexy, On the Concept
the assumption that what they are doing is correct, regardless of whether it is actually entirely so. According to Alexy, when this assumption is not formulated, and when those who govern only take a personal or a class advantage with their power, practice of the law does not amount to a legal system.

Yet it seems evident that not just any content allocated to that which is assumed as correct will attain legality for a normative system. For this reason, Alexy complements his thesis on correctness with a reference to *ius*-fundamental principles. The correctness of the assumption of a government’s actions is basically expressed through its reference to fundamental rights.

What does this mean? When does a State recognize, identify, protect, and promote rights? When does it put forth its “politics of rights” as imposed by its constitution? Or, in other words, how can human rights be consistently conceptualized, indexed, justified, and interpreted? In the preceding account, each of the problems being dealt with has directly involved these questions. The answer to such questions necessarily requires appealing to instances beyond the legal texts where rights are recognized, as I have attempted to demonstrate here in general terms.

It could be thought, together with Norberto Bobbio, that the suggested element is a consensus, in which the basis of human rights could be found and the place where semantic indecisiveness could be resolved when interpreting them. Yet there is an argument

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23. ANTONIO-LUIS MARTÍNEZ PUJALTE, LA GARANTÍA DEL CONTENIDO ESSENCIAL DE LOS DERECHOS FUNDAMENTALES (Centro de Estudios Constitucionales 1997).

which destroys all the appeal of this alternative: human rights discourse has been presented historically as the limit to what is “able to be settled by agreement,” or to paraphrase the German Constitutional Court, the “limit of limits” that consensus (including democratic consensus) can legitimately impose upon the freedom of human actions.25 In other words, if the meaning of rights depends on consensus, these rights are devoid of meaning. The solution, thus, must be found elsewhere.

The question, however, is where? What has been presented here so far supports the proposal of a possible answer that lies in the following: all current legal systems formulate not one but two assumptions. On the one hand, the claim to correctness as postulated by Alexy, and on the other hand, a claim to moral objectivity, found implicitly in the defense of principles.26 Without one or the other, the discourse of rights turns into self-reference and, for this reason, becomes groundless and unintelligible.27

25. See BVerfGE 19, 342, 348.
26. PILAR ZAMBRANO, LA INEVITABLE CREATIVIDAD EN LA INTERPRETACIÓN JURÍDICA. UNA APROXIMACIÓN IUSFILOSÓFICA A LA TESIS DE LA DISCRECIONALIDAD (UNAM 2009; published as no. 142 in the ESTUDIOS JURIDICOS series).
27. As pointed out recently, it is noteworthy that the acceptance of the presence of moral elements in legal reasoning by neo-constitutionalists and inclusive positivists has not brought about further and more profound reflection on moral objectivity. Above all, a negative response to this last question would imply the negation of legal objectivity. See JUAN B. ETCHEVERRY, EL DEBATE SOBRE EL POSITIVISMO JURÍDICO INCLUYENTE. UN ESTADO DE LA CUESTIÓN (UNAM 2006), and ETCHEVERRY, OBJETIVIDAD Y DETERMINACIÓN DEL DERECHO. UN DIÁLOGO CON LOS HEREDEROS DE HART (Comares 2008; published as vol. 20 FILOSOFÍA, DERECHO & SOCIEDAD).
Origins of the Division of Servitudes into Natural, Legal and Contractual

Carlos Felipe Amunátegui Perelló*

I. Introduction ................................................................. 603
II. Servitudes in the Roman Systematic ............................... 606
III. Reception of Servitudes in the West and the Development of the Division ................................................. 610

I. INTRODUCTION

Most civil codes, following the Code Napoléon, have defined servitudes as “a charge on a servient estate for the benefit of a dominant estate” (art. 646, Louisiana Civil Code).¹ A bit further, after considering some legal rules on servitudes, the Louisiana Civil Code divides them into natural, legal, and voluntary or conventional (art. 654, Louisiana Civil Code).² The whole systematic treatment of servitudes is based on this division. The definition is, in the context of real rights, quite unusual. It defines servitudes as a charge—that is to say, in a negative way—and not as a right, in positive terms. It is also exceptional in a historical context, for it does not follow the traditional medieval definition.

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¹ Compare this with the definition of art. 637 of the Code Napoléon: “Une servitude est une charge imposée sur un héritage pour l’usage et l’utilité d’un héritage appartenant à un autre propriétaire.” On the matter, see A.N. Yiannopoulos, Predial Servitudes; General Principles: Louisiana and Comparative Law, 29 LA. L. REV. 1, 2 (1968) [hereinafter Yiannopoulos, Predial Servitudes].

² See art. 639, Code Napoléon: “Elle dérive ou de la situation naturelle des lieux, ou des obligations imposées par la loi, ou des conventions entre les propriétaires.” Again, see Yiannopoulos, Predial Servitudes, supra note 1, at 43.
already present in the *Siète Partidas* and popularized by Bartolus, nor the humanist versions of the 16th century, nor the definitions of the rationalist schools of the 17th and 18th centuries.

3. “Properly the wise said that servitude is the right one has to use the buildings or the estates of another man and to profit from them in the benefit of those that one owns” (author’s translation); (Propiamente dixeron los sabios que tal servidumbre como esta es derecho e uso que ome ha en los edificios, o enlas heredades agenas para servirse dellas a pro de las suyas.) LAS SIETE PARTIDAS, pt. 3, tit. XXXI, law 1.

4. The usual definition from the Middle Ages is due to Bartolus, who defined real servitudes as “a certain right inherent in a estate, that looks for its benefit and diminishes the liberty of the other estate” (author’s translation); (quoddam ius praedio inherens, et ipsius utilitatem re spiciens, et alterius praedius ius sive libertatem diminuens). BARTOLI A SAXOFERRATO, IN PRIMAM DIGESTI VETERIS PERTEM COMMENTARIA 182v (1574 ed.), 364 (2004 ed.) (Nicolau Bevilaquam 1574; Elec. ed., A.J. Sirks 2004).

5. For instance, Donellus says: “It is [a servitude] the one that is imposed on a alien estate, for the use of a neighboring estate, constituted in perpetuity” (author’s translation); (Ea est [servitus] quae alieno praedio imposita ad vicini alicujus praedii solius usum, eumque perpetuum constituta est). HUGONIS DONELLI, 3 OPERA OMNIA, COMENTARIORUM DE IURE CIVILI 226 (Osualdi Hilligeri ed., Maceratae 1839).


Along the same lines, we can quote other less influential 18th century French authors who also define servitudes in a positive way. For instance, Astruc, at the beginning of the 18th century, says that a servitude is “un droit établi dans la chose d’autrui, contre le droit naturel, à l’utilité des fonds des personnes.” LOUIS ASTRUC, TRAÎTÉ DES SERVITUDES RÉELLES. NOUVELLE ÉDITION MISE EN RAPPORT AVEC LE CODE CIVIL, PAR H. SOLON 10 (Gallica 1841). What is particularly striking is that, according to him, real servitudes are against natural law, which he explains a bit further stating that ownership should be free. *Id.* at 11.

Later, Desgodets, who wrote an important work on servitudes in the mid-18th century, defines them simply as “l’Assujettissement d’une chose à une autre.” ANTOINE BABUTY DESGODETS, LES LOIX DES BÂTIMENS, SUIVANT LA COUTUME DE PARIS: TRAITANT DE CE QUI CONCERNE LES SERVITUDES RÉELLES, LES RAPPORTS DES JURÉS-EXPERTS, LES RÉPARATIONS LOCATIVES, DOUARIERES, USUFRUITIÈRES, BÉNÉFICIALES, ETC. 1 (1748).

Gabriel François d’Olivier, who wrote the first Civil Code Project for revolutionary France, also uses a positive definition: “droit particulier attribué à une personne contre une autre personne, pour obliger celle-ci à supporter quelque chose ou l’empêcher de faire quelque chose.” GABRIEL FRANÇOIS D’OLIVIER, 1 PRINCIPES DU DROIT CIVIL ROMAIN 207 (Merigot 1776), although in his project he does not include any definition.
The definition is a creation of the French codification process that appeared for the first time in the Cambacérès project of 1793. Following Falcone, it seems to have been taken from the Latin translation of Theophilus’ *Paraphrasis*, a somewhat awkward source that eventually extended globally due to the influence of the French codification.7

Something similar happens with the division of servitudes into natural, legal and conventional, a classification that structures the systematic approach of most 19th century civil codes and was taken from the French codification. This was an innovation regarding the Hispanic tradition8 that underlies the Louisiana Civil Code, and it has been subject to harsh criticism.9 In fact, many of the so-called legal servitudes do not fit well into the category. For instance, the common wall servitude (art. 673, Louisiana Civil Code) can hardly be a servitude at all, for there is no dominant nor servient estate. In fact, both estates are liable to the same rights and duties. This type of servitude seems to regulate the legal limits of

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7. As one might expect, it was a legal humanist—Janus a Costa—who brought this concept into the Western legal tradition. While addressing servitudes, he quoted Theophilus and said: “It is therefore a servitude, as rightly our Theophilus said, a right constituted in a certain way, that makes the neighbor stand a charge” (author’s translation): *(Est igitur servitus, ut recte Theophilus noster, jus quoddam certis modis constitutum, quod efficit, ut vicinus vicini onera sustineat).* JANI A COSTA, PRAELECTIONES AD ILLUSTRIORES QUODSADAM TÍTULOS LOCAQUE SELECTA JURIS CIVILIS 22 (Bavius Voorda 1773). For a detailed study, see Giuseppe Falcone, *Note historique sur la définition législative de la servitude* (article 637 Code Napoléon – article 1027 Code Civil Italien), 79:1 REVUE HISTORIQUE DE DROIT FRANÇAIS ET ÉTRANGER 13-30 (2001) [hereinafter Falcone, *Note historique*].

8. For instance, García Goyena, when he proposes this division for the Spanish Civil Code Project, says that neither Roman law nor Hispanic law included property limits among servitudes: “*El Derecho romano y patrio no comprendieron estos gravámenes entre las servidumbres, y les dedicaron títulos separados, como se ve en los tres primeros del libro 39, y en casi todos del 43 del Digesto, y en el título 32. Partida 3, sobre las labores nuevas.*” See FLORENCIO GARCÍA GROYENA, I CONCORDANCIAS MOTIVOS Y COMENTARIOS DEL CÓDIGO CIVIL ESPAÑOL 420 (Sociedad Tipográfico-Editorial 1852).

9. We quote here the very important comments of Professor Yiannopoulos: “[C]ritics have observed that, from the viewpoint of accurate analysis, natural and legal servitudes involve limitations on the content of ownership rather than veritable servitudes. Indeed, it is often impossible to determine which is the dominant estate . . . .” Yiannopoulos, *Predial Servitudes, supra* note 1, at 44.
property, for its primary function is to establish the legal atmosphere of ownership. Therefore, the formal equality of both estates seems necessary, because property limits compel both owners. This is something unthinkable in regular servitudes, for these have an asymmetric structure, where one estate beholds the rights and the other the duties. In this sense, legal servitudes are intended to protect the estates’ freedom and the equality between neighboring real estates, because they configure the normal frame of property, while true servitudes tend to restrain the exercise of ownership in one estate to the benefit of another estate. As Professor Yiannopoulos said, “In modern civil codes, the concepts of natural and legal [servitudes] have thus given way to the idea of limitations on the content of ownership.”

Although its reform was under discussion in 1976, the division was, at that time, unfortunately left unchanged, as an odd legal transplant in the heart of Louisiana’s Civil Code. As Watson explains, “law is often adopted because of the reputation and authority of its model or promulgator; hence, in part, [this implies] the reception of even less than adequate rules.”

II. SERVITUDES IN THE ROMAN SYSTEMATIC

The origin of the inclusion of these limits to property into the category of servitudes is quite curious. Romans did not face the problem of ownership limits this way. In Roman law, the different

10. RUOEOEL VON JHERING, 6 JAHRBÜCHER FÜR DIE DOGMATIK DES HEUTIGEN RÖMISCHEN UND DEUTSCHEN PRIVATRECHTS 91 (F. Mauke 1863).
11. BIOJDO BIONDI, LA CATEGORIA ROMANA DELLE “SERVITUTES” 19 (Vita e Pensiero 1938) [hereinafter BIONDI, LA CATEGORIA ROMANA].
12. In this sense, see ESTHER ALGARRA PRATS, LA DEFENSA JURÍDICO-CIVIL FREnte A HUMOS, OLORES, RUIDOS Y OTRAS AGRESIONES A LA PROPIEDAD Y A LA PERSONA 16 (McGraw-Hill 1995).
13. Yiannopoulos, Predial Servitudes, supra note 1, at 44.
property limits had a very heterogeneous nature. They were sometimes structured as *interdictae possessoria*, in other cases as negative actions, or other different legal figures. Therefore, what we now call property limits were treated in an unsystematic fashion and included into different institutions.

Originally in Rome, real estates should have been separated from each other by a physical space that did not belong to any of the neighbors. For urban real estates, it was called *ambitus*. As time went by and Rome grew into an overpopulated metropolis, the system became untenable. To allow the use of all the land in the city for construction, the *ambitus* system was replaced and in its place the wall that separated two estates started to be considered common for both owners (*paries communis*) and a new regulation established many different sorts of obligations regarding it. The wall was not considered to be under a servitude, but, on the contrary, there was a whole set of things that the owners could not do regarding the wall unless they had a servitude over the neighboring estate.

Generally speaking, in Rome, the main issue regarding the neighborhood was the power that an owner had to exclude non-owners from his estate, and especially, of course, his neighbors.  


On the matter, Paricio says:

> En el Derecho romano, dada la particular naturaleza del dominium con su carácter absoluto e independiente (salvo que hubiese sido limitado voluntariamente, p.ej. con una servidumbre), las relaciones entre los titulares de los diversos fundos vecinos se nos presenta bajo la forma de un régimen negativo, es decir, de una respectiva libertad tutelada y defendida por diferentes recursos procesales . . . . Lo que existen son medios jurídicos de defensa y no limitaciones a la propiedad; por ello los recursos procesales que se concedían para resolver problemas surgidos en las relaciones de vecindad no pueden ser considerados estrictamente como limitaciones sobre la propiedad.

JAVIER PARICIO, LA DENUNCIA DE OBRA NUEVA EN EL DERECHO ROMANO CLÁSICO 1 (Bosch, 1982). *See also* BIONDI, LA CATEGORIA ROMANA, *supra* note 11, at 20.

17. BIONDI, LA CATEGORIA ROMANA, *supra* note 11, at 46.

18. *Id.* at 20.
The “legal atmosphere” of each estate should be protected.\textsuperscript{19} To do something on someone else’s property (facere in alieno) was prohibited. In order to act on another man’s property, one must have had a servitude, for its function was to alter the normal regime of the exclusion of non-owners. Therefore, the whole system of servitudes was designed to authorize acts in alien estates, whether they were directly done in their physical limits or the owner just had to suffer the negative consequences of acts performed on another estate (direct and indirect immissions). Therefore, the function of servitudes was to change the normal regime of third parties’ exclusion that was implied in property, and many times, when one of these immissive acts was performed, the existence of a servitude was under discussion. The interdictae possessoria were a typical tool to determine the legal position of each part in the possible legal action that was to be summoned.\textsuperscript{20}

The one that claimed the existence of a servitude had a real action to assert its existence, while the one that denied its existence had a real action, called a negative action, that aimed to defend the freedom of the estate.\textsuperscript{21}

\begin{footnotesize}
\begin{enumerate}
\item VON JHERING, supra note 10, at 91.
\item On the relation between interdictae possessoria and actions we follow Falcone’s thesis. See Giuseppe Falcone, Ricerche sull’origine dell’interdetto uti possidetis in 44 ANNALI DEL SEMINARIO GIURIDICO DELLA UNIVERSITÀ DI PALERMO 5-360 (1996).
\item On the matter, the jurist Gaius gives the following division: A real action is one in which we either claim some corporeal property to be ours, or that we are entitled to some particular right in the property, for instance, the right of use and enjoyment; or the right to walk or drive through the land of another; or to conduct water from his land; or to raise the height of a building, or to have the view unobstructed; or when a negative action is brought by the adverse party; (translation by Francis de Zulueta, Oxford Univ.). (\textit{In rem actio est, cum aut corporalem rem intendimus nostram esse aut ius aliquod nobis competere, uelut utendi aut utendi fruendi, eundi, agendi aquamueducendiuel altius tollendi prospiciendiue, aut cum actio ex diverso adversario est negativa.})
\item THE INSTITUTES OF GAIUS at bk. 4.3 [hereinafter GAIUS].
\end{enumerate}
\end{footnotesize}
Although in Classical times, servitudes were treated in an unsystematic fashion, Justinian’s *Corpus* made a systematic effort to put them altogether and bring some order to their treatment. This effort tended to obscure its dogmatism in the centuries to come. Justinian puts them in a separate book in the *Digest*, where he starts by elaborating general aspects of servitudes (*Digest* 8.1), to continue with urban servitudes (*Digest* 8.2), followed by rustic ones (*Digest* 8.3) and then their common rules (*Digest* 8.4). Having done this, he then continues with the actions that can be put forward (*Digest* 8.5) and, finally, the rules that regard the liberation of the estates. That the main systematic depends on their being rural or urban makes sense in Classical Roman law, for the first are *res mancipi*, and therefore they can only be transferred following certain formalities, while the others are not. Nevertheless, in Justinian’s law—which did not contemplate this division of *res mancipi* and *nec mancipi*—the reasons for keeping this kind of systematic approach are obscure. Regardless, the main issue in servitudes was the exclusion of the neighbor’s acts from an estate and, therefore, *Digest* 8.5 (on vindication and denial of servitudes) was mainly concerned with problems of neighboring estates, which could also be treated as problems of *interdictae possessoria*. Some problems were even addressed in both places.

Nevertheless, Justinian did something more than merely systematizing, for he also included some property limits under the title of servitudes in his *Codex*. In the western part of the former

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22. This appears quite clearly in the treatment that Gaius gives to servitudes in his *Institutes*. They are mentioned among incorporeal things (Gaius 2.14), the *res mancipi* (Gaius 2.17) and the acquisition of property (Gaius 2.29), supra note 21. See Biondo Biondi, *Le servitù* 4 (Giuffrè 1967; published as Vol. 12 Trattato di diritto civile e commerciale).

23. They are contained in Justinian’s *Institutes* (bk. 2, tit. 3), in the 8th book of the *Digest* and in the 34th title of the 3rd book of the *Codex*.

24. This tendency would have expanded during Late Antiquity as a simplification of the complex classical legal system. It is mentioned in the *Codex Theodosianus* [hereinafter C.TH.] in an Imperial Constitution on the distance that two buildings should keep: C.TH. 4.24 *De servitute luminis vel
Empire, legal simplification meant the disappearance of the whole dogmatic category of servitudes.  

III. RECEPTION OF SERVITUDES IN THE WEST AND THE DEVELOPMENT OF THE DIVISION

When the Corpus was received in the West (c.1100 AD), the institution of servitudes was resurrected, and it is through Justinian’s text that they again came to rule in European law. Some
scholars—like Biondi and Bonfante\textsuperscript{26}—explicitly attest that it would have been during the Middle Ages that the category of legal and natural servitudes would have been developed, although we have not found any evidence of it. In truth, although the glossators and commentators hold the idea that some limits to property should be treated as servitudes—an idea they inherited from Justinian—their systematization follows the scheme of the Corpus. In fact, the main system that will encompass servitudes during the whole period between the reception of the Corpus and the French codification can be found in the work of Bartolus called the \textit{arbor servitutum}, or tree of servitudes.\textsuperscript{27} This is a sort of general systematization into personal, real (as the Louisiana Civil Code does in article 533) and mixed servitudes, taken from a fragment of Marcian that has been considered interpolated with which the book of servitudes starts in the Digest.\textsuperscript{28} According to this systematization, real servitudes can be divided into urban and rural. The complex casuistry that regards the acts that may or may not be performed without the existence of a servitude are considered innominated servitudes, which can fit into the urban or the rural ones. The systematization was so successful that became the regular treatment of servitudes in the following centuries.

Legal humanism (16th century) kept this same systematization, although it put the division into a more logical place: after

\textsuperscript{26} BIONDI, LE SERVITÙ PREDIALI, \textit{supra} note 24, at 75; PIETRO BONFANTE, 11.2 CORSO DI DIRITTO ROMANO. LA PROPRIETÀ 322 (Giuffrè 1966).

\textsuperscript{27} The systematization is a creation of Bartolus of Saxoferrato. Nevertheless, it was so successful that it was included in the later editions of the \textit{Magna Glossa} as an introduction to the 8th book of the Digest. \textit{See} BARTOLUS SAXOFERRATO, \textit{supra} note 3, at 182v and for the \textit{Magna Glossa}, 1 DIGESTUM VETUS SEU PANDECTARUM IURIS CIVILIS 1091 (Iunta 1592).

\textsuperscript{28} DIGEST 8.1.1 Marciamus libro tertio regularum. Servitutes aut personarum sunt, ut usus et usus fructus, aut rerum, ut servitutes rusticorum praediorum et urbanorum. (“Servitudes are personal, like use or usufruct, or real, like the servitudes on rural and urban states.” (Author’s translation.)) The quotation—strongly interpolated—comes from the jurist Marcian. He wrote a pedagogical work called \textit{regulae}, where he probably introduced some new categories in order to systematize the \textit{iura in re aliena} for teaching proposes. We think it is probable that the original fragment just said \textit{iura praediorum aut personarum}. 

addressing ownership, right before the other real rights, and not just before real servitudes, as the Louisiana Civil Code does. During humanism, mixed servitudes went into oblivion. 29 Anyway, at this historical point some new dogmatic categories came into existence in order to analyze servitudes. First, new legal definitions of servitudes appeared, which eventually led to the one adopted by the French Civil Code. 30 Second, some systematic elements were introduced. For instance, Donellus, when commenting on the composition of servitudes, tells us that they can be created either by nature or by non-natural elements. 31 These non-natural elements can be due to our own action (conventions and pacts) or by an act of authority (a judge’s act). This is not the proper division into natural, legal and conventional servitudes, but at least some of its elements are present.

Nevertheless, the jurists of legal rationalism (17th and 18th centuries) seemed to return to the Bartolistic scheme. In fact, Domat kept a traditional systematic approach, distinguishing between personal and real servitudes, and then focusing his treatment of the subject on the difference between urban and rural servitudes. As was traditional, the limits of property were included among the servitudes, following Justinian’s model to the letter. 32

Astruc, author of an important treaty on servitudes at the beginning of the 18th century, even excludes servitudes from natural law, 33 because, according to him, they restricted ownership’s natural freedom. His classification also followed the Bartolistic model. Desgodets, who wrote an important treaty on the

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29. On the matter, Donellus follows this same line, passing from servitudes in general, to urban servitudes, rural ones and then the rules involved in actiones confesoris and negatorialis. See DONELLI, supra note 5, at 3-4.

30. See supra note 6.

31. “On the acquisition of servitudes. They are acquired when they are rightly constituted. They are constituted by nature or by an external event” (author’s translation); (De acquirenda praeediti servitute. Acquiri tunc, cum recte constituta est. Constitut Natura aut Externo facto.) DONELLI, supra note 5, at 295.

32. JEAN DOMAT, 4 OUVRES COMPLETES 188 (Alex-Gobelet 1835).

33. See supra note 6.
matter regarding the *Coutume de Paris*, also followed the traditional model.\(^{34}\)

Pothier is more innovative on the treatment of servitudes. Although he followed the traditional Bartolistic order dividing servitudes into personal and real, to then distinguish between urban and rural,\(^{35}\) he separated neighborhood relations and property limits from servitudes, which he conceptualized as quasi-contracts. He addresses them in a separate place, in the book of societies, in an appendix of community.

Olivier, author of the first revolutionary civil code project, also follows the traditional division of servitudes,\(^{36}\) although he does not include any classification in his project.

The major systematic change comes only with the *Code Napoléon*. This legal body not only includes a somewhat extravagant definition of servitudes, constructed in a passive voice due to the reception of byzantine ideas from 16th century France, but it also includes an exotic systematic in the institution, which transforms a complex casuistry on property limits and *interdictae possessoria* into servitudes. Falcone points out that the definition would come from a work of the 16th century that was lucky enough to be included in a compilation of the 18th century, edited by Meerman.\(^{37}\) Nevertheless, although the jurist under discussion—Jani a Costa—adopts the definition of Theophilus on real servitudes, he addresses the institution following the traditional systematic approach, without any mention of natural, legal and conventional servitudes. On the other hand, such a work, written in Latin and edited in Holland, would hardly have the diffusion and influence to impose itself in Napoleonic France over Pothier himself, practically without any discussion in the codifying

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34. DESGODETS, *supra* note 6, at 2.
35. POTHIER, *supra* note 6, at 312-18.
36. D’OLIVIER, *supra* note 6, at 207.
commission.  

It seems that the commission had already assumed the division and, therefore, another work must have the dubious honor of inspiring it on the subject. In fact, just a few years before the Cambacérès Project, a monumental work was published, written in a forensic style quite along the lines of the above-mentioned approach. It is the *Répertoire universel et raisonné de jurisprudence*, a sort of legal encyclopedia very popular in the late 18th century. In it, in volume 58, we find a systematic treatment of servitudes that can be considered as the key antecedent of the French Civil Code. In fact, we find there not only a definition of servitudes in the passive voice, but it also takes Donellus’ model of sources of servitudes, transforming it into the systematic axis of the subject by introducing the division of servitudes into natural, legal and conventional. Neighborhood relations are included in legal servitudes, and institutions that traditionally were not included among servitudes, such as the common wall, are considered among them. In short, this work constitutes the dogmatic base of the *Code Napoléon*’s treatment of servitudes. The article was written by Jean Phillip Garran de Coulon, who later participated in the French codification by presenting a proposition to the National Assembly to name a commission to codify the civil

38. In fact, when one checks the preparatory works of the codifying commission, the uncritical manner in which such a revolutionary way to systematize servitudes is taken by the Commission is striking. The whole title on servitudes is adopted with only minor observations. The project was presented by Treilhard in the session of 4th Brumaire of the 12th year of the Revolution (October 27, 1803). Although some discussion was generated among the commissioners that were present (Cambacérès, Treilhard, Bigot-Préameneu Pelet, Berliet, Regnaud and Tronchet), their concerns were on other aspects of the project. In fact, both the definition (art. 637) and the division (art. 639) were immediately approved. See Pierre Antoine Fenet, 11 RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL 245 et seq. (Videdoq 1836).


40. GUYOT, supra note 39, at 238.

41. Id. at 240.
law. Both its diffusion and the prestige of the author of the work would explain the adoption of its systematization by the codifying commission, who aimed to depart from the medieval models that had anteceded the Code. With a revolutionary spirit, a confused nomenclature and a weak dogmatism were adopted, which forced 19th century French jurisprudence to create a regulation of neighborhood relations outside of servitudes.

In conclusion, it is worth taking a second look at Professor Yiannopoulos’ proposal to modify the Louisiana Civil Code’s division of servitudes, replacing natural and legal servitudes for limitations on the content of ownership and its subsequent discussion. This should involve a close examination of the treatment of servitudes and limitations of ownership established in the BGB. This legal body limits the concept of servitudes to conventional ones (as in traditional Roman law), while the legal and natural servitudes are encompassed in the larger category of limitations to ownership, where other important aspects, as the immissions theory, are regulated. At that time, the traditionalist opinion prevailed over pure legal dogmatism in the belief that by preserving this odd classification, the civil law tradition that characterizes Louisiana would be secured. By this historical analysis we would like to prove that this division is not only illogical, but it is not even really founded in the civil law tradition. It was invented shortly before the Code Napoléon and it has persisted in many civil codes because of the authority of the French codification. Like many legal transplants, it is founded on

42. See Peter Van den Berg, The Politics of European Codification: A History of the Unification of Law in France, Prussia, the Austrian Monarchy and the Netherlands 195 (Europa Law Publ’g 2007).
43. For instance, Pardessus, in the most popular treaty on servitudes after the codification, says that even the name of the institution should be changed in order to distinguish it from the one that existed during the Ancien Régime. Jean-Marie Pardessus, 1 Traité des Servitudes, ou Services Fonciers 4-5 (8th ed., Thorel 1838).
45. See para. 1018 to 1029, Bürgerliches Gesetzbuch [BGB].
46. See para. 905 et seq., BGB.
“the authority of the donor system,” but “[a]t times this respect might lead to odd results.”

47. WATSON, supra note 15, at 57.
EUROPEAN UNION LAW AND GAY RIGHTS: ASSESSING THE EQUAL TREATMENT IN EMPLOYMENT AND OCCUPATION DIRECTIVE AND CASE LAW ON EMPLOYMENT BENEFITS FOR REGISTERED SAME-SEX PARTNERSHIPS

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II. Scope and Content of the Equal Treatment Directive .......................... 622
   A. Content of the Equal Treatment Directive ........................................ 622
   B. Scope of the Equal Treatment Directive ........................................ 624
III. Landmark Court Decisions ............................................................. 625
   A. The European Court of Justice Preliminary Reference Process .......... 626
      1. Sweden v. Council .................................................................... 627
      2. Maruko v. Versorgungsanstalt der deutschen Bühnen.................. 631
      3. Römer v. Freie und Hansestadt Hamburg ................................ 635
IV. Critical Analysis ........................................................................... 639
   A. The Supranational Nature of EU Law ........................................ 639
   B. A Survey of Sexual Orientation Rights Before and After the Directive ...................................................................... 645
   C. By the Numbers: Sexual Orientation Discrimination Prevalence Before and After the Directive ........................................... 648
V. Recommendations ........................................................................ 650
VI. Conclusion ................................................................................ 652

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I. INTRODUCTION: THE ADVENT OF GAY RIGHTS IN THE EUROPEAN UNION

Recognition of rights based on sexual orientation (referred to interchangeably as “gay rights”) is a fairly new phenomenon in the European Union (EU). Before the Treaty of Amsterdam specifically, article 13—sexual orientation protection had never been expressly mentioned in EU law. Article 13 makes it clear that sexual orientation discrimination—among others, such as race, sex, and religion—would be combated. During the development of gay rights generally in the EU, there have been three legislative texts and resolutions aimed at combating sexual orientation discrimination. These texts are: the European Parliament Resolution (hereinafter “Resolution”), article 13 in the Treaty of Amsterdam, and the Charter of Fundamental Rights (hereinafter “Charter of Rights”), which were recognized or passed in 1994, 1997, and 2000, respectively.

2. Presently art. 19 (1) of the Treaty on the Functioning of the European Union, formerly art. 13 of the Treaty on European Union. Article 19 (1) provides:
   Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
4. Charter of Fundamental Rights of the European Union, 2010 O.J. C 83/02 [hereinafter Charter of Rights]. Article 6 of the Treaty on European Union [hereinafter TEU] created the article of fundamental rights—European Union’s Charter of Fundamental Rights. This article is binding as long as EU Member States and EU institutions are applying Union law. This Charter was actually passed in 2000, and would have been modified in the failed 2004 European Constitution. Thus, its legal force was in the balance until it was successfully implemented in the Treaty of Lisbon (signed in December 2007, came into force in December 2009).
The 1994 Resolution asked Member States\textsuperscript{5} to provide gays and lesbians with legal protection. The Resolution recognized that gays and lesbians should be treated equally with their heterosexual counterparts. The Resolution affirmatively called for the de-criminalization of homosexuality and also sought to protect sexual orientation minorities in the areas of inheritance, social security, and housing.\textsuperscript{6} Notwithstanding the Resolution’s non-binding effect, it was noteworthy as it explicitly recognized the rights of sexual orientation minorities in the EU. Consequently, due to the Resolution’s non-binding effect, EU Member States citizens could not rely upon the Resolution in court.\textsuperscript{7} Nevertheless, the European Parliament reaffirmed the 1994 Resolution in 1996,\textsuperscript{8} just before the Treaty of Amsterdam was signed.

On October 2, 1997, the then fifteen Member States signed the Treaty of Amsterdam, which went into effect in 1999.\textsuperscript{9} Before this provision, there was an unanswered question as to whether the EU was competent to enact anti-discrimination laws to protect sexual orientation minorities.\textsuperscript{10} One of the effects of the implementation of article 13 in the Treaty of Amsterdam was that the above question was answered in the affirmative.\textsuperscript{11} The article 13 provision forbidding discrimination based on sexual orientation was also vital in leading the way for other anti-discrimination laws.\textsuperscript{12}

\begin{thebibliography}{9}
\bibitem{5} See discussion infra Part IV. Member States of the EU are countries that have relinquished some national power to the European Union.
\bibitem{6} Id.
\bibitem{7} Id.
\bibitem{9} The 15 Member States were: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxemburg, Netherlands, Portugal, Spain, Sweden, and the United Kingdom.
\bibitem{11} Id.
\bibitem{12} Id.
\end{thebibliography}
On December 7, 2000—shortly after the Treaty of Amsterdam went into effect—the Charter of Rights was signed. The non-discrimination clause of the Charter of Rights forbade discrimination on many grounds, including sexual orientation. However, the Charter of Rights was ineffective and lacked legal force until December 1, 2009, when the Treaty of Lisbon, in which it was incorporated, took effect.

Outside the EU, the European Convention on Human Rights (hereinafter “the Convention”) was promulgated by the Council of Europe, which is comprised of 47 countries including all EU Member States. The Convention was originally enacted in 1950, and has been amended several times to encompass a wider array of human rights issues. Even though the Convention pre-dates the establishment of the EU, every EU Member State has ratified the Convention. The European Court of Human Rights (hereinafter “ECHR”) was created to ensure compliance with the Convention. Any person who believes that a state party to the Convention has violated their rights under the Convention can file a complaint to...

14. Charter of Rights, supra note 4, art. 21. The Charter is comprehensive and forbids discrimination based on “race, color, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth right, disability age, and sexual orientation.”
17. The Council of Europe was founded on May 5, 1949, as a political institution. The Council of Europe has promulgated a plethora of conventions. The Most important of these is the European Convention of Human Rights.
18. The Convention covers, among others: (art. 1) right to life, (art. 11) freedom of association, (art. 14) freedom from discrimination, (art. 12) right to marriage. The amendments made through additional protocols further expand the rights granted: E.g. Protocol 12 (art. 1), prohibition of discrimination, Protocol 13 (art. 1) abolition of the death penalty.
20. The Convention, supra note 16, art. 19.
the ECHR. Likewise, a High Contracting Party may file a complaint to the ECHR against another High Contracting Party for a violation of the Convention. All of the court’s decisions are binding. Nonetheless, the relevant provision on the prohibition of discrimination fails to mention sexual orientation.

The gradual development of EU powers lead to much stronger anti-discrimination laws. In 2000, the Council unanimously passed the Directive on Equal Treatment in Employment and Occupation (hereinafter “Directive”). The goal of the Directive is stated in article 1: “The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.”

21. The Convention, supra note 16, art. 34:
The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

22. The Convention, supra note 16, art. 33.

23. Id.

24. See The Convention, supra note 16, art. 14: “sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”; see also Protocol 12, art. 1, para. 1. covers: “sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other statutes” & para. 2: “No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.”

25. Council Directive 2000/78/EC Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000 O.J. (L 303/16) [hereinafter Directive]. A directive is binding upon the Member States or group of Member States to which it is addressed to. This Directive was addressed to all Member States. A directive is specific as to the results that should be achieved. Directives work to secure uniformity among the EU Member States. Although it is binding, the form or method of implementation are left at the discretion of the Member States, as long as the objective of the Directive are transposed into national law before the deadline for implementation.

beacon of hope in sexual orientation anti-discrimination law because it specifically banned sexual orientation discrimination in the workplace.27

Although there is a plethora of issues that arises in the context of sexual orientation discrimination in the EU workplace, this essay focuses on the rights of EU citizens—in registered same-sex partnerships—to recover employment benefits. Civil statuses, such as registered same-sex partnerships, are within the competence of the individual Member States.28 Nevertheless, as the rejection of employment benefits is not the only issue faced by sexual orientation minorities in the EU workplace, this essay also delves into the effects of the Directive in other employment areas. This essay also shows that, to a certain degree, the efforts to strengthen protection of sexual orientation minorities in the EU workplace are hindered by the interaction of EU law with the national laws of the Member States.


II. SCOPE AND CONTENT OF THE EQUAL TREATMENT DIRECTIVE

A. Content of the Equal Treatment Directive

As mentioned above, the Directive lays down “a general framework for combatting discrimination” on the grounds covered.29 The Directive covers both direct and indirect discrimination. Direct discrimination occurs “where one person is
treated less [favorably] than another is, has been or would be
treated in a comparable situation, on any of the grounds referred to . . . .” 30 Likewise, indirect discrimination occurs where an
“apparently neutral provision, criterion or practice would put
persons having a particular religion or belief, a particular
disability, a particular age, or a particular sexual orientation at a
particular disadvantage compared with other persons.” 31 Unlike
direct discrimination, there are few exceptions made in the context
of indirect discrimination. For instance, indirect discrimination is
acceptable if the criterion used is “objectively justified.” 32 Lastly,
the Directive covers harassment, which is defined as an “unwanted
conduct related to any grounds . . . with the purpose of violating
the dignity of a person and of creating an intimidating, hostile,
degrading, humiliating or offensive environment.” 33 Furthermore,
unlike the direct and indirect discrimination provisions, the
Directive allows Member States to define harassment in
accordance with their national law. 34 Although the Directive is a
beacon of hope, it nevertheless has some defects. 35

30. See Directive, supra note 25, art. 2.
31. Id.
32. Directive, supra note 25, art. 2 (b)(i)-(ii):
   For the purposes of paragraph 1:
   (b) indirect discrimination shall be taken to occur where an apparently
   neutral provision, criterion or practice would put persons having a
   particular religion or belief, a particular disability, a particular age, or a
   particular sexual orientation at a particular disadvantage compared with
   other persons unless:
   (i) that provision, criterion or practice is objectively justified by a
   legitimate aim and the means of achieving that aim are appropriate and
   necessary, or
   (ii) as regards persons with a particular disability, the employer or any
   person or organisation to whom this Directive applies, is obliged, under
   national legislation, to take appropriate measures in line with the
   principles contained in Article 5 in order to eliminate disadvantages
   entailed by such provision, criterion or practice.
33. Directive, supra note 25, art. 2(3).
34. Id.
35. See discussion infra Part III. See also Directive, supra note 25, art. 2. In
defining types of discrimination, among other things, definitions of
discrimination, harassment are too limited.
B. Scope of the Equal Treatment Directive

Along with the force in employment and occupation, the Directive covers vocational training and employer/employee organizational memberships. The Directive is applicable to both private and public sectors, including public entities. The Directive encompasses dismissals, pay, working conditions, and access to employment. The Member States may provide for a more heightened level of protection, but the Council, when drafting Directives, sets forth minimum requirements, which Member States must follow. The Directive does not cover “payment of any kind made by state scheme or similar, including state social security or social protection schemes.” Member States are allowed to opt out of the Directive’s provision on age and disability as it relates to their armed forces. Article 10 imposes remedies for individuals in national court (the referring court). Furthermore, in a suit based on the Directive, the burden of proof is placed upon the defendant to prove the absence of an unlawful discrimination. Currently, all 28 Member States have implemented the Directive into national law. By December 2, 2003—the deadline for the implementation—all of the “old
Member States,” had transposed the Directive into national law.\footnote{3} The 10 “new Member States”\footnote{4} had implemented the Directive into national law by May 1, 2004. Two Member States, Romania and Bulgaria, joined the EU on January 1, 2007,\footnote{5} and have implemented the Directive. Croatia also became a member of the EU in 2013.

III. LANDMARK COURT DECISIONS

An important aspect of gauging anti-discrimination progress against sexual orientation minorities in the EU workplace is to analyze the rulings of the EU courts. There have been three landmark court cases. These three cases—\textit{Sweden v. Council},\footnote{6} \textit{Maruko v. Versorgungsanstalt der deutschen Bühnen}\footnote{7} and \textit{Römer v. Freie und Hansestadt Hamburg}\footnote{8}—will be discussed and analyzed to determine the level of protection of sexual orientation minorities in regard to employment benefits for registered same-sex partners.

In order to better understand the rulings of the following decisions, it is essential to understand the process that the cases underwent, in particular, the ECJ’s\footnote{9} preliminary reference process.

\footnotesize
\begin{itemize}
\item \footnote{4} See Treaty concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union, April 16, 2003.
\item \footnote{5} See Treaty concerning the accession of the Republic of Bulgaria and Romania to the European Union, April 25, 2005.
\item \footnote{7} Case C-267/06, Tadao Maruko v Versorgungsanstalt der deutschen Bühnen, 2008 E.C.R I-01757.
\item \footnote{8} Case C-147/08, Jürgen Römer v. Freie und Hansestadt Hamburg, 2010 E.C.R. I-3595.
\item \footnote{9} See Consolidated Version of the Treaty on European Union art. 19, 2010 O.J. (C 83) 1, at 27 [hereinafter TEU].
\end{itemize}
A. The European Court of Justice Preliminary Reference Process

The preliminary reference process is detailed in article 267 of the Treaty on the Functioning of the European Union (hereinafter “TFEU”).50 The article describes the process in which a Member State’s national court may refer a case to the Court of Justice of the European Union (hereinafter “ECJ” or “the Court”). The article confers jurisdiction to the Court on preliminary rulings in interpreting treaties. Furthermore, jurisdiction is conferred “where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.”51 In essence when there is a question as to how to interpret EU law by the national Member States, the Member States are allowed to refer the question to the Court.

Procedurally, there are three stages to the preliminary reference. The first stage is when the national court of a Member State seeks a preliminary reference from the Court. The next stage is when the Court makes a decision regarding the interpretation of EU law or answers a legal question brought before it. Lastly, after the Court has made a decision, the national court and the litigants decide how to implement the decision of the Court. After the Court rules, the national court will then make its own decision, while

The Court of Justice of the European Union includes the Court of Justice, the General Court and specialized courts. The Court is tasked with ensuring proper application and interpretation of Treaty laws. The body of the Court consists of one judge from each Member State. The Court of Justice of the European Union shall:

[in] accordance with the Treaties: (a) rule on actions brought by a Member State, an institution or a natural or legal person; (b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union Law or the validity of acts adopted by the institutions; (c) rule in other cases provided for in the Treaties. Id.

51. Id.
applying the Court’s interpretation of EU law, or the Court’s answer to the legal question brought before it.52

The jurisdiction of the Court is limited in scope. As such, “there are two legal norms that can become the object of a preliminary ruling.”53 The Court has jurisdiction over the interpretation of Treaties and the “validity and interpretation of acts of the institutions, bodies, offices and agencies of the Union.”54

B. The Application of the Directive in Landmark Cases

1. Sweden v. Council

Sweden v. Council consolidated two appeals from the judgment in the Court of First Instance.55 The law applicable to the facts of Sweden predated the implementation of the Directive, but the ruling was made after the Directive was passed.56 The plaintiff, Mr. D, brought action against the Council of the European Union (hereinafter “Council”) after its refusal to award Mr. D a household allowance under the Staff Regulations of Officials of the European Communities (hereinafter “Staff Regulations”).57 The

54. Id.
56. Sweden, 2001 E.C.R. I-4319, para. 4. (The Council rejected Mr. D’s application for the Staff Regulation benefit in 1996. The case was decided in 2001, one year after the Directive was implemented).
57. Article 1(2) of Annex VII to the Staff Regulations of Officials of the European Communities (‘the Staff Regulations’) provides as follows:
The household allowance shall be granted to:
a. A married official;
b. An official who is widowed, divorced, legally separated or unmarried and has one or more dependent children . . . .
Council enacted the Staff Regulation, which regulated employee pension benefits. Mr. D, a Swedish national, was an official of the European Communities, as an employee of the Council. Mr. D entered into a registered same-sex partnership with another Swedish national on June 23, 1995. The allowances were available to married officials, among others. Mr. D applied for the allowance and requested that his same-sex partnership be treated equivalently to marriage for purposes of qualifying for the allowance. The Council denied his request. The Council reasoned that the same-sex partnerships could not be treated as equivalent to marriage for the purpose of obtaining the allowance.

