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Translators’ Preface to the Laws of Las Siete Partidas which are Still in Force in the State of Louisiana

Louis Moreau-Lislet & Henry Carleton
with an Introduction by Agustín Parise

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I. INTRODUCTION

As the Tunisian Constituent Assembly voted on the provisions of its new post-revolution constitution, international media reports—noting that the new constitution contains no express reference to Islamic law—ebulliently declared that Tunisia had rejected Islamic law and embraced secular civil law.¹ Shortly thereafter, on the same day the rhapsodic headlines were printed, the deliberation on the Tunisian constitution was suspended “after a deputy claimed he had received death threats because a colleague had accused him of being an ‘enemy of Islam.’”² The issue of whether or not the Tunisian constitution would reference Islamic law had, throughout the preceding year, been the focus of intense and acrimonious debate within Tunisia and among international actors with an interest in Tunisia’s post-revolution transition to

¹. See RT, Tunisia opts for civil, not Sharia law as assembly votes on new constitution (Jan 5, 2014), http://rt.com/news/tunisia-rejects-islam-law-196/; see also AAP, Tunisia's assembly has rejected Islam as the main source of law as it voted on a new constitution (January 5, 2014); “Tunisia's Islamist-dominated constituent assembly has compromised in rejecting Islam as the main source of law as it voted on a new constitution for the country that spawned the Arab spring.” http://www.sbs.com.au/news/article/2014/01/05/tunisia-mps-reject-islam-law
². See Tunisia MPs reject Islam as law, supra note 1.
Therefore, when the new constitution omitted mention of Islamic law, it was viewed in certain circles as a triumph of progressive liberalism and, in others, a defeat of Islamic legal principles. This article, in analyzing the domestic civil law in force in Tunisia, posits that, with regard to Tunisian civil law, neither conclusion is entirely true. To the contrary, for well over a century, Tunisian civil law, a “mixed” civil law system which incorporates elements of continental civil law derived from European codes with Islamic law and Tunisian custom, has regulated the ordinary affairs of Tunisians in a manner that is consistent with both modern legal norms and the tenets of Islamic law.

Illuminating this hybridity in Tunisian civil law is useful on a number of levels. From an academic perspective, in the context of Middle Eastern and North African civil law systems, recent scholarship (quite rightly) has focused on the work of Abd al-Razzaq Al-Sanhūrī, among the most accomplished comparative lawyers of the twentieth century and the chief architect of many civil codes for countries in the Middle East and North Africa who

3. Aziz El Yaakoubi, Death threats disrupt Tunisia constitution debate, Reuters, Jan 5, 2014: “Since the 2011 uprising, tensions over the role of Islam in Tunisia and the assassination of two secular politicians by hardline Islamist militants last year have widened divisions between Islamists and secular parties.”

4. Id.

5. For an interesting discussion regarding the relevancy of such a clause, known as a repugnancy clause, see Haider Ala Hamoudi, Repugnancy in the Arab World, 48 WILLAMETTE L. REV. 427, 427 (2012).

6. There are numerous schools of Islamic law (or madhabs). Although the Maliki madhab prevails in Tunisia, see HALIM RANE, ISLAM AND CONTEMPORARY CIVILISATION 83 (2010), the Hanifi madhab is also very significant. Other minority madhabs, such as the Ibāḍī madhab, can also be found in Tunisia. See, generally, J.H. van Riel, The Ibāḍī Traders of Bilād al-Sūdān (Master’s thesis, The American University in Cairo, School of Humanities and Social Sciences, 2012). As this article will demonstrate, in those areas where it draws on Islamic law, the Tunisian Code of Obligations and Contracts draws most significantly from the Maliki and Hanafi madhabs.

7. See Amr Shalakany, Sanhuri and the Historical Origins of Comparative Law in the Arab World (or How Sometimes Losing Your Asalah can be Good for You) in RETHINKING THE MASTERS OF COMPARATIVE LAW 152 (2001).
were achieving independence in the aftermath of World War I. Sanhūrī’s work is notable for its masterful synthesis of European and Islamic legal principles and has come to serve as the archetype for Middle Eastern civil codes. The Tunisian civil code, however, is an interesting example of North African legislation which predates Sanhūrī and which also seeks to reconcile Islamic law with continental civil law based on European codifications—and a model which has influenced subsequent codifications in North Africa and the Sahel, specifically in Morocco and Mauritania. The Tunisian legal experience, therefore, represents the genesis of a unique version of Middle Eastern and North African legal codification.

In addition, an understanding of Tunisian civil law can inform analysis of the current political situation in Tunisia as many of the ongoing post-revolution debates have revolved around the role of

8. Id.

9. Id. It is worth noting that continental civil law has always demonstrated a unique capacity to be exported and assimilated into other legal milieus. Since the advent of the modern civil code, civil law jurists (and comparativists) in various places throughout the world have acted as “synthesists,” working to create a civil code based on the French model but retaining a sufficient degree of organic legal substance so as to be faithful to the legal traditions of the jurisdiction. These “synthesists” include the Haitian-born Louisiana jurist, Louis Casimir Elisabeth Moreau-Lislet, who, as early as 1806, along with another jurist named James Brown, was charged with creating a civil code for what was then called “the Territory of Orleans.” See Alain A. Levasseur, Louis Casimir Elisabeth Moreau Lislet, Fater of Louisiana Civil Law 80 (1996). As Professor Alain Levasseur demonstrates in his illuminative book on the topic, Moreau-Lislet was given the task of creating a civil code based on the laws in force in Louisiana at that time, the substance of which was Spanish in origin. He was charged with this duty almost contemporaneously with the promulgation of the Code Napoléon. Id. at 64. To accomplish this task, Moreau-Lislet was perhaps the first civil law jurist to synthesize the French civil code with non-French law (the Spanish law that was at that time in force). In this effort, “[a]nterior laws were repealed, so far only as they were contrary to or irreconcilable with any of the provisions of the new.” Id. at 65. Such a method is akin to the method used in crafting Tunisian civil law.


11. See Id.
Islamic law in Tunisian society. Understanding how Tunisian civil law accommodates Islamic law can render the analysis of such debates more meaningful by revealing the degree to which constitutional references to Islamic law actually influence the presence or absence of Islamic legal influence in contemporary Tunisian legislation. A review of that legislation and its history presents a far richer and more nuanced view of Tunisian law and its sources and, importantly, gives reason for Tunisians of all political and ideological stripes to find a measure of accord and acceptance of their civil laws and their legal and philosophical lineage.

II. TUNISIAN LAW AND ITS STRATEGIC CONTEXT

The past decade or so has witnessed a marked increase in the attention paid to legal systems in the Middle East and North Africa. Wars, revolutions, and the increasingly expeditionary foreign policies of western governments in the 21st century (which viewed foreign instability as a threat to domestic national security) have drawn the study of these legal systems into the foreign policy calculus of major countries seeking to promote stability or otherwise assert influence in the region. Most recently, the challenges faced by countries in the region in the aftermath of the


13. See CHIBLI MALLAT, IRAQ: GUIDE TO LAW AND POLICY XXI (2009): “A search in American and British law journals yielded 250 entries for articles and notes on Iraq since 2003. There was hardly a tenth that number over the previous 50 years.” See also University of London SOAS, http://www.soas.ac.uk/cimel: “The Centre of Islamic and Middle Eastern Law was established in 1990 at the School of Oriental and African Studies in recognition of the growing importance of law in both its Islamic and Middle Eastern dimensions.”

Arab Spring are beginning to draw attention to the legal systems of North Africa and the Levant. This is, in part, because the deleterious effect of that series of revolutions on the domestic institutions of affected countries has made those countries more prone to “destabilizing ethnic and sectarian rivalries” and “have created opportunities for extremist groups to find ungoverned space from which to destabilize the new governments and prepare attacks against Western interests inside those countries.” A major issue of concern for these various regions is the way in which law and legal institutions can effectively address the needs of heterogeneous and pluralistic societies which must co-exist in the context of a unified legal and national framework. This is especially true in those countries which are currently crafting new constitutions, writing new legislation, and wrestling with the complex issues associated with the proper role of religion and religious law. But such legal harmonization is a challenge at

15. See Islamic Law in Transitioning Arab Spring Countries Subject of June 4 Program, http://www.loc.gov/today/pr/2013/13-091.html (noting that the Law Library of Congress and the Library’s African and Middle Eastern Division hosted a panel discussion on the role and impact of Islamic law in the developing constitutions and laws of transitioning countries in the Middle East/North Africa region in 2013.).


17. Id.

18. See Lally Weymouth, The Arab Spring’s Last Hope: An interview with Rachid Ghannouchi, the leader of Tunisia’s largest political party, http://www.slate.com/articles/news_and_politics/foreigners/2013/12/rachid_ghannouchi_interview_the_tunisian_leader_of_the_ennahda_party_on.html (quoting Rachid Ghannouchi as saying: “I believe that Tunisia will be successful in presenting a successful democratic model because we have a homogenous society, with a small Jewish minority.”) See also Euro-Mediterranean Network for Human Rights, The Reform of Judiciaries in the Wake of the Arab Spring, http://www.refworld.org/pdfid/515009ac2.pdf (“The ‘Arab Spring’ is not only ‘Arab’. Due regard should be given to the role and contribution of the different ethnic and linguistic minorities in the region, such as Amazigh, Kurds, and many others who equally participated in the democratic uprising.”).

every level. As Professor Mireille Delmas-Marty notes: “Ordering multiplicity without reducing it to sameness, admitting pluralism without giving up on building common law with a common measure for fair and unfair, can therefore seem an unattainable goal.”

Developments in Tunisia are of particular interest due to the fact that Tunisia, more than any other country in the region, is emerging as a model for Arab Spring countries seeking a successful transition to democracy. Tunisia, after all, was the genesis and the epicenter of the Arab Spring (which began as the “Jasmine Revolution”). While outcomes throughout the region have varied, in the aftermath of those tremorous spasms of discord and political upheaval, commentators have noted Tunisia’s relatively successful transition from autocracy. This success is due, in no small part, to the fact that Tunisia experienced a regime change but retained its vital state institutions and has, throughout its process of transition, maintained relative (though imperfect) stability whereas neighboring countries have not. As a result, Tunisia’s very real potential for success has redefined it on the

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24. See Aziz El Yaakoubi, Tunisia starts voting on new constitution, Reuters, Fri Jan 3, 2014: “[Tunisia's] final steps to full democracy have been widely watched as a possible model in a region where Egypt, Libya and Yemen, which also ousted their leaders in 2011, are struggling with violence and instability as well as resurgent Islamism.”
world stage as a regional anchor, a lodestar for countries in transition, and “the Arab Spring’s last hope.”

Central to Tunisia’s transition from autocracy to democracy is the question of what law will apply and the sources from which that law is to be derived. The major focus of analysis and debate in this regard has been on Tunisia’s new constitution, which, after intense national debate, was formulated without reference to Islamic law as a source of law. Very little attention, however, has been paid to the domestic civil law in force in Tunisia and the sources of that law, the analysis of which demonstrates that Islamic law remains part of Tunisian civil law. While the retention of Islamic law in the Tunisian legal corpus is most evident in its Personal Status Code, which is based on a progressive interpretation of Islamic law and Tunisian custom, Islamic law is

25. See Weymouth, supra note 18.
27. See Aziz El Yaakoubi, supra note 24.
29. See Lombardi, supra note 19:
The [Ennahda] party thus supported the adoption of a constitution that did not explicitly require the constitution to respect Islam—preferring to ensure that the constitution left room for Islamists to take power and impose laws that reflected their understanding of Islam. Ennahda appears, in fact, to favor a fairly liberal understanding of Islam, but one could imagine a more conservative group taking a similar path.
See also Thousands rally demanding sharia law in Tunisia, AFP, Mar 16, 2012.
30. See Jane Adas, Tunisia’s Personal Status Code and Modernity (Development and Human Rights, Washington Report on Middle East Affairs, March 2007), at 42-43 (noting that “[e]lements of the code were promulgated in a 1939 draft based on Islamic canon law under the Ottoman Bey, when Tunisia was still under French control,” and that:
Mohamed Habib Cherif, minister of justice and human rights, observed that the Personal Status Code is deeply anchored in Tunisian society, where women have been an important presence since Queen Dido founded Carthage. The godfather of the Personal Status Code was Tunisian reformist scholar Tahar Haddad, who in 1930 published Our Women in Religion and Society. Elements of the code were promulgated in a 1939 draft based on Islamic canon law under the
also firmly entrenched in the ordinary civil law which regulates the daily transactions of Tunisian citizens. Importantly, however, an analysis of Tunisian civil law also demonstrates that the presence of Islamic legal influence in Tunisian civil law has not been a negative aspect or a harmful element, nor has Islamic law’s presence in Tunisian civil law over the past century served to significantly alter the physiognomy of Tunisian society into something unrecognizable to Western secular sensibilities. To the contrary, the Tunisian code demonstrates how Islamic law can function in a modern context alongside continental civil law as part of a mixed jurisdiction in which domestic civil law is derived from a multiplicity of sources.31

This article, therefore, provides a focused analysis on Tunisian civil law and its role in post-revolution Tunisia, specifically focusing on the Tunisian Code of Obligations and Contracts, which, since its promulgation in 1906, has been described as “the first durable codification of Tunisian civil law.”32 Through an analysis of the history, sources, and operation of Tunisian civil

Ottoman Bey, when Tunisia was still under French control. The 1956 Code, Cherif said, erased discriminatory traditions, such as customary marriage and secret divorce, and reformed the judiciary by replacing the Islamic, Christian and Jewish courts with a uniform, secular system.).

31. See Seán Patrick Donlan, The Mediterranean Hybridity Project: Crossing the Boundaries of Law and Culture, 4 J. Civ. L. STUD. 355 (2011) (describing “mixed legal systems” as “diverse state laws [that] emerge from different legal traditions, . . .” Id. at 359-60, and noting that:
Neither the hybridity nor the diffusion of laws is new. Within Europe, law predated the state and the creation of genuinely national laws; a legal “system” centered on the modern nation-state, and the elimination of competing jurisdictions and marginalization of non-legal norms was a very long historical process. Especially before the 19th century, there were multiple contemporaneous legal orders co-existing in the same geographical space and at the same time. Modern national traditions are unique hybrids rooted in diverse customary or folk laws, summary and discretionary jurisdictions, local and particular iura propria, the Romano-canonical “learned laws” or ius commune, and other trans-territorial iura communia (including feudal law and the lex mercatoria). Id. at 356.

32. See Kamel Charfeggine, supra note 10.
law, the article demonstrates that this body of law is remarkably well-suited to the task of accommodating a diverse society, parts of which might insist on or desire the application of certain Islamic legal norms. Moreover, it is a historically important document as it is also an early example of legal fusion—"une tentative de conciliation unique en son genre entre droits civils de pays européens et droit civil musulman."  

A. Tunisian Legal History: A Brief Overview

Before delving too deeply into Tunisian legislation, it is worth noting some key aspects of Tunisia’s legal history which have served to shape and continuously influence the country’s legal physiognomy. The geographic territory that we associate today with the modern country of Tunisia is one with a rich history of diverse people and successive empires, all of which influence modern Tunisia’s fascinating legal culture. The Punic Wars brought Tunisia under the Roman Empire in 149 BC. Tunisia’s subsequent “integration into the Roman and Byzantine Empires led to the Christianization of the region in the first several centuries CE.”

33. See Haider Ala Hamoudi, The Death of Islamic Law, 38 GA. J. INT’L & COMP. L. 293, 295 (2009-2010): “That the Muslim world is replete with political institutions and leaders (described herein, in their multitudinous varieties and approaches, as ‘Islamist’) who seek a greater role than this for the shari’a in the affairs of the state is obvious to anyone even faintly familiar with the region.”


35. Although this article, for the sake of clarity, consistently refers to “Tunisia,” it is important to keep in mind Professor Lisa Anderson’s admonition that “it is an anachronism to refer . . . to “Tunisia” and “Libya” when discussing the 19th century. Until they were occupied by the Europeans, these countries were known by the names of their capital cities, Tunis and Tripoli.” LISA ANDERSON, THE STATE AND SOCIAL TRANSFORMATION IN TUNISIA AND LIBYA, 1830-1980 at 13 (1986).


37. Id.
late seventh century and initiated the spread of Islamic influences throughout the country.\textsuperscript{38} Coextensive with that series of rulers, Roman law prevailed in the early history of the territory known today as Tunisia, until the Arab conquest in the 7th Century AD effectively replaced Roman law with Islamic law.\textsuperscript{39} During that latter period, among the predominantly Muslim population, the Maliki school of Islamic law became most prominent during the Aghlabite dynasty, though a notable minority of adherents to the Hanafite school also existed in the region.\textsuperscript{40} Islamic law, however, applied only to Muslims during this period. The Jewish population was still governed by Mosaic law and Christians by ecclesiastic law (which retained elements of Roman law).\textsuperscript{41} Professor Faouzi Belknani, a legal scholar who has served on faculties in both Tunisia and Qatar, notes that, in the 12th century, Muslim jurists compiled collections of fatwas and juridical opinions on diverse questions of law,\textsuperscript{42} such as the Hanafite compilations of Alhindia and Alamkîrya or the Malikite collection called Al-Mi’yâr by the jurist al-Wanshârisi.\textsuperscript{43}

The modern administration of Tunisia began in the 19th Century,\textsuperscript{44} which saw the creation of multiple distinct jurisdictions and courts, the applicability of which depended on the religion of the party. For instance, Muslims had access to Malikite or Hanifite courts, while Jews had access to rabbinical courts, etc.\textsuperscript{45} As a general matter, however, commentators note that, before 1885, civil law in Tunisia was largely regulated by Islamic law.\textsuperscript{46} It was also during the 19th century that efforts to codify Tunisian law began. The Civil and Penal Code promulgated in 1861 by Sadek

\textsuperscript{38} Id. 
\textsuperscript{39} See Afif Gaigi, Tunisia in \textit{Yearbook of Islamic and Middle Eastern Law} 417 (1994). 
\textsuperscript{40} Id. at 417-18. 
\textsuperscript{41} Id. at 418. 
\textsuperscript{42} See Belknani, \textit{supra} note 34, at 12. 
\textsuperscript{43} Id. 
\textsuperscript{44} See Id. at 14 n.44. 
\textsuperscript{45} See Afif Gaigi, \textit{supra} note 39, at 418. 
\textsuperscript{46} See Belknani, \textit{supra} note 34, at 14.
Bey contained provisions inspired by Maliki and Hanafi schools of Islamic law, but was short lived and was repealed by 1864. In 1885, the promulgation of the Tunisian Code foncier marked the beginning of a process of progressive diminution of Islamic law’s applicability in Tunisia. The momentum toward codification had begun and would only garner force.

It is also worth noting that, in 1876, as the global movement toward codification began, perhaps the most significant early attempt at codification of Islamic law came with the promulgation of the Ottoman code known as the Mejelle. That compilation would, however, have no immediate influence on the development of Tunisian law and was never fully in force in the region today associated with modern Tunisia—a region which, as noted, was deeply immersed in its own legislative initiatives by the time the Mejelle was promulgated. In that regard, commentators note that the Ottoman legal reforms of the late 19th century occurred parallel to Tunisian legal developments, but did not have significant impacts in Tunisia, which “retained substantial autonomy under the rule of the Husaynid Bey. . . .” Nonetheless, as discussed further below, the Mejelle would come to influence modern Tunisian civil law in later years.

In 1881, with the Treaty of Bardo, Tunisia’s period as a French protectorate began. During this time, the Bey maintained power in theory, but was effectively under the power of a foreign (French) sovereign. French legal influence became more pronounced in

47. See Afif Gaigi, supra note 39, at 418.
48. Id. at 419.
49. See Belknani, supra note 34, at 14.
50. Id. It is interesting to note that the Mejelle, though frequently characterized as the first codification of Islamic civil law, is predated in Tunisia by Sadek Bey’s Civil and Penal Code of 1861.
52. Id.
53. See Afif Gaigi, supra note 39, at 419.
1883 after signing of the Treaty of Marsa formally established the French protectorate and permitted France to directly undertake legislative reforms.\(^5^4\) This opened the door to far more expansive and ambitious legal projects, among the first of which was an effort to codify Tunisia’s civil and commercial law based on the French model of codification,\(^5^5\) an effort which, for its successful completion, required a deep knowledge of continental civil law, sensitivity to local Tunisian custom, and expertise in Islamic law. This effort resulted in a remarkable piece of legislation which has now been in force for well over a century.

**B. David Santillana and the Synthesis of Civil Law and Islamic Law in Tunisia**

During Tunisia’s time as a French protectorate, the task of developing a codification of Tunisian civil law ultimately fell on a codification commission composed of four French scholars and a Tunisian jurist named David Santillana.\(^5^6\) Born in Tunis in 1855, Santillana came from a Jewish family of European ancestry.\(^5^7\) Commentators suggest that Santillana’s family fled to Tunisia after the fall of Grenada and the expulsion of the Jewish population.\(^5^8\) Historical records note that his grandfather, David Diaz Santillana,

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54. *Id.* at 419.

55. *See* Charfeggine, *supra* note 10.

56. Santillana is a notable figure in legal history, whose life and circumstances paralleled, in interesting ways, that of Moreau-Lislet, in that both were civil law jurists whose presence in the jurisdictions where they were to have an impact was the result of displacement—making each something of an outsider, but not without a definite link with and affinity for their adopted jurisdiction. *See* LEVASSEUR, *supra* note 9, at 80.


58. *Id.* *See also* Jewish History Sourcebook: The Expulsion from Spain, 1492 CE, available at http://www.fordham.edu/halsall/jewish/1492-jews-spain1.asp: “In the spring of 1492, shortly after the Moors were driven out of Granada, Ferdinand and Isabella of Spain expelled all the Jews from their lands and thus, by a stroke of the pen, put an end to the largest and most distinguished Jewish settlement in Europe.”
was born in Tunis in 1780 and served as a translator for the British Consulate General.\textsuperscript{59} His father, Moses Santillana, succeeded his grandfather as consular interpreter\textsuperscript{60} and became a close companion of Richard Wood, the British Consul in Tunisia, who saw to it that the younger David Santillana was educated in an Italian school in Tunis.\textsuperscript{61} Thereafter, Santillana studied law in Rome and, after graduation, worked as an attorney both in Rome and Florence,\textsuperscript{62} though still playing a role in controversial legal matters across North Africa, such as the legal defense of Ahmed Orabi, an Egyptian military officer who staged a revolt against the British and French presence in Egypt.\textsuperscript{63}

Cultivated in such a cosmopolitan and learned environment, Santillana grew to become a comparative law scholar, a practitioner, and an expert in Islamic law who understood the potential for Islamic law’s viability in a modern context.\textsuperscript{64} As a result, when the Commission for the Codification of Tunisian Laws was established in 1896, Santillana was a natural choice to preside over the commission along with four French legal scholars. This commission would produce a draft civil code which would eventually become enacted in part as the Tunisian Code of Contracts and Obligations.\textsuperscript{65} To create this remarkable piece of legislation, Santillana and his team would draw on a plurality of

\textsuperscript{59.} See Great Britain, Parliament, House of Commons, Reports from Commissioners, Naturalization Commission, Appendix to the Report, at 9 (1869).
\textsuperscript{60.} Id.
\textsuperscript{61.} See Ammou, supra note 57.
\textsuperscript{62.} Id.
\textsuperscript{63.} ALEXANDER MEYRICK BROADLEY, HOW WE DEFENDED ARÁBI AND HIS FRIENDS: A STORY OF EGYPT AND THE EGYPTIANS 75 (1884) (referring to Santillana as “one of the most accomplished living Arabic scholars”).
\textsuperscript{64.} See Donna E. Arzt, The Application of International Human Rights Law in Islamic States, 12 HUM. RTS. Q. 202, 213-14 (1990) (quoting Santillana as writing: “There is no doubt that the high ethical standard of certain parts of Arab law acted favourably on the development of our modern concepts and therein has its enduring merit.”).
\textsuperscript{65.} See GEORGE N. SFEIR, MODERNIZATION OF THE LAW IN ARAB STATES 39 (1998).
sources, namely the French civil code, the German civil code, several schools of Islamic jurisprudence (especially the Malikite and Hanafite schools), and the Ottoman codification of Islamic law known as the Mejelle. Commentators also note that their work was influenced by Tunisian custom, French jurisprudence, and the jurisprudence of French courts which were active in Tunisia during its time as a French protectorate. The character of the Tunisian code, therefore, is as diverse and cosmopolitan as its principal author.

The creation of such a code—successfully addressing the needs of so diverse a polity—was a complex endeavor. An analysis of his work demonstrates that Santillana synthesized diverse sources of continental civil law with Islamic law and Tunisian custom through four primary methods. The first of these was by direct incorporation of Islamic law and legal devices into the codal text. The second method was through exploiting the natural parallelisms that exist between Islamic law and continental civil law. In that regard, scholars have noted that “Islamic Law is rooted in Arabic and Middle-Eastern legal traditions, but through its evolution, it has assimilated elements of Roman law.” The third method used by Santillana consisted of excepting Muslims from aspects of the civil law which might violate the tenets of Islamic law and, thereby, permitting certain transactions between Muslims to occur in a way that comports with Islamic law. The fourth method used by Santillana involved imparting a religious dimension to otherwise secular legal devices, a technique which, in the context of Tunisia, naturally tilts in favor of Islamic law. The result is a codification of civil law which, at the same time, adheres to the

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66. See Belknani, supra note 34, at 18.
67. Id.
68. Id.
69. See Belknani, supra note 34, at 12.
70. See Voorhoeve, supra note 51, at 54.
modern civil law model inspired by the French civil code and is also uniquely Tunisian.

III. THE TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS

Tunisia’s unique legal history and development resulted in a somewhat different approach to codification than what is seen elsewhere in civil law jurisdictions. Rather than a single, cohesive code governing all civil law—or even the “codal dualism”\(^\text{72}\) that characterizes countries in the Middle East and North Africa with codes drafted by Abd al-Razzaq Al-Sanhûrî—Tunisian legal development has been characterized by what has been called “thematic codification.”\(^\text{73}\) For instance, Tunisian property law is now largely governed by the law of 12/2/1965 which enacted the Code of Real Rights,\(^\text{74}\) the Personal Status Code governs “personal status law” such as marriage, divorce, and successions,\(^\text{75}\) etc. As a result, among the most notable aspects of the Tunisian Code of Obligations and Contracts is its intensely subject-specific focus. Centered, as its name implies, on the formation of obligations and contracts, the Tunisian Code lacks provisions of broader applicability to persons and things that characterize most modern civil codes. In that regard, the Tunisian Code consists of only 1531 total articles which are divided into two books: Book I (Obligations in General);\(^\text{76}\) and Book II (Different Contracts and Quasi-Contracts Relating Thereto).\(^\text{77}\) Commentators have noted

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\(^{73}\) See Belkmani, *supra* note 34, at 40.

\(^{74}\) See Afif Gaigi, *supra* note 39, at 426.

\(^{75}\) See Belkmani, *supra* note 34, at 40. Given the diversification of codes in Tunisia, it must be emphasized that the Tunisian Code of Obligations and Contracts represents but one facet of the corpus of laws that comprise the entirety of Tunisian civil law. It is, nonetheless, a critical pillar in the architecture of the Tunisian legal system.

\(^{76}\) TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Book I (Arts. 1-563).

\(^{77}\) TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Book II (Arts. 564 – 1531).
that this division, in essence, divides the Tunisian code into a “general part” and a “special part,” each of which reflects a diversity of sources.78

A. Sources of Law

As noted, the Tunisian Code of Obligations and Contracts is derived from a plurality of sources, though a study of the manner in which those sources are referenced or incorporated into the code reveals a fascinating array of legislative feats and codal compromises which were necessitated by the political environment in which the Tunisian code germinated. Interestingly, in contrast to the relatively meticulous and comprehensive approach which characterizes the rest of the Tunisian code, the legal provisions which concern the Tunisian code’s sources of law (those which may be called upon in interpreting the code’s provisions) tend to be somewhat recondite. In setting forth the sources of law that may be drawn upon for the proper interpretation of codal provisions, the Tunisian code states that, in applying the law, one shall give it no other meaning than that resulting from the ordinary meaning of the law’s provisions and the intent of the legislature.79 The code specifically states that “[w]hen the law is expressed in general terms, it must be understood in the same sense.”80 Likewise, where the law reserves a particular case, it applies to all other cases which are not expressly excepted. Where a case cannot be decided by a specific provision of the law, a court may look to the provisions governing similar cases.81 If the solution is still in doubt, the Tunisian code states that a court may decide according to “general rules of law,”82 a phrase which is conspicuously inexact and nebulous.

78. See Belknani, supra note 34, at 14.
79. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 532.
80. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 533.
81. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 535.
82. Id.
Both the phraseology and the location of these articles of the Tunisian code are in striking discord with the articles addressing sources of law in most other civil codes, including civil codes in the Middle East and North Africa. In comparable codes, the sources of law are generally set forth in Article 1 of the civil code—an initial article which typically articulates a predictable hierarchy of sources. For example, the Libyan Civil Code, Syrian Civil Code, Egyptian Civil Code, and Algerian Civil Code all contain an initial article (Article 1) which governs the sources of law and, in essence, states that the written provisions of the code govern all matters. In the absence of written provisions, Article 1 of those codes uniformly states that courts may adjudicate matters in accordance with the principles of Islamic law. In the absence of an Islamic rule on a particular matter, the Libyan, Syrian, Egyptian, and Algerian codes permit courts to look to custom and the principles of equity.

But the Tunisian code is different and does not reference Islamic law as a subsidiary source of law, nor any other specific body of law. In that regard, Tunisian courts have held that nothing in the Tunisian code permits recourse to Islamic law as a source of law, and commentators have noted that the very ambiguous reference in Article 535 to the “general rules of law” offers little clarity with regard to other potential sources of law and may have been a purposive ambiguity deemed necessary in this early codification of Tunisian law. Otherwise stated, it has been

83. See, e.g., LOUISIANA CIVIL CODE (LA CIV. CODE) art. 1: “The sources of law are legislation and custom;” 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.”

84. See LIBYAN CIVIL CODE, Art. 1, para. 2.; SYRIAN CIVIL CODE, Art. 1.

85. Id.

86. See STÉPHANE PAPI, L’INFLUENCE JURIDIQUE ISLAMIQUE AU MAGHREB 235 n.1273 (2009).

87. See M. Mohamed Kamel Charfeddine, Esquisse sur la méthode normative retenue dans l’élaboration du Code tunisien des obligations et
suggested that this is a simple prudence, designed to allow the code to take root and become integrated into Tunisian society. 88

Interestingly, Professor Haider Ala Hamoudi, in his excellent work on post-conflict constitution drafting in Iraq, posits that when formulating national legislation such as a constitution in a post-conflict environment where key stake-holders may have pronounced “identitarian commitments,” it is sometimes advantageous for drafters to permit such legislative lacunae to exist so that long-term solutions can be incrementally achieved. 89

[T]he solution well may be to proceed with constitution making, but on particularly difficult problems—namely those in which any view to the long term is likely to raise the prospect of intractable disputes based on quite inconsistent conceptions of statehood—to defer the problem for later, incremental resolution. In other words, on such matters of dispute, the solution might well be, counterintuitively, to push the problem off in a manner that will reduce the stakes. 90

Santillana seems to have taken just such an approach with the Tunisian code insofar as it remains ambiguous as to which sources of law may be invoked by Tunisian courts. There are, however, other ways that a legal source can find influence in a civil code beyond express references. Even where a code does not expressly permit recourse to a certain body of law—such as Islamic law—elements from a legal tradition may still find relevance by being

88. Id.
90. Id.
incorporated into the codal text or through more subtle mechanisms which permit those sources to exude influence. This is certainly true for Santillana’s work in the Tunisian code which sought to incorporate Islamic legal principles and to blend those legal rules with European legal norms, effectively fusing two normative orders.91

B. Formation of Obligations and Contracts

Belknani notes that the general provisions relating to obligations in the Tunisian code are essentially drawn from the continental civil law tradition.92 Continental civil law, in that regard, envisions an obligation as something more expansive than simply a contract (though a contract can certainly form an obligation). Deriving the concept of an obligation from Roman law, civil law theorists have maintained that an obligation is “a legal relationship that compels us to give, to do, or to not do something.”93 This allows for obligations that are bilateral (such as contracts) but also for unilateral obligations by which only a single party is bound.94

In Roman law, according to a text by Gaius, all obligations derive from contract, delict, and several other causes. On that basis, the Corpus Juris asserts the existence of four sources of obligations which, as universally accepted by doctrine with almost no exception, are contracts, quasi-contracts, delicts, and quasi-delicts.95

91. See Voorhoeve, supra note 51, at 54: “Santillana explicitly referred to the Ottoman Mecelle and Qadri Pasha’s works as sources of inspiration, as well as Sahnun’s Mudawwana and Khalil’s Mukhtasar. When choosing between different solutions from Islamic law, the principle that was closest to French law was chosen.”
92. See Belknani, supra note 34, at 21.
93. A.M. Demante, 3 Programme du Cours de Droit Civil Français 246 (1833).
94. Demante, supra note 93, at 248.
The Tunisian code’s first article states that obligations are derived from conventions and other declarations of will, quasi-contracts, delicts, and quasi-delicts.\footnote{\textsc{Tunisian Code of Obligations and Contracts}, Art. 1. This article is almost identical in substance to Article 1757 of the Louisiana Civil Code which states that “[o]bligations arise from contracts and other declarations of will. They also arise directly from the law, regardless of a declaration of will, in instances such as wrongful acts, the management of the affairs of another, unjust enrichment and other acts or facts. \textit{La Civ. Code} art. 1757.} Similarly, under Tunisian law, the elements necessary for a valid obligation are: (1) the capacity to form an obligation; (2) a valid declaration concerning the essential elements of the obligation; (3) a definite object that can be the object of an obligation; and (4) a lawful cause for the obligation\footnote{\textit{Ces conditions sont au nombre de quatre: le consentement, la capacité, l’objet et la cause.”} }—requirements which echo civil law based on the French model and which adopt the continental civil law paradigm.\footnote{\textsc{Demanted}, supra note 93, at 252: \textit{“Ces conditions sont au nombre de quatre: le consentement, la capacité, l’objet et la cause.”}} It must be noted, however, that these rules are also consistent with Islamic law which requires people entering into contracts to be of sound mind\footnote{\textsc{Mejelle}, Art. 957 (“Infants, madmen and people of unsound mind (Ma’tuh) are of themselves prohibited from dealing with their property”), and Art. 966 (“When an infant has not understanding for business (Art. 943) even if his guardian give him permission, his verbal dispositions of property are fundamentally invalid.”).}, a lawful object for contracts\footnote{\textsc{Mejelle}, Art. 197 (“The existence of the thing sold is necessary”) and Art. 199 (“It is necessary that the thing sold should be [permitted by law].”)}, and which requires contracts to have a lawful cause.\footnote{\textsc{Mejelle}, Art. 211.}

Under Tunisian law, all persons have the capacity to form obligations unless declared otherwise by the law\footnote{\textsc{Tunisian Code of Obligations and Contracts}, Art. 3.} and, notably, the Tunisian Code expressly states that religious differences between muslims and non-muslims has no bearing on the capacity to contract, nor do such religious differences impact obligations between muslims and non-muslims.\footnote{\textsc{Tunisian Code of Obligations and Contracts}, Art. 4.} Importantly, however, the Tunisian code—as explained more fully below—contains a host of
provisions that provide for exceptions in the case of contracts between Muslims.

1. Unilateral Acts

Civil law doctrine recognizes, to varying degrees, the concept of a unilateral act. Planiol attributed the more modern approach of permitting a unilateral declaration to form a binding obligation to German jurists. While a relatively recent innovation during Planiol’s era, unilateral acts are now well-founded in modern civil law doctrine. As Litvinoff noted, “under certain circumstances, the law may attach consequences to a merely unilateral declaration of will which is promissory in nature.” Under Tunisian law, while a mere promise does not operate to create an obligation, a promise made by posters or other means of advertising which offer a reward to one who finds a lost object or accomplishes a task can create an obligation, and is deemed to be accepted by those who, even without having knowledge of the offer, find the thing or accomplish the task. In such circumstances, the author of the promise is required to provide the promised reward. Interestingly, while these provisions comport with the civil law model, they are drawn more from the German model than the French Code Civil and mirror quite closely the 1984 amendments to the Louisiana Civil Code, which “adopted the German-oriented

104. The degree to which unilateral declarations are considered sources of obligations varies among modern civil codes. See, e.g., Pablo Lerner, Promises of Rewards in a Comparative Perspective, 10 Annual Review of International & Comparative Law 53, 57 (2004):

If Puffendorf definitively installed the pactum as the central idea, it was Domat who simplified the problem by putting forth the agreement as the only expression of the autonomy of will. His ideas were adopted by the French legislator, and so the French code does not recognize the unilateral will as a source of obligation.

105. 2 Planiol, Traité Élémentaire de Droit Civil 273 (9th ed., 1923).

106. Litvinoff, supra note 95, at 13-14.


109. Id.
solution, reserving the promise of reward only for the case of performance of a specific fact."\(^{110}\)

Tunisian law further states that the promise of reward may not be revoked where the revocation occurs after execution has begun.\(^{111}\) One who has set a deadline for the completion of the task envisioned by the promise is deemed to have waived the right to revoke the promise until the expiration of the time limit.\(^{112}\) If several people have accomplished the task at the same time, the promised prize or reward is shared between them.\(^{113}\) If they have done it at various times, the award belongs to the first to accomplish it. If they each accomplished a portion of the task, then the reward is shared proportionally.\(^{114}\) If the reward cannot be shared but can be sold, then the price will be shared among the beneficiaries.\(^{115}\) If this price or reward is an object that has no market value or can only be given to one person, then according to the terms of the promise, the decision is made by drawing lots ("la décision est remise à la voie du sort").\(^{116}\) This latter provision is also taken directly from the German civil code,\(^{117}\) thus demonstrating Santillana’s reliance on a plurality of European civil law sources when drafting the Tunisian code.

2. Contracts (Bilateral Acts)

The notion of a bilateral act, of course, dates back to ancient times and was well-developed in Roman law.\(^{118}\) Modernity and

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110. Lerner, supra note 104, at 63.
111. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 20.
112. Id.
113. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 21.
114. Id.
115. Id.
116. Id.
117. See BGB, Art. 659(2):
If the act has been undertaken simultaneously by more than one person, then each is entitled to an equal portion of the reward. Where the reward cannot be shared due to its quality, or if, according to the terms of the promise of a reward, only one person is to be given the reward, then the matter is decided by drawing lots.
118. PLANIOL, supra note 105, at 333.
commerce only increased the frequency of this method for forming obligations. Writing in the 19th century, civil law jurist A.M. Demante noted that, even during that era, the majority of obligations were formed through the creation of contracts.119 The general rule in modern civil law is that a contract is formed by the consent of the parties to the contract.120 Consistent with this theory, under Tunisian law, a contract is perfected only by agreement of the parties on the essential elements of the obligation, as well as on all other lawful clauses that the parties consider essential to the agreement.121 Barring a provision to the contrary, changes by the parties by mutual agreement to the contract which occur immediately after its conclusion do not constitute a new contract, but are considered part of the initial agreement.122 Even so, a contract is not perfected when the parties expressly reserve certain clauses to form the object of a subsequent agreement.123 The agreement reached under these conditions, on one or more such clauses, does not constitute the conclusion of a contract, even if a preliminary agreement has been drawn up in writing.124 In any case, reservations or restrictions which are not brought to the attention of the other party are not set aside or restrict the effects of the declaration of intent as provided for in its apparent expression.125

C. Transfer of Obligations

Consistent with the continental civil law tradition, the Tunisian civil code permits the transfer of obligations. As Litvinoff noted, “[a]s an asset in his patrimony, the creditor or obligee may transfer or assign the obligation to another if he so wishes. Also, the debtor

119. A.M. Demante, 2 Programme du Cours de Droit Civil Francais 246 (1831).
120. Planiol, supra note 105, at 333.
122. Id.
124. Id.
may substitute another person at his end of the relation. In both instances the obligation remains the same, however.” Under Tunisian law, the transfer of rights and claims of an original creditor to another person can take place, either pursuant to the provisions of Tunisian law or pursuant to an agreement between the parties. Rights or claims that are not yet expired may be transferred, though such a transfer may not operate for future rights. Similarly, the transfer is considered null: where the right or claim may not be transferred by virtue of its constitutive title or by law; where it is intended that the rights or claims are of a purely personal nature; or where the debt cannot be subject to seizure or attachment—though when the right or claim is susceptible of being seized with the concurrence of a party or to have its value determined, the assignment of the right will be valued in the same proportion. The assignment of a claim includes the accessories that are integral to the claim, such as privileges, with the exception of those that are personal to the assignor. It includes wages, mortgages and sureties unless there is an express stipulation to the contrary.

Notably, an assignment is also assumed to include accrued interest unless there is a stipulation to the contrary. This latter provision relating to interest, however, is not applicable between Muslims. This exception pertaining to Muslims, of course, is due to the provisions of Islamic law which disallow the charging of interest in the course of transactions. The authority for this doctrine in Islamic law—which is not interpreted with precise

126. Litvinoff, supra note 95.
129. Id.
131. Id.
132. Id.
133. Id.
uniformity—is from Quranic exhortations against the idea of *ribā* (or interest) and sunna in which the Prophet is reported to have said as follows:

(Sell) gold for gold and silver for silver, wheat for wheat, barley for barley, dates for dates and salt for salt of the same kind for the same kind and the same quantity for the same quantity, from hand to hand and if they differ from each other in quantity sell them as you like but from hand to hand.

In permitting an exception to ordinary civil law for Muslims where interest is involved, Santillana adopts a civil law concept but in a way which permits compatibility with Islamic legal tenets.

**D. Extinction of Obligations**

The Tunisian code’s articles on the extinction of obligations are drawn from civil law in that they incorporate civil law concepts of remission of debt, novation, compensation, and confusion. Notably, however, these articles also incorporate Islamic legal concepts that provide traditional protections and limit the civil law concepts to the extent their operability could transgress Islamic legal boundaries.