Mr. D subsequently filed a complaint with the Secretary General of the Council. The Secretary General denied his request, and cited the same reasons given by the Council. Mr. D then filed a complaint to the Court of First Instance. His complaint requested—among other things—for the Court of First Instance c. By special reasoned decision of the appointing authority based on supporting documents, an official who, while not fulfilling the conditions laid down in (a) and (b), nevertheless actually assumes family responsibilities.

59. Id.
60. Id.
61. Id.
62. Id. (“The Council rejected the application, by note of 29 November 1996, on the ground that the provisions of the Staff Regulations could not be construed as allowing a ‘registered partnership’ to be treated equivalent to marriage”).
63. Id. at para. 6.
64. Id.
65. Id. at para 7. Mr. D also pleaded:
1. Entitlement to other general provisions “applicable to officials of the European Communities”.
3. “Infringement of the principle of equal pay for men and women contained in Article 119 of the EC Treaty—Article 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC.” Id.

As to first plea, the court acknowledged only the household allowance under the Staff Regulations, and no other general provisions that are applicable to officials
to annul the refusal of the Secretary General to allow his same-sex partnership to be considered equivalent to marriage for the purposes of obtaining the household allowance.

Although Mr. D raised other grounds on appeal, the Court of First Instance limited its ruling to the household allowances under the Staff Regulation. The court cited *Arouxo v. Commission* in concluding that for purposes of the Staff Regulation “the concept of marriage must be understood as meaning a relationship based on civil marriage within the traditional meaning of the term.” The court further ruled that the Council was under “no obligation to regard as equivalent to marriage, for the purposes of the Staff Regulation, the situation of a person who had a stable relationship with a partner of the same sex, even if the relationship was recognized by national authority.” Lastly, the court held that the reference to the Member State’s law on marriage was inapplicable as the Staff Regulation was susceptible of an independent interpretation. Thus, the court rejected his claim.

66. See Id.
67. Id. at para. 8. The court held that:
   [the plea of non-discrimination was under] Council Regulation (EC, ECSCM Euratom) No 781/91 of 7 April 1988 amending the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities in respect of equal treatment (O.J. 1998 L. 113, p. 4), which introduced Article 1a into the Staff Regulations giving officials entitlement to equal treatment irrespective of their sexual orientation, without prejudice to the provision of the Staff Regulations requiring a particular marital status, did not enter into force until after the adoption of the contested decision and so it was not appropriate to take the regulation into consideration. Id.
68. Id. at para. 11. Case T-65/92, 1993 E.C.R. II-593.
70. Id. at para. 12.
71. Id. at para. 11.
Mr. D appealed to the ECJ, and the Government of Sweden (hereinafter “Government”) intervened on his behalf.\textsuperscript{72} The Government argued that since civil status is a matter which comes within the exclusive competence of the Member States, terms such as married official or spouse should be interpreted by reference to law of the Member States and not given an independent interpretation (as defined in the Staff Regulation).\textsuperscript{73} The issue before the Court was whether married spouses and same-sex couples in a registered partnership should be treated as equivalent for the purposes of the allowance, and if so, whether Mr. D was discriminated against because of his sexual orientation. Furthermore, the Court was asked which definition of marriage—the Member States or the Staff Regulation—should control in regards to the household allowance under the Staff Regulation.

The Court held that the Court of First Instance did not err when it rejected the petition because “even in the law of those Member States which recognize the concept of registered partnership, that concept is distinct from marriage . . . .”\textsuperscript{74} The Court stated that the issue in this case (“the question whether the concepts of marriage and registered partnership should be treated as distinct or equivalent . . . .”\textsuperscript{75}) was an issue of first impression. Nevertheless, the Court held that refusal to grant the allowance was not discriminatory based on sex, as it was applicable to both men and women.\textsuperscript{76} Furthermore, the Court held that the sex of the partners is not determinative, but rather it is the tie between the partners that counts.\textsuperscript{77} Next, the Court held that the “principle of equal treatment can apply only to persons in comparable situations,”\textsuperscript{78}

\textsuperscript{72} Id. at para 17.
\textsuperscript{73} Id. at para. 29.
\textsuperscript{74} Id. (The court further stated that it was for the EU legislature to decide the equivalency and not the role of the judiciary, as the EU legislature dealt with budgetary and financial impact of the Staff Regulation).
\textsuperscript{75} Id. at para. 33.
\textsuperscript{76} Id. at para. 46.
\textsuperscript{77} Id. at para. 47.
\textsuperscript{78} Id. at para. 48.
thus it was necessary to consider whether a married official could be comparable to registered partnership between same-sex couples.\textsuperscript{79} The Court first assessed the prominent view of the “Community” in its entirety—and stated that there was an “absence of any general assimilation of marriage and other forms of statutory union.”\textsuperscript{80} As such, and in light of the Court’s observations, the appeal was rejected.\textsuperscript{81} Nevertheless, the Court stated that it is for the Community legislature to amend the Staff Regulation language to encompass same-sex partnership for the purpose of qualifying for the allowance under the Staff Regulation.

2. Maruko v. Versorgungsanstalt der deutschen Bühnen

In 2008, Maruko v. Versorgungsanstalt der deutschen Bühnen was decided. In 2001, Mr. Maruko entered into a registered same-sex partnership with another German national.\textsuperscript{82} His partner, Hans Hettinger, was a theatrical costume designer.\textsuperscript{83} Their partnership was formed under the Lebenspartnerschaftsgesetz (LParG),\textsuperscript{84} a German law that provides legal protection for partnerships that resembled marriage. In 2005, Mr. Maruko’s partner died.\textsuperscript{85}

\textsuperscript{79} Id.
\textsuperscript{80} Id. at para. 50.
\textsuperscript{81} Mr. D, for the first time (in front of the Court of Justice) raised an issue of a plea relating to discrimination based on nationality and restriction of freedom of movement. The Court rejected these pleas because they were not asserted in the lower court. The Court also rejected Mr. D’s plea relating to Article 8 of the European Convention on Human Rights.
\textsuperscript{82} Maruko, 2008 E.C.R. I-01757, para. 19.
\textsuperscript{83} Id.
\textsuperscript{84} See paragraph 1 of the Law on registered life partnerships (Gesetz über die Eingetragene Lebenspartnerschaft) of 16 February 2001 (BGBl. 2001 I, p. 266), as amended by the Law of 15 Dec 2004 (BGBl. 2004 I, p. 3396, the “LPartG”):
(1) Two persons of the same sex establish a partnership when they each declare, in person and in the presence of the other that they wish to live together in partnership for life (as life partners). The declarations cannot be made conditionally or for a fixed period. Declarations are effective when they are made before the competent authority.
\textsuperscript{85} Maruko, 2008 E.C.R. I-01757, para. 21.
A month after his partner’s death, Mr. Maruko petitioned the Versorgungsanstalt der deutschen Bühnen (VddB), the insurance company that provided his partner’s survivor pension for artists, to receive the widowers or surviving spouse pension. Maruko’s partner, as a costume designer, qualified for the pension. Furthermore, Maruko’s partner voluntarily contributed to the insurance plan, even though he was under no obligation to do so. The VddB denied Mr. Maruko’s petition.

The VddB’s interpretation of a widow or widower pension included married spouses only, and did not include partners in a registered partnership. Mr. Maruko brought a claim before the Bayerisches Verwaltungsgericht München (Bavarian Administrative Court) in Munich. Mr. Maruko asserted that VddB’s refusal to grant the pension infringed “the principle of equal treatment” since registered partnerships have been placed on the same footing as marriage, specifically, because paragraph 46(4) was introduced in the Social Security Code. Mr. Maruko further asserted that to deny the pension would constitute discrimination based on sexual orientation since married spouses were in a comparable situation with registered partners. Lastly, Mr. Maruko claimed that because German law prescribed the same

86. Id. at para. 22.
87. Paragraphs 32 and 34 of the VddB Regulations defined Widow(er’s) pension as follows:
Para. 32 (widow’s pension): (1) “The spouse of the insured man or retired man, if the marriage subsists on the day of the latter’s death, shall be entitled to a widow’s pension.”
Para. 34 (widower’s pension): (1) “The spouse of the insured woman or retired woman, if the marriage subsists on the day of the latter’s death, shall be entitled to a widower’s pension.”
88. Id. at para. 20.
89. Id. at para. 22 (the VddB rejected Mr. Maruko’s application “on the ground that its regulations did not provide for such entitlement for surviving life partners”).
90. Id.
91. Id. at para. 23 (the Bavarian Administrative Court, Munich, is the referring court).
92. Id.
93. Id.
rules relating to property to both life partnerships and marriages, by extension, the VddB could not withhold the pension. The VddB considered their insurance scheme as a state social security and, as such, argued that it should not be defined as “pay” within the meaning of Article 3(1)(c) of the Directive. Consequently, if the insurance scheme was not within the scope and reach of the Directive, the VddB was not obligated to grant Mr. Maruko’s request.

The Bavarian Administrative Court stated that “in view of the structure of the VddB and the decisive influence exercised by the theatre companies and insured persons over its operations, we are inclined to think that the VddB does not manage a scheme equivalent to a state social security scheme, within the meaning of Article 3(3) of Directive 2000/78.” The court further stated that unlike heterosexual couples, it was impossible for Mr. Maruko and his partner to satisfy the terms of marriage set forth in the VddB survivors’ insurance benefit because of their sexual orientation. Furthermore, satisfying the terms of marriage was dependent upon receiving the pension. The court, in its referral to the ECJ, asked whether the “combined provisions of Article 1 and Article 2(2)(a) of the Directive precludes provisions in regulations such as those of the VddB,” under which a person whose life partner has died

94. Id.
95. Id. at para. 35.
96. See Directive, supra note 25, art. 3(3): “This Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes.”
97. Directive, supra note 25, art. 3(1)(c): “[T]his Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to . . . employment and working conditions, including . . . pay.”
99. Id. at para. 29.
100. Id.
101. Id. at para. 27. See also Directive, supra note 25, art. 1 (“The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment”) & art. 2(2)(a) (“Direct discrimination shall be taken to occur where one person is treated less favorably
does not receive survivor’s benefits equivalent to those offered to a surviving spouse, even though, like spouses, the life partners have been living in a union of mutual support and assistance which was constituted for life.

The court stated that the VddB provision was contrary to the Directive, which “precludes provisions such as those of the VddB regulation,”102 under which entitlement to those benefit was restricted to surviving spouses. The court concluded that there was discrimination based on sexual orientation against Mr. Maruko because his claim fell within the Directive.103

Nevertheless, the Bavarian Court suspended its proceedings and sought a preliminary ruling from the ECJ.104 The issue presented to the Court was whether VddB’s insurance scheme was a state scheme under article 3(3),105 or, more specifically, whether the insurance scheme for widow and widower’s pension qualified as “pay” under Article 3(1)(c)106 of the Directive. The Bavarian Court also presented the issue of whether article 1, in conjunction with article 2(2)(a) precludes regulations such as those by the VddB in which a registered partnership is not treated equivalent to married spouses in obtaining pension benefits.107 Lastly, the court questioned (if the above issues were answered in the affirmative) whether Mr. Maruko was discriminated based on his sexual orientation.108 The Bavarian Court feared that they would interpret the Directive broadly if they answered the above issues in the affirmative without first obtaining a preliminary reference from the ECJ.

103. Id. at para. 28.
104. Id. at para. 33.
105. See supra note 96 and accompanying text.
106. See supra note 97 and accompanying text.
108. Id.
The ECJ deduced that first; the survivors’ pension was the result of the employment relationship between Maruko’s partner and the VddB, and “therefore, must be classified as ‘pay’ within the meaning of the Directive.” 109 Next, the Court ruled that articles 1 and 2 of the Directive forbid both direct and indirect sexual orientation discrimination. 110 As such, the VddB’s requirement that the recipient of the survivor benefit be married constituted indirect discrimination under the Directive since gays and lesbians are unable to marry in Germany, but are afforded equal protection as married spouses and considered to be in comparable situations. 111 The national law recognized a movement in the equivalency of marriage and partnerships, and likewise, that:

[T]he combined provisions of Articles 1 and 2 of [the Directive] preclude provisions such as that at issue in the main proceedings under which, after the death of his life partner, the surviving partner does not receive a survivor’s benefit equivalent to that granted to a surviving spouse, even though, under national law, life partnership places persons of the same sex in a situation comparable to that of spouses so far as concerns that survivor’s benefit. 112

The Court referred the case back to the Bavarian Administrative Court to determine whether spouses and partnerships are equivalent or compatible 113 under German law. If they were, then Maruko would be entitled to the insurance benefit held by VddB.

3. Römer v. Freie und Hansestadt Hamburg

*Römer v. Freie und Hansestadt Hamburg* was decided in 2011. Römer worked for Freie (employer) as an administrative employee

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109. *Id.* at para. 56.
110. *Id.* at para. 66.
111. *Id.*
112. *Id.* at para. 73.
113. *Id.* The Court also stated “it is for the referring court to determine whether a surviving life partner is in a situation comparable to that of a spouse who is entitled to the survivor’s benefit under the occupational pension scheme managed by the VddB.”
from 1950 until May 1990, when he ceased working due to incapacity.\textsuperscript{114} On October 15, 2001, Mr. Römer and his partner, Mr. U entered into a registered partnership pursuant to the LPartG.\textsuperscript{115} Before their registered partnership, Mr. Römer and Mr. U resided together continuously since 1969.\textsuperscript{116} Shortly after the couple entered the registered partnership, Mr. Römer wrote a letter to inform his [former] employer of the registered partnership.\textsuperscript{117} A month after the first letter—and on November 28, 2001—Mr. Römer wrote a second letter and “requested a recalculation of his ongoing pension entitlement on the basis of the more advantageous deduction of income tax . . . ”\textsuperscript{118} under the First RGG.\textsuperscript{119} The employer refused and stated that, according to the First RGG, only married pensioners were entitled to the tax calculations, and since Römer was in a partnership, he would not qualify for the calculation under the First RGG pension plan.\textsuperscript{120} The calculations showed that Römer’s retirement pension would have been higher if Römer was in tax category 111/0 as opposed to tax category I.\textsuperscript{121} After the employer refused to re-calculate his pension, Römer brought suit in the Arbeitsgericht Hamburg, a national labor court

\begin{itemize}
  \item \textsuperscript{114} Römer, 2010 E.C.R. I-3595, at para 22.
  \item \textsuperscript{115} See supra note 84 and accompanying text.
  \item \textsuperscript{116} Id.
  \item \textsuperscript{117} Id.
  \item \textsuperscript{118} Id.
  \item \textsuperscript{119} Erstes Ruhegeldgesetz, (the First RGG—Additional Supplementary Retirement and Survivors’ Pensions Act), May 30, 1995, [GVBI.] at 108 (Ger.) [hereinafter the First RGG].
  \item \textsuperscript{120} Id. The employer cited paragraph 10(6)(1) of the First RGG, which states, in pertinent part:
  \begin{quote}
  \textit{In a day of commencement of the retirement benefits . . . is not permanently separated married pensioners, as well as a pension recipient who is entitled to child allowance or a corresponding power to this day, the amount of that day as a wage tax . . . would be paid by tax class 111/0.}
  \end{quote}
  \item \textsuperscript{121} Id. at para. 24:
  \begin{quote}
  Mr. Römer’s monthly pension, from September 2001, determined on the basis of tax category I, amounted to DEM 1204.55 (EUR 615.88). According to Mr. Römer’s calculations, which are not disputed by his ex-employer, that monthly retirement pension would have been, in September 2001, DEM 590.87 (EUR 302.11) higher if tax category III had been applied.
  \end{quote}
\end{itemize}
He argued that under the Directive his calculations for the tax in his pension should be viewed as equal with married pensioners, and argued that “the criterion of ‘married pensioners,’ laid down by the provision must be interpreted as meaning that it includes pensioners who have entered into a civil partnership in accordance with the LPartG.”

Römer further contended that, under the Directive, he had a cause of action to claim an equal calculation as a married pensioner.

Römer’s employer rejected the above-mentioned contentions and claimed that the pension calculation system applies only to “families under the special protection of the state,” and marriage is “usually a prerequisite to forming a family, because it is the most usual form of relationship between men and women [recognized] by law and it constitutes a framework for the birth of children, and therefore the transformation of the married couple into a family.” Thus, the employer continued, the advantage of the calculation system was designed to compensate for the extra financial burden involved in having a family. The Arbeitsgericht Hamburg acknowledged that the LPartG—the law, under which Römer and his partner registered their partnership, as amended in 2004—was geared towards a gradual harmonization of registered partnerships and marriage. Furthermore, the court stated that under German law there are no significant differences between partnerships and marriage, except that marriage is between people of opposite sex.

However, the court decided to suspend its proceedings and refer the case to the ECJ. The question to be decided was whether the supplementary retirement pensions such as those given

\[122. \text{Id.} \]
\[123. \text{Id. at para. 25.} \]
\[124. \text{Id. at para. 26.} \]
\[125. \text{Id. at para. 27.} \]
\[126. \text{Id.} \]
\[127. \text{Id.} \]
\[128. \text{Id. at para. 34.} \]
to former employees of Freie fall within the scope of the Directive. If so, whether article 2 of the Directive prohibits a scheme that favors married pensioners over partners in a registered same-sex partnership, resulting in either direct or indirect discrimination.

First, the Court held that the supplementary retirement pension qualified as “pay” within the Directive, and further held that the state social security scheme exception under article 3(3) was inapplicable. The Court also held that under the national law of Germany, registered partnerships and marriage have no legally significant differences, and “the main remaining difference is the fact that marriage presupposes that the spouses are of different gender, whereas registered life partnership presupposes that the partners are of the same gender.” Thus, no sufficient difference exists which would justify the unequal treatment of Römer and as such, provisions such as that in the First RGG that grants lower supplemental retirement pension to registered partnerships based solely on sexual orientation constitutes direct discrimination. Furthermore, after the Court’s finding of direct discrimination, it held that it is for the “referring court to assess the comparability” of spouses and individuals in a registered partnership. Accordingly, the Court stated that in making this assessment, the referring court should focus on the rights and obligations of

129. Id.
130. See Directive, supra note 25, art. 2, which provides, in pertinent parts:
   For purposes of paragraph 1:
   (a) [D]irect discrimination shall be taken to occur where one person is treated less [favorably] than another is, has been or would be treated in a comparable situation, on any of the grounds referred to . . . .
   (b) [I]ndirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular . . . sexual orientation at a particular disadvantage compared with others . . . .
131. Id.
132. Id. at para. 35-36.
133. Id. at para 45.
134. Id. at para. 52.
135. Id.
married spouses and persons in partnerships, which are relevant inquiries considering “the purpose of and the conditions for the grant of the benefit in question.” 136 Nevertheless, the Court, citing Maruko, noted that German law “. . . made it clear that registered life partnership is to be treated as equivalent to marriage as regards the widow’s or widower’s pension.” 137

IV. CRITICAL ANALYSIS

A. The Supranational Nature of EU Law

The EU operates on a supranational level and on limited sovereign powers that have been conceded by the Member States. 138 A constitutional treaty which some argue might have resulted in a federalist structure was proposed, but never ratified. 139 Accordingly, the Member States participate in a cooperative manner in exercising their sovereignty. 140 Therefore, the EU can only act “within the limits of the areas of competence conferred on the Community.” 141 Thus, in accepting a case that has been referred to it, the Court must first decide whether the issue initially presented before the national court (referring court) deals with interpretation of EU law, as the Court cannot interpret national law. 142 Furthermore, the Court is also limited in granting an opinion to the issue referred to it. 143 The Court must find a balance between enforcing EU law and refraining from enforcing areas of law that are within the exclusive competence of Member States. 144

136. Id.
137. Id. at para. 42.
140. Id. at 98.
141. See Directive, supra note 25, art. 3.
142. See supra Part III.A.
143. Id.
The “marital status of persons falls exclusively within the competence of the Member States.”\textsuperscript{145} As such, an important hurdle in the applicability of the Directive in the above cases was to determine whether the national court (referring court) would make the compatibility determination—that is, whether marriage is treated equivalently as a registered same-sex partnership.\textsuperscript{146} The Court cannot decide the validity of a Member States’ restriction on same-sex partnerships, marriages or unions. However, once a Member State has decided to confer a status on same-sex partnerships that is comparable to married spouses—as in the \textit{Maruko} and \textit{Römer} decisions—the denial of benefits on the basis of a claimant’s sexual orientation would then be within the purview of the Court’s jurisdiction.\textsuperscript{147}

The \textit{Makuo} decision was the first time the Court ruled “in favor of same-sex couples.”\textsuperscript{148} Thus, the \textit{Maruko} and \textit{Römer} decisions were progressive milestones in the right of sexual orientation minority in EU in general, and in the employment benefit context, in particular. These cases were in stark contrast to the ruling in \textit{Sweden}. The \textit{Sweden} decision was distinguishable from the latter two cases for several reasons. First, in the \textit{Sweden} decision, the issue of comparability determination between same-sex partnerships and marriage was an issue of first impression before the Court.\textsuperscript{149} Second, the \textit{Sweden} decision dealt with a Community Staff Regulation, which was susceptible to its own independent interpretation. According to the Court, the independent interpretation correlated with the Community practices at the time

\begin{itemize}
\item \textsuperscript{145} \textit{Id.}
\item \textsuperscript{146} \textit{See discussion supra Part III.B.}
\item \textsuperscript{147} \textit{Id.} In both the \textit{Maruko} and \textit{Römer} decisions, the Court stated that if the national court where to find that the status conferred to same-sex partnership is comparable to that of married spouses in regard to the respective pension plans, then the claimants would be entitled to receive the pension benefits, notwithstanding the classification of the relationships.
\item \textsuperscript{148} \textit{EU backs gay man’s pension rights}, BBC NEWS (Apr. 1, 2008, 15:44 GMT), \url{http://news.bbc.co.uk/2/hi/europe/7324824.stm}.
\item \textsuperscript{149} \textit{See supra} Part III.B.1.
\end{itemize}
Sweden was decided. As such, the decision in Sweden derived from the Court’s determination that in implementing the Staff Regulation, the Community legislature had the traditional meaning of marriage in mind. That is, the Staff Regulation did not anticipate coverage of same-sex partnerships, marriages or unions because there was an “absence of any general assimilation of marriage and other forms of statutory union,” for same-sex couples within the Community. Thus, although there was clear discrimination in Sweden, the Court was limited in its ruling, as the Staff Regulation interpretation forbade further scrutiny by the Court. Third, unlike Maruko and Römer, the Staff Regulations’ ability of independent interpretation hindered the comparability analysis in Sweden.

The Court went on to rule, however, in the later cases, that the Member States should determine the compatibility of partnerships and marriages, and if such compatibility were founded, the plaintiffs would be entitled to their pensions and insurance, respectively. Thus, even though the Swedish Government granted a comparative situation to same-sex registered partnerships as married couples, the ability of the Staff Regulations independent interpretation made such determination irrelevant. Ironically, the latter cases hinged upon such determination. The Court, for its part, called for the EU legislature to amend the language of the Staff Regulation. It remains to be seen whether the result of the Court in Sweden would have been different if the case dealt instead with an insurance company such as the VddB in Maruko, and not a Staff Regulation sponsored by the Community. Lastly, Sweden is distinguishable from Maruko and Römer, as the Sweden

150. See, e.g., Ian Curry-Sumner, Same-sex Realationships in Europe: Trends Toward Tolerance? 3 AMSTERDAM L. FORUM 44, 51 (2011) (When Sweden was decided in 2001, Germany and Finland allowed registered-partnership, and only the Netherlands allowed same-sex marriage. This suggests that the court took into account the “Community practice,” which indicated a reluctance to grant martial and partnership status to same-sex couples).
151. See supra Part III.B.1.
152. Id.
153. Note, however, that both public and private entities are covered under the Directive.
decision, although factually similar to the latter cases, could not have been analyzed under the Directive. It would have been interesting whether Sweden would have been decided differently if the Directive would have been applicable.

An essential part of the applicability of the Directive was whether the employment benefit sought qualified as “pay.” If the benefit did not qualify as “pay” it would fall outside the scope of the Directive. The relevant articles of the Directive are articles 1, 2 and 3. Article 1 established the protected grounds. Article 2 defines direct and indirect discrimination, both of which are covered under the Directive. Article 3(1)(c) covers “pay” within the confines of the Directive, while article 3(3) removes state social security schemes from the Directive’s coverage.

The Court’s recognition that the calculation scheme in Römer and the insurance scheme in Maruko qualified as “pay” within article 3, was the first step in order for appellant’s to assert their claim under the Directive. Had the Court ruled differently (that these benefits were not considered “pay” for the purposes of the Directive) the Court would not have reached the question of whether the respective provisions were discriminatory. The next step was the Court’s ruling that—pursuant to article 2—the appellants were either directly or indirectly discriminated against because they were not treated comparably with married couples with whom they were similarly situated. Without such finding, the Court would not have had a reason to request the compatibility analysis from the national courts so as to determine whether partnerships where comparable to marriage in order for the

154. See supra note 96 and accompanying text.
155. See Directive, supra note 25, arts. 1, 2 & 3.
156. See supra Part I.
157. See supra note 130.
158. See supra note 97.
159. See supra note 96.
161. See supra Part III. B.
appellants to claim entitlement of such benefits.\textsuperscript{162} Thus, the Court was right to find that the rejection of a survivor pension by a partner should be deemed less favorable treatment, because a married spouse would be automatically entitled to the pension, while a partner would not. Furthermore, it was important that the Court not only concluded that the treatment was less favorable, but that the provisions in both \textit{Römer} and \textit{Maruko} were unacceptable because they attempted to restrict benefits for same-sex partners, who otherwise qualified for the benefits under national law.

Although the Directive is not as strong as it could be due to the nature of the EU,\textsuperscript{163} the Member States are entitled to grant greater protection than the Directive provides.\textsuperscript{164} As such, the Member States and their judicial branch should be at the forefront in providing for higher protection than the Directive calls for. This request at first glance seems feasible. However, while heightened protection from Germany made all the difference in the latter two cases, the \textit{Sweden} case showed how a different level of protection failed to accomplish the task.\textsuperscript{165} As a consequence, the question becomes whether the protection for same-sex partnership rests upon the type of benefit that is challenged, as opposed to the Member State’s grant to same-sex partners of comparable status to married spouses. Furthermore, in \textit{Sweden} the Court stated that the sexual orientation of the partners did not matter, but that it was the tie between the partners that mattered.\textsuperscript{166} However, in \textit{Maruko} and \textit{Römer}, the Court ruled that it was discrimination based on sexual orientation because the tie between the partners could never be one of marriage due to their sexual orientation.\textsuperscript{167} The rulings in both \textit{Maruko} and \textit{Römer} have proven to be big steps forward for EU

\textsuperscript{162} Id.
\textsuperscript{163} Id. See also Part II.
\textsuperscript{164} See supra Part III.B.
\textsuperscript{165} See Part III.B.1 through 3.
\textsuperscript{166} See Part III.B.1.
\textsuperscript{167} See supra Part III.B.2 & Part III.B.3.
citizens in registered same-sex partnerships in providing the opportunity to recover employment benefits.

Currently, sixteen of the EU Member States recognize some form of registered partnership, with nearly ten of the Member States recognizing same-sex marriage.\textsuperscript{168} However, since the definition of comparability is within the Member States competence, it is possible that provisions such as the VddB, and those in \textit{Freie}\textsuperscript{169} would be considered non-discriminatory, if same-sex partnerships and marriage are not considered comparable to married spouses. Accordingly, if a Member State allows same sex partnerships, but does not confer comparable benefits to the partners as those of married spouses, the citizen would undoubtedly be treated as second class solely because the Member State does not accord comparability status. Thus, in essence, “this means that the Member States frame the comparability between homosexual and heterosexual situations and thereby indirectly decide upon the applicability of EU law,”\textsuperscript{170} by granting a benefit to a same-sex partner, but failing to uphold such benefit like in the case of married spouses, thereby removing the matter from the confines of the Directive, and from the Court’s jurisdiction.

Furthermore, it would also be legal to refuse same-sex partners from benefitting from the same employment benefits as those enjoyed by married spouses. In the \textit{Maruko} case, the “results would have been very different if Germany would [not have

\textsuperscript{168} See Emmanuelle Bribosia, Isabelle Rorive & Laura Van den Eynde, \textit{Same-Sex Marriage—Building an Argument before the European Court of Human Rights in Light of the U.S. Experience}, 32 BERKELEY INT’L L. J. (2013). The Netherlands was the first to do so in 2001, since then, Belgium, Spain, Sweden, Portugal, Denmark, France, and the United Kingdom have legalized same-sex marriage. Germany, Finland, Luxembourg, Hungary, Czech Republic, Slovenia, Austria, Ireland and Spain recognize some form of same-sex partnership, while Croatia recognizes unregistered cohabitation. Cyprus, Estonia, Greece, Italy, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, and Bulgaria do not recognize any form of same-sex partnership or marriage.

\textsuperscript{169} \textit{Römer}, 2010 E.C.R. I-3595.

provided life partners with a ‘comparable situation so far as it concerns survivors benefit . . . ’.”\textsuperscript{171} Even though, concededly, the structure of the EU lends itself to this form of governance, the goal of equal application of the Directive to all Member States would be hampered. Articles 1 and 2 call for combating unfavorable treatment based on sexual orientation. The cases presented above show that a Member State could allow same-sex partnerships, but with none of the benefits that married couples would have, if the Member State decides that partnerships and marriage are not comparable. In such a case, essentially, the partnership would be in name only.

\textbf{B. A Survey of Sexual Orientation Rights Before and After the Directive}

The Directive itself—having been implemented—is an important step towards equal treatment of sexual minorities, of same-sex partners in regard to employment benefits, in particular, and EU sexual minorities citizens in general. Even though the case law on the Directive has been based on granting pensions and insurance benefit for same-sex partners, the Directive has provided relief in other areas as well. For instance, before the Directive, sexual minorities in the workplace did not have a cause of action or remedy against those who discriminated against them. The Directive offers explicit judicial and administrative remedy for victims, reinforced by the stipulations that the sanctions chosen must be “effective, proportionate and dissuasive in case of breaches of the obligation . . . ”\textsuperscript{172}

The Directive, in effect, stands for a proposition that sexual orientation discrimination ought to be taken seriously, and remedied accordingly. This tough stance on discrimination is further apparent under the Directive as the defendant has the burden of proving the absence of discrimination.

\textsuperscript{171} \textit{Id.} at 180.
\textsuperscript{172} \textit{See} Directive, \textit{supra} note 25, art. 3.
Under the Directive, it is easier to “challenge legally the conduct of persons responsible for carrying out homophobic harassment in the workplace.” In turn, as stated before, the Directive grants a direct remedy to those who have been discriminated against. As such, those discriminated against would no longer have to rely on weaker law and weaker theories of recovery, such as harassment, assault or battery.

As a result of the Directive, labor organizations in the EU have mobilized in an effort to promote the Directive’s objectives and goals. The European Trade Union Confederation (hereinafter “ETUC”) is one such organization. One aim of the ETUC is to promote and defend human and civil rights, while demanding equality in the workplace for sexual orientation minorities. In the wake of the Directive, the ETUC has partnered with other national governmental organizations and trade unions in furthering their commitment to equal treatment, respect and dignity for lesbians, gays, bisexuals, and transgendered (hereinafter “LGBT”) citizens in the workplace. As part of its commitment to eliminate sexual orientation discrimination, the ETUC has set up a four-year action plan. This plan is aimed at raising awareness of LGBT discrimination in the workplace, and promoting diversity, non-discrimination, as well as raising awareness to sexual orientation discrimination among trade union members.

173. Id.
174. See e.g., supra Part I, discussing the judicial unenforceability of earlier provisions by EU citizens against those who discriminated against them.
176. Id.
177. Id.
178. Id.
In the EU, sexual orientation minorities are sometimes referred to as invisible citizens because they have to hide their sexual orientation to prevent harassment. Another labor organization, the European Commission EQUAL Community Initiative (hereinafter “EQUAL”), has the objective of ending the invisibility of sexual minorities in the workplace. The EQUAL initiative was co-founded by the Member States after the adoption of the Directive. The aim of EQUAL resembles that of the ETUC. EQUAL’s objective is to create a working environment in the EU where homosexuals feel safe in the workplace. It is safe to say that without the Directive the above-mentioned organizations would not have been created. Furthermore, absent the Directive, such organizations could not effectively promote and raise awareness of discrimination of sexual minorities in the workplace.

As such, the Directive has had notable accomplishments. First, the Directive provided labor organizations with a law to rely on in implementing change. Second, EU Member States sexual orientation minority citizens can rely on the Directive in court. Third, in connection with the applicability of the Directive in court, sexual minority citizens are able to seek remedies against violators.

179. See, e.g., Homosexuals. The Invisible Citizens of Lithuania, BALTIC WORLDS, http://balticworlds.com/homosexuals-the-invisible-citizens-of-lithuania (last visited Jan. 14, 2014). These “invisible citizens”—as they are termed by the sociologists who authored a large-scale survey on homophobia in Lithuania—are subject to several forms of discrimination, most notably in the workplace. In Lithuania, they do not benefit from any legal recognition or organized communal life.  
181. Id. The European Social Funds initially funded EQUAL.  
182. Id. EQUAL also relies on the impact of media coverage to raise awareness of the rights of sexual minorities in the workplace. In addition, EQUAL takes it a step further and addresses LGBT issues in organizations such as churches, the police and the military. Furthermore, the EQUAL partnership has succeeded in educating and training management groups, trade union and work personnel.  
183. Id.
of the Directive. In light of the above, the Directive has been successful.

C. By the Numbers: Sexual Orientation Discrimination Prevalence Before and After the Directive

In comparing the prevalence of sexual orientation discrimination in the workplace, it is important to view both pre-Directive and post-Directive numbers. Unfortunately, there is no system for assessing adverse impact of discrimination in the EU. This makes tracking the progress made after the implementation of the Directive difficult. However, “an action plan on statistics and a forthcoming EU Regulation are geared towards achieving comparable data of sexual orientation discrimination in the workplace at the EU level.”

Nevertheless, statistics are taken from independent sources to gauge the progress of the Directive’s anti-discrimination measures. Before the Directive was implemented, anti-gay discrimination was considered prevalent. A 1994 survey revealed that almost sixteen percent of respondents agreed that they had been discriminated against at work, while half answered that they were harassed. Eight percent of respondents reported that they were fired from their jobs due to their sexual orientation. Twenty-five percent said that they were “too afraid to apply for certain jobs or to specific employers.” There is support for such fear. For example, up until recently, Italy considered homosexuals as being “unfit” to serve in the military.

186. Id. at 112.
187. Id.
188. Id.
189. Id. at 113.
Since the implementation of the Directive, Member State citizens have taken advantage of its legal provisions. In 2007, official statistics by the European Union Agency for Fundamental Rights were released. The following countries’ courts made findings of discrimination based on the “total number of complaints in each country.” In Sweden, sixty-two cases of sexual orientation discrimination in the workplace were filed, with a result in six instances of proven discrimination. In Latvia, there were twelve cases filed and only one case resulted in a finding of sexual orientation discrimination. In the Czech Republic, there was only one case of sexual orientation discrimination filed, and discrimination was found in that sole case. It is important to point out that in Great Britain, the highest monetary remedy for a victim of sexual orientation discrimination in the workplace was £120,000. Unfortunately, these statistics also revealed the prevalence of discrimination post-Directive. For instance, France reported sixteen percent of individuals were discriminated against in the workplace. In the United Kingdom, that number is fifty two percent (more than triple in comparison to France). In Sweden, thirty percent reported such instances of discrimination.

Respondents replied to a survey conducted by the European Commission. The respondents stated that if a “company can

191. Id. at 60.
192. Id.
193. Id.
195. Id. at 64.
choose between two candidates with equal skills and qualifications,” a sexual orientation minority would be at a nineteen percent hiring disadvantage.\textsuperscript{197} Forty-three percent responded that they would be either as likely or more likely to grant a promotion to a sexual orientation minority.\textsuperscript{198} Furthermore, sixty-six percent responded that they are in favor of adopting “measures that provide equal opportunities” to sexual orientation minorities in the “field of employment.”\textsuperscript{199} The above statistics indicate that, while sexual orientation discrimination is not as prevalent and blatant as before the implementation of the Directive, there is still work to be done.

V. RECOMMENDATIONS

Not all discrimination is based on a refusal to grant a surviving same-sex partner a pension or insurance benefit. Most discrimination in the workplace deals with a hostile environment from either co-workers or superiors. Studies have shown that LGBT experience harassment and discrimination—direct and indirect—in the workplace.\textsuperscript{200} This impacts an individual’s decision to be either openly gay in the workplace or become an invisible citizen.\textsuperscript{201} Sexual minorities should not be forced to accept such a choice.\textsuperscript{202} Based on the above analysis and discussion, the following are practical and feasible recommendations.

First, with any aspect of life, education should be in the forefront of a successful implementation of this Directive.

\begin{flushleft}
\textsuperscript{197} Id. at 18.  \\
\textsuperscript{198} Id. at 19.  \\
\textsuperscript{199} Id. at 20.  \\
\textsuperscript{200} See European Union Agency for Fundamental Rights, \textit{supra} note 190, at 63.  \\
\textsuperscript{201} Id. at 67.  \\
\textsuperscript{202} Id. (“Many workplaces are currently not considered ‘safe havens’ for LGBT staff. Although data varies according to national context, studies and interviews with National Equality Bodies and LGBT NGOs demonstrate that the majority of LGBT persons are generally reluctant, or somewhat reluctant, to being ‘out’ and open in the workplace”).
\end{flushleft}
Currently, only Sweden has a body specifically authorized to deal with discrimination on grounds of sexual orientation.\textsuperscript{203} That body is the HomO, one of four Equality Ombudspersons in Sweden.\textsuperscript{204} More Member States should raise awareness and educate their citizenry about this issue. Furthermore, it is essential that employers develop training programs focused on educating workplace personnel from the very top management to the employees.

Next, it is recommended that the Member States offer incentives to employers who take action in the effort to combat sexual orientation discrimination. This will provide sexual orientation minorities with hiring and promotional opportunities that would not have otherwise been available. As noted above, the European Commission has conducted surveys and studies into the prevalence of sexual orientation discrimination. The European Commission should work on developing a system that focuses on creating a mandatory reporting system for statistical data in order to gauge the progress of the Directive.

Lastly, it seems that the national courts and the ECJ are interpreting the Directive in a way that is favorable towards same-sex partnerships. Looking onward, this trend should continue, as the Member States and individual companies, such as the VddB, would be less inclined to implement provisions that would have a discriminatory effect on sexual orientation minorities in the EU. While recognizing that this is a brave recommendation, Member States that want to grant same-sex partnerships should be mandated to create such a scheme, whereby same-sex partnerships would be recognized as comparable to marriage for the purpose of securing employment benefits, among other things. It could be possible, however, that mandating Member States to provide comparability status would generate resistance to granting any recognition of same-sex partnership rights. While this might be the

\begin{footnotes}
\item[203.] Id. at 58.
\item[204.] Id.
\end{footnotes}
case, Member States who do intend to recognize such status but refuse to confer the benefits of such status create comparability in name only, thereby rendering it ineffective. This contradicts the essence of the recognition of same-sex partnerships, unions, or marriages.

VI. CONCLUSION

It is true that laws aimed at combating sexual orientation discrimination in the workplace are a fairly new concept. However, the EU has come a long way since the non-binding provisions of the Parliamentary Resolution. Perhaps a comprehensive Directive that focuses on sexual orientation minorities’ rights in all aspects of life (subject to the competence limitations of EU institutions) would be the next step. There is not much an EU Directive can do in regards to the recommendations made above, except that the Member States would have to raise their standards, while also granting a comparable situation to married spouses. Another option would be for the EU to move towards a model of federalism, which will allow the EU more discretion in implementing anti-discriminatory laws. Concededly, this is an ambitious goal, since there have been debates about a federal EU, but the model was rejected.205 Until further reconsideration, the progress of the EU in implementing Directive 2000/78/EC should be commended.

205. See supra Part IV.
Volume 5 of the Journal of Civil Law Studies published several titles of the Louisiana Civil Code in English and in French. This included the Preliminary Title and the general law of obligations, namely three titles of Book Three: Obligations in General (Title 3), Conventional Obligations or Contracts (Title 4), and Obligations Arising without Agreement (Title 5). The English and the French appeared side by side, rather than one above the other, as on the webpage. Representation and Mandate (Title 15) and Suretyship (Title 16) are the object of the present publication. These two titles were translated by Dr. Ivan Tchotourian, then Associate Professor at the Université de Nantes (France) and presently Professor at the Université Laval (Québec), during a two-month visit at the LSU Law Center in the fall of 2011. The translation was revised by Dr. Matthias Martin, Université de Lorraine (France), during his visit at the LSU Law Center in the spring of 2014.¹

¹ For a general presentation of the translation project, see Olivier Morèteau, The Louisiana Civil Code Translation Project: An Introduction, 5 J. CIV. L. STUD. 97-104 (2012).
BOOK III. OF THE
DIFFERENT MODES OF
ACQUIRING THE
OWNERSHIP OF THINGS

TITLE XV.
REPRESENTATION AND
MANDATE
[Acts 1871, No. 87; Acts 1997,
No. 261, §1, eff. Jan. 1, 1998]

CHAPTER 1.
REPRESENTATION

Art. 2985. A person may represent another person in legal relations as provided by law or by juridical act. This is called representation.

Art. 2986. The authority of the representative may be conferred by law, by contract, such as mandate or partnership, or by the unilateral juridical act of procuration.

Art. 2987. A procuration is a unilateral juridical act by which a person, the principal, confers authority on another person, the representative, to represent the principal in legal relations.

The procuration may be addressed to the representative or to a person with whom the representative is authorized to represent the principal in legal relations.

LIVRE III. DES DIFFERENTS MOYENS DONT ON ACQUIERT LA PROPRIETE DES BIENS

TITRE XV. DE LA REPRÉSENTATION ET DU MANDAT
[Loi de 1871, n°87 ; Loi de 1997, n°261, § 1, entrée en vigueur le 1er janvier 1998]

CHAPITRE 1. DE LA REPRÉSENTATION

Art. 2985. Suivant les termes de la loi ou d’un acte juridique, une personne peut en représenter une autre dans ses rapports juridiques. Ceci s’appelle la représentation.

Art. 2986. Le pouvoir du représentant peut être conféré par la loi, par un contrat tel que le mandat ou la société en nom collectif, ou par un acte juridique unilatéral de procuration.

Art. 2987. La procuration est l’acte juridique unilatéral par lequel une personne, le représenté, donne pouvoir à une autre personne, le représentant, de la représenter dans ses rapports juridiques.

La procuration peut être adressée au représentant ou à un tiers avec lequel il a le pouvoir d’agir au nom du représenté dans ses rapports juridiques.
Art. 2988. A procuration is subject to the rules governing mandate to the extent that the application of those rules is compatible with the nature of the procuration.

CHAPTER 2. MANDATE

SECTION 1. GENERAL PRINCIPLES

Art. 2989. A mandate is a contract by which a person, the principal, confers authority on another person, the mandatary, to transact one or more affairs for the principal.

Art. 2990. In all matters for which no special provision is made in this Title, the contract of mandate is governed by the Titles of "Obligations in General" and "Conventional Obligations or Contracts".

Art. 2991. The contract of mandate may serve the exclusive or the common interest of the principal, the mandatary, or a third person.

Art. 2992. The contract of mandate may be either onerous or gratuitous. It is gratuitous in the absence of contrary agreement.

Art. 2988. La procuration est soumise aux règles du mandat dans la mesure où leur application est compatible avec la nature de la procuration.

CHAPITRE 2. DU MANDAT

SECTION 1. PRINCIPES GÉNÉRAUX

Art. 2989. Le mandat est un contrat par lequel une personne, le mandant, donne pouvoir à une autre personne, le mandataire, de faire une ou plusieurs affaires pour lui.

Art. 2990. Pour toutes les matières dans lesquelles il n'existe pas de dispositions particulières dans le présent titre, le mandat est régi par les titres “Des obligations en général” et “Des obligations conventionnelles ou des contrats”.

Art. 2991. Le mandat peut être conclu dans l'intérêt exclusif ou commun du mandant, du mandataire ou d'une tierce personne.

Art. 2992. Le mandat est à titre onèreux ou à titre gratuit. Il est réputé à titre gratuit en l’absence de convention contraire.
Art. 2993. The contract of mandate is not required to be in any particular form.