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135. RAHIM, *supra* note 134, at 294:

The Hanafi doctors have interpreted the tradition to mean that whenever an article belonging to the description of similar of capacity or of weight is sold or exchanged for an article of the same species, neither party is allowed to receive anything in excess of the quantity sold by himself, in other words absolute equality in quantity is insisted upon. The Shafi‘is hold that the law of riba only applies to articles of food and such things as constitute price, namely gold and silver.


*Ribā*, like zakat, was another situation where the general judgment in the Qur’an as clear but the precise details problematic. The main prohibition against riba comes in Q 2: 278-9 where we read that those who practice riba should be aware that they have engaged in “a war with Allah and His Messenger,” from which the “ulamā‘” derived the judgement that those who engage in riba and refuse to repent are, if they have a power-base [are to be fought as rebels].

1. Remission of Debt

A remission of debt, according to civil law doctrine, is a unilateral act by which a creditor renounces his or her rights against a debtor.¹³⁸ Such an act produces a liberation of the debtor, extinguishing the debt and all accessory obligations pertaining to the debt.¹³⁹ Tunisian law incorporates this concept, though alloyed with Islamic legal concepts. Under Tunisian law, an obligation is extinguished by the voluntary surrender of the obligation by a creditor that is considered capable of making a donation.¹⁴⁰ The remission takes effect as long as it has not been expressly refused by the debtor.¹⁴¹ Tunisian law also notes, however, that the remission granted by an ill person to a third party during his or her last illness is valid up to a maximum of one-third of what remains in the succession after the payment of debts and funeral expenses.¹⁴² This latter provision is derived from Islamic law which generally places a limit of one third of the estate on the amount which a person may bequest (preserving the remainder of the decedent’s estate for family members)¹⁴³ and, therefore, placing cautionary limits on the ability of an ill person to alienate property and extinguish debts in excess of that limit. For instance, the Mejelle provides as follows:

If someone in his mortal sickness has given something to one of his heirs and has died, if the other heirs do not allow it, that gift is not good.
But if he has made a gift and delivered it to a person who is not an heir of his, and a third of his estate is sufficient for

¹³⁸. PLANIOL, supra note 105, at 198.
¹³⁹. Id.
¹⁴⁰. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 350.
¹⁴¹. Id.
¹⁴². TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 355.
¹⁴³. See, e.g., UN-Habitat, Islam, Land & Property Research Series, Paper 6: Islamic Inheritance Laws and Systems, at 10 (2005), available at www2.unhabitat.org/programmes/landtenure/documents/ILP%206.doc: “[A] Muslim’s ability to bequeath is restricted to only one-third of an individual’s estate under certain rules with the remaining two-thirds devolving according to the compulsory inheritance rules.”
the whole of the gift, it is good.
If it is not sufficient, and the heirs do not permit the gift, the gift is good up to the amount, for which the third of the estate is sufficient. The rest, the donee is compelled to return.144

The Tunisian code, therefore, incorporates the Islamic legal limitation of “one third of the estate” into the civil law concept of remission of debt and protections designed to maintain the integrity of Islamic inheritance law. Otherwise, the Tunisian codal language is largely consistent with other modern civil codes, holding that the release of any debt in general and without reservation cannot be revoked.145 Special provisions, however, exempt the finality of such remissions made by an heir in the case of an inherited debt and where that remission was justified by fraud or deceit on the part of the debtor or other people acting in complicity with the debtor.146 It is worth noting here, however, that many continental civil law jurisdictions, likewise, maintain the concept of “forced heirship” (deriving their rules in that regard from Roman law) and similarly prohibit bequests in excess of a certain portion of the decedent’s estate.147 The Tunisian, Islamic, Roman, and continental civil law rules tend to blur into one another at such legal intersections.

2. Novation

The concept of novation is drawn from Roman law but was adapted by civil law jurists throughout the ages so that it is applicable to modern contracts and obligations.148 Under Tunisian law, novation is the extinction of an obligation due to the creation

144. MEJELLE, Art. 879.
145. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 356.
146. Id.
147. Joseph Dainow, The Early Sources of Forced Heirship: Its History in Texas and Louisiana, 4 L.A. L. REV. 60 (1941) (Noting that in Louisiana “as in both French and Spanish law, excessive dispositions are not null, but are reducible to the disposable quantum.”).
148. PLANIOL, supra note 105, at 178: “La novation est un procédé d’origine romaine mais qui s’est bien transformé depuis l’antiquité.”
of a new obligation which is substituted for it. 149 Novation cannot be presumed and, to the contrary, the desire for a novation must be expressed.150 Both the former obligation and the newly formed obligation must be considered legally valid obligations for novation to have effect. 151

The Tunisian Code provides that novation occurs in three types of circumstances: (1) when the creditor and debtor agree to substitute a new obligation for the former, which extinguishes or changes the cause of the former obligation; (2) when a new debtor is substituted for the former who is discharged by the creditor (such a substitution may take place without the participation of the first debtor); and/or (3) where, by the effect of a new commitment, a new creditor is substituted for the former creditor, thus discharging the debtor vis-à-vis the former creditor. 152 Such a definition comports with the concept of novation as it appears in modern civil codes based on the French model. 153

3. Compensation

Civil law doctrine maintains that when two people owe to one another similar obligations, it is not necessary that each one pay the other. Rather, it is simpler to consider each obligation reciprocally extinguished up to the amount of the lesser debt. 154 Litvinoff notes that, in civil law systems based on the French model, “[c]ompensation takes place by operation of law, that is, independently of the will of the parties. The two obligations extinguish each other reciprocally, to the extent of the lesser

149. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 357.
150. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 358.
151. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 359.
152. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 361.
153. See, e.g., LA CIV. CODE art. 1881: “Novation takes place when, by agreement of the parties, a new performance is substituted for that previously owed, or a new cause is substituted for that of the original obligation. If any substantial part of the original performance is still owed, there is no novation.”
154. PLANIOL, supra note 105, at 189; LA CIV. CODE art. 1893.
In systems based on the German model, in contrast, “compensation does not take place automatically, but must be raised as a defense by the interested party...”\textsuperscript{156}

Tunisian law also recognizes this civil law concept, though with a typically Tunisian variant on the theme. According to the Tunisian Code, “[c]ompensation occurs when parties are mutually and personally creditor and debtor of the other. It does not take place between Muslims in cases where it would constitute a violation of religious law.”\textsuperscript{157} Santillana, therefore, again adopts a civil law concept but permits an exception to it for Muslims insofar as it might run afoul of the tenets of Islamic law. Otherwise, Tunisian law permits that compensation may take place between debts which have different causes or are of different portions.\textsuperscript{158} When the two debts are not of the same sum, compensation is carried out up to a maximum of the lesser debt.\textsuperscript{159} Consistent with civil law doctrine, Tunisian law provides that compensation takes place between debts of same kind and quality.\textsuperscript{160} Tunisian law requires that the two debts must be liquidated and presently due, but it is not necessary that they be payable at the same place.\textsuperscript{161}

\textit{4. Confusion}

Planiol defines the civil law concept of confusion as the union of the two qualities of creditor and debtor in the same person (“la\textit{ réunion sur la même tête des deux qualités de créancier et de débiteur}”) and notes that this concept most frequently finds application by the effect of a succession in which a creditor

\begin{itemize}
\item \textsuperscript{155} LITVINOFF, supra note 95.
\item \textsuperscript{156} \textit{Id}.
\item \textsuperscript{157} TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 369.
\item \textsuperscript{158} TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 377.
\item \textsuperscript{159} \textit{Id}.
\item \textsuperscript{160} TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 373.
\item \textsuperscript{161} TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 374.
\end{itemize}
inherits a debt. Under Tunisian law, when the qualities of creditor and debtor of an obligation is together in the same person, there is a confusion of rights which eliminates the relationship between creditor and debtor. Consistent with civil law doctrine, the Tunisian code provides that confusion may be total or partial, depending on whether it occurs for the entire obligation or only a portion. When the cause that produces confusion disappears, the credit-right is revived along with its accessories, for all persons, and confusion is deemed to have never occurred. The Tunisian articles on confusion are scant, but maintain the civil law concept without modification.

E. Vices of Consent

Continental civil law has traditionally held that “le dol, l’erreur et la violence sont les trois causes qui vicent la volonté.” As civil law jurist Saul Litvinoff noted when explaining this concept:

Autonomy of the will is the basic idea that underlies the doctrine of juridical acts implicit in the civil codes of France and Louisiana. From the vantage point of that idea, a person’s declaration of will produces the intended legal effects when the consent it expresses is informed by a reason, a cause, and is also free from interfering circumstances that frustrate its intention. As clearly stated in the Code Napoleon, consent is invalid when it has been given through error, extorted by duress, or obtained by fraud. When such is the case, though consent has come into existence, it is impaired, defective, it is tainted by a vice that affects its freedom.

162. PLANIOL, supra note 105, at 197.
163. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 382.
164. Id.
165. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 383.
166. PLANIOL, supra at 105, at 165.
Islamic law, likewise, has long held that fraud, error, and duress are grounds for rescinding contracts. These legal provisions, therefore, form an area of comparative overlap between Islamic law and continental civil law.

The Tunisian Code incorporates this framework for vitiation of consent—though clearly drawing its provisions principally from the French model. Accordingly, under Tunisian law, the consent of a party is annulable when it is given in error, when induced by fraud, and when it is obtained through violence.

1. Error

Error, under the Tunisian code, can give rise to rescission when it is a legal error or a factual error. With regard to legal error, such an error may result in rescission when (1) it is the sole or principal cause for the obligation; and (2) if it is excusable. A factual error, likewise, may give rise to rescission when it bears on the identity, type, or quality of the object of the obligation. Simple errors in calculation, however, do not give rise to rescission, but they must be rectified.

2. Violence

The vice of consent termed “violence” in the Tunisian code is defined as “coercion without the authority of the law, and subject to which one brings a person to perform an act to which he or she did not consent.” Violence, under Tunisian law, gives rise to

168. See Rahim, supra note 134, at 237; see also Mejelle, Art. 20 and Art. 52.
169. See Rahim, supra note 134, at 237; see also Mejelle, Art. 29 and Art. 32.
170. See Rahim, supra note 134, at 232-237; see also Mejelle, Art. 52.
173. Id.
174. Id.
175. Tunisian Code of Obligations and Contracts, Art. 47.
rescission when that violence was the principal cause for undertaking the obligation and when—having regard to age, gender, status of the person and their level of impressionability—the violence consists of acts that are of such a nature that they are likely to produce physical suffering, or profound mental suffering (from fear, exposing that person’s honor or possessions to material injury). 177

The fear inspired by the threat of prosecution or other legal channels generally will not give rise to rescission under Tunisian law unless the person making the threat does so in a way that qualifies as legally cognizable violence (the sorts of will-overtaking threats described above) and is done so in a way that abuses the position of the threatened party by seeking to extort excessive or undue benefits from him or her. 178

Violence gives rise to rescission of the obligation, even if it was not exercised by one of the parties to the obligation 179 and even if it was exercised upon a person with which the contracting party is closely related by blood. 180 Reverential fear, however, does not give rise to rescission of an obligation unless also accompanied by serious threats or assault. 181

3. Fraud

Fraud gives rise to rescission when the tactics or non-disclosures of one of the parties, or a person who represents or is complicit with that party, are of such a nature that without these tactics or non-disclosures, the other party would not have contracted. 182 The deceit practiced by a third party has the same effect, when the party that benefits from that fraud had knowledge

177. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 51.
178. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 52.
179. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 53.
180. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 54.
181. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 55.
182. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 56.
of it.\textsuperscript{183} Fraud with regard to the accessories of the obligation and which was not central to the obligation can give rise only to damages and not rescission.\textsuperscript{184}

4. Additional Bases for Rescission

There is reason to rescind when the party who contracted was in a state of drunkenness, which has troubled his faculties.\textsuperscript{185} The reasons for rescission based on the State of disease and other similar cases, are subject to the discretion of the judges.\textsuperscript{186}

Under Tunisian law, lesion does not give rise to rescission, unless it is caused by fraud by the other party, the other party’s representative, or by one who acted for the other party.\textsuperscript{187} The only exception to this is when the injured party is a minor or is incompetent, even though he or she would have contracted with the assistance of his guardian or legal counsel in the manner determined by law and although there be no fraud by the other party.\textsuperscript{188} Lesion is defined as any obligation entailing a price differential beyond a third of the given price and the actual value of the thing.\textsuperscript{189}

F. Contract of Sale

A review of the Tunisian provisions relating to the contract of sale reveal an equally interesting blending of continental civil law with Islamic legal precepts, both by incorporating requirements that adhere to the Islamic law of sales and by creating strategic exceptions where Islamic law and continental civil law diverge.

At the outset, the Tunisian code obviously incorporates classical civil law concepts into its provisions on the contract of

\begin{enumerate}
\item\textsuperscript{183} Id.
\item\textsuperscript{184} TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 57.
\item\textsuperscript{185} TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 58.
\item\textsuperscript{186} TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 59.
\item\textsuperscript{187} TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 60.
\item\textsuperscript{188} TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 61.
\item\textsuperscript{189} Id.
\end{enumerate}
sale. In the continental civil law system, "a sale is a contract by which a person, who is called the vendor, obliges himself to transfer the ownership of a thing to another, whereas the other person, who is the buyer, obliges himself to pay the value of the thing in money."\textsuperscript{190} The necessary elements of such a sale are the consent of the parties, a thing to be sold, and a price to be paid.\textsuperscript{191} Modern civil codes around the globe maintain this basic concept of the contract of sale. For instance, under the Louisiana Civil Code, a "[s]ale is a contract whereby a person transfers ownership of a thing to another for a price in money. The thing, the price, and the consent of the parties are requirements for the perfection of a sale."\textsuperscript{192}

The Tunisian code incorporates this very model for the contract of sale. Under Tunisian law, a sale is a contract by which one party transfers ownership of a thing or a right to another contracting party for a price which the latter obligates himself or herself to pay.\textsuperscript{193} A contract of sale is perfected between the parties, as soon as there is consent of the contracting parties (one to sell and the other to buy) and the parties agree on the thing, the price and the other terms of the contract.\textsuperscript{194} The Tunisian code, moreover, requires that the selling price in a contract of sale must be determined. A contract of sale cannot refer the determination of the selling price to a third party or the price paid by a third party, unless the price is known to the contracting parties.\textsuperscript{195} The contract may, however, refer to the fixed market price, or a determined rate, or the average of the market prices, when it comes to goods which do not have a variable price.\textsuperscript{196} When the price is variable, contracting parties are presumed to be referring to the average

\textsuperscript{190} Planiol, \textit{supra} note 105, at 462.
\textsuperscript{191} Id. at 464.
\textsuperscript{192} LA CIV. CODE art. 2439.
\textsuperscript{193} TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 564.
\textsuperscript{194} TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 580.
\textsuperscript{195} TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 579.
\textsuperscript{196} Id.
market price. 197 These requirements are consonant with classical continental civil law insofar as the price must be fixed, but seem to gravitate more toward Islamic law in the rigidity of this requirement. As Planiol notes, continental civil law has long permitted the price in a contract of sale to be determined by outside experts or arbiters, 198 and modern civil codes based on the French model have permitted even more laxity with regard to prices set by third parties and even courts. 199 Islamic law, in contrast, has more adamantly required that the price be determined at the time of the formation of the contract. 200 This is due to the prohibition on gharar (the sale of “items whose existence or characteristics is not certain, the risky nature of which makes the transaction akin to gambling”). 201 Commentators note that a sale in which the price is deferred is an example of gharar. 202 The Tunisian code, by expressly disallowing the selling price to be determined by third persons, thus, aligns more consistently with Islamic law than continental civil law.

Islamic law’s influence on Tunisian law becomes even more pronounced in its articles which hold that a sale is considered null if it is for things that, by nature or circumstances, are unlikely to be delivered to the purchaser; for example: the fish in the water, the

197. Id.
199. See, e.g., LA CIV. CODE art. 2645: “The price may be left to the determination of a third person. If the parties fail to agree on or to appoint such a person, or if the one appointed is unable or unwilling to make a determination, the price may be determined by the court.”
200. MEJELLE, Art. 237: “It is necessary that the price should be named at the time of the sale (Bey’). Therefore, if the price of the thing sold is not mentioned at the time of the sale, the sale is bad (Fasid).” See also MEJELLE, Art. 238: “It is necessary that the price should be known.”
bird in the air, the escaped animal. 203 This prohibition also relates
directly to the prohibition on gharar sales. Commentators have
noted that Islamic law, to varying degrees, has disallowed the sale
of fish in the water and escaped things. 204 “Other hadiths, still of
contemporary relevance, forbid the sale of a bird in the air, a fish
in the water, an escaped animal or slave, or anything else that the
vendor might be unable to deliver owing to lack of possession.” 205
Perhaps even more strikingly, any contract of sale is, likewise,
considered null if it is between Muslims and for things declared
unclean by religious law (la loi religieuse) except the objects
which “religious law” has authorized for trade, such as animal
fertilizer for agricultural purposes. 206 Thus, Tunisian civil law
expressly incorporates Islamic law into its law regulating contracts
and prohibits contracts which would violate its precepts.

Under Tunisian law, the buyer acquires full ownership of the
thing sold, as soon as the contract is perfected by the consent of the
parties. 207 As soon as the contract of sale is perfected, the buyer
may dispose of the thing sold, even before delivery. 208 Likewise,
the seller may assign his or her right to payment, even before the
delivery of the thing, unless there is a contrary agreement by the
parties. 209 Such provisions align with continental civil law which
does not require delivery of the thing in order to have transfer of
ownership in a contract of sale. 210 Interestingly, however, the
Tunisian code provides that these latter provisions relating to
transfer of ownership prior to delivery are inapplicable with regard
to the sale of foodstuffs among Muslims. 211 As noted above,

203. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 571.
204. ABDULLAH ALWI HAJI HASSAN, SALES AND CONTRACTS IN EARLY
ISLAMIC COMMERCIAL LAW 80 (2007).
206. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 575.
207. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 583.
208. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 584.
209. Id.
210. SEMANTE, supra note 93, at 141 (“La délivrance ou tradition n’est plus
auparavant hier requise pour transérer la propriété.”)
211. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 584.
Islamic law in regard to such contracts has very specific requirements with regard to *riba*\textsuperscript{212} and, in this instance, the Tunisian code seems to partially codify the sunna admonishing believers to

\[\text{[sell] gold for gold and silver for silver, wheat for wheat, barley for barley, dates for dates and salt for salt of the same kind for the same kind and the same quantity for the same quantity, from hand to hand and if they differ from each other in quantity sell them as you like but from hand to hand.}\textsuperscript{213}

Moreover, Islamic law, as reflected in the Mejelle, is more limiting with regard to what one may do before delivery of the thing. The Mejelle permits a seller to “dispose of the price of a thing sold before he has received it,”\textsuperscript{214} and, in the case of immovable property that “the purchaser can sell to another, before delivery, the property sold. . . .”\textsuperscript{215} Moveable property, however, cannot generally be sold to another before delivery.\textsuperscript{216} The Mejelle, likewise, gives special significance to delivery in sales involving things sold in quantities that are weighed and do not suffer damage by division (such as corn) in that such a sale becomes final when there is delivery and the amount delivered is correct.\textsuperscript{217} Otherwise, the buyer is given a right of option and may annul the sale or purchase the lesser amount.\textsuperscript{218}

\textsuperscript{212} ABU-MUHAMMAD ABDULLAH BIN ABI-ZAYD & ABDUR-RAHMAN AL-QYRAWANI, THE GIST OF THE TREATISE ON MALIKITE JURISPRUDENCE 84 (1994):

When grains, legumes, and preserved foodstuffs are bartered in kind, the quantity received should be equal to the quantity given; no delay in delivery is allowed in this exchange. It is forbidden to barter foodstuff delivered immediately for foodstuff to be delivered at a subsequent time, whether the exchange is in kind or not, whether the foodstuff is perishable or not.

\textsuperscript{213} RAHIM, \textit{supra} note 134, at 294.

\textsuperscript{214} MEJELLE, Art. 252.

\textsuperscript{215} MEJELLE, Art. 253.

\textsuperscript{216} Id.

\textsuperscript{217} MEJELLE, Art. 223.

\textsuperscript{218} Id.
Mejelle’s provisions, if there is excess in such a case, the surplus belongs to the seller. 219

Belknani similarly highlights article 565 of the Tunisian code, relating to the sale of a thing by an ill person on his or her deathbed. 220 According to that article, the sale by an ill person on his or her deathbed (“during his last illness”), where it is made to one of his heirs with the intention to favor that heir (for example, the thing is sold at a price much lower than the real value of the thing) is governed by the provisions of article 354 of the Tunisian code, 221 which, in turn, states that a remission of debt made by an ill person on his or her deathbed to one of his heirs is valid only if the other heirs ratify the act. 222 In contrast, the sale by an ill person to a non-heir is governed by the provisions of article 355 of the Tunisian code 223 which states that a remission of debt granted by an ill person to a third party is valid up to a maximum of one-third of what remains in the estate after the payment of debts and funeral expenses. 224 Accordingly, under Tunisian law, such a sale could be limited depending on what debts and expenses remain after the death of the seller. Belknani notes that such a sale would be considered mawki‘f under Islamic law, 225 and a review of Islamic jurisprudence finds this provision of the Tunisian code to be derived from the Mejelle:

If a sick person sells something to one of his heirs while he is in his death sickness, it is dependent on the permission of the other heirs, if, after the death of the sick person, they give permission, it takes effect, if they do not give permission, it does not take effect. 226

219. Id.
220. See Belknani, supra note 34, at 22 n.99.
221. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 565.
222. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 354.
223. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 565.
225. See Belknani, supra note 34, at 23.
226. MEJELLE, Art. 393.
Similarly, the Mejelle provides that if a sick person while in his death sickness sells something, for a price less than the value of the thing and a third of his property “is not sufficient to provide for the benefit, the purchaser is compelled to make good the reduction in the price, and if he [does not] make [the reduction], the heirs can annul the sale.”227

In addition, Belknani highlights article 576 of the Tunisian code, relating to the sale of a thing belonging to another, as an example of Islamic legal doctrine being incorporated into the Tunisian code.228 According to this article, the sale of a thing belonging to another is valid: (1) if the true owner of the thing ratifies the sale; or (2) if the seller then acquires ownership of the thing. Where the true owner refuses to ratify the sale, the purchaser may ask for dissolution of the sale. The seller is liable for damages when the purchaser was unaware at the time of the sale that the thing belonged to another. The nullification of the contract, however, can never be opposed by the seller due to the fact that the thing belonged to another.229

G. Contract of Exchange

Civil law jurist A.M. Demante, writing in the 19th Century, noted that the contract of exchange is more ancient than the contact of sale.230 While continental civil law recognizes the contract of sale, so does Islamic law, and the Tunisian code incorporates the concept of this contract in a way that permits it to comport with both legal traditions.

Under Tunisian law, a contract of exchange is a contract by which each party gives to another, as property, a movable or immovable thing, or an intangible right, against another thing or

227. MEJELLE, Art. 394.
228. See Belknani, supra note 34, at 22 n.99.
229. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 576.
230. DEMANTE, supra note 93, at 189.
right of a similar or of a different nature. This comports with modern civil codes which retain this nominate contract and tend to define it as “a contract whereby each party transfers to the other the ownership of a thing other than money.”

Consistent with classical civil law, Tunisian law holds that a contract of exchange is perfected by the consent of the parties. When, however, the contract of exchange regards buildings or other objects susceptible to mortgage, the provisions of the Tunisian code dealing with immoveable property are applicable (namely the contract must be made in writing with a date that is certain and will have no effect vis-à-vis third parties unless it is registered in the registry of finance, subject to the special provisions relating to registered buildings).

When the exchanged objects are different of values, the parties are permitted to make up the difference through cash payments or other objects, at that time or as a future sale. This provision has no effect between Muslims when the exchanged objects are commodities. As with contracts of sale, this exception for Muslims relates to the Islamic rules relating to the sale of commodities and future contracts, which maintain very specific requirements which are occasionally at variance with the continental civil law rules.

**H. Deposit and Sequestration**

A deposit is a contract by which a person surrenders a chattel to another person who undertakes to keep the deposited thing and

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232. See, e.g., **La Civ. Code** art. 2660.
237. **Abu-Muhammad Abdullah bin Abi-Zayd & Abdur-Rahman Al-Qyrawani, supra note 212.**
return it in its individuality. A contract of deposit must be made in writing if it is of a value exceeding one thousand dinars. This rule does not, however, apply to a necessary deposit which is defined as one that was forced by a fortuitous event or force majeure event, such as a fire, a shipwreck or another event, the proof of which may be made by any means, regardless of the value of the object of the deposit.

A person making or accepting a deposit must have the capacity to form obligations. If, however, a person able to bind himself accepts a deposit made by an incapable person, that person is bound by all obligations arising from the deposit.

The depositary is answerable for any foreseeable loss or damage to the thing when (a) he or she receives a salary for the custody of the deposit; and/or (b) when he or she receives deposits as a result of his or her status or according to his or her functions. The depositary is not answerable for loss or damage caused (a) by nature or problems with the thing deposited or by the negligence of the depositor; or (b) in cases of force majeure or fortuitous events, so long as the depositary has not been already put in default for failure to return the thing deposited, or so long as the force majeure is not the depositary’s fault or the fault of persons for which he is responsible. Proof of force majeure or defect of the things is the depositary’s burden, when the depositary receives a salary for the filing or when he received the thing by virtue of his status or pursuant to his functions. Otherwise, the depositary shall ensure the custody of the deposit, with the same diligence that one would apply to things that belong to him.

238. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 995.
239. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 1003.
240. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 998.
241. *Id.*
242. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 1021.
243. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 1022.
244. *Id.*
245. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 1005.
Under Tunisian law, any agreement is void in which the depositary would be held responsible for fortuitous events or force majeure, except in certain circumstances, including those where the depositary receives a salary.\(^{246}\) This last provision only applies between non-Muslims.\(^ {247}\) This exception for Muslims relates to Islamic law governing the delivery of things for safe-keeping, which generally hold a depositary liable for the destruction of the thing entrusted to him, except for cases of fortuitous events or force majeure. The Mejelle’s provisions on this topic, for instance, provide that “if the contract for delivery [for safekeeping] has been made for payment to be made for the safe keeping, in case it is destroyed or wasted by a cause which it is possible to guard against, it becomes a cause of compensation.”\(^ {248}\) When, however, the loss is not something that could be guarded against, then the general rule applies that “if it be destroyed or wasted without any [fault] of the person who accepts it and without any fault in the keeping of it, it does not become necessary to make compensation.”\(^ {249}\) In providing an exception to the civil law rule, the Tunisian code permits this Islamic rule to become operational between Muslims.

I. Mandate

Under Tunisian law, a mandate can be special or general.\(^ {250}\) A special mandate is one that is given for one or more specified endeavors, or which confers only specific powers.\(^ {251}\) It gives power to act in specified endeavors and matters necessarily attendant thereto, according to the nature of the matter.\(^ {252}\) A general mandate, in contrast, is one which gives the mandatary the
power to manage all the interests of the principal without limit, or which confers broad powers without limit in a particular case.\(^{253}\) It gives the power to do all that is in the interests of the principal, according to the nature of the case and the usage of trade, and especially to recover what is due, to pay debts, to carry out conservatory acts, to bring possessory actions, and even enter into obligations to the extent necessary to carry out the affairs for which the principal is responsible.\(^{254}\)

With regard to the sources of law used for the Tunisian rules on mandate, Belknani highlights article 1163 as an example of the integration of Islamic law into the Tunisian code.\(^{255}\) According to that article, the total or partial revocation of the mandate cannot have effect toward third parties of good faith who have contracted with the mandatary before the revocation, except for the principal’s recourse against the mandatary.\(^{256}\) When the law prescribes a determined form for the establishment of the mandate, the same form is required for revocation.\(^{257}\)

A review of the provisions of the Mejelle reveal similar provisions regarding \textit{vekyalet}—a contract in which a person appoints another to conduct affairs on his or her behalf.\(^{258}\) Those provisions make clear that the excesses of the person so appointed (the \textit{vekyl}) do not prejudice third parties but, instead, inure to the detriment of the \textit{vekyl}.\(^{259}\)

\textit{J. Oaths (Les Serments)}

Another area where the gravitational pull of Islamic law and Tunisian custom is evident is in the rules governing oaths. Continental civil law recognizes, among other things, the use of

\(^{253}\) \textsc{Tunisian Code of Obligations and Contracts}, Art. 1119.
\(^{254}\) \textit{Id.}
\(^{255}\) \textit{See} Belknani, \textit{supra} note 34, at 22 n.100.
\(^{256}\) \textsc{Tunisian Code of Obligations and Contracts}, Art. 1163.
\(^{257}\) \textit{Id.}
\(^{258}\) \textsc{Mejelle}, Art. 1449.
\(^{259}\) \textit{E.g.}, \textsc{Mejelle}, Arts. 1470-1471, 1479.
oaths as a manner of proving the existence of facts relevant to civil litigation. For instance, Article 1357 of the French Civil Code provides for the use of judicial oaths (le serment). This has been described as “a remnant of the formalistic medieval procedure” which is used less frequently today. 260 There are three varieties of such judicial oaths in French civil law: the decisory oath (serment décisoire), the supplementary oath (serment supplétoire), and the serment in litem or serment in plaids which deals with damages.

The first of these (the serment décisoire) is an oath administered by one party to the other, upon which the result of the action is made to depend. 261 The serment supplétoire is the oath administered by the judge to one of the parties in order to determine an issue. 262 The last variety (serment en plaids, or serment in litem) is a kind of oath in which, under certain exceptional circumstances, the judge may to administer to a plaintiff in order to determine the value of the thing forming the object of the action. 263

Tunisian law also recognizes two types of oaths for purposes of establishing facts in civil litigation: (1) one which a party refers to the other in order to make the case depend upon it (décisoire); and (2) one which is brought ex officio by the judges to one or the other of parties (supplétoire). 264 Although a lengthy discussion of these devices is beyond the scope of this article, it is worth noting that Tunisian civil law incorporates them, but also imbues them with a

260. See Peter Emilus Herzog, Civil Procedure in France 358 (1967).
261. Oliver Eaton Bodington, An Outline of the French Law of Evidence 72-73 (1904). Writing in 1904, Oliver Eaton Bodington noted that “the serment décisoire, or oath administered by one party to the other, may be administered by any party who has proof to make in support of his demand, or of his plea in defence.” Importantly, such an oath can be made in a variety of judicial contests but can only be made in regard only to “things done by the person himself, or at the doing of which he was present.” Bodington also noted that French courts and commentators have universally held “that the oath can only be administered in regard to facts which are of a decisive character, that is to say, a character which shall determine the issue.”
262. Id. at 72-73.
263. Id.
religious dimension that does not ordinarily exist in continental civil law. Specifically, Article 495 of the Tunisian code notes that “[t]he oath must always be taken in the mosque on Friday or in any other religious place which will be indicated by the party offering the oath and in conformance with the religious sect of the party.” If the place where the oath must be taken is further than three miles from the place where the Court sits, the part to which the oath is referred may refuse to go there. Notably, the party who refuses to be sworn in the indicated place is deemed to have refused the oath. Such provisions—requiring an oath to be taken “in the mosque on Friday or in any other religious place”—imbues this procedure with a religious element that gives recognition to the role of religion in civil affairs.

K. Mouçakâte and Moughâraça

The Tunisian code’s inclusion of the Islamic concepts of mouçakâte and moughâraça are also examples of how Islamic influences can sometimes become dominant traits within the codal text, especially in the code’s treatment of agricultural contracts. With regard to the first of these, the Tunisian civil code incorporates the device of a mouçakâte defining it as a contract by which the owner of a crop which is ready for cultivation charges another person, referred to as a colon, to do the necessary work of picking or harvesting in exchange for a determined share of the harvest. This sort of arrangement is derived from the Islamic legal arrangement with the same name, also transliterated as musaqah or musāqāt, which is generally defined as a type of contract in which “an owner of trees or crops entrusts his trees or crops to a person to look after and water them until they bear fruit

265. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 495.
266. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 496.
267. See Belknani, supra note 34, at 23.
268. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 1395.
or ripen [in exchange for] a specific portion of such fruit or crops.\textsuperscript{269}

The Tunisian code also incorporates the device known as 
\textit{moughâraça}, which it defines as a contract which forms an entity which has for its object the fruit trees or other crops with regard to which one of the parties, known as the colon, is responsible for their planting and care in exchange for an undivided share of the land and soil and the trees or crops.\textsuperscript{270} This is obviously derived from the Islamic property device of the same name—also transliterated as \textit{mugharisah} or \textit{magharisah}—which endows the lessee with real rights and is typically defined as “a contract by virtue of which an owner entrusts land to a person who undertakes to plant it with fruit trees [in exchange for] receiving a portion of the land.”\textsuperscript{271}

Professor Lisa Anderson provides some context for how such a contract would order society in rural North Africa:

In both Tunisia and Libya, the Sahil was often home of a contract known as the \textit{magharisah}, in which property was confided to a land-poor farmer for development; upon its harvest, he was to receive half the land as his own. This type of contract was particularly characteristic of the tree-crop regions, where the first harvest of marketable produce was sometimes decades from planting. The \textit{magharisi}—the developer—was tied to the landowner by numerous personal obligations. During the tenure of the contract, he was often obliged to ask for advances in money or in kind from the landowner, much of which he would not be able to return until the expiration of the agreement, and even then, he might find himself better served by a renewal of the contract than under the obligation to repay his debts.\textsuperscript{272}

Inclusion of such traditional Islamic legal devices demonstrates the way in which Santillana sought to directly instill certain aspects

\textsuperscript{269} See \textsc{Farhat J. Ziaede}, \textit{Property Law in the Arab World} 70-71 (1979).
\textsuperscript{270} \textsc{Tunisian Code of Obligations and Contracts}, Art. 1416.
\textsuperscript{271} Id.
\textsuperscript{272} Anderson, \textit{supra} note 35, at 45.
of Islamic law into the Tunisian code and to preserve both a sense of tradition, historicity, and legal continuity in its text.

IV. CONCLUSION

Tunisia is now emerging as a model for Arab Spring countries seeking a successful transition to democracy. Its recent success in completing its new, post-revolution constitution demonstrates its leading role in the region. As such, legal developments within Tunisia carry the potential for regional impact as other countries seek to emulate its successful transition.\textsuperscript{273} Political contention relating to the role of Islamic law in post-revolution Tunisia, however, will not cease simply because a new constitution is now in force.\textsuperscript{274} Rather, the issues of concern to Islamists in Tunisia and more secular Tunisians will continue to be debated in the corridors of Tunisia’s newly democratic institutions.\textsuperscript{275} Understanding that debate as it relates to Tunisian law necessarily requires an understanding of the domestic law in force in Tunisia, its sources, and its compatibility with Islamic law.

As this article has demonstrated, the fact that Tunisia’s new constitution contains no express reference to Islamic law does not mean that Islamic law plays no role in Tunisia.\textsuperscript{276} To the contrary, an analysis of Tunisian civil law demonstrates the historic and continuing presence of Islamic legal influence in Tunisian civil law. Importantly, this influence—which spans the history of modern Tunisia—has not been a negative aspect or a harmful element. Rather, the Tunisian code demonstrates how Islamic law can function in a modern context alongside continental civil law as part of a mixed jurisdiction in which domestic civil law is derived

\textsuperscript{273} See Woodruff, \textit{supra} note 22.
\textsuperscript{274} See Ghribi, \textit{supra} note 26.
\textsuperscript{275} See \textit{supra} note 22; see also HAMOUDI, \textit{supra} note 89, at 226: “Tunisia, for example, appears deeply split between a moderate Islamist movement that seeks a more enhanced role for Islam, and a strong secular movement significantly influenced by Tunisia’s recent past, which regards such aspirations with uncommon fear.”
\textsuperscript{276} See \textit{supra} note 1.
from a multiplicity of sources, namely the French civil code, the German civil code, several schools of Islamic jurisprudence (especially the Malikite and Hanafite schools), the Mejelle, Tunisian custom, French jurisprudence, and the jurisprudence of French courts which were active in Tunisia during its time as a French protectorate. Equilibrium between continental civil law and Islamic law was achieved in that code through direct incorporation of Islamic law and Islamic legal devices into the codal text; exploiting the natural parallelisms that exist between Islamic law and continental civil law; excepting Muslims from aspects of the civil law which might violate the tenets of Islamic law; and through imparting a religious dimension to otherwise secular legal devices. The result is a codification of civil law which adheres to the modern civil law model inspired by the French civil code, but which is also uniquely Tunisian—and uniquely well-suited to the task of ordering plurality in Tunisia in the aftermath of the Jasmine revolution.

Understanding this aspect of Tunisian civil law informs our understanding of the ongoing debates surrounding the role of Islamic law in post-revolution Tunisia and the significance of constitutional references to Islamic law or the lack thereof. Islamic law has, to some extent, been a part of Tunisian civil law for over 100 years and, because Islamic law is interwoven into the fiber of Tunisia’s foundational legal texts, it will continue to be part of Tunisian civil law under the aegis of the new constitution. As with other countries, however, its compatibility with Islamic law and its incorporation of traditional Tunisian legal devices in the context of a modern civil code has doubtlessly contributed to its institutional durability, and durable institutions of that nature will be needed to

277. See Donlan, supra note 31.
278. See Belknani, supra note 34, at 18.
279. Id.
280. Id.
281. Id.
282. See Voorhoeve, supra note 51, at 54.
maintain stability in a region undergoing such dramatic social and political upheaval. As Béatrice Hibou noted in the preface to the English edition of her excellent work on Tunisia entitled *The Force of Obedience: The Political Economy of Repression in Tunisia*:

> What is happening in Tunisia is important, over and above what this country in North Africa actually represents, with its small population, lacking any income derived from economy, energy sources or geopolitical clout, or any dominant position in the region. These days it benefits from the impact of the Tunisian ‘revolution’ on the rest of the region, in Egypt, of course, but also elsewhere in the Arab world and sub-Saharan Africa. But history has already shown how this ‘little country’ could serve as an example.\(^{283}\)

The fact that Tunisia’s mixed civil law system has persisted for over a century (and remains a celebrated facet of the country’s legal culture) provides reason for optimism as Tunisia moves forward in its transition to democracy. Moreover, other countries in the region may also benefit from the Tunisian experience—the example of this “little country” which has changed the physiognomy of the Middle East and North Africa at almost every level—as they look to develop civil laws which are modern, yet compatible with their legal traditions, customs, and Islamic legal precepts. As noted in this article, it would not be the first time that this small country on the Mediterranean coast illuminated a path for others to follow.

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ABSTRACT

Scotland is typically regarded as a mixed jurisdiction based on an assessment of its combination of civilian and common law traditions. If this narrow definition of “mixture” is opened up, one

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will find several other traditions which are constituent parts of the Scottish legal tradition. Those range from the seemingly remote Celtic and udal law, through feudal and canon law, to the law of the European Union and the European Convention on Human Rights. An holistic approach to the question of mixture requires that each of these traditions is accounted for, especially because of the difficulties in assessing the legacy of any given tradition. Those difficulties are exacerbated by the fact that legal traditions are indiscrete or “impure”, having been the subject of influence, modification, contamination, borrowing and so forth. They have mixed with other traditions, and some have conveyed parts of others. By focusing on the civilian and common law traditions, we risk adopting a reductionist approach to the question of mixture by essentially excluding vital parts of the story: which other traditions were (or are) part of the mixture, which parts disappeared or were subsumed into other traditions, which aspects of one tradition were conveyed by another. An holistic approach also recommends that the predominantly private law oriented focus of the literature is opened up to analysis of public law and criminal law. That will likely bring out further aspects which show that the pedigree of Scots law is a mixture, not only of civilian and common law ingredients, but also of other diverse traditions.

I. INTRODUCTION

Scotland is often described as a “mixed” jurisdiction. Whilst some have claimed that it is the only such system in Europe, others may disagree with that proposition. We are told, at any rate, that Scotland is the oldest among those jurisdictions comprising the world’s “third” legal family.

2. See, for example, arguments advanced that Cyprus and Malta are also mixed systems—see, respectively, Nikitas E. Hatzimihail, Cyprus as a Mixed Legal System, 6 J. CIV. L. STUD. 37; and Kevin Aquilina, The Nature and Sources of the Maltese Mixed Legal System: A Strange Case of Dr. Jekyll and Mr. Hyde?, 4 COMP. L. REV. 1 (2013).
3. VERNON VALENTINE PALMER, MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY 5 (Cambridge Univ. Press 2001); Mauro Bussani & Vernon Valentine Palmer, The Liability Regimes of Europe – Their Façades and
That may be so under a specific casting of the mixed jurisdiction category, principally understood as one combining civilian and common law traditions. In that sense, Konrad Zweigert and Hein Kötz argued that “Scots law deserves particular attention from comparative lawyers as a special instance of the symbiosis of the English and Continental legal traditions.”

That may be understood within what has been said to be “characteristic of mixed jurisdictions,” namely “to retain private civil law within a surrounding system of Anglo-American public law.”

T.B. Smith described the mixed jurisdiction as “basically a civilian system that had been under pressure from the Anglo-American common law and has in part been overlaid by that rival system of jurisprudence.” Similarly, Niall Whitty described it as usually meaning “a civilian system overlaid by the common law.”

Whilst this civilian and common law dichotomy would inevitably place Scotland in a “mixed” category, it represents just one perspective on the concept of “mixture”. If we reconsider what it is that constitutes mixture, in particular by forcing the definition open beyond a simple civilian and common law antithesis, might we change our view of the extent to which Scotland is a mixed jurisdiction, or whether it is a special case among jurisdictions in being “mixed”?

The question becomes one of what, exactly, is being mixed? As Esin Örücü has pointed out, not all mixed systems would be

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mixtures of the same ingredients.\(^8\) This fact has not gone unnoticed in the literature. Vernon Palmer proposed three principal characteristics by which mixed jurisdictions might be identified. First, they should be “built upon dual foundations of common-law and civil-law materials,” and even although other systems “present diverse mixes,” including traditions of religious law, indigenous custom and so on, “common law and civil law [should] constitute the basic building blocks of the legal edifice.”\(^9\) Second, the presence of these dual elements should be “obvious to an ordinary observer.”\(^10\) Third, there is a structural allocation of content: “the civil law will be cordoned off within the field of private law, thus creating the distinction between private continental law and public Anglo-American law.”\(^11\) Notwithstanding Palmer’s definition, which marks off the “mixed jurisdiction” from jurisdictions with traditions otherwise mixed, the basic analytical framework still draws on a civilian and common law dichotomy.\(^12\)

In Scotland, it is well documented that there is a mixture of civilian and common law traditions.\(^13\) However, if one were able to reach into the legal system and remove the civilian and common law components, would all of its content have been extracted? The answer to that must be firmly negative. If one is receptive to the footprint or legacy of other legal traditions in Scots law, they will find them. Those other traditions, too, are part of the mixture; one

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10. *Id.* at 8.
11. *Id.*
12. Palmer has acknowledged the limitations of a straight civilian and common law dichotomy. He also outlined the difference in approach between scholars studying mixture within the civilian and common law framework—whom he described as “scholars in the classic mixed jurisdiction tradition,” and those of a more liberal persuasion who may be regarded as legal pluralists. See Vernon Valentine Palmer, *Mixed Legal Systems – The Origin of the Species*, 28 TUL. EUR. & CIV. L.F. 103 (2013).
which is in Scotland revealed as much more diverse than the initial hybrid of civilian and common law traditions may have suggested. Moreover, even if those comprise the two principal traditions in Scots law, it will be asked whether a quantitative approach is appropriate.

This article considers the mixed quality of Scots law and the Scottish legal tradition in four contexts, each of which is intended to point to a deeper and fuller concept of mixture in the mixed jurisdiction analysis.

The first is an historical perspective: if the civilian and common law traditions are not the only traditions which have left a legacy in the Scottish legal order, what others might be identified? This section gives a brief and non-exhaustive outline of other traditions which have featured in the evolving Scottish legal tradition, namely Scottish common law, feudal law, canon law, udal law, Celtic law, the Bible, and foreign maritime law.

Second, the argument is made that an “updated” view of mixed jurisdiction must take account of the extent to which two major streams of law have permeated Scots law in more modern times — those of the European Union (EU) and the European Convention on Human Rights (ECHR). These cannot be excluded from the analysis, and whilst they may constitute part of the mixture in any jurisdiction to which they relate, that fact alone necessarily distinguishes those jurisdictions from the majority of the world's jurisdictions where neither EU law nor ECHR law is applicable. Moreover, the particular character and structural features of EU and ECHR law are such that they do not receive monolithic, uniform application in each jurisdiction. They gain the colouring of local institutional and normative features which vary among jurisdictions.

The third aspect discussed is one of methodology: an holistic approach is required for the question of mixed jurisdiction. It should be asked whether a quantitative, or some other, framework of analysis is preferred for evaluating whether and to what extent
individual constituent traditions should feature in the discussion. Consideration should be given to how one accounts for temporal dimensions, how one addresses the question of legacy, and the extent to which legal traditions are indiscrete or “impure”. This section will reflect on these issues.

Fourth, it is suggested that the extent to which private law analysis has dominated mixed jurisdiction scholarship has the potential to misrepresent, or only partially represent, the nature of the law and legal system in general. In particular, the discussion may be said to take insufficient account of public law, criminal law and other areas which lie beyond the field of private law. The risk arises that jurisdictions are in general classified according to definitions and analyses conducted along private law fault lines. The suggested outcome is that, if and until other areas of law are properly accounted for, it may be appropriate for the private law literature to explicitly confine itself to private law, and be cautious about purporting to speak to the nature of the wider law and legal system in general terms.

The view taken by this article is very much a general one which aims to address Scots law and the Scottish legal system at their widest extent. That position is purposely taken, both as a response to the tendency of the mixed jurisdiction literature to focus on a private law analysis, and because there appears little reason in principle to begin with a magnified view of any one substantive area of law (such as private law) and to recede from that point to a more general analysis. An alternative approach may have been to move from the principal focus of the literature—private law—out to a more general analysis, however that would reinforce the notion that private law is the natural starting point for the discussion, and the article seeks to contest that idea; at least until (should one be forthcoming) a convincing explanation is given as to why private law should be the main focus of an holistic

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14. See infra section IV.
mixed jurisdiction discussion which can faithfully be said to address the general law and legal system at large. The article therefore raises a series of questions which it is hoped will feed into a discussion on the proper parameters and methodology of the mixed jurisdiction commentary.

By final word of introduction, this article is concerned with “sources” in the sense of the pedigree of law—that is to say, streams or currents of legal tradition. It does not discuss “sources” in the sense of resources of law, such as legislation and the common law, although these are often the media through which legal traditions are conveyed.

II. TRADITIONS OF LAW IN SCOTLAND: HISTORICAL

In line with the principal orientation of the mixed jurisdiction literature on a civilian and common law axis, the contemporary debate on the mixed character of Scots law has primarily been conducted on the same axis.

Even if the civilian and common law elements were the main contributors to Scots law and the Scottish legal tradition as now understood, it is perhaps surprising that such little attention has been given to other contributing traditions in the context of a mixed jurisdiction analysis. The accent on civilian and common law elements is subject to a range of possible criticisms: it is too simplistic an analysis; it is reductionist; it suggests that these are pure and discrete traditions; it is a Eurocentric analysis (and therefore ill-suited for application in a global comparative law context); and so on. The reductionist criticism is particularly instructive because it points to the fact that in measuring a system with a civilian and common law yardstick, the legacy of other traditions is essentially left out of the discussion. That legacy may manifest directly in the Scottish legal tradition, or even indirectly

through another tradition—including through the civilian and common law traditions.

This section outlines some of the other traditions which jostle for recognition of their own respective places within the Scottish legal tradition. Rather than attempting to restate the effect of the civilian and common law traditions in Scotland, the opportunity will instead be taken to give an overview of traditions with a less remarked footprint. The traditions identified are not exhaustive—this is a necessarily brief overview, but should give a taste of the plurality and variety of those traditions.

A. Scottish Common Law

When the “common law” is discussed in the Scottish context, reference is typically made either to the common law tradition deriving from England, or common law as a non-statutory resource of law.

There is recognised to have been, however, a Scottish “common law” in the sense of a more indigenous common law tradition inherited in the mediaeval period. This likely comprised significant elements derived from the English common law tradition, but with Scottish usages, additions and innovations. This would precede the main period of civil law reception in Scotland, as well as the main period of common law reception.

The common law of Scotland\(^{16}\) was a feature of the historical circumstances of the kingdom, and whilst it would include aspects of other legal traditions—such as English common law, mediaeval Roman law and canon law influences—there is also recognised to have been a body of “native Scottish customs,” the first known reference to that “common law” being in a royal brieve from

\(^{16}\) Noting that the approximate geopolitical territory of Scotland as now understood took shape from around the 9th to the 13th centuries. See also infra note 90.
This law was “common” in the sense that it derived from customs common to the various peoples who together made up the people of the Scottish kingdom. The medieval Parliament of Scotland not only enacted programmatic statutes, with their connotations of positivity, but also expressed the accumulated customs—the “common law”—of the realm.

Custom should be understood as an important source (or expression) of “law” in earlier periods in Scotland; indeed, as it was elsewhere in Europe. David Ibbetson identified three senses in which the term “custom” (consuetudo) can be understood in the context of medieval Europe. First, it refers in its least technical sense to the way in which a social group orders its affairs; the way in which things are done. Second, custom is distinguishable from lex: whilst lex is written law (ius scriptum), custom is unwritten (ius non scriptum). They are, however, complementary, in the sense that lex can record customs, clarify them or recognize them as authentic or authoritative. Third, custom is distinguished from lex, but rather than being understood as complementary, lex prevails: it conditions custom.

The importance of custom in the specifically Scottish context comes through in several senses.

First, the kingdom was not socially or demographically cohesive, at least to the extent that it would become; custom was therefore about drawing out “the way things were done” from a variety of social groups. Second, jurisdiction was scattered through a broad array of courts, officials and other bodies. Their jurisdiction was sometimes overlapping or even competing, and they were not united in a defined jurisdictional hierarchy: practices

17. A.M. Godfrey, Civil Justice in Renaissance Scotland: The Origins of a Central Court 18 (Brill 2009).
19. See Godfrey, supra note 17, at 18.
and usages common to these fora could therefore be regarded as customs in a broader sense. Third is the related fact that there was no centralised, characteristically judicial forum until the establishment of the Court of Session (or College of Justice) in 1532: until then, no single judicial institution had the capacity and jurisdiction to regularize the application and implementation of law throughout the kingdom. Underlying patterns or commonalities therefore pointed to customs in the realm. Fourth, Parliament was not purely a legislative body as now understood. Not only did it perform an additional, adjudicative function, its statutes were not always programmatic in nature. Instead, they often promulgated and gave regularised form to existing customs. Finally, the resources of law were not widely recorded in writing. The “way things were done” would therefore embody a bottom-up, constitutive approach to custom, rather than a top-down, prescriptive approach expressed in legal writings.

The common law of Scotland was not confined to substantive content, but necessarily entailed more structural aspects, especially in the context of the emergence of a general framework or system of jurisdiction across the kingdom. Mark Godfrey has written extensively on this subject in the context of the emergence of the Court of Session as a supreme civil court in Scotland in the 16th century.21 The ultimate normative authority of the monarch was essentially the unifying factor in an array of jurisdictions, exercised by a multitude of persons, officials and bodies, the jurisdictions of which were, as noted, sometimes overlapping or even competing. The common law would in this context emerge through common practices or applications of law, or the manner in which remedies were awarded. The various jurisdictions hung together under a general governing role exercised by the King in Council and Parliament, but the mediaeval common law context facilitated the systematization of the legal order and its movement toward an

21. See generally Godfrey, supra note 17.
overall structure, both in terms of jurisdictional hierarchy and structural coherence. Hector MacQueen has powerfully argued that the pleadable briefs of right, mortancestry and novel dissasine occupied a central place in the development of a Scottish common law, and that they were in use in Scotland (modelled on English equivalents) from prior to 1300 until the 15th century or later.

The main, early repository of the Scottish common law was the Regiam Majestatem. Whilst based on the English text De legibus et consuetudinibus regni Angliae attributed to Ranulf de Glanvill (itself an expression of English common law), Regiam Majestatem also incorporated materials from the Romano-Canonical tradition and other early resources, in addition to containing a significant body of feudal material. The date of origin of the text (or texts) is disputed, though it may have been compiled in the early 14th century, or even have been older in nature. It is regarded as the most important statement of Scots law in that period, though it is supplemented by other texts including Quoniam Attachiamenta, and the older, 13th century, Leges Quatuor Burgorum. Regiam Majestatem has itself been referred to in a few cases from the 20th and 21st centuries. It has, for example, been cited with reference to guardianship, testamentary succession, reparation, the

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22. GODFREY, supra note 17, at 269.
25. Id. at paras. 366 and 551.
26. Id. at para. 365.
27. Law Hospital NHS Trust v Lord Advocate, 1996 S.C. 301 at 323, per Lord Clyde.
28. Clark's Executor v Clark, 1943 S.C. 216 at 223, per Lord Justice-Clerk Cooper.
criminal liability of married persons, and the criminal offence of rape.

B. Feudal Law

As noted, *Regiam Majestatem* contained a significant body of feudal material, indicating the presence or legacy of feudalism in this earlier period in Scotland. Whilst it is unclear when feudalism arrived in Scotland, it may have been as early as the end of the 11th century, though it has also been attributed to the reign of King David I of Scotland, which spanned 1124-1153. The idea was that all land belonged to the Crown, and was “feued” out to vassals, often capable of further “subfeuing”. This was in return for services—originally of “men at arms” and produce, or of commodities, and then for monetary payments called feu duties.

From the reign of David I onward, the reach of feudalism was gradually extended in Scotland with the effect of strengthening royal control over the territory. Although there continued to exist pre-feudal estates and lordships, and the campaign of “feudalization” may have had less impact on lower levels of society in the 12th and 13th centuries, feudal charters could grant rights of jurisdiction, particularly manifesting in regality and barony courts (so-called “franchise courts”).

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35. MacQueen, *supra* note 33, at 5-7.
36. *See id.* at 14-17.
jurisdiction was regarded as being distinct from the grant of land itself, with the jurisdiction being heritable,\textsuperscript{38} feudalism clearly had important consequences for the manner in which the law and legal system\textsuperscript{39} were organised.

The system of feudal tenure was not abolished until November 28, 2004.\textsuperscript{40} Whilst the Abolition of Feudal Tenure etc. (Scotland) Act 2000 proclaimed that the “feudal system of land tenure, that is to say the entire system whereby land is held by a vassal on perpetual tenure from a superior is, on the appointed day, abolished,”\textsuperscript{41} this was in fact the end stage in a series of abolitionary steps stretching back over several centuries.\textsuperscript{42} In the wake of feudal tenure came fresh legislation relating to title conditions and tenemental properties,\textsuperscript{43} dealing with specific proprietorial issues which would arise on the abolition of feudal tenure.

Kenneth Reid has described the legacy of feudal tenure in Scotland as “less than might be supposed,” noting that the abolition of feudal tenure brings “the most substantial reception of Roman law in Scotland since the seventeenth century.” One exception to this is the legacy of the affirmative real burden,\textsuperscript{44} a form of condition on the development of land, which Reid described as “a permanent legacy of the feudal era.”\textsuperscript{45}

\textsuperscript{38.  THE LAWS OF SCOTLAND: STAIR MEMORIAL ENCYCLOPAEDIA, Criminal Procedure Second Reissue, para. 20, Butterworths LexisNexis.}
\textsuperscript{39.  To the extent that it is legitimate to (i) speak of a single “system”, and not of a mosaic of “systems”, at that time; and (ii) invoke the connotations of uniformity and regularity associated with a “system”.}
\textsuperscript{40.  The date on which the Abolition of Feudal Tenure etc. (Scotland) Act 2000 took effect.}
\textsuperscript{41.  Abolition of Feudal Tenure etc. (Scotland) Act 2000, s.1.}
\textsuperscript{42.  THE LAWS OF SCOTLAND: STAIR MEMORIAL ENCYCLOPAEDIA, Vol. 18, para. 113, Butterworths LexisNexis.}
\textsuperscript{43.  Title Conditions (Scotland) Act 2003; Tenements (Scotland) Act 2004.}
\textsuperscript{44.  Kenneth G.C. Reid, Vassals No More: Feudalism and Post-Feudalism in Scotland, EUR. REV. PRIV. L. 282, 300 (2003).}
\textsuperscript{45.  Id.}
C. Canon Law

Canon law has left a significant legacy on Scots law and the Scottish legal system. Papal jurisdiction was exercised with regard to disputes in Scotland from at least as early as 1170.⁴⁶ The Court of Session (or College of Justice), established in 1532 as the country's first (and surviving) central and characteristically judicial institution, comprised a bench split equally between spiritual and temporal appointees;⁴⁷ those in the former category being canon lawyers. It was a rule, until 1579, that the President of the College of Justice should be a prelate.⁴⁸ This distinction between spiritual and temporal appointees survived until 1640.⁴⁹

Canon lawyers were also active among the practitioner cohort. Some of these were particularly experienced,⁵⁰ and John Cairns noted that by 1590 there had developed in Edinburgh a professionalised central civil court patronized by an organised legal profession “largely trained in the Roman and canon laws.”⁵¹ A number of intrants to the Court had read both the canon and civil laws predominantly at continental European universities,⁵² though it appears that canon law was in fact taught prior to civil law at the University of St. Andrews.⁵³

⁴⁶. See R.S. MYLNE, THE CANON LAW 9-10 (Morrison & Gibb 1912).
⁴⁷. ROBERT KERR HANNAY, THE COLLEGE OF JUSTICE 109 (William Hodge 1933); and see also the College of Justice Act 1532.
⁴⁸. HANNAY, supra note 47, at 107-109.
⁴⁹. John W. Cairns, Historical Introduction to 1 A HISTORY OF PRIVATE LAW IN SCOTLAND 86 (Kenneth Reid & Reinhard Zimmermann eds., Oxford Univ. Press 2003).
⁵⁰. See, for example, JOHN FINLAY, MEN OF LAW IN PRE-REFORMATION SCOTLAND 87 (Tuckwell Press 2000).
Cairns also noted that canon lawyers were assisting litigants in secular disputes.\textsuperscript{54} Indeed, canon law commanded persuasive authority in the secular courts,\textsuperscript{55} and canonical materials were being cited in secular litigation as early as 1380.\textsuperscript{56} Even though canon law was regarded as the “fouler source” or “dunghill” in some circles,\textsuperscript{57} the institutional writer Sir Thomas Craig wrote that whenever a conflict arose between canon and Roman law, the former was preferred.\textsuperscript{58}

It has been said that the Scots law of marriage and testamentary succession were based on canon law,\textsuperscript{59} and that its influence on the law of obligations was “positive and direct”.\textsuperscript{60} The canonical tradition is also thought to have significantly influenced civil procedure in Scotland,\textsuperscript{61} perhaps influenced by the practice and procedure of the Sacra Rota Romana.\textsuperscript{62} In sum, Lord Cooper wrote of “the extent to which . . . Canonist traditions permeated the thinking of Scottish lawyers,” and noted that the “immense debt which Scots Law owes to Canon Law and Practice has never been sufficiently acknowledged.”\textsuperscript{63} The canonical tradition has also

\textsuperscript{54} Cairns, supra note 49, at 31, 46 and 69-70.
\textsuperscript{55} Gordon, supra note 53, at 23.
\textsuperscript{56} Cairns, supra note 49, at 45.
\textsuperscript{57} See David B. Smith, Canon Law in AN INTRODUCTORY SURVEY OF THE SOURCES AND LITERATURE OF SCOTS LAW 188 (Stair Society 1936).
\textsuperscript{58} Abolition of Feudal Tenure etc. (Scotland) Act, I, 18, 17.
\textsuperscript{60} W. David H. Sellar, Promise in 2 A HISTORY OF PRIVATE LAW IN SCOTLAND 266 (Kenneth Reid & Reinhard Zimmermann eds., Oxford Univ. Press 2004).
\textsuperscript{62} See Robertson, supra note 61, at 121-125.
\textsuperscript{63} LORD COOPER, SELECT SCOTTISH CASES OF THE THIRTEENTH CENTURY xxii (William Hodge 1944).
been described as “powerfully operative”, 64 “longlasting[, and] . . . profound”65 in the Scottish legal system.

D. Udal Law

Norse settlers arrived on Orkney and Shetland, two archipelagos off the north east coast of the Scottish mainland, around 800. Under their rule, the islands were subject to Norse law, or “udal law”.

“Udal” derives etymologically from the Old Norse “ođal”, meaning “ownership of inherited family property in which certain rights belong to the kin.”66 The term “udal law” is used in two senses: narrowly, by reference to the specific regime of land ownership from which it etymologically derives (sometimes referred to as udal tenure); and more broadly, by reference to Norse law as generally applied in Orkney and Shetland.67

Udal law was maintained in Orkney and Shetland upon their transfer to Scotland in the mid-15th century. As part of the marriage arrangements of King James III of Scotland and Margaret, daughter of King Christian I of Denmark, the latter pledged the archipelagos in 1468 and 1469 respectively in lieu of a dowry. Even although Scottish customs and culture had growing influence on the islands, a parliamentary commission was of the view in 1567 that they should be subject to their own laws.68 The contrary view was expressed by the Privy Council in 1611, which

64. HANNAY, supra note 47, at xiv and 107.
67. William Jardine Dobie, Udal Law in AN INTRODUCTORY SURVEY, supra note 57, at 450; JONES, id. at 110.
held that “foreign laws” were no further to be used in Orkney and Shetland.69

One of the characteristic features of udal tenure was the alodial nature of land ownership, that is to say, its ownership by the “udaller” or “odalsman” without service being owed to a superior. This stood in contrast to the feudal system which was widespread in Scotland. The udaller was, however, under strong familial obligations with regard to disposition of land.

In addition to the udal or “odal”, which was the hereditary estate itself, there were also common lands which belonged to the community and were used for pasture, water and so on. These appear to have been known as “commons” in Orkney and as “scattold” or “scattald” in Shetland.70 “Scat”, (from the Norse “skattr”, meaning “tax” or “tribute”) was paid annually for the udal lands in the form of butter, fish, oil and coarse cloth.71 Land could also be let by the udaller to a stranger for a payment of rent called a “leigu-burdr”.72

Although udal tenure is an outstanding feature of the Orcadian and Shetlandic legal traditions, it did not exist to the complete exclusion of feudalism.73 In fact, feudalism came to increasingly displace udal tenure, such as with the Crown’s feuing of the islands and inducing udallers to receive charters for the sake of having written title74—udal land titles were held rather by proof of possession. Other aspects of udal law and custom were displaced, such as the more feudalistic practice of primogeniture coming to supersede partition as the udal mode of succession.75

70. See W.P. DREVER, UDAL LAW IN THE ORKNEYS AND ZETLAND 11 (W. Green 1914).
71. Id.
72. Id. at 3.
73. Id. at 1.
74. See id. at 4-6.
75. Id. at 7.
Other characteristics of the udal legal tradition included rules on prescription,\textsuperscript{76} the mode in which proprietorial ownership was passed,\textsuperscript{77} a system of land measures (such as ouncelands and pennylands)\textsuperscript{78} and of weights and measures (such as pundlars, lispunds and cuttels),\textsuperscript{79} and the existence of a superior court called the “law-thing” (under the presidency of a “law-man”), with the decrees of island courts subject to review in Norway.\textsuperscript{80}

Much of this system of law has since departed, and the courts have ruled against its application in a handful of cases. In 1890, for example, the Court of Session denied that an udal custom, whereby proprietors in Shetland could demand a share of the value of whales stranded and killed on their land, had “the force of law.”\textsuperscript{81}

In an action brought by the Lord Advocate against the University of Aberdeen, with regard to ownership of Pictish antiquities excavated on St. Ninian's Isle, Shetland, the Court of Session held that “the law or rule of Magnus was not still the law of Scotland in the islands of Shetland.”\textsuperscript{82} This referred to a code attributed to King Magnus VI of Norway which was introduced around 1274, which would (it was alleged) be determinative of ownership; but it was not the sum of udal law. Of the state of udal law in general, Lord Patrick said that “the position was long ago reached where nothing could be said with certainty to remain of that law save udal tenure of land, scat, which was the return for udal lands, scattold, which was a right of commonty, and a few weights and measures.”\textsuperscript{83}

\textsuperscript{76} Id. at 8.
\textsuperscript{77} Id. at 8-10.
\textsuperscript{78} Or perhaps “systems” in the plural, as some measures had different values between the archipelagos, and it appears that land in Orkney was subdivided into much smaller units such as merks, uriscops and yowsworths—see id. at 14-15.
\textsuperscript{79} Or perhaps, again, “systems” in the plural.
\textsuperscript{80} See Dobie, supra note 67, at 451-455.
\textsuperscript{81} Bruce v Smith (1890) 17 R. 1000.
\textsuperscript{82} Lord Advocate v University of Aberdeen, 1963 S.C. 533.
\textsuperscript{83} Id. at 556, per Lord Patrick.
In a case in which questions arose as to the legal status of the seabed within the territorial waters around Shetland, the Court of Session declined to find in favour of the applicability of udal law to the seabed.\(^{84}\) Although it was argued that in Norway the seabed was subject to udal law in the same way as the foreshore, it was held that there was no (domestic) authority supporting that contention in Shetland. Udal law did not expressly deal with ownership of the seabed. In addition, as udal land titles were determined by proof of possession, rather than by writing, it seemed contrary to principle to expect that udal tenure should govern the seabed, which was permanently covered by sea water.\(^{85}\)

Whilst much of udal law has perished, udal tenure survives, being recognised both in statute\(^{86}\) and case law.\(^{87}\) Furthermore, the udal legal tradition may be said more generally to have resulted in some local differences as to the application or applicability of law. For example, there was judicial confirmation in 1907 that the feudal law on salmon fishing rights did not apply in Orkney.\(^{88}\) There may also be implications arising from udal tenure for rights relating to the foreshore, cables, pipelines and fishing.

Udal law comprised an additional legal tradition which was influential at least in one part of Scotland, and which does not fall

\(^{84}\) *Shetland Salmon Farmer Association v Crown Estate Commissioners*, 1991 S.L.T. 166.

\(^{85}\) *Id.* at 183, per Lord McCluskey.

\(^{86}\) Land Registration (Scotland) Act 1979, ss.2(1)(a)(v) and 3(3)(b); Abolition of Feudal Tenure etc. (Scotland) Act 2000, sch. 12, para. 39(2)(b); Housing Benefit Regulations 2006/213, art. 2(1); Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006/214, art. 2(1); Land Registration etc. (Scotland) Act 2012, s.50(5). It is stated in the explanatory notes to the Abolition of Feudal Tenure etc. (Scotland) Act 2000, at para. 183, that “Skat is a tribute under udal tenure which equates to feuduty under feudal tenure. In the case of skat, however, this would normally be payable directly to the Crown. Payment of skat has survived only on Orkney and Shetland”.


\(^{88}\) *Lord Advocate v Balfour*, 1907 S.C. 1360.
within the civilian/common law framework. In addition, it had to be conciliated with the law prevailing on the Scottish mainland, and this engaged both the law and institutions of the Scottish mainland.

E. Celtic Law

The content and extent of Celtic law observed in Scotland is obscured by a lack of documentary evidence. Among the few surviving documents are Adomnán's Law, from 697, which sets out laws on armed conflict for the protection of women and non-combatants;\(^89\) and the Book of Deer, which in addition to mainly Christian texts, contains some records of grants of land. Notwithstanding the paucity of surviving written material, David Sellar has made a significant contribution to this otherwise little-remarked pasture of Scottish legal history.

Celtic law is understood as the law pertaining to communities speaking a Celtic language, rather than any specific ethnic group as such. Accordingly, Sellar noted that, of the four main peoples who inhabited Scotland—namely the Scots, Picts, Britons and Anglo-Saxons\(^90\)—only two, the Scots and the Britons, were Celtic peoples, and a third, the Picts, may have been to some extent.\(^91\)

Sellar has argued that “the story of Celtic law in Scotland did not come to an abrupt end with the advent of feudalism.”\(^92\) He illustrated a number of instances in which Celtic legal tradition appears to have made its way into the common or general law of

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90. The Scots, of Dál Riata, were predominantly found in the western coastal areas of Scotland. The Picts were mainly to the north of the River Forth and in the east of Scotland. The Britons were found in Strathclyde and the southwest of Scotland. The Anglo-Saxons were found in Northumbria, straddling the area to the southeast of the River Forth and part of what is now the northeast of England.
91. Sellar, *supra* note 89.
Scotland. For example, whenever the old regality and barony courts were repledging their jurisdiction over inhabitants from within their geographical jurisdiction whom had been accused before other courts, there was a requirement for a person to act in the capacity of a cautioner— in essence, a guarantor— called a “culrath” (or variant spellings thereof). Sellar explained that this represented a technical term of Celtic law, deriving from “cúl” meaning “back”, and “ráth” a “pledge” or “surety”, the etymology of the term providing a good explanation of its function in law.\textsuperscript{93} He cited a number of cases from the 16th century in which this “culrath” was found, and an unsuccessful attempt at repledging as late as 1700.\textsuperscript{94}

Another instance of Celtic legal tradition was that of tanistry, namely, “[l]oosey defined . . . the name given to the system whereby succession to office, typically the office of king or chieftain, is open to various members, or to different segments, of a ruling kindred, rather than descending by primogeniture down the one line, as under feudal law.”\textsuperscript{95} Sellar cited instances of tanistry in Scotland from the 15th, 16th and 17th centuries,\textsuperscript{96} and stated that it was a “long lasting legal concept” which was “capable of being harmonized with others from a quite different background,” including the tutor in both feudal and Roman law.\textsuperscript{97}

Sellar gave a number of other illustrations, arguing that “[s]urvaluations are to be seen not as isolated curiosities, of antiquarian interest only, but as part of the very fabric of a legal system one of the outstanding features of which has been continuity with the past.”\textsuperscript{98} These suggest that Celtic law is another part of the mixture within the Scottish legal tradition.

\textsuperscript{93} See \textit{id.} at 15-16.
\textsuperscript{94} \textit{Id.} at 15.
\textsuperscript{95} \textit{Id.} at 13.
\textsuperscript{96} \textit{Id.} at 14.
\textsuperscript{97} \textit{Id.}
\textsuperscript{98} \textit{Id.} at 20. See also W.D.H. Sellar, \textit{Marriage, Divorce and Concubinage in Gaelic Scotland}, 51 \textit{TRANSACTIONS OF THE GAELIC SOCIETY OF INVERNESS}
F. The Bible

The law of Scotland included part of the Bible. The most notable example was the Incest Act 1567, which prohibited incest by consanguinity and affinity with the degrees of relation “as is contenit in the xvij Cheptour of Leuiticus.” That is to say, the 18th chapter of Leviticus was directly incorporated as part of the Scots law of incest. What is all the more remarkable is that this state of affairs persisted until the repeal of the 1567 Act by the Incest and Related Offences (Scotland) Act 1986.

It is not the only example of reliance on Biblical sources in Scots law. Sodomy and bestiality were punishable by death as criminal offences, not due to criminalising legislation, but because according to the Bible they constituted sins. More recently, the view was taken in a case from 1963 that two verses of the Book of Exodus may have been made part of the law of Scotland by a previous case with regard to liability for animals. In addition to these specific examples of reliance on the Bible, it has been argued that Christian theological doctrine, and Calvinist Presbyterianism in particular, significantly influenced Scots criminal law and its particular brand of moralism.

G. Foreign Maritime Law

The High Court of Admiralty was one Scotland’s central courts, in existence until its jurisdiction was transferred to the Court of Session by statute in 1830. It commanded jurisdiction

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101. See generally Kennedy, supra note 99.
102. Court of Session Act 1830, s.21.
over prize,\textsuperscript{103} maritime and admiralty affairs, both civil and criminal.

It was stated by Thomas Callander Wade that the law administered by the High Court of Admiralty was “the customary law of the sea, and not necessarily the ordinary law of the land . . . a sort of general law of the sea based on the \textit{jus gentium} and customs of seafaring men.”\textsuperscript{104} These were formally expressed in various codes, the most authoritative of which was said to have been the 13th century\textsuperscript{105} \textit{Rôles d’Oléron}, (of which there were Scots translations\textsuperscript{106}) which had application throughout Northwestern Europe. Edda Frankot argued that one can “assume that the \textit{Rôles d’Oléron} were part of the central body of medieval Scottish law,”\textsuperscript{107} and that although there is “no specific evidence that the \textit{Rôles} were adopted as the official Scottish sea law... that the extant copies are all part of compilations of the main Scottish laws does suggest that they were in common use throughout the country.”\textsuperscript{108} Wade also stated that the \textit{Lex Rhodia} (used primarily in the Mediterranean), incorporated in the \textit{Digest} of Justinian, (and therefore in “Roman law”), was “if not … authoritative, at least … a useful guide.”\textsuperscript{109} There may also have been knowledge in Scotland of the Gotland or Wisby Sea Law,\textsuperscript{110} primarily used in the Baltic.

\textsuperscript{103} Prize jurisdiction is that over enemy property seized or captured at sea.
\textsuperscript{104} THOMAS CALLANDER WADE (ed.), \textit{ACTA CURIAE ADMIRALLATUS SCOTIAE xix} (Stair Society 1937).
\textsuperscript{107} Frankot, supra note 106, at 164.
\textsuperscript{108} FRANKOT, supra note 105, at 13.
\textsuperscript{109} WADE, supra note 104, at xix.
\textsuperscript{110} Frankot, supra note 106, at 164; though see FRANKOT, supra note 105, at 88.
The sources of maritime and admiralty law in Scotland were considered by some of the institutional writers. Viscount Stair noted that “the rule by which the Lords have always proceeded in the matter of prizes hath been the law and custom of nations,” and that “the Lords . . . do not exclude the defence of strangers . . . though that be a rule by our custom, but do proceed according to the common law of nations.” George Joseph Bell stated that Scots maritime law “partakes more of the character of international law than any other branch of jurisprudence,” noting that “in all the discussions on this subject in our Courts, the continental collections and treaties on this subject, and the English books of reports, have been received as authority by our Judges, where not unfitted for our adoption by any peculiarity which our practice does not recognize.” He listed, by order of authority in that regard: first, foreign maritime codes and laws (the Rhodian laws, Il Consolato del Mare, the laws of Oléron and Wisby, the Ordinances of the Hanseatic Towns, Le Guidon de la Mer, the Ordonnance de la Marine, and the Code de Commerce); second, the decisions of foreign maritime and mercantile courts (in particular the High Court of Admiralty in England, the mercantile court of Genoa, the supreme civil courts of Friesland, and the courts of Holland); and third, the works of foreign writers in maritime law.

These suggest a broad array of non-Scottish sources in use in maritime and admiralty causes in the Scottish courts, which do not appear to align with a simple civilian/common law dichotomy.

111. Stair, Institutions, II, 2, 6; with the “Lords” (i.e. the Court of Session) nevertheless observing treaties between the King and his allies, “in so far as they differ from the common law of nations”.


113. Id. at 498-502. Several foreign sources are cited by A.R.G. McMillan, Admiralty and Maritime Law in An Introductory Survey, supra note 57, at 325.
There is another dimension to the concept of a mixed legal system which has not gone unacknowledged in the literature, but which should be emphasised as potentially further disturbing a simple civilian and common law dichotomy. That is the extent to which two modern streams of law or legal tradition have permeated the Scottish legal order: the law of the European Union (EU) and the law on the European Convention on Human Rights (ECHR). Other “external” streams of law may be making their way into Scots law, such as aspects of modern international law, but the EU and ECHR dimensions have arguably had a particularly extensive impact on domestic Scots law, and for that reason those two streams of law will be selected for comment.

A. European Union Law

Scotland, along with the other UK jurisdictions, became subject to the law of the European Communities upon the coming into effect of the European Communities Act 1972. The norms, processes and institutions of the European Communities were gradually developed to the far-reaching extent of the European Union of the present day. Through directives, regulations and other legal instruments, much EU-generated law has filtered into and shaped domestic law in Scotland, as it has elsewhere in the EU. Moreover, the European Court of Justice serves as the highest court in matters of EU law, its decisions serving both an interpretive and adjudicative function with the potential to have far-reaching consequences for domestic law.

114.  See, for example, Örücü, supra note 8, at at 10, 12 and 14; and Chris Himsworth, Scotland: The Constitutional Protection of a Mixed Legal System in ONE COUNTRY, TWO SYSTEMS, THREE LEGAL ORDERS – PERSPECTIVES OF EVOLUTION: ESSAYS ON MACAU’S AUTONOMY AFTER THE RESUMPTION OF SOVEREIGNTY BY CHINA 120 (Jorge Costa Oliveira & Paulo Cardinal eds., Springer 2009).
The substantive reach of EU law is wide, including such diverse fields as education, employment, health and safety, consumer protection, financial regulation, companies, competition, intellectual property and data protection. It has also established extensive frameworks relating to the free movement of persons, goods, capital and services, which have implications across several areas of law.

Whilst it is true that EU law does not regulate everything in the domestic legal sphere, and that it is often implemented through media of national law and institutions, as in the case of directives, it cannot fail to be considered as a major source of law in the evolving Scottish legal tradition. It brings, indeed, another legal tradition to Scotland as manifested in the norms, systems, processes, practices and institutions of the EU—a tradition which is not confined to a single area of law. The civilian/common law dichotomy is at risk of looking outdated in the context of such a pregnant legal tradition as that of the EU; one which stretches across much of Europe. The EU legal order indeed has great potential for legal convergence or “harmonisation” across the member state jurisdictions, buttressed by the judicial clout of the European Court of Justice. This is a major dimension which must surely feature in a modern sources of law and legal traditions discussion.

B. European Convention on Human Rights Law

The law and jurisprudence on the European Convention on Human Rights is another distinct stream of law or emerging legal tradition.

The ECHR was ratified by the UK in 1951, but was not formally introduced into the domestic legal space until the enactment of the Human Rights Act 1998. Under that regime,

115. This potential for legal convergence or harmonisation is sometimes seen as a medium or catalyst by which a new European ius commune can be achieved.
courts and tribunals in the UK must “take into account” the judgments, decisions, declarations and advisory opinions of the European Court of Human Rights;\(^{116}\) they must interpret primary and secondary legislation in a manner that it is compatible with Convention rights;\(^{117}\) and they can declare that legislation is incompatible with the Convention.\(^{118}\) It is unlawful for public authorities, which includes courts and tribunals, to act in a manner that is incompatible with Convention rights.\(^{119}\) If a Minister of the Crown considers that there are compelling reasons for doing so, he may by order make such amendments to legislation that has been declared incompatible, as he considers necessary to remove the incompatibility.\(^{120}\)

The human rights framework has had an additional dimension in Scotland: Acts of the Scottish Parliament are deemed by the Scotland Act 1998 to be “not law” to the extent that they contravene Convention rights.\(^{121}\) The ECHR indeed bears on the very legislative competence of the Scottish Parliament.

The ECHR legal framework as implemented in the UK is thus an overarching one, bearing on the way in which public authorities conduct their activities, the way in which courts interpret legislation, and even the way in which the Scottish Parliament can legislate. There is, moreover, not only a statutory framework in the form of the Human Rights Act, but an ever-growing body of human rights jurisprudence both in the domestic courts and the European Court of Human Rights. These stimulate a deep well of human rights law and jurisprudence which does not appear to resonate with a simple civilian/common law analysis.

Before the “traditions of law” part of this article is left behind, there is an open question which should be posed: how would we

\(^{116}\) Human Rights Act 1998, s.2.
\(^{117}\) Id. at s.3.
\(^{118}\) Id. at s.4.
\(^{119}\) Id. at s.6.
\(^{120}\) Id. at s.10.
\(^{121}\) Scotland Act 1998, s.29.
characterise those great areas of law, especially statutory law, which do not seem readily to correspond with the aforementioned traditions? Are the many statutes which regulate fields as diverse as pensions, social security, health and safety at work and road traffic to be regarded as expressions of the (English) common law tradition? Are they somehow connected to the civilian tradition? Or are they in some other category, perhaps a more general “modern statutory law” category, whether of Scotland or the wider UK? Furthermore, what import might devolution hold for this: is legislation of the Scottish Parliament spawning a nascent legal tradition, distinct from that of the UK Parliament?

These questions, whatever their answers, lead into essential issues of methodology.

IV. REQUIREMENT FOR AN HOLISTIC ANALYSIS

Whether or not it is correct to say that the civilian and common law traditions are the dual foundations or building blocks of Scots law, those are clearly only part of the story when it comes to describing Scotland as a mixed jurisdiction. As Chris Himsworth observed, “the Scottish system is inadequately described simply as a mix of common law and civil law.”122 Other traditions have occupied their own place in Scottish legal tradition, including some with considerable legacy, such as canon law. It is only by means of an holistic analysis that we can achieve a more faithful statement of the character of the law and legal system as a whole, beyond its *prima facie* civilian and common law parts.

The first question to be clarified is one which goes to the heart of the methodology employed in evaluating mixture in legal traditions. If the principal traditions of law in Scotland are civilian and common law in nature (and it would have to be shown how that is so), then this might form the basis for an argument that those should form the backbone of the analysis. Perhaps the Celtic

or udal law traditions are not worth bothering about because they seem so remote or marginal, or because their modern relevance seems so slight. This is essentially a quantitative approach whereby the analysis seems driven by a search for the size of a legal tradition's footprint: the civilian and common law traditions merit the most attention because theirs is the “largest” contribution.

It seems that even a quantitative approach must be at least partly qualitative, however. In measuring canon law against feudal law, for example, one must surely take account of the fact that the canon law influence is arguably the more enduring—in civil procedure, and so on.

If one insists on a strict definition of mixture, however, a tradition seems worthy of attention whether its contribution is 50% or 5%. Of course, we may be tempted, and even justified, in affording the 50% more consideration than the 5%; but should we then demote the 5% from our analysis, or from the principal axis of assessment, simply because it is 5% and not 50%? It sometimes appears that this is what happens in the mixed jurisdiction literature, with traditions bearing a smaller footprint overshadowed by a debate over which of the two major contributions, civilian or common law, first penetrated Scotland, or which was the more influential. A legal tradition is the sum of its constituent parts, and any exclusion of its constituent traditions from the discussion is an omission. It encourages an incomplete or distorted evaluation of the receiving legal tradition.

A second issue in methodology is our attitude toward the temporal aspect of the analysis. In particular, to what extent is, or should, our approach be time-bound? Are we relaxed about timelines, or eager to keep “updating” our evaluation of Scottish legal tradition with each development? Should we, for example, regard feudal law as a minor contributor to Scottish legal tradition now that feudal tenure has finally been abolished? Should it have been demoted in our analysis when the Abolition of Feudal Tenure etc. (Scotland) Act 2000 came into effect? Or should it continue to
feature prominently in our analysis because it still underpinned land ownership in Scotland until quite recently, and indeed because Scotland was remarkably placed in Europe in having a system of feudal tenure in place at such a late date? Do we continue to recognise the extent to which feudal law made land ownership in Scotland distinctive, or look upon it as an historical artefact? If, incidentally, we opt for an approach of continual updating, the time may have come to challenge a straight civilian and common law dichotomy as “outdated” in light of the aforementioned EU and ECHR contexts.

The temporal dimension leads into another question: how do we assess legacy? A meaningful contemporary analysis should probably not be concerned with bygone traditions that were once observed somewhere in the land we now call Scotland, but which are firmly extinct. Instead, we should be concerned with those which have left some footprint on Scots law or the Scottish legal system.