Nevertheless, when the law prescribes a certain form for an act, a mandate authorizing the act must be in that form.

Art. 2994. The principal may confer on the mandatary general authority to do whatever is appropriate under the circumstances.

Art. 2995. The mandatary may perform all acts that are incidental to or necessary for the performance of the mandate.

The authority granted to a mandatary to perform an act that is an ordinary part of his profession or calling, or an act that follows from the nature of his profession or calling, need not be specified.

Art. 2996. The authority to alienate, acquire, encumber, or lease a thing must be given expressly. Neither the property nor its location need be specifically described.

Art. 2997. Authority also must be given expressly to:

(1) Make an inter vivos donation, either outright or to a new or existing trust or other custodial arrangement, and, when also expressly so provided, to impose such conditions on the donation, including, without limitation, the power to revoke,
that are not contrary to the other express terms of the mandate.

(2) Accept or renounce a succession.

(3) Contract a loan, acknowledge or make remission of a debt, or become a surety.

(4) Draw or endorse promissory notes and negotiable instruments.

(5) Enter into a compromise or refer a matter to arbitration.

(6) Make health care decisions, such as surgery, medical expenses, nursing home residency, and medication.

[Amended by Acts 2001, No. 594, §1]

Art. 2998. A mandatary who represents the principal as the other contracting party may not contract with himself unless he is authorized by the principal, or, in making such contract, he is merely fulfilling a duty to the principal.

Art. 2999. A person of limited capacity may act as a mandatary for matters for which he is capable of contracting. In such a case, the rights of the principal against the mandatary charges, y compris le pouvoir de révoquer sans aucune limite, si celles-ci ne sont pas contraires aux autres termes exprès du mandat.

(2) Accepter ou renoncer à une succession.

(3) Contracter un emprunt, reconnaître l’existence d’une dette ou la remettre, ou encore se porter caution.

(4) Tirer ou endosser des billets à ordre ou tout autre effet de commerce.

(5) Compromettre ou soumettre une matière à l’arbitrage.

(6) Prendre une décision relative à la santé telle qu’une intervention chirurgicale, des dépenses médicales, un placement en maison de soins et un traitement médicamenteux.

[Modifié par Loi de 2001, n°594, § 1]

Art. 2998. Le mandataire qui représente le mandant en tant qu’autre partie contractante ne peut contracter avec lui-même sans l’autorisation du mandant, à moins qu’en concluant un tel contrat, il s’acquitte simplement de son devoir vis-à-vis du mandant.

Art. 2999. La personne dont la capacité est limitée peut agir comme mandataire dans les matières pour lesquelles elle est capable de contracter. En pareil cas, les droits du mandant à l’encontre du mandataire sont
are subject to the rules governing the obligations of persons of limited capacity.

Art. 3000. A person may be the mandatary of two or more parties, such as a buyer and a seller, for the purpose of transacting one or more affairs involving all of them. In such a case, the mandatary must disclose to each party that he also represents the other

SECTION 2. RELATIONS BETWEEN THE PRINCIPAL AND THE MANDATORY

Art. 3001. The mandatary is bound to fulfill with prudence and diligence the mandate he has accepted. He is responsible to the principal for the loss that the principal sustains as a result of the mandatary's failure to perform.

Art. 3002. When the mandate is gratuitous, the court may reduce the amount of loss for which the mandatary is liable.

Art. 3003. At the request of the principal, or when the circumstances so require, the mandatary is bound to provide information and render an account of his performance of the mandate. The mandatary is bound to notify the principal,
without delay, of the fulfillment of the mandate.

Art. 3004. The mandatary is bound to deliver to the principal everything he received by virtue of the mandate, including things he received unduly. The mandatary may retain in his possession sufficient property of the principal to pay the mandatary's expenses and remuneration.

Art. 3005. The mandatary owes interest, from the date used, on sums of money of the principal that the mandatary applies to his own use.

Art. 3006. In the absence of contrary agreement, the mandatary is bound to fulfill the mandate himself. Nevertheless, if the interests of the principal so require, when unforeseen circumstances prevent the mandatary from performing his duties and he is unable to communicate with the principal, the mandatary may appoint a substitute.

Art. 3007. When the mandatary is authorized to appoint a substitute, he is answerable to the principal for the acts of the substitute only if he fails to exercise diligence in selecting the substitute or in giving instructions. When not authorized to appoint a substitute, the

Art. 3004. Le mandataire doit remettre au mandant tout ce qu'il a reçu en vertu du mandat, quand bien même ce qu'il aurait reçu n'eût point été dû au mandant.

Le mandataire peut retenir en sa possession suffisamment de biens du mandant pour couvrir ses dépenses et sa rémunération.

Art. 3005. A compter du jour de leur utilisation, le mandataire doit l'intérêt sur les sommes d’argent dues au mandant que le mandataire a utilisé pour son propre usage.

Art. 3006. Sauf convention contraire, le mandataire est tenu d’accomplir personnellement le mandat.

Néanmoins, le mandataire peut, si les intérêts du mandant l’exigent, se substituer un tiers lorsque des circonstances imprévues l’empêchent d’accomplir le mandat et qu’il ne peut en aviser le mandant.

Art. 3007. Lorsque le mandataire est autorisé à se substituer un tiers, il répond envers le mandant des actes de la personne qu’il s’est substitué uniquement dans l’hypothèse où il n’a pas fait preuve de diligence dans le choix de ce tiers ou dans les instructions qu’il lui a données.

Lorsqu’il n’a pas été
mandatary is answerable to the principal for the acts of the substitute as if the mandatary had performed the mandate himself.

In all cases, the principal has recourse against the substitute.

Art. 3008. If the mandatary exceeds his authority, he is answerable to the principal for resulting loss that the principal sustains.

The principal is not answerable to the mandatary for loss that the mandatary sustains because of acts that exceed his authority unless the principal ratifies those acts.

Art. 3009. Multiple mandataries are not solidarily liable to their common principal, unless the mandate provides otherwise.

Art. 3010. The principal is bound to the mandatary to perform the obligations that he mandatary contracted within the limits of his authority. The principal is also bound to the mandatary for obligations contracted by the mandatary after the termination of the mandate if at the time of contracting the mandatary did not know that the mandate had terminated.

The principal is not bound to autorisé à se substituer un tiers, le mandataire répond envers le mandant des actes de la personne qu’il s’est substituée comme s’il les avait personnellement accomplis.

Dans tous les cas, le mandant a un recours contre la personne que le mandataire s’est substituée.

Art. 3008. Lorsque le mandataire excède ses pouvoirs, il est responsable des pertes qui en résultent et qui sont subies par le mandant.

Le mandant n’est pas responsable envers le mandataire des pertes subies par ce dernier et trouvant leur source dans des actes excédant ses pouvoirs à moins que le mandant ne les ait ratifiés.

Art. 3009. A moins que le mandat n’en dispose autrement, plusieurs mandataires ne sont pas responsables solidairement à l’égard de leur mandant commun.

Art. 3010. Le mandant est tenu d’exécuter les obligations contractées par le mandataire dans la limite de ses pouvoirs. Le mandant est également tenu des obligations contractées par le mandataire après la fin du mandat si, au moment de leur conclusion, le mandataire ignorait que le mandat avait pris fin.

A moins qu’il ne ratifie les actes accomplis, le mandant
the mandatary to perform the obligations that the mandatary contracted which exceed the limits of the mandatary's authority unless the principal ratifies those acts.

Art. 3011. The mandatary acts within the limits of his authority even when he fulfills his duties in a manner more advantageous to the principal than was authorized.

Art. 3012. The principal is bound to reimburse the mandatary for the expenses and charges he has incurred and to pay him the remuneration to which he is entitled.

The principal is bound to reimburse and pay the mandatary even though without the mandatary's fault the purpose of the mandate was not accomplished.

Art. 3013. The principal is bound to compensate the mandatary for loss the mandatary sustains as a result of the mandate, but not for loss caused by the fault of the mandatary.

Art. 3014. The principal owes interest from the date of the expenditure on sums expended by the mandatary in performance of the mandate.

Art. 3015. Multiple principals for an affair common to them are solidarily bound to their mandatary.

n'est pas tenu d'exécuter les obligations contractées par le mandataire qui excèderaient les limites de ses pouvoirs.

Art. 3011. Le mandataire reste dans les limites de ses pouvoirs lorsqu'il agit d'une manière plus avantageuse pour le mandant que celle qui était convenue.

Art. 3012. Le mandant doit rembourser au mandataire les dépenses et les frais qu'il a dû engager et lui payer la rémunération à laquelle il a droit.

Le mandant doit ce remboursement et ce paiement même lorsque, en l'absence de faute du mandataire, l'objectif du mandat n'a pas été atteint.

Art. 3013. Le mandant doit indemniser le mandataire des pertes résultant du mandat, mais non de celles causées par la faute du mandataire.

Art. 3014. A compter du jour de leur dépense, le mandant doit l'intérêt sur les sommes d'argent engagées par le mandataire dans l'exécution du mandat.

Art. 3015. En cas de pluralité de mandants pour une affaire commune, chacun est tenu solidairement envers le mandataire.
SECTION 3. RELATIONS BETWEEN THE PRINCIPAL, THE MANDATARY, AND THIRD PERSONS

SUBSECTION A. RELATIONS BETWEEN THE MANDATARY AND THIRD PERSONS

Art. 3016. A mandatary who contracts in the name of the principal within the limits of his authority does not bind himself personally for the performance of the contract.

Art. 3017. A mandatary who contracts in his own name without disclosing his status as a mandatary binds himself personally for the performance of the contract.

Art. 3018. A mandatary who enters into a contract and discloses his status as a mandatary, though not his principal, binds himself personally for the performance of the contract. The mandatary ceases to be bound when the principal is disclosed.

Art. 3019. A mandatary who exceeds his authority is personally bound to the third person with whom he contracts, unless that person knew at the time the contract was made that the mandatary had exceeded his authority or unless the principal ratifies the contract.
SUBSECTION B. RELATIONS BETWEEN THE PRINCIPAL AND THIRD PERSONS

Art. 3020. The principal is bound to perform the contract that the mandatary, acting within the limits of his authority, makes with a third person.

Art. 3021. One who causes a third person to believe that another person is his mandatary is bound to the third person who in good faith contracts with the putative mandatary.

Art. 3022. A third person with whom a mandatary contracts in the name of the principal, or in his own name as mandatary, is bound to the principal for the performance of the contract.

Art. 3023. A third person with whom a mandatary contracts without disclosing his status or the identity of the principal is bound to the principal for the performance of the contract unless the obligation is strictly personal or the right non-assignable. The third person may raise all defenses that may be asserted against the mandatary or the principal.

SOUS-SECTION B. DES RELATIONS ENTRE LE MANDANT ET LES TIERS

Art. 3020. Lorsque le mandataire agit dans les limites de ses pouvoirs, le mandant est tenu d’exécuter le contrat conclu avec le tiers.

Art. 3021. Celui qui laisse croire à un tiers qu’une autre personne est son mandataire est tenu envers le tiers qui a conclu de bonne foi avec ce prétendu mandataire.

Art. 3022. Le tiers qui contracte avec un mandataire agissant au nom du mandant, ou en son propre nom en qualité de mandataire, est tenu envers le mandant d’exécuter le contrat.

Art. 3023. Le tiers qui contracte avec un mandataire qui ne révèle pas son statut ou l’identité du mandant est tenu envers ce dernier d’exécuter le contrat, à moins que l’obligation ne soit strictement personnelle ou que le droit soit incessible. Le tiers peut opposer au mandataire ou au mandant tout moyen de défense.
SECTION 4. TERMINATION OF THE MANDATE AND OF THE AUTHORITY OF THE MANDATORY

Art. 3024. In addition to causes of termination of contracts under the Titles governing "Obligations in General" and "Conventional Obligations or Contracts", both the mandate and the authority of the mandatary terminate upon the:

(1) Death of the principal or of the mandatary.

(2) Interdiction of the mandatary.

(3) Qualification of the curator after the interdiction of the principal.

Art. 3025. The principal may terminate the mandate and the authority of the mandatary at any time. A mandate in the interest of the principal, and also of the mandatary or of a third party, may be irrevocable, if the parties so agree, for as long as the object of the contract may require.

SECTION 4. DE LA FIN DU MANDAT ET DES POUVOIRS DU MANDATAIRE

Art. 3024. Outre les causes de fin de contrat prévues aux titres "Des obligations en général" et "Des obligations conventionnelles ou des contrats", le mandat ainsi que les pouvoirs du mandataire prennent fin :

(1) Au décès du mandant ou du mandataire ;

(2) A compter de l’interdiction légale du mandataire ;

(3) A compter de la prise de fonction du curateur après interdiction légale du mandant.

Art. 3025. Le mandant peut mettre fin au mandat et aux pouvoirs du mandataire à tout moment. Lorsque les parties en conviennent et aussi longtemps que l’objet du contrat est susceptible de le requérir, le mandat peut être irrévocable, lorsqu’il est donné non seulement dans l’intérêt du mandant, mais aussi dans celui du mandataire ou d’un tiers.
Art. 3026. In the absence of contrary agreement, neither the contract nor the authority of the mandatary is terminated by the principal's incapacity, disability, or other condition that makes an express revocation of the mandate impossible or impractical.

Art. 3027. Until filed for recordation, a revocation or modification of a recorded mandate is ineffective as to the persons entitled to rely upon the public records.

Art. 3028. The principal must notify third persons with whom the mandatary was authorized to contract of the revocation of the mandate or of the mandatary's authority. If the principal fails to do so, he is bound to perform the obligations that the mandatary has undertaken.

Art. 3029. The mandate and the authority of the mandatary terminate when he notifies the principal of his resignation or renunciation of his authority.

Art. 3030. The mandatary is bound to complete an undertaking he had commenced at the time of the principal's death if delay would cause injury.

Art. 3031. If the mandatary does not know that the mandate or his authority has terminated and enters into a contract with a
third person who is in good faith, the contract is enforceable.

Art. 3032. Upon termination of the mandate, unless this obligation has been expressly dispensed with, the mandatary is bound to account for his performance to the principal.

Arts. 3033-3034. [Blank]

TITLE XVI. SURETYSHIP
[Acts 1987, No. 409, §1, eff. Jan. 1, 1988]

CHAPTER 1. NATURE AND EXTENT OF SURETYSHIP

Art. 3035. Suretyship is an accessory contract by which a person binds himself to a creditor to fulfill the obligation of another upon the failure of the latter to do so.

Art. 3036. Suretyship may be established for any lawful obligation, which, with respect to the suretyship, is the principal obligation.

The principal obligation may be subject to a term or condition, may be presently existing, or may arise in the future.

Art. 3037. One who ostensibly binds himself as a principal obligor to satisfy the obligation of another is considered to have the same status as the original creditor.

Art. 3038. [Blank]
present or future obligations of another is nonetheless considered a surety if the principal cause of the contract with the creditor is to guarantee performance of such obligations.

A creditor in whose favor a surety and principal obligor are bound together as principal obligors in solido may presume they are equally concerned in the matter until he clearly knows of their true relationship.

Art. 3038. Suretyship must be express and in writing.

Art. 3039. Suretyship is established upon receipt by the creditor of the writing evidencing the surety's obligation. The creditor's acceptance is presumed and no notice of acceptance is required.

Art. 3040. Suretyship may be qualified, conditioned, or limited in any lawful manner.

CHAPTER 2. KINDS OF SURETYSHIP

Art. 3041. There are three kinds of suretyship: commercial suretyship, legal suretyship, and ordinary suretyship.

Art. 3042. A commercial suretyship is one in which:

(1) The surety is engaged in

l’obligation présente ou future d’une autre personne est toutefois considéré comme caution si la raison principale du contrat avec le créancier est de garantir de telles obligations.

Un créancier en faveur duquel une caution et un débiteur principal se sont engagés solidairement comme débiteurs principaux peut présumer qu’ils se sont engagés tous deux de cette manière jusqu’à ce qu’il ait connaissance de leur véritable relation.

Art. 3038. Le cautionnement doit être exprès et écrit.

Art. 3039. Le cautionnement est établi à réception, par le créancier, de l’écrit attestant de l’obligation de la caution. L’acceptation du créancier est présumée et aucune notification d’acceptation n’est requise.

Art. 3040. Le cautionnement peut être restreint, conditionnel ou limité de toutes les manières que la loi autorise.

CHAPITRE 2. DES DIFFÉRENTES SORTES DE CAUTIONNEMENT

Art. 3041. Il y a trois sortes de cautionnement : le cautionnement commercial, le cautionnement légal et le cautionnement ordinaire.

Art. 3042. Le cautionnement commercial est celui dans lequel, au choix :
a surety business;

(2) The principal obligor or the surety is a business corporation, partnership, or other business entity;

(3) The principal obligation arises out of a commercial transaction of the principal obligor; or

(4) The suretyship arises out of a commercial transaction of the surety.

Art. 3043. A legal suretyship is one given pursuant to legislation, administrative act or regulation, or court order.

Art. 3044. An ordinary suretyship is one that is neither a commercial suretyship nor a legal suretyship.

An ordinary suretyship must be strictly construed in favor of the surety.

CHAPTER 3. THE EFFECTS OF SURETYSHIP BETWEEN THE SURETY AND CREDITOR

Art. 3045. A surety, or each surety when there is more than one, is liable to the creditor in accordance with the provisions of this Chapter, for the full performance of the obligation of the principal obligor, without benefit of division or discussion, even in the absence of an express
agreement of solidarity.

Art. 3046. The surety may assert against the creditor any defense to the principal obligation that the principal obligor could assert except lack of capacity or discharge in bankruptcy of the principal obligor.

CHAPTER 4. THE EFFECTS OF SURETYSHIP BETWEEN THE SURETY AND PRINCIPAL OBLIGOR

Art. 3047. A surety has the right of subrogation, the right of reimbursement, and the right to require security from the principal obligor.

Art. 3048. The surety who pays the principal obligation is subrogated by operation of law to the rights of the creditor.

Art. 3049. A surety who pays the creditor is entitled to reimbursement from the principal obligor. He may not recover reimbursement until the principal obligation is due and exigible.

A surety for multiple solidary obligors may recover from any of them reimbursement of the whole amount he has paid the creditor.

Art. 3050. A surety who in good faith pays the creditor when the principal obligation is extinguished, or when the principal obligor had the means
principal avait les moyens de la tenir en échec, a néanmoins une action en répétition contre le débiteur principal. Cette action est ouverte lorsque la caution a fait un effort raisonnable pour avertir le débiteur principal que le créancier exigeait le paiement, ou lorsque le débiteur principal savait que le créancier exigeait le paiement.

Les droits de la caution à l’encontre du créancier ne sont pas pour autant exclus.

Art. 3051. A surety may not recover from the principal obligor, by way of subrogation or reimbursement, the amount paid the creditor if the principal obligor also pays the creditor for want of being warned by the surety of the previous payment.

In these circumstances, the surety may recover from the creditor.

Art. 3052. A surety may not recover from the principal obligor more than he paid to secure a discharge, but he may recover by subrogation such attorney's fees and interest as are owed with respect to the principal obligation.

Art. 3053. A surety, before making payment, may demand security from the principal obligor to guarantee his reimbursement when:
(1) The surety is sued by the creditor;

(2) The principal obligor is insolvent, unless the principal obligation is such that its performance does not require his solvency;

(3) The principal obligor fails to perform an act promised in return for the suretyship; or

(4) The principal obligation is due or would be due but for an extension of its term not consented to by the surety.

The principal obligor may refuse to give security if the principal obligation is extinguished or if he has a defense against it.

Art. 3054. If, within ten days after the delivery of a written demand for the security, the principal obligor fails to provide the required security or fails to secure the discharge of the surety, the surety has an action to require the principal obligor to deposit into the registry of the court funds sufficient to satisfy the surety's obligation to the creditor as a pledge for the principal obligor's duty to reimburse the surety.

(1) La caution est poursuivie par le créancier;

(2) Le débiteur principal est insolvable, à moins que l’obligation principale soit telle que son exécution ne requière pas sa solvabilité;

(3) Le débiteur principal n’a pas exécuté l’acte promis en retour du cautionnement;

(4) L’obligation principale n’est échue ou ne serait échue qu’en raison de la prorogation du terme accordée sans le consentement de la caution.

Le débiteur principal peut refuser d’octroyer une sûreté si l’obligation principale est éteinte ou s’il dispose d’un moyen de défense.

Art. 3054. Lorsque, dans un délai de dix jours après la délivrance d’une demande écrite de constitution de sûreté, le débiteur principal échoue à fournir celle-ci ou échoue à garantir la libération de la caution, la caution a une action pour exiger du débiteur principal de consigner au tribunal les fonds suffisants afin d’exécuter l’obligation de la caution envers le créancier, en gage de l’exécution du devoir du débiteur principal de rembourser la caution.
CHAPTER 5. THE EFFECTS OF SURETYSHIP AMONG SEVERAL SURETIES

Art. 3055. Co-sureties are those who are sureties for the same obligation of the same obligor. They are presumed to share the burden of the principal obligation in proportion to their number unless the parties agreed otherwise or contemplated that he who bound himself first would bear the entire burden of the obligation regardless of others who thereafter bind themselves independently of and in reliance upon the obligation of the former.

Art. 3056. A surety who pays the creditor may proceed directly or by way of subrogation to recover from his co-sureties the share of the principal obligation each is to bear. If a co-surety becomes insolvent, his share is to be borne by those who would have borne it in his absence.

Art. 3057. A surety who pays the creditor more than his share may recover the excess from his co-sureties in proportion to the amount of the obligation each is to bear as to him. If a surety obtains the conventional discharge of other co-sureties by paying the creditor, any...
CHAPTER 6. TERMINATION OR EXTINCTION OF SURETYSHIP

Art. 3058. The obligations of a surety are extinguished by the different manners in which conventional obligations are extinguished, subject to the following modifications.

Art. 3059. The extinction of the principal obligation extinguishes the suretyship.

Art. 3060. Prescription of the principal obligation extinguishes the obligation of the surety. A surety's action for contribution from his co-sureties and his action for reimbursement from the principal obligor prescribe in ten years.

The interruption of prescription against a surety is effective against the principal obligor and other sureties only when such parties have mutually agreed to be bound together with the surety against whom prescription was interrupted.

Art. 3061. A surety may terminate the suretyship by notice to the creditor. The termination does not affect the
surety's liability for obligations incurred by the principal obligor, or obligations the creditor is bound to permit the principal obligor to incur at the time the notice is received, nor may it prejudice the creditor or principal obligor who has changed his position in reliance on the suretyship.

Knowledge of the death of a surety has the same effect on a creditor as would a notice of termination received from the surety. A termination resulting from notice of the surety's death does not affect a universal successor of the surety who thereafter unequivocally confirms his willingness to continue to be bound thereby. The confirmation need not be in writing to be enforceable.

Art. 3062. The modification or amendment of the principal obligation, or the impairment of real security held for it, by the creditor, in any material manner and without the consent of the surety, has the following effects.

An ordinary suretyship is extinguished.

A commercial suretyship is extinguished to the extent the surety is prejudiced by the action of the creditor, unless the principal obligation is one other
than for the payment of money, and the surety should have contemplated that the creditor might take such action in the ordinary course of performance of the obligation. The creditor has the burden of proving that the surety has not been prejudiced or that the extent of the prejudice is less than the full amount of the surety's obligation.

CHAPTER 7. LEGAL SURETYSHIP

Art. 3063. The provisions governing commercial suretyship contained in this Title apply to legal suretyship except as otherwise provided in this Chapter.

Art. 3064. The provisions of this Chapter apply to the extent they are not contrary to special laws governing particular kinds of legal suretyship.

Art. 3065. Legal suretyship may be given only by a person authorized to conduct a surety business in Louisiana or by a natural person domiciled in this state who owns property in this state that is subject to seizure and is of sufficient value to satisfy the obligation of the surety. The qualification of a natural person to act as legal surety must pass extinction when the obligation principal is not relative to the payment of money, and the surety should have contemplated that the creditor might take such action in the ordinary course of performance of the obligation. The creditor has the burden of proving that the surety has not been prejudiced or that the extent of the prejudice is less than the full amount of the surety's obligation.

CHAPITRE 7. DE LA CAUTION LEGALE

Art. 3063. En l’absence de dispositions contraires dans ce chapitre, les règles du cautionnement commercial du présent titre s’appliquent au cautionnement légal.

Art. 3064. Les dispositions de ce chapitre s’appliquent dans la mesure où elles ne sont pas contraires aux lois spéciales relatives aux différentes catégories du cautionnement légal.

Art. 3065. Le cautionnement légal ne peut être donné que par une personne habilitée à conclure un cautionnement commercial en Louisiane ou par une personne physique domiciliée dans cet état où elle est propriétaire de biens susceptibles d’être saisis et dont la valeur est suffisante pour satisfaire à l’obligation de la
be evidenced by his affidavit and the affidavit of the principal obligor.

A legal surety may not raise his lack of qualification as a defense to an action on his contract.

Art. 3066. A legal suretyship is deemed to conform to the requirements of the law or order pursuant to which it is given, except as provided by Article 3067.

Art. 3067. A surety is not liable for a sum in excess of that expressly stated in his contract. A legal suretyship may contain terms more favorable to the creditor than those required by the law or order pursuant to which it is given, but it may not provide for a time longer than is provided by law for bringing an action against the surety.

Art. 3068. Legal suretyship may be given whenever the law requires or permits a person to give security for an obligation. The principal obligor may in lieu of legal suretyship deposit a sum equal to the amount for which he is to furnish security to be held in pledge as security for his obligation.

La qualité d’une personne physique à agir comme caution légale doit être établie par sa déclaration écrite et celle du débiteur principal.

Une caution légale ne peut invoquer son manque de qualité comme moyen de défense à une action fondée sur son engagement.

Art. 3066. Sauf disposition contraire de l’article 3067, le cautionnement légal doit être conforme aux exigences de la loi ou de l’ordonnance en vertu de laquelle il est donné.

Art. 3067. La caution n’est pas tenue au-delà de son engagement exprès. Le cautionnement légal peut prévoir des conditions plus avantageuses pour le créancier que celles prévues par la loi ou l’ordonnance en vertu de laquelle il est donné. En revanche, ce cautionnement ne peut pas prolonger la période légale durant laquelle la caution est exposée à un recours.

Art. 3068. Le cautionnement légal peut être donné chaque fois que la loi impose ou permet à une personne de garantir une obligation. A la place de ce cautionnement et en gage de l’exécution de son obligation, le débiteur principal peut déposer une somme équivalente à celle pour laquelle il doit fournir une sûreté.
Art. 3069. No judgment shall be rendered against a legal surety unless the creditor obtains judgment against the principal obligor fixing the amount of the latter's liability to the creditor or unless the amount of that liability has otherwise been fixed. The creditor may join the surety and principal obligor in the same action.

Art. 3070. If a legal surety ceases to possess required qualifications or becomes insolvent or bankrupt, any interested person may demand that the principal obligor furnish additional security in the same amount and upon the same terms as those given by the existing surety for the performance of the obligation.

Art. 3069. Aucun jugement ne peut être rendu contre une caution légale. Il en va autrement lorsque le créancier a lui-même obtenu un jugement contre le débiteur principal déterminant le montant de sa responsabilité ou lorsque ce montant a été autrement fixé. Le créancier peut associer la caution et le débiteur principal dans la même action.

Art. 3070. Lorsqu’une caution légale n’a plus les qualités requises ou lorsqu’elle devient insolvante ou est mise en faillite, toute personne intéressée peut demander que le débiteur principal fournisse une garantie supplémentaire du même montant et aux mêmes conditions que celles données par la caution.
I. INTRODUCTION

Recently, in Martin v. A-1 Home,\(^1\) an apparently mundane case of personal injury (in which the victim sought to trigger the liability of a company that allegedly was in a master-servant\(^2\) relationship with the tortfeasor) puts into question the practice of importing common law principles into matters governed by the Louisiana Civil Code.

Should a Louisiana court be able to look to established common law principles to render a final decision when there is no direct and clear norm from the Civil Code nor a direct line of jurisprudence constante on the issue? Does this equate to the legislative gap contemplated by article 4 of the Louisiana Civil Code?\(^3\) Is the equity mentioned in article 4 enough for a judge in

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\(^{1}\) Martin v. A-1 Home Appliance Ctr., Inc., 12-784 (La. App. 5 Cir. 5/30/13), 117 So. 3d 281 [hereinafter Martin].

\(^{2}\) Though largely used in American literature, the language of “master” and “servant” should be replaced by the dichotomy “employer-employee,” thus also following the European trend in Tort Law. An example of such a transition can be seen in a recent Louisiana Tort Law casebook: JOHN M. CHURCH, WILLIAM R. CORBETT & THOMAS E. RICHARD, TORT LAW: THE AMERICAN AND LOUISIANA PERSPECTIVES 515-51 (Vandeplas Pub’g 2008).

\(^{3}\) LA. CIV. CODE art. 4: “When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages.”
Louisiana to immediately look at the Restatement of the Law in order to find a solution?  

Apart from what may seem just a purely theoretical debate, a better understanding of existing civilian concepts could provide answers to these questions. This case note scrutinizes, in its first part, the flow of arguments used by the court, and, in its second part, offers an alternative theoretical system, consistent with the civil code, but with a different outcome from the decision rendered by the court in Martin.

II. BACKGROUND

The plaintiff, Mr. Martin, bought a refrigerator from one of the defendants, A-1 Home Appliance Center, Inc. (hereinafter A-1).  

After purchasing the refrigerator, the defendant’s employee told Mr. Martin that, in exchange for a $75 fee, they would deliver the product to the customer's home. The plaintiff agreed and paid this additional service. A couple of days later, Mr. Martin was called and informed that the refrigerator would be delivered the next day. That next day, the plaintiff was called again by a representative of A-1, indicating that they were in the area, ready to deliver the refrigerator. While trying to lift the refrigerator over the kitchen counter inside Mr. Martin's house, the deliverymen appeared to be losing control of the appliance. According to Mr. Martin's testimony, he voluntarily and uninvitedly stepped in and grabbed one side of the refrigerator, trying to rebalance the refrigerator and prevent it from falling over the counter. Once the plaintiff got hold of the refrigerator, its entire weight fell upon him and resulted in the tearing of his right bicep muscle. This arm injury required


5. Martin, 117 So. 3d at 282.

6. *Id.*
several surgeries and a prolonged period of rehabilitation, and Mr. Martin sought to recover the cost of the damages incurred.

The plaintiff found out that the deliverymen were not A-1’s employees as he initially thought, but that they were working for another company, Johnson Delivery Service (hereinafter Johnson); A-1 contracted with Johnson in order to make deliveries of its appliances. The plaintiff filed a personal injury action against both A-1 and Johnson, and their insurance companies.

III. DECISION OF THE COURT OF APPEAL

At trial, before the verdict was delivered, Mr. Martin settled with Johnson and its insurer for the amount of $100,000. Additionally, the jury returned a verdict exonerating A-1, and finding only Johnson liable for the injury. The reasoning behind this decision originated from the fact that there was no indication of an employer-employee relationship between A-1 and Johnson, the latter being an independent contractor. Following the denial of Martin's motion for a new trial, the plaintiff appealed the decision.

Mr. Martin argued that the trial judge erred in not instructing the jury that A-1 could be jointly liable for the acts of Johnson under the theory of “apparent authority.” The plaintiff contended in his appeal that this is a second theory of recovery, distinct from the theory of vicarious liability.

The Fifth Circuit dismissed the appeal, reiterating the lack of any relationship between A-1 and Johnson, which would otherwise fall under article 2320, and also by distinguishing the fact pattern

7. Id.
8. Id. at 283.
9. Id. at 282.
10. Id.
11. LA. CIV. CODE art. 2320:
Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed... In the above cases, responsibility only attaches, when the masters or employers, teachers and artisans, might have prevented the act which caused the damage, and have not done it.
in the present case from a Louisiana Supreme Court case, *Independent Fire Insurance Company v. Able Moving and Storage Company, Inc.* The court found that the “apparent authority” theory was not applicable to the facts of *Martin*, and reaffirmed the challenged judgment.

IV. COMMENTARY

This commentary is divided in two parts. The first part follows the court’s reasoning in trying to establish whether A-1 is liable. The second part of the commentary suggests an alternative way of analyzing *Martin*, by using a reliance-based theory of liability derived from the Louisiana Civil Code (*la théorie de l’apparence*). This theory provides a different result for *Martin*, and, through its generality, might prove useful in establishing up a framework grounded in the Civil Code for future cases.

A. Re-Analyzing Martin Through the Lens of General Tort Law Principles

1. General Methodology

As a matter of principle, for every wrong done by a person to another, outside a contractual relationship, there is a private action with which the victim can recover the damages incurred. However, what the law designates as a “wrong”, and whether or not a victim has a cause of action, are questions dependent upon the existence of certain grounds, or foundations, for liability. It is a matter of “elementary justice” to recognize that, as a default rule,

12. 650 So. 2d, 750 (La. 1995) [hereinafter Able].
15. Peter Cane, *The Anatomy of Tort Law* in WALTER VAN GERVEN, JEREMY LEVER & PIERRE LAROCHE, CASES, MATERIALS AND TEXT ON NATIONAL, SUPRANATIONAL AND INTERNATIONAL TORT LAW 17 (Hart Publ’g 2000; published as part of the IUS COMMUNE CASEBOOKS FOR THE COMMON LAW OF EUROPE series).
everyone should “bear the ‘general risk associated with existence’”\textsuperscript{16} and that risk cannot simply pass to other individuals.\textsuperscript{17} Liability is an exception to this rule, and, therefore, without legal grounds, or a legal norm that sets out a certain conduct as being unlawful,\textsuperscript{18} a victim must bear her own loss.\textsuperscript{19} Hence, tort regulation involves a constant tension between protecting the legal interest of society at a given moment and the freedom of action of each individual.\textsuperscript{20} This tension is incorporated in the normative process. It illustrates, or at least should illustrate, societal views on the kind of conduct generally considered to be unlawful at a given moment in time, and how such conduct ought to be deterred.\textsuperscript{21}

The usual grounds for liability, fault-based liability and strict liability, would not have served the victim in Martin. A-1 committed no fault of its own when the acts of Johnson’s employee caused damage, therefore fault-based liability would not apply.

Things are not necessarily as straightforward when it comes to strict liability, and that is why the court focused in its discussion on one such heading of liability: vicarious liability.\textsuperscript{22}

2. Is A-1 Liable under Louisiana Civil Code Article 2320?

In Martin, the plaintiff raised the question of whether there was an employer-employee relationship between A-1 and Johnson. During the trial, the jury was duly instructed to answer this
question, having in mind the provisions of Louisiana Civil Code article 2320, and the factors used by the Louisiana Supreme Court in determining the existence of such a relationship. The jury established that Johnson was an independent contractor, and, therefore, that no liability should be imposed on A-1 for the tortious acts of Johnson, under this theory of recovery. In the assignments of errors, the plaintiff did not dispute this finding.

Under article 2320, a victim has to prove two cumulative elements: (1) that there is an employer-employee relationship, and (2) that the negligent act of the employee could have been prevented by the employer. Because the first element was not present, the court’s analysis stopped there.

3. Is A-1 Liable under the “Apparent Authority” Theory?

Mr. Martin alleged that there was an “apparent authority” with which Johnson was clothed to act on behalf and in the name of A-1. He argued that the conversations he had on the phone were with A-1 representatives, and that he relied on the fact that A-1 would deliver his refrigerator to his home, in his decision to purchase the refrigerator. The plaintiff used the arguments from Able, to support his assertion.

23. Id. at 530. In Louisiana, an employer is liable for the damages produced by her employee while in the exercise of the functions of said employment.
24. Amyx v. Henry & Hall, 79 So. 2d 483, 486 (La. 1955). The Fifth Circuit listed the factors, but did not use Amyx as a reference. However, analyzing the factors is not the purpose of the present note.
25. Martin, 117 So. 3d at 283.
26. Id.
27. William Crawford, 12 Louisiana Civil Law Treatise: Tort Law 186 (2d ed., West 2009). Although the codal provision requires the second condition, the courts in Louisiana have consistently ignored it, and do not require the proof of negligence. Considering the doctrinal and jurisprudential dispute in this matter, it is of little importance for the study of Martin whether the liability under article 2320 falls under fault or no-fault liability. See also Cox v. Gaylord Container Corp., 897 So. 2d 1 (La. Ct. App. 1st Cir. 2004) and Doe v. East Baton Rouge Parish School Bd., 978 So. 2d 426 (La. Ct. App. 1st Cir. 2007).
Before looking at the Fifth Circuit’s reasoning with regard to this aspect, this commentary will make a short comparative review of agency law and the contract of mandate.

a. The Contract of Mandate

The contract of mandate is different from the concept of agency. The concept of agency encompasses a larger pallet of legal effects than the contract of mandate does. Louisiana’s provisions regarding the contract of mandate were initially drafted in a manner similar to the provisions of the French Civil Code. Likewise, after the 1997 Revision of the Louisiana Civil Code, the conceptual and functional essence of the contract of mandate did not change.

The French Civil Code did not create a institution such as the common law’s agency. It defined the institution of mandate as a contract whereby one person (the principal) gives to another (the mandatary) the power to conclude, on his behalf, one or more juridical acts. The mandatary represents the interests of the principal. Given the specifics of some activities (e.g., some acts of commerce), the mandatary will have to execute not only juridical acts, but also material acts. This distinction bears a great

32. Wendell Holmes & Symeon C. Symeonides, Representation, Mandate, and Agency: A Kommentar on Louisiana’s New Law, 73 TUL. L. REV. 1087, 1158 (1999). Speaking about the changes that occurred in 1997, the authors conclude that “while being faithful to Louisiana’s civil heritage, the new law recognizes the realities of contemporary transactional practice as well as the need for some uniformity with the law of the surrounding common law states.”
33. Yiannapoulos, supra note 31, at 783.
34. Mandant, in French.
35. MARCEL PLANIOL & GEORGE RIPERT, 2.2 TREATISE ON THE CIVIL LAW 286 (Louisiana State Law Inst. trans., William S. Hein & Co. 1939). The same definition can be found in MALAURIE & AYNES, supra note 29, at 277.
36. MALAURIE & AYNES, supra note 29, at 272.
importance when it comes to liability. The French Civil Code chose to not expressly regulate the liability of the mandatary with respect to the material acts, opening the ground for the Court of Cassation to extend the interpretation and applicability of service contracts in this context (contrat d’entreprise). In this regard, as a result of business practices, often times the contract of mandate becomes a mixed contract, creating ancillary obligations which do not stem from the traditional notion of mandate. This is the legal technique by which the service contract is incorporated into the bigger and complex contract of mandate. Hence, the mandatary shall be held liable for the juridical acts according to the terms of the contract of mandate, and shall be liable towards the principal for the material acts according to the terms of the service contract. The principal is liable to third parties only according to the general theory of liability.

The borderline between these two concepts might be blurred, but no arguments can be offered to stand for the proposition that they are similar. Louisiana Civil Code article 2989 provides that “a mandate is a contract by which a person, the principal, confers authority on another person, the mandatary, to transact one or more affairs for the principal.” The departure from the French Civil Code stands in that the notion of “affairs” encompasses both juridical and material acts. However, the Revision Comments for article 2989 warn the reader that most of the provisions regarding the contract of mandate have been construed with the juridical acts in mind. Louisiana did not import ad litteram the concept of contract of mandate as prescribed by the French Civil Code.

37. Id. at 272 n.7, citing the decision of the Commercial Section of the French Court of Cassation. An equivalent English translation would be “service contract.” A definition of “contrat d’entreprise” could provide that it is a convention in which the contractor undertakes an obligation to make his talent available to the client through a compensation previously agreed with the other party. GÉRARD CORNU, VOCABULAIRE JURIDIQUE 357 (5th ed., Quadrige/PUF 2004).
38. MALAURIE & AYNES, supra note 29, at 273.
40. LA. CIV. CODE art. 2989, cmt. (e) (1997).
Instead, the drafters might have thought that the problem regarding material acts could be simplified if they use the concept of “affair” to encompass the inclusion of both juridical and material acts.41

b. Agency

The attempt to find a satisfactory definition of agency is a rather difficult task.42 The basic hallmark of agency law is that the principal bears the consequences created by the fact that she chose to run her business through an agent.43 This view embraced by the Restatement (Third) of Agency points out a rather minor difference between agency and the contract of mandate. That is, the right of the principal to control the agent’s behavior and to prevent any wrongdoing by the agent.44 In a more complicated manner, but to serve the same purpose, the contract of mandate incorporates a service contract (contrat d’entreprise). This way, the Civil Code contemplates a method by which the principal has “control” over her mandatary’s behavior with respect to material acts. This design comes close to the control which agency law entails, but no degree of equivalence can be seen between the methods of how the

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42. Olivier Moréteau, Droit anglais des affaires 105 (Daloz 2000). See also Paula J. Dalley, A Theory of Agency Law, 72 U. Pitt. L. Rev. 495 (2011), for brief considerations regarding the attempts to find a proper definition.

43. The law of agency:

   [E]nc ompasses the legal consequences of consensual relationships in which one person (the principal) manifests assent that another person (the agent) shall, subject to the agent's acts and on the principal's right of control, have the power to affect the principal's legal relations through the agent's acts and on the principal's behalf. Restatement (Third) of Agency § 8.14(2)(b) (Am. Law Inst. 2006).

44. Dalley, supra note 42, at 513.
control is exerted.\footnote{MALAURIE \& AYNES, supra note 29, at 276.} The principal’s control in a contract of mandate is limited to contractual obligations, while agency law assumes that the principal is empowered to control the facts concerning the agent’s behavior, contractual or non-contractual.

This apparent theoretical distinction is important in cases where the agency relationship looks much like an employment relationship or projects an image that causes a third party to rely on the fact that the agent is working for the principal, because in such a case it might give rise to liability of the principal for the acts of the agent.\footnote{Holmes \& Symeonides, supra note 32, at 1097.} In agency law, by default, the principal has a broader authority to control the behavior of the agent.

The Louisiana Civil Code cannot contemplate such an interpretation, because the only available means of control the principal has over the mandatary are contractual in nature, and the mandatary enjoys more freedom than an agent in common law. The higher degree of control allowed to the principal over the agent in common law jurisdictions comes with heightened responsibility towards third parties. Despite the lower level of control a principal has over the mandatary, in Louisiana there have been cases where courts had to find a basis for imposing liability on a principal, when the equity of the case demanded it. Is the resort to the doctrine of “apparent authority” a solution?

4. A Short History of Agency Law Intrusion in Louisiana Law

This tendency of departing from the codal provisions with regards to contract of mandate is not new.\footnote{Sentell v. Richardson, 29 So. 2d 852, 855 (La. 1947). In interpreting the former language of article 2985, which provided the definition of the contract of mandate, the Louisiana Supreme Court decreed that the words “‘and in his name’ are not essential to the definition of a procuration or power of attorney.”} In accordance with the traditional view of the code, the courts have long supported the idea that vicarious liability and contract of mandate are
incompatible,\textsuperscript{48} unless there is an employer-employee relationship. The first decision in which a court imposed liability on a principal for the negligent act of an agent was in \textit{Blanchard v. Ogima}.\textsuperscript{49} The Louisiana Supreme Court simplified the analysis to find out whether there is an employer-employee relationship. Following this decision, a federal court\textsuperscript{50} dealt with the same question that was raised in \textit{Martin}, related to “apparent authority.”\textsuperscript{51} The court acknowledged that it wasn’t very clear whether it is possible under Louisiana law to impose vicarious liability on the principal for the negligent acts of his agent, but argued that as a federal court, they assume the future position of the courts, which should adopt this “apparent authority” theory.\textsuperscript{52}

In \textit{Rowell v. Carter Mobile Homes, Inc.},\textsuperscript{53} in an opinion delivered by Justice Dennis, the issue was whether a bank (a principal), that authorized a mobile home dealer to act as an undisclosed agent\textsuperscript{54} was liable for the injuries that were suffered by


\textsuperscript{49} 215 So. 2d 902 (La. 1968) “A master or employer is liable for the tortious conduct of a servant or employee which is within the scope of authority or employment.” \textit{Id}. at 902.