The question of legacy is, however, far from straightforward. How, for example, would we assess the legacy of feudal law in Scotland? To what extent has the abolition of feudal tenure diminished the feudal legacy? Clearly the active feudal component of Scots law has waned, but does that signify a corresponding diminution in legacy? It is perhaps too superficial to suggest that the legacy of feudal law is present only to the extent that feudal components are present, active and visible in the system. Somewhere between the extremes of the defunct legal tradition, and that which is still in obvious operation, is a grey area where a tradition is no longer observed in its own terms, but the legacy of which lingers on. To what extent has feudal law influenced the Scottish legal tradition in the longer term? To what extent has it bequeathed deeper conceptual, methodological or structural elements to the legal order? How different would Scots law, including property law and jurisdiction, look today had feudal law never arrived on Scottish shores?
The question of legacy is further complicated by another phenomenon: legal traditions are not discrete. Aspects of one tradition may, and are perhaps even likely to, inform, shape, alter or influence others with which they have contact. They are and have been incorporated into others. That is evident in the very concept of a “Scottish legal tradition” embodying aspects of other legal traditions,—civilian, canonical and so on. It is also evident from the literature; Hector MacQueen and David Sellar wrote, for example, that “from the time of its emergence in the Middle Ages, the common law of Scotland has been open to influence from both the common law and the civilian tradition. It has been a ‘mixed’ system from the very beginning.”123 In other words, the civilian and common law traditions were both received into a third entity: the Scottish common law. It was not the case that these two traditions arrived in a vacuum, and that the two combined to produce a Scottish legal tradition. Whilst that might seem obvious, it is immediately apparent why it is unsatisfactory to measure “mixture” by principal reference to the two received traditions (civilian and common law), but not the receiving tradition (Scottish common law).

The indiscrete or “impure” reality of legal traditions demands that we revisit the temporal aspect. Consider, in particular, the extent to which the timelines of the various legal traditions overlap, and then the corresponding improbability that these traditions would, or could, be kept discrete. Of the traditions discussed in this article, the most ancient to be observed in “Scotland” is Celtic law. This significantly predated the Christian era, and as outlined, aspects of Celtic law survived in Scotland until as late as the 17th century. By then, a number of other traditions were already coexisting in Scotland. Feudalism may have arrived as early as the end of the 11th century. A Scottish

common law was in existence by at least the mid-13th century. It has been said that this was modelled after English common law to such an extent that it is “legitimate . . . to speak of a Reception.”\textsuperscript{124} Canon law commanded sufficient authority in Scotland to be cited in \textit{secular} cases by 1380. The Roman tradition may have begun to indirectly influence Scots law from the 13th century,\textsuperscript{125} and Scots lawyers were being educated in civil law at continental European universities from the 14th century.\textsuperscript{126} Even before one folds the udal, Biblical or diverse maritime legal traditions into the analysis, the temporal overlap among these traditions is clear.

The coexistence or cohabitation of these traditions was unlikely to be—indeed, was not—politely discrete. The picture that emerges is not only one in which civilian and common law were but two of several traditions; but one of, to adopt a fitting term used by Örücü, “encounter and combination”.\textsuperscript{127} The traditions would perhaps inevitably compete, compare, borrow, lend, analogise, innovate, imitate, overlap, contaminate; in short, mix.

This is borne out by some initial evidence which could form a separate topic of research in its own right: the extent to which the constituent traditions of Scots law were or are “impure”. As crossovers, mutations and adaptations occurred, aspects of traditions would be absorbed into others and even be conveyed by them. Canon law may be taken as an example. Canon law was heavily influenced by the Roman law tradition from as early as the 4th century,\textsuperscript{128} and continued to be influenced in a variety of ways in the centuries that followed.\textsuperscript{129} The European \textit{ius commune} was essentially a product of cross-pollination between the canon law

\begin{itemize}
\item \textsuperscript{124} Sellar, \textit{supra} note 13, at at 6.
\item \textsuperscript{125} Gordon, \textit{supra} note 53, at 15 \textit{et seq.}
\item \textsuperscript{126} \textit{Id.} at 19-20.
\item \textsuperscript{127} Örücü, \textit{supra} note 8, at 5.
\item \textsuperscript{128} See JAMES A. CORIDON, \textit{AN INTRODUCTION TO CANON LAW} 11-19 (Geoffrey Chapman 1991).
\item \textsuperscript{129} See, for example, JAMES A. BRUNDAGE, \textit{MEDIEVAL CANON LAW} 59-60 (Longman 1995); Robertson, \textit{supra} note 59, at 112-115; and JOSEPH DODD, \textit{A HISTORY OF CANON LAW} 134-135 (Parker, London 1884).
\end{itemize}
and Roman law traditions. As such, the practise of canon law often meant indirectly drawing on the Roman law tradition. In other words, aspects of civilian tradition were conveyed through canon law before there was a more direct reception of the civilian tradition in Scots law. Nevertheless, the canonical tradition is excluded from the principal axis of civilian and common law assessment in the orthodox mixed jurisdiction methodology.

Canon law is not alone in its apparent “impurity”. The Scottish common law was, as noted, open to influence from the English common law and civilian traditions, and was also penetrated by the canon law of arbitration. The evolving Scots feudal tradition, including its more formal and customary aspects, drew upon the English feudal tradition, and may also have drawn upon traditions from parts of continental Europe such as Normandy, Brittany and Flanders. It has also been argued to have been reinforced by the Scottish common law and shaped by the European ius commune, and the system of feudal tenure may even have incorporated aspects of Celtic legal tradition.

Even the two great traditions often cast as adversaries, civilian and common law, failed to be discrete: English common law, for example, appears to have been influenced by civil law, canon law, and even Celtic law. It is likewise implausible that civil law stood insulated from the influence of other legal traditions, and not least from the canonical tradition. The ius commune is just one aspect of that. Accordingly, even although each tradition has been

131. See David B. Smith, Roman Law in AN INTRODUCTORY SURVEY, supra note 57, at 172; and Robertson, supra note 61.
132. See MacQueen & Sellar, supra note 123.
133. GODFREY, supra note 17, at 363-364 and 373.
134. MacQueen, supra note 33, at 12-14.
135. See id. at 17-26.
136. See, for example, Sellar, supra note 92, at 6-7.
137. See, for example, David J. Seipp, The Reception of Canon Law and Civil Law in the Common Law Courts before 1600, 13(3) OXFORD J. LEGAL STUD. 388 (1993).
separately identified and discussed in the foregoing part of this article, this has been done for taxonomic convenience only, and should not give the impression that these traditions were at all times separate and discrete. They are separately identified precisely to highlight the diversity of the Scottish legal tradition of which they became constituent ingredients.

Even if it were the case that the civilian and common law traditions were the two great streams which emerged from this clutter of traditions, they were by that stage, whenever it could be said to have occurred, quite impure. The extent to which they were impure, or bore the marks of other traditions, is not for this contribution to assess; but it is clear that the idea of a civilian and common law template with which to measure the character or imprint of Scots law becomes less plausible when these considerations are taken into account. If aspects of one legal tradition were mixed up with, or latent in, other legal traditions, the question arises as to the point at which aspects of the former tradition become aspects of the latter tradition. When one feature is incorporated into a conveying or vehicular tradition, to what extent is the bequeathing tradition removed from the equation? Has that feature now passed into the claim (or even definition) of the receiving tradition, or has it merely acquired the colour or veneer of a conveying tradition?

Moreover, if aspects of one tradition become conveyed through multiple traditions, how are we to characterise those elements? As noted, the civilian tradition was not only received in its own right, but also through canon law, and perhaps through other traditions; even the English common law tradition. It becomes hugely difficult to separate out all of the civilian strands from the conveying traditions.

Further still, to the extent that civilian elements survive in Scots law, they are collectively conveyed through Scottish legal tradition. The civilian tradition is, of course, conveyed in other jurisdictions, too, bearing the marks and idiosyncrasies of those
conveying traditions. As such, which version of civilian tradition is to be regarded as the “most civilian”? In other words, do civilian elements not acquire and become bound up in their conveying traditions such that it becomes decreasingly meaningful to speak about a single civilian tradition? Or is the discussion purely historical or genealogical, such that there is regarded as some end point after which the civilian tradition is either “deceased” or regarded as something different?

If therefore, the basic argument is that Scotland is a mixed jurisdiction because it combines the civilian and common law traditions, the concept of mixture is revealed as selective and reductionist. First, as noted, Scots law also incorporates aspects of other legal traditions. Second, even were it convincingly demonstrated that its dual foundations or basic building blocks are civilian and common law in nature, those foundations have themselves been the subjects of mixing, distortion, contamination, evolution and so on. Neither is purely civilian nor common law in its own right. Third, the Scottish legal tradition, like all extant traditions, is a living tradition. It evolves and undergoes change. Even if it was the case that the civilian and common law inheritances were the dual foundations or basic building blocks of Scots law, they have not necessarily remained so. In particular, a serious contemporary analysis cannot avoid accounting for the EU and ECHR traditions, and considering the extent to which they might dilute or further enrich the mixture of existing traditions. Furthermore, serious consideration should be given to how a great deal of modern statutory law is to be classified. Finally, the very receiving of aspects of the civilian and common law traditions was at least partly achieved by way of conveyance through other traditions. Those conveying traditions are then excluded from the basic dichotomy, even although they played a role in the very manifestation of certain civilian and common law elements.
Perhaps the civilian and common law dichotomy remains a valuable tool in the comparative private law context. Perhaps if all systems were regarded as mixed, in its broadest sense, then one of the principal tools of comparison would be discarded, and the special nature of the mixed jurisdiction category lost.

However, the dichotomy faces significant methodological challenges, and is at risk of tempting a distorted and exaggerated picture of Scots law and the Scottish legal tradition. It also arguably offers limited scope in a global comparative law context. If the world is truly a patchwork, not only of civilian and common law traditions, but of varying shapes and shades of canon, Celtic, Norse, Norman, Islamic, Talmudic, Chinese, Adat, socialist, tribal, customary law, and so on—how meaningful is a civilian and common law dichotomous approach to the question of mixed jurisdiction? Or is the mixed jurisdiction analysis intended for a more limited, European and private law audience? The very nature of taxonomy may require that regarding every system as a mixed system is against the spirit of the exercise, but the taxonomy should not be any more reductionist than is unavoidable; either in the sense of how many traditions are represented, or the extent to which traditions are or can be regarded as pure or discrete.

If, however, there is still value in approaching questions of comparative law by reference to a civilian and common law yardstick, and in continuing to identify Scotland as one of the quintessential mixed jurisdictions, that reference to mixture should, at very least, not be perceived to exhaust the definition. It serves just one analytical framework, which neither shows the full extent of mixture within this particular mixed jurisdiction, nor which properly scrutinises the other legal traditions which may constitute part of the mixture, including those which played a role in conveying or influencing civilian and common law ingredients.

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139. See infra section IV.
140. Id.
V. OVER-EMPHASIS ON PRIVATE LAW?

The literature discussing the detail and extent of Scotland's mixed legal heritage has focused primarily on private law. It may be asked why it is that the topic of Scotland as a mixed jurisdiction has been examined primarily in a private law context. A plausible answer is simply that it has captured the interest of private lawyers much more than that of public lawyers. As the field receives more private law contributions, perhaps public and criminal lawyers do not regard this as a subject for them, that they have little to contribute to a field heavily aligned with a private law analysis.

Perhaps there is a different, or additional, reason: if Scots law is more distinctive from its English counterpart in the field of private law than in public law, then private law may be the natural focal point, because it is potentially where the distinctiveness factor is at its most pronounced. If that were the reason, or a reason, the literature would benefit from clarification on this point, and would in that case surely have to include more consideration

141. Though not exclusively. See, for example, a brief comment on public law and criminal law in Sellar, supra note 13, at 8-9; a private law take on what is typically conceived as a public law area in Hector L. MacQueen, Human Rights and Private Law in Scotland: A Response to President Barak, 78 TUL. L. REV. 363 (2003); and Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa, (Reinhard Zimmermann, Daniel Visser & Kenneth Reid eds., Oxford Univ. Press 2004), in which there are references to human rights law in the chapter on nuisance by François du Bois and Elspeth Reid. An exception to the general trend, which comes rather from a public law perspective, is Himsworth, supra note 114, at 119-141; and see also Esin Örücü, Approaching Public Law as a “Mixed System”, JUR. REV. 131 (2002).

142. See, for example, Robin Evans-Jones, Unjust Enrichment, Contract and the Third Reception of Roman law in Scotland, 109 L.Q. REV. 663 (1993); Evans-Jones, supra note 13; Robin Evans-Jones, Roman law in Scotland and England and the Development of one Law for Britain, 115 L.Q. REV. 605 (1999); George L. Gretton, Reception Without Integration? Floating Charges and Mixed Systems, 78 TUL. L. REV. 307 (2003); MacQueen, supra note 1; Hector MacQueen, Unjustified Enrichment in Mixed Legal Systems, 13 RESTITUTION L. REV. 21 (2005); Whitty, supra note 7; and Zimmermann, Visser & Reid, supra note 141.

143. This may be the suggestion of MacQueen, supra note 1, at 317.
of non-private law areas, such as public law and criminal law, in order to arrive at such a conclusion.

We therefore find that the mixed jurisdiction discussion is dominated by some quite particular attributes. First, the main focus in terms of pedigree is on the civilian and common law traditions. The contributors to the literature have certainly not been ignorant of other traditions. On the contrary, some have made significant contributions on other legal traditions, such as Hector MacQueen on the Scottish common law, and David Sellar on Celtic law. However, for whatever reason, these have tended not to be folded into the wider mixed jurisdiction literature.

Second, the main focus in terms of area of law has firmly been that of private law. It is not that public law or criminal law aspects have gone unremarked—again, we find these occasionally mentioned in the literature. However, the field is dominated by private law oriented analysis. It is through a private law lens that the evaluation of the mixed character of Scots law has been made.

These comments are not intended to diminish the valuable work that has been invested in the private law literature. The suggestion is rather that, if and until other areas of law are properly accounted for, it may be appropriate for private law contributions to explicitly confine themselves to private law, and be cautious about purporting to speak to the nature of the wider law and legal system in general terms. Some of the scholarship has been sensitive to this very point. Kenneth Reid and Reinhard

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144. See, for example, acknowledgement of other legal traditions in Kenneth Reid & Reinhard Zimmermann, *The Development of Legal Doctrine in a Mixed System* in Reid & Zimmermann, *supra* note 49, at 2-3 and 7. Reid and Zimmermann also described the "deeply entrenched and irreducible chasm between the civil law and common law traditions" as "exaggerated", and, even within the "civil law systems", such a dichotomy "is in danger of underrating [their] diversity"—*id.* at 2-3. Notwithstanding these observations, the contribution in question still primarily orientates its "mixed" analysis on civilian and common law fault lines.


147. See *supra* note 141.
Zimmermann, for example, were clear that the two-volume work of which they were editors, *A History of Private Law in Scotland*, was not a “full history of legal doctrine in Scotland,” but was instead, “confined to private law and within private law to selected topics from the law of property and the law of obligations.”

What seems apparent is a potential usefulness of the mixed jurisdiction category to comparative lawyers as a study in approximating or conciliating civilian and common law traditions in the private law sphere. That is different, however, from a general description of Scots law or the Scottish legal system as “mixed”, whether in general or in terms of a mixture of civilian and common law constituents, beyond the significant but limited sphere of private law.

The orientation of the discussion in the field of private law may be self-reinforcing, both a cause and an effect of further private law contributions. Whatever the reason for the topic's principal orientation toward private law, the paucity of non-private law contributions cannot bode well for the probability that our conclusions are sufficiently holistic. The discussion becomes lopsided. The risk arises that the literature purports to describe, or is taken to describe, the whole of Scots law and the Scottish legal tradition; whilst in fact substantially discussing only private law material. In other words, there is a risk that the mixed character of Scots private law is extrapolated to the four corners of the legal order; that the character of a part of the law is used to suggest the character of the whole.

The literature is therefore in the odd position of having created a restricted analysis (civilian vs. common law; private law) which has been too liberally applied to the law and legal system at large. The mixed pedigree of Scots private law is not in dispute, though the extent to which it is mixed *is* disputed. Expanding the

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149. *See id.* at 3-4, though the language used is still one of “legal systems” rather than bodies of private law.
discussion to one which embraces, rather than glosses over, public law and criminal law will enrich the analysis and improve both its accuracy and its holistic viability. Even were Scots public and criminal law found to be plain expressions of some single legal tradition (quite unlikely, of course), then we would at least know that private law is where the mixed pedigree is found. What seems more probable is that an evaluation of public, criminal and other areas of law would reveal a further enriching mixture of traditions which make up the Scottish legal tradition as a whole.

VI. CONCLUSION

Scotland is a mixed jurisdiction in the sense that it combines a mixed pedigree of legal traditions. It is well remarked that Scots law includes inheritances from the civilian and common law traditions, and often that combination is precisely why Scots law is described as “mixed”.

However, the literature has tended to focus on the civilian and common law traditions, often to the exclusion or significant relegation of other constituent traditions. The mixture also includes aspects of, at least, the Scottish common law, feudal law, canon law, udal law, Celtic law, the Bible and foreign maritime law. Holistic considerations may require that these other traditions are folded into an analysis of Scotland as a mixed jurisdiction; not only because they coexist with aspects of the civilian and common law traditions, but because these traditions have, for centuries, mixed with each other. The traditions are neither discrete nor pure, and have informed, influenced and shaped others. Some have conveyed aspects of others. The extent to which the literature has focused on the civilian and common law traditions is at risk of insufficiently recognising or accounting for these phenomena.

The orthodox civilian and common law dichotomy may also struggle to deal with EU law and ECHR law as two modern streams of law which are not only making substantial headway in
Scotland, but in other jurisdictions too. Are EU and ECHR law civilian or common law in nature? Are they, themselves, mixed in pedigree? Or are they neither? The same questions may be asked of large areas of modern statutory law.

The picture of Scotland as a mixed jurisdiction is one of a very mixed jurisdiction; one which has received and been influenced by a number of indiscrète legal traditions. Comparative lawyers may still find value in upholding Scotland as a quintessentially mixed jurisdiction in the private law sphere, combining civilian and common law traditions, but these traditions bear the marks of each other, and of other traditions which they have encountered. Furthermore, even if they were found to account for a majority of the mixture, they comprise just part of a wider array of heritages which, together, make up the Scottish legal tradition.
CIVIL STATUS AND CIVIL REGISTRY: 
CURRENT TRENDS IN SPANISH LAW

Sofía de Salas Murillo*

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ABSTRACT

Currently, in Spanish Law, civil status is a concept under
discussion in regard to its definition, its content, the enumeration
of possible civil statuses, and even its very subsistence as a
category. The processing given to civil status in the corresponding
Laws of the Civil Registry is especially important as precisely this
Registry has the main, although not sole, objective to officially
verify the “acts” or “facts concerning the civil status of persons,”
although other legal facts, which are not classifiable as such, are
also recorded. The interdependence of both concepts means that it
is advisable to have combined treatment of both as regards this theme. The Law 20/2011, of July 21, on the Civil Registry (LCR 2011), has entailed a substantial change of structure and management regarding these matters. Besides, there are several de facto situations that can have an entry in the new system which cause the concept of civil status lose its identity, and perhaps, its utility.

I. APPROACH

Civil status is a concept under discussion in regard to its definition, its content, the enumeration of possible civil statuses, and even its very subsistence as a category. This is due to the absence of a legal definition of civil status, aggravated by the diversity of situations it refers to, which makes its delimitation particularly difficult.

In a first approach to the concept, the term status refers to the state—with legal importance—of persons in society, or, in other words, to their legal situation in society. In fact, the concept has its origin in the status of Roman Law, or position in which each person stood in society, depending on whether he was free, a freedman or a slave (which marked his status libertatis), or whether he was a Roman citizen, a foreigner or Latin (status civitatis), or whether he was alieni iuris or sui iuris (which describes his situation in the family, determining the status familiae). In this regard, there is a well-known Roman aphorism persona est homo statu civili praeditus.

The idea of status has continued throughout the centuries, adapting to the changes which have affected, among other areas, freedom (on the abolition of slavery) or the family (due to the evolution of the content of parental authority, which ceases to be understood as subjugation to the father). As well as freedom, citizenship and family, throughout the centuries, other parameters were used at different times and also marked a status, such as sex, religion or whether or not one is a member of the nobility.
However, neither the Spanish Civil Code of 1889 (Código Civil, hereinafter C.C.) nor any law in our system defines the concept of civil status, nor do they include an enumeration of civil statuses although they refer to the term in several norms, even assigning certain legal consequences to them, which compose a certain common system.

Thus, we find the term civil status in several bodies of law:

a) In article 39 of the Spanish Constitution, on referring to the equality of mothers under the law “regardless of their civil status,” identifying it, in this case, with the vulgar meaning of civil status, with reference to marriage according to which it is possible to have the civil status of a single or married person, a widow or widower, separated or divorced person.

b) Article 9.1 C.C. states the norm of Private International Law, which stipulates that the personal law of natural persons—which is determined by nationality—“capacity and civil status” will prevail; article 244.4 C.C., which prevents a person who carried out “actions regarding civil status” with the minor or disabled person from being a guardian; articles 325 to 332 C.C., concerning the Civil Status Register (currently repealed by the Law on the Civil Registry of 2011¹), order that the “acts concerning civil status” are registered in the Register kept for this purpose; and article 1814 C.C., which stipulates that it is not possible to compromise on “the civil status of persons.”

c) The Law on Civil Procedure of 2000 (LCP),² which stipulates that in the “rulings on civil status . . . res iudicata will have effects as regards all as from the registration or annotation in the Civil Registry” (article 222.3.II LCP, and in article 525.1, according to which “In no case will they be susceptible to

provisional execution: 1. The rulings issued in proceedings on . . . civil status . . .”)

d) The Criminal Code\(^3\) classifies the offence of usurpation of civil status (article 401).

e) In the international area, although there are systems of other countries which have dispensed with the concept, reference can be made to several international conventions, particularly the work of the International Commission on Civil Status (I.C.C.S.), an intergovernmental organization, of which Spain is a member, created in 1948 in order to foster international cooperation in this regard, with special importance, inter alia, in the notarial area. The United Nations also continues to take it into account for the purposes of the *World Programme of the United Nations in Order to Improve Vital Statistics*, approved by the Economic and Social Council through Resolution 1307/1968, and for the *International Programme for Accelerating and Improving the Vital Statistics and Civil Registration Systems*, of 1991. In addition, in the European area, the Green Paper of the European Commission\(^4\) is notable, with the title “Less Bureaucracy for Citizens: Promoting Free Movement of Public Documents and Recognition of the Effects of Civil Status.”

Beyond mere terminology, the processing given to civil status in the corresponding Laws of the Civil Registry is especially important as precisely this Registry has the main, although not sole, objective to officially verify the “acts” or “facts concerning the civil status of persons” (article 1 of the provisional Law of the Civil Registry of 1870,\(^5\) article 1 Law of the Civil Registry 1957,\(^6\)

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5. Civil Registry Act of June 17, 1870.
and in similar terms, article 2.2 LCR 2011\(^7\), with multiple references to the term throughout their respective articles.

Civil status is recorded in the Civil Registry (we must remember, the Civil Code eloquently called this the *Civil Status Registry*\(^8\)) although in the Civil Registry, other legal facts are recorded which are not classifiable as such. The interdependence of both concepts means that it is advisable to have combined treatment of both with regards to the theme of this treatise.

II. CONCEPTS OF CIVIL STATUS AND CIVIL REGISTRY

A. The Concept of Civil Status

From the perspective mentioned, we can consider that civil status is a legal concept which includes personal situations, with a certain stability and permanence, evaluated by the legislator as relevant, and, due to this, with the same legal system.

1. The Same Legal System?

In fact, this intended common system of civil status is reduced to two aspects, which, as we shall see throughout this theme, are not treated uniformly, which casts doubt on the continuance of the category.

These two aspects, simply stated, are as follows:

a) the state actions, which is the generic manner which doctrine uses to refer to judicial actions in order to assert civil status, either by declaring those already existing (declaratory actions), or by modifying them precisely by the ruling resulting from this action (as occurs with disability, where the ruling would have constitutive value); in fact, the procedural aspects are those which, in a fashion, have imposed the notion of civil status on the

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legislator and on doctrine so that the theory of civil status started as a theory of *state actions*,\(^8\) and

b) the peculiarities of the proof of civil status, marked by the evidentiary privilege which is attributed to the resources provided by the Civil Registry, will be seen in the terms below.

It is not possible to speak of a common system regarding the acquisition and loss of civil statuses as some of these are attributed due to the existence of one or several legal facts (e.g., in the case of Spanish nationality acquired by *ius sanguinis*, due to the fact of being born to a Spanish progenitor); others are judicial creations (e.g., the judicial modification of the capacity to act can only be done by a ruling, which is of a constitutive nature); others are the result of a declaration of the will of the persons concerned (e.g., marriage or the recognition of a child out of wedlock), etc.

2. The Influence on the Capacity of the Person to Act does not Form Part of the Concept of Civil Status

From the definition of civil status as explained above, it can be deduced that unlike in previous epochs, currently it is not a common characteristic of civil statuses to affect the *capacity to act*.

The classical definition of civil status by Federico de Castro, as the “legal quality of the person due to his special situation (and consequent condition as member) in a legal organization, and, as such, this characterizes his capacity to act and the environment of his power and responsibility”;\(^9\) according to the historical records and the legal provisions in force at the time, this supposes that civil status determined the capacity of a person to act. At that time, for example, the situations of husband and wife determined their capacity in regard to the matrimonial economic system,

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specifically restricting the capacity of the wife to act, even regarding her own exclusive goods.

At the present time, and especially after Law 11/1981, of May 13, on the modification of Civil Code regarding filiation, paternal authority and the economic system of the marriage, the unity of the concept “does not lie in its influence on the capacity to act but in its defining value of the basic legal situation of the person in society, besides and beyond the sole aspect of his capacity.”

Indeed, some civil statuses influence the capacity to act, such as those derived from age or the possible legal modification of this (i.e., disability); however, others, such as marriage or filiation, do not affect this capacity at the present time.

B. Concept of Civil Registry

As has been said, it is advisable to mention the concept of Civil Registry in these initial sections, among other things, because the question of the enumeration of civil statuses has to be connected with the list of facts and acts which can be registered in the Civil Registry, the terms of which will be given below.

The Civil Registry is the instrument for the verification and publicity of the legal facts, and acts regarding the civil status of persons, and of those others which do not refer to civil status, are determined by the law.

Registration is currently regulated by Law 20/2011, of July 21, on the Civil Registry (LCR 2011), which entailed a substantial change of structure and management with regard to the system of the previous Law (Law of the Civil Registry of June 8, 1957, LCR 1957), in force until the entry into force of the LCR 2011, which took place three years after its publication in the official register.

12. Supra note 1.
13. Supra note 6.
(Boletín Oficial del Estado), therefore, on July 22, 2014. The LCR 2011 would be reformed through the Draft Bill of the Law on the Integral Reform of Registries (LRIR), by virtue of which and in regards to the Civil Registry, would also be assumed by the Property Registrars.

With the LCR 2011, changes were made:

1) From a Registry controlled by Judges to a Registry controlled by specialized civil servants (Property Registrars, according to the aforementioned project).

2) From a register of facts, which were registered in the respective sections of the Registry (1st: Births and General, 2nd: Marriages, 3rd: Deaths, 4th: Guardianships and Legal Representations), which made it necessary to have a complex system of internal cross-references between the books of the four existing sections, changing to a system in which these sections disappear, as this was a register of persons. The Law of the Civil Registry establishes an individual registration system based on a single personal file which shows the civil record of each person from birth, and the registration will be assigned a Personal Code, which will serve for all the processing which the person needs to carry out with the Civil Registry. Most of this processing can be made electronically. In any case, in the new system, Public Administrations will have access to the registration information required for the exercise of their functions.

3) From a Registry which responded to the concern for the territorial verification of the aforementioned facts concerning the persons, and which gave rise to a territorially-dispersed structure, this transformed into a single electronic registry for all of Spain, in which the application for registration and the registration itself can be carried out at any of the General Offices of the Civil Registry, regardless of the place in which the facts which can be registered occur.

Although the organization of the LCR 1957, based on the registrations made by Judges and divided into four sections, is
destined to disappear, a long process of the execution of the restructuring is still expected. In addition, the procedures and files initiated prior to the entry into force of the new Law, as well as the questions concerning the books not digitalized (Transitory Provisions 4 and 5 LCR 2011\textsuperscript{14}), will continue to be regulated by the LCR 1957; thus, it is advisable to know its system and general lines.

The changes made by the LCR 2011 do not affect the function of the institution, which continues to be the official confirmation— with the effects and the objectives applicable in each case—of the facts and acts which refer to the civil status of persons and the others determined by Law.

This affirmation requires two considerations:

a) In fact, the ultimate purpose of the Registry is the official confirmation, thus, its registrations have a confirmation or declarative value. However, precisely due to their official nature, this makes it possible to have a means of quickly and simply proving civil status, and they constitute a title of legitimation of the exercise of the rights which result from each condition or specific civil status of the person in the form shown in the entries of the Registry.

In other cases, the Registry serves for more than just confirming or declaring facts, as is necessary in order to constitute a new civil status: in these cases, registration has constitutive value. This will be dealt with below.

b) Until a short time ago, although the Civil Code has continued to refer to the “Civil Status Civil Registry”),\textsuperscript{15} for a long time, this Registry has included personal data and circumstances other than those included in the concept of civil status. The design of the new Civil Registry stipulates an area of application even more extensive than that stipulated by the LCR 1957, regarding

\textsuperscript{14} Supra note 1.
\textsuperscript{15} See arts. 325 to 332 C.C., derogated by the LCR 2011.
facts and acts which can be registered, which distances it from the strict limits of the traditional civil status, as we shall see.

III. ENUMERATION OF CIVIL STATUSES

There is no unanimity as regards which facts or situations must be considered to be civil status and which are not, since, as was stated above, there is no legal enumeration; thus, some authors restrict civil statuses to those derived from the permanent social links of citizenship or of a regional nature and family situations. The Laws of the Civil Registry (of 1957 and 2011) have lists of facts and acts which can be registered and which can be considered as possible enumerations of civil statuses, but the headings of the articles recognize that not everything contained therein are civil statuses: as was stated, all those which exist are there because if they are considered to be civil statuses they must appear in this list due to the finality of the Civil Registry—precisely, the official confirmation of civil status— but not all are there because there are simple legal facts which are not civil statuses. This was already stated in article 1 LCR 1957,16 but it is even clearer in the LCR 2011: “The Civil Registry is intended to officially confirm the facts and acts which refer to the civil status of persons and the others determined by this Law.”17 Article 4 adds that:

Access to the Civil Registry is possible for the facts and acts referring to identity, civil status and other circumstances of the person. Therefore, the following can be registered:
1. Births. 2. Filiation. 3. Name and surnames and their changes. 4. Sex and change of sex. 5. Nationality and place of residence. 6. Emancipation and the benefit of legal age. 7. Marriage. Separation, annulment and divorce. 8. The legal or agreed matrimonial regime. 9. Paternal – filial relations and their modifications. 10. The legal modification of the capacity of persons, as well as that which derives from insolvency proceedings of natural

16. Supra note 6.
17. Article 2.2 LCR 2011, supra note 1.

Considering all of these, the following civil statuses related to those above are considered to be the following:

1) Marriage, depending on the whether the civil status is single, married, widower, widow, divorced or separated.
2) Filiation, in wedlock, out of wedlock or by adoption, so that the person is a son, daughter, father or mother.
3) Nationality (Spanish or alien).
4) Civil residence (the residence of common law, Aragon, Catalonia, etc.).
5) Age, by virtue of which, a person is a minor, of legal age or an emancipated minor.
6) The judicial modification of the capacity to act which can determine the civil status of the disabled person (now called a person with judicially modified capacity), and in the environment of State legislation, that of prodigal.

As can be deduced from the heading of article 4 of the LCR 2011, some items mentioned are not civil statuses, but refer to identity (No. 3 should be noted here), others are circumstances of the person which determine his very existence (Nos. 1, 15), or the regime of their goods in the event that they are married (No. 8), or of their legal guardianship if their capacity has been judicially modified (No. 11), or the recourse to certain mechanisms offered by legislation when there is a disability, which does not necessarily entail that the capacity to act is affected (Nos. 12 and 13).

There is no unanimity with regard to the quality of civil status of sex (No. 4), of prodigality, of the declaration of insolvency, and even disability (the three are related to No. 10), and declared

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18. Supra note 1.
absence (No. 14). We will return to these questionable civil statuses below as it is advisable to first examine those concerning the possible legal characters and regimes of civil statuses.

IV. CHARACTERISTICS OF CIVIL STATUSES

Despite the difficulty involved in establishing clear criteria on what is and what is not civil status, we should mention some common features of these:

1) Personal character, in the sense that civil status is united to and classifies the person. Due to this, this is noted in the Civil Registry in the margin of the birth registration of each person (LCR 1957), or in the current system (LCR 2011) on the individual sheet or registration.

This personal character means that:

a) Every person has one or other status classification (he is Spanish, alien or stateless; emancipated or not emancipated, etc.) and the person has several compatible statuses (he is Spanish, with civil residence in Aragon, emancipated, married, etc.).

b) This immediately affects personality; therefore, it is of a personal nature and deserves protection similar to the person. In fact, de Castro stated that although civil status is not a “legal right”, it is a “personal legal situation” and an attack against it or ignorance of it are illicit so that, if either of these economically or morally cause damage, they must be compensated by the person causing the damage through article 1902 C.C. It must be added that subsequent to the work of Federico de Castro, the Criminal Code of 1973 classified offences against the civil status of persons in articles 468 et seq., referring to the supposition of birth and the substitution of babies, the usurpation of, and the holding of illegal marriages. Current regulation, the result of the reform carried out

19. DE CASTRO Y BRAVO, supra note 9, at 72.
in 1995, only maintains the offence of usurpation of civil status;\textsuperscript{21} however, it introduces a Part on the\textit{ offences against family relationships}\textsuperscript{22} in which neither the concept nor the term civil status are used.

c) Civil status has a very personal character in the sense that: 1) civil statuses do not form part of inheritance and, therefore, they are not transmitted\textit{iure succeisionis} to the heirs, without prejudice to the fact that, in specific cases, the law attributes the possibility for the heirs of a person concerned to once the person has died; and 2) that the creditors could not exercise these rights by subrogation (article 1111 C.C.), e.g., claiming the paternity of their debtor in order to try to more easily recover what is owed to them.

d) The personal character is compatible with each civil status having consequences regarding estates: e.g., the recognition of a minor entails the obligation of the father to feed him, the minor becomes his heir to the legitimate part of the estate, etc. These consequences concerning estate do not have the same characteristics of civil status, and, consequently, can, for example, be the subject of a transaction (Ruling of the Supreme Court of October 13, 1966).\textsuperscript{23}

2) The character of\textit{ public order} as the condition of the person is of interest to the very structure of the community, insofar as it indicates the person’s position and legal meaning. This feature determines that the norms regulating civil status are of a compulsory nature, transaction is not possible (article 1814 C.C.) nor is submittal to arbitration (article 2 of Law 60/2003).\textsuperscript{24} Generally, it is possible to speak of the unavailability of content, which is not incompatible with a certain degree of freedom of action with regard to some of the facts determining civil status.\textsuperscript{25} It

\begin{itemize}
\item \textsuperscript{21} Supra note 3, at art. 401.
\item \textsuperscript{22} Supra note 3, at Tit. 12.
\item \textsuperscript{23} S.T.S., Oct. 13, 1966 (Roj. 972/1966).
\item \textsuperscript{24} B.O.E. n. 309, Dec. 26, 2003.
\item \textsuperscript{25} Juan Roca Guillamón, \textit{Comentario al artículo 2} in \textit{COMENTARIOS A LA LEY DEL REGISTRO CIVIL} 100 (Thomson-Reuters-Aranzadi ed., 2012).
\end{itemize}
also justifies the need for the intervention of the Prosecutor’s office in the proceedings concerning civil status (article 3.6 of the Organic Statute of the Prosecutor’s Office, according to which it corresponds to the Prosecutor’s office “To take part in proceedings concerning civil status in defence of legality and the public or social interest”\textsuperscript{26}), as well as the very system pre-constituting an official proof of civil status provided by the registration in the Civil Registry, as we shall have occasion to see.

3) \textit{General} character which determines the efficacy \textit{erga omnes}, to the extent that it has to be respected by all, and its guardianship remains under the protection of the State, which supposes that if one is married or emancipated, this is with regard to all and not only some. Another point is that for determined purposes, this \textit{erga omnes} character makes it depend on the registration of the ruling which determines this status in the Civil Registry.

4) Other authors add, as a consequence of the character of public order, the note regarding \textit{security, stability and a certain permanence} of civil status, which does not mean that civil status cannot be modified, but it is subject to certain formalities or guarantees, such as declarations made before the competent civil servant or before a judge, etc. (articles 20, 73.3, 120, 317 C.C.).\textsuperscript{27}

Furthermore, although one’s civil status can be modified within certain limits, the civil status of another cannot be changed as it is considered that civil status is inherent to the person; only in determined circumstances is this allowed. For example, the legal representative of a minor or disabled person can choose a determined nationality for the minor or disabled person (article 20 C.C.), and, precisely due to the character we are examining, only with special precautions and guarantees, such as judicial approval.

\textsuperscript{26} Law 50/1981 of December 30, B.O.E. n. 11, Jan. 13, 1982.
\textsuperscript{27} M\’\ A\’\N\’\E\G\’\E\S PARRA LUC\’\N ET AL., \textsc{curso de derecho civil i: derecho privado. derecho de la persona}, 392 (4th ed., Colex 2011).
With arguable criteria, which led to debate, the Courts have also permitted that, on behalf of the disabled person, the legal representative can exercise the action of separation (Ruling of the Constitutional Court 311/2000, of December 18) and even the action of divorce (ruling of the Supreme Court of September 21, 2011\textsuperscript{28}). From the promulgation of Law 15/2005, of July 8,\textsuperscript{29} the exercise of neither of these actions requires the allegation of causes. This exercise of action entails the automatic change civil status; in this case, it is supposed that the precautions of judicial approval, etc., are included within the marriage proceedings.

V. CHARACTERISTICS OR PRINCIPLES WHICH REGULATE THE CIVIL REGISTRY

At the beginning of this theme, mention was made that the common legal system of civil statuses is that which refers to the actions of status and the proof. In both cases, the Civil Registry has a fundamental role so that, in order to correctly classify this system, it is necessary to have a general view of the principles which inspire the functioning of the Civil Registry, extracted from the LCR 1957 and the Regulations of the Civil Registry of 1958 (RCR 1958)\textsuperscript{30} temporarily in force, and expressly formulated in the LCR 2011.

\textit{A. The Principle of Legality}

Applied to the Civil Registry, the principle of \textit{legality} is shown in the classification powers attributed to the person responsible for the Civil Registry; until now, this was a Judge and in the new Civil Registry, a “qualified civil servant”, who, according to the Draft Bill of the Law on the Integral Reform of the Registries, will be a property registrar.

\textsuperscript{28} S.T.S., Sep. 21, 2001 (Roj. 5855/2011).
\textsuperscript{29} Law 15/2005 of July 8, B.O.E. n. 163, Jul. 9, 2005.
\textsuperscript{30} Decree of November 14 on the Regulation of the Civil Registry [hereinafter RCR 1958], B.O.E. n. 296, Dec. 11, 1958.
In fact, the LCR 2011 does not mention *classification* but *verification* and *examination* (article 13) and of *control of legality* (articles 30 to 32), although this may be considered *classification* in the sense of “activity of an eminently legal nature, . . . which consists of a judgment of value, an appreciation of the factual circumstances, carried out with the objective of adopting the decision to register, not register or suspend the registration.”

Thus, article 13 of the LCR 2011 stipulates that: “Those responsible for the Civil Registry will ex officio verify the reality and legality of the facts and acts whose registration is intended as results from the documents which accredit and certify these, in any case, examining the legality and precision of these documents.”

This question is developed in a specific chapter, dedicated to the *control of legality* (articles 30 to 32 of the LCR 2011), which entails, as was done by the previous legislation, the “legality of the extrinsic forms of the document,” but also the “*validity of the acts and the reality of the facts contained therein*” (article 30.2.I). In the same chapter, it is stipulated that, in the examination of the applications for registration and declarations, “the identity and capacity of the applicants or declarers will be verified and, if applicable the authenticity of the signature will be checked” (article 31).

This control is preceded or accompanied by the duty to care for the concordance of the Registry and extra-registry reality which is also imposed on the person responsible for the Registry (article 16.1 LCR 2011, including the *Presumption of precision*, which we will deal with below). In this regard, as explained by the Prosecutors’ Council: “The need to ensure the concordance of the registration expression of the facts of civil status which could be registered and the reality of these facts required that any fact which could be registered was registered; that the registration expression of the fact was a true reflection of this fact and, that only legally

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efficacious were registered through formally correct entries. This was determined by the triple requirement of integrity, reality and legality of the Civil Registry which transcends all registration legislation.\textsuperscript{32}

\textbf{B. The Principle of Official Nature and Obligatory Registration}

Article 14 of the LCR 2011 includes the principle of official nature and provides that:

Those responsible for the Civil Registry must make the due registration when they have the required certificates. The natural and legal persons and the organisms and public institutions which are obliged to foster registrations will facilitate those responsible for the Civil Registry with the data and information required to carry these out.

If the registration legislation of 1957 and 2011 imposes carrying out this activity \textit{ex officio} on the person responsible for the Civil Registry, the procedural legislation imposes a concordant and complementary task on the judges of civil law who issue rulings which can be registered. Thus, the LCP imposes the \textit{ex officio} communication of the rulings of the Civil Registries:

When applicable, the rulings and other resolutions issued in the proceedings referred to in this Part will be communicated \textit{ex officio} to the Civil Registries in order to make the corresponding entries. On request, these will also be communicated to any other public registry for the purposes applicable in each case.\textsuperscript{33}

Despite the fact that the initial expression may lead to understanding something else, this article imposes the obligation to communicate the rulings and proceedings which might be relevant for the registrations contained therein to the Civil Registry, and

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this is to be done immediately once the resolution which must be registered has been issued and published.  

This principle of an official nature, which we have just described, is the only one which openly contrasts with the principle of the Property Registry, where the principles of rogation and voluntariness of registration govern, except in regards to the goods and rights of the Public Administrations, regardless of whether these are of the public sector or estate, with regard to those stipulated in the obligatory registration, as per article 36.1 of Law 33/2003, of November 3, on the Assets of the Public Administrations.

Moreover, the point of view imposed by the new law should not be ignored as it recognizes the “right of registration” of the facts and acts which refer to identity, civil status and other personal conditions which the law stipulates (article 11.b LCR 2011), complemented by the right “to foster the registration of determined facts and acts intended for the protection of minors, persons with judicially modified capacity, persons with disabilities and elderly persons” (article 11.i LCR 2011), understanding that, in many cases, it will not be the persons referred to who take care of the effectiveness of their right to registration.

C. The Principle of the Registry’s Publicity

The registration or recording of the facts and legal acts related to the lives of persons in the Civil Registry is intended to provide publicity of the same.

In this regard, the finalities which the Civil Registry achieves require that the registration be public, that is to say, that its content be accessible or knowable by all those which the legal system considers to be the holders of a legitimate interest.
1. Legitimized Access to the Data Contained in the Civil Registry

a. Access to the Data

Legitimate interest exists, by definition, in the data itself. Thus, article 15 LCR 2011 designs a principle of the Registry’s publicity stressing its aspect as the right of the citizen in regard to his data: “1. The citizens will have free access to the data which appears in their individual registrations.” This is also designed as one of the subjective rights recognized by the Law: “The right to access the information requested regarding the content of the Registry, with the limitations stipulated in the present Law” (article 11.c)

b. Access of the Public Administration in Order to Carry Out their Functions

After the reference to the right to access one’s own data, article 15 LCR 2011 states that, “2. The Civil Registry is public. The Administrations and civil servants can access the data contained in the Civil Registry in order to carry out their functions under their own responsibility.”

Access is facilitated in article 8.2 of this law, through the use of electronic means:

In the exercise of their competencies and under their own responsibility, all the Administrations and civil servants will have access to the data which is recorded in the single Civil Registry with the exceptions related to the specially protected data stipulated in this Law. This access will also be made through electronic procedures with the requisites and technical prescriptions established within the National Interoperability Scheme and the National Security Scheme.

It seems to be necessary to establish some type of control or requisite to be complied with by the civil servants who intend to access the information contained in the Civil Registry, delimiting the very wide content of the indeterminate legal concept “carrying out their functions.” Of course, the information of the private persons which the Public Administration gathers for the aforementioned carrying out of their functions cannot be made
public indiscriminately. The idea could be expressed that all those who require this information—the Notary to authorize a document, the Registrar to register it, the Procurator’s office in order to carry out the work entrusted to it involving checking and monitoring, etc.—may have all the information, both quickly and simply, but only those who really need it for the protection of a person with a disability, or for their own interest if this is related to the information, may have it. The mention that the action of civil servants in this regard is carried out “under their responsibility” (articles 8.2 and 15.2 LCR 2011) lays the bases for control of possible excesses in this regard, but \textit{a posteriori}.

c. Access to the Data of Others by Private Persons

If the data is the person’s own data, we have seen that article 15.1 LCR 2011 proclaims the free access to this data by the holder. Logically, the system changes if the data is of another person. In this case, article 15.3 of the LCR 2011 provides that, “Registration information may also be obtained through the publication resources stipulated in articles 80 et seq. of this Law when they refer to a person other than the applicant on condition that the identity of the applicant appears and there is a legitimate interest.”

In this case, the knowledge of the data by private persons requires a reasonable justification, and not mere curiosity or the indiscriminate publication of information which is of no interest to the public. For this reason, there exists a \textit{legitimate interest}.

In this case, the question is not only to delimit this indeterminate concept of \textit{legitimate interest}, but to determine who is to accredit this.

In the system provisionally in force (although it is true that it is a precept at regulation level), there is a presumption that: “The interest in knowing the entries is presumed for whoever requests the certification.”\footnote{36}
There continues to be data especially protected based on the constitutional right to personal and family privacy, which will be subjected to the system of restricted access (articles 15.4, 83 and 84 LCR 2011), which are adoption or unknown filiation, rectification of sex, marriage in secret, the reasons for the deprival or suspension of parental authority, the changes of surnames authorized when the applicant concerned is the victim of gender violence, or other legally authorized changes of identity. In these cases, there are no restrictions if the person concerned applies for this. The LCR 2011 also expressly recognizes “the right to privacy in relation to specially protected data subjected to the system of restricted publicity” (article 11.e).

2. Formal and Material Aspects of the Registry’s Publicity

In this context, the concept of publicity, as it has been consolidated in mortgage legislation, includes formal and material publicity. This is transferable to the area of the Civil Registry, with the necessary due adaptations.

   a. The Principle of Formal Publicity

   The LCR 2011 includes two formal publication instruments:

   1) Electronic certification (although it may be issued exceptionally by non-electronic means), and

   2) Access to the registration information by the Administration when it acts in the exercise of its functions and under its responsibility (articles 80 to 82 of the LCR 2011).

Furthermore, the latter is conceived “as the preferential instrument of publication so that, only in exceptional cases, must the citizen submit certifications of data of the Civil Registry” (Preliminary Recitals IV LCR 2011), which, as can be appreciated, entails a change of conception of the formal publicity. It is not the person concerned who has the burden of proof of the facts of the civil status, thus obtaining the evidence of the Civil Registry, but it is the Administration which must and may directly access the data.
b. The Principle of Material Publicity

The most characteristic principle of Registry’s publicity, as explained by Lacruz Berdejo when referring to the mortgage principles, is that which refers to the effects of the registration and:

[It]s in turn traditionally broken down into another two principles: one, of legitimation, which states the exactness of the Registry to the benefit of the holder registered unless there is evidence otherwise. The other is that of public witnessing or publicity in the strict sense, in favour of the acquirer in good faith.

In the words of Jerónimo González:

Once the principle of publicity is focused from this substantive or substantial point of view, it has two aspects, one positive and the other negative, depending on the truth of the registration declarations or their irreproachability. That is to say, the registration is exact as it corresponds to the full, legal reality, as it is complete. What is registered is real, and there is nothing beyond the registration of this nature.37

Now an analysis must be made whether such principles and presumptions govern the functioning of the Civil Registry in general. To do this, we will start from the distinction made by the doctrine of positive value and negative value of the Civil Registry. As regards the positive value applied to the registration, mention must be made of its usefulness as a means of proof, as certification of legitimation and constitutive certification, and as regards the negative value, this brings up whether the absence of registration can give rise to a special protection of the third parties who ignore the change of civil status, which has occurred in reality and is not yet registered.

D. Presumption of Exactness and Positive Value of the Registration as a Means of Proof and Certification of Legitimation

1. Presumption of Exactness

Regarding the Property Registry, based on article 38 of the Mortgage Law, it has been said that if it is presumed that the content of the Register is exact, the registration holder is legitimized, as holder, to act in the development and in the process (Lacruz Berdejo).39

Likewise, although not in an identical manner, in the case of the Civil Registry, the LCR 2011 starts from a presumption of exactness, which brings to mind the stipulations in article 38 of the Mortgage Law: “It is presumed that the facts registered exist and the acts are valid and exact while the corresponding entry is not rectified or cancelled in the form stipulated in law” (article 16.2 LCR 2011).

This presumption is a consequence of the compliance with the obligation which the person responsible for the Civil Registry has in order to care for the concordance between the data registered in the Registry and the reality beyond the Registry (article 16.1). In order to ensure the continuity of this concordance and the exactness, “When the acts and facts registered in the Civil Registry are challenged, the rectification of the corresponding entry must be sought” (article 16.3).

2. Positive Value of the Registration as a Means of Proof

As a result of this presumed exactness and the concordance of what is registered and what is real, the registration has the character of “full proof of the facts registered” (article 17.1 LCR 2011). We will analyse this question more thoroughly as regards the proof of civil status.

38. Decree of February 8, on the official Mortgage Law, B.O.E. n. 57, Feb. 27, 1946.
39. Lacruz Berdejo et al., supra note 37.
3. Positive Value of the Registration as Certification of Legitimation

If the content of the Register is exact, the holder of the registration is legitimized, as such, in order to act in the transfer and in the process in accordance with its content; therefore, the registration also functions as certification of legitimation.

The Civil Registry is the certification of legitimation par excellence of civil status. The registration institution is conceived so that whoever exhibits the corresponding certification or certifications does not have to do anything else: he will be a legitimate, illegitimate or adoptive child, his marriage will be valid, etc. and whoever opposes the consequences of each of these statuses will assume the burden of proof to demonstrate the invalidity or non-existence of the respective certification of attribution. Thus, the principle of legitimation included in articles 1 and 38 of the Mortgage Law for the Property Registry may be transferred to the area of the Civil Registry by stating that the registrations of the Civil Registry are under the protection of the courts. These take effect while their inexactness is not declared by the means established in the Law so, that for all legal purposes, it is presumed that the facts registered exist and belong to their holder in the form determined by the respective entry. The presumption of reality and legality of the fact registered is iuris tantum so that the dispensation of proof for the holder and the consequent onus probandi for the opponent contributes to facilitating the legal process.40

It must be added, in general, that the registrations and their respective certifications have the character of a public document for the appropriate effects (article 7 LCR 1957), as whoever issues them—“The Person Responsible and, by delegation, the Secretary” (article 17 RCR 1958)—who is “a competent public employee
with the formalities established by the law” (article 1216 C.C.), and “civil servants legally empowered to bear witness in the exercise of his functions” (article 317.5 LCP). Classifiable as public administrative documents are those which give proof as regards third parties or *inter partes*, in the terms and conditions stated in article 1218 C.C.\textsuperscript{41}

E. Presumption of Integrity and Negative Value of the Registry: Ineffectiveness of What is not Registered

In the mortgage area, the presumption of integrity of the Property Registry is deduced from the content of article 32 of the Mortgage Law, in relation to articles 13, 29 and 37 of this Law, and from this, it follows that what the Registry does not contain or publish at the time of acquisition is considered non-existent. Consequently, what is not registered does not harm a third party.

In contrast, in the area of the Civil Registry, the principle of integrity is not used for regulation, “nor is it necessary to the extent that the fundamental finality of the registration institution is to achieve a means of proof of status quickly and simply, without discarding the possibility of other means of proof;”\textsuperscript{42} the legislator is aware that the changes of civil status may occur in the reality of extra-registration with full validity and efficacy. That is why the Preliminary Recitals of the LCR 1957 stated that, “The Civil Registry does not have the presumption of integrity and, therefore, does not constitute proof of negative facts.”

Consequently, in the area of the Civil Registry, the principle of ineffectiveness does not play a part either (“what is not registered does not damage third parties”), as this principle is based on the presumption of integrity of the content of the Registry, which occurs in the case of the Property Registry. Although it leaves the question open, we are reminded of this by the 2\textsuperscript{nd} Resolution of the Department of Registries and Notaries of January 28, 2008:

\textsuperscript{41} Díez del Corral Rivas, *supra* note 40, at 32.
\textsuperscript{42} Consejo Fiscal, *supra* note 31, at 37.
... [T]he determining fact of a specific civil status may have occurred extra-Registry and is not even recorded in the Civil Registry, which does not mean that this is unknown by the person affected or the holder of this specific civil status, regarding whom all the implicit effects take place, but the question is whether this civil status which is not registered may not damage bona fide third parties. Certainly, no direct answers can be found to the question posed neither in the LCR nor in its Regulations.43

The LCR 2011 surprisingly includes a *presumption of integrity* and a *principle of ineffectiveness*, both in article 19:

1. The content of the Registry is presumed to be complete as regards the facts and acts registered. 2. In the cases legally stipulated, the facts and acts which can be registered in accordance with the prescriptions of this Law will be effective against third parties from the time that they access the Civil Registry.

However, it is immediately appreciated that the mention which article 19 makes of the presumption of integrity is circumscribed exclusively to the facts and acts *registered*, which, in the opinion of the Council of the Judicial Power is not, despite the title of the article, only a reaffirmation that:

... [T]he Civil Registry does not have the presumption of integrity and, therefore, this does not constitute a proof of the negative facts... As an example, articles 70.4 and 73.2 of the Draft Bill include the legal system stipulated in article 18 [in the LCR 2011, article 19] as regards tacit emancipation or independent life, the authorization of age and the legal measures regarding the custody or administration and regarding surveillance and control of these guardianships.44

Integrity of the facts and acts *registered* is, therefore, presumed, rather than those of the Registry as a whole. That is to

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say, it is not that the Registry is presumed to be complete in itself in such a way that what is not registered does not damage third parties, but that what is already registered is presumed to be full and complete. Thus, it does seem clear that the new LCR is not intended to change the state of things by introducing an authentic presumption that the Registry is complete, and, therefore, exhausts the legal reality regarding the facts or acts in its area; if such a presumption existed, the consequence should be that it also serve as proof of negative facts in such a way that what is not registered is not effective against third parties.

What is certain is that, on the one hand, in regard to negative facts, proof is not established, but, only the declarations with the value of simple presumption continue to be upheld,\textsuperscript{45} to which we also refer when speaking of proof.

On the other hand, the coherent consequence with a principle of integrity is the effectiveness of what is registered and the ineffectiveness of what is not registered. What the LCR 2011 provides regarding effectiveness or ineffectiveness is that, in the cases in which a law states, with regard to a fact or a specific legal act, if it is not registered it is ineffective; such a legal consequence of substantive legislation is, we should say, “endorsed” by registry legislation. This does not contribute any rules on effectiveness as it is limited to making a dynamic legislative referral and to making, if appropriate, the commencement of the consequence of effectiveness. Not even on this point is the mention useful as it is not clear what “from when they access the Civil Registry”\textsuperscript{46} means since this may refer to the application for or actually the making of the entry. Taking all of this into account, the new law does not seem to contribute much, but can, however, create certain confusion.

Apart from this, if it is said that effectiveness against third parties begins from when they access the facts and acts in the Civil

\textsuperscript{45} Chapter 3 of Part IX, arts. 92-93 LRC 2011, supra note 1.
\textsuperscript{46} Article 19.2 LCR 2011, supra note 1.
Registry; until that time, they are ineffective. However, according to article 19, it is only “In the cases legally stipulated.” But apart from these cases, it seems that the rule continues to be the same: in the Civil Registry, what is not registered (except for the cases of constitutive registration) exists and takes effect in regard to third parties, including bona fide third parties.

VI. LEGAL REGIME OF CIVIL STATUS

Apart from the common characteristics examined, the maintenance of the notion of civil status is of an eminently instrumental nature, insofar as there are common aspects of its practical legal regime.

The first of these concerns the aforementioned actions of status and the second concerns its proof.

A. The Actions of Status—Especially, the Need for the Registration of the Rulings on Civil Status in the Civil Registry so that they May Be of an erga omnes Nature

With regard to civil status, judicial rulings may be involved: e.g., on separation of married couples, or emancipation by judicial concession judicial; some civil statuses are even constituted through rulings—this occurs, for example, with disability. The actions which commence the judicial proceedings that tend to achieve a specific pronouncement on civil status are called actions of status.

We have already seen some questions concerning these:

1) in the LCP, they do not receive autonomous treatment, but in connection with the special processes on capacity, filiation, marriage and minors (articles 748 et seq. LCP), which are processes related to determined actions of status;
2) the Prosecutor’s office must intervene in these proceedings in defence of legality and the public or social interest (article 3.6 Organic Status of the Prosecutor’s Office\(^47\) and article 749 LCP);

3) in these processes, it is not possible to conduct transactions (article 1814 C.C.) nor, we now add, renounce or accept the same, and desisting is limited to certain cases;

4) the provisional enforcement of these rulings is not possible (article 525 LCP, expressly referring to “civil status”).

These are procedural questions, whose in-depth study is not relevant now, but we are going to take time to deal with the specific point of the registration of the rulings in the Civil Registry which are a result of these actions of status.

In general, the rulings produce their effects as material matters judged from the time that they are definitive, and from that time, they affect “. . . [T]he parties to the process in which the ruling is issued and their heirs and successors . . .” as provided generally for the material \textit{res iudicata} in article 222.3.I LCP.

However, and as an exception to the general rule, the second and third sub-sections of article 222.3 LCP establish cases of extension of the \textit{res iudicata} to subjects who have not been parties in the previous litigation. Specifically, in the “rulings on civil status, marriage, filiation, paternity, maternity and disability and reintegration of capacity, the res iudicata will take effect as regards all as from the registration or annotation in the Civil Registry.”\(^48\)

This extension \textit{erga omnes} of the \textit{res iudicata} is based on the idea that nobody can have a civil status in relation to determined persons and lack this as regards others, and it means that:

a) Third parties not legitimated (to exercise the action of status in question) must observe the civil status recognized in the ruling, and

b) Those legitimated are forbidden to initiate a second process on the same question.

\(^47\). \textit{Supra} note 26.

\(^48\). Article 222.3.I LCP, \textit{supra} note 2.
In fact, article 222.3 LCP does not suppose an absolute novelty as there were already articles which provided for the recording in the Civil Registry of several judicial resolutions on civil status: on the separation of married couples (article 83 C.C.), divorce (article 89 C.C.), filiation (articles 112 et seq. C.C.), disability (the repealed article 214 C.C.) and guardianship (article 218 C.C.). What must be stressed is that “for the first time it is said that it is necessary to have the confirmation of these types of resolutions in the Civil Registry so that the effect of res iudicata occurs as regards all.”

Apart from this, could the aforementioned article 222.3 LCP be used to base a possible generic effect of ineffectiveness of what is not registered in the Civil Registry? It seems impossible to speak of a generic principle of ineffectiveness in this sense, and there is no sufficient basis to support the possibility that the third party might take advantage of the intended ineffectiveness in order to prevent the annulment of a legal transaction made with the disabled person, for example, on the day following the date on which the ruling is issued, arguing that it was not registered.

It is revealing that the LCR 2011 does not mention ineffectiveness in the case of registration of the modification of capacity (article 72), but does so, however, in the registration of guardianship and its modifications (article 73.2): “These resolutions will only be effective as regard third parties when the due registrations have been made.” In this final sub-section, this is incorporated and reproduced in the registration legislation; the LCR 1957 did not contain this pronouncement of article 218.II C.C., expressed in positive terms.

The lack of registration of the ruling, especially considering the mandate of 755 LCP, continues to be anomalous or “pathological”

49. Juan José Pretel Serrano, La publicidad del régimen económico matrimonial. Relaciones entre el Registro Civil y el Registro de la propiedad in DERECHO DE FAMILIA Y REGISTRO DE LA PROPIEDAD 225 (Centro de Estudios Registrales ed., 2002).
regarding coordination between official organisms: it is supposed that the rulings on disability are automatically communicated to the Civil Registries, and, even more so, with the new systems of entries with electronic format and storage systems.

In this regard, in its report, regarding the Draft Bill of the Civil Registry, the Prosecutor’s office proposed that “[i]t is] the obligation that the Court or Tribunal Secretaries who have issued a definitive judicial result of the modification of capacity, is electronically forwarded to the office of the Civil Registry, with the finality that any alteration of the capacity of a person be immediately registered in the Civil Registry.”\(^50\) Article 34 LCR. 2011 has included this suggestion regarding the entries of judicial resolutions and, in general, provides for civil status, that:

The Court Secretary of the organism which has issued a resolution whose resolution must involve an entry in the Civil Registry as it affects the civil status of persons, must be sent by electronic means to the office of the Civil Registry, as testimony of the judicial resolution referred to.\(^51\)

B. Proof of Civil Status and Attribution of Legitimation

The second common aspect in the legal regime of civil status concerns the evidence.

Frequently it is necessary to prove that a determined civil status is held or not held. The most characteristic evidence is that provided by the Civil Registry, whose function is, precisely, the official confirmation, with the effects and the ends in each case of the facts and acts which refer to the civil status of the persons and those others determined by Law. In fact, registration in the Civil Registry has had and has the character of privileged evidence as regards civil status.

\(^50\) Consejo Fiscal, supra note 31, at 42.
\(^51\) Article 34 LCR 2011, supra note 1.
1. Registration in the Civil Registry

The character of privileged proof which is attributed to the registration in this Registry (traditionally included in 2 to 6 of the LCR 1957), means two things: the first is that it is only permissible to accredit the facts that are possible to register and those registered, and the second is that the content of the Registry is under the custody of the courts so that it may only be rectified by a definitive judicial ruling.\(^{52}\) According to de Castro, this is justified by the fact that “this is a question of pre-constituted evidence within the legal period of time and by the legitimated person (before contestation, the affirmation is not suspicious), under the guarantee of criminal sanction and the control of registration classification.”\(^{53}\)

The LCR 2011 attempted to draw attention to the doctrine accrued in the years since the LCR. 1957 was in force and confers on the registration the character of “full proof of the facts registered” (article 17.1). Following the traditional tendency on this point, article 18 of this law clarifies that the other possible efficacy of the registration, the constitutive registration, will only occur “in the cases stipulated in law.” That is to say, the registration serves primarily and fundamentally to prove the civil status and to prove this with the characteristic of fullness, but it may also serve to constitute a new civil status (for example, in the case of the acquisition of nationality).

The classification as full, applied to the proof, which did not appear article 2 of the LCR 1957, does not contradict the possibility that the registration is challengeable, but it refers fundamentally to the “legal privilege of evidential exclusivity of civil status” which the Civil Registry has (as stated by, among others, the Resolution of the Department of Registries and Notaries

\(^{52}\) Articles 3-4 LCR 1957, supra note 6.
\(^{53}\) de Castro y Bravo, supra note 9, at 572.
of June 25, 2007\textsuperscript{54}), and which has its logical complement in the principle of the judicial safeguard of the registration entries. However, this must take into account that:

1) In the case of inexact or erroneous registration, the judicial challenge is admitted, for which, logically, other means of extra-registration proof can be provided; a challenge which requires the commencement of the rectification of the entry (article 16.3 LCR 2011: “When the acts and facts registered in the Civil Registry are challenged, the rectification of the corresponding entry must be sought”), and

2) In article 17.2 LCR 2011:

In the cases of lack of registration or in which was not possible to certify the entry, other means of proof will be admitted. In the first case, an essential requisite for its admission will be the accreditation that, previous or simultaneously, the registration omitted or the reconstruction of the entry is commenced and not only the mere application.

2. The Annotations and their Informative Value

As opposed to the full proof of registration, there is another type of entry in the Civil Registry, annotations, which have simply informative value (article 38 LCR 1957 and article 40 LCR 2011). They lack the efficacy of full and excluding proof which characterizes registration. Thus, the facts and acts informed of in these types of entries may be proved by other means.

3. The Declarations with the Value of Simple Presumption

As we shall see in the corresponding themes, there are determined civil statuses which are only recorded in the Civil Registry insofar as they are acquired as derived, or are the subject of change, etc. Thus, the nationality acquired by \textit{ius sanguinis} and

\textsuperscript{54} B.O.E. n. 188, Aug. 7, 2007.
maintained throughout time may never be achieved expressly in the Civil Registry.

In cases like these and in general, when these involve civil statuses which are not expressly recorded in the Civil Registry, this does not have the basis to provide the proof which will make the registration possible. Thus, for some time, the Civil Registry governmental records are reviewed and utilized in order to declare with the value of simple presumption determined circumstances related to civil status (article 96 LCR 1957), among which are nationality and original residency, the domicile of stateless persons, or any status not recorded in the Registry. These declarations are also taken into account in the LCR 2011 (articles 92 and 93), and are the subject of obligatory annotation, which does not add more value to these than that of stating the existence of this presumption.

Declarations which, as is stated in the Resolution of the Department of Registries and Notaries of January 28, 2008,55 “tend to achieve the proof of the negative facts of the civil status,” but do not have the value of proof of the facts and acts registered, but rather of presumption: the possibility that of dispensing with the proof of the presumed fact for the party which this fact favours, with no need to prove “the certainty that the indicative fact the presumption is based on has been established through admission or proof.”56 In this case, it comes from a governmental record and this presumptive value is applied to this result.

4. The Possession of Status

The possession of status is the continued appearance of filiation or marriage accepted by all as real, which may also exist in relation to the other civil statuses.57

55. Supra note 43.
56. Article 385.1 LCP, supra note 2.
57. LACRUZ BERDEJO ET AL., supra note 8, at 30.
The Supreme Court has stressed that the possession of status is a question of fact, to be freely appreciated by the Courts of First Instance, and the specific circumstances must be taken into account (rulings of the Supreme Court of November 5, 1987 and of February 2, 1999, among others). Traditionally, the requisites of *nomen, tractatus, fama* are required. For example, if the matter has to do with possession of the civil status of a son, he will have the surnames of the progenitor, they have the normal relationship of father and son, and it is publicly known that they are father and son. The possession of status according to these parameters is evident in repeated acts, carried out continually and in public, and it is not necessary that the acts showing such possession be very numerous nor carried out at all times with full publicity. It must last for a certain time, even when its actual existence at the time it is invoked is not required, and it is sufficient that it be recorded in the recent past (rulings of the Supreme Courts of February 16, 1989; of May 20, 1991, and of November 14, 1992, among others).

It is not a matter of acquiring civil status by continued possession (a type of *usucapio* of civil status) but of demonstrating a civil status which exists when there is no registration, it is not known where the registration is (it is not known where the birth or marriage is registered), or its exactness is arguable.

In connection with what has been seen regarding the character of privileged proof of the registration, it is understood that it is only possible to resort to the possession of status as a means of proof in its absence, serving as a basis for completing its omission or to obtain a declaration with the simple value of presumption.

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In turn, it may also serve as a basis for obtaining the rectification of the Civil Registry if there is a problem of the exactness of the registration.

It is frequently used together with other factors in judicial proceedings in order to obtain a ruling which declares civil status—for example, a declaration of paternity.

Although it is fundamentally used in cases of filiation and marriage, there are also examples of possession of status in legal residence and nationality (Resolutions of the Department of Registries and Notaries of July 3, 1967 and of October 28, 1986).60

VII. DOUBTFUL CIVIL STATUS

Having seen the characteristics and judicial regime of civil status, we must now approach the classification as a civil status of some situations which are put forward as doubtful, and which we will deal with under this heading, and the crisis and continuance of the category, which will be dealt with under the final heading.

A. Sex as Civil Status

We have seen that one of the registrations mentioned is sex, with its possible change (article 4.4 of the LCR 2011). It must be remembered that, besides its aspect of identity, the condition of male or female has been considered as civil status for a long time precisely because the woman had her capacity to act in some areas conditioned or limited due to being a woman.

The principle of constitutional equality in article 14 Constitución Española (CE), focused on the negative and unjustified discrimination due to sex, has been included in several laws which have eliminated such discrimination: in the civil area, the laws of May 13, 1981 and July 7, 1981 and expressly, the Law

of October 15, 1990, in application of the principle of non-discrimination due to sex; with general scope, outstanding is Organic Law 3/2007, of March 22, for the effective equality of women and men.

Essential legislative differentiations are maintained, for example, in the determination and actions concerning paternity and maternity, due to the different roles of the man and the woman in the conception, gestation and birth. Furthermore, precisely because it is the woman who gestates and gives birth, attending to this circumstance, the Constitution does not stipulate in vain the integral protection of mothers (article 39 CE), with no reference to fathers. In order to adapt reality to the principles of equality, the legislator introduced some affirmative action in favour of the woman, tending to compensate this circumstance in order to achieve real equality. Measures which are the result of the ratification by Spain (in 1983) of the Convention on the Elimination of all Forms of Discrimination against Women of 1979, which encourages the States to take “special measures of a temporary nature aimed at speeding up de facto equality between men and women,” which has caused our Constitutional Court to consider as constitutional some measures which, apparently, would be discriminatory toward men (rulings of the Constitutional Court of July 16, 1987, of January 24, 1995, and May 14, 2008, this last one is in relation to Organic Law 1/2004, of December 28, on the integral protection against gender violence, which considers that the physical, psychical and moral integrity of the woman as member of a couple is insufficiently protected).

However, in general terms, it can be said that once the limitation to the capacity of the woman to act due to her sexual condition has disappeared, this condition, or that of the male are not civil statuses as such, but indications of identity.

As such, mentions of identity have traditionally been possible to alter through governmental rectification proceedings in the Civil Registry, in the cases of material error on consigning the sex, and in the cases of physical intersexuality (anatomical conformation which does not correspond to the chromosome conformation), defined subsequently differently from what is consigned in the entry (article 93.2 LCR 1957).

The problem has arisen, not in these cases which we can call errors, but in cases of sex change, in the cases of trans-sexuality, and, specifically, in regard to the possibility, manner and effects of consigning these sex changes in the Civil Registry. Precisely because it was a transformation with regard to the previous situation, and partly because sex continued to be considered as civil status, in order to consign this change in the Registry, the application of the regime of actions of status was required so that only through a judicial ruling (and not simple registration proceedings) was it possible to obtain this change in the registered identification of sex. Besides this, sex thus transformed was considered to be fictitious, and as such it prevented the application of all the consequences which would result from the new sexual condition. Thus, a female transsexual who at chromosome level is male could not marry a male: in this regard, among others, the Resolutions of the Department of Registries and Notaries, of January 21, 1988, of October 2, 1991, of December 29, 1994, of June 18 and 21, 2001, and the Rulings of the Supreme Court of July 2, 1987, of July 15, 1988, of March 3, 1989, and of April 19,
1991,\textsuperscript{67} which considered the marriage contracted by a transsexual with a person of the same original sex as null.

However, in two resolutions of 2001 (January 8 and 31),\textsuperscript{68} the Department of Registries and Notaries admitted this possibility on condition that the transsexual had obtained a registration rectification through a judicial ruling, based, among other arguments, on the fact that the pronouncements against the rulings of the Supreme Court which had been \textit{obiter dicta} and did not constitute case law.

The admission by Law 13/2005, of July 1,\textsuperscript{69} of the marriage between persons of the same sex, from the point of view of positive law, eliminates the debate on the question of transsexual marriage.

However, in order to solve the problem of marriage, Law 3/2007, of March 15,\textsuperscript{70} goes much further as it permits registration rectification of the mention of sex in the cases of trans-sexuality with no need for a judicial ruling, once the applicant accredits the following, among other points:

\begin{itemize}
  \item [a)] that a gender identity disorder has been diagnosed, with discordance between the morphological sex or physiological gender initially registered and the gender identity felt by the applicant or psychosocial sex, as well as the stability and persistence of this discordance, . . . and
  \item [b)] that the person has been medically treated for, at least, two years in order to accommodate his physical characteristics to the corresponding sex claimed. It is not necessary that the medical treatment included sexual reassignment surgery (article 4.1).
\end{itemize}

Therefore, governmental proceedings are sufficient if the resolution is effectively positive and it agrees to the rectification of

\begin{thebibliography}
\footnotesize
\item 70. B.O.E. n. 65, Mar. 16, 2007.
\end{thebibliography}
the registration mention of the sex, it will have constitutive effects from the time of its registration in the Civil Registry:

2. The registration rectification will permit the person to exercise all the rights inherent to his new condition. 3. The change of sex and the name agreed will not alter the holding of the rights and legal obligations which might have corresponded to the person previous to the registration of the registration change.71

Thus, the change of sex differs from other questions such as disability, which, although it is partial and limited to the minimum aspects, requires a judicial ruling; which also: a) if it is upheld, is of a constitutive nature according to the majority of doctrine, and b) it must be registered in the Civil Registry, which is an act of improper execution.

Law 3/2007 is applicable to the cases which were pending resolution such as the Ruling of the Supreme Court of September 17, 2007,72 on the fact that a surgical operation is not required; from this ruling, the more than doubtful character of the civil status of the sexual condition can be deduced, in the light of the loss of importance of the condition of man and woman as a judicial situation, and the inapplicability of the of the regime of actions of status in the sense that it is not unavailable, but may undergo registration rectification at the discretion of the person concerned.73

B. Prodigality, the Declaration of Insolvency and Disability

1. Prodigality

The declaration of prodigality limits the capacity of the person to act, and, for this reason, he is subjected to a limited guard system: guardianship (article 286 C.C. and 760.3 LCP). The

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73. See also the ruling of the Supreme Court of July 18, 2008 (Roj. 3962/2008).
prodigal does not suffer limitations in the personal area, and the limitations he suffers in the area of estate are only *inter vivos*. For this reason, insofar as it is a judicial modification of the capacity of the persons, it is possible to consider it to be civil status. However, it is curious that it is not mentioned in the list of either of the two Laws of the Civil Registry (1957 and 2011). At least at the present time, this may be due to the fact that some legislation, in particular, Aragonese legislation which explicitly states that “prodigality will have no other effect than to be the reason for incapacitation when the requisites of the previous section are present” (article 38.3 Code of Local Jurisdiction Law of Aragon⁷⁴), that is to say, when wasting and squandering assets is the result of “persistent illnesses or deficiencies of a physical or psychical nature which prevent the person from governing by himself” (article 38.2 Code of Local Jurisdiction Law of Aragon). If this presupposition does not exist, the capacity to act in the estate area cannot be limited as a measure to protect the interests of others although it can permit the adoption of measures for insurance and obligatory enforcement of family duties: assistance in the marriage, bringing up the children, food among relatives, etc. In fact, according to the third transitory provision of Aragonese Law 13/2006, of December 27, on the Law of the person:

1. From the entry into force of this law, nobody can be declared to be a prodigal. 2. The persons declared to be prodigals on the entry into force of this Law will continue to be regulated by the norms of the previous legislation, but they can judicially apply for the reintegration of their capacity.⁷⁵

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2. The Declaration of Insolvency

Once insolvency is declared in accordance with Law 22/2003, of July 9, the debtor will have his economic powers modified, in the sense that these are: a) intervened by the insolvency receivers if the insolvency is voluntary, or b) possibly suspended if it is a necessary insolvency, and in this case he will be substituted by the insolvency administration.

Despite the fact that this limitation is registered in the Civil Registry on the sheet or register of the debtor (No. 10: “The judicial modification of the capacity of the persons... which derives from the declaration of insolvency of natural persons”), the fact that, on the one hand, it is not a stable situation as it may terminate at any time by an agreement between the debtor and his creditors, and, on the other hand, it is intended fundamentally for the benefit of the creditors (which makes it possible to understand that there are no reasons of public order), makes the Supreme Court consider that insolvency is not a civil status (rulings of the Supreme Court of June 30, 1987 and October 14, 2005, referred to bankruptcy, whose regime is now unified with that of guardianship).

3. Incapacitation and the Measures for Safeguarding the Person with Disability

One of the traditionally classified civil statuses constituted differently from other civil statuses by judicial ruling is that of the incapacitated person. Nevertheless, some authors do not include the judicial modifications of the capacity to act among civil statuses; as we have seen, these are circumscribed to those derived from the permanent social links of citizenship or regionality and those derived from family situations.

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77. Article 4.10 LCR 2011, supra note 1.
Apart from the fact that the *Convention of the Rights of Persons with Disability*\(^79\) does not at any time refer to incapacitation, but to the “adequate and effective safeguard measures” (article 12), even less so, it conceives these as configuring its own *civil status*. It must also be taken into account that, as will be seen in the corresponding theme, there is a doctrinal and professional sector which considers that the Convention of the Rights of Persons with Disability proscribes, as contrary to judicial equality, the difference between judicial capacity and the capacity to act, and judicial incapacitation, and, therefore: a) in the case of the capacity to act, this should be mentioned simply, as stated by the *Convention of the Rights of Persons with Disability* as “the exercise of judicial capacity” (article 12), with regard to which measures may be taken which provide the aforementioned adequate and effective safeguards for this exercise, but without limiting the same, and b) regarding the process of incapacitation, this current of thought proposes its substitution by a system of supports for the free taking of decisions, in the case of persons with disability who require this.

In the European environment, the Green Paper of the European Commission\(^80\) in order to promote the recognition of the effects of civil status certificates, only lists as civil statuses: birth, marriage and death, with no reference to incapacitation or the modification of the capacity to act.

In recent years, legislative interest is focused on *incapacitation*, which tends to be reduced to a minimum in the cases strictly necessary and which continue to be effectively considered to be civil status, but in the regulation of measures for the support of persons with disability. Measures which are the subject of publicity in the Civil Registry,\(^81\) through different types of entries are:

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\(^80\) *Supra* note 4.

register of judicial modifications of the capacity of persons to act, with the corresponding assignment of the regime of legal guardianship (articles 72 and 73 LRC 2011); annotation—without probative value—of the situations of natural disability which are accompanied by de facto guardianship (article 40.3.9th LRC 2011); register of the protected estates of persons of persons with disability, who do not necessarily have to be disabled (article 76 LRC 2011); register of the preventive powers of attorney (article 77 LRC 2011), and, finally and more recently, register of the assistance, incorporated to the Civil Code of Catalonia (article 226-7 of Law enacting Book II of Catalan Civil Code, Llei 25/2010, de 29 de juliol).\textsuperscript{82}

The new conceptions of disability involve:

[A] new judicial approach to these and this leads to the security and permanence sought with the configuration of

\footnotesize{82. The Preamble of this Catalan Law gives an interesting account of the policy underlying these alternative measures for the support of persons with disabilities:

Along with the provision which allows not to establish guardianship if a power of attorney was granted in anticipation of a loss of capacity, changes regarding de facto custody are a reflection of the new model of personal protection established by the second book. This model is guided by the idea that incapacity is too drastic a remedy and that it sometimes shows little respect for the natural capacity of the protected person. It is for this very reason that Chapter VI includes a new instrument of protection, assistance, aimed at the adult who needs to care for his person or property because of a non-disabling decrease in his physical or mental faculties. Personal protection is thus not necessarily linked to cases of lack of capacity: it also includes instruments, based on the free development of the personality, which serve to protect persons in situations such as aging, mental illness or disability. This instrument can also be very useful for certain vulnerable groups for whom incapacity and the implementation of a regime of guardianship or curatorship seem disproportionate, such as persons affected by mild mental retardation or other persons for whom, due to the kind of impairment they suffer, traditional instruments are not appropriate to meet their needs. In line with the guidelines of Recommendation R (99) 4, of the Committee of Ministers of the Council of Europe, of 28 February 1999, and with the existing precedents in various neighbouring legal systems, it was considered that this model of protection, parallel to guardianship or curatorship, could be more appropriate. Moreover, this trend also inspires the Convention on the Rights of Persons with Disabilities.}
incapacitation as a civil status of the person terminating and being transformed into ballast which prevents the flexibility which the persons with disability require for the protection that integrates them into society. Thus, conserving the conception of civil status for the most extreme cases, we understand that agile mechanisms must be sought which permit carrying out the protection and assistance of persons with deficiencies in their participation in the judicial world, which, one way or another, affect their self-governance without affecting their civil status.83

4. The Declaration of Absence

The judicial nature of absence, as is seen in the corresponding theme, is arguable: before the reform Civil Code of 1939, the majority opinion was that declared absence was a modifying reason for the capacity of the person. This opinion cannot currently be maintained as, according to the current drafting of article 188.2 C.C., purchases made by a third party from the person absent show that he conserves his capacity to act.

Regardless of the effect on the capacity to act, its character of civil status has been defended in the light of the wide range of judicial consequences which occur at the personal and estate level of the person absent. There are authors who recognize the importance of the effects of the declaration of absence, and they understand that this is not a question of civil status but of a disconnection between the person and the assets administered by a representative, which has a reflexive effect on the capacity of the person to act. Counter to the usual character of civil status, the possibility is added of removing the effect of the declaration at any time, based on presumptions and uncertainties so that the matter can be re-examined whenever it is necessary.

For some decades, doctrine has shown the ambiguity of the scope and meaning of civil status in our legislation due to the reasons already explained and others we shall see below.

A. Vagueness of the Concept

On the one hand, civil status as a category no longer affects the capacity to act, although there are cases in which this capacity is affected by some of the civil statuses, such as the status of minor or disabled person, it is not affected by others, such as marriage. As this common denominator does not exist, gathering such diverse situations as nationality, family status, age or disability in the same category inevitably leads to a vague and imprecise concept, whose unity lies solely, as was stated above, in its value for defining the basic judicial situation of the person in society. This is why some authors have abandoned the concept, and others recognize that the law continues to use it with this meaning. This must continue to be taken into account, but conceptually it is a dispensable concept, to the extent that it adds little to the specific regulation of each of the situations of the human being.

These doubts are evident from the fact that the LCP: a) does not take into account a specific regime for the actions of status, but for determined processes which affect situations traditionally framed in civil status (the special processes of Part I of Book IV on capacity, filiation, marriage and minors), and b) when it speaks of the impossibility to submit the lawsuits on these matters to transaction (articles 748 to 781 LCP), nor does it mention the term civil status.

85. Supra note 2.
It is true that it maintains the term when it takes into account two specific specialties related to the scope of the *res iudicata* (article 222.3) and of the execution of judgments (article 525.1.1), as was seen above. However, we have also seen that what is relative to the scope of the *res iudicata* is not clear, recalling what is relative to the confusing regime of article 222 LCP.

Despite everything (the LCP in those two articles), and the LCR 2011 (and the Bill for the Integral Reform of the Registries) continue to use the concept of *civil status* and, due to this, the interpreter cannot dispense with this, although must acknowledge the “elasticity of the concept” and its “historically variable content,”86 or its instrumental nature.87

B. Disassociation of Civil Status and the Civil Registry

In the processing of the LCR 2011, it was put forward that the concept be discarded, and probably this would have been the appropriate time to do so considering the conceptual proximity of civil status and Civil Registry. The General Council of Judicial Power understood this to be so in the report on the Bill, for this law: “Perhaps the legislator must make an effort in this regard and dare to define the legal concept of civil status once and for all or dispense completely with the use of this term.”88

Nevertheless, the law (LCR 2011) decided to conserve the express reference to *civil status*, but it must be recognized that the broadness of the mention “other conditions of the person”89 could give the sensation—at least from the standpoint of the positive law—that it is practically unnecessary to continue using this concept.

In this law, the concepts of Civil Registry and civil status are disassociated, perhaps even more strongly: the function of the

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86. LACRUZ BERDEJO ET AL., *supra* note 8, at 393-94.
Registry continues to be that of official confirmation, with the appropriate effects and the finalities of the facts and acts which refer to civil status of persons in each case, but also “to those others which are determined by the Law”.  

This disassociation of civil status and the Civil Registry had already begun previously—although it is true that, until a short time ago, the Civil Code continued to talk of the “Registry of civil status” since, for some time, this Registry has admitted much data and many personal circumstances independent of the concept of civil status. If the last two Laws of the Civil Registry (of 1957 and of 2011) are examined, the Civil Registry is not nor has been solely a Registry of civil status, as the Civil Code seemed to say, but has admitted other facts, which is why it is called simply the Civil Registry.

What refers to disability is a proof of this; thus, the Civil Registry wished to admit entry to concepts or institutions which function apart from disability, and, therefore, a possible change in civil status. The design of the new Civil Registry stipulates an area of application even wider than the area stipulated by the LCR 1957 with regard to facts and acts which can be registered. This circumstance distances it from the strict limits of traditional civil status.