\textsuperscript{50} Arceneaux v. Texaco, 623 F.2d 924 (5th Cir. 1980) [hereinafter Arceneaux].

\textsuperscript{51} The definition provided by the \textit{RESTATEMENT (SECOND) OF AGENCY § 8} (Am. Law Inst. 1958): Apparent authority represents “the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other’s manifestations to such third persons.” Apparent authority is different from actual authority, in the sense that it is created by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him. \textit{Id}. § 27.

\textsuperscript{52} “Louisiana courts have drawn freely from the common law and the Restatements of the Law in developing both tort and agency doctrine. We may assume for present purposes, without deciding, that they would proceed along the Restatement path and adopt the rule of apparent authority in tort cases.” Arceneaux, 623 F.2d at 926.

\textsuperscript{53} 500 So. 2d 748 (1987) [hereinafter Rowell].

\textsuperscript{54} Note that for an accurate use of legal terminology when discussing about the contract of mandate, the parlance involves the principal and the mandatary. \textit{See} LA. CIV. CODE Title XV. Representation and Mandate. On the
the buyer of the mobile home, due to the negligent repair of the floor (which was performed by the bank’s agent). The court again simplified the legal analysis, to the extent of whether the agent was an employee for the principal or not, concluding that absent any physical control of the agent’s activity within the scope of the mandate given, the principal was not liable for the tortious act of its agent. This decision recited passages from Blanchard, but its approach remained faithful to the civilian doctrine.

5. Louisiana Supreme Court and “Apparent Authority”

In Able, the Louisiana Supreme Court held that, in the event that there is no employer-employee relationship, a principal could become vicariously liable for the tortious acts of its “agent”, relying on the doctrine of “apparent authority.”

The facts in Able are strikingly similar to those in Martin. The plaintiff used the yellow pages to find a transporter for her furniture. She found an advertisement for a national mover, called “Bekins”. However, at the bottom of the advertisement there was a disclaimer informing the potential customers that the local operator of “Bekins” was a company called “Able Moving & Storage Co.” According to the testimony heard during the trial, the plaintiff was under the impression that she had hired Bekins, and had no knowledge at any point that she had contracted with Able. The moving operations were conducted by two workmen. The plaintiff handed them a check indicating that the recipient of the payment was “Bekins.” After Able’s employees left, a fire consumed the plaintiff’s house. It was later established that the fire was caused

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other hand, in agency law the mandatary is referred as agent. Unfortunately, legal scholars, judges and lawyers are using agent and mandatary interchangeably, though they have different meanings.

55. Rowell, 500 So. 2d at 749.
56. Id. at 751. As a side note, the court tangentially touched on the issue of “control.”
57. For a short exposé of the facts, see Holmes, Ruminations, supra note 48, at 572.
by a cigarette butt left there by one of the workmen. While it was clear that the workman and Able were liable, the plaintiff raised the question of whether Bekins was liable, for creating the impression that she was dealing with Bekins.

The court resorted to the common law Restatement (Second) of Agency to motivate the application of apparent authority to a non-contractual relationship between the principal and the victim. The court also distinguished Able from Rowell, and held that when a principal makes a representation to a third party, there is an agency relationship between said principal and the agent and, because of this representation, the third person justifiably relies upon the care or skill of such apparent agent, the principal is subject to liability to the third party for harm caused by the lack of care or skill of the party appearing to be her agent.

The language from the decision suggests that the court read the applicable provisions from the Civil Code, found no explicit rule to apply to the facts sub judice, and borrowed the doctrine of “apparent authority” from the Restatement, in order to create a legal basis for imposing liability on the principal for the acts of the agent. Nonetheless, the Louisiana Supreme Court confused the concept of “apparent authority” with the concept of “agency by estoppel.” In a previous case also decided by the Supreme Court, the court emphasized that the doctrine of “apparent authority” is based on a contract theory which says that a party ought to be bound by what she says and manifests, rather than by what she intends, and, therefore, the third party who contracts with the agent need only prove reliance on the appearance of authority.

58. Abel, 650 So. 2d at 751.
59. Holmes, Ruminations, supra note 48, at 572. See also supra note 51.
60. Id.
61. RESTATEMENT (SECOND) OF AGENCY § 267 (Am. Law Inst. 1958):
One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.
Agency by estoppel is based on tort principles of preventing loss by an innocent person. The third party has to prove reliance and a change in position, which damaged the third party, and that it would be unjust to allow the principal to deny the existence of agency relationship.

Although there is no explicit language in the decision, the rationale behind this solution could stem from Louisiana Civil Code article 4. Equally important to determine why the court resorted to this solution is the fact that an element of emotional sympathy could have weighed decisively in rendering the decision. Shortly after this incident, Able’s headquarter was also destroyed in a fire, leaving the plaintiff without any possibility of recovering the damages.

6. Applying Able to the Facts in Martin

In Louisiana, matters pertaining to civil law which are not clearly resolved by the Code should not be solved by the courts with the doctrine of precedents, but rather resort to an established jurisprudence constante.

In Martin, the plaintiff based his entire theory of recovery on the rule established in Able. The court narrowed the spectrum of Able, focusing on the reliance element of the claim. The court essentially asked whether the victim’s change of position was determined by her reliance on the representation made by A-1. Conversely, in order to trigger the liability of the principal, the victim needed to have changed her position because of her...
reasonable belief that she dealt with a “servant or other agent” of the principal. In *Martin*, the court stated that there were no facts to support the proposition that Mr. Martin relied on the apparent authority when he made the decision to purchase the refrigerator, or when he allowed the deliverymen to enter on his house. Johnson’s truck had no sign on it, but the deliverymen were wearing Johnson uniforms. Although the court acknowledged that the rule in *Able* was correct, it distinguished *Martin* from *Able* in the sense that in the former case, there was no evidence that the plaintiff “would not have made the payment had he known the facts of the delivery process.” It is also possible that, since the plaintiff already recovered $100,000 from Johnson, this might have had some influence on the decision.

**B. A Civilian Alternative to the Doctrine of “Apparent Authority”**

1. **Reanalyzing Able**

One author suggested with regards to *Able*, that the court “instead of looking to agency law and apparent authority . . . need only have looked to the Civil Code articles.” This approach is equally applicable to *Martin*. This part first overviews the effects of the rule stated in *Able,* and then proposes a theory of recovery based on the Civil Code.

The rule affirmed in *Able* has been regarded as a wrong decision by a small number of authors. For an approach that salutes this step taken by the Supreme Court, see Holmes, *Ruminations,* supra note 48, at 576-77, 581. The author calls this decision “a potentially major expansion of the doctrine of apparent authority by opening its application to the field of torts.” See also Michael B. North, *Comment: Qui Facit Per Alium, Facit Per Se: Representation, Mandate, and Principles of Agency in Louisiana at the Turn of the Twenty-First Century,* 72 Tul. L. Rev. 279 (1997).

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69. *Able,* 650 So. 2d at 752.
70. *Martin,* 117 So. 3d at 284.
71. *Id.*
72. *Grauberger,* supra note 30, at 274.
73. *Id.* at 272-73. For an approach that salutes this step taken by the Supreme Court, see Holmes, *Ruminations,* supra note 48, at 576-77, 581. The author calls this decision “a potentially major expansion of the doctrine of apparent authority by opening its application to the field of torts.” See also Michael B. North, *Comment: Qui Facit Per Alium, Facit Per Se: Representation, Mandate, and Principles of Agency in Louisiana at the Turn of the Twenty-First Century,* 72 Tul. L. Rev. 279 (1997).
matter has drawn attention primarily upon the unintended consequences on the franchisor-franchisee relationship.\textsuperscript{74} It may seem that, in Louisiana,\textsuperscript{75} the franchisor should guard against any negative outcome by extending their insurance policy to cover the acts of a franchisee’s employees, as one author has suggested.\textsuperscript{76} This uncertainty\textsuperscript{77} stems from the poor language used by the Supreme Court, which comfortably reproduced the rule existing in agency law.

In 1997 (two years after \textit{Able} was decided), the Civil Code was revised, and one of the changes involved Title XV, on the Contract of Mandate. The Louisiana Civil Code does not mention at any point “apparent authority” within Title XV (Representation and Mandate), or anywhere else, for that matter. The legislature probably intended to import the rule from the common law, and similarly to \textit{Able}, into a codal provision, and therefore adopted article 3021 regarding the “putative mandatary.”\textsuperscript{78} It seems it was an attempt to introduce a reference to “apparent authority,” but through a civilian-oriented approach and with civilian terminology. Nonetheless, the new language from article 3021 does not offer a solution to cases such as \textit{Martin} or \textit{Able}. Rather, it is an “old wine in new bottle”,\textsuperscript{79} because it does not apply to tort cases. Its applicability is limited to contractual issues, and it regulates how the principal is liable toward a third party in good faith.

\textsuperscript{74} Holmes, \textit{Ruminations}, supra note 48, at 579. The author depicts a common example, when a McDonald’s employee commits a tortious act. The question under the rule in \textit{Able} is whether the victim should prove that she chose McDonald’s from Wendy’s or Burger King, relying on the skill and care of the agents, as contemplated by Section 267.

\textsuperscript{75} \textit{Id.} at 579. See also the line of cases cited at 579 n.49, \textit{id.}

\textsuperscript{76} \textit{Id.} at 580.

\textsuperscript{77} Grauberger, supra note 30, at 259. The author contemplates this path as having “destructive effects of the introduction of common-law agency principles into the Louisiana legal system.” \textit{Able} also affects other business areas such as hospitals, and large retail chains.

\textsuperscript{78} LA. CIV. CODE art. 3021: “One who causes a third person to believe that another person is his mandatary is bound to the third person who in good faith contracts with the putative mandatary.”

\textsuperscript{79} Holmes & Symeonides, supra note 32, at 1151.
In addition, the current language of article 3021 ought to be read in conjunction with the general rules laid down in the general law of obligations. The second paragraph of article 1967 has the character of a general norm, and article 3021 is a special provision. Two rules of interpretation apply to such a situation. First, specialia generalibus derrogant—the special provision is applied with priority over the general rule, when the two come in conflict. Second, generalia specialibus non derogant—when the special rule is silent, the gaps can be filled by resorting to the general rule.

2. A Reliance-Based Theory of Liability

Seemingly, there is no direct and clear norm in the Civil Code for a situation like the one presented in Martin. There is a gap in the legislation. In such a case, the court would have been entitled to proceed according to article 4. Many pages have been written...
with respect to this article. Two lines of interpretation have been particularly relevant.

On one hand, Justice Dennis extrapolated this provision by setting up a methodology which would guide the judges who are faced with this kind of situation. The author compared the judge to a “legislator’s helpmate” and advocated a constant devotion to the civilian doctrine. In this interpretation, the judge should first try to deliver a solution according to the scope and meaning of the Civil Code, and only after this fails, should the judge use the liberty conferred by the “equity” of article 4. Regardless, the judge should not automatically look to common law for guidance in such circumstances.

On the other hand, Professor Palmer’s article argues that this permanent guidance of the Code should be read less strictly, and that this legal provision leaves room for importing common law rules. Based on this interpretation, ruling on “equity” prevails

87. Justice Dennis underlined the fact that “the judge does not have absolute discretion but is required to return again and again to the Code seeking its guiding values and adhering as closely to them as possible.” Id. at 17.
88. “When dealing with the civil law, the judge’s constitutional oath to support the law requires that he recognize that the Civil Code is the primary source of law.” Id. See also Grauberger, supra note 30, at 275. This author is of opinion that the courts are not allowed to import common law principles in the Louisiana Law because it is not consistent with the Constitution of Louisiana.
89. Palmer, supra note 85, at 19:
   In a limited number of cases [the judges] proceed by analogy from the Code’s other provisions, as good civilian judges are thought to do. Yet in others, they import and transplant concepts that have no analogy within the Code or within the civilian vocabulary. In other instances, they build from the prior precedents that they established in novel cases.
90. “In Louisiana today, practitioners do not readily recognize civilian connotations in the term ‘equity,’ but they rather easily associate that word with particular common-law doctrines absorbed within the fabric of the law.” Palmer, supra note 85, at 51.
without any other intellectual debates, and justice should be served regardless of the origin of the legal solution.

The Code as a system should not be treated as an “arbitrary and spontaneous product,” but rather as the result of the “labor of reason in the past centuries.” After reading the Louisiana Civil Code, it may appear that it does not provide a theory of recovery for the victim, with respect to the facts in Martin, but, after a closer look, by correlating multiple articles of the code, a theory of liability can be found within the spirit of the code.

In the common law, if a principal unreasonably fails to control an unauthorized agent and a third party relies on the agent to her detriment, the principal will be liable under the theory of agency by estoppel. Similarly, civilian jurisdictions like France and Quebec have identified a new basis of liability in such situations based on a theory called “la théorie de l’apparence.” Based on this theory, reasonable reliance can be a binding source of obligations, very similar to a situation where the equitable remedy of estoppel would apply. Obligations are created for the benefit of a third party, who legitimately relied on a situation created or under the control of the obligor, and acted accordingly. The theory draws its origins from the Roman Law principle of error communis facit jus, but it is more developed and complex nowadays. French doctrine and jurisprudence developed the

91. Levasseur, supra note 4, at 697.
92. Id.
93. Dalley, supra note 42, at 514.
94. Theory of appearance, in English.
97. A common error is a source of law.
theory starting from Geny’s liberal interpretation, but without resorting to “equity” or other rules not prescribed by the Code. It is considered to be a theory contained in the French Civil Code, despite the fact that it is not based on an explicit and clear norm.

This theory of liability can easily be fit into the framework of Louisiana Civil Code, and the articles regarding tort law (2315-2322). The Civil Code already has expressions of reliance-based theories of liability in contractual relations. Articles 1967 and 3021 create obligations in situations where an innocent victim relies on an appearance of facts to her detriment. The French théorie de l'apparence offers a framework for a more general basis for liability.

In order to impose liability on someone based on the théorie de l'apparence, there are two conditions that have to be met: (1) the apparent situation should be different from the real, objective situation, and (2) the victim should legitimately rely on the fact that the situation corresponds to reality—in other words the victim must be in error.

In Martin, this theory is connected to the allegedly false representation to the victim that Johnson was an “apparent employee” of A-1. Under the test laid down above, and considering the facts provided in the decision, A-1 should be

99. The French Court of Cassation has used the theory of appearance to lift the corporate veil and impose liability on shareholders, who were abusing the privilege of incorporation. William Tetley, Q.C., Arrest, Attachment, and Related Maritime Law Procedures, 73 TUL. L. REV. 1895, 1944 (1999).

100. See FRANÇOIS GÉNY, MÉTHODE D’INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF 20 (Louisiana State Law Inst. trans., 2d ed., LSLI 1954) for an extensive counterargument to the exegetic French school of thought.

101. GHESTIN, supra note 98, at 784.

102. The current trend in the French doctrine is that the error should be legitimate, which regards the standard to be that a reasonable person, if they had been in the same situation, would have regarded the situation as real. Prior theories required error to be “common”. The main difference is important as a practical matter, because with regard to legitimate error, the situation is analyzed in concreto, whereas the common error is scrutinized in abstracto (therefore more strictly). Id. at 771-74.
liable, because both conditions are met. Mr. Martin was in a legitimate error, mainly because he paid the delivery fee to A-1 and because at no point he did know he would have to deal with an independent contractor. It does not matter whether the plaintiff changed his position or not. Under the théorie de l'apparence, A-1 may be liable, and this approach also provides a better framework to guide courts in their approach to future similar cases.

V. CONCLUSION

When talking about the process of drafting the French Civil Code, Portalis said that it is virtually impossible to anticipate all situations and regulate them. To that extent, the Martin case represents an exempli gratia.

In this author’s opinion, the court in Martin had enough legal provisions in the Louisiana Civil Code to construct an argument in accordance with principles grounded in the civilian tradition. The resort to the common law concept of “apparent authority” was unnecessary, and the implementation of this concept, without taking into considerations the nuanced differences between the contract of mandate and agency, may create confusion in Louisiana jurisprudence.

Based on the théorie de l'apparence, the court may have reached a different result in Martin. By introducing this theory, this case note advocates for a civilian solution to the problems that spring from cases such as Martin and Able.

Probably a more serious problem, discussed in passing in this note, can be identified in the treatment of the contract of mandate—in particular, the confusion created from equating mandate with agency. It has been argued that the codal provisions are behind the present business realities, and there is a need for

104. 117 So. 3d 281 (2013).
105. 650 So. 2d. 750 (1995).
harmonizing the rather complex doctrine of representation.\textsuperscript{106} The 1997 revision of the law of representation tried to keep the civilian terminology and conceptual framework intact, but cases like \textit{Martin} and \textit{Able} show that, in order to respect this choice of the legislature, one has to look at the Civil Code as a whole\textsuperscript{107} and interpret its provisions based on its spirit.

\textsuperscript{106} North, \textit{supra} note 73, at 280.
\textsuperscript{107} \textsc{L.A. Civ. Code} art. 13.
Bloxom v. City of Shreveport, Behind the Veil: A Proximate Cause Case

Garrett M. Condon

May the president of a company be held personally liable for the criminal conduct of an employee he chose to hire? In a sharply divided court on re-hearing, the Louisiana Second Circuit in Bloxom v. City of Shreveport recently held yes.

I. BACKGROUND

Brian Horn, a convicted and registered sex-offender, murdered twelve-year-old Justin Bloxom. Horn, a taxi driver, had been posing as a young female in text messages to the boy. These texts tricked Justin into sneaking out of his parents’ house late at night and getting into Horn’s taxi, believing the young girl had sent a cab to him so they could rendezvous. Horn had successfully lured Justin into the trap, from which there was no escape from Horn’s brutality. Justin’s mother filed survival and wrongful death actions against a number of defendants, including the president of the taxi company David McFarlin—in his personal capacity—for hiring Horn as a taxi driver.

Prior to these events, Horn had been convicted of felony sexual assault in Missouri. After being released from prison, he moved to Louisiana and applied for a job as a taxi driver. McFarlin

* J. D., Hofstra University (2001), LL.M. Candidate, LSU Law Center (2013).
1. Bloxom v. City of Shreveport, 47,155 (La. App. 2 Cir. 8/31/12); 103 So. 3d 383.
2. Id. at 384.
3. Id. at 384-85.
5. Bloxom, 103 So. 3d at 385.
6. Id. at 384.
7. Id.
interviewed Horn for the position, and chose to hire him while having full knowledge of his prior conviction and registered sex offender status. While McFarlin made the hiring decision, multiple layers of corporate and contractor entities separated McFarlin from the driver employees. McFarlin was the president of Blue Phoenix Trading Company, which did business as Action Taxi. Action Taxi used a subcontractor, Moore’s Consulting, to employ the drivers.

McFarlin moved for summary judgment to dismiss him as a defendant in his personal capacity. In that motion, he admitted to hiring Horn despite having knowledge of the conviction and registered sex offender status, but argued that because he acted in his capacity as president of Blue Phoenix Trading Company, the company should hold the potential liability and not McFarlin personally. Ms. Bloxom argued that McFarlin owed a personal duty to Justin and that his own fault caused the injury. The trial court granted McFarlin’s motion and Ms. Bloxom appealed.

II. DECISION OF THE COURT

On appeal with the Louisiana Second Circuit, a three-judge panel originally decided the case in favor of McFarlin, with one judge dissenting. The majority held that McFarlin owed no personal duty to Justin, stating “a corporate officer making a hiring decision is primarily acting on behalf of his or her company [and] owes a duty of reasonable care which does not extend to all torts that all employees might commit.” However, the Second Circuit granted a re-hearing, and in a three-to-two decision vacated the

8. Id. at 385.
9. Id. at 384.
10. Id.
11. Id. at 385.
12. Id. at 385.
13. Id. at 385.
14. Id.
15. Bloxom, 103 So. 3d at 383.
16. Id. at 388.
original opinion and reversed the trial court’s summary judgment decision. The majority on re-hearing said the facts of the case were a “perfect storm” that created personal liability on the part of McFarlin.\textsuperscript{17} All the written opinions (majority and dissent in both the original hearing and the re-hearing) are based on Second Circuit jurisprudence, viewing the issue as one of “piercing the corporate veil.” In that vein, the analyses in the opinions strongly integrate corporate limited liability policies in determining whether McFarlin should be exposed to personal liability or not.

III. COMMENTARY

\textit{Bloxom} is a recent example of the Second Circuit’s line of confusing cases involving personal liability on the part of corporate officers, specifically in cases where officers personally act within the scope of their employment.\textsuperscript{18} These cases appear to mix two different theories of personal liability for corporate officers, labeling any instance of personal liability as an issue of “piercing the corporate veil.”

A corporation is a legal person, an entity distinct from the individuals who comprise it.\textsuperscript{19} Generally, the owners and officers of a limited liability company are not personally liable for the debts, obligations, or liabilities of the corporation.\textsuperscript{20} The Louisiana Supreme Court, in \textit{Riggins v. Dixie Shoring Co., Inc.},\textsuperscript{21} stated that this protection is meant to encourage business growth because individuals can invest in a company while insulating their personal assets from liability. “Piercing the corporate veil” is an equitable means by which a court can hold a shareholder or officer personally liable for the liabilities of the company despite the general protections of the corporate structure, generally when a

\begin{footnotesize}
\begin{enumerate}
\item Id. at 390.
\item See infra note 32.
\item L.A. CIV. CODE ANN. art. 24 (2013).
\item 590 So. 2d 1164, 1167-68 (La. 1991).
\end{enumerate}
\end{footnotesize}
corporation is in reality the alter ego of the owner or when the entity is not truly operated as a corporation.22 The opinions in Bloxom recognize what the Louisiana Supreme Court has stated in Riggins and elsewhere, all stating directly or in essence that “Louisiana courts are reluctant to hold a shareholder, officer, or director of a corporation personally liable for corporate obligations, in the absence of fraud, malfeasance, or criminal wrongdoing.”

A corporate bankruptcy scenario provides a good example of this limited liability protection. Imagine a person has a business idea. He incorporates, becomes the single shareholder, and hires someone to be the president of the company to operate the business. In an attempt to run the business legitimately, the owner and president authorize several obligations on behalf of the company, such as long-term contracts and loans. Unfortunately, the business ultimately fails and its assets can only cover the repayment of a small fraction of the total amount owed to its creditors. Absent the existence of extraordinary circumstances as outlined in Riggins, such as fraud or running a sham corporation, the limited liability construct would protect both the shareholder and the president from being personally liable for the remaining debts of the failed corporation, despite the money still owed to the business’ creditors. A court would only be authorized to pierce the corporate veil (resulting in personal liability on the part of the shareholder or officer) if the corporation was actually set up as a sham to illegitimately try to protect the officers and shareholders.

22. Like in other jurisdictions, factors to consider when determining whether to pierce the corporate veil include “1) commingling of corporate and shareholder funds; 2) failure to follow statutory formalities for incorporating and transacting corporate affairs; 3) undercapitalization; 4) failure to provide separate bank accounts and bookkeeping records; and 5) failure to hold regular shareholder and director meetings.” Id. at 1168. The Second Circuit previously applied these factors in Cahn Electric Appliance Co., Inc. v. Harper, 430 So. 2d 143 (La. App. 2 Cir. 1983). The Cahn case involved a traditional “piercing the corporate veil” issue of an attempt to reach the president and sole shareholder of a company personally for the obligation of the company.

23. Riggins, 590 So. 2d at 1168.
The facts in the Bloxom case offer a wholly distinct form of corporate officer personal liability, and really do not relate to the notion of what commonly is referred to as piercing the corporate veil. A corporate officer who takes a personal action, even if undertaken as part of his or her duties to the corporation, is not somehow shielded from personal liability because of the existence of the corporation. The Louisiana statute on point specifically excludes from the general corporate limited liability protection situations where a third party has a legal right against an officer who commits a negligent or wrongful act.24 Further, this distinction was made in Canter v. Koerhing Co.,25 where the Louisiana Supreme Court explained that a corporate officer does owe a duty of care under the general tort liability article26 to third persons when personally acting on behalf of the corporation.27 This distinction was actually emphasized in the law recitation within the original Bloxom majority opinion, where it summarized the holding in Canter by stating “[i]f an officer or agent of a corporation through his fault injures another to whom he owes a personal duty, whether or not the act culminating in the injury is committed by or for the corporation, the officer or agent is liable personally to the injured third person, and it does not matter that liability might also attach to the corporation.”28 Unfortunately, the

25. 283 So. 2d 716 (La. 1973).
27. See also Lytell v. Hushfield, 408 So. 2d 1344 (La. 1982) (holding certain corporate officials personally liable for injury caused by forklift when those officials were delegated the duty to provide a safe working environment and personally knew of the forklift defects but did nothing to correct them).
28. Bloxom, 103 So. 3d at 386. The final phrase “it does not matter that liability might also attach to the corporation” is in reference to the issue of vicarious liability under the doctrine of respondeat superior. Generally, a corporation as an employer may be deemed vicariously liable for the actions of its employees taken within the scope of their employment. See LA. REV. STAT. ANN. § 9:3921 (2013). For instance, the taxi company may be liable if one of its taxi drivers negligently causes a car accident. However, the corporate officer will not be personally liable for the torts of corporate employees based on his general administrative responsibility in the corporation. See Canter, 283 So. 2d at 721. This theory would be inapplicable in this case because it requires a
original majority did not apply this law in their analysis, and, puzzlingly, the majority on re-hearing failed to cite to it at all, even though it is directly on point and tends to support their holding.

These same general principles exist in other jurisdictions. While not part of Louisiana jurisprudence, the distinction between piercing the corporate veil and personal liability for personal actions was succinctly made by the Pennsylvania Supreme Court:

Where the court pierces the corporate veil, the owner is liable because the corporation is not a bona fide independent entity; therefore, its acts are truly his. Under the participation theory, the court imposes liability on the individual as an actor rather than as an owner. Such liability is not predicated on a finding that the corporation is a sham and a mere alter ego of the individual corporate officer. Instead, liability attaches where the record establishes the individual’s participation in the tortious activity.29

“Participation theory” is not a term of art used in Louisiana, but its essence exists both in legislation and case law.30

The Bloxom case follows a stream of Second Circuit cases that mix these two concepts. For years, the conflated analysis has extended Louisiana’s corporate limited liability protections to the personal acts of corporate officials taken in the scope of employment, despite the distinction made in Canter. The analysis in each opinion in this line of cases cites to Riggins v. Dixie Shoring Co., Inc.,31 despite the fact that Riggins was not a case involving a corporate officer’s personal action. The cases citing

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30. For an excellent and in-depth review on both topics, see Glenn G. Morris, Personal Liability for Corporate Participants without Corporate Veil-Piercing, 54 LA. L. REV. 207 (1993) (discussing Louisiana law on personal liability for tortious conduct of corporate officers) and Glenn G. Morris, Piercing the Corporate Veil in Louisiana, 52 LA. L. REV. 271 (1991) (discussing Louisiana law on piercing the corporate veil).
31. 590 So. 2d 1164 (La. 1991).
Riggins incorrectly use the lack of “fraud, malfeasance or criminal wrongdoing” as a factor in not finding personal liability, as those factors are only relevant in determining whether to hold an officer or shareholder personally liable for the liabilities of the corporation. They are not relevant in cases like Bloxom. Further, Second Circuit opinions discuss policy justifications for treating corporations as separate entities to rationalize why corporate officers should be shielded from personal liability for their acts on behalf of the corporation. Again, that rationale is only applicable for traditional piercing-the-corporate-veil situations and not in situations like Bloxom. Even the majority opinion on re-hearing in Bloxom strains to keep intact the Second Circuit’s jurisprudence on limited liability generally for the personal actions of a corporate officer taken within the scope of their duties. With tortured reasoning, the opinion tries to separate McFarlin’s actions as somehow extraordinarily unique compared to the personal acts of most corporate officers.

Based on Canter, the analysis of whether McFarlin owed a personal duty in this case should have been relatively straightforward. The issue is whether he was negligent in hiring Horn. Negligent hiring cases are based purely on the standard negligence provision of article 2315 of the Louisiana Civil Code,

32. In Kemper v. Don Coleman, Jr., Builder, Inc., 746 So. 2d 11 (La. App. 2 Cir. 1999), plaintiffs sued the president of a construction corporation for failing to warn that their newly built houses were susceptible to flooding. The president personally knew of the flooding concern and did nothing to disclose the information. The Court held that the president was protected from personal liability because he was acting in his capacity as corporate president and that the sales were between the plaintiffs and the corporation. In Carter v. State, 46 So. 3d 787 (La. App. 2 Cir. 2010), a plaintiff sued the president of a corporation in his personal capacity after a car accident caused injury. The allegations were that he “conducted a negligent inspection of the tractor-trailer and determined that the vehicle was roadworthy when it was not, made the negligent decision to instruct his employee to drive the vehicle from the auction yard to his wrecker yard at night and negligently entrusted the vehicle to an unqualified driver,” all of which were done in the scope of his employment. The Court held the president could not be held personally liable because these actions were taken in his “corporate capacity” rather than his “individual capacity.”

33. See Roberts v. Benoit, 605 So. 2d 1032 (La. 1992) (on re-hearing).
which is cited in the Bloxom original opinion and the re-hearing dissent, but again, strangely, is not cited by the majority on re-hearing. The duty-risk analysis used under article 2315 “requires proof by the plaintiff of five separate elements: (1) the defendant had a duty to conform his conduct to a specific standard (the duty element); (2) the defendant’s conduct failed to conform to the appropriate standard (the breach element); (3) the defendant’s substandard conduct was a cause in fact of the plaintiff’s injuries (the cause-in-fact element); (4) the defendant’s substandard conduct was a legal cause of the plaintiff’s injuries (the scope of liability or scope of protection element); and (5) the actual damages (the damages element).” 34 Whether a duty exists is a matter of law, in which courts must make a policy decision in light of the unique facts and circumstances presented along with reviewing laws (statutory, jurisprudential, or arising from general principles of fault). 35 Louisiana Supreme Court jurisprudence does not factor the benefits of the corporate structure as part of the duty analysis, but rather declared them distinctly separate issues in Canter. Other Louisiana appellate courts have applied this distinction. 36

While not used in their analyses, both the original majority opinion 37 and the majority opinion on re-hearing 38 cite the same line of negligent hiring cases. 39 These cases all state that a duty exists (although limited in scope, like all negligence cases) on the part of an employer to exercise reasonable care in the hiring of an employee who, in the performance of his duties, will have a unique

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34. Lemann v. Essen Lane Daiquiris, Inc., 923 So. 2d 627 (La. 2006).
35. Id. at 633.
37. Bloxom, 103 So. 3d at 387.
38. Id. at 392.
39. Both opinions cite the same three cases: Cote v. City of Shreveport, 73 So. 3d 435 (La. App. 2 Cir. 2011); Kelley v. Dyson, 10 So. 3d 283 (La. App. 5 Cir. 2009); and Taylor v. Shoney’s Inc., 726 So. 2d 519 (La. App. 5 Cir. 1999).
opportunity to commit a tort against a third party. The Louisiana Supreme Court has also certainly acknowledged a general cause of action against an employer for negligent hiring, analyzed using the standard negligence test of article 2315 of the Louisiana Civil Code, such as in Roberts v. Benoit.\(^{40}\) In Roberts, a sheriff deputized a cook and gave general instructions to carry a firearm at all times while off duty. Minimal training was given, but a manual told the new deputy not to carry a firearm while drinking alcohol and that the weapon should only be drawn if life is in danger. The deputy later went to a social gathering where he drank alcohol and engaged in horseplay with his firearm, during which he negligently shot another person. The Louisiana Supreme Court held that despite the fact that the sheriff may have been negligent in deputizing and arming the cook with insufficient training, the scope of the duty did not extend to this particular harm because it was too attenuated and too unforeseeable that the new deputy would use the firearm in such a manner in clear violation of both the manual and common sense.

The case of Jackson v. Ferrand\(^ {41}\) is remarkably similar to Bloxom. The victim in Jackson had locked herself out of her hotel room. A hotel worker assisted her by getting a master key and letting her into her room. While doing so, he invited her to go on a date with him and she agreed. While out, she alleged he drugged and sexually assaulted her. The victim filed a cause of action against the hotel for, among other things, the negligent hiring and supervision of the alleged assailant, stating that the hotel knew the assailant had a criminal history. The Court affirmed a summary judgment in favor of the hotel, finding that even if the hotel knew of his criminal history, hiring him was neither the cause-in-fact nor

\(^{40}\) 605 So. 2d 1032, 1041 (La. 1992) (on re-hearing). See the entire Roberts opinion for an in-depth discussion of the differences between the respondeat superior and negligent hiring theories of employer liability.

\(^{41}\) 658 So. 2d 691 (La. App. 4 Cir. 1994).
the legal cause of the damages because the hotel could not foresee the sexual assault despite his criminal history.42

Because it incorporated elements of “piercing the corporate veil” doctrine, the final *Bloxom* majority opinion failed to use the correct analysis in determining that McFarlin owed a personal duty. Limited liability should have been relegated to nothing more than a footnote to state that McFarlin’s personal conduct put him personally at risk based on Section 12:1320(D) of the Louisiana Revised Statutes and *Canter*. The true issue of the case is whether McFarlin is liable under article 2315 of the Louisiana Civil Code for negligently hiring Horn. The operative questions should have been, first, whether McFarlin could reasonably have foreseen Horn’s actions when he was hired such that McFarlin owed a duty to Justin and his mother in this situation; and second, whether McFarlin’s hiring of Horn was a proximate (or legal) cause of the damages suffered by Justin and his mother.

While there may be many foreseeable risks in hiring a convicted and registered sex offender as a taxi driver, it is a far stretch to say that Horn’s murder of Justin was one of them. Perhaps foreseeable would have been that Horn would recidivate by either sexually assaulting a passenger he happened to pick up, or noting a victim’s address in dropping them off and using that information to come back later to commit a sexual crime.43 But using the taxi as part of a greater plan to murder someone? That was not reasonably foreseeable. Moreover, even assuming a duty,

42. *Id.* at 702.
43. Close to this example is *Smith v. Orkin Exterminating Co., Inc.*, 540 So. 2d 363 (La. App. 1 Cir. 1989). There, the employer pest control service (Orkin) was found liable for the rape of a customer committed by an Orkin employee, because the company failed to enforce its yearly polygraph requirements. The employee had unlocked a window while treating the victim’s home, and later entered through that window and raped the victim. The Court found Orkin should have foreseen this kind of harm (which they actually did foresee because they had a policy in place for annual polygraphs of employees), and thus had a duty to protect this type of victim. However, had the assailant simply used his Orkin truck to kidnap and kill some random person he picked up off the street, it is hard to imagine the Court reaching the same result.
the link between the hiring of Horn and the murder of Justin is so attenuated that it is doubtful a reasonable jury could find that McFarlin proximately caused these damages. From the facts available, it seems to be an unfortunate truth that Horn was going to prey on Justin regardless of his taxi driver status. The taxi happened to be of convenient assistance in his horrible plan, but Horn easily could have substituted this with any other means imaginable—his job as a taxi driver was not a proximate cause of the damages here.

IV. CONCLUSION

The majority decision on re-hearing, holding that McFarlin’s duty extended to the harm Justin and his mother suffered, is of dubious rationale as a matter of law. Of more widespread relevance beyond this individual case, however, is that the Second Circuit’s analysis follows a line of cases that incorrectly conflates two distinct theories of personal liability and fails to follow the Louisiana Supreme Court case of Canter. This jurisprudence should be reviewed to align itself with Canter to state, generally, that corporate officers should be protected from personal liability for both the general obligations of the corporation as well as vicariously for the actions of its employees, but should not be protected when they commit personal torts in the scope of their employment or personal torts committed in their “corporate capacity.”
Trahàn v. Kingrey: An Analysis of Louisiana’s Relocation Statute

John H. Leech, Jr.*

I. BACKGROUND

Trahàn v. Kingrey involves the question of relocation of the minor child, Devon, of Douglas Anthony Trahan and Elizabeth Donald Kingrey Romero. Devon was born on January 3, 2005 in Lafayette, Louisiana. Devon’s mother, Elizabeth Kingrey, was unmarried at the time of Devon’s birth and paternity was in question until DNA testing confirmed that Douglas Trahan was Devon’s biological father. After confirmation by DNA testing, Trahan fully accepted the obligations and responsibilities of parenthood. Two months after Devon’s birth, Trahan and Kingrey entered into a consent judgment which stated that they were to share equal joint custody of Devon on a one-week rotating basis. Kingrey was designated as the domiciliary parent.

Kingrey subsequently married Timothy Romero on July 21, 2005, who was her husband during the proceedings surrounding this case. Romero’s employer, The Wood Group, was in the process of shutting down its facilities in Louisiana. Romero was offered a promotion to stay with The Wood Group, but that promotion required his relocation to West Virginia. Rather than filing a “Notice of Relocation,” as required by Louisiana Revised

* J.D. Candidate, LSU Law Center (2014). The author would like to provide a special thanks to Professor Elizabeth R. Carter for her assistance and guidance in the production of this case note. A special thanks also to Jennifer Lane and Alexandru-Daniel On of the JCLS.

1. Trahan v. Kingrey, 2011-1900 (La. App. 1 Cir. 5/4/12), 98 So. 3d 347.
2. Id. at 349.
3. Id.
4. Id.
5. Id.
6. Id.
7. Id.
8. Id.
Statutes 9:355, et seq., Kingrey filed a “Rule for Custody” on July 15, 2009, stating that the move to West Virginia was required for her husband (Romero) to keep his employment.\(^9\) In her “Rule for Custody,” Kingrey alleged that the move to West Virginia would require a change to the shared custody arrangement.\(^10\) Trahan filed a “Rule for Change of Custody” in opposition to Kingrey’s request for relocation of Devon, alleging that it was in the child’s best interest that he be named domiciliary custodial parent rather than Kingrey.\(^11\) Trahan filed a subsequent pleading which alleged that Kingrey failed to follow the statutory requirements of Louisiana Revised Statutes 9:355 et seq. because she failed to give him notice of the proposed relocation and failed to provide the address, telephone number, date of move, proposed revised schedule of visitation, and a statement informing him that an objection to the proposed relocation should be filed within thirty days of the receipt of the notice.\(^12\) While awaiting judgment, Trahan and Kingrey entered into an interim consent judgment on September 4, 2009, wherein they agreed that they would share custody of Devon on a twenty-eight day rotating basis.\(^13\)

The trial court entered judgment granting the parties joint custody of Devon with Kingrey designated as the domiciliary parent, subject to visitation in favor of Trahan, pursuant to a Joint Custody Plan confected by the trial court.\(^14\) Devon was to reside with Kingrey in West Virginia.\(^15\) In written reasons for judgment, the court stated that, because all prior judgments issued in conjunction with this matter were by consent of the parties, and that there had never been a “considered decree” rendered in the case, “each party need only prove a change in circumstances

\(^9\) Id.
\(^10\) Id.
\(^11\) Id.
\(^12\) Id.
\(^13\) Id.
\(^14\) Id.
\(^15\) Id. at 349-50.
materially affecting the welfare of Devon and that any proposed changes to the previous child custody decree are in the best interest of Devon.”16 The court also stated that it had considered the factors listed in Civil Code article 134 which are to be used to determine the best interest of a child for custody purposes and that the court came to its determination that Kingrey be the domiciliary custodial parent of Devon, subject to visitation with Trahan, based on those factors.17

Trahan filed a motion for new trial with the trial court, which was denied.18 Appeal to the First Circuit subsequently followed.19

II. JUDGMENT OF THE COURT OF APPEAL

A. Standard of Review

The Court determined that this case was to be reviewed de novo. The Court proceeded with its determination that the trial court ruling should be reviewed de novo by quoting from Evans v. Lungrin:20 “where one of more trial court legal errors interdict the fact-finding process, the appellate court should then make its own independent de novo review of the record.”21 The legal error the appellate court identified was the failure of the trial court to analyze this case based on the relocation statutes (Louisiana Revised Statutes 9:355 et seq.).22 Instead, the trial court used the “best interest” factors for awarding custody (Louisiana Civil Code article 134).23 The trial court may have reasoned that Civil Code article 134 was the proper law to analyze this case due to the fact that Kingrey’s rule only requested a modification of custody rather

16. Id. at 350.
17. Id.
18. Id.
19. Id.
21. Trahan, 98 So. 3d at 351.
22. Id. at 350.
23. Id.
than a true relocation. The practical effect, however, of Kingrey’s rule for modification of custody was to create a relocation. The appellate court determined that the relocation factors should have been analyzed by the trial court, despite the improper filing by Kingrey.\textsuperscript{24} Thus, legal error was committed because the trial court applied the incorrect principles of law, and such errors were prejudicial, which caused deprivation of substantial rights to Trahan.\textsuperscript{25}

\textbf{B. Burden of Proof}

The appellate court made note that the burden of proof in this case was different than what the trial court assumed.\textsuperscript{26} In relocation cases:

The relocating parent has the burden of proof that the proposed relocation is made in good faith and is in the best interest of the child. In determining the child’s best interest, the court shall consider the benefits which the child will derive either directly or indirectly from an enhancement in the relocating parent’s general quality of life.\textsuperscript{27}

Therefore, the appellate court determined that Kingrey had to not only show that the relocation was done in good faith, but that such relocation was also in Devon’s best interest.\textsuperscript{28}

\textbf{C. Good Faith}

The party seeking relocation—in this case Kingrey—bears the burden of showing that the relocation is made in good faith.\textsuperscript{29} The appellate court made the initial determination that Kingrey was in good faith when she first relocated with her husband, Timothy

\begin{itemize}
\item \textsuperscript{24} Id. at 350-51.
\item \textsuperscript{25} Id. at 351.
\item \textsuperscript{26} Id. at 352.
\item \textsuperscript{28} Trahan, 98 So. 3d at 352.
\item \textsuperscript{29} Id.
\end{itemize}
Romero.\textsuperscript{30} However, the facts changed after the initial move. Originally, Kingrey relocated to West Virginia because her husband was forced to take a job there in order to retain his employment with The Wood Group.\textsuperscript{31} At the time of trial, however, Romero no longer worked for The Wood Group.\textsuperscript{32} He had resigned his position in March of 2010, and accepted work with a competitor, Seaboard International, located in West Virginia.\textsuperscript{33} There was no evidence that Romero attempted to find comparable employment in Louisiana.\textsuperscript{34} Therefore, the Court was left questioning whether Kingrey remained in good faith.\textsuperscript{35}

\textbf{D. Best Interest}

Louisiana Revised Statutes 9:355.14\textsuperscript{36} lists twelve factors which the court shall consider when evaluating whether a proposed relocation is in the child’s best interests.\textsuperscript{37} The twelve factors are as follows: (1) The nature, quality, extent of involvement, and duration of the child’s relationship with the parent proposing to relocate and with the non-relocating parent, siblings, and other significant persons in the child’s life; (2) The age, developmental stage, needs of the child, and the likely impact the relocation will have on the child’s physical, educational, and emotional development, taking into consideration any special needs of the child; (3) The feasibility of preserving a good relationship between the non-relocating parent and the child through suitable visitation arrangements, considering the logistics and financial circumstances.

\begin{itemize}
  \item \textsuperscript{30} \textit{Id.}
  \item \textsuperscript{31} \textit{Id.} at 349.
  \item \textsuperscript{32} \textit{Id.} at 352.
  \item \textsuperscript{33} \textit{Id.}
  \item \textsuperscript{34} \textit{Id.} at 352-53.
  \item \textsuperscript{35} \textit{Id.}
  \item \textsuperscript{36} LA. REV. STAT. 9:355.14 is where the relocation factors are located as of August 1, 2012. This case references the relocation factors as LA. REV. STAT. 9:355.12, which is where the relocation factors were located at the time of this case. This case note will refer to the relocation factors as LA. REV. STAT. 9:355.14.
  \item \textsuperscript{37} LA. REV. STAT. ANN. § 9:355.14 (2012).
\end{itemize}
of the parties; (4) The child’s preference, taking into consideration the child’s age and maturity level; (5) Whether there is an established pattern of conduct of the parent seeking the relocation, either to promote or thwart the relationship of the child and the non-relocating party; (6) Whether the relocation of the child will enhance the general quality of life for both the custodial parent seeking the relocation and the child, including but not limited to financial or emotional benefit or educational opportunity; (7) The reasons for each parent in seeking or opposing the relocation; (8) The current employment and economic circumstances of each parent and whether or not the proposed relocation is necessary to improve the circumstances of the parent seeking relocation of the child; (9) The extent to which the objecting parent has fulfilled his or her financial obligations to the parent seeking relocation, including child support, spousal support, and community property obligations; (10) The feasibility of a relocation by the objecting parent; (11) Any history of substance abuse or violence by either parent, including a consideration of the severity of such conduct and the failure or success of any attempts at rehabilitation; and (12) Any other factors affecting the best interest of the child.38

The court is required to consider these factors, as opposed to Louisiana Civil Code article 134 which lists factors that a court may consider when determining a child’s best interests in custody matters.39

The Court weighed factors one, three, five, six, seven, eight, and ten in favor of Trahan.40

The first factor in Louisiana Revised Statutes 9:355.14 concerns the nature, quality, extent of involvement, and duration of the child’s relationship with the parent proposing to relocate and with the non-relocating parent, siblings, and other significant

39. Trahan, 98 So. 3d at 353.
40. Trahan, 98 So. 3d 347 (La. App. 1st Cir. 2012).
persons in the child’s life.\textsuperscript{41} The Court found that the sheer distance between Louisiana and West Virginia would inhibit the relationships between Devon and his numerous family members, especially that of his grandparents.\textsuperscript{42} The Court considered also that while Trahan had no relatives in the West Virginia area, Kingrey did have relatives in Louisiana in the form of her new adoptive parents in Lafayette.\textsuperscript{43} The presence of family in Louisiana provided Kingrey with more opportunities to visit Devon in Louisiana than it would Trahan in West Virginia.\textsuperscript{44}

The third factor concerns the feasibility of preserving a good relationship between the non-relocating parent and the child through suitable visitation arrangements, considering the logistics and financial circumstances of the parties.\textsuperscript{45} According to the visitation schedule the trial court devised, Trahan was responsible both for picking up Devon and returning him back to West Virginia, and was to incur all of the associated costs.\textsuperscript{46} The sheer distance in miles and travel time from West Virginia to Louisiana burdened Trahan to the point that the Court believed that even if such travel was financially feasible, it would greatly decrease both the frequency and the amount of time that Devon would be able to see his father, his paternal grandparents, and other family.\textsuperscript{47}

The fifth factor concerns whether there is an established pattern of conduct of the parent seeking relocation, either to promote or thwart the relationship of the child and the non-relocating party.\textsuperscript{48} The Court noted that Kingrey, in the past, had refused to disclose Devon’s daycare/school names and locations to Trahan.\textsuperscript{49} Kingrey also would not put Trahan as an emergency contact for Devon’s

\begin{itemize}
  \item \textsuperscript{41} LA. REV. STAT. ANN. 9:355.14 (2012).
  \item \textsuperscript{42} Trahan, 98 So. 3d at 355.
  \item \textsuperscript{43} Id. at 355-56.
  \item \textsuperscript{44} Id. at 356.
  \item \textsuperscript{45} LA. REV. STAT. ANN. 9:355.14 (2012).
  \item \textsuperscript{46} Trahan, 98 So. 3d at 357.
  \item \textsuperscript{47} Id.
  \item \textsuperscript{48} LA. REV. STAT. ANN. 9:355.14 (2012).
  \item \textsuperscript{49} Trahan, 98 So. 3d at 357.
\end{itemize}
schools and instead placed her husband, Romero, as an emergency contact. The Court also took note of Kingrey’s hostility toward Trahan and his parents during her testimony, and it stated that there were concerns that she would attempt to thwart Trahan’s relationship with Devon.