If the Bill for the Integral Reform of the Registries is approved, the difference will be even more marked as the registry would admit questions as distant from the category of civil status as life or accident insurance or pension schemes.

C. Civil Status is Compatible with the Maintenance of Groups or Social Categories

It is true that the notion of civil status has, on occasions, been identified with the idea of social stratification or classification.

90. Article 39, LCR 2011, supra note 1.
91. Cf. arts. 325 to 332 C.C., repealed by the LCR 2011.
92. Cf. infra Part VII.B.3.
This is scarcely in accordance with the current configuration of a democratic society, and this would be a new incentive to abandon the category. Nevertheless, this is not an impediment to its survival for several reasons:

a) The equality of all persons before the Law, with no distinctions, determines the fact that, today, civil status only refers to certain specific qualities such as marriage, age, disability, nationality, and not others such as race, social class and sex, which, from a constitutional point of view, would be inadmissible as they go against the dignity of persons and the principle of equality (articles 10 and 14 of the European Constitution). In this regard, the LCR 2011 starts from the:

[U]nequivocal acknowledgement of dignity and equality has supposed the progressive abandonment of judicial constructions from past epochs which configured civil status based on social status, religion, sex, filiation or marriage. A Civil Registry coherent with the Constitution must assume that persons, equal in dignity and rights, are its only reason for existence, not only from an individual and subjective point of view but also in their objective dimension, as members of a politically organized community.

The fact is that, although the grouping of persons who are in the same personal situation subjected to the same legal regime may suggest the idea of social classification by status, currently, the judicial consequences of civil status, as well as its judicial treatment must be controlled by the principle of constitutional equality (article 14 of the CE); a principle, which, as is known, does not prohibit any inequality, but rather the differences of unjustified or discriminatory treatment, and even permits positive discrimination (in the case of women, for example, intended to obtain real equality).

94. Roca Guillamón, supra note 25, at 97.
95. Preamble LCR 2011, supra note 1.
b) It is not correct to limit status to those involved in belonging to a determined social community in our current legal system even though historically this was so. This means that they are not limited to those related to status familiae and civitatis, nor are they identified as a category with any social compartmentalization.

c) The recent tendencies regarding human rights mark out groups and collectives requiring special protection, such children and persons with disabilities, for whom international conventions and several norms have approved specific protection regulations. Some have observed here “new civil statuses”.96 There are doubtful aspects, such as the fact that the recognition of the “degree of disability”, for the purposes of Legislative Decree 1/2013, of 29 November, approving the revised text of the General Law on the Rights of Persons with Disabilities and their Social Inclusion,97 and the qualification of the “dependence”, for the ones of the Law on the Promotion of Personal Autonomy and Care for Dependent Persons,98 are administrative declarations, in principle without civil effects, which do not have access to the Civil Registry99—besides the fact that, as such administrative resolutions, at least in principle, the regime LCP would not apply to these. However, for the purposes which we are now analysing, it is an irrefutable fact that there is no opposition in current law to introducing legislative differences, designing their own regime tending to facilitate the real equality of these collectives. In fact, the Preamble of the LCR 2011 expressly refers to the fact that “in this Law both the Convention of the Rights of the Child of November 20, 1989, ratified by Spain on November 30, 1990, and the Convention on the rights of persons with disabilities of

96. LACRUZ BERDEJO ET AL., supra note 8, at 28-29.
99. In fact, some people have obtained the administrative declaration of a certain “degree of disability” (expressed in percent), whose ability to act, however, has not been modified, and vice versa. The same applies to the classification of the “dependence”. In this sense, we must remember that none of these procedures, even the judicial modification of capacity are compulsory.
December 13, 2006, ratified by Spain on November 23, 2007 is incorporated.”

D. Civil Status and de facto Relations

Another factor which blurs the limits of civil status, which has been shown by Parra Lucán, is the fact that, in the social reality, purely de facto situations occur, parallel to judicial relationships but apart from its legal regulation: de facto unions, de facto separation, de facto emancipation, naturally disabled persons and their de facto guardianship, etc.100

It seems clear that, although there are determined legal consequences (for example, article 319 C.C. for de facto emancipation, or the varied Autonomous Community Laws on unmarried stable couples) these situations are not civil status, nor does the regime of civil status apply to them.

However, the process of transforming judicially what is intended to be de facto, which, in principle, is a contradiction, and even reaches the Civil Registry. Thus, the reform carried out by Law 1/2009, of March 25,101 to article 38 LCR 1957, introduced the possibility to annotate: “At the request of the Prosecutor’s office or any person concerned, . . . with simply informative value and with the statement of their circumstances: . . . 6. The existence of a de facto guardian and the judicial means of control and surveillance adopted as regards the minor or presumed disabled person.”102 In the same regard, article 40 LCR 2011 admits (“These may be annotated . . .”) the registration annotation of the de facto guardianship.

This is one of the most blurred points in our legislation and on which gives rise to more interpretational problems.

The first of these derives from the initial perplexity arising from giving registration publication, even if this is informative, to

100. PARRA LUCÁN, supra note 27, at 394-96.
what is considered to be a *de facto* situation, whose publication seems to derive from the public notoriety of this. The conflict has already arisen regarding the administrative registration of unmarried stable couples: not in vain, the registration in these Registries is an essential requisite in the majority of Autonomous Community legislations in order to obtain the “judicial nature” of these non-marriage unions for the purposes of the application of the corresponding legal (administrative and civil) measures. In this regard, article 304 of the Code of Civil Law of Aragon\(^{103}\) imposes the obligation to register the stable couple “in a Registry of the Government of Aragon so that the administrative measures regulated in this Law be applicable to it, as well as being annotated or mentioned in the competent State legislation if the State legislation stipulates this.” In contrast, Chapter IV of Part III of the new Second Book C.C., dedicated to “the stable cohabitation of the couple” does not require, at least in the legal text, registration in any administrative Registry.

However, besides the administrative registers, it is certain that neither in the LCR 1957 nor in the new LCR 2011, its annotation or mention in the Civil Registry is stipulated despite the fact that there was a Bill in 2003 on the reform of the LCR in order to permit the access of a stable union of couples or a common law marriage in the Civil Registry\(^{104}\) and that, in the processing of the current law (LCR 2011), an amendment in this regard was proposed.\(^{105}\) In the Bill of 2003, it was considered that this access was the most adequate means to make the constitutional principle judicial of security effective in the area of stable unions or common law couples, and, among other measures, it was proposed that the Second Section of the Civil Registry be called “Marriage,

\(^{103}\) *Supra* note 74.


Stable Union or Common Law Couple.” This initiative did not prosper and, as was noted, the new LCR does not stipulate the registration mentioned.

The panorama is clearly different in the case of *de facto* guardianship, whose access to the Civil Registry is open from Law 1/2009 and endorsed in the LCR 2011, with no need to have administrative registers for this purpose.

Once the Civil Registry is legislatively open to *de facto* custody, the second problem lies in the way to prove the existence of this, which is closely linked to another problem—a basic problem—which is the concept of *de facto* custody and the extension which must be given to this. This is not the right scenario for an in-depth analysis of these questions, but it does serve, at least, to show the intricate and diffuse relationships between all these institutions.

As it stands, we are witnessing the opening of the Civil Registry to these factual situations, although it is true that the essential role of the official verification of these is not complied with, but rather only an informative role, which, for the purposes we have seen in this regard, reaffirms the separation of the Civil Registry and civil status.
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ABSTRACT

This article is on the hidden state interest that article 52(§1) of the Chinese Contract Law protects and the questionable applicability of freedom of contract to Chinese state-owned enterprises (hereafter “SOEs”). In common law, fraud and duress make a contract voidable. In Western civil law jurisdictions, including Louisiana, fraud and duress make a contract relatively null. Article 52(§1) of the Chinese Contract Law renders a contract induced by fraud and duress absolutely null (null and void if using common law terminology) when state interest is harmed. At the same time, according to article 54 of the Contract Law, fraud and duress only make a contract relatively null just like in Western laws. The situation is further complicated by article 58 of General Principles of Civil Law (hereinafter “G.P.C.L.”), which renders all civil juristic acts absolutely null when induced by fraud and duress. To understand when a contract is null or annulable one has to reconcile these three statutory provisions and figure out what the state interest article 52(1) refers to. This article attempts to demystify this state interest through a historical survey of the evolution of contract law in the communist regime in China in comparison with the similar path Soviet civil law had gone through. If it simply means public interest, Chinese law is no different than the western counterparts. If it means something different, a secretive enlarged state power to declare nullity and invade freedom of contract might come with this law. Given the principal-agent relationship between the state and SOEs regarding the ownership rights of SOE assets, the absence of a sufficiently competitive market, the incentive incompatibility between the state
and SOEs, an enlarged state power over contractual autonomy is therefore implied and justified. This article suggests that such a state interest be state-owned enterprises’ financial interest, which is different from public interest. As a result, freedom of contract shall not be applicable to Chinese SOEs when ownership rights and a competitive market are missing, and a different interpretation of nullity law should be adopted to protect SOEs’ financial interest.

I. INTRODUCTION

In Western civil law jurisdictions, a contract that violates the law, public policy or morality is absolutely null. A contract that was entered into through fraud or duress is relatively null: it is valid unless the victim of the wrongdoing asks to have it annulled. There is good reason for the distinction. If a contract violates the law, public policy or morality, it should not be valid whether the parties wish it to be or not. If a contract is induced by fraud or


2. There is a conceptual difference between common law and civil law that can be reflected in the choice of terminology between voidable and relatively null. Common law contract law concerns the enforceability of a promise and the voidability of the contract is raised by the promisor as a defense to bar the enforcement of a promise. In civil law, a relatively null contract is valid until declared null by a court upon the request of the aggrieved party. China adopted the civil law approach and requires, when certain circumstances warrant a revocable contract, the aggrieved party to request the court to have a contract annulled or revoked. See Chinese Contract Law art. 54. Therefore, in this article, I refer to contracts induced by fraud and duress as “relatively null contracts” in conformity with the civil law tradition. Also, as appeared in the official translation of Chinese contract law, the term “null and void” was adopted to correspond to the concept of “absolutely nullity” in the mainstream civil law. In this article, I will quote the term “null and void” in reference to “absolutely null”. The contracts that are relatively null are phrased literally as “revocable and modifiable” contracts in Chinese statutes. Chinese law gives the aggrieved party not only the option to nullify such contracts as they are “revocable”, but also the power to modify the contract if they can reach agreement with the party at fault.

3. For example, under German law, a declaration of intention that is induced by fraud or duress, and therefore not genuine, is only voidable. See Bürgerliches Gesetzbuch [BGB] [Civil Code] art. 123 (Ger.). Under French law, error, violence, and deceit are vices to consent, making the contract relatively null. See Code civil [C. CIV.] art. 1109, 1110, 1113, 1116 (Fr.).
duress, it should be valid only if the victim so chooses. A buyer may have been fraudulently induced to pay 100 for goods with a market value of 80. In this case, he should be able to withdraw from the contract and get restitution damage—return the goods and get the 100 back. But, if the market price suddenly jumped to 120, he should be able to enforce it. He should also be able to enforce it if the goods are unique and worth more than 100 to him personally.

When relative nullity exists, why should the law allow the aggrieved party to determine the validity of the contract rather than declare the contract null and void \emph{ab initio}? Clear classification of nullities had not been achieved by Roman law.\footnote{The detailed accounts of the historical confusions can be seen in Reinhard Zimmermann, The Law of Obligations: Roman Foundations of the Civilian Tradition 679 (1990); see also Ronald J. Scalise Jr., Rethinking the Doctrine of Nullity, 74 La. L. Rev. 665 (2014).} The modern classification of nullities and the widespread recognition of relative nullity in the civil law world owes to the rise of freedom of contract and will theories as a result of the 19th century liberalism and laissez-faire capitalism.\footnote{The relevant provisions in French Civil Code are a typical product of this movement. See supra note 2.} The reasoning behind relative nullity is usually that party will know his own interest better than the court and courts shall not interfere with contracting parties’ free will, as dictated by the principle of freedom of contract. The wills of the contracting parties and their consent that relative nullity law tries to protect were not the central theme of contract law before the 19th century. However, since the rise of will theories and freedom of contract, the classical contract theory has “the tendency to attribute all the consequences of a contract to the will of those who made it.”\footnote{P.S. Atiyah, The Rise and Fall of Freedom of Contract 404 (Oxford 1979).} As a result, “the primary function of the contract came to be seen as purely facultative, and the function of the court was merely to resolve a dispute by working out the implications of what the parties had already chosen to do.”\footnote{Id. at 408.}
The core of freedom of contract is to give binding force to whatever is mutually agreed between the contracting parties. Thus, to ensure freedom of bargaining, which was regarded as “the fundamental and indispensable requisite of progress” by the 19th century economists, courts shall not step in to rectify an unfair bargain “since the force of competition will ensure fairness in terms and prices.”

When the vice of consent in a contract only affects the interest of the contracting parties, nullity of contract can only be asserted by the party shouldering the negative consequence of this defect. The aggrieved parties are the only class of people the law of relative nullity is trying to protect, and the law gives them the option to confirm the act. Whenever they decide to confirm the validity of a defective contract that does not impair public or bona fide third party’s interest, they are acting in their own interest, and they are in a better position than the court to estimate the consequence of annulling a contract for themselves. In addition to protecting freedom of contract, the rules of relative nullity also operate to guarantee the safety of transactions. They give an incentive for parties to engage in business transactions by assuring them of their power to rescind the contract on their own initiative barring circumstances where the contractual defects will interfere with the interest of the public or a third party.

The unrestricted role the rise of capitalism and 19th century liberalism placed on the will has undoubtedly declined as so declared by Gilmore and Atiyah. According to them, the destiny

8. Article 1134 of the French Civil Code describes this principle as such: “contracts legally formed have the force of law for the parties who made them.” Chinese law adopted the idea of contractual freedom for the first time in 1999 through art. 4 of the Contract Law: “The parties have the right to lawfully enter into a contract of their own free will in accordance with the law, and no unit or individual may illegally interfere therewith.”


10. ATIYAH, supra note 6, at 405.

11. See generally GRANT GILMORE, THE DEATH OF CONTRACT (Ohio State Univ. Press, 1974); ATIYAH, supra note 6.
of freedom of contract is closely related to that of general theories of contract law, and neither of the two existed before the 19th century. The role of freedom of contract has been declining when the dominant role of the general theory of contract was gradually taken over bit by bit by the rise of protection of consumer interests in transactions where the bargaining powers are extremely unequal, limitations placed by special contracts such as the adhesion contracts, the emergence of regulatory law, and sophisticated commercial contracts that will allow parties to opt out of the requirements what freedom of contract would expect. Still, in the west as in most parts of the world, freedom of contract as a doctrine survived these attacks and is widely respected outside the particular areas of the contract law mentioned above.

Nevertheless, contract law certainly predates capitalism and will theories and principles such as equality in exchange, commutative justice, and fairness guided contractual transactions in pre-commercial societies and post commercial but pre-capitalist civil law without the will theories. With all the difficulties and discredits mentioned earlier, does every industrialized society have to have contract theories that are based solely on the will and autonomy? Shall freedom of contract be applied to all human societies regardless of any features in its economy or are there certain prerequisites a society must entail for this doctrine to be justified and therefore become desirable?

This investigation on the relative nullity of contract in Chinese law serves as a test to examine whether freedom of contract, borrowed from the West and recognized as a fundamental principle of Chinese contract law, should be preconditioned on certain prerequisites such as the existence of private ownership and the availability of a competitive market. More specifically, I hope to test whether freedom of contract is applicable to Chinese state-

owned enterprises (SOEs) by investigating whether Chinese SOEs are afforded the option the relative nullity law provides theoretically to all contracting parties. I am of the opinion that, if freedom of contract is not applicable to China or Chinese SOEs, it is only reasonable that a different kind of relative nullity law should be adopted in China to serve the economic features unique to China.

In China, given the nuances arising from the inner-consistencies of various statutory provisions, the question whether a contract is absolutely null or relatively null is unclear. At first sight, the law seems contradictory. Contracts are governed by the Contract Law enacted in 1999. Article 54 provides that, as in Western jurisdictions, a party who was induced to enter a contract by fraud or duress may have it annulled or modified. Article 52 provides that a contract is “null and void” if it “is concluded through the use of fraud or coercion by one party to damage the interests of the State” (§1); if it “harms the public interest” (§4); or if it “violates the compulsory provisions of the laws and administrative regulations” (§5).

If article 52 merely meant that a contract is null and void when it is illegal or offends public policy or morality, Chinese law would

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13. Western civil law scholars have raised the possibility of adding a third category of nullity, namely, mixed nullity for civil juristic acts or contracts that do not fit neatly within the traditional dichotomy of nullity. See Scalise, supra note 4. In determining the validity of contract or civil juristic act, Chinese law does introduce a third category: effect-to-be-determined contract or act, to put the legal effect of a contract or civil juristic act entered with inadequate civil capacity on hold pending on the confirmation or denial of the party with adequate capacity. The most relevant example is that a joint venture agreement between a Chinese domestic enterprise and a foreign enterprise is subject to state approval. Before such approval, the agreement is considered neither a valid nor an invalid contract. This situation is common in foreign investment transactions where the state will have paternalistic power over the validity of the contract. For example, in the United States, the President has the power to suspend or prohibit foreign acquisitions on the grounds of national security. See 50 U.S.C. app. §2170(d). This article focuses solely on the tension between relative and absolute nullity under Chinese law, and therefore consciously avoids the complications mixed nullity would add to Chinese nullity law.
be like that of Western jurisdictions. In the case of fraud or duress, a contract would be relatively null at the instance of the wronged party. In the instance of illegality or immorality, the contract would be absolutely null. But then there would have been no need for the statute to provide that a contract is absolutely null, not only when it violates the law, but when “the use of fraud and duress damage the interest of the state” (§1) or “malicious collusion committed to harm the state interest” when the contract neither “harms the public interest” (§4) nor violates any “laws” or “administrative regulations” (§5).

Suppose, however, that all contracts were deemed to affect the “interest of the state” or the “public interest.” As we will see, that was the official view before the introduction of elements of market economy in China. To the extent that view still prevails, every interference with the contracting by fraud and duress would “damage the interest of the state.” All contracts entered into by fraud or duress would be absolutely null under article 52(§1). But then, article 52(§1) would conflict with article 54, which provides that contracts are annulable for fraud and duress, yet only at the instance of the wronged party.

The law on the nullification of contracts induced by fraud or duress has been further complicated by article 58(§3) of the G.P.C.L.,¹⁴ which was enacted in 1986 to provide general

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¹⁴. Article 58 of the General Principles of Civil Law of the People’s Republic of China (GPCL—Adopted April 12th, 1986 and Effective January 1st, 1987) provides that:

Civil juristic acts in the following categories shall be null and void:
(1) those performed by a person without legal capacity for civil conduct;
(2) those that according to law may not be independently performed by a person with limited capacity for civil conduct;
(3) those performed by a person against his true intentions as a result of fraud, duress or exploitation of his unfavorable position by the other party;
(4) those performed through malicious collusion are detrimental to the interest of the state, a collective or a third party;
(5) those that violate the law or the public interest;
(6) economic contracts that violate the state's mandatory plans; and
provisions that were intended to operate as the Book I of the future Chinese Civil Code. Contract is regarded as a subcategory of “civil juristic acts” (Rechtsgeschäft) in civil law jurisprudence. Article 58 lists all the circumstances where a civil juristic act is deemed null and void. This laundry list covers all the circumstances under both article 52 and article 54 of the 1999 Contract Law without recognizing annulable civil acts. Under article 58(§3), a civil juristic act is null and void when a manifestation of intent is violated by fraud, duress and exploitation of the victim’s unfavorable position. The literal interpretation of this article would possibly mean fraud and duress will make a civil juristic act absolutely null regardless of whether the state interest is harmed, which conflicts with the two Contract Law articles mentioned above.

Perhaps, the most direct and effective way to assess the situation is to examine how courts interpret this provision in practice. However, this was not feasible until very recently. For many years, Chinese cases had not been available and accessible to general public and even the practitioners. In fact, most judicial opinions had been regarded as state secrets and made available only to the parties and court personnel. Only in the past few years had the newly-established search engines and legal research database started providing a select amount of cases to the public. For this project, up until the summer of 2013, I was only able to locate 23 cases decided under article 52 but none of the cases cited article 52(§1). In spring 2014, with more cases becoming accessible from the databases, I have identified 99 cases that cited article 52(§1). Through all these cases, one can easily detect the fact that courts are splitting on two issues: whether the state

(7) those performed under the guise of legitimate acts conceal illegitimate purposes. Civil acts that are null and void shall not be legally binding from the very beginning.
interest here is equivalent to public interest or the SOE’s interest; if and when state interest really means SOEs’ interest, whether SOEs are afforded the option to keep the contract when there is a defect in consent induced by fraud or duress. I would like to suggest that such a hidden interest be the financial interest of SOEs that is different from public interest or any other interest law or public policy should protect in a market economy. Nevertheless, such interest should be otherwise protected given the absence of a sufficiently competitive market, and incentive incompatibility between the state as the owner of state assets and SOEs as the agents of the state. Also, I would like to argue that state should only exercise this enlarged power to declare the nullity of contract on the court’s own initiative when there is neglect of duty, where the situation warrants no reasonable ground to justify the SOE management’s failure to revoke the contract – the option afforded by article 54.

Determining which contracts are relatively null and which are absolutely null under Chinese law is not simply a matter of reconciling the three statutory provisions. It is a matter of reconciling the role of the state and the role of contracting parties in an economy which is in part state managed and in part market driven. To understand such a battle over contract autonomy, one has first to figure out what this secret state interest the Chinese laws are trying so hard to protect is. To see what is at stake, one must consider the role that contract and contract law played before and after private markets were introduced in the communist China.

II. CONTRACT LAW UNDER THE COMMUNIST REGIME


1. The Economic Logic behind Nationalization

Upon the establishment of the People’s Republic of China in 1949, private ownership of land and industry was gradually
eliminated in order to implement the heavy industry oriented economic strategy. Following the massive nationalization of industry and commerce and the establishment of the state-owned enterprises (SOEs), a free and competitive market was gone and the price distortion emerged to artificially lower the cost in developing heavy industry. Such price distortion made it impossible for the state to evaluate the SOEs’ management performance by using profit rate as the primary indicator, as it has been used in a market economy. Under these circumstances, without an effective governance model, the incentive incompatibility and information asymmetry between state and SOEs would not permit SOEs to have either the autonomy or business incentive in contracting.

The fact that communist China was founded upon a low level of industrialization and a backward economic structure made the government designate the development of heavy industry a priority, especially given the economic embargo due to the international disapproval of the new government and military threats China faced at the time.15

The profit generated by the same capital in light industry was 270% of that generated in heavy industry in 1957.16 If given a choice, private investors likely had much less incentive to invest in heavy industry, therefore not meeting state expectations. Therefore, the nationalization of heavy industry and the replacement of privately-owned enterprises with SOEs became the alternative. Also, in order to reduce the production costs of heavy industry, it was essential to bring down the living costs of industrial workers.17 Given the fact that private investors would have had no incentive to invest if the prices had to be distorted to serve the heavy industry, light industry was also nationalized.18

16. See id. at 23.
17. See id. at 24.
18. See id.
Following nationalizations, prices were distorted. A competitive and free market was no longer available. The implementation of state economic plans was considered the top priority for SOEs rather than profit maximization. All this appeared to be reasonable, since in a highly centrally planned economy, both profits and deficits can be artificially attributed to a particular industrial sector or a monopolized enterprise with the purpose of achieving the government’s economic agenda. In such an economy, profit can no longer serve as an indicator in the evaluation of the business performance of SOEs.\(^1\) When the market was gone, so was market competition. Without market competition, SOEs acted as monopolies in their designated regions. Profits and deficits can be easily manipulated by the state’s decisions in price setting, prioritizing the development of an industry, or the manufacturing of certain products. It followed that the incentive to maximize profits should not even be permissible for the fear that SOE managers might try to intercept the production residuals at the expense of the implementation of state economic plans.\(^2\) Nevertheless, the incentive incompatibility between the state as the owner of the state assets and SOEs as the managers of the state assets still existed. To protect the state from managers intercepting industrial residues and misappropriating state-owned assets, and to supply the lack of sufficient information in evaluating enterprise performance, it was required that the state be deeply involved in the daily operation of SOEs, which further took away the business autonomy and incentive of SOEs.

In the rural areas, the land reform took place which allowed the peasants to take over land from the landlords by force rather than by law or administrative decrees. Land ownership was since then monopolized by state and village collectives. Socialist agricultural communes were established in 1958 upon the enactment of the Resolution of the Politburo of the Central Committee of the

\(^{1}\) See id. at 116.

\(^{2}\) See id.
Communist Party to bring about the agricultural collectivization and state monopoly of crops. The commune supplied all the economic resources and means of production equally to its members for free.

As a result of the ownership reform, the only type of ownership desired and allowed in the country’s economy was public ownership.\(^{21}\)

When private ownership disappeared in industry and commerce, and freedom of contract was completely taken away from enterprises, contract law was no longer considered private law and contracting became a mere documentation of state economic plans.

Together with nationalization and as part of its ideological campaign, the Chinese Communist Party followed the Soviet Union’s experience in “casting out all prerevolutionary law” in order to “create a new heaven and a new earth.”\(^{22}\) As a result, all pre-existing laws enacted by the Nationalist Government such as the Civil Code were regarded as evil and something to be eliminated.\(^{23}\) Both private economy and private contractual transactions lost legal legitimacy. With contracting parties losing all financial incentive to enforce a contract, nullification was no longer an issue. As a result, contracts other than economic contracts were either not regulated by law or outlawed entirely. The Chinese economic system in this period of time imitated the militant commune system operated in Soviet Union from 1918 to 1921 when private ownership and contract rights had been totally denied. The later Chinese economic reform resembles the New Economic Policy adopted by Soviet Union after the failure of the militant commune system. During both reforms, private ownership

\(^{21}\) Of course, private ownership had to still exist in reality, especially when it came to personal property.


and private market were reintroduced along with the resurrection of legal institutions based on the civilian tradition. However, much like what happened later in China, the Soviet Union continued to exercise a central control over the economy and retained extensive powers to protect the state financial interest in the economy, thereby largely interfering with freedom of contract.

2. Militant Communism in the Soviet Union

Militant Communism was a period of time from 1917 to 1921 when the Soviet government was fighting the civil war against its domestic opponents and foreign intervention. During this period of time, the Soviet government established a communist social order through massive collectivization and attempted to use central economic planning to replace markets.24

A series of fundamental legal and institutional changes began in 1918 that allowed the government to be the “exclusive owner of land, industrial and commercial establishments, and the only producer and distributor of commodities”.25 The Soviet Union proclaimed its status as a communist country and at the same time destroyed the legality of private ownership. The right to contract disappeared along with property rights.

On November 30th, 1918, the Statute on the Judiciary abrogated all older laws.26 On February 19th of the same year, all private land ownership was abolished.27 Transactions regarding the right to use land were also prohibited.28 Massive confiscations and nationalization took place. In 1918, several decrees annulled inheritance rights, stocks, bonds, and confiscated savings.29 Banking, insurance and foreign trade were also subject to

25. Id.
26. See id.
27. See id. at 10.
28. Id.
29. Id.
government monopolies. 30 By June 1919, copyrights and patents became subject to government monopoly. 31

The government ownership of land and monopoly of crops and grains was enforced through the establishment of socialist agriculture communes. Special military detachments were sent to villages to collect the crops. 32 Peasants could only keep the crops and grains needed for their bare consumption. The surpluses above those needed for consumption had to be delivered to the government at “fixed prices equal to confiscation”. 33 All private trade in food was forbidden. 34

The Supreme Economic Council was established in 1917 to manage all the state owned enterprises and confiscate private enterprises. In 1920, in order to inhibit the undesirable growth of the private businesses, the council issued an order nationalizing “all industrial establishments employing ten or more workers, or even five or more workers if with motorized installations.” 35 Following the massive confiscation and governmental regulations, from 1918 to 1920, all business initiatives were barred as were private property rights.

Soon enough, the omnipotent state role replaced the private law and the rigorous state planning left no place for contracting.

According to Goikhbarg, private law such as contract law was almost entirely absent during the period of militant communism with one exception, the contract of a village with the shepherd of the community herd. 36

In 1921, a famine ended militant communism. The New Economic Policy was introduced and a Russian Soviet Federative

30. Id.
36. See Gsovki, supra note 24.
Socialist Republic (R.S.F.S.R.) Civil Code was enacted in 1922, heavily influenced by the German Civil Code. Starting in May 1922, some confiscated properties were returned to former owners. Any new confiscation was prohibited for the future.

3. The Total Denial of Private Ownership and Contract Law as Private Law in China

As had happened in the Soviet Union after 1917, rigid state planning took place in China in the 1950s, leaving no place for autonomy in contracting.

As in the Soviet Union, given the fact that all means of production were now controlled by the government on behalf of every citizen, the only legally permissible contracts became economic contracts. As a consequence, only SOEs and government organs were allowed to contract.

Nevertheless, the nationalization of means of production and private ownership along with the repudiation of all preexisting contract laws did not mean that no rules were in place to regulate contracts. It is said that, “up to 1958, 66% of 4000 regulations dealt with the national economy.” Most remaining laws regulating contract were provisional decrees that were enacted to implement the state economic plans. For example, contracting was regulated by Provisional Methods on Contractual Agreement

37. Id.
38. Id.
41. The author is not arguing that there were no customs or informal local rules that might have been dealing with contracts in the civil law sense in Chinese society. However, whatever informal rules and dispute resolution mechanisms that might have been available before the economic reform at the end of 1970s, they were unofficial rules not recognized by the state and the activities that they dealt with were not regarded as contracting by the state until 1999 when contract law was finally defined as civil law.
Made between Government Agencies, State Enterprises, and Cooperatives (hereinafter “Provisional Methods”), which was issued in 1950 by the Commission of Finance and Economy under State Council (the equivalent of the Supreme Economic Council in the Soviet Union). In 1963, the Commission on Finance and Economy issued another administrative regulation titled Tentative Methods Regarding Mining Products Ordering Contracts (hereinafter “Tentative Methods”). Other Ordering Contract Regulations were issued during this period.

Under the Provisional Methods, a contract was an economic act subject to state control. The aim of such contracting activity was to distribute the resources and products according to rigid state economic plans and to satisfy every citizen’s quota. This is akin to a system in which the state is a big company that employs every citizen and everyone lives for free without drawing a salary.

During this so-called “lawless” era, the validity of contract was not even a practical legal issue and was never worth fighting for. Therefore, there was no mention of the nullity of contract in the Provisional Methods and Tentative Methods. The purpose of contracting was to “ensure the conscientious implementation and all-around fulfillment of the state plan.” In accordance with this principle, parties entered into contracts not to maximize their profits but to serve the state interest. No legal rights were vested in the hands of contracting parties. It can be inferred that no contract could be entered into except to carry out the state economic plan. In such a context, it made sense that parties would not have to bear the risk of financial loss. Actually, at that time, all businesses were owned by the state, which provided 100% of the enterprise

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42. See MO ZHANG, supra note 23, at 3.
43. See id.
44. See the Administration Council Commission on Finance and Economy, Tentative Methods Regarding Mining Products Ordering Contracts art. 2 (1963).
equity.\textsuperscript{45} Each individual business entity had neither an independent budget nor independent financial status.\textsuperscript{46}

As Pitman B. Potter described:

Enterprise budgets were fixed and were generally unaffected by the nonfulfillment of contracts. Enterprise managers bore very little responsibility for losses caused by nonperformance of contracts, since such losses were generally made up by the state, either through an adjustment of the aggrieved party’s planned production quota or by directly absorbing the deficit suffered by the aggrieved party.\textsuperscript{47}

Under the 1950 Regulations, all contracts had to be registered at the People’s Banks,\textsuperscript{48} if the payment could not be processed immediately, and contracts, upon conclusion, had to be filed with the superior government and its economic commission, and also filed in the record of the department of treasury.\textsuperscript{49} Compulsory dispute resolution mechanisms were in place before a contract dispute could be adjudicated by a court. Disputes regarding to nonperformance or breach of contract would have to be first submitted to a higher governmental authority for mediation since all businesses were owned by the state, and operated in the same way as a government agency.

If both parties were from the same province or circuit, their disputes had to be submitted to the higher level government’s economic commission.\textsuperscript{50} If the parties were from different provinces or circuits, the disputes had to be submitted to the

\begin{flushleft}
\textsuperscript{45} Capital structure of SOEs include 100\% of state equity and zero debt. See JIAN CHEN, CORPORATE GOVERNANCE IN CHINA 52 (Routledge 2005).
\textsuperscript{47} Id. at 27.
\textsuperscript{48} The People’s Bank is the central bank of China and the regulatory body of China’s financial institutions.
\textsuperscript{49} Provisional Methods on Contractual Agreement Made between Government Agencies, State Enterprises, and Cooperatives art. 10 (1950).
\textsuperscript{50} See id. at art. 10.
\end{flushleft}
economic commission under the central government. 51 A suit could only be filed in court when such arbitration or mediation from the higher authority could not solve the disputes. 52 Even when a suit was eventually filed in court, it would probably not concern the validity of contract. At first, government-run businesses had no concern whether a contract had been concluded legally, and whether the parties’ declaration of intention was genuine. Since contracting was merely a form for recording state economic plans, contracting parties signed contacts simply to implement the executive order from higher government authorities, which excluded any autonomous intention on the part of the parties. Therefore, vices of consent, such as fraud and duress, as understood in Western law, did not really violate a contracting party’s consent. Moreover, even if fraud and duress did violate one contracting party’s financial interest, the loss suffered by the innocent party would be borne by the state and the unjust enrichment that resulted would also be absorbed by the state.

The major dispute a court might be dealing with in that time would be the failure to perform a contract. When this happened, a contracting party could not choose the form of remedy, and no monetary damages were available. The primary remedy was always specific performance. 53 When there was a late delivery, the remedy would probably “take the form of an apology and a promise to deliver as soon as possible.” 54

Therefore, from 1950–1981, Chinese contract law was pure public law. The Western idea of freedom of contract, which is based on theories of will and the declaration of will, was not even remotely applicable in China. 55 If German contract law can be

51. See id.
52. See id.
53. See POTTER, supra note 46, at 42.
54. Id.
55. See ZWEIGERT & KÖTZ, supra note 1, at 326.
criticized for “containing only a few drops of social oil,” Chinese law, at that time, could be said to contain nothing but “social oil.”


The Third Plenary Session of the 11th Communist Party of China Central Committee Meeting, held in 1978, changed the direction of Chinese economy. The “Reforming and Opening Up” policy was adopted at this meeting. The lawless era ended as soon as China reopened its door to the world in 1979. The first contract law statute, called Economic Contract Law (E.C.L.), was drafted in 1980 and became effective in 1981. The E.C.L. was the law that governed domestic contracts. Another statute, the Foreign Economic Contract Law, was enacted to regulate contracts entered into with foreign parties. A third statute, the Technology Contract Law, was also adopted to govern technology related contracts. The concepts of private ownership and private economy were no longer prohibited and were reintroduced as “a supplement to the socialist economy”. As a summary of the previous administrative regulations, the E.C.L. was an essential component to carry out the rigid state economic plan while at the same time allowing the increased autonomy that an open market and private ownership economy required. The E.C.L. was enacted with the purpose of “ensuring the fulfillment of state plans.” Further, following this non-civil law definition, the E.C.L. allowed only legal persons to be the parties to an economic contract. Under this article, economic contracts were defined as “agreements between legal entities for the purpose of realizing certain economic goals and specifying each other's rights and obligations.” While maintaining the concern with economic law, certain features of

56. See BASIL S. MARKESINIS, GERMAN LAW OF CONTRACT 45 (Hart 2006).
57. See Constitution of the People’s Republic of China art. 11.
58. See Economic Contract Law of the People’s Republic of China art.1
59. See id. art. 2.
60. Id.
civil law emerged for the first time in the legislative history of the People’s Republic of China. The contracting party, for the first time, had a lawful interest in contracting and contracting parties’ autonomy in contracting was recognized and protected. Along with increased autonomy, enterprises began to have independent financial status and to bear contractual liabilities. Still, by the time of the E.C.L.’s enactment, the effect of a planned economy was dominant and the hard-won autonomy was very limited. The state was still responsible for setting the market prices for products according to planning. According to the E.C.L., the contract price could only be negotiated when the state policy permits.

As a result, the concept of the nullification of contract was introduced for the first time. The E.C.L., however, did not distinguish relatively null contracts from absolutely null contracts. It annulled the contracts that might be deemed relatively null under French and German law. According to the E.C.L., all the following contracts are deemed null and void:

1. contracts in violation of the law or state policies and plans;
2. contracts signed through the use of fraud, coercion or similar means;
3. contracts signed by an agent beyond the scope of his power of agency, or contracts signed by an agent in the name of his principal with himself or with another person whom he represents; and
4. economic contracts infringing on the interests of the state or the public interest.

The striking effect of this article was that violation of state plans was one of the grounds to rescind contracts, and the

61. Id. art. 1.
62. Id. art. 5. This article provides: “Economic contracts must be made according to the principles of equality and mutual benefit, agreement through consultation and compensation of equal value. Neither party is allowed to impose its will on the other, and no unit or individual is allowed to interfere illegally.”
63. Id. at art. 17(3), art. 23. Prices for both sales and lease contracts can be negotiated by parties when prices are not set by the State.
64. See id. art. 7.
65. Id. at art. 7.
existence of fraud and duress made a contract absolutely null rather than relatively null. Also, acting beyond the scope of authority rendered a contract null without recognizing later ratification by the principal as a cure for nullity. This clear cut solution as to defective contract was a reflection of the strong sense of protection of state economic interest under which the protection of private parties’ interest was secondary. By this time, freedom of contract was not yet introduced. Also, protecting the safety of transaction and bona fide third party were significantly outweighed by safeguarding the state interest.

Though state control had been somewhat relaxed to leave room for a private economy and private market, the planned economy remained dominant. It might sound unsophisticated, by modern continental civil law standards, to deprive the parties from contract autonomy and to regard all annullable contracts as already null and void. Nevertheless, it was an understandable result given the historical context in China at that time in which the state had to intervene and declare a contract null when the majority of legal persons, as SOEs, didn’t have contractual autonomy and business incentive to enforce their contractual rights on behalf of the state.

In the early stage of the economic reform, the state’s financial interest in carrying out the economic plans without interference by fraud and duress was superior to the protection of the small scale privately owned enterprises’ business autonomy in deciding whether to annul a contract when their consent was violated. After all, the overriding purpose of contracting was to meet the needs of the production and business operation under the mandate of the state plans.66 Many times, contracts had to be concluded under the quota provided by the state and the conclusion of the contract had to be authorized by a higher government authority.67

66. See Mo Zhang, supra note 23, at 32 (Quoting Su Huixiang, Theory of Economic Contract Law 3–5 (Liaoning People’s Press 1990)).
67. See id. at 48. This situation happens when the business transactions concerning products and items fall within the scope of state mandatory plans.
On the other hand, in contrast to the West, where contracting is a result of business judgment, the majority of the contracting parties in China were simply carrying out the daily tasks assigned by higher authorities. Therefore, it made sense to consider fraud and duress as offenses to public policy and harms to public interest. In Western law, contracts in violation of public policy or morality are universally regarded as absolutely null or void. Moreover, given the fact that when the E.C.L. was enacted, virtually all business entities allowed to contract at that time were owned by the state, and consequently no private interest could have been harmed by the state intrusion in nullifying all contracts concluded by fraud and duress. At the beginning of the economic reform, private parties were simply not within the purview of the E.C.L.

As a contract under the E.C.L. was not essentially a civil juristic act, and no private interest was involved, the only party bearing the loss caused by fraud and duress was the state. Therefore, it seemed reasonable for the state to interfere with the validity of all such contracts and to rescind them.

5. 1993–1999: The Emergence of a Market Economy and the Obsolescence of the E.C.L.

a. Emergence of Private Ownership

Starting in 1980, a private economy first appeared among the peasants’ households when a land tenure system named the Land Contract Responsibility System was established. The state allocated the cultivated land to peasant families. Families, as the basic units, were responsible for producing a certain amount of grain according to their assigned quota. Farmers were also allowed to keep the surplus as their own when exceeding the quota. The emergence of surplus created trade markets within each village neighborhood that sold exclusively agricultural products. This reintroduction of private ownership gave the farmers an incentive to produce more. Private ownership was soon extended to urban
cities where privately owned business households were allowed to operate. Such business entities were owned by individuals and their families, without employees outside the family.\textsuperscript{68} This small-scale business economy was favored by the Communist Party. A party policy would soon allow these privately owned businesses to hire employees, under the cover name of training “apprentices.”\textsuperscript{69} However, according to an administrative decree issued by the State Council, the number of employees such privately owned businesses were allowed to hire could not exceed seven.\textsuperscript{70} This limit was placed to make sure that private business could only operate on a small scale so that state ownership would still be dominant and the foundation of communism would not be threatened. However, over the next few years, this restriction was not strictly enforced, and economy based on private ownership grew rapidly.

\textit{b. State-Owned Enterprise Reform to Allow Autonomy and Incentives}

The state-owned enterprise reform in China differs from similar reforms in Eastern European and Latin American countries where massive privatization took place.\textsuperscript{71} The Chinese SOE reform has been mainly about allowing SOEs to acquire limited business autonomy and benefit from economic incentives rather than divesting SOEs and introducing a sufficiently competitive and free market. Admittedly, allowing economic motive improved SOE performance and efficiency, whilst a mere increase of autonomy and incentive does not guarantee the continued improvement of

\begin{itemize}
\item[68.] In Marxism, capitalists, as business owners, obtain undue surpluses from the exploitation of their employees. Employment with private employers was deemed as an inherent feature in the capitalism that should not be allowed in communist China.
\item[69.] Implementing Rules on Urban Individual Business Households art. 4 Cheng Xiang Ge Ti Gong Shang Hu Guan Li Tiao Li.
\item[70.] \textit{Id}.
\item[71.] \textit{See generally} WORLD BANK, BUREAUCRATS IN BUSINESS (Oxford Univ. Press 1995)
SOE performance. Moreover, the pre-existing incentive incompatibility and the information asymmetry between the state and SOEs were not effectively addressed in the economic reform. State interference with freedom of contract is still necessary to effectively prevent SOEs from maximizing their own interest that can be incompatible with the state economic goals.