The sixth factor of Louisiana Revised Statutes 9:355.14 considers whether the relocation of the child will enhance the general quality of life for both the custodial parent seeking the relocation and the child, including, but not limited to, financial or emotional benefit or educational opportunity. Because Kingrey is the parent who relocated, she carried the burden of proof to show that there was a benefit to the child, Devon, in this move. Both housing locations were suitable for Devon. The schools available to Devon in West Virginia and in Houma were seen as equal in the Court’s eyes. There was an assumption that the move to West Virginia resulted in an increase in salary for Romero, but the Court noted that there was nothing in the record indicating what he was making in Louisiana and, therefore, there could not be a calculation of any salary increase. Kingrey did not claim that she was unable to obtain any employment while in Louisiana. Given this information, the Court determined that Kingrey did not meet her burden of proving that the move to West Virginia enhanced Devon’s general quality of life and considered this factor to weight against allowing relocation.

Factor seven of Louisiana Revised Statutes 9:355.14 considers the reasons for each parent in seeking or opposing the relocation. The Court stated that Kingrey’s request to relocate originally was

50. Id.
51. Id. at 358.
53. Trahan, 98 So. 3d at 358.
54. Id.
55. Id.
56. Id.
57. Id.
58. Id. at 359.
in good faith, because it was due to the fact that her husband, Romero, either had to make the move to West Virginia or lose his job with his company, which was closing its business in Louisiana. However, that good faith was in question due to the fact that Romero subsequently accepted another job in West Virginia with another company and there was nothing to indicate that he attempted to find employment in Louisiana.

Factor eight considers the current employment and economic circumstances of each parent and whether or not the proposed relocation is necessary to improve the circumstances of the parent seeking relocation of the child. Originally, the move to West Virginia was due to the fact that the company that Romero worked for was closing its offices in Louisiana and told him that, in order to keep his position with the company, he would need to transfer to West Virginia. Kingrey, herself, did not need to make the move for her own employment. Therefore, the Court determined that Kingrey had failed in meeting her burden of proving that the relocation was necessary to improve her circumstances.

The tenth factor requires the court to consider the feasibility of a relocation by the objecting parent. The Court speculated that Trahan, who is a registered nurse, could likely obtain employment in West Virginia. However, the Court noted that Trahan also did not wish to leave his family behind to move to West Virginia.

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60. Trahan, 98 So. 3d at 359.
61. Id.
63. The Wood Group.
64. Trahan, 98 So. 3d at 349.
65. Id. at 359. It is important to remember that Romero had also ceased working for The Wood Group and there was no evidence provided that he had attempted to find employment in Louisiana before accepting another position in West Virginia. Id.
66. Id.
68. Trahan, 98 So. 3d at 360.
69. Consisting of approximately ninety relatives in or around Houma.
70. Trahan, 98 So. 3d at 360.
The Court found that factors two, four, nine, eleven, and twelve weighed in favor of neither party.71

The second factor considers the age, developmental stage, needs of the child, and the likely impact the relocation will have on the child’s physical, educational, and emotional development, taking into consideration any special needs of the child.72 The Court determined that, as to Devon’s health and educational concerns, there was no evidence that either West Virginia or Louisiana was more beneficial than the other.73

The fourth factor of Louisiana Revised Statutes 9:355.14 is the child’s preference, taking into consideration the child’s age and maturity level.74 Because of Devon’s young age and the fact that both parents seem to have a good relationship with Devon, the Court determined that this factor did not weigh in favor or either Trahan or Kingrey.75

Factor nine evaluates the extent to which the objecting parent has fulfilled his or her financial obligations to the parent seeking relocation, including child support, spousal support, and community property obligations.76 The Court noted that Trahan had always timely paid his child support obligations and there was no judgment or holding that Trahan had ever been in contempt for failing to make child support payments.77

Factor eleven considers any history of substance abuse or violence by either parent, including a consideration of the severity of such conduct and the failure or success of any attempts at rehabilitation.78 The parties in this case, in the past, had abused drugs, and both alleged past instances of violence by the other.79

71. Id. at 347.
73. Trahan, 98 So. 3d at 356.
75. Trahan, 98 So. 3d at 357.
77. Trahan, 98 So. 3d at 360.
79. Trahan, 98 So. 3d at 360.
The Court also noted that since Devon’s birth, there were no allegations of either drug abuse or violence by either party. The past custody agreement in which the parties split time with Devon evenly indicated that Kingrey did not consider Trahan to be a threat to Devon. Therefore, the Court found that that factor did not weigh in favor or either party.

The final factor, factor twelve, is a catch-all provision requiring the court to evaluate any other factors affecting the best interest of the child. The Court here found no other factors affecting the best interest of the child that had not already been covered.

The Court found none of the twelve factors in Louisiana Revised Statutes 9:355.14 to weigh in favor of Kingrey.

E. Other Suggestive Factors

Louisiana Civil Code article 134 provides twelve factors that are used in determining the custody of a child and were suggestive in this relocation case. The Court considered most of what is provided for in Louisiana Civil Code article 134 by looking at the mandatory factors in Louisiana Revised Statutes 9:355.14, but the Court evaluated some of the factors in article 134 that were not explicitly covered.

Factor 1 of Civil Code article 134 requires a court in a custody proceeding to consider “the love, affection, and other emotional ties between each party and the child.” Factor 2 of Civil Code article 134 requires a court in a custody proceeding to consider “the capacity and disposition of each party to give the child love, affection, and spiritual guidance and to continue the education and
rearing of the child.” 89 Factor 3 requires a court to consider “the capacity and disposition of each party to provide the child with food, clothing, medical care, and other material needs.” 90 The Court compared the availability of each party for the care of Devon and found that both parties were available to care for Devon, even though both parties required the aid of others in their households (Kingrey required help from Romero, and Trahan required the help of his parents, with whom he lived). 91

Factor 4 of Civil Code article 134 requires a court in a custody proceeding to consider “the length of time the child has lived in a stable, adequate environment, and the desirability of maintaining continuity of that environment. Factor 5 requires a court to consider “the permanence, as a family unit, of the existing or proposed custodial home or homes.” 92 The Court noted that Kingrey was born in Seoul, South Korea, and subsequently moved to California when she was adopted. 93 She then moved with her adoptive family to Louisiana and lived in Morgan City, Lafayette, Broussard, Youngsville, and Houma. 94 She then moved to West Virginia with her husband, Romero, as part of his relocation for work. 95 Trahan was born, raised, and still lived in Houma. 96 Devon was also born in Louisiana (Lafayette) and had spent half of his life either in Lafayette or Houma, up until the time his mother moved to West Virginia, relocating with her prior to this case. 97 The Court noted that Devon had a stable and supportive family structure in Louisiana and was of the opinion that it would be desirable to maintain that environment. 98

89. Id.
90. Id.
91. Trahan, 98 So. 3d at 361.
92. LA. CIV. CODE art. 134.
93. Trahan, 98 So. 3d at 361.
94. Id.
95. Id.
96. Id. at 361-62.
97. Id. at 362.
98. Id.
F. Holding

The Court concluded that Kingrey did not meet the burden of proof required of her as the relocating parent in a relocation case. In addition, the Court found that Trahan was more likely than Kingrey to provide Devon with a “stable and permanent” residence in Louisiana. The Court further noted that both Trahan and Kingrey were capable of being available for Devon as far as custody was concerned.

The Court reversed the judgment of the 32nd Judicial District Court and rendered judgment in favor of Trahan as domiciliary parent of Devon. The Court determined that the parties should have joint custody of Devon and that visitation of Devon should be awarded in favor of Kingrey. The Court determined that the previous visitation schedule devised by the trial court for Trahan should stand, with Kingrey rather than Trahan as the visiting parent.

III. COMMENTARY

The Court approached this decision very methodically and provided an excellent framework for the way in which Louisiana Revised Statutes 9:355.14 and Louisiana Civil Code article 134 operate in conjunction with each other. The Court arrived at the correct decision by the letter of the law, and it seems the judgment is also equitable considering the facts and circumstances. Nonetheless, there are a few areas of this decision that present an opportunity to ask questions as to how the outcome could have been improved.

99. Id.
100. Id.
101. Id.
102. Id.
103. Id.
104. Id.
To begin with, it should be noted again that Louisiana Revised Statutes 9:355.14 was revised in 2012, just after this case was heard. It was previously Louisiana Revised Statutes 9:355.12. Louisiana Revised Statutes 9:355.14 comment (a) states that the revision changed the opening language of the statute to make it clear that a court does not need to make a factual finding on every factor. Here, this Court made a finding as to each of the twelve factors. Such analysis was not needed then, and certainly is clearly not needed now, per comment (a). Failure to analyze each factor does not constitute an error of law triggering a de novo review. The court is free to give whatever weight it deems appropriate to any of the relocation factors.

Second, the visitation schedule that was assigned to Kingrey was exactly the same as that was originally assigned to Trahan by the trial court. The Court addresses that visitation plan while analyzing factor three, and expresses its concern that the sheer distance between Louisiana and West Virginia would have led to a substantial decrease in the amount of time Trahan could spend with Devon because of the financial constraints of such travel. The assignment of that same visitation plan to Kingrey does not remove the principal problem that the Court addressed. The Court merely shifted the burden that Trahan bore in the visitation plan to Kingrey. This action does not alleviate the problem created for the child’s relationship with his non-domiciliary parent.

That being said, Factor 3 does concern the preservation of the relationship of the non-relocating parent with the child, and that “non-relocating” parent is not Kingrey. Therefore, the Court may

105. See supra note 36.
107. See Poe v. Stone, 118 So. 3d 1227, 1229 (La. App. 4th Cir. 2013), citing Gathen v. Gathen, 66 So. 3d 1, 9 (mentioning that a court is not required to expressly analyze each of the twelve relocation factors).
108. Id.
109. Poe, 118 So. 3d at 1229.
110. See supra Part II.D.
111. Trahan, 98 So. 3d at 357.
not be concerned with the financial constraints that traveling from West Virginia to Louisiana puts on Kingrey because she is the relocating parent. Moreover, it is certainly understandable that it is extremely difficult to devise a visitation schedule for two parents separated by roughly a thousand miles that is both feasible financially and fosters a good relationship between the non-domiciliary parent and the child.

The ultimate concern in cases such as this should be what is best for the child. It is the author’s opinion that the visitation schedule does not adequately help foster a good relationship between Kingrey and the child. It does seem equitable that Kingrey, as the relocating parent (taking into account also that living in West Virginia is no longer required for Kingrey and Romero), should incur the cost of travel for visitation. Kingrey is only granted thirty-five days in the summer and, not including the holiday rotation, thirty hours per month. The thirty hours per month seems profoundly low. While devising a visitation schedule that is fair and does not put the child in strenuous situations is difficult, in these kinds of predicaments more could probably be done. Even just providing an additional weekend per month in which Kingrey could visit Devon if she were to travel to Louisiana rather than have Devon travel to West Virginia might suffice. Understandably, Kingrey may not have the ability to finance her or Devon’s traveling from Louisiana to West Virginia, or vice versa, but the option to do so should be there. Thirty hours per month, which includes travel time, is just not enough to maintain a healthy relationship between a parent and a child.

Third, Kingrey has a nuclear family structure that seemed to be overlooked. Kingrey is married to Romero and Kingrey has two other children, Jade and Noah, who visit during the summer and holidays (the same time as Devon), and Romero has two children that live in Lafayette.\textsuperscript{112} Therefore, through his mother’s side of

\textsuperscript{112.} Id. at 355.
the family, Devon has two half-brothers, a step-brother and a stepsister. While it is a very scattered family unit, the presence of a married couple running a household and the connection with siblings is valuable for a young child and seemed to be overlooked.113 Meanwhile, Trahan is not married, lives with his parents, and has no other children (albeit he has a rather large extended family).114 This could have been a circumstance that helped Kingrey’s case, had it been considered in either Factor 1 or Factor 12 of Louisiana Revised Statutes 9:355.14, or even in Factor 5 of Louisiana Civil Code article 134. Perhaps, however, the Court felt that preserving and cultivating Devon’s relationships with his paternal extended family outweighed the need to do so with his siblings.115

Even had the Court addressed these two concerns, undoubtedly the outcome would have been the same. The only change that may have been warranted is minor tweaking to the visitation schedule in order to better foster Devon’s relationship with his mother as long as she continues to reside at such a distance from Devon.

IV. CONCLUSION

In this author’s opinion Trahan should have been named the domiciliary parent, as the Court decided. However, the visitation schedule is far too inadequate for the minor child. A mere thirty-five days in the summer, rotating holidays, and a scant thirty hours per month, which includes travel time for the child, is simply not sufficient to foster a healthy relationship between Devon and his mother.

113. See Cucchiara v. Cucchiara, 543 So. 2d 638, 640 (La. App. 1st Cir. 1989) (evaluating custody and considering the fact that the child would live in a nuclear family by residing with his mother).
114. Trahan, 98 So. 3d at 355.
115. See Franklin v. Franklin, 763 So. 2d 759, 764 (La. App. 3rd Cir. 2000) (considerating the child’s relationship with his siblings and also other significant persons in the child’s life in evaluating custody).
It seems as if the aim of the Court was simply to hand back to Kingrey that which had been handed to Trahan by the trial court. The Court even made reference to the fact that the visitation plan the trial court gave to Trahan was inadequate to foster a relationship between Devon and Trahan.\textsuperscript{116} While it seems that Kingrey may well have been trying to use the relocation, after her husband no longer needed to reside in West Virginia for work, to remove Trahan from Devon’s life as much as possible (and the court points out the fact that she had attempted to do so in the past\textsuperscript{117}) retaliation for such acts should not be the aim of a visitation schedule. The main concern is, and always should be, the child’s best interests. The author is of the opinion that, whenever possible, and in the best interests of the child, having both parents’ influence in a child’s life is better than having just one or the other, or a limited amount of one or the other. It does not seem that a full effort was put into devising a visitation schedule here that would be best for the child.

The fact that Kingrey is the relocating parent and that she (and perhaps her husband) no longer has any good reason to remain in West Virginia should be taken into consideration. But that consideration should only be in regard to which parent becomes the domiciliary parent and who bears the costs of transportation, not as to how the visitation schedule breaks down.

The rigors of long distance travel on a young child must also be considered. And perhaps this is why the Court stuck with the trial court’s visitation schedule. For a young child, traveling from Louisiana to West Virginia once every month can be extremely stressful. Therefore, making the child travel every other weekend to West Virginia would not be in the best interests of the child. But visitation time with his mother is certainly in Devon’s best interest. For that reason, it is the author’s opinion that an equitable solution would have been to simply add to the visitation schedule that

\textsuperscript{116} Trahan, 98 So. 3d at 357.
\textsuperscript{117} Id. See also LA. REV. STAT. ANN. 9:355.14, Factor 5 (2012).
Kingrey could also travel to Louisiana herself once per month, on a weekend, and have an additional thirty hours of visitation with Devon, with all costs to be incurred by her. While, financially, she may not be able to afford such travel on a consistent basis, at least the option would have been afforded her, and that would certainly serve the best interests of Devon. While Kingrey may have been conspiring the remove Trahan from Devon’s life, there was no mention by the Court that Kingrey was an unfit mother and, thus, there is no reason to deprive Devon of the influence, guidance, and relationship with his mother any more than necessary to make this custody plan work.

Besides the slight tweaking of the visitation plan, the author is of the opinion that this case is a superb example of the way in which the relocation factors (in Louisiana Revised Statutes 9:355.14) and the best interests factors (in Louisiana Civil Code article 134) operate in conjunction with one another. The Court does an excellent job of breaking down the case by each particular issue and analyzing each in a very methodical manner. Moreover, it serves as a stark reminder to attorneys that if the proper procedure is not followed in relocation scenarios, the results can be devastating for the client.
REED V. ST. ROMAIN:
EVERYDAY GIFT GIVING AND LEGAL TAXONOMY

Alexandru-Daniel On*

I. INTRODUCTION

The facts of Reed v. St. Romain1 are rather mundane. A man, Alvin, gave his girlfriend at the time, Judy Ann, a diamond ring. They later split up. Alvin contends that the ring was given in contemplation of marriage, as an engagement ring, and since they did not go through with the marriage, he wants the ring back.3 Judy Ann says that it was nothing of the sort, and contends that it is her property. She argues that it was a “shut up” ring or an early Christmas present.4

Although the facts of this case are not very intricate, the law that ought to be applied in circumstances such as those described above is based on a taxonomy that is not easily navigable. Taxonomy is a central element in civilian legal thinking, and much of the civil law’s legal imaginarium is based on the intellectual

* Research Associate, Louisiana State University Law Center. The author warmly thanks Professor Olivier Moréteau for his help and for the engaging conversations on the subject treated herein; Professor Alain Levasseur for his notes and comments; Professor Luz M. Martinez Velencoso, Professor Aniceto Masferrer, Adrian Tamba and Shane Büchler for their edits and help; and Jennifer Lane for the careful final editing of this piece.
2. Id. at 1.
3. In support of his claim, Alvin Reed testified that he got down on one knee and asked Judy Ann to marry him, and she accepted. Id. He also introduced as evidence a photograph of her wearing the diamond ring on the “ring finger” and a copy of her address book where he was listed as her “fiancé.” Id.
4. Judy Ann St. Romain testified that Reed never asked her to marry him and that the present was given to her a few days before Christmas as an early Christmas present. Id. at 2. She added that they never called each other fiancées and that she listed Reed in her address book as her fiancé because she had always wished and hoped that one day they would be engaged. Id. Also, on cross-examination, Reed acknowledged that they had never set a date for the wedding. Id. Kristen Barnhardt, St. Romain’s daughter, also gave testimony supporting her mother’s side of the story. Id.
attempt to abstractly arrange the law into categories. The Aristotelian division, into categories and subcategories, brings logic, thoroughness and credibility to the system, but taxonomy has its traps and challenges. Civilian methodology requires that the facts of a case be placed inside the proper box or container in order to correctly determine the juridical effects of the facts in question, a process that can be relatively straightforward, but might also at times look like opening a Russian Matryoshka doll. Of course, things become even more challenging in borderline cases, when finding the right box also entails discovering the reasoning behind the categories (the ratio legis) and the boundaries between them.

The theoretical model for the law applicable to cases like Reed is more complex, yet more fluid and flexible than one would expect. The purpose of this case note is to go beyond the analysis and critique of the Reed opinion, and explore some distinctions that are essential to a better understanding of the law applicable in similar cases.

II. DECISION OF THE COURT

The Court of Appeals in Reed focused on the issues of fact, and found that the trial court was not manifestly erroneous in deciding that the ring was a “shut up” ring and not an engagement ring. Accordingly, Judy Ann was allowed to keep it. In its analysis, the court cited articles 1468 and 1556 of the Louisiana Civil Code and decided that, based on these articles, as applied to the facts, the parties entered into an “irrevocable donation.”

5. Id. at 2-3.
6. LA. CIV. CODE art. 1468: “A donation inter vivos is a contract by which a person, called the donor, gratuitously divests himself, at present and irrevocably, of the thing given in favor of another, called the donee, who accepts it.”
7. LA. CIV. CODE art. 1556: “A donation inter vivos may be revoked because of ingratitude of the donee or dissolved for the nonfulfillment of a suspensive condition or the occurrence of a resolutor condition. A donation may also be dissolved for the nonperformance of other conditions or charges.”
III. COMMENTARY

A. A Brief and Cryptic Opinion

One might reasonably wonder how the court arrived at this result, because the opinion lacks a proper and convincing demonstration. The main focus is on issues of fact, all the legal issues being treated in a rather brief and cryptic manner in just one paragraph at the beginning of the opinion.8 The court simply cited the above-mentioned civil code articles, as if their recitation would automatically bring light as to how they apply to the facts of the case.

Based on the opinion as a whole, it is evident that the court had two possible legal rules in mind: on the one hand, if the ring was an early Christmas present or a “shut up” gift (and this version of the facts was found more plausible), this meant that the parties entered into a definitive, non-conditional donation (the court used the term “irrevocable”);9 on the other hand, if the gift had been an engagement ring, this court probably would have found that the donation would have been subject to a resolutory condition.10

The court in the end decided the case correctly. Indeed, if the gift was not made in contemplation of marriage, as an engagement present, the donee became the owner from the moment the possession of the ring was exchanged (travitio),11 and the donation was not subject to any condition.12

The facts from Reed present, however, an opportunity to discuss a few fine distinctions that are rarely mentioned in the legal literature. Placing a ring on a loved one’s finger can, according to the circumstances, be an act having the nature of either a usual gift

9. “Non-conditional” and “irrevocable” are not synonyms. See infra Part III.C.
10. Based on the fact that LA. CIV. CODE art. 1556 was cited by the court.
11. LA. CIV. CODE art. 1543: “The donation inter vivos of a corporeal movable may also be made by delivery of the thing to the donee without any other formality.”
12. See infra Part III.C.
or a donation, and such an act can be either definitive or conditional. Surrounding circumstances such as the occasion when the gift was made, the value of the gift, the fortune of the donor, any accompanying words or gestures, and previous or subsequent conduct, can lead to a different interpretation of the facts, a different legal qualification of the act, and different juridical effects.

In Reed, the first distinction, between donations and usual gifts, was not even mentioned by the court, and it probably would not have made any difference in the outcome of the case. In future cases, however, this distinction might be quite important, and there is very little guidance in Louisiana doctrine on this issue. The next section of this case note (section B) will analyze the distinction between the two types of acts based on the general theory of juridical acts, and section C will briefly discuss the distinction between conditional and non-conditional gifts.

B. Donations and Usual Gifts


Although the answer might, at first sight, seem obvious, the first problem a court must consider in a case like Reed is whether the act of giving a ring to a loved one is juridical or non-juridical in nature.

13. See infra Part III.B.
14. See infra Part III.C.
15. In Louisiana, the category of “usual gifts” is only briefly mentioned in the legal literature, and their treatment is limited to identifying the different requirements and effects of such acts in the law of successions or matrimonial regimes. See Kathryn Venturatos Lorio, 10 LA. CIV. L. TREATISE, SUCCESSIONS AND DONATIONS § 7:14, 10:6 (2d ed., West 2009-2011); Maunsel W. Hickey et al., 1 LA. PRAC. EST. PLAN. § 4:49, 4:85 (2013-2014 ed., West); Katherine S. Spaht & Richard D. Moreno, 16 LA. CIV. L. TREATISE, MATRIMONIAL REGIMES § 1.10 (3d ed., West 2006-2012).
A juridical act is an act of volition, a manifestation of will, expressed with the intent to produce juridical effects.\(^{16}\) An act of volition can be unilateral, giving rise to a unilateral act, or it can be bilateral, as it is most often the case, or multilateral, giving rise to a contract (a bilateral or multilateral act).

\(^{16}\) ALAIN LEVASSEUR, RANDALL TRAHAN & SANDI VERNADO, LOUISIANA LAW OF OBLIGATIONS. A METHODOLOGICAL & COMPARATIVE PERSPECTIVE 3 (Carolina Academic Press 2013); FRANÇOIS TERRÉ, INTRODUCTION GÉNÉRALE AU DROIT 165 (7th ed., Dalloz 2006); JEAN CARBONNIER, DROIT CIVIL. INTRODUCTION 268 (22nd ed., PUF 1994); Claude Brenner, Acte juridique, at no. 10, in ENCYCLOPÉDIE DALLOZ. RÉPERTOIRE DE DROIT CIVIL (Dalloz 2013). The term declaration of will (déclaration de volonté) has also been used in the literature. See, e.g., FRIEDRICH CARL VON SAVIGNY, 2 LE DROIT DES OBLIGATIONS. PARTIE DU DROIT ROMAIN ACTUEL 82 (T. Hippert trans., Bruylant-Cristophe & Co. 1873). In Louisiana, the late Professor Saúl Litvinoff used the term “declaration” of will when proposing a definition for juridical acts. SAÚL LITVINOFF, 5 LOUISIANA CIVIL LAW TREATISE. THE LAW OF OBLIGATIONS 12 (WEST 2001); and SAÚL LITVINOFF & W. THOMAS TÊTE, LOUISIANA LEGAL TRANSACTIONS. THE CIVIL LAW OF JURIDICAL ACTS 105 (Claitor’s Publ’g Division 1969). The Louisiana Civil Code also refers to “other declarations of will” in article 1757, where the sources of obligations are enumerated. LA. CIV. CODE art. 1757. The term “manifestation” is preferable because it is broader, and encompasses all non-verbal communication. One might doubt, for instance, whether some manual gifts would be seen as originating from “declarations” of will, when all that the donor does is place a gift in the hands of the donee, without a written act or without saying anything.

It is also worth mentioning other definitions of juridical acts that have been proposed in doctrinal works. Some authors tried to improve the definition laid down above by adding reference to the obligational contents of juridical acts. See BORIS STARK, HENRI ROLAND & LAURENT BOYER, INTRODUCTION AU DROIT 553 (3d ed., Litéc 1991). Others have tried to offer definitions where the subjective element (the will) is coupled with objective considerations, in order to better distinguish juridical acts from juridical facts. See EMMANUEL GOUNOT, LE PRINCIPE DE L’AUTONOMIE EN DROIT PRIVÉ. CONTRIBUTION À L’ÉTUDE CRITIQUE DE L’INDIVIDUALISME JURIDIQUE (Rousseau 1912) 246-47 (arguing that a juridical act is created only when the manifestation of will is aimed at organizing the effects of the act, and not merely intending them, thus (over)emphasizing the normative element of juridical acts); JACQUES MARTIN DE LA MOUTTE, L’ACTE JURIDIQUE UNILATÉRAL; ESSAI SUR SA NOTION ET SA TECHNIQUE EN DROIT CIVIL 26 (Bernard Frères 1951) (arguing that it is not enough for the will to intend the juridical effects generated by the act; the manifestation of will must also be “necessary” for the effects to be produced); and JEAN HAUSER, OBJECTIVISME ET SUBJECTIVISME DANS L’ACTE JURIDIQUE 70, 322 (L.G.D.J. 1971) (arguing that the role of the will is limited to the initiative to enter into an operation that has juridical content; in a view that combines objective and subjective elements, the author considers that the effects of the act spring exclusively from the law, but the actor’s initiative to enter into such an act, while not a source, is a necessary trigger).
A juridical act must cumulatively fulfill three conditions that can be extracted from the above-mentioned definition: (1) it needs to be a manifestation of will; (2) it must produce juridical effects; and (3) the juridical effects must be intended by the author.  

The latter condition is of special interest for the facts presented in *Reed*. By placing the ring on Judy Ann’s finger, Alvin expressed his will. By placing the ring on Judy Ann’s finger, Alvin expressed his will.18 Also, the act produced legal effects, as ownership of the ring was transferred to Judy Ann (the court later recognizing this transitive effect in its decision). However, not all intentional acts of volition that produce juridical effects are juridical acts. Many are classified as juridical facts, like intentional delicts,19 or the management of (another’s) affairs.20 What differentiates juridical acts from juridical facts is precisely the author’s intent for the act to produce juridical effects. It is rather exotic to think, for instance, that somebody would commit a battery with the intent to pay reparation.21 Also, in the case of a management of another’s affairs, the specific intent is to help or act for the interest of another,22 but not necessarily to generate the obligations that arise from this fact.23

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17. Brenner, *supra* note 16, at no. 10. The third condition need not be understood in its most absolute meaning. It is enough for the author of the act to understand and intend the principal effects of the act, and not every possible legal consequence that comes with concluding a juridical act.

18. Judy Ann’s acceptance of the ring when placed on her finger makes the juridical act bilateral, as her will joined Alvin’s to form a contract.

19. *See* LA. CIV. CODE art. 2315.

20. *See* LA. CIV. CODE art. 2292.

21. Some French scholars adjusted the definition of juridical acts in order to anticipate this sort of bizarre event, and argue that a juridical act is not simply an act wherein the juridical effects are intended, but also where the effects necessarily follow from that intent. MARTIN DE LA MOUTTE, *supra* note 16, at 26. For instance, if the actor commits a delict with the intent to pay reparation, the act would still be a delict and not a unilateral juridical act, because if the intent to pay reparation were missing, the act would produce effects anyway (as a delict). *Id.*

22. The intent to be of service to another need not be the exclusive reason why the gestor manages the affairs of another. A cause of action based on management of affairs is recognized even if he also had selfish reasons for rendering the performance. SAÚL LITVINOFF, *THE LAW OF OBLIGATIONS IN THE LOUISIANA JURISPRUDENCE: A COURSEBOOK* 465 (6th ed., LSU Law Center
More importantly, the intent to produce juridical effects also differentiates juridical acts from what could be called “non-juridical acts.” These acts take the form of agreements, which apparently resemble juridical acts, but in fact are not intended to be binding. The typical example is a gentlemen’s agreement,24 practiced so often in commercial settings. Also, acts like helping, or promising to help, a friend move some furniture or paint his house, qualify as non-juridical manifestations of will.25 If the intent to be legally bound is missing, as a matter of principle,26 the manifestation of will cannot and will not produce juridical effects.


24. See Bruno Oppetit, L’engagement d’honneur, D. 1979 Chron. 107. However, the idea that gentlemen’s agreements are non-juridical acts needs to be nuanced. While in some of these agreements the parties really intend to give rise to mere moral obligations, there are many situations in which the intent is to place the agreement outside of state law, but the effectivity of the agreement is beyond doubt, and the parties do feel bound by their promises. Id. at 108. See also Cass Com., January 23, 2007, D. 2007 Act. Jurisp. 442, obs. Xavier Delpech; RTD. Civ. 2007, at 340, obs. Jacques Mestre & Betrand Fages. With a pluralist view on what the law is, one could argue that there are two types of gentlemen’s agreements: on the one hand, if the parties of the agreement do not want to be bound except in conscience, or otherwise said, the act shall not have any binding effect, the gentlemen’s agreement would be a veritable non-juridical act; on the other hand, if the gentlemen’s agreement is concluded with the intent to apply a different law to the transaction, a law other than state law, either created by the parties themselves, or chose by the parties from other non-étatique regulatory sources (like, for instance, lex mercatoria), then it is a veritable juridical act, because the parties do intend to be bound by their will and subject the act to some form of normative background (law lato sensu).

25. For instance, if Primus promises to Secundus, his best friend, that he will help him with some gardening work, he is not bound by this promise, unless it is reasonable to think that the parties meant for the obligations resulting from the agreement to be legally enforceable. Other examples of apparent manifestations of will that are not intended to produce effects include: manifestations of will that were intended as mere jokes or jests, the recitation of a line in a theater play or on the set of a movie, the example a law professor gives in class, etc.

26. The exceptions to this rule are based on theories of good faith and reasonable reliance and are intended primarily to secure the setting for commercial or civil transactions. For instance, if a person makes an offer which apparently fulfills every condition of a valid offer, but does not really intend to be bound, his real intentions being reserved solely within his own mind, and a
Therefore, in order to determine whether or not the agreement between Alvin and Judy Ann is a juridical act, and, to be more exact, a contract, one would have to look into the specific intent of the parties.

2. Gift-Giving—Always a Juridical Act?

Under the civil code, gift giving implies donative intent (*animus donandi*). This intent usually is materialized into a contract of donation, which is a recognized juridical act, and, more accurately, a nominate contract (its special rules regarding formation and effects being laid down in Book 3, Title 2 of the Louisiana Civil Code).

However, not all gifts necessarily fall within the scope of the provisions from this title of the code. Low value and symbolic gifts (like, for instance, Christmas or engagement presents), generically named “usual or customary gifts” (présents d’usage), are not subject to the codal provisions regarding donations. Some authors even wonder whether usual gifts can be placed within the category of juridical acts, as they seem to have been exempted from many good faith offeree accepts the offer, the former will be bound by his declaration of will despite his real intent. Litvinoff & Tête, supra note 16, at 114. In Germany, this principle has been codified in art. 116 of the BGB: “A declaration of intent is not void by virtue of the fact that the person declaring has made a mental reservation that he does not want the declaration made. The declaration is void if it is to be made to another person who knows of the reservation” (Translation by Langenscheidt Translation Service, available at http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html).

27. LA. CIV. CODE art. 1468.
28. LA. CIV. CODE art. 2349: “The donation of community property to a third person requires the concurrence of the spouses, but a spouse acting alone may make a usual or customary gift of a value commensurate with the economic position of the spouses at the time of the donation” (emphasis added).
30. Ionel Reghini, Serban Diaconescu & Paul Vasilescu, Introducere în dreptul civil 429-30 (Hamangiu 2013); and Perreau, supra note 29, at 512.
of the prerequisites of juridical acts, and are deprived of many of the usual effects of donations.

Usual gifts are exempted from capacity requirements. For instance, a minor can validly make an ordinary gift (like a modest Christmas present or a flower to a girlfriend), although he does not have the capacity to make liberalities (donations or a testament). Other legal restrictions also do not apply: usual gifts are not subject to the requirement of mutual consent of the spouses for the conclusion of gratuitous dispositions on community property; as to their effects, usual gifts are not subject to collation, and obviously, it would also be absurd to subject them to reduction. Also, they are, of course, not subject to the authentic form requirement.

A gift is considered a présent d’usage when two conditions are fulfilled: (1) the value of the thing is low by comparison to the

32. See LA. CIV. CODE art. 1476:
   A minor under the age of sixteen years does not have capacity to make a donation either inter vivos or mortis causa, except in favor of his spouse or children.
   A minor who has attained the age of sixteen years has capacity to make a donation, but only mortis causa. He may make a donation inter vivos in favor of his spouse or children.
33. LA. CIV. CODE art. 2349. See André Colmer, Communauté, at no. 801, in ENCYCLOPÉDIE DALLOZ. RÉPERTOIRE DE DROIT CIVIL (Dalloz 2013).
34. LORIO, supra note 15, at 7:14; Succession of Gomez, 67 So. 2d 156, 162 (La. 1953). See also, art. 852 of the French Civil Code: “The expenses of food, support, education, apprenticeship, the ordinary costs of outfitting, those of weddings and usual presents, shall not be collated.” The Louisiana equivalent of the French article 852 is LA. CIV. CODE art. 1244, which is phrased differently: “Neither the expenses of board, support, education and apprenticeship are subject to collation, nor are marriage presents which do not exceed the disposable portion.” Usual presents are not enumerated in art. 1244, but based on the legislative history of this article, it must be interpreted as also excluding usual gifts from collation. LORIO, supra note 15, at 7:14.
35. Ibrahim Najjar, Donations, at no. 85, in ENCYCLOPÉDIE DALLOZ. RÉPERTOIRE DE DROIT CIVIL (Dalloz 2013). The lack of authentic form is not necessarily an exception to the general rules that apply to other donations, because usual gifts are almost always made in the form of manual gifts.
fortune of the donor; and (2) the present is made on the occasion of a social event or in a family setting.\textsuperscript{36}

In order to explain this \textit{sui generis} category of gifts, French legal doctrine developed two main theories that attempt to explain their nature.

The first theory places usual gifts somewhere in-between moral and legal realms, by resorting to the mechanism of natural obligations.\textsuperscript{37} This theory is based on the argument that since these gifts are made in social or family settings, the “donor” feels bound in conscience before making the gift, and the making of the gift relieves him of this moral duty. However, if the act of making usual gifts is seen as the performance of a pre-existing natural obligation, usual gifts are not, properly said, donations.\textsuperscript{38} The performance of an obligation is incompatible with the ideas of “liberality” and “donative intent.” This onerous nature of usual gifts would explain the difference as to the exemption from collation, or from the rules regarding community property. Moreover, if the volitional act is considered non-juridical, and only the \textit{traditio} (the performance) produces juridical effects, the rules regarding capacity can also be justified by this theory.

That being said, even though the effects of usual gifts are deduced very elegantly from the way natural obligations work, the whole theoretical construct is based on two fictions that ignore or distort the will of the parties. First, the role of the will as a basis for transferring ownership is minimized, and the transitive effect of the act is linked to the transfer of possession alone (\textit{traditio}). Second, this theory presumes that the intent to extinguish a moral duty is the cause of the act, and not the author’s liberal intent (\textit{animus donandi}). The moral circumstances and the social pressure

\textsuperscript{36} Id. at no. 86.
\textsuperscript{37} Perreau, \textit{supra} note 29, at 512.
\textsuperscript{38} The performance of a natural obligation cannot be described as a liberality, the same way a contract wherein the objective cause of one of the obligations is a preexisting natural obligation cannot be a gratuitous act. \textit{Litvinoff, 5 Louisiana Civil Law Treatise…}, \textit{supra} note 16, at 33.
that exist when making these presents can serve as a motive for making the gift (the subjective cause of the act), but the liberal intent is clearly present (the objective cause of the act is *animus donandi*).\(^{39}\) It is rather cynical to describe giving a Christmas present as the fulfillment of a duty, and not gift-giving.

That is why the second theory, which describes usual gifts as veritable donations, a sub-category of manual gifts, subject to a different legal regime,\(^{40}\) is more convincing.\(^{41}\) When one makes an ordinary gift, the specific intent is to transmit, gratuitously, ownership of the object to the donee, and this intent is enough to characterize the act as juridical and, consequently, a donation. Custom and practical considerations justify the different legal regime applicable to this category of manual gifts, and not the mechanism of natural obligations: usual gifts are part of ordinary social interaction, their rules are dictated by local social standards (that might also vary in time), and are made on so many social occasions that it might be excessively burdensome to keep track of them in order to apply the full extent of consequences attached to donations.

\(^{39}\) For a detailed presentation of the distinction between *subjective cause* and *objective cause*, see Judith Rochfeld, *Cause*, at nos. 14-19, in *ENCYCLOPÉDIE DALLOZ. RÉPERTOIRE DE DROIT CIVIL* (Dalloz 2013).

\(^{40}\) See Najjar, *supra* note 35, at no. 84.

\(^{41}\) A Spanish author has developed an intermediary opinion, which describes usual gifts as liberalities, and rejects the idea that such gifts are, in fact, a way of performing a preexisting natural obligation, but considers them some sort of *sui generis* liberalities, and not donations. Ramón M. Roca Sastre, *La donación remuneratoria*, 31 *REVISTA DE DERECHO PRIVADO* 823, 839-40 (1947). In support of this opinion, the author argues that the cause of usual gifts is the intent to conform to a prevailing usage, and not *animus donandi*. *Id.* at 840. Liberal intent (*animus donandi* or *animus testandi*) is what distinguishes liberalities from onerous acts, and to say that usual gifts are liberalities without *animus donandi* is a contradiction in terms. Furthermore, the author seems to reject the incidence of custom as the normative background for usual gifts and emphasized the role of prevailing usages, and that might have given rise to confusion between the cause of the act (an internal element) and the source of law that applies to usual gifts (an external element). *See id.* at 839. Saying that the cause of usual gifts is the intent to respect a prevailing usage is like saying that the cause of a sale is to respect the civil code.
Arguably, one could easily dismiss the hypothesis of usual gifts in a case like Reed, because the present was a diamond ring. Therefore, although the gift was made on the occasion of a social event (in either hypothesis: a Christmas present or on the occasion of the couple’s engagement), a strong argument can be made that the gift is valuable enough to exclude any possibility of characterizing it as a usual or customary gift. The value of the diamond ring alone, however, is not enough. The relative value of the ring, determined by comparison with the donor’s patrimonial situation, will determine whether or not the gift falls within one category or another, and not its objective value.42

3. The Juridical Nature of Engagement Presents

The distinction between donations, as regulated in the code, and usual gifts, is of particular significance in the context of engagement presents. Based on previous jurisprudence, in Louisiana engagement presents are considered to be conditional donations, because they are made in contemplation of marriage.43

This rule is of jurisprudential origin, and the question can come up in the future whether low-value engagement presents that would qualify as usual or customary gifts would be subject to the same type of resolutory condition. According to the natural obligation theory,44 usual gifts could not be made conditional because they are in fact the means of performing a pre-existing obligation, and therefore, as soon as the gift is made, the obligation is

42. See Cass Ire Civ., December 30, 1952, D. 1953 161, JCP 1953 II. 7475 (Fr.) (the French Court of Cassation decided in this case that, given the vast fortune of the donor, a sumptuous diamond bracelet was a usual or customary gift, even though it was objectively very valuable). Contra, see Hickey et al., supra note 15, at § 4:49.


44. See Perreau, supra note 29, at 512.
extinguished. However, based on the donation theory, at least theoretically, even low-value gifts could be made conditional.

In France, low-value engagement presents are considered non-conditional, except for family heirlooms, the resolutory condition being implied in the latter case in order to keep these objects in the family of the donor.

Seeing how the rules regarding engagement presents are deeply grounded in custom or usages, their possible transplant into Louisiana jurisprudence would need to be done with care. Courts have to be deferential to the parties will, their societal expectations, and local customs or usages. There is no set recipe for determining what the parties intend and expect when making engagement presents, and U.S. jurisdictions give a powerful example in this regard, as other states have adopted substantially different rules in dealing with the issue of ownership of engagement presents when engagements are broken.

45. See Najjar, supra note 35, at no. 84.
47. CORNU, supra note 46, at 272. LA. CIV. CODE art. 1: “The sources of law are legislation and custom” (emphasis added).
48. LA. CIV. CODE art. 4: “When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages” (emphasis added).
49. To this author’s knowledge, so far, Louisiana courts have not decided any case regarding low value engagement presents, especially based on the distinction between usual gifts and family heirlooms.
50. Today, based on the foundation of the set of rules that determine the fate of engagement presents after an engagement is broken, U.S. jurisdictions can be divided into two major categories: (1) States that apply a fault-based test for determining whether the donor can recover the ring (i.e., the donor can recover only if he is not at fault for breaking the engagement); (2) States that consider engagement presents conditional gifts, and recovery is not premised on fault (i.e., if the parties do not go through with the marriage, the donor can recover the ring even if he is at fault). See Brian L. Kruckenberg, “I don’t”: Determining Ownership of the Engagement Ring When the Engagement Terminates (note on Heiman v. Parrish, 942 P.2d 631 (Kan. 1997)), 37 WASHBURN L.J. 425, 434 (1997-1998); Rebecca Tushnet, Rules of Engagement,
C. Conditional and Non-Conditional Gifts

In determining whether or not a gift is conditional a court must find the common intent of the parties. The intent of the parties is usually deduced from the manifestation of will itself, which in cases where this takes the form of a written document, is rather straightforward by comparison to cases that involve manual gifts. The mere fact of placing a ring on someone’s finger, like in the Reed case, by itself, can hardly explain whether the parties wanted to enter into a contract of donation, a loan, a sale, or some other contract. It is even harder to find that the parties intended to subject the rights or obligations from the act to a modality (a condition or a term). However, the accompanying circumstances of the act can shed light on the true intent of the parties, and based on these extraneous elements, both the nature and the contents of the act can be deduced. That is why the court in Reed focused so much on whether or not the gift was given with the occasion of the parties’ engagement, or for some other reason (as a Christmas present, or a “shut up” present).

That being said, in its argument, the court made a serious terminological and conceptual mistake, when it stated in dicta that “if the ring was given in contemplation of marriage, it is a revocable donation because marriage is the condition which was not fulfilled.”51 A donation subject to a condition should never be confused with a revocable donation. The two concepts are different in both nature and effects.

51. Reed, supra note 1, at 1 (emphasis added).
By default, donations, whether of substantial value or merely usual gifts, conditional or non-conditional, are irrevocable. The Louisiana Civil Code defines the contract of donation as: “a contract by which a person, called the donor, gratuitously divests himself, at present and irrevocably, of the thing given in favor of another, called the donee, who accepts it.” The irrevocability prescribed by the civil code must be understood in the sense that the donor cannot change his mind after making the donation. If the donor reserves the possibility to take the gift back in any way that would depend solely on his will, the existence of *animus donandi* is in doubt (and a donation is not valid without a clear donative intent). That is why article 1530 of the Louisiana Civil Code declares that a donation which is conditioned solely on the will of the donor is null.

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52. LA. CIV. CODE art. 1468 (emphasis added).

53. This is a very old rule in the civil law, being embodied in a general maxim: “*donner et retenir ne vaut.*” The rule evolved from Roman law, where donations in general were always regarded with suspicion, and therefore were not considered binding until the corporeal possession of the donated thing was exchanged (*traditio*). FRANÇOIS TERRÉ, YVES LEQUETTE, DROIT CIVIL. LES SUCCESSIONS. LES LIBÉRALITÉS 351 (3d ed., Dalloz 1997). In the *Ancien Droit* (the French law that existed before the French revolution), the Roman rule was reinterpreted to mean that the act of donation cannot allow the donor to reclaim the alienated thing (in this form, the rule can be found in the Royal Ordinance of 1731 regarding donations). *Id.* Traditionally, the rule is said to be protective of the donor, who, knowing that the donation is irrevocable, is made aware of the significance of the act of donation, and is supposedly going to make donations only after seriously considering whether the act is necessary and whether by making the donation he is distributing his fortune fairly (particularly when donations are used as means of succession planning). *Id.* at 352, n.1. Some authors consider, however, that another, perhaps more important, reason behind the “*donner et retenir ne vaut*” rule is to protect the donee, who is left vulnerable, because the donor can revoke the gift at his whim. *Id.* at 352.

54. Article 1531 of the Louisiana Civil Code is an expression of the same idea. If the donation is conditioned on the payment of future or unexpressed debts and charges, the donor can eliminate the advantage conferred upon the donee simply by taking on more debts.
A conditional donation is perfectly valid, and remains irrevocable, as long as the condition is not dependent solely on the will of the donor. In the civil law, revocation implies the intervention of someone’s will for the purpose of canceling out the effects of an initial manifestation of will.\textsuperscript{55} In other words, in case of revocation two separate juridical acts are in play. The initial act would have to be a contract (the donation), and the subsequent act, the revocation, would be a unilateral act canceling the effects of the donation. It is important to emphasize that the subsequent unilateral act is the source for the effects on the rights or obligations of the first act. That is because, as opposed to revocation, when a condition is fulfilled, there is no second manifestation of will aimed at canceling the effects of another, initial, juridical act. The condition is a part of the initial act and its fulfillment or non-fulfillment will generate effects which are anticipated by the original act and flow from that original manifestation of will.

Revocation can be non-judicial or judicial. Non-judicial revocation operates only in special circumstances, like in cases of donations \textit{mortis causa}.\textsuperscript{56} Judicial revocation operates for cases of ingratitude.\textsuperscript{57} A conditional donation is irrevocable, unless it falls within one of the special circumstances of revocable donations described above.\textsuperscript{58}

In article 1556, the Louisiana Civil Code clearly makes a distinction between causes of revocation and causes of dissolution

\textsuperscript{55} GÉRARD CORNU, VOCABULAIRE JURIDIQUE 920-921 (9th ed., PUF 2011).
\textsuperscript{56} LA. CIV. CODE art. 1469. Before 1942, former Louisiana Civil Code article 1749 provided that donations between spouses were revocable. Today, as a rule, donations between spouses are irrevocable. However, a right of revocation can be introduced by the parties by express stipulation in the act of donation, but only if the donation is made by notarial act. LA. REV. STAT. ANN. § 9:2351 (2005).
\textsuperscript{57} LA. CIV. CODE art. 1556. \textit{See also} LA. CIV. CODE art. 1557.
\textsuperscript{58} For instance, a donation subject to a condition can, of course, be revoked for ingratitude by a court, but in that case the act of ingratitude, and not the condition, is what makes the donation revocable.
of a donation. The ingratitude of the donee is a motive for revocation, whereas the nonfulfillment of a suspensive condition or the fulfillment of a resolutory condition leads to the dissolution of the donation.

IV. CONCLUSION

This rather lengthy case note covers more than what would generally be necessary when discussing a case like Reed. In itself, the case is not very complex, and the decision of the court followed Louisiana law. Still, there are a couple of reasons why more ground is covered than what would generally be expected of a standard case note and why some taxonomical issues are treated at length.

First, a slight change in circumstances would have led the court towards a completely different result. If Alvin had made a formal engagement proposal when he gave the ring to Judy Ann, the donation would have been most probably considered subject to a resolutory condition. Even then, things might have changed if the court found that the contract between the parties was an usual or customary gift, and not a conditional donation. And things might not stop there, other distinctions becoming relevant within each subcategory. That is why it is essential to clearly determine the facts in cases like Reed, and applying the law to these facts depends on a firm grasp on traditional distinctions of the civil law: between juridical and non-juridical acts, between donations and ordinary gifts, and between conditional and non-conditional gifts.

Second, the Civil Code does not have specific and detailed rules for circumstances such as those of the Reed case. The degree

59. LA. CIV. CODE art. 1556: “A donation inter vivos may be revoked because of ingratitude of the donee or dissolved for the nonfulfillment of a suspensive condition or the occurrence of a resolutory condition. A donation may also be dissolved for the nonperformance of other conditions or charges” (emphasis added).

60. Dissolution in this case is not a sanction and should not be confused with dissolution as it appears in Title 4, Chapter 9 of the same Book 3.

61. See supra note 43.
of abstraction of the general theory of juridical acts is beyond what is necessary in a regulatory instrument, and such general theories were developed after the Code Napoléon entered into force. Also, while usual gifts are mentioned in the code, the distinction between these gifts and donations is not made clear, either in the code, the jurisprudence, or the existing Louisiana legal doctrine. Moreover, while there is more than enough information in the code regarding what a condition is and how conditions operate, the code itself contains inconsistencies, and, as proved by the Reed opinion, courts, when discussing conditions, sometimes confuse some of the concepts used by the code.

For these reasons, it was worth discussing at length the Reed v. Saint Romain case, even though the opinion remains, to this day, unpublished in the Southern Reporter. Beyond all practical concerns, this case provided the perfect alibi for a discussion on fundamental notions of private law and traditional civilian

62. The Code is not a mere regulatory instrument, but also an instrument of liberty, as it creates a framework for the individual will to exert its normative power freely. A contract is the law for its parties. Based on deference to individual will, judges must devise the best methods of identifying and enforcing the nomothetic will. In the civil law, the intent of the parties is the criterion for the classification of an act and for determining its contents, and ultimately, its effects.

63. Brenner, supra note 16, at no. 5.

64. Although it is not the purpose of this case note to also make de lege ferenda propositions for the Louisiana Civil Code, one problem needs to be at least mentioned. While the sections of the code that define conditional obligations and describe their effects are relatively well written and modern (see arts. 1767-1776), article 1562 of the code (in a section that, improperly, is named “exceptions to the rule of the irrevocability of donations inter vivos”), oddly distinguishes between suspensive and resolutory conditions as to their effects. According to this article, resolutory conditions do not operate automatically, like suspensive conditions. The code makes resolutory conditions effective only (1) if the parties agree to “dissolve” the contract or (2) by way of court action. This creates a hybrid type of resolutory conditions, specific only to donations, which operate to some extent like the common law conditions subsequent, instead of operating de iure and retroactively, like the resolutory conditions described in articles 1767-1776 of the code. Louisiana jurisprudence has interpreted art. 1562 to mean that an action for rescission is needed in order to give effect to the resolutory condition, in the context of donations. See Busse v. Lambert, 773 So. 2d 182 (La. App. 5 Cir.); and Orleans Parish Sch. Bd. v. City of New Orleans, 700 So. 2d 870 (La. App. 4 Cir.).

65. Supra Part III.C.
categories. These concepts, and, of course, the taxonomy of juridical acts, need to be properly understood before arguing or deciding similar cases. But their study brings much more than just guidance for future cases. The general theory of juridical acts is at the height of abstraction, and more than anything, the structure, the finesse, the logic, the coherence and symmetry of its taxonomy, brings civilians closer to an ideal of order—a right order, for this world of men.66

BACK TO BASICS: DISTINGUISHING REAL AND PERSONAL RIGHTS IN WAGONER V. CHEVRON USA INCORPORATED II

Michael C. Wynne*

I. INTRODUCTION

No discussion of oil and gas operations in Louisiana would be complete without the discussion of “legacy” litigation. In Louisiana legacy suits have proliferated. A legacy lawsuit refers to a suit by a landowner claiming that oil and gas operations caused damage to his property through contamination or pollution.

Legacy suits impose substantial burdens on the oil and gas operators allegedly responsible for damage to contaminated property and production sites. Even before a legislative response was made to these economically damaging suits, Louisiana courts developed and refined a jurisprudential rule referred to as the “Subsequent Purchaser Doctrine.” This judicially-created doctrine provides that a purchaser cannot recover from a third-party for damage inflicted prior to the sale.1 The distinction between real and personal rights is fundamental for a proper understanding of the doctrine. This paper will discuss the operation of the Subsequent Purchaser Doctrine, and the importance of the distinction between real and personal rights, through the lens of the influential Wagoner v. Chevron USA Incorporated2 (“Wagoner II”) decision.

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1. Ashley M. Liuzza, Buyer Beware: How Purchasers are Left Holding the Bag When it comes to Property Damages, 57 LOY. L. REV. 375, 381 (2011).

2. Wagoner v. Chevron USA, Inc., 48,119 (La. App. 2 Cir. 7/24/13), 121 So. 3d 727 [hereinafter Wagoner II].
II. BACKGROUND

A. Wagoner v. Chevron USA Incorporated ("Wagoner I")

Understanding the breadth and purport of the Wagoner II decision requires insight into the earlier related judgment, Wagoner I. In Wagoner I, the Louisiana Second Circuit Court of Appeals reviewed a surface owners’ claim for damages against lessees for contamination of the land that took place prior to the surface owners’ acquisition of the same. The court, articulating the Subsequent Purchaser Doctrine stated:

The general rule, often referred to as the subsequent purchaser doctrine, is that a purchaser cannot recover from a third party for property damage inflicted prior to the sale. It is the landowner at the time of the alleged damages who has a real and actual interest to assert a claim. More importantly, for the purposes of this note, the court premised their decision on the following analysis:

The right to damages conferred by a lease, whether arising under a mineral lease or a predial lease, is a personal right, not a property right . . . it does not pass to the new owners of the land when there is no specific conveyance of that right in the instrument of sale.

Relying upon the Subsequent Purchaser Doctrine, the court ruled in favor of the defendant lessees, based on an exception of no right of action. The court noted that the plaintiffs were not parties to the mineral leases obtained by the operator who damaged the land and the landowner who held the real right of ownership at the time of the injury. However, the court suggested, in dicta, that the subsequent landowners could have brought a claim for these damages if they had secured an express assignment of the right to

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3. Wagoner v. Chevron USA Incorporated, 55 So. 3d 12 (La.App. 2 Cir. 2010) [hereinafter Wagoner I].
4. Id. at 22-23 (citations omitted) (emphasis added).
5. Id. at 23.
6. Id.
sue the mineral lessees for property damage that took place before their purchase of the property.7

B. Wagoner v. Chevron USA Incorporated (“Wagoner II”)

After the Wagoner I decision, the plaintiffs (“assignees”) obtained an assignment of 99% of the rights from the owners of the mineral servitudes (“assignors”), and for a second time brought suit to recover for damages to the property caused by oil exploration and production by the lessees.8 Significantly, the assignors, unlike the assignees, had a real right in the land at the time the property was damaged by the lessees’ operations. The assignors conveyed a personal right (the right to request damages) through the assignments to their assignee, the subsequent surface owners.

In Wagoner II, the primary issue before the court was whether the assignees’ acquisition of the assignors’ right to sue for damages to the property changed the capacity in which the subsequent surface owners appeared, such that the assignee could defeat the defendants’ claims of res judicata. At first blush, the question before the court was purely procedural, and the court dispensed with the issue concluding that in Wagoner II, the subsequent surface owners, through the aforementioned assignments, “stepped into the shoes” of the prior assignees who had a real interest in the property at the time of the damage.9 The court reasoned that in Wagoner I the subsequent surface owners filed suit in their capacity as present surface owners who acquired the property after the damage occurred. However, in Wagoner II, the subsequent surface owners sued in their capacity as assignees of the rights of the prior mineral servitude owners. This change in capacity was sufficient to defeat the defendants’ claims of res judicata.

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7. Id.
8. Wagoner II, 121 So. 3d at 727.
9. Id. at 729.
The Second Circuit affirmed the trial court’s finding in favor of the defendants’ exception of res judicata in relation to the claims brought by the plaintiffs in their capacity as "surface owners" as adjudicated in Wagoner I.10 These claims were dismissed with prejudice. However, the assignees’ claims brought in their capacity as the mineral servitude owners’ assignees survived the defendants’ exceptions of res judicata. The matter was remanded for further proceedings on those claims.11 Dispensing with the procedural issue at hand, Wagoner II demonstrated the application of the dicta from Wagoner I. The distinction between real and personal rights was an outcome-determinative feature in the Wagoner decisions.

III. COMMENTARY

A. Patrimonial Rights and their Subdivision

A patrimonial right is one susceptible to monetary evaluation.12 Patrimonial rights are further divided into real rights and personal rights (credit rights), and it is this distinction that was determinative in Wagoner II.13 Real rights, unlike personal rights, require only one subject, the holder of the right.14 This holder exerts “a direct and immediate power over the thing which is the object of the right.”15 In contrast, a personal right, such as a credit-right, “presupposes an active subject, the creditor or obligee, and a passive one, the debtor or obligor.”16 Because a real right is exerted directly over a thing, it is considered “absolute” (in the sense that the holder of a real right can hold it against everyone).17

10. Id. at 735-36.
11. Id. at 736.
13. Id.
14. Id. at 8 (§1.5).
15. Id.
16. Id.
17. Id. at 9.
In contrast, a credit-right is relative because its holder may only demand performance from a specific debtor.\(^{18}\)

The distinction between real and personal rights is muddled in practical application. This distinction is particularly problematic “when the performance relates to a thing, especially an immovable thing.”\(^{19}\) Professor Litvinoff provided an example of this difficulty and set forth the proper analysis to navigate the problem. He articulated:

Thus, the indemnity owed to an owner for the expropriation of a part of his immovable property, and the damages owed to the owner of a thing for its partial destruction or for an interference with his rights in it, belong to the person who was owner at the time of the expropriation, destruction, or interference, as the right to demand indemnity or to demand damages is a personal right that is not transferred together with the thing.\(^{20}\)

In the case of ownership or other real rights the actor has direct power over a thing, which may be held against the world; whereas, in the case of personal rights, such as the right to damages arising out of damage to an immovable, the actor’s right is relative (in the sense that the actor is entitled to receive a performance from only one or more persons in particular). In the instant case, the right to claim damages arising out of the pollution of a landowner’s immovable property is a personal right.

\(\text{B. Application: Personal Rights in the Wagoner Decisions}\)

The \textit{Wagoner} decisions represent prominent examples of the problem identified above: instances when the performance of an obligation relates to a thing, especially an immovable thing. Consequently, the determination of the nature of the rights in \textit{Wagoner I} and \textit{II} is as essential as it is challenging. In the \textit{Wagoner}

\(^{18}\) Id.


\(^{20}\) Id., citing comment (e) to L.A. CIV. CODE art. 1764 (emphasis added).
decisions, the courts accurately concluded that the right to damages arising out of the lease agreement between the lessee and the original landowner was a personal right, not a real right. As reproduced above, the *Wagoner I* court stated:

The right to damages conferred by a lease, whether arising under a mineral lease or a predial lease, is a personal right, not a property right; it does not pass to the new owners of the land when there is no specific conveyance of that right in the instrument of sale.21

This holding is consistent with the nature of the right springing from the damages to the land caused by the lessees’ conduct. As noted in the example provided above, damages owed to the owner of a thing for its partial destruction belong to the person who was owner at the time of the destruction, as the right to demand damages *is a personal right that is not transferred together with the thing*. This is the very conclusion the court reached in *Wagoner I*, when it determined that, absent a specific assignment of that personal right to collect damages from the previous owners, the subsequent landowners did not have a valid claim.

The determination that the rights to claim damages under the lease were personal rather than real was significant. Namely, the subsequent landowners did not acquire a right to the action through their purchase of the land, as they would have if the right had been deemed “real,” in the sense that it “runs with the land.”22 As a consequence of the personal nature of the right, the subsequent owners needed to purchase the right to claim damages from the original owners.

The right to sue for damages vested in the patrimony of the original owners and was not transferred with the property, and that is why an assignment of right to claim damages was necessary for the subsequent owners to bring a suit. It also explains why the plaintiffs sued in a different capacity after acquiring this right.

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22. *See* LA. CIV. CODE arts. 1763 & 1764.
Effectively, the subsequent landowners tested the *dicta* articulated by the *Wagoner I* court to the effect that a specific conveyance of that right would permit them to exercise the personal right to damages against the lessees. The subsequent landowners’ efforts were successful in that respect.

**IV. CONCLUSION**

The exploration of the characteristics of real and personal rights is not a purely academic exercise; rather, this distinction can have significant consequences. Principally, for landowners, the lesson is that an act of conveyance should include a specific conveyance of any and all personal rights arising out of the ownership of the immovable. Prudent landowners who wish to acquire personal rights are cautioned by the *Wagoner* decisions to make these personal rights part and parcel to their bargain with the original landowner. For oil and gas operators, this decision could prove bothersome, as it demonstrates that a subsequent landowner, through an assignment of the personal right to claim damages, can acquire and effectively exercise that right even if the assignment does not occur in the original act of conveyance. These assignments do not increase an operator’s liability. However, they may provide a right to sue for damages to a more litigious landowner.
I. The Draft Reforms of French Tort Law .............................. 760
   A. The Draft Revision of the French Civil Code Tort Provisions
   ................................. 760
   B. The Rationale of the Draft Projects and their Impact on the
      Civil Code ................................. 762
      1. The Catala Draft: A Revision Adulterating the Civil Code
      ................................. 764
      2. The Terré Drafts: A Recodification Perfecting the Civil
         Code ................................. 765
   C. A Quick Glance at the Drafts and their Compatibility with the
      PETL ................................. 766
      1. Time Factors ................................. 766
      2. Scope of Civil Liability ................................. 767
      3. Causation ................................. 769
      4. Liability for Others ................................. 770
      5. Specific Regimes ................................. 772
      6. Exclusion and Exoneration ................................. 774
      7. Contract Clauses ................................. 777
      8. Compensation ................................. 777
   D. Conclusion ................................. 785

II. Recent Jurisprudence in French Tort Law ......................... 786
   A. The Sinking of the Tanker Erika and the Advent of
      Environmental Damage ................................. 786
   B. Proportional Liability: French and European Perspectives
      Converge ................................. 792
      1. Multiple Tortfeasors, Concurrent and Alternative Causes
      ................................. 792
      2. Uncertainty of Causation and Loss of a Chance ................................. 797

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This inaugural chronicle of French law will focus on tort law or civil liability, to use civilian terminology. The first section presents forthcoming legislative evolution, commenting on two draft reforms that have not been debated in the National Assembly but are receiving much doctrinal attention inside and outside the country. The second section discusses a few recent cases. Both sections place French recent developments in the light of European Harmonization, particularly the Principles of European Tort Law, published in 2005 by the European group on Tort Law, of which the author is a member, and the Draft Common Frame of Reference (DCFR), compiled under the supervision of the European Commission.

I. THE DRAFT REFORMS OF FRENCH TORT LAW

A. The Draft Revision of the French Civil Code Tort Provisions

At the Napoleonic time, French tort law was codified in five Civil Code articles, articles 1382 to 1386 of a chapter entitled “Of Delicts and Quasi-Delicts.” These articles contain general clauses that have served as the basis for the development of a formidable and abundant jurisprudence. Law teachers find in this short chapter of Book III their best examples when they want to illustrate the creativity of the courts and the interaction of law professors and judges in the creation of the law. Legislative work has been very limited in the 150 years that followed the enactment of the Code civil des Français. Four of the five Code articles remain totally

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1. EUROPEAN GROUP ON TORT LAW, PRINCIPLES OF EUROPEAN TORT LAW (2005); PRINCIPES DU DROIT EUROPÉEN DE LA RESPONSABILITÉ CIVILE, TEXTES ET COMMENTAIRES (Olivier Morétau ed., Michel Séjean Trans., Société de législation comparée 2011).
2. DRAFT COMMON FRAME OF REFERENCE (DCFR). FULL EDITION. PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW (Sellier 2009).
3. This section was first published in FESTSCHRIFT FÜR ULRICH MAGNUS 77 (Peter Mankowski & Wolfgang Wurmnest eds., Sellier 2014) under the title The Draft Reforms of French Tort Law in the Light of European Harmonization.
unchanged. Slight modifications were made to paragraphs 2 and following of article 1384, whilst paragraph 1, still in its vintage drafting, served as the unintended seat for the development of an overreaching doctrine of strict liability for damage caused by the act of a thing (fait des choses).

Few developments were made outside the Code, such as workers’ compensation legislation. Only in the second half of the 20th century did legislative production accelerate, yet not so much to revise or complement the time-honored Civil Code articles, but to create specific regimes by special laws ancillary to the Civil Code. The most noteworthy of these is the law of July 5, 1985 aiming at the improvement of the condition of road traffic accident victims and the acceleration of the compensation process. Other special laws developed insurance coverage and created compensation funds for special categories of victims. French law moved from an individualistic system where victims had to bear their own losses except where damage was caused by the fault of another (neminem laedere), to a system where the victim occupies a central place, with the development of strict liability and the socialization of risks. Legal doctrine shifted from fault-based to risk-based liability, and Boris Starck later developed a théorie de la garantie whereby law and society should guarantee compensation to most if not all victims. Under the impulse of such doctrines, judges and legislators raced to the bottom, pampering French citizens and residents, and obscuring Civil Code principles whilst mitigating the escalating cost of welfare by the allocation of modest compensation. On a number of significant points, French law strayed away from mainstream European ideas.

4. Law of 9 April 1898.
5. With the exception of arts. 1386-1 to 1386-18 implementing the European directive of 1985 on product liability.
6. Alongside with the Civil Code articles, parts of it can be read in English in Olivier Moréteau, France in EUROPEAN TORT LAW, BASIC TEXTS 85 (K. Oliphant and B.C. Steininger eds., de Gruyter 2011).
7. On the evolution, see GENEVIÈVE VINEY, INTRODUCTION À LA RESPONSABILITÉ, nos. 33 to 56 (3d ed., L.G.D.J. 2008).
Whilst French tort law developed a victim friendly attitude, much of the efforts to compensate victims were done through the development of a welfare system combining social security, compulsory insurance or compulsory insurance coverage of otherwise uninsurable risks, together with reinsurance and the development of compensation funds. Though solutions will often differ, this did not cause the traditional framework of French tort law to change: to a large extent, it remains conversant with mainstream European solutions.

In recent years, a movement took place to promote a revision of the French Civil Code regarding the law of obligations, including tort law. This coincided more or less in time with the final steps leading to the publication of major European projects such as the Draft Common Frame of Reference (hereinafter DCFR) and the Principles of European Tort Law (hereinafter PETL), the latter being available when the reform drafts came to be finalized. This paper offers a brief overview of these French reform projects, checking their impact on the architecture of the French Civil Code. It then considers to what extent they take into account recent European developments, with a special focus on their compatibility with the PETL.

**B. The Rationale of the Draft Projects and their Impact on the Civil Code**

On September 22nd, 2005, a substantial report was submitted to the French Minister of Justice to propose a comprehensive reform of the general part of the law of obligations.

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Université Panthéon Assas Paris 2. It is the work of an impressive team, including Professor Geneviève Viney (Université Panthéon Sorbonne Paris 1), a former member of the European Group on Tort Law, in charge of the provisions dealing with civil liability (responsabilité civile) (hereinafter the Catala draft). This is a document of 225 pages, consisting in draft Civil Code articles preceded with explanatory preambles (at the beginning of each title) and sentences (at the beginning of each chapter, section, or paragraph), including a number of substantial footnotes.

In 2008 and 2011, another academic group proposed a reform of the general part of the law of obligations. Together with a team of some twenty distinguished scholars, François Terré, also Professor Emeritus at Université Panthéon Assas Paris 2, submitted two draft proposals, one to reform the law of contract (2008, hereinafter the Terré draft on contract)\(^9\) and the other to reform the law of tort (2011, hereinafter the Terré draft).\(^10\) Both were prepared with the cooperation of the Ministry of Justice under the aegis of the Academy of Moral and Political Sciences, of which Professor Terré is a distinguished member. Each publication opens with the draft Civil Code articles and continues with chapters presenting the project in general and each subdivision in particular.\(^11\)

In the meantime, a bill (proposition de loi) was introduced, presented by Senator Laurent Béteille, limited to the responsabilité civile or delictual liability.\(^12\) The Béteille draft is based on the civil


\(^12\) Proposition de loi portant réforme de la responsabilité civile, Sénat, no. 657 (9 July 2010).
liability part of the Catala draft, drafted under the leadership of Professor Geneviève Viney. No further action was taken on this bill, and no legislative action is scheduled for the months to come regarding tort law.

1. The Catala Draft: A Revision Adulterating the Civil Code

The Catala draft is the first ambitious and comprehensive attempt to reform the French Civil Code, since the post-war project to reform the Civil Code,13 which influenced Civil Code reform in the 1960s and 70s, though in other domains. One may also mention the French-Italian project of a Code of Obligations, published in 1927.14 The Catala draft is not a revolution, but an attempt to clarify the law, taking into account the impressive jurisprudential work of the Court of Cassation. In that sense, it proposes a revision rather than a recodification.15 Civil Code article numbers are used in the draft. Specific rules governing civil liability are left outside the Civil Code with the exception of product liability, maintained in the Code at articles 1386 to 1386-17 and compensation of victims of road traffic accidents, moved to articles 1385 to 1385-5.

Fundamental questions are not left aside. The Group had to decide whether liability in tort and contract had to be dealt with separately, as in the present Code, or jointly, as recommended by some scholars. The draft deals with contractual and extra-contractual liability as a single question: all rules regarding contractual and extra-contractual liability are presented in one single section entitled Civil Liability (responsabilité civile). Tort

15. For an attempt to define these terms, see Olivier Moréteau & Agustín Parise, Recodification in Louisiana and Latin America, 83 Tul. L. Rev. 1103, 1104-1112 (2009).
and contract are to sleep in the same bed, which purists may describe as adultery. However, the Group refused to abandon the time-honored règle du non-cumul whereby a plaintiff cannot opt for tort liability where a contractual relationship may serve as a cause of action. The justification is that in so doing, the plaintiff may by-pass a contractual clause. This may be a sound argument, yet it is very often trumped by mandatory rules preventing the exclusion or limitation of some damages, especially physical harm. The group opted for a reasonable compromise, allowing the victim of physical harm to choose the most favorable regime.\textsuperscript{16}

\textbf{2. The Terré Drafts: A Recodification Perfecting the Civil Code}

Contrary to the Catala draft, dealing with contractual and extra-contractual liability as a single question,\textsuperscript{17} both Terré drafts keep with the traditional architecture of the \emph{Code civil} (though not using Civil Code article numbers) and leave contract liability within the law of contract: tort law aims at restoring the victim to what the situation would be without the damage (negative or reliance interest) whereas contractual damages have the additional purpose of providing an equivalent to the expected benefit (positive or expectation interest).

The 2011 draft is limited to the law of civil delicts, abandoning the traditional distinction of delicts (intentional torts) and quasi-delicts (non-intentional torts), recently described as inaccurate.\textsuperscript{18} The draft is phrased in general provisions and avoids definitions, to keep the Code flexible, as originally intended. In the overall presentation of the \emph{responsabilité civile} project, Philippe Remy and

\textsuperscript{16} Art. 1341(2) Catala Draft.
\textsuperscript{17} A position reflected in the Béteille draft (\textit{supra} note 12), at arts. 1386-24.
\textsuperscript{18} \textsc{E. Descheemaeker}, \textsc{The Division of Wrongs, A Historical Comparative Study} 121-38 (Oxford Univ. Press 2009).
Jean-Sébastien Borghetti\textsuperscript{19} explain why the Terré Group prefers the recodification option to a simple revision. The draft aims at reconciling the apparently irreconcilable: rebuilding a consistent, comprehensive code system, and making it compatible with leading European options, illustrating how French law had strayed away from both. Like in the Catala draft, general clauses are maintained, despite the development of specific regimes. There is no attempt to rewrite article 1382 (contrary to the Catala draft), and yet a significant addition is made, indicating that the damage must be “illicitly caused,” which is a major breakthrough. The draft article 1 makes it clear that victims must bear their own losses and may only recover where the damage is caused in an illicit manner, which may cause Boris Starck to turn in his grave.\textsuperscript{20}

\textbf{C. A Quick Glance at the Drafts and their Compatibility with the PETL}

\textbf{1. Time Factors}

Members of the Terré Group took into account both the PETL\textsuperscript{21} and the DCFR. In a series of preliminary reflections written before the group started working and published along with the draft, Philippe Remy offers a critical appraisal of current French law,\textsuperscript{22} opening various options such as consolidation (proposed in the Catala draft) or recodification, the latter being the option favored by the Group. Of the proposed choice between general clauses \textit{à la Française}, a common law style catalogue of

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\textsuperscript{20} The draft was described as a “bomb in the landscape of personal injury law” by victims’ rights militants: Claudine Bernfeld, \textit{Rapport Terré, Feu la réparation intégrale}, JCP 2012, no. 30.
\textsuperscript{21} Not fully available in French at the time of publication. \textit{See PRINCIPES DU DROIT EUROPÉEN DE LA RESPONSABILITÉ CIVILE, TEXTES ET COMMENTAIRES, supra} note 1.
\end{flushright}
specific torts or to German like selective and hierarchized protected interests, the Group preferred the French option. In the preliminary chapter, Philippe Remy reviews the DCFR and the PETL like visiting a store or a catalogue, shopping for items that may serve the improvement of the French system and leaving aside those already abandoned by French jurisprudence, as being old-fashioned.23 The draft, overall, aims at favoring European options whenever compatible with French views. It comes as no surprise that it is more European friendly than the Catala draft. Geneviève Viney, in charge of the civil liability part of the Catala draft, had left the European Group on Tort Law, and the author of the present article, who joined the Group in 2002, was not a member of the Catala taskforce nor of the Terré Group and had limited contacts with members of both groups during the period of conception and production. The PETL and DCFR were still in the making when the Catala Group was working and published its report.

2. Scope of Civil Liability

As mentioned already, the Terré draft is closer to mainstream European solutions than the Catala draft. The fact that it keeps the traditional distinction between tort and contract liability, in line with the DCFR,24 rather than merging provisions on tort and contract damages as proposed by the Catala Group, provides a significant example. Except where otherwise provided, the compensation of physical and psychological harm (atteintes à l'intégrité physique et psychique de la personne) is to be exclusively regulated by the law of delicts, though occasioned in the context of contract performance (article 3). This is a useful clarification, the compensation of such losses having nothing to do

23. Id. at 43-59.
with contractual damages that aim at satisfying by equivalent the positive or expectation interest of the victim of non-performance. Failure to perform contractual obligations is indeed governed by the law of contract (article 4). The Terré Group insists on clear boundaries between contractual and delictual liability, and the unwritten *principe du non-cumul* remains a French signature.

Whether provisions on damages are gathered in one Code chapter (articles 1340-1386 Catala draft) or kept separate (Terré drafts) is not much of an issue, as long as distinct provisions exist for the compensation of purely contractual losses (expectation interest). The Catala draft, however, whilst making special provisions for contract damages, may be blamed for not making clear provisions directing to the award of expectation damages in case of non-performance of contract (*lucrum cessans*), a drawback if we compare with the clear wording of article 1149 of the French Civil Code and article 118 of the Terré draft on contract.

The Terré draft makes room for prevention, article 2 enabling the judge to order reasonable measures to prevent or stop the illicit act that the claimant is facing. Though not expressly articulated in the PETL, prevention is a purpose underlying art 2:104 PETL. Compensation of preventive expenses is also to be found in article 1344 Catala draft and article 51 Terré draft. In her *exposé des motifs* to the civil liability part of the Catala draft however, Geneviève Viney insists that prevention is not a specific function of tort law, although she refers to article 1369-1 Catala draft dealing with reparation in kind, which allows the judge to order the cessation of the illicit act.

Section I of the Terré draft (*Du délit civil en général*) offers general provisions that apply not only to cases governed by the

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25. Hence a recent shift from contract to tort liability in cases of medical malpractice: Cass. Civ. 1, 3 June 2010, Bull. I no. 128; Olivier Morétreau, *France* in *EUROPEAN TORT LAW 2010*, at 175, nos. 4-10 (H. Koziol and B.C. Steininger eds., de Gruyter 2011).

26. Catala Draft, supra note 8. See also VINEY, supra note 7, at 155-58, no. 66-3.
general clause, but also in cases governed by the special regimes, forming a *droit commun* in the French sense. It first deals with fault (articles 5 to 7), offering a classical definition introducing the concept of illicit act in the French Code, where it is so far only implied (article 5), as opposed to article 1352 Catala draft, which makes no reference to the illicit character of the act.\(^{27}\) Damage must be certain and is defined in a general clause as any harm to “an interest recognized and protected by the law,”\(^{28}\) without any attempt to list such protected interests, although they are featured as separate heads of damage in Section IV of the draft dealing with compensation. One notes the recognition of collective interest such as in case of damage to the environment, whenever provided by the law (article 8 paragraph 2). Loss of a chance, though unnamed in article 9, is identified as a separate head of damage, like in article 1346 Catala draft, confirming a well-established jurisprudence and encompassing recent developments, here at variance from mainstream European solutions.

3. Causation

Causation is dealt with in different ways in both projects. The Catala draft deals with it in two short articles, with no attempt to define causation or give guidance, but simply insisting that a causal link must be proved (article 1347). The Terré draft defines causation (article 10), describing the cause of damage as any fact susceptible of producing it “according to the ordinary course of things and without which it would not have occurred.” Article 10 also limits liability to immediate and direct consequences of the author’s act. Causation may be established by all means, which must be understood as including presumptions.

\(^{27}\) Though saying that the violation of a law or a regulation would be a delict: art. 1352 para. 2 Catala draft.

\(^{28}\) Art. 8, para. 1 Terré draft; *see also* art. 1343 Catala draft; art. 2:101 PETL.
Article 11 and 12 Terré draft deal with complex issues, proposing rules that are more detailed than the DCFR, yet without the fine-tuning of the PETL. The idea is to keep the system flexible, while providing the courts with guidelines. Article 11 makes room for solidary liability in case of multiple tortfeasors, with a solution similar to article 1348 Catala draft:

Except as otherwise provided, those who caused the same damage are each answerable for the whole. If they all committed a fault, they contribute among themselves in proportion to the gravity of their respective fault. If none of them committed a fault, they contribute in equal shares. If only some of them committed a fault, they alone bear the final onus of the damage.

Article 12 provides: “When damage is caused by an undetermined member of a group of persons acting together, each one is answerable for the whole, except where proving that he could not have caused it.”

4. Liability for Others

Liability for others is dealt with in article 13 Terré draft, providing an interesting structural change that was also discussed by the European Group on Tort Law, though not implemented in the PETL. Liability for others is not dealt with as a head of liability like fault or liability for the fact of things (fait génératore); it deals with imputation of compensation, shifting the onus to others. Article 13 locks liability for others to cases provided for by the law and to cases where there is a delict. This is a big change regarding liability of parents for the acts of their children, which had been stretched in scope beyond situations where a child was the author of a delict, with infants made liable for “objective fault” etc. One wonders whether the draft does not go too far when limiting the liability of parents for “the act of the minor,” which seems to exclude liability for the act of things, animals, or buildings, which may be too restrictive (article 14), a restriction not to be found in
article 1356 of the Catala draft which otherwise makes similar provisions. Like the PETL, the Catala draft treats liability for others like a separate head of liability (act of a third party, articles 1355-1360).

The Terré draft also rearranges the development of a general doctrine of liability for others developed by the courts on the basis of the present article 1384 paragraph 1, into more suitable subcategories: it adds to the strict liability of parents and tutors the strict liability of legal or natural persons entrusted by judicial or administrative decision or by contract with the task of organizing or monitoring the life of a minor (article 14), making a similar provision in the case of a major under protection (article 15). Other persons professionally in charge of monitoring another person’s life are also answerable, though under a simple presumption of negligence (article 16). Similar provisions are to be found in articles 1355 to 1358 Catala draft.

Article 17 defines the scope of the employer’s liability for the fact of the employee using modern language (unlike in article 1359 Catala draft, the antiquated commettant and préposé are replaced by employeur and salarié), yet with a dualistic approach, depending upon whether or not employer and employee are bound by a contract of employment. Where a contract exists, the employer is liable except when proving an abuse of function (abus de function) on the part of the employee, namely when acting without authorization for a purpose unconnected with the employment (article 17). Under the same article, the employee is liable for the consequences of his intentional fault, which does not mean that the employer will always be exonerated in such a case. Article 17 paragraph 3 Terré draft and article 1359.1 Catala draft exclude the liability of the employee acting within the limits of his employment when having committed no intentional fault. The Catala draft adds an exception for cases where the victim cannot recover from the employer or from insurance. This latter point is left open in article 6:102 PETL.
In the absence of a contract of employment, the liability of the employer is based on a simple presumption of negligence, the employee being liable for his own fault (article 18 Terré draft).

Article 1360 Catala draft makes special provision allowing victims to sue entities regulating or organizing the activity of independent workers, or entities controlling the activity of others, such as franchisors or parent companies.

5. Specific Regimes

Section II of the Terré draft deals with the main special delicts (Des principaux délits spéciaux), making clear that fault liability may be invoked in every circumstance (article 19 paragraph 1). However, a victim may not ride on several special regimes (article 19 paragraph 2). The general provision on liability for the act of things is maintained, though with a major qualification: it is limited to physical and psychological harm, which is a substantial reduction of the scope of the Jand’heur jurisprudence (article 20). Additional detail restates well established jurisprudence: the custodian is defined as the one having the use and the control of the thing (article 1354-2 Catala draft has it in one word only: la maîtrise de la chose), with a presumption that the owner has custody; as to the fact of the thing, it may lie either in its defects, in its abnormal position, its state, or its behavior. There is no reference to the dangerousness of the thing, which keeps well alive the French idiosyncrasy of strict liability for damages caused by any sort of things, though with a limited scope if we compare it to existing law and the Catala draft (article 1354 to 1354-4). No change is to be noted regarding the fact of animals (article 21) and buildings (article 22), the draft keeping the wording of article 1385 and 1386. Though the latter has been swallowed by article 1384 in recent jurisprudence, it would regain its lost autonomy for the

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compensation of damage to property if excluded from the scope of liability for the fact of things.

A new special regime appears under the name of classified facilities, a substitute to liability for abnormally dangerous things to be found at article 1362 Catala draft, which echoes article 5:101 PETL. Article 23 reads:

[Except as otherwise provided, the operator of a facility classified in accordance with the Environment Code is answerable by operation of law for physical or psychological harm to persons or damage to property caused by its operation, when it is precisely the occurrence of the risk that justified classification that caused the damage.]

Classification serves a preventive purpose. Liability is strict and exoneration causes are limited to the inexcusable fault of the victim or the intentional fact of a third party where such facts can be characterized as force majeure, which fits the scenario of an act of terrorism.

Another addition is codification of the doctrine of trouble du voisinage, the French version of nuisance, thus far a purely jurisprudential construct. Article 24 Terré draft does not differ much from what is proposed in article 1361 Catala draft, also setting normal inconvenience as the standard. Likewise, liability for damages caused by motor vehicles is added to the Civil Code (articles 25 to 28), yet with a few changes. Product liability (articles 29 to 42 Terré draft; articles 1386 to 1386-17 Catala draft) is of course based on the 1985 EU directive, with a few cosmetic changes. Section II ends with article 43 on medical malpractice. It makes health providers liable for damage caused by their fault, regardless of the existence of a contract. Non-fault liability may only prosper in those cases provided for in the Public Health Code.
6. Exclusion and Exoneration

The Terré draft addresses exclusion and exoneration, clearly distinguishing two concepts that are easily confused. Some defences aim at excluding liability altogether when, due to certain circumstances, there is no delictual conduct (article 45). Others exonerate totally or partially the author of a delict when some outside circumstances interfere with causation (articles 46 and 47). The Catala draft does not confuse the two, dealing with exoneration in articles 1349 to 1351-1, and justification or exclusion (though none of these words is used) in article 1352. The European Group on Tort Law preferred the use of the common law word “defences,” using it as a generic title in the PETL (Title IV. Defences).  

a. Exclusion

On all accounts, both Catala and Terré drafts do not aim at changing the law but bringing useful clarification, whilst completing the Code civil with solutions that have been developed by the courts.

Exclusion is dealt with in article 1352 Catala draft, stating that there is no fault in situations provided for by articles 122-4 to 122-7 of the Penal Code. The Terré Group preferred to list these justifications in article 45: “as provided for by the Penal Code, no liability stems from the damaging act, if it was prescribed by legislative or regulatory provisions, imposed by a legitimate authority, or ordered by the necessity of self-defence or of safeguarding a higher interest.”