Following the expansion of autonomy in the privately-owned business, starting in 1984, a similar trend occurred among state-owned enterprises as well. On May 10th, 1984, an administrative decree entitled “Provisional Regulations concerning the Expansion of Autonomy for State-owned Industrial Enterprises” was issued by the State Council. Several measures have been taken since then to allow more autonomy in the operation of state enterprises and to motivate employees. According to the decree, the SOEs were allowed to sell their above-quota production at their discretion and could even sell 2% of the planned production quota. For the goods at the SOEs’ disposal, SOEs can set the price within the range of 20% less to 20% above the state price. This was a change in the over-centralized price control in China. In 1979, there were 256 industrial products whose prices were subject to mandatory state planning. By 1984, this number was reduced to 60. The trend has continued: the products whose prices are set by the state now account for only 5% of those in the market.

72. Behavioral studies have shown that performance is not always proportional to economic motive. And SOE reform in many other countries have reached the consensus that, besides improving incentive structure, successful SOE reforms also come with introducing competitive and free markets, toughen SOE financial budgets, and divestiture of SOE ownership, etc. See WORLD BANK, BUREAUCRATS IN BUSINESS, supra note 71, at 5. As a result, mere increase of incentive doesn’t lead to better performance of SOEs.

73. Provisional regulations concerning the expansion of autonomy for state-owned industrial enterprises (Quoted in SHAHID YUSUF, UNDER NEW OWNERSHIP: PRIVATIZING CHINA’S STATE-OWNED ENTERPRISES 56 (Stanford Univ. Press (2006)).

74. Id.

75. Id.

76. Id.
Another effort to motivate the SOE workers is to link their work performance with profits and abolish their employment tenure. The decree also allowed up to 3% of industrial workers to receive merit raises\(^{77}\) and by 1988, 60% of industrial workers were subjected to a wage scheme that links their salaries to the profits of the SOEs.\(^{78}\) Also, starting in 1986, a new system was adopted to deny lifetime employment to employees newly hired by the SOEs.\(^{79}\)

The business autonomy of SOEs was further promoted by the contract responsibility system, which was adopted in 1987.\(^{80}\) Under this system, SOEs will sign a performance contract with the government, whose terms will extend for at least three years. These contracts were all written negotiated agreements specifying business goals for the SOEs to achieve within a given time frame.\(^{81}\) This scheme allows the SOEs to retain a large share of the profits and arrangements were made to divide the cash flow between the SOE and the government.\(^{82}\)

After over a decade of SOE reform, business autonomy greatly increased as a result, nevertheless, such autonomy was still limited and under the supervision of the state. As a survey conducted in 1994 suggested, daily operational rights had been delegated to most of the SOEs while the autonomy to make major business decisions such as mergers and acquisitions, investment, authority to conduct international trade was reserved to a small percentage of the SOEs.\(^{83}\) According to this survey, 94% of the SOEs had acquired autonomous decision making rights of production and operation, 90.5% had acquired product sales rights, 95% acquired product sales right, 86% had acquired the wage and bonus

\(^{77}\) Id.
\(^{78}\) Id.
\(^{79}\) Id.
\(^{80}\) Id. at 59.
\(^{81}\) Id.
\(^{82}\) Id.
\(^{83}\) See Justin Yifu Lin et al., supra note 15, at 61.
allocation rights, 73.6% had acquired product pricing rights while on the other hand, only 25.8% of SOEs had acquired import and export rights, 46.6% had acquired asset disposing rights, 39.7% acquired the joint operation and acquisition rights.  

Still, the benefits of the increased autonomy is limited by the facts that prices are still not completely determined by market, state policy burden and corporate social responsibility results in the overstaffing in virtually all SOE, which still hinder the efficiency of SOEs. Without a sufficiently free and competitive market in place, profit cannot serve as a sufficient information indicator of SOE performance. The budget constraints on SOEs are not hard enough and bank loans are still available upon request with interest rates well below the market rates even when the banks are well aware that this is risky lending. Moreover, the fact that the state was the only or majority shareholder made it impossible for these SOEs to adopt effective corporate governance structure.

As a result, the increased autonomy of SOEs is still not the same as that of privately-owned enterprises in the West.

c. Introduction of Socialist Market Economy

To reflect and support these unstoppable changes in the country’s economic system, the concept of socialist market economy was introduced by the Party in 1993 at its 14th Central Committee Meeting. Since then, in theory, means of production and products should be now distributed by the market rather than state planning.

As a result of these changes, a private interest now exists in the economic contracts, and privately-owned businesses have acquired the right to contract.

To facilitate the transformation of a planned economy to market economy, the E.C.L. was amended in 1993; the Company

84. Id. (Quoting Tao Song et al., Multi-Perspective Thoughts of 40 Economists on the SOE Reform 91).
The amended E.C.L. added peasant households and private-owned business households as parties who are allowed to enter into economic contracts. Also, in the amended article 7 of the E.C.L., violation of Communist Party economic policy was no longer a cause leading to nullity, which signified the end of planned economy. The then-newly enacted Company Law did not limit legal persons to SOEs and therefore opened the floodgate to allow privately-owned enterprises to register as corporations and assume the status of legal persons.

The law regarding nullity remained unchanged, allowing the state to step in even in cases where there should be relative nullity and therefore a possibility of confirmation of the contract by the aggrieved party. This still allows the state to invade the contract autonomy.

Now that private parties have the financial incentive in contracting, as in the West, when both parties to the contract are privately owned entities, this approach to invalidity can no longer be justified. As we have seen, the contract law of Western jurisdictions is based on the principle of freedom of contract. As noted in the Introduction, it allows the victim of fraud or duress to protect his own interest by choosing whether the contract will or will not be annulled. The privately-owned companies are legal persons who have stronger incentives to protect their own interests than the state. As such, they are in a better position to make decision as to whether a contract should be annulled.

It is legitimate for the aggrieved party to have the option to exercise the right to rescission when only their interest will be affected by the decision. It is true that, in China, the majority of the economy is still government-owned, and that SOEs play a more

85. Before the promulgation of Company Law, there were two separate statutes dealing with state-owned enterprises and privately-owned enterprises separately.

86. See Economic Contract Law art. 2 (1993).

important role in the economy. Nevertheless, in a market economy, contractual autonomy should extend to them as well. The state-owned enterprises are no longer established for the sole purpose of implementing state policies. Most of them are for-profit and operate under the leadership of their own management rather than government authorities. Of course, the latter keep a supervising power over the management, through the authority of the State-owned Asset Supervision and Administration Commission (SASAC), various ministries and financial regulatory bodies. Still, they are market participants whose interests should receive only as much protection as private parties. It has been argued that, in the market economy, state-owned enterprises’ interests are not equivalent to state interest.

III. FROM 1999 TO THE PRESENT: CONTRACTS ANNULABLE FOR FRAUD AND DURESS WHEN NO STATE INTEREST IS INVOLVED

A. Contract Law in General and the Invalidity of Contract

In response to the rapid social and economic changes, the uniform Contract Law of China was enacted to replace the three separate statues and came into force in 1999. It is a fairly westernized statute that retains only a few of the ideological features of socialism. The new law protects the state interest in private transactions, but cautiously.

88. 120 Centrally owned SOEs account for 62% of the Chinese GDP and the total value of their fixed assets amounts to 120% of the Chinese GDP (Data available at http://www.sasac.gov.cn/n1180/n1566/n258203/n259490/13878095.html). See Li-Wen Lin & Curtis J. Milhaupt, We are the (National) Champions: Understanding the Mechanisms of State Capitalism in China, 65 STAN. L. REV. 697, 735 (2013).

89. State-owned Asset Supervision and Administration Commission (SASAC) was created in 2003 to exercise state’s shareholder rights within the SOEs. SASAC has the authority to appoint the management personnel, supervise major management decision-making and the use of state-owned assets.

90. See 隋彭生《合同法要义》134页 中国政法大学出版社 （2003）[SUI PENG SHENG, ESSENCE OF CONTRACT LAW 134 (Press of China Univ. of Political Science and Law 2003)].
It is the first post–1949 law that defines contract law as an area of civil law and contracting as a voluntary act. The law also confirms the equal status of the contracting parties and allows natural persons to enter into contracts. For the first time, the law would deal with the manner in which offers are made and accepted.

The tension between articles 52 and 54 of the 1999 law was pointed out in the Introduction. Article 54 provides that, as in Western jurisdictions, a party who was induced to enter a contract by fraud or duress may have it nullified or modified. Article 52 provides that a contract is “null and void” if it “is concluded through the use of fraud or coercion by one party to damage the interests of the State” (§1); if it “harms the public interest” (§4); or if it “violates the compulsory provisions of the laws and administrative regulations (§5).” To summarize the general rules, if a contract was entered into through fraud and duress, it may be annulled or modified upon the aggrieved party’s request unless a state interest is involved; in that event the contract is void ab initio. As discussed earlier, if the state were deemed to have an interest under article 52 whenever a contract was made through fraud and duress, all such contracts would be absolutely null, and article 54 would be pointless. If the state were deemed to have an interest, and a contract to be null, only if fraud and duress violated some independent law or regulation, article 52(§1) would be pointless. If neither article is pointless, there must be some circumstances in which fraud and duress violate a state interest and some in which they do not. Article 54, as we have seen, protects party autonomy in a way that article 52 does not. The question then

91. See Contract Law art. 2.
92. See Contract Law art. 4. This is the Chinese expression of freedom of contract.
93. See id. at art. 2.
94. See generally, id. at arts.14–31.
95. See Contract Law art. 54.
96. See Contract Law art. 52 (§1).
is what protection party autonomy should receive in the present Chinese economy?

Further, the situation can be complicated by the courts’ interpretations of G.P.C.L. article 58(§3), which, as mentioned in the Introduction, has rendered all civil juristic acts induced by fraud or duress absolutely null since 1986. Will the interpretation of this provision change the law on invalidity of contract formed through fraud or duress?

B. Party Autonomy and the Validity of Contracts

In practice, party autonomy is gaining more and more respect. Although article 52(§1) allows a court to declare a contract formed through fraud and duress to be null when a state interest is harmed, in practice, this power is hardly ever exercised on the court’s own initiative. Also, no judicial interpretation by the Supreme Court and no case accessible by research suggest what the limits of this power should be. Neither is there any existing judicial interpretation as to whether the interest of SOEs constitutes a state interest under article 52(§1).

Several positions regarding the meaning of article 52(§1) have been taken by scholars. The first position is that the interest of SOEs is not deemed to be a state interest; only fraud and duress that violate criminal law qualify as fraud and duress that damage a state interest. The basis for this position is that Code of Criminal Law does penalize the manager of a state-owned enterprise when he or she was defrauded into entering a contract due to a neglect of duty, and the result was a heavy loss to the state.

The second position is that a state interest includes political, economic and security interests of the state but not that of state-owned enterprises. Only when the content and purpose of the

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97. *See* SUI PENG SHENG, *supra* note 90, at 134.
contract induced by fraud or duress violate the public interest of the society will the contract be regarded as null and void.\textsuperscript{100}

The third position is that “for the article 52(§1) to apply, the harmful effect of the contract on the innocent party whose interests represent those of the state must be so serious that no reasonable person in the position of the innocent party would elect to confirm the contract.”\textsuperscript{101}

The fourth position is that:

[I]n reality, there are many circumstances where contracts are used for the purpose of misappropriating state assets and therefore infringing upon state interest. However, due to victim’s fear of being held liable or insensitivity to the loss of state assets, heavy loss of state assets might be resulted. If such contracts are not categorized as void per se, it is not sufficient to protect state assets.\textsuperscript{102}

A consequence of the first two positions is that the “state interest” in question is only a term interchangeable with “public interest,” and that article 52(§1) does nothing more than rephrasing article 52(§4). The third and fourth positions, however, seem to provide an alternative by claiming that the state interest is that of parties who represent the state and manage the state assets. Accordingly, a state interest under article 52(§1) means the interest of state-owned enterprises other than the public in general.

To solve this puzzle, I propose a three-step analysis. The first step is to determine whether there is a state interest in a private transaction entered into by a state-owned enterprise despite the leading opinion that there is not. If there is a state interest, the second step is to determine when that interest can be harmed by act of fraud or duress in the formation of a contract. The third step is

\textsuperscript{100}. 梁慧星《民法总论》179页 法律出版社 [HUIXING LIANG, GENERAL THEORIES OF CIVIL LAW 179 (3d ed., Law Press 2007)].

\textsuperscript{101}. See BING LING, CONTRACT LAW IN CHINA 182, (Sweet & Maxwell Asia 2002).

\textsuperscript{102}. 胡康生《中华人民共和国合同法释义》79，80页 法律出版社 (1999) [HU KANGSHENG, INTERPRETATIONS OF CHINESE CONTRACT LAW 79–80 (Law Press 1999)].
to determine when such a state interest should be considered “harmed” and under what circumstances the harm should be remedied by declaring that the contract is null. Is there state interest existing in private transactions that can be threatened by fraud and duress?

1. Is there a State Interest in Private Transactions?

Yes, there is a state interest in private transactions when at least one contracting party is a state-owned enterprise. There is a state interest because the state is a shareholder of a business enterprise. It used to be the case, as described earlier in this article, that the state was the sole owner of all businesses. Government ownership was the only legitimate ownership until the policy of reform and openness. Now, there is an increasing number of privately-owned enterprises, and in the stock market, there are state-owned companies listed in which less than a majority of the shares are tradable to prevent the state assets from going into the private sector. As long as there is financial investment from government, the investments in these companies constitutes state assets, which are threatened by fraud and duress.

Yet the consequence is not that the state should always intervene to protect its interests. Although the state has an interest in protecting its assets, as a market participant, the state must respect the autonomy of the parties in entering into a contract. The state interest might be protected by interfering with party autonomy. Yet, if the state nullifies every contract in which it has an interest, the new recognition of contractual autonomy and freedom of contract by 1999 Contract Law will again disappear on Chinese soil since the state will be making the decision on behalf of the contracting parties.
In my opinion, the only interest of the state that needs to be protected from fraud and duress in a contractual transaction is the SOEs’ interest, which represents the state’s pure financial interest rather than public interest.

Public interest is a universal ground for nullity of contracts. However, this interest doesn’t need protection from article 52(§1). When the public interest is harmed, the contract can easily be nullified on the ground of illegality, violation of public policy or morality as suggested by laws in virtually all other jurisdictions. These grounds are also available in §2–5 of article 52. According to these subsections, a contract will be declared null, if the contract is a sham transaction that harms the public interest or violates the mandatory laws. In any event, if the state interest in question falls within the state’s political, economic, or security interest—leaving aside its interest in state-owned enterprises—such an interest will be protected by article 52(§4) and (§5) rather than article 52(§1).

In addition, in the context of socialist market economy, separation of SOEs from government has been regarded as one of the core elements of SOE reform. Accordingly, the public policy should be to treat SOEs equally as a market participant and to reduce SOEs’ hidden advantages as much as possible. The public policy here should be to prevent state from acting at the same time both as a referee and a player. The financial interest of the SOE therefore shall not be regarded as equivalent to a state or public interest.

Admittedly, the Criminal Code penalizes the managers of state-owned enterprises for neglect of their duties if they allow themselves to be defrauded into making contracts that result in “heavy losses of the state interest.”¹⁰³ It does not penalize making a contract with a state-owned enterprise by the use of fraud.

Consequently, defrauding a state-owned enterprise is not a violation of law that will make a contract null and void under article 52(§5). There is no reason why, if the manager is penalized for bad business judgment and gross negligence, the contract itself should automatically become null. Consequently, in this context, fraud and duress do not in themselves qualify as violations of criminal law. Moreover, contract law, being part of the civil law, is not the appropriate forum to protect the state interest from criminal conduct or conduct that violates the public interest.

On the other hand, as the sole or majority shareholder of the SOEs, the state has had a long standing financial interest in contracts made by state-owned enterprises ever since the time of the planned economy.

To understand what state interest in China can be harmed by fraud and duress, it is better to start by asking the question “why don’t Western civil laws protect the state interest from fraud and duress and make such contracts null and void?” The answer is that, if fraud or duress violates law and public policy, the contract will automatically be null and void. Nevertheless, a court will sit on its hands when the only interest harmed is the private interest of a private party. The reason is that without the existence or with very limited existence of the state-owned companies, the state presumptively has no or little interest in private transactions unless law is violated or public order is offended. In China, given the socialist features of its economic system, the state does have an ownership interest in the private contract transactions entered by state-owned enterprises. There will be no difference in each civil law jurisdiction’s treatment towards fraud or duress that violates criminal law or other statutory provisions, or when an absolute simulation or a sham transaction takes place—such contracts will be deemed null and void. The only interest China has that the

104. See SUI PENG SHENG, supra note 90, at 134.
capitalist counterparts do not have is the state’s pure financial interest in SOEs’ interest in private transactions.

This enlarged power of the state to intervene to annul private contracts can be traced back to article 30 of 1922 Civil Code of R.S.F.S.R., which states: “A civil juristic act made for a purpose contrary to law, or in fraud of law, as well as a transaction directed to the obvious prejudice of the State, shall be invalid.” Though this provision is not exactly the same as article 52(§1), they both annul contracts to protect the same interest – the financial interest of the state and SOEs. Under this Soviet Civil Code article, an otherwise legal contract that is directed to the obvious prejudice of the state is absolutely null. The Soviet case law and jurisprudence tend to suggest that the range of contracts that were deemed to be directed to the obvious prejudice of the state covers was larger than those covered by article 52(§1).

Most scholars have agreed that it was a device to guard against the undesirable growth of private business and that it was enacted in conformity with Lenin’s instruction “to enlarge the interference of the State with the relations pertaining to private law and to enlarge the right of the government to annul, if necessary, private contracts.”105 Another scholar, T.E. Novitskaya, refers to this device as “an effective weapon in the hands of the Soviet state.”106 The right of the state to interfere with any contracts made in any area of civil law created a tool to avoid consequences disadvantageous for the socialist economy. In a Russian Supreme Court case, the court annulled sales contracts solely because SOEs had an interest in the objects for sale.107 Such annulments were based on the “socially announced purpose of use” of the object.108 In another case the high court annulled a lease and thereby interfered with a party’s property right because the property right is

105. See Gsovski, supra note 24, at 426.
107. Id.
108. Id.
not absolute under the civil code, and the economic interest of the SOE prevailed over the property right. 109 It can be inferred that had the SOE been defrauded or under duress in contract formation, the Soviet courts would have annulled the contract to protect the financial interests of the SOE. Also, what makes this device more powerful than article 52(§1) is the legal sanction: when a contract is annulled under article 30, damages for unjust enrichment will be collected by the state rather than the innocent party. 110

3. The Judicial Responses

Chinese courts are confused as to what the state interest refers to and do not fully understand the distinction between absolute nullity and relative nullity.

My observations are based on the study of 122 cases decided under article 52.

Courts appear to be careful about declaring a contract to be absolutely null and certainly have not done so without a request from the innocent party. Courts seem to go by the checklist under article 52. They declare the contract valid if none of the circumstances under article 52 apply and no party requested that the contract be rescinded.

Also in the majority of cases decided under article 52, contracts were annulled under either article 52(§4) or article 52(§5) for violation of the public interest or of a mandatory law. It is noteworthy that in most of the cases that cited article 52(§4), the courts never cited article 52(§1) or article 52(§2) at the same time, where both provisions mention state interest. It is clear that in the opinion of many courts, the state interest in question is not the public interest but rather something else. There is a significant number of cases where courts cited article 52(§1)–(§5) as authority

109. Id. at 87.
110. See R.S.F.S.R. Civil Code art. 147.
nullify a contract without reference to a specific subsection or without providing any explanation.

Among these cases, only a few were decided under article 52(§1) and article 52(§2) where the state interest is identified. Is the state interest under article 52(§2) the same as the state interest under article 52(§1)? Given the logical structure of the article, most likely the state interests in both these provisions refer to the same thing – the SOEs’ interest. The only difference between the two provisions is that when only one party committed the wrong in contract formation, article 52(§1) is applicable to annul the contract; when both parties collectively committed the wrong, article 52(§2) is applicable. Also the level of state interference will be upgraded when both parties are at fault: the state will annul the contract when either state interest, collective interest (meaning the rural villages’ interest) or a third party’s interest, is harmed.

The cases show that several Chinese courts do distinguish state interest from public interest and acknowledge that the state interest was really the SOEs’ financial interest. One district court openly admitted that whenever an SOE’s interest is harmed, the state interest is therefore harmed. In this case where the court cited article 52(§2), the plaintiffs were state-owned pharmaceutical companies that entered into an agreement with two advertising firms after the two firms prevailed in the bidding process. However, the plaintiff’s employees had leaked the confidential information in the course of the bidding process to help the defendants succeed. The court, in its opinion, stated that “the employees of the two plaintiffs and two defendants committed malicious collusion and therefore harmed the two plaintiffs’ interests. Given the fact that the two plaintiffs are state-owned enterprises, when their interests are harmed, the state interest is harmed.” In another case decided under article 52(§1), where a

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111. San X Pharmaceutical JSC v. Ya Advertising LLC. 2010, Shen Luo Min Er Chu Zi No. 3X4X (citation partially omitted).
112. Id.
state-owned pharmaceutical company was defrauded by another pharmaceutical company, the court annulled the contract, citing article 52(§1) as the only authority, rather than using article 54.  

Here, the plaintiff and appellant, a state-owned company, had sued in damages for non-performance, making no claim for dissolution. The claim was dismissed but the court declared the contract null on the basis of article 52(§1), though without explaining what the state interest was. The only possible state interest at stake here was the SOE’s financial interest. It is obvious that, according to both the trial court and appellate court, the SOE didn’t have the option to uphold the contract and sue in damages for non-performance even though it might be more beneficial for the state and the SOE to maintain the contract and obtain expectation damages. In a third case, it was asserted that a malicious collusion took place between the immediate past manager and legal representative of a state-owned gallery, the Gallery of Shenyang Municipality, and a pharmacy that had been a lessee leasing space within the Gallery. It turned out that the manager kept the official stamp after he left office and produced a lease that was a counterfeit which renewed the lease for three years and lowered the rent from 1.15 million RMB to 0.8 million RMB. The Gallery asked to have the contract annulled because “the conspiracy resulted in the loss of a state-owned enterprise.” The trial court upheld the validity of the contract based on the doctrine of apparent agency. The appellate court sided with the Gallery and annulled the contract citing article 52(§2) because “the interest of Gallery of Shenyang Municipality is harmed.” No reasoning or  

115. Id.  
116. Id.  
117. Id.  
118. Id.
explanation was given to identify one of the three interests listed in article 52(§2). There was no collective or third party interest involved, thus leaving only one logical explanation: the court must have been of opinion that the Gallery, as an SOE, represented the state interest. Therefore, it is fair to say that these courts are at least of the opinion that the state interest protected by article 52 is identical to the state-owned enterprise’s interest.

The courts, however, are not unanimous. In another case, the court did not nullify the contract even though the state-owned hospital was defrauded in a licensing agreement for a patent and had claimed rescission of the contract based on article 52(§1).\textsuperscript{119} The hospital could no longer request nullification on the basis of article 54, due to the one-year prescription. Nullity remained possible on the basis of article 52(§1) where contracts that are absolutely null are imprescriptible according to a recently published Supreme Court case.\textsuperscript{120} The court’s only line of reasoning was that “a state-owned enterprise’s interest is not the equivalent of state interest” and therefore article 52(§1) was not applicable.\textsuperscript{121} It is worth mentioning that victims of fraud or duress try to use article 52(§1) as a last resort to nullify a contract when the one-year prescriptive period for annulable contracts runs out and the victims happen to be SOEs.\textsuperscript{122}

4. When is the State Interest Harmed, and under what Circumstances shall the Article 52(§1) Power be Exercised?

My answer to the third question is that the state or a third party can only step in to have a court declare a contract formed under fraud or duress to be null when the situation is so deleterious that

\textsuperscript{119} Tao Zhenhai v. Liaohe Oil Field Center Hospital 2006, 沈民四知初字第65号 [2006 Shen Min Si Zhi Chu Zi No.65].
\textsuperscript{120} Guangxi BeiSheng Co. Ltd v. Beihai Weihao Real Estate Development Co. Ltd 2005, 民一终字第104号 [2005 Min Yi Zhong Zi] (Published in May, 2013).
\textsuperscript{121} See supra note 119.
\textsuperscript{122} See Contract Law art. 54.
the failure of the state-owned enterprise to seek restitution constitutes a neglect of duty. Such strings must be attached to prevent the state from abusing its power, and thereby harm the safety of transactions. In addition, it is not always in the state’s own financial interest to rescind a contract made under fraud or duress.

If the state tried to seek annulment of every contract induced by fraud or duress on behalf of the state-owned enterprises, the state-owned enterprises would lose their autonomy as market players to make a business decision in their best interest. State-owned enterprises would then be pure government agencies rather than business entities. After all, since a government-led market economy has been established in China, private transactions are no longer mere forms in which state supplies are operated. State-owned enterprises now have independent financial status and independent management. Such intrusion, if allowed, would greatly discourage commercial transactions because people would be more concerned in making contracts where a third party or the state can step in and declare it null without their consent.

Also, as previously described, it might be in the state’s economic interest to enforce a contract even though it was made by means of fraud or duress. The reasons might be that expectation damages for non-performance are greater than reliance damages that may be granted in addition to nullity, or that some market change made it beneficial to enforce such a contract. Also, the object of the contract might simply be of great subjective value to the state-owned enterprise, and therefore creates a legitimate reason for the company to enforce it regardless of fraud or duress.

Therefore, in my opinion, the enlarged state power to annul contracts can only be exercised when there is neglect in the performance of a duty and that neglect is so severe that no reasonable businessman would choose to enforce the contract after knowing of the fraud or being released from duress.
Further, state intervention can be justified by the lack of a sufficiently free and competitive market and the lack of a sufficient information indicator to evaluate the SOE performance.

We discussed the aggrieved party’s incentive to act in its best interest in evaluating the financial consequences of nullification. Even though reforms have been carried out to invigorate SOEs, the state-owned enterprises are not sufficiently business-driven. The absence of effective shareholding and corporate governance results in a lack of management accountability. Managers in state-owned enterprises are more like government employees than businessmen and are short of personal incentive and financial stake in running the business. Throughout the SOE reforms around the world, it has been observed that “bureaucrats typically perform poorly in business, not because they are incompetent, but because they face contradictory goals and perverse incentives that can distract and discourage even very able and dedicated public servants.”123

In China, SOE managers receive salaries that are comparable to government employees with similar bureaucratic ranks, and directors and officers can be laterally transferred to other government agencies in the event the SOE goes bankrupt. Therefore, unlike privately-owned businesses, profit maximization is never the top priority of these government-employed businessmen who are tasked to carry out state policies and held accountable only to the state. Since these quasi state-officials are not nearly as motivated as private entrepreneurs, since they are not accountable to shareholders for their grossly negligent business decisions, one may expect poor judgment when it comes to decide whether a contract should be nullified.124

Also, given the bad experience China had had during the economic reform in giving SOE managers too much autonomy and

123. See WORLD BANK, supra note 71, at 3.
124. 浙江省金华县人民法院（1992）白民初字第57号 [Zhe Bai Min Chu Zi No. 57 (1992)]
incentive\textsuperscript{125} and the incentive incompatibility that the reform fails to cure with both the policy induced burden and absence of a competitive market, this situation is unlikely to improve in the foreseeable future. Despite the introduction of a market economy, the state, as the owner of the SOEs, has its own policy agenda that needs to be carried out by SOEs, which is often incompatible with normal business incentives. For example, SOEs often have to carry out policy burdens such as the “policy-induced over-staffing” in order to assist the state in “resettling the redundant workers”.\textsuperscript{126} Also, as the main forces in pursuing the state economic objectives, SOEs still don’t have the complete autonomy in choosing their production direction.\textsuperscript{127} Price distortion still exists to serve the state development strategies.\textsuperscript{128} Unlike in the West, profit alone usually does not accurately reflect the efficiency and diligence of the management. It is possible that a poorly managed enterprise can still generate significant profits due to the lack of competition and superficial entry barriers created by government. Under such circumstances, if the state totally keeps its hands off SOE management decision making, it is possible for the manager to

\textsuperscript{125} Jian Chen, in his book \textit{Corporate Governance in China}, described one of the lessons:

Contract responsibility systems were introduced in most large and medium-sized state industrial enterprises during 1986–1997. The system was officially intended to place government ownership at arm’s length to enterprise management, so allowing more decision making space (business autonomy) to the latter. In the contract, the firm hands over an agreed amount of annual profit and tax for which they have contracted. It was permitted to retain a proportion of any surplus it achieved above the contract level. Also, the firm guaranteed to invest to increase asset value and to develop technology by an agreed amount, using retained profit during the contract period. But substantial collusion soon emerged between the directors, and the heads of the supervising government departments, leading to widespread corruption. The directors found that it was easier or quicker to reward themselves by transferring the firm’s assets to their own firms. The lesson was that it was not feasible to relinquish control to the firm’s managers in attempt to improve performance.


\textsuperscript{126} See Justin Yifu Lin et al., \textit{supra} note 15, at 114.

\textsuperscript{127} See \textit{id}. at 119–120.

\textsuperscript{128} See \textit{id}. at 145.
neglect the management duty to effectively protect state-owned assets and the SOE’s financial interest without being noticed by the state, if the state, as the majority shareholder, only looks at the usual information indicators as in the West.

These endogenous features inherent in Chinese economy warrant the state’s supervisory role over the SOEs. In response to the incentive incompatibility, information asymmetry, and liability disproportionality discussed above, it is legitimate for the state to nullify otherwise annulable contracts when affording the SOE management the option to confirm a contract that would harm the state’s interest in the SOE. Nevertheless, a court cannot rescind an annulable contract on its own initiative when neither party is an SOE. If both parties are private companies, then no such state interest will be involved. The state should not intervene, no matter how serious the consequence of fraud or duress is, and how big a financial loss the innocent party suffers.

Also, the state should not be able to rescind an annulable contract where the only aggrieved party is an SOE but there is a reasonable business choice not to rescind it. This may be in order to benefit from a market change or to obtain greater damages, or because the contract has a reasonable subjective value to the aggrieved party.

C. Further Confusions Caused by Article 58(§3) of the G.P.C.L.

As mentioned above, G.P.C.L. article 58(§3) adds to the complexity of the puzzle this article tries to resolve.

Though the G.P.C.L. assume their status as the highest law in the realm of civil law, as a general law, it is trumped by special laws such as contract law statutes, should any conflict exist. The GPLC govern civil juristic acts, of which contracts are a category. Every time a contract is induced by fraud or duress, a potential conflict between the Contract Law and the G.P.C.L. arises. Presumably, this outdated law should either be no longer
applicable or only applicable to civil juristic acts other than contract, in application of the civilian principle that special rules take precedence over general rules (*specialia generalibus derogant*). This would keep article 58(§3) away from further confusing the conflict between article 52 and article 54 of the Contract Law. However, an examination of 35 cases decided under article 58 in the past 23 years reveals a different story. It appears that when an SOE is harmed by a civil juristic act induced by fraud or duress, article 58(§3) merely extends the article 52(§1) protection of SOEs’ financial interest afforded to the civil juristic acts by imposing the absolute nullity of civil juristic acts when induced by fraud or duress. Also, a court might use article 58(§3) to enlarge its contract nullification power and infringe the autonomy established by article 54 of the Contract Law, by considering the contract simply as a civil juristic act rather than characterizing it as a contract.

For contracts entered into between 1986 and 1999, when nullifying economic contracts formed under fraud or duress, courts usually cited both G.P.C.L. article 58 and E.C.L. article 7.\(^\text{129}\) This was probably because contracting was deemed both a civil juristic act and an economic contract. When nullifying contracts between individuals where the contracts did not fall within the regime of the E.C.L., courts only cited G.P.C.L. article 58.\(^\text{130}\) In a case decided in 1992, a sale of an apartment between two individuals was nullified because of a fraudulent misrepresentation by the defendant.\(^\text{131}\) The act of sale was deemed a civil juristic act rather than a contract and therefore was annulled under G.P.C.L. article 58(§3) rather than under the special contract law. The court did not explain why this sale was not a contract. Most probably, because only juristic persons or business entities were allowed to enter into


\(^\text{130}\) This is contrary to the traditional view that contracts between individuals were not regulated before 1999.

\(^\text{131}\) 浙江省金华县人民法院（1992）白民初字第57号 [Zhe Bai Min Chu Zi No. 57 (1992)].
economic contracts and because the sale did not comply with rigid form requirements under the E.C.L., the E.C.L. was not applicable to the case.

For contracts entered into from 1999 to present, in theory, courts are supposed to apply article 58 (§3) to nullify civil juristic acts that are not regarded as contracts. In such cases, these juristic acts induced by fraud or duress are absolutely null, and therefore can be nullified on the court’s own initiative. For example, in a 2005 Supreme Court case, a company in the business of international trade deceived a state-owned bank into issuing letters of credit through a series of misrepresentations when applying for the letters. The court held that the issuance of such letters of credits was null because they were civil juristic acts that fall within the scope of article 58(§3). Article 58(§3) is used as an extension of the article 52(1) power into the state-owned bank’s issuance of letters of credit.

Also, in several private loan disputes cases, courts unanimously treated the signing of an informal acknowledgement of debts (“IOU”) under the threat of physical violence and a payment by the wife of the alleged debt of the husband when the wife was defrauded by a falsified IOU as absolutely null juristic acts. These annulments were based solely on article 58(§3).

However, courts sometimes use article 58(§3) as a vehicle to annul contracts for fraud or duress, without mentioning article 52

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132. For example, under the E.C.L. art. 3, an economic contract should be in writing. Article 12 lists a series of main provisions that should be included in an economic contract.

133. For example, when a person made a will under duress, to nullify the will, the court has to apply art. 58(§3) of the G.P.C.L. rather than art. 54 of the Contract Law.


135. Id. In the West, a letter of credit is regarded as a contract. However, in China, courts are not certain whether the letter shall be defined as a contract. In this case, the court seemed to be convinced that the letter of credit was a civil juristic act that was not a contract.


or article 54 of the Contract Law, thus preferring the general law to the special law. This preference is generally a distinction without a difference since the victim usually requested the court to nullify the transaction anyway. Nevertheless, sometimes courts tend to nullify contracts on their own initiative when the victim of fraud or duress might in theory choose to perform the contract regardless of relative nullity.

In a case decided in 2009, the plaintiff filed suit to have the court annul a settlement agreement signed by him under duress.138 In this case, the plaintiff and defendant were fathers of a newly-wed couple who were having disputes over each other’s share of the wedding expenses.139 The defendant brought over 40 relatives and hooligans to the plaintiff’s house. The group not only beat the plaintiff but also forced him to sign a settlement agreement. Without addressing the possibility that this agreement may be considered a contract, the court treated it as an absolutely null civil juristic act, solely based on the application of article 58(§3).140

IV. CONCLUSION

In contrast with Western civil law systems in which contract law theories are based on freedom of contract and the expression of the will, the post–1949 Chinese contract law is based on a system in which government ownership of the economy dominates and the market is not yet free and competitive. Upon China’s adoption of a market economy, the role of contract has been slowly and reluctantly moving from public economic law, which emphasizes state regulatory control, to private civil law, which requires contractual autonomy and more limited state interference. The SOE reform that has allowed SOEs more autonomy, but has not yet provided the solution to cure the incentive incompatibility, information asymmetry, and liability disproportionality between

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139. Id.
140. Id.
the state and SOEs. Under these circumstances, freedom of contract, though adopted by the Chinese Contract Law, will be abused by SOEs at the expense of the state if made applicable to them without additional strings. The interference with freedom of contract, as exemplified by Contract Law article 52(§1), is a reasonable solution to prevent the abuse. Nevertheless, such a state intrusion must be restricted and narrowly tailored to permit the rescission of contracts only when rescission was not sought due to a neglect of a duty by those in charge of state-owned enterprises.

Despite my arguments, it remains uncertain, as we have seen from the various cases, how the Chinese courts interpret this state interest in practice. Foreign corporations, when conducting business in China and contracting with Chinese state-owned enterprises, should know that the validity of their contracts may depend on such an extensive state power when state interest is at stake. The scope of this power might be as narrow as this article proposes: it might extend to the state-owned enterprises’ interest under extreme circumstances. Yet, it might also be broadly applied to protect SOEs’ financial interests under ordinary circumstances and SOEs might not be afforded the option to keep the contract when it was induced by fraud or duress. Another possibility is that article 52(§1) will be applied to protect other state interests. In that event, however, article 52(§1) will merely be a paraphrase of the protection of public interest under article 52(§4), as in all the Western legal systems in which violation of public order is a ground for absolute nullity of contract.
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). Representation and Mandate (Title 15) and Suretyship (Title 16) were published in Volume 6. We are now publishing Sale (Title 7) and Exchange (Title 8). The translation, made at the Center of Civil Law Studies, was revised with the assistance of Dr. Matthias Martin, Université de Lorraine (France), during his visit at the LSU Law Center in the spring of 2014.¹

BOOK III. OF THE
DIFFERENT MODES OF
ACQUIRING THE
OWNERSHIP OF THINGS

LIVRE III. DES DIFFÉRENTS
MOYENS DONT ON
ACQUIERT LA PROPRIÉTÉ
DES BIENS

(...) 

TITLE VII. SALE
1, 1995] 

CHAPTER 1. OF THE
NATURE AND FORM OF THE
CONTRACT OF SALE

Art. 2438. In all matters for
which no special provision is
made in this title, the contract of
sale is governed by the rules of
the titles on Obligations in
General and Conventional
Obligations or Contracts.

Art. 2439. Sale is a contract
whereby a person transfers
ownership of a thing to another
for a price in money.

The thing, the price, and the
consent of the parties are
requirements for the perfection
of a sale.

Art. 2440. A sale or promise
of sale of an immovable must be
made by authentic act or by act
under private signature, except as
provided in Article 1839.

Art. 2441. [Reserved] 

(...) 

TITRE VII. DE LA VENTE
[Loi de 1993, n° 841, §1, en
vigueur le 1er janvier 1995] 

CHAPITRE I. DE LA NATURE
ET DE LA FORME DU
CONTRAT DE VENTE

Art. 2438. Dans toutes les
matières pour lesquelles aucune
disposition spéciale n’est prévue
dans ce titre, le contrat de vente
est régi par les règles des titres
Des obligations en général et
Des obligations conventionnelles
ou des contrats.

Art. 2439. La vente est un
contrat par lequel une personne
transfère à une autre la propriété
d’une chose en échange d’un
prix en argent.

La chose, le prix et le
consentement des parties sont
requis pour parfaire une vente.

Art. 2440. Une vente ou une
promesse de vente d’un
immeuble doivent être constatées
par acte authentique ou par acte
sous seing privé, sous réserve
des dispositions prévues à
l’article 1839.

Art. 2441. [Réservé] 

Art. 2442. Les parties à un
acte de vente ou à une promesse
de vente d’un bien immobilier
sont liées à partir du moment où
l’acte est fait, mais un tel acte
n’a d’effet à l’égard des tiers
qu’à partir du moment où il est
déposé pour enregistrement
conformément aux lois relatives
Art. 2443. A person cannot purchase a thing he already owns. Nevertheless, the owner of a thing may purchase the rights of a person who has, or may have, an adverse claim to the thing.


Arts. 2445-2446. [Reserved]

CHAPTER 2. OF PERSONS CAPABLE OF BUYING AND SELLING

Art. 2447. Officers of a court, such as judges, attorneys, clerks, and law enforcement agents, cannot purchase litigious rights under contestation in the jurisdiction of that court. The purchase of a litigious right by such an officer is null and makes the purchaser liable for all costs, interest, and damages.

CHAPTER 3. OF THINGS WHICH MAY BE SOLD

Art. 2448. All things corporeal or incorporeal, susceptible of ownership, may be the object of a contract of sale, unless the sale of a particular thing is prohibited by law.

Art. 2449. [Reserved]
Art. 2450. A future thing may be the object of a contract of sale. In such a case the coming into existence of the thing is a condition that suspends the effects of the sale. A party who, through his fault, prevents the coming into existence of the thing is liable for damages.

Art. 2451. A hope may be the object of a contract of sale. Thus, a fisherman may sell a haul of his net before he throws it. In that case the buyer is entitled to whatever is caught in the net, according to the parties' expectations, and even if nothing is caught the sale is valid.

Art. 2452. The sale of a thing belonging to another does not convey ownership.

Art. 2453. When the ownership of a thing is the subject of litigation, the sale of that thing during the pendency of the suit does not affect the claimant's rights. Where the thing is immovable, the rights of third persons are governed by the laws of registry. [Amended by Acts 1878, No. 3; Acts 1993, No. 841, §1, eff. Jan. 1, 1995]

Arts. 2454-2455. [Reserved]

CHAPTER 4. HOW THE CONTRACT OF SALE IS TO BE PERFECTED

Art. 2456. Ownership is transferred between the parties as soon as there is agreement on the thing and the price is fixed, even though the thing sold is not yet delivered nor the price paid.

Art. 2457. When the object of a sale is a thing that must be
individualized from a mass of things of the same kind, ownership is transferred when the thing is thus individualized according to the intention of the parties.

Art. 2458. When things are sold by weight, tale, or measure, ownership is transferred between the parties when the seller, with the buyer's consent, weighs, counts or measures the things.

When things, such as goods or produce, are sold in a lump, ownership is transferred between the parties upon their consent, even though the things are not yet weighed, counted, or measured.

Art. 2459. [Reserved]

Art. 2460. When the buyer has reserved the view or trial of the thing, ownership is not transferred from the seller to the buyer until the latter gives his approval of the thing.

Art. 2461. The sale of a thing includes all accessories intended for its use in accordance with the law of property.