Safeguard of a higher interest is taken care of in article 122-7 of the Penal Code, excluding liability when the defendant faces actual or imminent danger to herself, a stranger, or property, and accomplishes an act necessary to safeguard such person or

30. The French translation of Title IV (Les causes limitatives et exonératoires de responsabilité) reflects and amplifies the conceptual confusion in that part of the PETL.
property, except where the act is disproportionate. The Terré draft adds a qualification in the final part of article 45: if the higher interest to be safeguarded is not the victim’s interest, the victim may claim “equitable” compensation. This may apply whenever it is necessary to damage third-party property in order to assist a person in a situation of imminent danger, such as breaking into a room to rescue a suffocating child. The drafters seem anxious to avoid a possible interplay with the law of unjustified enrichment, though one may find it more equitable to allow the third party to be compensated by the safeguarded party on a de in rem verso basis rather than by the Good Samaritan on the basis of the final provision of article 45. The PETL are conducive of such a solution, excluding liability in case of necessity (article 7:101(1)(b)), the commentary explaining that restitution claims remain open in such a case. However, the wording of article 45 leaves room for a claim against the enriched rather than against the Good Samaritan.

Last, but not least, volenti non fit injuria is reflected in the second paragraph of article 45, excluding compensation to the victim who consented to the damage, except in those cases where the law does not allow the victim to renounce the protection of the infringed interest, which echoes article 7:101(1) PETL. Likewise, The Catala draft excludes compensation where the victim sought the harm voluntarily (article 1350).

b. Exoneration

Exoneration is dealt with in articles 1349 to 1351-1 Catala draft and articles 46 and 47 Terré draft. All articles address cases where outside circumstances tamper with causation. Both drafts agree on

a generic use of force majeure that includes the act of a stranger or
the act of the victim and is distinguished from a fortuitous event
(cas fortuit), meant to be a sub-category (article 1349 Catala draft;
article 46 Terré draft). When they can be characterized as force
majeure, such acts exonerate the defendant, which reflects current
court practice, which is not fully in line with article 7:102 PETL.33
The drafts differ on the definition of force majeure.

According to article 1349 paragraph 3 Catala draft, “Force
majeure is an unavoidable event that the actor could not foresee or
whose effects one could not avoid through appropriate
measures.”34 In this definition, unforeseeability and irresistibility
are not cumulative conditions. Unforeseeability does not appear in
the Terré definition. Article 46 defines force majeure as an event
which, by itself or by its consequences, cannot be resisted through
appropriate measures. This definition is at variance with that used
in the context of contractual obligations, which does not generate
problems given the clear separation of tort and contract liability in
the Terré draft.35

Partial exoneration may only exist in case of fault of the victim,
when it does not have the characteristics of force majeure (article
1351 Catala draft; article 47 Terré draft), which does not change
the law and reflects article 8:101 PETL. However, the Catala draft
requires the victim’s fault to be serious (faute grave) for partial
exoneration, when suffering physical harm. This solution is meant
to be protective of victims of physical injury but it may add useless
complexity. Both drafts exclude partial exoneration when the
victim is deprived of judgment, meaning that minors must receive

33. Art 7:102 PETL provides for full or partial exoneration and applies to
strict liability only.
34. Capitant translation, supra note 8.
35. Irresistibility is the sole factor insisted on these days in tort cases: See
GENEVIEVE VINEY & PATRICE JOURDAIN, LES CONDITIONS DE LA
keeps a requirement of reasonable foreseeability when force majeure is used in
contractual obligations (art. 100 Terré draft on contract).
full compensation even when acting negligently. This latter solution must be approved; it would have the effect of overruling a much criticized jurisprudence.

7. Contract Clauses

Both drafts deal with contract clauses limiting or excluding liability, with a scope limited to tort liability in the case of the Terré draft. Liability for physical harm (to which the Terré draft adds psychological harm) may not be excluded or limited by a contract clause (article 1382-1 Catala draft; article 48 Terré draft). Liability for fault cannot be limited or excluded by a contract clause (article 1382-4 Catala draft; article 48 Terré draft). Unless otherwise provided, under article 48 Terré draft, no-fault liability may be limited or excluded by contract, but such limitation or exclusion has no effect regarding physical and psychological harm, in full accordance with the principle that “Life, bodily or mental integrity . . . enjoy the most extensive protection” (article 2:102(2) PETL).

8. Compensation

The French Civil Code makes no provision regarding compensation. Rules have been developed by doctrine and jurisprudence, often adapting Civil Code provisions applicable to contract damages (articles 1146 to 1155). This is therefore an important area where the Code needs to be completed. Both drafts

36. Art. 1351-1 Catala draft; art. 47 Terré draft.
often make similar provisions, though the perspective may be different at times, due to differences in scope: over-inclusive view of civil liability in the Catala draft, encompassing contractual and extra-contractual obligations compared to the exclusive, tort-only approach of the Terré draft. Yet, as to what pertains to extra-contractual liability, both aim at compensating damage unjustly caused, thereby promoting prevention and cessation of illicit disorder. This paragraph will focus on some novelties or specificities of French law.

\textit{a. The Principle of Full Compensation}

Full compensation of damage remains a cardinal principle, subject to exceptions that will be discussed below. The chief idea is to restore the victim to the position she would have been in if the wrong had not been committed (article 1370 Catala draft; article 49 Terré draft; compare with article 10:101 PETL and article 6:101(1) DCFR). According to article 1368 Catala draft and article 50 Terré draft, the judge has complete discretion when it comes to choosing between compensation by equivalent (damages) and restoration in kind. On this point, both drafts reflect the French tradition and do not follow the PETL.\textsuperscript{40}

Both drafts (articles 1379-5 to 1379-8 Catala draft; articles 61 and 62 Terré draft) make sure that the victim receives full compensation, no more and no less, which is a key element in orchestrating subrogatory action by third-party payers such as welfare, social security, or insurance, in cases where the victim received full or partial payments from such third-party payers. All this is to be based on the interplay of Civil Code and special legislation.

\textit{b. Restoration in Kind}

Restoration in kind must aim at suppressing, reducing, or compensating the damage (article 1369 Catala draft; article 51

\textsuperscript{40} Arts. 10:101 and 10:104 PETL favor damages over restoration in kind.
Terré draft). According to article 51 Terré draft, it may be supplemented with an allocation of damages, but may not interfere with the defendant’s fundamental rights or impose an excessive burden, which echoes article 10:104 PETL. Article 1369-1 Catala draft and article 51 paragraph 2 Terré draft allow for self-help, provided that it is judicially authorized. The defendant may offer restoration in kind when damages are claimed (article 51 paragraph 3 Terré draft), which invites the judge to adopt the less costly option.

c. Assessment and Itemization of Damages

Both drafts invite the court to assess damages on the day of the judgment, taking into account the foreseeable evolution of the damage (article 1372 Catala draft; article 52 paragraph 1 Terré draft), in accordance with current jurisprudence. Additional compensation may be reclaimed when the damage happens to increase after judgment (article 1375 Catala draft; article 52 paragraph 1 Terré draft).

Article 1374 Catala draft and article 52 paragraph 2 Terré draft force the judge to detail the heads of damage. This breaks with the long-term Court of Cassation practice of accepting compensation by way of a lump sum, on the pretense that assessment of damage is a question of fact not to be reviewed by the highest court.\(^41\) This does not mean that all lower courts refrain from giving detailed judgment: many decisions itemize heads of damage and assign reasons. However, for the sake of good justice and in furtherance of the principle of exact compensation, it is reasonable to request itemization in all cases. As a rule, itemization of damages does not restrict the victim’s right to use the moneys freely, with private discretion, though the court may impose a particular appropriation in exceptional cases (article 1377 Catala draft; article 55 Terré draft).

\(^41\) VINEY & JOURDAIN, supra note 39, at no. 62.
d. Punitive Damages or Disgorgement of Illicit Profit

Article 1371 Catala draft makes provision for punitive damages: where an obviously intentional fault becomes a source of profit (faute lucrative), punitive damages may be awarded, in addition to compensatory damages. The amount of punitive damages must be clearly distinguished from compensatory damages and part of them may be made payable to the Public Treasury. Punitive damages may not be the object of insurance. Naming this additional award “punitive damages” may be a misnomer. It seems the purpose of the rule is not so much to punish the tortfeasor but disgorging illicit profit, with a reasonable allocation to the Public Treasury, to prevent or limit an unjustified enrichment of the victim.

The Terré draft has a similar provision, though more carefully drafted, since article 54 does not use the punitive damages terminology. Article 54 allows the disgorgement of illicit profits as a substitute to purely compensatory damages, provided there has been intentional fault aimed towards illicit gains (faute lucrative).42 Under this rule, any amount exceeding pure compensation cannot be covered by liability insurance. The Terré Group carefully drafted article 54 so that it would be strictly restitution-based, thereby avoiding any confusion with punitive damages, which never was and should not be an option in French tort law. This is a much-needed provision, preferable to its Catala counterpart.

e. Mitigation of Damage

Both drafts plan to introduce a duty to mitigate damage into French law. Article 1373 Catala draft provides that “[w]hen the victim by sure, reasonable, and proportionate means might have reduced the extent or the aggravation of the injury suffered, his failure to do so will result in a reduction of his award, unless the

42. See Rodolphe Mésa, Précisions sur la notion de faute lucrative et son régime, JCP 2012, no. 625.
nature of the measures would be such as to violate his physical integrity.”43 Given the scope of the draft, this is meant to apply to liability in tort and in contract. Article 53 of the Terré draft introduces a similar duty though limited to tort law,44 also saying it does not apply to cases of physical and psychological harm. In other cases, the judge may reduce the amount of damages awarded to the victim for failure to take safe and reasonable steps to mitigate the loss. Unlike the PECL,45 the PETL make no provision to this effect. This would be a significant change in French tort law, though recent jurisprudence leans in this direction:46 acceptable in the context of contracts, mitigation of damage is more controversial in tort law, but reflects the standard of conduct as articulated in article 4:102 PETL.

f. Physical Harm

Articles 1379 to 1379-3 Catala draft and articles 56 to 64 Terré draft deal with the compensation of physical and psychological harm, bringing much desirable clarification and certainty to the matter. These rules will not be discussed in much detail. There was considerable discussion on the subject at the time of the adoption of the special law on road traffic accidents (1985) and the matter received particular attention with a report by Professor Lambert-Faivre (2003) and the so-called nomenclature Dintilhac (2005), triggering subsequent legislative action in 2006 and 2010.47 Reference must be made to tables or schedules adopted by way of regulation, in an itemized manner (article 1379-1 Catala draft;

43. Capitant translation, supra note 8.
44. A comparable duty appears in art. 121 Terré draft on contract, which connects to the duty of good faith.
45. Art. 9:505 PECL.
46. Cass. Civ. 2, 24 November 2011, JCP 2012, no. 170 (note V. Rebeyrol); RTDCiv 2012, 324 (obs. P. Jourdain): this confusing case seems to limit the duty to damage to property, and to the prevention of additional damage that has not been caused yet, rather than mitigation of existing damage. Id. at 326.
47. For details, see Pauline Remy-Corlay, De la réparation, in POUR UNE RÉFORME DU DROIT DE LA RESPONSABILITÉ CIVILE 191, 203 et seq. (F. Terré ed., Dalloz 2011).
articles 56 and 57 Terré draft). The victim’s pre-existing condition is only to be taken into account to the extent that its adverse consequences began manifesting themselves at the time the victim was harmed (article 1379-2 Catala draft; article 57 Terré draft), which reflects current jurisprudence.  

48 Article 1379 Catala draft and article 59 Terré draft define the scope of compensation, including actual and future expenses, lost income and loss of profits. Compensation of future losses can take the form of indexed periodic payments, which can later be changed into capital (article 1379-3 Catala draft; article 60 Terré draft).

4. Indirect Victims

Both drafts (article 1379 Catala draft; article 63 and 64 Terré draft) deal with the compensation of indirect victims (victimes par ricochet), who appear to benefit from much larger compensation awards compared to what they get in other jurisdictions. 49 The victim’s dependents can be compensated for the loss of support. The Terré draft specifically refers to the spouse, parents, children, and special others living with the victim where the Catala draft refers to them under the generic name of victimes par ricochet. The Terré draft makes them eligible for compensation of moral damage, and may cumulate such compensation with rights they receive from the victim as successors in case of death (article 63). Compensation of their indirect damage (dommage réfléchi) is subjected to exoneration causes affecting the direct victim’s claim. Indirect damage may not be compensated outside the scope of article 63, except in exceptional cases and for very specific reasons (article 64). These rules come close to articles 10:202(2), 10:301(1), and 8:101(2) PETL.

h. Damage to Property

Both drafts adopt classical solutions regarding compensation of damage to property. When a corporeal thing is damaged, the victim

48 Id. at 204.
49 Id. at 218.
is entitled to the cost of repair or the cost of a replacement, whichever of the two is lower (article 65 Terré draft), or the cost of replacement if repair is costing more (article 1380 Catala draft). When none of these solutions is possible, compensation must reflect the value of the thing at the time of the judgment, taking into account its condition just before the damage occurred (article 1380-1 Catala draft; article 65 Terré draft). This looks slightly less generous than article 10:203(1) PETL which allows compensation to the extent of the upper bracket if the victim chooses the more expensive option, “if it is reasonable to do so.” All related economic losses must be compensated (article 1380-2 Catala draft; article 66 Terré draft). In case of intentional harm causing serious non-pecuniary loss, the latter may be compensated (article 67 Terré draft). Article 1380-2 Catala draft is broad enough to support not only compensation of such a loss but also of any damage caused by loss of enjoyment.

i. Non-Pecuniary Damage

Pure non-pecuniary damage (dommage moral) is taken care of in the last two articles of the Terré draft (articles 68 and 69). The Catala draft mentions “non-economic and personal harm” at article 1379, listing psychological harm, pain and suffering, disfigurement, deprivation of pleasure (préjudice d’agrément), and sexual impairment.

Article 68 Terré draft opens a right to compensation for any form of harm to “moral integrity, particularly dignity, honour, reputation, or private life.” This echoes article 10:301(1) PETL. Such a right is recognized not only to natural persons, but also to juridical persons in case of serious fault. This latter provision may seem rather odd, but finds some support in recent cases decided by the Court of Cassation50 and by the European Court of Human

Rights.\textsuperscript{51} Professor Terré himself wrote a plea for its adoption, insisting that wrongful harm to the reputation of an enterprise may have serious adverse economic consequences. This is certainly true, but should we not characterize such harm as economic loss, though admittedly, it is of a class difficult to assess?\textsuperscript{52} It is a good thing to have special provisions for pure non-pecuniary damage, but we should not forget that French law also makes room for the compensation of pure economic loss.\textsuperscript{53}

The final provision relies on vast judicial discretion regarding the assessment of non-pecuniary harm, which cannot be tabled in any manner. According to article 69 Terré draft, damages may be nominal or exemplary when the harm was caused intentionally, thereby opening a broad spectrum, which may stretch as far as allowing a punitive element in the assessment of damages. Though mental integrity and human dignity rank very high on the scale of protected interests (article 2:102 PETL), this may not warrant such a generous provision, especially when protection is not limited to natural persons. This exemplary-damages provision does not reflect the spirit of the draft, which aims at the exact assessment of damage, full compensation, and avoidance of unjustified enrichment. Such right is recognized not only to natural persons, but also to juridical persons in case of serious fault, which is controversial, especially in a system where tort law opens

\textsuperscript{51} See Association for European Integration and Human Rights and Ekindzhiev v. Bulgaria, 28.6.2007, (ECHR), recognizing that an association is entitled to the protection of its correspondence. Remy-Corlay, supra note 47, at 221.

\textsuperscript{52} François Terré, \textit{Le préjudice moral}, in \textsc{Pour une réforme du droit de la responsabilité civile} 223 (F. Terré ed., Dalloz 2011). The author recognizes that it is difficult in such cases to distinguish non-pecuniary and economic damage. \textit{Id.} at 224.

\textsuperscript{53} \textsc{Marcel Planiol \& Georges Ripert}, \textit{6 Traité pratique de droit civil français}, \textsc{Obligations, Part I}, at no. 552 (P. Esmein ed., 2d ed., L.G.D.J. 1952), wisely state that a juridical person cannot suffer and therefore cannot be victim of non-pecuniary damage, adding that when courts offer such compensation, either they want to compensate a pecuniary damage that they are unable to assess, or they want to impose a non-criminal penalty, camouflaged under the name of compensation of non-pecuniary damages.
compensation for pure economic loss. Were this to pass into law, it would be hoped that French judges will not use it as a gateway towards punitive damages and will rather make sure that the spirit of the whole reform prevails.

D. Conclusion

It is to be hoped that these remarkable projects will turn into a legislative draft in the not too distant future, in order to rejuvenate the French Code civil. We know of too many enlightened drafts that, in other European countries, have not been turned into legislation in this fertile area of the law. The fact that the legislative process starts moving regarding contractual obligations (Project de loi of November 27, 2013) is encouraging.

If a choice is to be expressed, the author has a strong preference for the Terré draft, which is more in harmony not only with the spirit of the French Civil Code, but also with current European trends. It reflects a perfect understanding of the Code dynamic and taxonomy. Its logic is flawless. Its style is impeccable, making François Terré a worthy follower of Portalis’ philosophy. It may also be praised for leaving article 1382 intact, not only because it is iconic, but because it expresses the essence of the Civil Code.

The Catala attempt to rewrite art 1382 Civil Code is at best questionable, if not iconoclast. It looks as vain as repainting Delacroix’s La liberté guidant le peuple or re-sculpting Michelangelo’s Moses. One may repaint the Eiffel Tower or replace an elevator, but making it higher would change a marker of French identity. Art 1382 is known the world over; it is the Mona Lisa of the legal Louvre. It lives in the eye of the citizen and the judge alike. Changing it is like tampering with the Declaration of the Rights of Man and the Citizen.

Let us fix the minor flaws in the final articles and have the representatives of the French people vote the Terré draft into law,
rather than moving it by delegated legislation as planned for contractual obligations. The Civil Code will be more complete and reflect more European harmony.

II. RECENT JURISPRUDENCE IN FRENCH TORT LAW

Over the past ten years, I have had the privilege of reporting on French tort law for the European Yearbook of Tort law, published by the Vienna based European Centre of Tort and Insurance Law. The following are selected cases commented in the five most recent volumes. The first cases deal with the environmental disaster caused by the sinking of the tanker Erika. A second series of cases deals with proportional liability, showing how French courts, whilst dealing with causation problems in a French pragmatic way, happen to be in line with the Principles of European Tort Law.

A. The Sinking of the Tanker Erika and the Advent of Environmental Damage

The tanker Erika split in two off the French Atlantic coast in severe weather on December 12, 1999 and spilled 15,000 tonnes of her heavy fuel oil cargo. The entire crew of 26 was airlifted to safety. The two sections, with a further 15,000 tonnes of fuel oil remaining in the cargo tanks, sank in 120 metres of water about 100 km from the mouth of the River Loire. The spilt cargo was blown east towards the coast and on December 25 the first oil washed ashore. By early January various stretches along a 400 km length of French coastline had been polluted, and thousands of seabirds had been oiled. The State, a number of local authorities, associations, and individuals had initiated criminal proceedings, together with claims in damages (plaintes avec constitution de partie civile), against Total, the French multinational oil company

54. Professor Michel Séjean (Université de Bretagne-Sud) has taken over as of 2013.
owning the cargo, the carrier, and other protagonists of the catastrophe.

Criminal proceedings were initiated against the ship-owner, but also against the owners of the cargo, the Total oil company. In a judgment of January 2008, the Paris court of first instance found them guilty of marine pollution, and sentenced them to fines ranging from €75,000 for individuals to €375,000 for corporations. In addition, the Paris court found all parties liable, awarding a total of €165 million to a wide range of victims, including a sum to compensate “damage resulting from harm to the environment.”

The carrier’s liability was confirmed by the Court of Appeal in Paris in a judgment of March 30, 2010, increasing the total amount of damages to over €200 million. Criminal sentences were confirmed, also against Total, who had inspected and vetted the vessel. Total was found criminally guilty but not civilly liable, the Paris Court of Appeal reversing the first judgment on this point. Liability was based on the International Convention on Civil Liability for Oil Pollution Damage. The Convention places liability on the carrier, and not on the owners of the cargo.

Appeal (pourvoi) was made to the Court of Cassation. In a lengthy, very detailed judgment, the Criminal Chamber of the Court of Cassation upheld the judgment of the Paris Court, reversing on one point only: Total, as owner of the cargo, is also to be found solidarily liable on the basis of the International Convention, for having interfered with the carriage, and based on the trial judge’s finding, the Court of Cassation agrees that Total’s fault satisfies the requirement of recklessness (the Court uses the

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term *faute de témérité*), meaning that liability can be extended from the carrier to the charterer of the vessel.

The latest Court of Cassation judgment57 is bringing a long judicial story58 to a happy end. There would be a lot to say on this very lengthy decision, the longest the reporter has ever read from a court known for the brevity of its judgments (107 pages in two-column fine print in the official Bulletin), but the present report will only focus on the points having an impact on general tort law.

First, the concept of environmental or ecological harm (*préjudice écologique*) is now officially recognized at the highest level of the French judiciary, 59 a concept that will need to be narrowed down in the years to come 60 and may also find legislative recognition in the Civil Code. 61 This is a remarkable achievement, especially as the Advocate General denied the autonomy of environmental harm, arguing that it is not distinct from the harm suffered by the environmental non-profit associations, but rather merges within their non-pecuniary damage.62

The Paris *Tribunal de grande instance*63 declared that compensation of environmental harm was owed to “the local authorities to whom the law grants a specific competence in matter

59. It was first recognized by the Paris lower court in the first judgment. See supra note 55 & Moréteau, *supra* note 57.
61. Proposition no. 546 du Sénateur Retailleau, proposing the addition of article 1382-1: “Any act whatever of man that causes damage to the environment obliges him by whose fault it occurred to repair it.” As noted by Philippe Delebecque (*supra* note 57, at 2712), this would need further elaboration.
62. See Jourdain, *supra* note 57, at 120.
63. *Supra* note 55.
of environment, conferring upon them a special responsibility in the protection, management, and preservation of a territory.”

Only those authorities having proved effective harm to a sensitive zone got compensation. Given its object, the LPO (Ligue de protection des oiseaux) is also eligible. The Paris Court noted the large scope of the disaster on the thousands of birds hibernating in the region, and also the very efficient role of LPO in taking care of the birds during several months, in connecting with the local authorities and population, as well as its national and international representativeness. Such harm appears to be considered objectively rather than in consideration of the person of the victim. It had been recognized before but never with such high scale compensation.

Second, Total had been found guilty of involuntary pollution, and liable for the consequences thereof by the Paris Tribunal de grande instance. The criminal part of the judgment had been affirmed by the Paris Appeal Court, but liability was denied. According to the appellate court, the International Convention on Civil Liability for Oil Pollution Damage places liability on the carrier, and not on the owners of the cargo. As a charterer, the oil company is not liable “unless the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.” The Paris Court of Appeal recognised that the oil company had been negligent in chartering a tanker that was in an advanced state of decay. Total had after all participated in the vetting process; their representatives knew of the bad state of the

64. Par. 3.1.2.2.3. of the Judgment.
65. See supra note 55.
66. Par. 3.1.2.2.6. of the Judgment.
68. See id. at 2681, and Laurent Neyret, La réparation des atteintes à l’environnement par le juge judiciaire, D. 2008, 170, 172.
69. Art III(4)(c) of the the International Convention on Civil Liability for Oil Pollution Damage.
vessel. However, in the opinion of the Court, they did not act with full awareness that by so acting, pollution damage was very likely to ensue. Commenting this holding, the present reporter noted: “This part of the judgment should not resist the Court of Cassation scrutiny.”70 Indeed it did not. The highest court wisely recognized that the oil company had been reckless, a judgment found severe by a distinguished scholar who also claims that the duty of Total to control oil carriage is not a sufficient foundation for making the company liable as a carrier.71

It is difficult to contend however that the damage was not caused by some omission on the part of the oil company whose representatives participated in the vetting process. The first judges had found Total negligent and not reckless, yet finding them liable. This was wrong, the International Convention requesting recklessness to make the charterer liable. According to the Court of Cassation, rather than denying Total’s liability, the appellate court should have characterized Total’s fault as a faute de témérité, in other words recklessness. They were wrong in characterizing it as excusable.

Interestingly, courts in the United States are facing a similar challenge in the wake of the oil pollution in the Gulf of Mexico, after the explosion of the Deepwater Horizon offshore oilrig on April 20, 2010. Under the federal Oil Pollution Act, liability of the polluter is limited to $75 million in the case of an offshore facility such as the Deepwater Horizon oilrig.72 However, limitations do not apply against a defendant acting with “gross negligence or wilful misconduct.”73

Other competing provisions may apply, but the point is that the commonplace concepts of “recklessness” or “gross negligence” are central in the solving of major oil pollution cases. These apparently

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70. Moréteau, supra note 56, at 193, no. 53.
71. Delebecque, supra note 57, at 2715. Professor Delebecque is president of the Chambre arbitrale maritime de Paris.
73. 33 U.S.C.A. § 2704(c)(1)(A).
simple words become the heart of the matter once the provision that enshrines them is found applicable. How are they to be interpreted? May each judge use his state or national standard? Should there be a federal standard (in the case of the United States) or an international one (when an international convention is applicable)? The question is relatively simple when discussing the liability of an individual, but becomes complex when applied to a corporation or a multinational group.

Professor Patrick Martin, an expert in mineral law and scholar in jurisprudence, looks at the matter with comparative law eyes, encompassing the common law, Roman law, and the Louisiana civil law. His approach is primarily linguistic and philosophical. He cites, on the one hand, judges and scholars who find it impossible to identify shades of negligence and to classify it as slight, ordinary, or gross negligence. On the other hand, he cites other United States judges who claim that it is not even necessary to instruct juries on the matter of distinguishing ordinary and gross negligence, so much this distinction is common-sense. He finally cites an 1822 case, *Tracy v. Wood*, where Supreme Court Justice Story, sitting as circuit judge, noted:

> If a bag of apples were left in a street for a short time without a person to guard it, it would most certainly not be more than ordinary neglect. But if the bag were of jewels or of gold, such conduct would be gross negligence. In short care and diligence are to be proportioned to the value of the goods, and the temptation and facility of stealing them and the danger of losing them.

Martin concludes: “the greater the degree of potential (or actual) harm, the greater the degree of negligence.” Transferring this to the Erika oil spill, the first Paris judges were no doubt wrong in holding Total liable without checking whether they had

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76. Martin, *supra* note 74, at 975.
been reckless and not simply negligent: the Convention could not be ignored. The Paris Appellate judges may be wrong in characterizing Total’s fault as excusable in the circumstance. May one reasonably imagine that crude oil can safely be carried in an old and defective tanker around the hazardous coasts of Brittany, without thinking of a possible disaster? Transporting two gallons of oil in a defective container may be regarded as ordinary negligence. Carrying thousands of tons in an old and defective tanker is recklessness or gross negligence. It is good news that the Court of Cassation agrees.

B. Proportional Liability: French and European Perspectives Converge

Proportional liability is on the cutting edge of tort scholarship. The Principles of European Tort Law have proposed proportional liability as a response to causal uncertainty, an issue recently revisited by members of the European Group on Tort Law.77 In particular cases where there are multiple tortfeasors or uncertainty of causation, various doctrines are applied, where the causation requirement is attenuated.

1. Multiple Tortfeasors, Concurrent and Alternative Causes

French jurisprudence does not accept that a victim may be undercompensated just because one or several of the tortfeasors may be unknown. For the sake of justice, it also wants to avoid shifting the whole burden of compensation on those tortfeasors who have been identified.

a. The Hunters’ Cases

Some reverse engineering is needed to understand the law pertaining to compensation of victims of hunting accidents. Victims must be compensated and will be compensated. If no tortfeasor is identified, this will be done by a compensation fund. If one hunter has been shooting, he may be held liable unless he can prove that his shotgun was pointed in another direction, shot another type of bullet, or that it was defective at the time. Liability may then fall on other identified hunters or an application for compensation may be filed to the compensation fund. If several hunters may have caused the damage, they can be made liable under one of the following doctrines: fault based liability (faute commune, faute collective), if acting as a group and guilty of a collective fault; custody of the bullets when two guns shot simultaneously and at least two bullets hit the victim (gerbe unique); or collective or joint custody of the bullets, also triggering strict liability for the fact of a thing under article 1384 paragraph 1. The case where one hunter is identified and the others are not is not discussed in standard books. This sole identified hunter would most probably be made fully liable, and this would not be regarded inequitable since every hunter must by law carry third party insurance. If this hunter is uninsured or insolvent, recourse can be made to the compensation fund.

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78. A Compensation Fund was created in 1951 to compensate victims of automobile accidents where the tortfeasor cannot be identified. A law of 11 July 1966 extended the benefit of this Fund to victims of hunting accidents where the tortfeasor cannot be identified.


b. The DES Cases

A scenario quite similar to the hunters’ case can be found in a recent Distilbène case. A woman suffered vaginal cancer allegedly caused by the fact that her own mother had been administered diethylstilboestrol or DES during pregnancy. No evidence was found of the details of the treatment: no prescription, no medical record (the doctor who treated the mother had died, and the record had disappeared). However, experts ascertained that the claimant’s pathology was the consequence of her mother taking DES while pregnant. In addition, the victim’s parents certified that the mother had taken Distilbène at that time, a fact corroborated by other witnesses. The victim sued UCB Pharma and Novartis, two companies that had produced and marketed diethylstilboestrol in France at the time, one under the name of Distilbène, and the other one under the generic name. However, everyone used the name Distilbène at the time, even to describe the generic DES. The victim could not prove which of the two companies had produced the substance her mother had taken. The Court of Cassation ruled that each of the two defendants had to prove that its product had not caused the damage, thereby creating a rebuttable presumption of causation. The two producers happened to supply the same commodity at the same time, rather than forming a group such as sport people or hunters in the typical cases. The judgment is based on the probability that one or the other of the two defendants caused the damage. It seems that the Court of Cassation decision is conducive of a 50-50 judgment, which may not be fair in the circumstances. At the time of the facts, UCB Pharma’s market share was 80 to 90%, leaving only 10 to 20% to Novartis.

Solidarity is not to be excluded, but Novartis’s share should not exceed 20%.

Interestingly, the case may fall under two different provisions of the Principles of European Tort Law regarding causation. It may be regarded as a situation of concurrent causes. According to article 3:102, “In case of multiple activities, where each of them alone would have caused the damage at the same time, each activity is regarded as a cause of the victim’s damage.” This leads to solidarity because we have multiple tortfeasors.83 Article 3:103(2) (alternative causes) may be a better fit.84

In case of multiple activities, where each of them alone would have been sufficient to cause the damage, but it remains uncertain which one in fact caused it, each activity is regarded as a cause to the extent corresponding to the likelihood that it may have caused the victim’s damage.

The European Group on Tort Law agreed that in cases of mass torts the burden of proof should not be too heavy on the victim,85 which is precisely what the Court of Cassation is doing when creating a presumption of causation. The Court did not rule whether liability is joint or solidary. Logically, alternative causation excludes solidarity.86

We do not know whether in the present case the victim’s mother took medication manufactured by one producer only, which may be one or the other (alternative causes). She may have been treated with the product of one, and then with that of the

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83. The case falls under art. 9:101(b) PETL:
(1) Liability is solidary where the whole or a distinct part of the damage suffered by the victim is attributable to two or more persons. Liability is solidary where:
   b) one person’s independent behaviour or activity causes damage to the victim and the same damage is also attributable to another person.
84. See LE TOURNEAU ET AL., supra note 79, at no. 1732-2 (discussing the case under alternative causation).
85. Art. 3:103 PETL, cmt. J. Spier, 49 no. 9.
86. Solidarity implies plurality of causes: LE TOURNEAU ET AL., supra note 79, at no. 1736; see also art. 9:101(b) PETL.
other,\textsuperscript{87} during the time of the pregnancy, in which case we have concurrent causes. The good news is that both articles lead to the same solution, though the “alternative causes” provision is more conducive of proportional liability, which looks like the best solution in the present case. Additional good news is that the French Court of Cassation ruled in compliance with the Principles of European Tort Law, even before the publication of the French edition by the \textit{Société de législation comparée}.\textsuperscript{88}

Another case decided by the same first Civil Chamber of the Court of Cassation, on June 17, 2010,\textsuperscript{89} confirms the willingness of the Court to rely on presumptions of causation. A man had contracted a nosocomial infection after having spent time in two different hospitals but it was impossible to prove in which hospital he had actually contracted the infection. The Court ruled that “where there is evidence of a nosocomial infection but the latter may have been contracted in several health institutions, each of those whose liability is sought has to prove that it did not cause the infection.” Though the facts are different, this is exactly what the Court ruled in the Distilbène case, in a case of alternative causes under the PETL.\textsuperscript{90}

c. Asbestos Cases

Similar to hunting accidents, one must proceed by reverse analysis. Asbestos related damage is covered by the national health system (\textit{Sécurité sociale}), with 100\% coverage where the patient is recognized as suffering from long term condition (\textit{longue maladie}). A compensation fund has been created by the law of December 23, 2000, so that no asbestos victim may be left without

\textsuperscript{87} Doctors sometimes shift to the generic form to save costs.
\textsuperscript{88} See supra note 1.
\textsuperscript{90} Art. 3:103 PETL.
compensation,\textsuperscript{91} making proportional liability a moot question. Specific legislation has been adopted since 1975,\textsuperscript{92} and tort law might apply, if necessary. An appellate court held an employer liable for damage suffered by the employee’s spouse who suffered from lung disease as a consequence of the asbestos on her husband’s clothing: the employer was held to have retained custody of the asbestos particles, which were not under the employee’s control.\textsuperscript{93} Employees may also sue employers on the basis of fault, and the Court of Cassation insists that this is an inexcusable fault (\textit{manquement à une obligation de sécurité de résultat}),\textsuperscript{94} thus triggering additional compensation by the \textit{Sécurité sociale}.\textsuperscript{95}

2. Uncertainty of Causation and Loss of a Chance

French courts routinely apply the doctrine of loss of a chance (\textit{perte d’une chance}) whenever of the opinion that the defendant’s activity deprived the victim of the opportunity of a favorable event when the victim can do nothing to remedy the situation. Loss of a chance is regarded as direct and certain damage. The French find it convenient to shift from causation to damage.\textsuperscript{96} Rather than admitting that causation is partial or uncertain and follow a path similar to articles 3:101 to 3:106 of the Principles of European Tort Law (PETL), French courts regard loss of a chance as a head of damage that will be fully compensated.\textsuperscript{97} As unorthodox as things may look from a theoretical point of view, it serves very pragmatic

\textsuperscript{91} Law no. 2000-1257 of 23 December 2000, art. 53, creating the \textit{Fonds d’indemnisation des victimes de l’amiante} (FIVA), financed by the \textit{Sécurité sociale} (75\%) and the State (25\%). See, for more detail, \textsc{le Tourneau et al.}, supra note 79, nos. 8490–8494.

\textsuperscript{92} \textsc{le Tourneau et al.}, supra note 79, at nos. 8486–8489.

\textsuperscript{93} CA Caen, 20 November 2001, JCP 2003, II, 10045 (note F.G. Trébulle).


\textsuperscript{95} \textsc{le Tourneau et al.}, supra note 79, no. 8484.

\textsuperscript{96} \textsc{Viney & Jourdain}, supra note 35, at no. 370.

\textsuperscript{97} Moréteau, \textit{Causal Uncertainty and Proportional Liability in France}, supra note 77, at no. 2.
purposes and has spread to other countries, both in the Romanist
and Germanic branches of the civil law family.98

Loss of chance is frequently applied in cases of medical
malpractice. Causation is tricky in medical malpractice cases due
to scientific uncertainty. In a recent case,99 a child was born in a
clinic with severe and multiple handicaps caused by a neurological
disorder. The parents sued the general practitioner and the
gynecologist who monitored the pregnancy. They also sued the
clinic where the mother delivered the child, together with the
midwife, an employee of the clinic. All defendants were found
liable in solidum for fault or negligence during the pregnancy and
at the time of childbirth. They had proved that, unknown to the
doctors at the time of the facts, the mother had a pre-existing
condition that, in the opinion of experts, had a decisive but
immeasurable influence on the handicap. However, the Court of
Cassation concluded that the defendants’ faults had in part caused
the damage, which justify solidary liability for loss of a chance by
the child to experience a lesser degree of cerebral infirmity,
“regardless of the degree of uncertainty of the first origin of the
handicap.” Based on the judgment of the lower court, the victims
were therefore to receive 75% compensation.

This is a typical example where to some extent, but to an
unknown extent, the loss is in the victim’s sphere, since the mother
had been suffering from a pre-existing condition. The point was
discussed at length by the European Group on Tort Law.
According to article 3:106 of the Principles of European Tort Law,
“The victim has to bear his loss to the extent corresponding to the

98. HELMUT KOZIOL, BASIC QUESTIONS OF TORT LAW FROM A GERMANIC
PERSPECTIVE 152-53 (Jan Sramek Verlag 2012).
Maitre); JCP 2010, no. 474 (note S. Hocquet-Berg), RTDCiv 2010, 330 (obs. P.
Jourdain); commented in Olivier Moréteau, France in EUROPEAN TORT LAW
2010, at 175, 182-84, nos. 20–28 (H. Koziol & B.C. Steininger eds., de Gruyter
2011), largely reproduced (often verbatim) in the present text. See also
Moréteau, Causal Uncertainty and Proportional Liability in France, supra note
77, at nos. 23-25.
likelihood that it may have been caused by an activity, occurrence or other circumstance within his own sphere.” The Comments give the example of a medical malpractice case with a victim falling seriously ill, where “the illness may well have a ‘natural’ cause. The doctor is liable to the extent his malpractice may have caused the illness.”

Applying the doctrine of the loss of a chance to our case leads to a similar result. Rather than lamenting on an unorthodox use of loss of a chance, one cannot but trust judges to make a reasonable assessment as to the percentage of liability to be placed on the defendant, when challenged with inconclusive evidence. In such doubtful cases, proportional liability is no doubt to be preferred to an “all-or-nothing” approach.

French law only allows for the compensation of a loss that is actual and certain. The compensation of uncertain future loss is not permissible unless regarded as a loss of a chance. French doctrine has identified two types of future losses. The loss is virtual (préjudice virtuel) where it potentially exists as a consequence of the blameworthy conduct: all the conditions of its existence in the future already exist at the time of the facts, much like an embryo contains all the elements necessary for the development of a human life. The loss is hypothetical (préjudice éventuel) where its existence depends on events that may or may not happen.

101. See Jourdain, supra note 99.
103. The Court of Cassation accepts, in certain circumstances, that compensation be made conditional: a patient diagnosed with HIV after a faulty blood transfusion was awarded conditional damages, with payment subject to medical evidence that he developed AIDS as a consequence of contamination: Cass. Civ. 2, 20 July 1993, Bull. Civ. II, no. 274, RTDCiv 1994, 107 (obs. P. Jourdain). Likewise, where the sale of an immovable is nullified partly as a consequence of the notary’s fault, the notary is under no obligation to compensate the buyer unless the latter proves that he failed to obtain restitution of the price from the seller, which again, makes compensation conditional: Cass. Civ. 1, 29 February 2000, Bull. Civ. I, no. 72, RTDCiv 2000, 576 (obs. P. Jourdain).
104. Le Tournneau et al., supra note 79, at no. 1414.
not occur, much like the eventuality of a human being to come to exist in case two persons of the opposite sex and able to procreate have intimate intercourse. If a CEO is prevented from concluding a promising contract because of an accident, the loss of benefit is regarded as hypothetical, since no-one knows whether the contract would have been concluded had the CEO not been prevented from conducting the negotiation.\footnote{105}{Cass. Civ. 2, 12 June 1987, Bull. II, no. 128, RTDCiv 1988, 103 (obs. J. Mestre).} The line is thin however, and one may want to decide that the CEO was presently and certainly deprived of a favourable opportunity, which is the test to decide whether a loss of a chance exists according to the most recent jurisprudence.\footnote{106}{See the discussion of Cass. Civ. 1, 28 January 2010, \textit{supra} note 99, and accompanying text above.}

A loss has to be virtual, not hypothetical, in order to be compensated as a loss of a chance. This may happen in cases where the occurrence of any future harm is uncertain, but also where the scope of the future harm is uncertain.

In the example of the CEO who was prevented from concluding a promising contract due to an accident, the occurrence of future harm is uncertain: nobody can tell for sure that the deal would have been concluded. French law applies a form of proportional liability whenever judges find that the plaintiff was presently and certainly deprived of a favourable opportunity. As explained above, compensation will be apportioned in the sense that it will be calculated as a share of the plaintiff’s various heads of damage.

The compensation of loss of a chance in such situations has caused no unreasonable surge in litigation. The fact that damages are likely to be quite low may help keep floodgates sufficiently proof. On the other hand, compensation of loss of a chance has caused no known over-deterrence in the exercise of professional activity such as legal or medical practice. In dubious cases, courts
are more than likely to describe the loss as hypothetical and reject
the claim, as eventually happened in the CEO case.

Cases in which harm has already been caused but the scope of
this harm in the future is unknown are common. All cases where a
victim suffers personal injury causing some form of disability
seem to fall into this category. The loss of vision in an eye, the
limitation in the use of an arm, or the loss of the ability to
procreate, is no doubt existing harm. However, the scope of the
loss for the future is unknown. The young person losing the
opportunity to procreate may elect for a lifestyle where this causes
no impediment or may be deprived of the chance of raising a small
or larger family. Such unknown harm can be described as virtual
since the condition exists at the time of the harm. It may be
repaired as a loss of a chance.

However, French courts are likely to indemnify as préjudice
d’agrément. This may cover the loss of a precise activity such as
the possibility to do sports or to play the violin, in situations where
the victim had already some practice.107 However, Geneviève
Viney voiced concern that such a narrow understanding of the
préjudice d’agrément would be “elitist,”108 expressing support for
the extension to the general agreement of a normal life, as
sometimes defined by the courts.109 This is a form of non-
pecuniary damage, the assessment of which is of course
problematic, and will never be fully adequate in the parties’ eyes.

107. Le Tourneau et al., supra note 79, at no. 1586.
108. Geneviève Viney, Responsabilité civile (Chronique d’actualité), JCP
1995, I, 3853, at no. 22.
attendre de l’existence); Cass. Crim. 5 March 1985, Bull. Crim., no. 105, D.
I. Introduction ............................................................................. 803
II. Trust and the Italian Legal System......................................... 805
III. The Reaction of Italian Lawmakers: Article 2645-ter of the Codice Civile................................................................. 814
IV. ...and the “Patto di famiglia” ............................................... 824
V. Conclusions............................................................................... 828

I. INTRODUCTION

The Italian legal system is undergoing a development process involving the traditional pillars of its legal framework. In addition to the law of contracts, usually accustomed to dealing with new legal tools autonomously developed by the contracting parties and generally circulating from other legal systems, other significant areas of law have been remarkably interested: for example, family law, succession law, bankruptcy law, and the law of obligations, in particular rules providing for debtor’s liability and creditor’s rights.¹ This phenomenon has prompted a re-evaluation of the approach to fundamental concepts as well as the limits traditionally

¹ See, for example, Directive 2002/47/EC on financial collateral arrangements, entitling the collateral-taker, should an enforcement event occur, to realize the collateral by appropriation (Directive, art. 4, 2002 O.J. (L168) 43. The text of the directive is also available at http://eur-lex.europa.eu/). The Directive has been implemented in Italy through the Legislative Decree 170/2004: this provision, and in particular art. 4 of the same, introduced a remarkable exception to art. 2744 of the Italian Civil Code which prohibits any form of the collateral’s appropriation by the creditor.
perceived as absolute (for example, the rule on the universal liability of the debtor set forth in article 2740 of the Italian Civil Code, that nowadays suffers so many exceptions that its prescriptive value of intangible provision has been weakened).\(^2\)

The change seems mainly due—directly or indirectly—to the entrance of the “trust” on the Italian scene: this occurrence induced several reactions, in particular by Italian lawmakers, who aimed at offering new and workable alternatives to trust. Although the debate within the Italian arena did not exclusively focus on this legal instrument and was enriched by suggestions coming from different sources (for example, Italian society, as well as European Institutions), nevertheless the increasing recourse to trust undoubtedly played a major role in the process of the reconsideration of traditional legal categories and the drafting new legal tools.\(^3\) In this sense, it can be said that the Italian legal menu,\(^4\) which used to offer potential customers a list of traditional

\(^2\) See, for example, Tribunal of Reggio Emilia, ord. of 14 May 2007, according to which such prescription would be deprived of its function, in Guida al diritto, 2007, n. 26, 50, commented by G. Finocchiaro.

\(^3\) The comparative literature grants specific attention to phenomena of circulation of models, legal transplants, legal irritants, legal flows and other events inducing reactions and change in the recipient country. Among the many contributions, see, for example, ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (Univ. Press of Virginia 1974) (the work has then been followed by other essays by the same author, developing the theory introduced therein); RODOLFO SACCO, INTRODUZIONE AL DIRITTO COMPARATO (5th ed., Utet 1992) (focusing attention on the circulation of models and highlighting two determining factors: force and prestige); Gunther Teubner, Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences, 61 MOD. L. REV. 11 (1998) (arguing that legal irritants explain the transfer of legal rules from one country to another better than legal transplants: while a transplant would induce either rejection or acceptance of the alien organ, to the contrary, when a foreign rule is imposed on a domestic culture, it is not transplanted into another organism, but rather works as a fundamental irritation which triggers a whole series of new and unexpected events); MAURIZIO LUPOI, SISTEMI GIURIDICI COMPARATI. TRACCIA DI UN CORSO 60 (ESI 2001) (defining as legal flow any element of a legal system operating in another system and introducing a situation of imbalance in the latter). See also, recently, Michele Graziadei, Legal Transplants and the Frontiers of Legal Knowledge, 10 THEORETICAL INQ. L. 723 (2009).

\(^4\) The title of the present work evokes the essay of Ian Ayres, Menus Matter, 73 U. CHI. L. REV. 3 (2006) (holding that lawmakers can affect contractual equilibria by regulating contractual menus, assuming that a menu is
dishes, has been enriched in order to take into account the preferences of parties with heterogeneous tastes.\

II. TRUST AND THE ITALIAN LEGAL SYSTEM

Italy was the first country to ratify the Hague Convention on the Law Applicable to Trusts and on their Recognition, through Law no. 364, of 16 October 1989, which came into force on January 1, 1992 (“Convention”).

Although there had been precedents dealing with trusts, the most significant case law—and the related attempts by the legislative formant to create competitive alternatives—occurred after the implementation in Italy of the Convention.

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a contractual offer that empowers the offeree to accept more than one type of contract, and highlighting that the menu can consist of two simultaneous offers that private parties make to each other and/or of offers that the state makes to potential contractors themselves) in order to highlight how the Italian legal sphere has been enriched with new legal instruments developed by private parties and/or introduced by Italian lawmakers.

5. The offer has therefore been amended, revisiting traditional recipes and/or adding new dishes to traditional ones like in the case of a menu listing at the same time homemade cannelloni, cardamom-flavoured ragù and shrimp-tempura. On food and recipes as a metaphor of legal systems, see in particular Olivier Moréteau, Mare Nostrum as the Cauldron of Western Legal Traditions: Stirring the Broth, Making Sense of Legal Gumbo Whilst Understanding Contamination, 4 J. CIV. L. STUD. 515 (2011).


9. It has been noted that a significant contribution to the Italian reflection over trusts was given by the enactment of the Law of the Republic of San Marino of 17 March 2005, no. 37, on trust. Though the legal system of San Marino and Italy are different (for example, because a main source of law in San Marino is ius commune), the above-mentioned legislative provision is the first of a civil law country drafted in Italian and providing for trust. See generally Enrica Senini, La nuova Legislazione della Repubblica di San Marino sul Trust, 7:3 TRUSTS 368 (2006).
Court rulings on trusts before such event generally either: (i) denied recognition of the latter on the basis of the assumed irreconcilable conflict between trusts and mandatory rules of the Italian legal system (for example, the concept of double-ownership allegedly related to trust against the uniqueness of the ownership right as set forth in art. 832 of the Italian Civil Code (hereinafter “C.C.”); the *numerus clausus* of the *iura in re aliena*, and the limits imposed by article 2740 C.C. about debtor’s liability (which, in paragraph 2, prevents any form of asset-segregation unless expressly admitted by law); or (ii) recognized only limited effects to trusts as long as they may be lead back, by analogy, to similar provisions of the Italian law.10

On the contrary, countries which ratified the Convention are obliged to recognize the legal effects of trusts subject to the law of a trust-country.

However, it has to be noted that the definition of trust under the Convention does not match that pertaining to the English common law.11 Pursuant to article 2, paragraph 1 of the former, trust includes “the legal relationship created, *inter vivos* or on death, by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.”12

Rather than properly defining trust, the Convention therefore opts in favor of a functional approach by depicting the characteristics of phenomena not necessarily falling under the concept of “trust” as developed in the English legal system. In addition, while English law recognizes both constructive and resulting trusts, the Convention applies only to voluntary trusts.


Second, the relationship between the trust fund and the trustee is described by the Convention in terms of “control”, with no further legal qualification. However, article 2, paragraph 2 of the same provides a guideline requiring a trust for the purposes of the Convention to have the following characteristics:

(a) the assets constitute a separate fund and are not a part of the trustee’s own estate;

(b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;

(c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.13

Consequently, legal relationships meeting the requirements set forth by the Convention will be recognized in Italy as “trusts”, although under English law they would fall within different legal categories. For this reason Professor Maurizio Lupoi refers to trust pursuant to the Convention in terms of “shapeless trust”.14

During the last twenty years, following the implementation of the Convention, Italian courts faced an increasing number of cases involving recognition of trusts, thus developing substantial body of case law.15

For example, in 1997 the Tribunal of Lucca ruled about a succession dispute grounded on the alleged nullity of a will providing for the appointment of a fiduciary executor who should

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14. MAURIZIO LUPOI, TRUSTS 425 et seq. (Giuffrè 1997); LUPOI, TRUSTS: A COMPARATIVE STUDY (Simon Dix trans., Cambridge Univ. Press 2000).
15. For a survey of Italian case-law on trusts, see in particular: La Giurisprudenza Italiana sui Trust in TRUSTS: OPINIONI A CONFRONTO 207-96 (E. Barla De Guglielmi ed., IPSOA 2006) (reporting several contributions of judges and law professors highlighting that: (i) trusts and, in particular, “domestic trusts” have become part of the Italian legal framework; (ii) trusts are broadly applied within the field of corporate law, real estate law, bankruptcy law and family law; (iii) Italian judges tend to disregard trusts when there is a clear evidence of the abusive recourse to the trust-scheme, while, in opposite cases, tend to grant full recognition to such scheme and its effects).
have managed the hereditary asset on behalf of the daughter of the *de cuius*. The daughter claimed the will should be declared null. To the contrary, the Tribunal affirmed the full legitimacy and validity of the latter, arguing that the legal relationship depicted therein amounted to a trust, thus qualifying the fiduciary executor as trustee and the daughter of the *de cuius* as beneficiary;\(^\text{16}\) in addition, the judge held that the trust-scheme ought to be recognized and applied even within successions governed by Italian law. Then, in two decisions in 2000 involving the purchase of immovables, both the Tribunal of Bologna and Tribunal of Chieti ruled in favor of registration of the purchase carried out by the trustee in his specific capacity.\(^\text{17}\) A different approach has been taken by the Tribunal of Velletri,\(^\text{18}\) according to which the so-called “domestic trust” (namely, a trust in which the sole foreign element is the governing law), although not falling within the provisions of the Convention and therefore not recognizable under the latter, nevertheless is enforceable in Italy pursuant to article 1322 C.C. Such a provision grants parties the right to create atypical contracts provided that they are aimed at satisfying interests worthy of legal protection. With reference to such an approach, it has to be highlighted that sometimes a tendency to assimilate trust to contracts may be inferred, although, as is known, the law of trusts and the law of contracts are different.\(^\text{19}\)

The Tribunal of Milan has, for example, approved a voluntary separation agreement providing for the creation of a trust aimed to protect the interests of the minor child of the parties;\(^\text{20}\) the Tribunal of Parma has approved a pre-bankruptcy agreement submitted by a


\(^{19}\) See Michele Graziaedei, *Trusts in Italian law: a matter of property or of obligation?*, in Italian national Reports to the XVth International Congress of comparative law 189 (Milan, 1998).

limited company, providing for the immovable assets owned by the company’s director to be included in a trust fund, together with the appointment of the judicial executor of the agreement as trustee.\textsuperscript{21}

In spite of such an increase in judicial recognition of trusts, perplexities arose, especially among scholars. In particular, whilst a significant part of the Italian doctrine argues in favour of trusts, deeming that they have become part of the Italian scenario, other authors show a more critical approach, highlighting the unsolved conflicts between trusts and the Italian legal system. The issue nowadays seems overtaken by recent and significant

\textsuperscript{21} The Italian case law on trusts is quite substantial (LF: in the sense of large quantity); for a comprehensive collection see LA GIURISPRUDENZA ITALIANA SUI TRUSTS (4th ed., IPSOA 2011) (collecting judgments on trusts up to 2011). Among the recent decisions of the Italian Supreme Court, see, for example, Cass. civ. Sez. VI - I, Ord. of 18 July 2013, n. 17621 (ruling about a conflict of competence between two Tribunals originated by the plaintiff’s request to be entitled to allot some assets within a trust fund on behalf of her minor children); Cass. civ. Sez. I, judg. of 26 July 2013, n. 18138 and Cass. civ. Sez. I, judg. of 11 July 2013, n. 17208 and Cass. civ. Sez. I, judg. of 30 May 2013, n. 13659 (not specifically addressing trust issues, but assuming the existence of a trust for a company’s liquidation purposes); Cass. civ. Labor Section, judg. of 3 December 2012, n. 21607 (not specifically addressing trust issues, but assuming the existence of a trust created by the employer); Cass. civ. Plenary Session, Ord. of 15 March 2012, n. 4132 (affirming Italian jurisdiction in a succession dispute involving three trusts created by the de cuius during his life); Cass. civ. Sez. II, judg. of 22 December 2011, n. 28363 (pointing out the specific featuring elements of trusts in order to reject the claimant’s recourse). For a judgment specifically addressing the issue at hand, see Cass. civ. Sez. I, judg. of 13 June 2008, n. 16022. The controversy at issue involved the case of former husband and wife (both Italian citizens, but residing in England) who entered into a divorce agreement setting forth a trust. The trust fund involved an apartment to be managed on behalf of their minor children and both former spouses were appointed as joint-trustees. The agreement granted the gratuitous right of habitation to the mother and expressly provided for the duty to rent the apartment should the mother move elsewhere. When the mother had to move to Italy with the children for professional reasons, the apartment was not rented and nobody took care of it. The former husband then brought a civil suit in the Tribunal of Milan petitioning for the judicial substitution of the ex-wife and the appointment of a new trustee. The Italian judge deemed the trust subject to English law in compliance with art. 7 of the Convention, and substituted both the plaintiff and the defendant, alleging breach of the trustee’s duties by both, and appointed two new joint-trustees. The Milan Court of Appeal affirmed the decision. The Supreme Court affirmed, too, disregarding the pleas of both parties and agreeing with the reasoning of the lower court.
developments; however, it is a notable aspect of the Italian experience with particular reference to the doctrinal formant.

The debate mainly focused on the “domestic trust”; namely, a trust in which the sole foreign element is the governing law, while all the other elements call for the application of the Italian law.22

Pursuant to a minority doctrine, internal trusts are irreconcilable both with the provisions of the Convention (in particular, with art. 13) and those of the Italian system, specifically with the above-mentioned article 2740, paragraph 2 C.C., requiring exceptions to the rule on debtor’s liability to be introduced only through an express legislative provision, whilst the Convention does not have such an effect.23 Namely, since the Convention provides for conflict of law rules, it is prevented from introducing uniform rules of substantial law and therefore cannot have the effect to allow recognition or creation of new categories of trusts, such as the “domestic” one.24 To further support the negative approach to domestic trust, reference has traditionally been made

22. Literature on recognition of trusts in Italy, and in particular of the domestic trust, is really copious. With reference to this issue, see specifically Maurizio Lupoi, *Il trust nel diritto civile* in TRATTATO DI DIRITTO CIVILE 263 et seq. (Rodolfo Sacco dir., Utet 2004) (summing up arguments on behalf and against the recognition of domestic trusts and concluding in favor of its positive recognition under the Convention). See also infra, note 25.


24. See, for example, Salvatore Mazzamuto, *Il trust nell’ordinamento italiano dopo la Convenzione dell’Aja*, VITA NOT. 754 (1998) (stating that recognition of internal trust would not be allowed under the Convention because its conflict of law rules provide for recognition of foreign trusts).
to the *numerus clausus* of *iura in re aliena* and the uniqueness of the right of ownership.

According to the prevalent doctrine, domestic trusts shall be recognized in Italy, as well as any other trust under the Convention, namely because: (i) article 6 of the Convention grants the settlor freedom to choose the governing law of trust (although within the limit set forth by article 2 of the same); (ii) the Convention does not require the trust to include foreign elements in addition to the governing law; and, (iii) article 13 of the same must be interpreted as allowing judges to assess *quam in concreto*, on a case-by-case basis, the real purposes of the specific trust at stake. Article 13 would therefore leave judges a sort of residual power of control for those cases in which the recourse to trust appears merely instrumental. Consequently, internal trust

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25. Pursuant to art. 11 of the Convention, a trust created in compliance with the law chosen by the settlor will have to be recognized as well as any other trust under the same Convention. In addition, art. 11 draws a distinction between necessary and further effects of the recognition of the shapeless trust. The necessary effects amount to segregation and the entitlement of the trustee to act on behalf of the trust and appear in this capacity before a court and/or any other public authority; further effects occur in so far as the governing law of the trust requires or provides for them. In particular:

a) that personal creditors of the trustee shall have no recourse against the trust assets; b) that the trust assets shall not form part of the trustee’s estate upon his insolvency or bankruptcy; c) that the trust assets shall not form part of the matrimonial property of the trustee or his spouse nor part of the trustee’s estate upon his death; d) that the trust assets may be recovered when the trustee, in breach of trust, has mingled trust assets with his own property or has alienated trust assets (*Hague Trust Convention, supra* note 6, at art. 11, para. 2).

26. *Hague Trust Convention, supra* note 6, at art. 13:

No State shall be bound to recognise a trust the significant elements of which, except for the choice of the applicable law, the place of administration and the habitual residence of the trustee, are more closely connected with States which do not have the institution of the trust or the category of trust involved.

shall be deemed in compliance with both the Convention and the relevant national provisions, and therefore deserve to be fully recognized within the Italian legal system.

Italian Courts adopted heterogeneous approaches: besides judgments denying recognition of internal trust, there are several decisions allowing it. However, the judicial denial of trusts does

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See, for example, supra note 15.
not seem due to a rejection of trust _ex se_, but rather to the abusive use of the trust scheme: for example, when a substantial reason for segregation of the assets is absent and the recourse to trust and its effects is neither supported nor justified by a worthwhile purpose.  

Regardless, trusts undoubtedly are present and operate within the Italian arena, thus testifying to their success and appeal in fulfilling the parties’ needs in different areas of law: in fact, they have been utilized within family relationships (both during the marriage and in case of separation and divorce), for succession and will purposes, and within business context (both in the on-going activity phase and in the event of insolvency, in particular with reference to bankruptcy—or alternative to bankruptcy—proceedings).

With specific regard to the relationship between trusts and bankruptcy issues, a significant contribution has been made by Law of 27 January 2012, n. 3—in particular articles 6-14—providing for cases of over-indebtedness not subject to current bankruptcy proceedings, and allowing the debtor to enter into a debt-reorganization agreement with creditors on the basis of a plan...
aimed at ensuring the regular payment of creditors not taking part in the plan. The plan may provide for collaterals, liquidation of certain assets and—for the purposes of the present analysis—the fiduciary entrustment (“affidamento fiduciario”) of the debtor’s estate to a trustee (“fiduciario”) for purposes of liquidation, preservation, and distribution of the proceeds among creditors. In particular, it has been noted that the above mentioned agreement, which has been referred to in terms of “contratto di affidamento fiduciario”, would be the civilian alternative to trusts: accordingly, that would mark a notable development in the relationships between trusts and the Italian legal framework, as well as other previous legislative attempts to provide for an Italian response to issues usually dealt with by means of a trust, although the outcome of such previous attempts did not always seem to gain the same success.

III. THE REACTION OF ITALIAN LAWMAKERS: ARTICLE 2645-TER OF THE CODICE CIVILE....

The reaction of Italian lawmakers to the increasing recourse to trusts by private parties, together with the increasing demand for new tools able to meet the heterogeneous needs of Italian society (for example within family, business, succession context), ended up with the introduction in the Italian Civil Code of new provisions aimed to operate as alternatives to trusts and, moreover, governed by Italian law.

In particular, in 2005 the Civil Code was amended by the insertion of article 2645-ter C.C., which allows the registration in public records of acts in public form whereby immovable goods and/or registered movable goods are destined, up to ninety years or up to the duration of the life of the natural person beneficiary, to fulfill protection-deserving interests, referring to people with a disability, to public administrations, or to other legal entities or

32. Lupoi, Il Contratto di Affidamento Fiduciario, supra note 30.
natural persons in compliance with article 1322, paragraph 2 C.C. The registration makes the bond effective toward third parties. The relevant goods and their fruits can be used only to achieve the specifically stated aim, and they can be seized only for debts incurred for such aim.

This provision has been inserted in the sixth book of the Code, generally dealing with protection of rights, and in particular in the section providing for registration of acts and their effects toward third parties. Pursuant to article 2645-ter C.C., parties are entitled to register acts aimed at fulfilling interest worthy of legal protection. Namely, it is allowed to create a bond of purpose upon certain kind of goods—i.e., registered movables or immovables—preventing any action by third parties against them. Article 2645-ter therefore disregards article 2740 C.C. on a debtor’s liability because it introduces, as a consequence of an express legislative provision, a limit to the general asset-liability of the debtor.

Although included in a set of provisions dealing with registration formalities, this article provides for certain substantial aspects, too.

In particular, it seems to introduce a new category of separate assets in addition to the other cases already provided for in the civil code: (i) inheritance with benefit of inventory; (ii) bankruptcy assets; (iii) the so-called “fondo patrimoniale” as set forth in articles 169 and following (a separate asset of goods bound to fulfill family’s needs); and (iv) the company’s separate assets for a

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33. Art. 1322 C.C. provides for parties’ autonomy and its second paragraph entitles the creation of atypical contracts to the extent that such contracts pursue “protection-deserving interests”. This assessment will be carried out on an ex-post basis by the judge and, according to the dominant doctrine, it ends up verifying whether the atypical contract is lawful or not. See infra note 45.

34. Although a notable portion of Italian scholars argues that the registration has a constitutive effect, because, absent it, the bond would not exist (as well as the constitutive effect of the mortgage’s registration), the majority opinion deems that the registration allows enforceability of the bond against third parties. According to the latter opinion, therefore, the origin of the bond will be the act providing for the bond, its purpose, duration, etc. For an overview of this debate see Andrea Ghironi, La Destinazione di Beni ad uno Scopo nel Prisma dell’Art. 2645ter c.c., 5 Riv. NOT. 1085 (2011), in particular paragraph 4.
specific deal pursuant to article 2447-bis C.C. However, the provision was quite incomplete and gave rise to criticism and uncertainties, especially among scholars.

Before dealing with this issue, it seems appropriate to briefly address a traditional legal instrument set forth in the Civil Code in order to meet the needs of married couples and their children: the above-mentioned “fondo patrimoniale”, as provided for by article 167 and following.\(^{35}\)

Pursuant to the same, the spouses, through a public act, a third party, or even by will, are entitled to designate registered movables, immovables and/or negotiable instruments to fulfill the needs of the family. The fund can even be created during the marriage and, absent different provisions, the ownership of the involved assets belongs to both spouses. In particular, the natural or civil fruits of such assets will be used for the family’s needs. The involved goods can neither be sold nor can be subject to pledge, encumbrance or any other lien unless agreed to by both spouses and, in the event of minor children, without the previous authorization of the competent Tribunal. Creditors cannot seize the assets and/or their fruits if they knew that the relevant debts were incurred for needs different than those of the family.\(^{36}\)

Accordingly, such a legal instrument represents a form of segregation of assets explicitly allowed by Italian lawmakers.

\(^{35}\) See generally Luca Domenici, Il fondo patrimoniale: negozio di protezione dei beni familiari, 5 Not. 549 et seq. (2011); Andrea Fusaro, Commento all’art. 167 c.c., in DELLA FAMIGLIA, I, ARTT. 74 - 176 C.C. at 1048 (Luigi Balestra ed., Utet 2010), part of the COMMENTARIO DEL CODICE CIVILE series (Enrico Gabrielli dir.).

\(^{36}\) Art. 170 C.C. deals with the relationship between creditors and the legal instrument at stake by providing for three categories of debts: (1) debts incurred to fulfill the family’s needs; (2) debts incurred to fulfill interests outside the family’s needs, when such circumstance is unknown to the creditor; and (3) debts incurred to fulfill interests outside the family’s needs, when such circumstance is known to the creditor. Only the first two categories of debts entitle the enforcement against the assets of the fund. On the relationship between the “fondo patrimoniale” and creditors, see generally ARNALDO MORACE PINELLI, INTERESSE DELLA FAMIGLIA E TUTELA DEI CREDITORI (Giuffrè 2003).
Nevertheless, so far it has had limited application. Moreover, two elements currently seem to further limit its development: on one side, the competition of alternative instruments—in particular trusts—coupling a broader flexibility and range of application together with a more efficient segregation effect and, on the other side, the judicial approach aimed to increase the cases in which credit enforcement against the assets of the fund is allowed, thanks to an extensive construction of the concept of “debts incurred for the needs of the family.” In addition, as a consequence of the black letter of article 167 and following, and of its specific insertion in the section aimed to provide for the patrimonial regime of spouses, the present legal instrument applies only to married couples.

A possible Italian response to the limits of this kind of legal tool has therefore been identified in article 2645-ter C.C., which, because of its wording, can be also used by unmarried couples in order to provide for their interests, both between partners and/or on behalf of their children.

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38. The judicial disfavour seems due in part to the fear of a fraudulent use of such instrument against the creditors’ legitimate expectations and in part to a cultural heritage more favourable to creditor’s rights. In particular, courts rendering decisions about “fondo patrimoniale” mostly ruled on the application to the same of the paulian action, both ordinary and within bankruptcy proceedings. See in particular Francesco Gazzoni, Tentativo dell’impossibile, supra note 23; Andrea Ferrari, Fondo patrimoniale e debiti erariali o d’impresa, 3 Fam. Dir. 303 (2011); Tommaso Auletta, Riflessioni sul fondo patrimoniale, 5 Famiglia, persone, successioni 326 (2012).

39. See, for example, Giacomo Oberto, I regimi patrimoniali della famiglia di fatto (Giuffrè 1991) and Oberto, Famiglia di fatto e convivenze: tutela dei soggetti interessati e regolamentazione dei rapporti patrimoniali in vista della successione, Famiglia e Diritto 661 (2006).

The broad wording of article 2645ter C.C. and its segregative effect can also be applied within the business context, especially for bankruptcy proceedings or other default proceedings (for example, pre-bankruptcy agreements, business-reorganization plans, etc.).

However, as mentioned above, the wording of article 2645-ter C.C. and its insertion among provisions dealing with registration formalities combined to increase criticism and doubts about its proper meaning, function and range of application.

The doctrinal debate mainly focused on the nature of such an article, namely whether it is aimed to provide only for the effects of the registration of the bond or whether it implies substantial aspects, too, thus providing for some featuring elements of the open-ended category of “acts of destination”. Following the second interpretation, article 2645-ter C.C. would therefore be the legislative recognition of such an open-ended category, in spite of its improper insertion and poor formulation.

Scholars adhering to the first opinion highlight that the substantial aspects introduced by the article (form and duration) are so limited as to prevent any further legal consequence of the article itself, but for the regulation of the public registration’s

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41. See, for example, Salvatore, Atto di destinazione e crisi di impresa, supra note 29.

42. See generally Francesco Gazzoni, Osservazioni sull’art. 2645-ter c.c., Il GIUSTIZIA CIVILE 165 et seq. (2006); Giovanni Gabrielli, Vincoli di destinazione importanti separazione patrimoniale e pubblicità nei registri immobiliari, RIV. DIR. CIV. 327 (2007); Gaetano Petrelli, La trascrizione degli atti di destinazione, RIV. DIR. CIV. 162 (2006), (criticizing the legislative trend of law reforming through inconsistent and piecemeal amendments to the civil code); Giuseppe Tucci, Fiducie, trust e atti di destinazione ex art. 2645-ter c.c. in 2 STUDI IN ONORE DI NICOLÒ LIPARI 2919, 2960 (Vincenzo Cuffaro & Giovanni di Rosa coords., Giffre 2008) (stressing the obscurity of the legislative provision); Renato Clarizia, L’art. 2645 ter e gli interessi meritevoli di tutela in 1 STUDI IN ONORE DI GIORGIO CIAN 545 (Giovanni De Cristofaro & Stefano Delle Monache eds., CEDAM 2010); Arturo Picciotto, Brevi note sull’art. 2645 ter: il trust e l’araba fenice, CONTRATTO E IMPRESA 1317 (2006) (highlighting the low quality of the legislative intervention).
effects; and the insertion of the same among provisions dealing with registration formalities would confirm such interpretation.\textsuperscript{43}

On the contrary, scholars following the second approach\textsuperscript{44} argue that: (i) the specific mention of substantial aspects (like form, duration, kind of goods involved, beneficiaries and parties entitled to act on behalf and for the purposes of the bond), and (ii) the express reference to article 1322, paragraph 2 C.C. would therefore demonstrate legislative recognition of the open-ended category of acts of destination, entitling parties to fill the gap of such scarce legal framework with autonomous provisions to the extent that the relevant juridical act (even when unilateral) fulfills the judicial test set forth in article 1322, paragraph 2.\textsuperscript{45}

\textsuperscript{43} See, for example, Paola Manes, La norma sulla trascrizione di atti di destinazione è, dunque, norma sugli effetti, CONTRATTO E IMPRESA 626, 630 et seq. (2006) (highlighting that the new article has been inserted among those providing for registration formalities and their effects toward third parties). See also Raffaele Lenzi, Le destinazioni atipiche e l’art. 2645 ter c.c., CONTRATTO E IMPRESA 229 et seq. (2007); Picciotto, Brevi note sull’art. 2645 ter, supra note 42, at 1318. Among the case law see, for example, Tribunal of Reggio Emilia, of 22 June 2012; Tribunal of Trieste, of 7 April 2006, RIV. NOT. 367 (2007).

\textsuperscript{44} See, for example, Lucilla Gatt, Il trust c.d. interno: una questione ancora aperta, 3 NOT. 280, 291 et seq. (2011) (highlighting, in contrast with the aforementioned opinion—see supra note 43 and the corresponding text—the proper choice of the lawmaker in setting forth the minimum legal requirements of the provision at stake and enhancing the role of each party’s autonomy in tailoring such an instrument to the respective interests and expectations); Gazzoni, Osservazioni sull’art. 2645-ter c.c., supra note 42, at 165; Mario Nuzzo, Atto di destinazione e interessi meritevoli di tutela in LA TRASCRIZIONE DELL’ATTO NEGOZIALE DI DE STINAZIONE. L’ART. 2645 TER DEL CODICE CIVILE 60 ( Bianca Mirzia ed., Giuffrè 2007); BIANCA MIRZIA, MAURIZIO D’ERRICO, ALESSANDRO DE DONATO & CONCETTA PRIORE, L’ATTO NOTARILE DI DESTINAZIONE. L’ART. 2645-TER DEL CODICE CIVILE (Giuffrè 2006); Bianca Mirzia, Il nuovo art. 2645 ter c.c. Notazioni a margine di un provvedimento del giudice tavolare di Trieste, IL GIUSTIZIA CIVILE 189 (2006); Bianca Mirzia, L’atto di destinazione: problemi applicativi, RIV. NOT. 1176 (2006); Arnaldo Morace Pinelli, Tipicità dell’atto di destinazione e alcuni aspetti della sua disciplina, RIV. DIR. CIV. 451, 468 (2008); Giacomo Rojas Elgueta, Il rapporto tra l’art. 2645-ter c.c. e l’art. 2740 c.c.: un’analisi economica della nuova disciplina, BANCA, BORSA, TITOLI DI CREDITO 203 (2007); Giorgio Rispoli, Riflessioni in tema di meritevolezza degli atti di destinazione, 8-9 CORRIERE DI MERITO 806, 808 (2011); Mastropietro, supra note 40.

\textsuperscript{45} Initially, the test under art. 1322, para. 2 C.C. used to be interpreted in light of a super-eminent and overriding principle of public interest (see in particular EMILIO BETTI, TEORIA GENERALE DEL NEGOZIO GIURIDICO 191 et seq. (reprint, Edizioni Scientifiche Italiane 1994); subsequently this approach
A second main issue dealt with the proper meaning of “interests worthy of protection” as provided for by the article 2645-ter C.C. with regard to the purpose of the relevant bond.

According to a minority opinion, such a requirement and the reference to article 1322, paragraph 2 C.C. overlap, both requiring that the act and the relevant bond be lawful. The wording of article 2345-ter C.C. would consequently be redundant because of the double reference to the lawfulness requirement. This approach has been criticized by those who deem that the reference to “interests worthy of protection” cannot be intended as a mere duplication of the lawfulness test under article 1322, paragraph 2 C.C. However, scholars disagree about the proper meaning of this requirement.

According to a different opinion, the requirement implies a selection of interests: the bond under article 2345-ter C.C. may therefore operate only if aimed at pursuing high-value interests, for example, those encompassed in the Constitution (especially in its first part). Such interpretation lies on (and is aimed to highlight) the value of the specific reference in the black letter of the article to people with a disability or public entities. Adherents to the

46. Gianfranco Palermo, Configurazione dello scopo, opponibilità del vincolo, realizzazione dell’assetto di interessi in LA TRASCRIZIONE DELL’ATTO NEGOZIALE DI DESTINAZIONE, supra note 44, at 77; Giuseppe Vettori, Atto di destinazione e trascrizione. L’art. 2645ter, LA TRASCRIZIONE DELL’ATTO NEGOZIALE DI DESTINAZIONE, supra note 44, at 176; Aurelio Gentili, Destinazioni patrimoniali, trust e tutela del disponente in LE NUOVE FORME DI ORGANIZZAZIONE DEL PATRIMONIO (Giovanni Doria ed., Giappichelli 2010); Rispoli, Riflessioni, supra note 44, at 810 (arguing in favor of a full overlapping of the two tests).

47. See infra note 50 and the corresponding text.

48. Such an interpretation has been criticized by scholars adhering to the previous opinion insofar as it would require public notaries and officials of the
present approach, indeed, stress that such a reference has been generally neglected as the by-product of a previous draft of the article, later modified at the moment of its enactment, but not properly amended; on the contrary, in their opinion, since this reference has been maintained in the currently-in-force version of the article, the same cannot be neglected or disregarded. Consequently, article 2645-ter C.C. may work as long as the relevant bond is intended to pursue a peculiar kind of interest, implying high-quality values of social solidarity.

Finally, according to the majority opinion, (i) the article at stake has recognized the category of “destination acts”, thus enhancing the role of each party’s autonomy in providing the content of such an atypical category; (ii) reference to article 1322, paragraph 2 C.C. shall therefore be intended as the requirement to be met for the specific destination act to be legally enforceable; (iii) the mention of “interests worthy of protection” shall not be intended as a mere duplicate of the test set forth by article 1322, paragraph 2 C.C., but rather has to be interpreted as requiring that the bond is created to fulfill a qualified interest to be assessed *quam in concreto*; and (iv) finally, reference to people

Register of immovables to assess whether the juridical act imposing the bond is aimed at pursuing worthwhile interests or not. For bibliographic references, see supra note 46.

49. This aspect has been specifically highlighted by Rispoli, *Riflessioni*, supra note 44, at 810.

50. See, for example, Gazzoni, *Osservazioni sull’art. 2645-ter*, supra note 42, at 165; Paolo Spada, *Conclusioni* to *LA TRASCRIZIONE DELL’ATTO NEGozIALE DI DESTINAZIONE*, supra note 44, at 201, 203.


52. See also Antonio Gambaro, *Appunti sulla Proprietà nell’Interesse Altrui*, 2 *TRUSTS* 169 (2007) (arguing that art. 2645-ter C.C. has officially marked the legislative recognition of “property on behalf of another party.” Accordingly, such a mechanism implies a distinction between the ownership in itself and the economic interest pertaining to a different party, so that the owner will have to exercise her right in order to pursue such interest and the relevant bond will be effective toward third parties.
with disabilities and/or public entities has an exemplificative but non-exhaustive role, since the wording of the article explicitly mentions, in addition to the those former, interests related to private parties as well. Consequently, the requirement of a qualified interest does not imply a selection among relevant and non-relevant public interests, but rather the need to verify the presence of a specific (and lawful) interest. Specifically, reference to the qualified interest is aimed at excluding cases in which the interest is lacking or is unlawful and, at the same time, to stress that the bond (and the consequent segregation effect) is not a value ex se. Accordingly, courts should disregard bonds created merely to prevent enforcement of the creditor’s rights, as well as those lacking interest or pursuing an unlawful result. Following such an approach, it has been argued that a bond in which the settlor is at the same time the beneficiary should not be recognized while a doubt still persists when the settlor is included among other beneficiaries (for example, when the bond created by the husband is aimed to fulfill the interests of the family members).

Anyway, it has been highlighted that article 2645-ter C.C. might imply a new interpretation of the “fiducia cum amico” scheme: traditionally, in civil law systems, the fiduciary bond may be invoked only inter partes and cannot be enforced against third parties, leaving the former owner of the goods with the sole remedy to make a claim for compensation of damages in the event of breach of the fiduciary agreement by the counter-party. On the contrary, should the fiduciary agreement (and therefore the fiduciary bond over the relevant goods) be registered pursuant to article 2645-ter C.C., the fiduciary obligation and the consequent bond would be effective toward third parties.

53. Id., passim.
54. Id., passim.
55. See, for example, GIOVANNI IUDICA & PAOLO ZATTI, LINGUAGGIO E REGOLE DEL DIRITTO PRIVATO 345 (14th ed., CEDAM 2013); PAOLO ZATTI & VITTORIO COLUSSI, LINEAMENTI DI DIRITTO PRIVATO 477 (14th ed., CEDAM 2013).
On the other side, scholars who had adopted a critical approach to the recognition of trusts in Italy believe that article 2645-ter is the means by which to recognize and register trusts in Italy (even domestic ones) over registered movables and immovables since, in this case, the previous legislative gap has been filled.  

However, it has to be noted that there was no need of such an article to recognize and register trusts in Italy because these effects are a direct consequence of the Convention, as mentioned above. Indeed, trusts were recognized and registered before the introduction of article 2645-ter C.C. In addition, it would be difficult to argue as to why internal trusts may be recognized insofar as they can be registered pursuant to article 2645-ter C.C. (and therefore to the extent that they include only registered movables or immovables), while internal trusts involving only movables goods (and therefore not subject to registration) may not. Such an assumption would create an unequal treatment difficult to be reconciled. Furthermore, trusts and article 2645-ter C.C. do not overlap, except in partial aspects, and therefore they remain different. Accordingly, it would be improper to qualify article 2645-ter C.C. in terms of the legal framework granted by Italian lawmakers to internal trusts.

Namely, trusts show a broader range of application in terms of interests to be fulfilled; furthermore, they imply the presence of a trustee with all the powers and duties related to such a capacity, as well as all the features of the governing law, including the relevant remedies, too.


On the contrary, it may be true that article 2645-ter, since subject to Italian law, might appear more familiar to Italian parties and might raise less operative difficulties than having to deal with a foreign law, as in the case of trusts. However, this is not an argument which seems to have played a significant role within the Italian scenario since private parties, professional advisors and Italian judges did not give the impression of being discouraged by such alleged inconvenience, as testified to by the broad recourse to trusts and by their broad judicial recognition.58

However, article 2645-ter C.C., in spite of its incomplete formulation, seems to be a further opportunity offered to Italian parties when assessing which legal tool would better meet their needs: an additional item in the Italian menu (although the relevant recipe has not yet been definitively developed).59

IV. ....AND THE “PATTO DI FAMIGLIA”

The Italian menu has been also enriched with the introduction of article 768-bis–768-octies C.C., providing for the “Patto di famiglia”.60

“Patto di famiglia” (hereinafter “family agreement”) is a contract whereby the entrepreneur carrying on a business activity,

58. In this regard, an important role is played by the business community together with private institutions like, for example, “Il Trust in Italia” (http://www.il-trust-in-italia.it), President Professor Maurizio Lupoi, promoting education on trusts through conferences, seminars and a specific post-graduate program, and hosting a worldwide web database on trusts. In addition, among the Italian law reviews, two deal specifically with trusts: TRUSTS AND ATTIVITÀ FIDUCIARIE and TRUSTS.

59. See Gambaro, Appunti, supra note 52 (noting that the law of trusts is the result of centuries of experience grounded on the property on behalf of another person. Similarly, with the introduction of art. 2645-ter C.C. being a recent event, the process of developing a proper set of rules and knowledge to deal with such new concept within the Italian legal system is only at the beginning).

60. The above-mentioned provisions have been introduced by art. 2 of Law 14 February 2006, n. 55. The insertion of the family agreement as a tool to provide for the family buy-out has been the Italian response to the guidelines of the European Institutions requiring State members to deal with such issue: see the Recommendation of the EU Commission 94/1069/EC of 7 February 1994, 1994 O.J. (L385), together with Communication of the EU Commissions of 28 March 1998, 1998 J.O. (C093) 2.
on his own or by means of a company, grants the business assets or
the shares to the person who, among his descendants, appears more
able to continue the family business. The grant may be in favor of
more descendants, too. Pursuant to the contract, the grantee is
bound to pay to the grantor’s spouse and to the other descendants a
sum equivalent to what they would be entitled to receive as forced
heirs under article 536 C.C., should the grantor’s succession occur
at the date of the agreement. The sum received as the equivalent of
the business assets or of the company’s quotas would count as part
of the overall quota of forced inheritance respectively owed to the
spouse and to each descendant.61

Similarly, the goods received by the grantee under the family
agreement will count as quota of the forced inheritance owed to the
same. Should the value of the grant be higher than the amount to
be paid as respective forced heirship, the exceeding part will be
qualified as part of the disposable portion of the grantor’s estate,
and the grantee will be the beneficiary of this exceeding part.62 The
grant and the payment made as consequence of the family
agreement will not be subject to collation or reduction.63

The aim of the family agreement is therefore the anticipation,
by means of an inter vivos act, of the succession effects as defined
and crystallized at the date of the agreement. This implies the risk
of a possible sacrifice to the credit-rights of the other descendants
should the value of the business assets or of the quotas assigned to
the grantee be accrued at the death of the grantor, rather than at the
date of the agreement. Vice versa, such anticipatory effect will

61. Art. 768-quater C.C. The Italian civil code refers to this concept in term
of “quota di legittima”; the Louisiana civil refers to “legitimate portion” or
“legitime”; see, for example, art. 1234 (Reduction of donations exceeding
disposable portions; calculation of legitime) or Title II (Of donations inter vivos
and mortis causa) – Chapter I (Louisiana Trust Code) – Subpart I (Arts. 1841-
1847) dealing with “The Legitime in Trust”. Please note that the legislative
decree 154/2013 has repealed any residual distinction between natural children
and legitimate children.

62. See, for example, IL PATTO DI FAMIGLIA (Ubaldo La Porta ed., Utet
2007).

63. Art. 768-ter C.C.
imply a sacrifice of the grantee’s rights in the event the value of such goods at the death of the grantor is lower than the amount the grantee paid to the other descendants under the family agreement. 64

The purpose of the agreement is therefore to fulfill the family buy-out. Such aim is perceived as very important within Italian society since the majority of Italian enterprises are small-medium ones, family-run, and therefore generally managed by the founder, together with members of his family. 65 Accordingly, the *intuitu personae* element and the proper management of the family buy-out through the identification of the descendant most capable of carrying on the family-business has always been one of the major concerns of Italian entrepreneurs, as well as the need to preserve the business value from any potential conflict among the family members. However, such an expectation mostly clashed with the right of each descendant to receive a quota of the non-disposable portion of the succession estate in those cases in which the relevant estate includes the ownership of a family-business and/or the family-run company. In order to balance these opposing interests, Italian lawmakers tried to reach a compromise through the family agreement mechanism. Accordingly, the elected descendant will be granted the family business, thus ensuring the positive outcome of the family buy-out, but, at the same time, he will have to pay-off the right of credits of the forced heirs, 66 thus ensuring compliance with the mandatory provisions of Italian law on *legitime*. The introduction of the family agreement induced several comments about its nature and legal effects. In particular, it has been pointed out that such legal instrument would be a multilateral contract,

64. *IL PATTO DI FAMIGLIA*, supra note 62, passim.
although it would not amount to a partnership or to an association agreement.\textsuperscript{67} Accordingly, lack of adhesion by any of the descendant renders the agreement null.\textsuperscript{68} In the opinion of some authors, in a such case the agreement would be valid, but not effective towards the non-adhering party, who will therefore be entitled to claim for collation,\textsuperscript{69} while other authors deem the agreement as falling within the category of contracts in favour of third parties.\textsuperscript{70}

With reference to this kind of legal instrument, the debate within the Italian arena mainly focused on its nature, the role of non-adhering descendants and the consequences of such non-adhesion, and on possible remedies and the proper relationship with mandatory succession provisions. The common opinion within the Italian sphere is that such a legal instrument encompasses interesting potentialities, but nevertheless needs to be improved—especially in its formulation.\textsuperscript{71}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{67} Id.
\item \textsuperscript{69} See in particular Giorgio Oppo, \textit{Patto di Famiglia e Diritti della Famiglia}, 4 RIV. DIR. CIV. 441 (2006).
\item \textsuperscript{70} See, for example, Dario Restuccia, \textit{Patto di famiglia e strumenti tradizionali di trasmissione della ricchezza} in \textit{PATTO DI FAMIGLIA} 94 et seq., supra note 62.
\item \textsuperscript{71} A first legislative attempt was made during the draft of decree n. 70/2011 (the “development decree”, providing for incentives for the small-medium enterprises), then converted in Law 106 of 12 July 2011: a preliminary version of such text included provisions aimed to significantly amend the whole scheme of the “patto di famiglia”, both from the legal and tax perspective. However, in the enacted version of the above-mentioned decree, any reference to such reform has been erased. While some commentators deem it a “lost opportunity”, others believe that it grants more time for appropriate reflection
\end{enumerate}
\end{footnotesize}
Italian legal framework reveals a complex and heterogeneous set of different legal tools aimed at meeting the different needs of Italian society. In particular, rather than a list of dishes, the Italian menu seems to offer a list of ingredients—some traditional, other of recent creation or mostly unknown since not long ago, some autochthonous (although clearly inspired by other experiences), other imported—which can be combined by customers in light of their taste and preferences. However, the process is still developing and seems to demand greater confidence and some improvements. Nevertheless, a notable element of such a caldron is the on-going dialogue among the different formants, which is progressively changing the Italian scene. Accordingly, at the end of 2013 the words used by a scholar in 2004 to describe the reactions induced by trust within the Italian legal system appear still up-to-date:

It is impossible not to listen to Italian academics and practitioners discussing everything from the structuring of a trust to trustee liability and the beneficiary’s remedies without reflecting that this was how things must have been in the late seventeenth and early eighteenth centuries in England. The difference, of course, is the twist given to Italian discussions by the fact that they are taking place against the backdrop of the modern sophisticated common law trust reaching into every corner of segregated private and public investment, asset securitisation, creditor security, and asset holding and management. The whole Italian trust scene is fascinating, and for the practitioners and academic involved evidently exciting.72

At that time, the author expressed disappointment for not having the opportunity to turn the page and see what was going to

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happen in the “Mediterranean saga”.\textsuperscript{73} In this sense, the Mediterranean saga goes on.

\textsuperscript{73} Id.