Art. 2462. [Reserved]

Art. 2463. The expenses of the act and other expenses incidental to the sale must be borne by the buyer.

\[2\] NdT : Compte apparaît dans le Digeste où il est traduit par erreur par tale, traduction de conte. Le mot tale a été repris dans les versions successives du Code civil, y compris lors de la révision de 1993 visant à mettre le Code civil en harmonie avec le Chapitre 2 du Code de commerce uniforme.
CHAPTER 5. OF THE PRICE OF THE CONTRACT OF SALE

Art. 2464. The price must be fixed by the parties in a sum either certain or determinable through a method agreed by them. There is no sale unless the parties intended that a price be paid.

The price must not be out of all proportion with the value of the thing sold. Thus, the sale of a plantation for a dollar is not a sale, though it may be a donation in disguise.

Art. 2465. The price may be left to the determination of a third person. If the parties fail to agree on or to appoint such a person, or if the one appointed is unable or unwilling to make a determination, the price may be determined by the court.

Art. 2466. When the thing sold is a movable of the kind that the seller habitually sells and the parties said nothing about the price, or left it to be agreed later and they fail to agree, the price is a reasonable price at the time and place of delivery. If there is an exchange or market for such things, the quotations or price lists of the place of delivery or, in their absence, those of the nearest market, are a basis for the determination of a reasonable price.

Nevertheless, if the parties intend not to be bound unless a price be agreed on, there is no contract without such an agreement.

CHAPITRE 5. DU PRIX DANS LE CONTRAT DE VENTE

Art. 2464. Le prix doit être fixé par les parties et consister en une somme d’argent certaine ou déterminable selon une méthode convenue entre elles. Il n’y a pas vente si les parties n’ont pas entendu qu’un prix soit payé.

Le prix ne doit pas être hors de toute proportion avec la valeur de la chose. Ainsi, la vente d’une plantation pour un dollar n’est pas une vente, mais ce peut être une donation déguisée.

Art. 2465. Le prix peut être laissé à la détermination d’un tiers. Si les parties ne parviennent pas à se mettre d’accord sur le choix ou la désignation du tiers, ou que celui choisi ne peut ou ne veut faire l’estimation, le prix peut être déterminé par le juge.

Art. 2466. Lorsque la chose vendue est un meuble habituellement vendu par le vendeur et que les parties ne sont pas prononcées sur le prix, ou ont décidé de se mettre d’accord ultérieurement sans y parvenir, le prix sera un prix raisonnable au temps et au lieu de la délivrance. S’il existe une bourse ou un marché pour de telles choses, les cours ou les listes de prix du lieu de délivrance ou, en leur absence, ceux du plus proche marché, servent de base pour la détermination d’un prix raisonnable.

Toutefois, si les parties entendent ne pas être liées tant
CHAPTER 6. AT WHOSE RISK THE THING IS, AFTER THE SALE IS COMPLETED

Art. 2467. The risk of loss of the thing sold owing to a fortuitous event is transferred from the seller to the buyer at the time of delivery.

That risk is so transferred even when the seller has delivered a nonconforming thing, unless the buyer acts in the manner required to dissolve the contract.

Arts. 2468-2473. [Reserved]

CHAPTER 7. OF THE OBLIGATIONS OF THE SELLER

Art. 2474. The seller must clearly express the extent of his obligations arising from the contract, and any obscurity or ambiguity in that expression must be interpreted against the seller.

Art. 2475. The seller is bound to deliver the thing sold and to warrant the buyer ownership and peaceful possession of, and the absence of hidden defects in, that thing. The seller also warrants that the thing sold is fit for its intended use.

Art. 2476. [Reserved]

Art. 2477. Delivery of an immovable is deemed to take place upon execution of the
writing that transfers its ownership.

Delivery of a movable takes place by handing it over to the buyer. If the parties so intend delivery may take place in another manner, such as by the seller's handing over to the buyer the key to the place where the thing is stored, or by negotiating to him a document of title to the thing, or even by the mere consent of the parties if the thing sold cannot be transported at the time of the sale or if the buyer already has the thing at that time.

Arts. 2478-2479. [Reserved]

Art. 2480. When the thing sold remains in the corporeal possession of the seller the sale is presumed to be a simulation, and, where the interest of heirs and creditors of the seller is concerned, the parties must show that their contract is not a simulation.

Art. 2481. Delivery of incorporeal movable things incorporated into an instrument, such as stocks and bonds, takes place by negotiating such instrument to the buyer. Delivery of other incorporeal movables, such as credit rights, takes place upon the transfer of those movables.

Art. 2482. When at the time of the sale the seller is not in possession of the thing sold he must obtain possession at his cost and deliver the thing to the buyer.

Art. 2483. The cost of making delivery is borne by the seller and that of taking delivery by the buyer, in the absence of agreement to the contrary.

Art. 2484. Delivery must be
made at the place agreed upon by the parties or intended by them. In the absence of such agreement or intent, delivery must be made at the place where the thing is located at the time of the sale.

Art. 2485. When the seller fails to deliver or to make timely delivery of the thing sold, the buyer may demand specific performance of the obligation of the seller to deliver, or may seek dissolution of the sale.

In either case, and also when the seller has made a late delivery, the buyer may seek damages.

Art. 2486. [Reserved]

Art. 2487. The seller may refuse to deliver the thing sold until the buyer tenders payment of the price, unless the seller has granted the buyer a term for such payment.

Art. 2488. [Reserved]

Art. 2489. The seller must deliver the thing sold in the condition that, at the time of the sale, the parties expected, or should have expected, the thing to be in at the time of delivery, according to its nature.

Art. 2490. [Reserved]

Art. 2491. The seller must deliver to the buyer the full extent of the immovable sold. That obligation may be modified in accordance with the provisions of the following Articles.

Art. 2492. If the sale of an immovable has been made with indication of the extent of the premises at the rate of so much
per measure, but the seller is unable to deliver the full extent specified in the contract, the price must be proportionately reduced.

If the extent delivered by the seller is greater than that specified in the contract, the buyer must pay to the seller a proportionate supplement of the price. The buyer may recede from the sale when the actual extent of the immovable sold exceeds by more than one twentieth the extent specified in the contract.

Art. 2493. [Reserved]

Art. 2494. When the sale of an immovable has been made with indication of the extent of the premises, but for a lump price, the expression of the measure does not give the seller the right to a proportionate increase of the price, nor does it give the buyer the right to a proportionate diminution of the price, unless there is a surplus, or a shortage, of more than one twentieth of the extent specified in the act of sale.

When the surplus is such as to give the seller the right to an increase of the price the buyer has the option either to pay that increase or to recede from the contract.

Art. 2495. When an immovable described as a certain and limited body or a distinct object is sold for a lump price, an expression of the extent of the immovable in the act of sale does not give the parties any right to an increase or diminution of the price in case of surplus or shortage in the actual extension of the immovable. [Amended by
Art. 2496. [Reserved]

Art. 2497. When the buyer has the right to recede from the contract the seller must return the price, if he has already received it, and also reimburse the buyer for the expenses of the sale.

Art. 2498. The seller's action for an increase of the price and the buyer's actions for diminution of the price or dissolution of the sale for shortage or excessive surplus in the extent of the immovable sold prescribe one year from the day of the sale.

Art. 2499. [Reserved]

CHAPTER 8. EVICTION

Art. 2500. The seller warrants the buyer against eviction, which is the buyer's loss of, or danger of losing, the whole or part of the thing sold because of a third person's right that existed at the time of the sale. The warranty also covers encumbrances on the thing that were not declared at the time of the sale, with the exception of apparent servitudes and natural and legal nonapparent servitudes, which need not be declared.

If the right of the third person is perfected only after the sale through the negligence of the buyer, though it arises from facts that took place before, the buyer has no claim in warranty.

Art. 2501. [Reserved]

Art. 2502. A person may transfer to another whatever

841, §1, en vigueur le 1er janvier 1995.]

Art. 2496. [Réservé]

Art. 2497. Lorsque l'acheteur a le droit de se désister du contrat, le vendeur doit restituer le prix s'il l'a déjà reçu et aussi rembourser l'acheteur des frais de la vente.

Art. 2498. L'action du vendeur pour une augmentation du prix et l'action de l'acheteur pour une diminution du prix ou pour la résolution de la vente en cas de déficit ou de surplus excessif de la contenance de l'immeuble vendu se prescrivent par un an à compter du jour de la vente.

Art. 2499. [Réservé]

CHAPITRE 8. DE L’ÉVICTION

Art. 2500. Le vendeur garantit l’acheteur contre l’éviction, qui est la perte ou le danger de perte par l’acheteur de tout ou partie de la chose vendue du fait qu’un tiers était titulaire d’un droit sur la chose au moment de la vente. La garantie couvre aussi les sûretés réelles sur la chose qui n’ont pas été déclarées au moment de la vente, mais elle ne couvre pas les servitudes apparentes et les servitudes non apparentes légales et naturelles, qui ne nécessitent pas d’être déclarées.

Si le droit du tiers ne devient parfait qu’après la vente du fait de la négligence de l’acheteur, et même si cela résulte de faits antérieurs, l’acheteur ne dispose d’aucune action en garantie.

Art. 2501. [Réservé]

Art. 2502. Une personne peut transférer à une autre des droits
rights to a thing he may then have, without warranting the existence of any such rights. In such a case the transferor does not owe restitution of the price to the transferee in case of eviction, nor may that transfer be rescinded for lesion.

Such a transfer does not give rise to a presumption of bad faith on the part of the transferee and is a just title for the purposes of acquisitive prescription.

If the transferor acquires ownership of the thing after having transferred his rights to it, the after-acquired title of the transferor does not inure to the benefit of the transferee.

Art. 2503. The warranty against eviction is implied in every sale. Nevertheless, the parties may agree to increase or to limit the warranty. They may also agree to an exclusion of the warranty, but even in that case the seller must return the price to the buyer if eviction occurs, unless it is clear that the buyer was aware of the danger of eviction, or the buyer has declared that he was buying at his peril and risk, or the seller's obligation of returning the price has been expressly excluded.

In all those cases the seller is liable for an eviction that is occasioned by his own act, and any agreement to the contrary is null.

The buyer is subrogated to the rights in warranty of the seller against other persons, even when the warranty is excluded. [Amended by Acts 1924, No. 116; Acts 1993, No. 841, §1, eff. Jan. 1, 1995]
Art. 2504-2505. [Reserved]

Art. 2506. A buyer who avails himself of the warranty against eviction may recover from the seller the price he paid, the value of any fruits he had to return to the third person who evicted him, and also other damages sustained because of the eviction with the exception of any increase in value of the thing lost.

Art. 2507. A seller liable for eviction must return the full price to the buyer even if, at the time of the eviction, the value of the thing has been diminished due to any cause including the buyer's neglect.

Nevertheless, if the buyer has benefited from a diminution in value caused by his own act, the amount of his benefit must be deducted from the total owed to him by the seller because of the eviction.

Art. 2508. [Reserved]

Art. 2509. A seller liable for eviction must reimburse the buyer for the cost of useful improvements to the thing made by the buyer. If the seller knew at the time of the sale that the thing belonged to a third person, he must reimburse the buyer for the cost of all improvements.

Art. 2510. [Reserved]

Art. 2511. When the buyer is evicted from only a part of the thing sold, he may obtain rescission of the sale if he would not have bought the thing without that part. If the sale is not rescinded, the buyer is entitled to a diminution of the price in the proportion that the
value of the part lost bears to the
value of the whole at the time of
the sale.

Art. 2512. The warranty against eviction extends also to
those things that proceed from
the thing sold.

Art. 2513. In a sale of a right
of succession, the warranty against eviction extends only to
the right to succeed the decedent, which entitles the buyer to those
things that are, in fact, a part of
the estate, but it does not extend
to any particular thing.

Arts. 2514-2516. [Reserved]

Art. 2517. A buyer
threatened with eviction must
give timely notice of the threat to
the seller. If a suit for eviction
has been brought against the
buyer, his calling in the seller to
defend that suit amounts to such
notice.

A buyer who elects to bring
suit against a third person who
disturbs his peaceful possession
of the thing sold must give
timely notice of that suit to the
seller.

In either case, a buyer who
fails to give such notice, or who
fails to give it in time for the
seller to defend himself, forfeits
the warranty against eviction if
the seller can show that, had he
been notified in time, he would
have been able to prove that the
third person who sued the buyer
had no right.

Arts. 2518-2519. [Reserved]
CHAPTER 9. REDHIBITION

Art. 2520. The seller warrants the buyer against redhibitory defects, or vices, in the thing sold.

A defect is redhibitory when it renders the thing useless, or its use so inconvenient that it must be presumed that a buyer would not have bought the thing had he known of the defect. The existence of such a defect gives a buyer the right to obtain rescission of the sale.

A defect is redhibitory also when, without rendering the thing totally useless, it diminishes its usefulness or its value so that it must be presumed that a buyer would still have bought it but for a lesser price. The existence of such a defect limits the right of a buyer to a reduction of the price.

Art. 2521. The seller owes no warranty for defects in the thing that were known to the buyer at the time of the sale, or for defects that should have been discovered by a reasonably prudent buyer of such things.

Art. 2522. The buyer must give the seller notice of the existence of a redhibitory defect in the thing sold. That notice must be sufficiently timely as to allow the seller the opportunity to make the required repairs. A buyer who fails to give that notice suffers diminution of the warranty to the extent the seller can show that the defect could have been repaired or that the...
repairs would have been less burdensome, had he received timely notice.

Such notice is not required when the seller has actual knowledge of the existence of a redhibitory defect in the thing sold.

Art. 2523. [Reserved]

Art. 2524. The thing sold must be reasonably fit for its ordinary use.

When the seller has reason to know the particular use the buyer intends for the thing, or the buyer's particular purpose for buying the thing, and that the buyer is relying on the seller's skill or judgment in selecting it, the thing sold must be fit for the buyer's intended use or for his particular purpose.

If the thing is not so fit, the buyer's rights are governed by the general rules of conventional obligations.

Arts. 2525-2528. [Reserved]

Art. 2529. When the thing the seller has delivered, though in itself free from redhibitory defects, is not of the kind or quality specified in the contract or represented by the seller, the rights of the buyer are governed by other rules of sale and conventional obligations.

Art. 2530. The warranty against redhibitory defects covers only defects that exist at the time of delivery. The defect shall be presumed to have existed at the time of delivery if it appears
within three days from that time.

Art. 2531. A seller who did not know that the thing he sold had a defect is only bound to repair, remedy, or correct the defect. If he is unable or fails so to do, he is then bound to return the price to the buyer with interest from the time it was paid, and to reimburse him for the reasonable expenses occasioned by the sale, as well as those incurred for the preservation of the thing, less the credit to which the seller is entitled if the use made of the thing, or the fruits it has yielded, were of some value to the buyer.

A seller who is held liable for a redhibitory defect has an action against the manufacturer of the defective thing, if the defect existed at the time the thing was delivered by the manufacturer to the seller, for any loss the seller sustained because of the redhibition. Any contractual provision that attempts to limit, diminish or prevent such recovery by a seller against the manufacturer shall have no effect. [Amended by Acts 1974, No. 673, §1; Acts 1993, No. 841, §1, eff. Jan. 1, 1995]

Art. 2532. A buyer who obtains rescission because of a redhibitory defect is bound to return the thing to the seller, for which purpose he must take care of the thing as a prudent administrator, but is not bound to deliver it back until all his qu'il l'ont suivie.

Art. 2531. Le vendeur qui ignorant que la chose vendue comportait un défaut est seulement tenu de le réparer, d'y remédier ou de le corriger. S’il en est incapable ou manque à le faire, il est alors tenu de restituer le prix à l’acheteur, portant intérêts à compter du moment où il a été payé, et de lui rembourser les frais raisonnables occasionnés par la vente, de même que les dépenses faites pour la conservation de la chose, déduction faite de la créance à laquelle le vendeur peut prétendre dès lors que l’usage fait de la chose ou les fruits qu’elle a produits ont eu une valeur quelconque pour l’acheteur.

Le vendeur dont la responsabilité est engagée pour un défaut rédhibitoire dispose d’une action à l’encontre du fabricant de la chose défectueuse pour toute perte subie par le vendeur en raison du vice rédhibitoire, dès lors que le défaut existait au moment où le fabricant a délivrée la chose au vendeur. Toute stipulation contractuelle qui vise à limiter, diminuer ou empêcher un tel recouvrement par le vendeur à l’encontre du fabricant est sans effet. [Modifié par la loi de 1974, n° 673, §1 ; loi de 1993, n° 841, §1, en vigueur le 1er janvier 1995.]

Art. 2532. L’acheteur qui obtient la résolution en raison d’un défaut rédhibitoire est tenu de restituer la chose au vendeur. À cette fin, il doit prendre soin de la chose en administrateur prudent, mais il n’est pas tenu de la délivrer tant que l’ensemble de
claims, or judgments, arising from the defect are satisfied.

If the redhibitory defect has caused the destruction of the thing the loss is borne by the seller, and the buyer may bring his action even after the destruction has occurred.

If the thing is destroyed by a fortuitous event before the buyer gives the seller notice of the existence of a redhibitory defect that would have given rise to a rescission of the sale, the loss is borne by the buyer.

After such notice is given, the loss is borne by the seller, except to the extent the buyer has insured that loss. A seller who returns the price, or a part thereof, is subrogated to the buyer's right against third persons who may be liable for the destruction of the thing.

Art. 2533. [Reserved]

Art. 2534. A. (1) The action for redhibition against a seller who did not know of the existence of a defect in the thing sold prescribes in four years from the day delivery of such thing was made to the buyer or one year from the day the defect was discovered by the buyer, whichever occurs first.

(2) However, when the defect is of residential or commercial immovable property, an action for redhibition against a seller who did not know of the existence of the defect prescribes in one year from the day delivery of the property was made to the buyer.

Lorsque le défaut rédhibitoire a causé la destruction de la chose, la perte est supportée par le vendeur, et l’acheteur peut intenter son action même après que la destruction soit survenue.

Une fois cette notification faite, la perte est supportée par le vendeur, sauf s’il l’acheteur a assuré cette perte. Le vendeur qui restitue le prix, ou une partie de celui-ci, est subrogé dans les droits de l’acheteur contre les tiers qui peuvent être responsables de la destruction de la chose.

Art. 2533. [Réservé]

Art. 2534. A. (1) L’action en rédhibition contre le vendeur qui ignorait l’existence du défaut de la chose vendue se prescrit par quatre ans à compter du jour de la délivrance de la chose à l’acheteur ou par un an à compter du jour où le défaut a été découvert par l’acheteur, la première survenance devant être prise en compte.

(2) Cependant, lorsque le défaut affecte un bien immobilier résidentiel ou commercial, l’action en rédhibition contre le vendeur qui ignorait l’existence du défaut se prescrit par un an à compter du jour de la délivrance du bien à l’acheteur.

B. L’action en rédhibition contre le vendeur qui
B. The action for redhibition against a seller who knew, or is presumed to have known, of the existence of a defect in the thing sold prescribes in one year from the day the defect was discovered by the buyer.

C. In any case prescription is interrupted when the seller accepts the thing for repairs and commences anew from the day he tenders it back to the buyer or notifies the buyer of his refusal or inability to make the required repairs. [Acts 1995, No. 172, §1; Acts 1997, No. 266, §1]

Arts. 2535-2536. [Reserved]

Art. 2537. Judicial sales resulting from a seizure are not subject to the rules on redhibition.

Art. 2538. The warranty against redhibitory vices is owed by each of multiple sellers in proportion to his interest.

Multiple buyers must concur in an action for rescission because of a redhibitory defect. An action for reduction of the price may be brought by one of multiple buyers in proportion to his interest.

The same rules apply if a thing with a redhibitory defect is transferred, inter vivos or mortis causa, to multiple successors.

Art. 2539. [Reserved]

Art. 2540. When more than one thing are sold together as a whole so that the buyer would not have bought one thing without the other or others, a redhibitory defect in one of such things gives rise to redhibition for the whole.
Art. 2541. A buyer may choose to seek only reduction of the price even when the redhibitory defect is such as to give him the right to obtain rescission of the sale. In an action for rescission because of a redhibitory defect the court may limit the remedy of the buyer to a reduction of the price.

Arts. 2542-2544. [Reserved]

Art. 2545. A seller who knows that the thing he sells has a defect but omits to declare it, or a seller who declares that the thing has a quality that he knows it does not have, is liable to the buyer for the return of the price with interest from the time it was paid, for the reimbursement of the reasonable expenses occasioned by the sale and those incurred for the preservation of the thing, and also for damages and reasonable attorney fees. If the use made of the thing, or the fruits it might have yielded, were of some value to the buyer, such a seller may be allowed credit for such use or fruits.

A seller is deemed to know that the thing he sells has a redhibitory defect when he is a manufacturer of that thing.

[Amended by Acts 1968, No. 84, §1; Acts 1993, No. 841, §1, eff. Jan. 1, 1995]

Arts. 2546-2547. [Reserved]
Art. 2548. The parties may agree to an exclusion or limitation of the warranty against redhibitory defects. The terms of the exclusion or limitation must be clear and unambiguous and must be brought to the attention of the buyer.

A buyer is not bound by an otherwise effective exclusion or limitation of the warranty when the seller has declared that the thing has a quality that he knew it did not have.

The buyer is subrogated to the rights in warranty of the seller against other persons, even when the warranty is excluded.

CHAPTER 10. OF THE OBLIGATIONS OF THE BUYER

Art. 2549. The buyer is bound to pay the price and to take delivery of the thing.

Art. 2550. Payment of the price is due at the time and place stipulated in the contract, or at the time and place of delivery if the contract contains no such stipulation.

Art. 2551-2552. [Reserved]

Art. 2553. The buyer owes interest on the price from the time it is due.

Art. 2554. [Reserved]

Art. 2555. A buyer who fails to take delivery of the thing after a tender of such delivery, or who fails to pay the price, is liable for expenses incurred by the seller in preservation of the thing and for other damages sustained by the seller.
Art. 2556. [Reserved]

Art. 2557. A buyer who is evicted by the claim of a third person may withhold payment of the price until he is restored to possession, unless the seller gives security for any loss the buyer may sustain as a result of the eviction.

A seller who, in such a case, is unable or unwilling to give security may compel the buyer to deposit the price with the court until the right of the third person is adjudged. Also the buyer may deposit the price with the court, on his own initiative, to prevent the accrual of interest.

A buyer may not withhold payment of the price when the seller is not liable for a return of the price in case of eviction.

Arts. 2558-2559. [Reserved]

Art. 2560. A buyer who paid the price before being evicted of the thing may not demand that the seller return the price or give security for it.

Art. 2561. If the buyer fails to pay the price, the seller may sue for dissolution of the sale. If the seller has given credit for the price and transfers that credit to another person, the right of dissolution is transferred together with the credit. In case of multiple credit holders all must join in the suit for dissolution, but if any credit holder refuses to join, the others may subrogate themselves to his right by paying the amount due to him.

If a promissory note or other instrument has been given for the price, the right to dissolution prescribes at the same time and

Art. 2556. [Réservé]

Art. 2557. L’acheteur qui est évincé par l’action d’un tiers peut retenir le paiement du prix jusqu’à ce que le trouble ait cessé, à moins que le vendeur ne constitue une sûreté pour toute perte que peut subir l’acheteur suite à l’éviction.

Le vendeur qui, dans un tel cas, ne peut ou ne veut pas constituer de sûreté a le droit de contraindre l’acheteur à déposer le prix auprès du tribunal jusqu’à ce qu’il soit statué sur le droit du tiers. L’acheteur peut aussi, de sa propre initiative, déposer le prix auprès du tribunal pour prévenir l’accumulation des intérêts.

L’acheteur ne peut pas retenir le paiement du prix lorsque le vendeur n’est pas tenu de restituer le prix en cas d’éviction.

Arts. 2558-2559. [Réservés]

Art. 2560. L’acheteur qui a payé le prix avant d’être évincé de la chose ne peut demander, ni que le vendeur lui restitue le prix, ni qu’il lui donne caution.

Art. 2561. Lorsque l’acheteur manque à payer le prix, le vendeur peut demander la résolution de la vente. Lorsque le vendeur a accordé un crédit pour le prix et transfère cette créance à une autre personne, le droit de résolution est transféré avec la créance. En cas de multiples titulaires de la créance, tous doivent se joindre à l’action en résolution, mais si l’un d’entre eux refuse, les autres peuvent se subroger dans ses droits en payant le montant qui lui est dû.

Lorsqu’un billet à ordre ou autre instrument a été remis en paiement du prix, le droit à
in the same period as the note or other instrument. [Amended by Acts 1924, No. 108; [Acts 1993, No. 841, §1, eff. Jan. 1, 1995]

Art. 2562. When an action is brought for the dissolution of the sale of an immovable and there is no danger that the seller may lose the price and the thing, the court, according to the circumstances, may grant the buyer an extension of time, not in excess of sixty days, to make payment, and shall pronounce the sale dissolved if the buyer fails to pay within that time. When there is such a danger, the court may not grant the buyer an extension of time for payment.

Art. 2563. When the contract of sale of an immovable expressly provides for dissolution in case of failure to pay the price, the buyer still has the right to pay, in spite of the express dissolution clause, for as long as the seller has not given the buyer notice that he avails himself of that clause or has not filed suit for dissolution.

Art. 2564. If the thing is movable and the seller chooses to seek judicial dissolution of the sale because of the failure of the buyer to perform, the court may not grant to the buyer any extension of time to perform.

Arts. 2565-2566. [Reserved]

CHAPTER 11. OF THE SALE WITH A RIGHT OF REDEMPTION

Art. 2567. The parties to a résolution se prescrit au même moment et dans la même période que ces instruments. [Modifié par la loi de 1924, n° 108 ; loi de 1993, n° 841, §1, en vigueur le 1er janvier 1995]

Art. 2562. Lorsqu’une action est intentée pour la résolution de la vente d’un immeuble et qu’il n’y a pas de danger que le vendeur perde le prix et la chose, le juge, suivant les circonstances, peut accorder à l’acheteur un délai supplémentaire, n’excédant pas soixante jours, pour effectuer le paiement. Il doit prononcer la résolution de la vente si l’acheteur manque à payer dans ce délai. Lorsqu’un tel danger existe, le juge ne peut pas accorder à l’acheteur de délai supplémentaire pour le paiement.

Art. 2563. Lorsque le contrat de vente d’un immeuble prévoit expressément la résolution pour faute de paiement du prix, l’acheteur conserve le droit de payer, malgré la clause expresse de résolution, tant que le vendeur n’a pas notifié à l’acheteur qu’il se prévaut de ladite clause ou qu’il n’a pas engagé d’action en résolution.

Art. 2564. En matière de vente d’effets mobiliers, lorsque le vendeur choisit de demander la résolution judiciaire de la vente en raison du défaut d’exécution de l’acheteur, le juge ne peut pas accorder à ce dernier de délai supplémentaire pour l’exécution.

Arts. 2565-2566. [Réservés]
contract of sale may agree that the seller shall have the right of redemption, which is the right to take back the thing from the buyer.

Art. 2568. The right of redemption may not be reserved for more than ten years when the thing sold is immovable, or more than five years when the thing sold is movable. If a longer time for redemption has been stipulated in the contract that time must be reduced to either ten or five years, depending on the nature of the thing sold.

Art. 2569. A sale with right of redemption is a simulation when the surrounding circumstances show that the true intent of the parties was to make a contract of security. When such is the case, any monies, fruits or other benefit received by the buyer as rent or otherwise may be regarded as interest subject to the usury laws.

Art. 2570. If the seller does not exercise the right of redemption within the time allowed by law, the buyer becomes unconditional owner of the thing sold.

Art. 2571. The period for redemption is peremptive and runs against all persons including minors.

It may not be extended by the court.

Art. 2572. When the thing is immovable, the right of redemption is effective against third persons only from the time the instrument that contains it is filed for registry in the parish.

Art. 2568. La faculté de rachat ne peut être stipulée pour un terme qui excède dix ans lorsque la chose vendue est un immeuble, ou cinq ans lorsqu'elle est un meuble. Si elle a été stipulée pour un terme plus long, elle est réduite à dix ou cinq ans, selon la nature de la chose vendue.

Art. 2569. Il y a simulation de vente avec faculté de rachat lorsque les circonstances montrent que l'intention véritable des parties était de conclure un contrat de sûreté. Dans ce cas, toutes sommes, fruits ou autres bénéfices perçus par l'acheteur, notamment sous forme de loyer, peuvent être considérés comme des intérêts soumis aux lois usuraires.

Art. 2570. Faute par le vendeur d'avoir exercé la faculté de rachat dans le terme prescrit par la loi, l'acheteur demeure propriétaire irrévocable.

Art. 2571. Le délai d'exercice de la faculté de rachat est péremptoire et court contre toutes personnes, même contre le mineur.

Il ne peut être prolongé par le juge.

Art. 2572. Lorsque la chose est un immeuble, la faculté de rachat n'est opposable aux tiers qu'à compter du moment où l'acte qui la contient est déposé pour l'enregistrement dans la
where the immovable is located.

When the thing is movable, the right of redemption is effective against third persons who, at the time of purchase, had actual knowledge of the existence of that right.

Art. 2573. [Reserved]

Art. 2574. A buyer under redemption may avail himself of the right of discussion against creditors of the seller.

Art. 2575. The fruits and products of a thing sold with right of redemption belong to the buyer.

Art. 2576. [Reserved]

Art. 2577. The buyer is entitled to all improvements he made on the thing that can be removed when the seller exercises the right of redemption. If such improvements cannot be removed, the buyer is entitled to the enhancement of the value of the thing resulting from the improvements. The buyer is also entitled to the enhancement of the value of the thing resulting from ungathered fruits and unharvested crops.

If the thing sold under right of redemption is naturally increased by accession, alluvion, or accretion before the redeeming seller exercises the right, the increase belongs to the seller.

Art. 2578. During the time allowed for redemption, the

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3 *NdT:* La Louisiane a conservé la paroisse comme division territoriale. Celle-ci est l’équivalent du comté dans les autres états.

4 *NdT:* L’art. 499, révisé en 1980, utilise “dereliction” pour désigner les relais, terme que l’on s’attendrait à trouver dans le présent article qui fait ici référence aux moyens d’acquérir la propriété par accession naturelle. Le C. CIV. QUÉBEC art. 966 traduit les relais par “accretion” (voir aussi C. CIV. Fr. art. 557). La traduction par “accroissement,” généralement acceptable pour “accretion” (voir aussi “engraissement”) doit être rejetée car elle désigne un type particulier d’alluvion (C. CIV. Fr. Art 556).
buyer must administer the thing sold with the degree of care of a prudent administrator. He is liable to the redeeming seller for any deterioration of the thing caused by the lack of such care.

Arts. 2579-2583. [Reserved]

Art. 2584. If more than one seller concurred in the sale with right of redemption of an immovable, or if a seller has died leaving more than one successor, the exercise of the right of redemption is governed by the rules provided for the division of the action for lesion among multiple sellers, or among successors of the seller or of the buyer.

Arts. 2585-2586. [Reserved]

Art. 2587. A seller who exercises the right of redemption must reimburse the buyer for all expenses of the sale and for the cost of repairs necessary for the preservation of the thing.

Art. 2588. The seller who exercises the right of redemption is entitled to recover the thing free of any encumbrances placed upon it by the buyer. Nevertheless, when the thing is an immovable, the interests of third persons are governed by the laws of registry.

CHAPTER 12. RESCISSION FOR LESION BEYOND MOIETY

Art. 2589. The sale of an immovable may be rescinded for lesion when the price is less than one half of the fair market value of the immovable. Lesion can be claimed only by the seller and d’exercice de la faculté de rachat, l’acheteur doit apporter à la chose vendue tous les soins d’un administrateur prudent. Il est responsable envers le vendeur exerçant la faculté de rachat pour toute détérioration résultant d’un manque de soins.

Art. 2579-2583. [Réservés]

Art. 2584. Lorsque plusieurs vendeurs ont procédé à la vente d’un immeuble avec faculté de rachat ou lorsqu’un vendeur a laissé plusieurs héritiers, l’exercice de la faculté de rachat est régi par les règles applicables à la division de l’action en rescission pour lesion entre plusieurs vendeurs ou entre les héritiers du vendeur ou ceux de l’acheteur.

Art. 2585-2586. [Réservés]

Art. 2587. Le vendeur qui exerce la faculté de rachat doit rembourser à l’acheteur tous les frais de la vente et le prix des réparations nécessaires à la conservation de la chose.

Art. 2588. Le vendeur qui exerce la faculté de rachat reprend la chose exempte de toutes les charges dont l’acheteur l’aurait grevée. Néanmoins, lorsque la chose est un immeuble, les intérêts des tiers sont régis par les lois sur la publicité foncière.

CHAPITRE 12. DE LA RESCISISON POUR LÉSION D’OUTRE-MOITIÉ

Art. 2589. La vente d’un immeuble peut être rescindée pour lésion lorsque le prix est inférieur à la moitié de la valeur marchande de l’immeuble justement appréciée. Seul le
only in sales of corporeal immovables. It cannot be alleged in a sale made by order of the court.

The seller may invoke lesion even if he has renounced the right to claim it.

Art. 2590. To determine whether there is lesion, the immovable sold must be evaluated according to the state in which it was at the time of the sale. If the sale was preceded by an option contract, or by a contract to sell, the property must be evaluated in the state in which it was at the time of that contract. [Amended by Acts 1950, No. 154; Acts 1993, No. 841, §1, eff. Jan. 1, 1995]

Art. 2591. When a sale is subject to rescission for lesion the buyer may elect either to return the immovable to the seller, or to keep the immovable by giving to the seller a supplement equal to the difference between the price paid by the buyer and the fair market value of the immovable determined according to the preceding Article. [Amended by Acts 1871, No. 87; Acts 1993, No. 841, §1, eff. Jan. 1, 1995]

Art. 2592. If the buyer elects to return the immovable he must also return to the seller the fruits of the immovable from the time a demand for rescission was made. In such a case, the seller must return to the buyer the price with interest from the same time.

If the buyer elects to keep the immovable he must also pay to the seller interest on the supplement from the time a demand for rescission was made. vendeur d’un bien immobilier corporel peut se prévaloir de la lésion. Elle ne peut être invoquée lors d’une vente judiciaire.

Le vendeur peut invoquer la lésion quand bien même il aurait renoncé à la faculté de s’en prévaloir.

Art. 2590. Pour savoir s’il y a lésion, il faut estimer l’immeuble vendu suivant son état au temps de la vente. Si la vente a été précédée d’une option contractuelle ou d’une promesse synallagmatique de vente, il faut estimer le bien suivant son état au temps de ce contrat. [Modifié par la loi de 1950, n°154 ; loi de 1993, n°841, §1, en vigueur le 1er janvier 1995]

Art. 2591. Lorsque la vente est sujette à rescision pour lésion, l’acheteur a le choix, ou de rendre l’immeuble au vendeur, ou de le garder en payant un supplément à hauteur de la valeur marchande de l’immeuble justement appréciée conformément à l’article précédent. [Modifié par la loi de 1871, n°87 ; loi de 1993, n°841, §1, en vigueur le 1er janvier 1995]

Art. 2592. Lorsque l’acheteur choisit de rendre l’immeuble, il doit aussi rendre les fruits du jour de la demande en rescission. Dans ce cas, le vendeur doit rendre à l’acheteur le prix portant intérêt à compter du même jour.

Lorsque l’acheteur opte de garder l’immeuble, il doit également l’intérêt du supplément, du jour de la demande en rescission.
Art. 2593. [Reserved]

Art. 2594. When the buyer has sold the immovable, the seller may not bring an action for lesion against a third person who bought the immovable from the original buyer.

In such a case the seller may recover from the original buyer whatever profit the latter realized from the sale to the third person. That recovery may not exceed the supplement the seller would have recovered if the original buyer had chosen to keep the immovable.

Art. 2595. The action for lesion must be brought within a peremptive period of one year from the time of the sale.

Art. 2596. When the buyer has granted a right on the immovable to a third person, rescission may not impair the interest of that person. The seller who receives back the immovable so encumbered is entitled to recover from the buyer any diminution in value suffered by the immovable because of the right of the third person. That recovery may not exceed the supplement the seller would have recovered if the buyer had not encumbered the immovable and had decided to keep it.

Art. 2597. When rescission is granted for lesion the seller must take back the immovable in the state it is at that time. The buyer is not liable to the seller for any deterioration or loss sustained by the immovable before the demand for rescission was made, unless the deterioration or loss was turned into profit for the buyer.

The seller must reimburse the buyer for the expenses of the

Art. 2593. [Réservé]

Art. 2594. Lorsque l’acheteur a vendu l’immeuble, le vendeur ne peut agir en rescision pour lésion contre un tiers l’ayant acquis de l’acheteur initial.

En pareil cas, le vendeur peut obtenir de l’acheteur initial une somme égale au profit que ce dernier a tiré de la vente au tiers. Cette somme ne peut être supérieure au supplément que le vendeur aurait perçu si l’acheteur initial avait décidé de garder l’immeuble.

Art. 2595. L’action en rescision pour lésion doit être exercée dans un délai péremptoire d’un an à compter du temps de la vente.

Art. 2596. Lorsque l’acheteur a accordé à un tiers un droit sur l’immeuble, la rescision ne saurait nuire aux intérêts de ce dernier. Le vendeur qui reprend l’immeuble ainsi grevé a le droit de recouvrer de l’acheteur toute diminution de valeur de l’immeuble résultant du droit du tiers. Cette somme ne saurait excéder le supplément que le vendeur aurait recouvré si l’acheteur n’avait pas grevé l’immeuble et avait décidé de le garder.

Art. 2597. Le vendeur doit reprendre l’immeuble dans l’état où il se trouve lors de la rescision pour lésion. L’acheteur n’est pas tenu des détériorations ou pertes subies par l’immeuble avant la demande en rescision, à moins que la détérioration ou la perte n’ait profité à l’acheteur.

Le vendeur doit rembourser à l’acheteur les frais de vente et les frais d’amélioration de
sale and for those incurred for the improvement of the immovable, even if the improvement was made solely for the convenience of the buyer.

Art. 2598. [Reserved]

Art. 2599. The buyer may retain possession of the immovable until the seller reimburses the buyer the price and the recoverable expenses.

Art. 2600. If more than one seller concurred in the sale of an immovable owned by them in indivision, or if each of them sold separately his share of the immovable, each seller may bring an action for lesion for his share.

Likewise, if a seller died leaving more than one successor, each successor may bring an action for lesion individually for that share of the immovable corresponding to his right.

CHAPTER 13. SALES OF MOVABLES

Art. 2601. An expression of acceptance of an offer to sell a movable thing suffices to form a contract of sale if there is agreement on the thing and the price, even though the acceptance contains terms additional to, or different from, the terms of the offer, unless acceptance is made conditional on the offeror's acceptance of the additional or different terms.

Where the acceptance is not so conditioned, the additional or different terms are regarded as proposals for modification and must be accepted by the offeror in order to become a part of the contract.
Between merchants, however, additional terms become part of the contract unless they alter the offer materially, or the offer expressly limits the acceptance to the terms of the offer, or the offeree is notified of the offeror's objection to the additional terms within a reasonable time, in all of which cases the additional terms do not become a part of the contract. Additional terms alter the offer materially when their nature is such that it must be presumed that the offeror would not have contracted on those terms.

Art. 2602. A contract of sale of movables may be established by conduct of both parties that recognizes the existence of that contract even though the communications exchanged by them do not suffice to form a contract. In such a case the contract consists of those terms on which the communications of the parties agree, together with any applicable provisions of the suppletive law.

Art. 2603. The seller must deliver to the buyer things that conform to the contract.

Things do not conform to the contract when they are different from those selected by the buyer or are of a kind, quality, or quantity different from the one agreed.

Art. 2604. The buyer has a right to have a reasonable opportunity to inspect the things, even after delivery, for the purpose of ascertaining whether they conform to the contract.

Art. 2605. A buyer may reject nonconforming things l'affrant afin de faire partie du contrat.

Cependant, entre commerçants, les termes supplémentaires font partie du contrat à moins qu'ils n'altèrent sensiblement l'offre, ou que l'offre ne limite expressément l'acceptation à ses termes, ou que le destinataire de l'offre ne soit avisé de l'objection de l'offrant dans un délai raisonnable. Dans tous ces cas, les termes supplémentaires ne font pas partie du contrat. Les termes supplémentaires altèrent sensiblement l'offre lorsque leur nature est telle qu'il doit être présumé que l'offrant n'aurait pas contracté sur cette base.

Art. 2602. Le contrat de vente de meubles peut être établi par le comportement des deux parties lorsqu'il révèle l'existence de ce contrat, même si la communication échangée est insuffisante à sa formation. En pareil cas, le contrat est constitué des termes concordants dans la communication échangée, ainsi que de toute disposition supplétive applicable.

Art. 2603. Le vendeur doit délivrer à l'acheteur des choses conformes au contrat.

Les choses ne sont pas conformes au contrat lorsqu'elles sont différentes de celles choisies par l'acheteur ou sont de nature, qualité ou quantité différente de celle convenue.

Art. 2604. L'acheteur doit avoir la possibilité raisonnable d'inspecter la chose vendue, même après délivrance, afin de déterminer sa conformité au contrat.

Art. 2605. L'acheteur peut refuser la chose non conforme
within a reasonable time. The buyer must give reasonable notice to the seller to make the rejection effective. A buyer's failure to make an effective rejection within a reasonable time shall be regarded as an acceptance of the things.

Art. 2606. A buyer who, with knowledge, accepts nonconforming things may no longer reject those things on grounds of that nonconformity, unless the acceptance was made in the reasonable belief that the nonconformity would be cured.

Art. 2607. Out of a quantity of things delivered by the seller, the buyer may accept those things that conform to the contract and form a commercial unit and may reject those that do not conform.

The buyer must pay at the contract rate for any things that are accepted.

Art. 2608. When the seller has no agent or business office at the place of delivery, a buyer who is a merchant and has rejected the things must follow any reasonable instructions received from the seller with respect to those things. If the seller gives no such instructions, and the things rejected are perishable or susceptible of rapid decline in value, the merchant buyer must make reasonable efforts to sell those things on the seller's behalf.

In all instances of rejection, a buyer who is a merchant must handle the rejected things as a prudent administrator.

Art. 2609. When the seller fails to render the performance required by a contract of sale of movable things, the buyer may dans un délai raisonnable. L'acheteur doit informer le vendeur de son refus de manière raisonnable afin de le rendre effectif. L'absence de refus effectif de la part de l'acheteur dans un délai raisonnable vaut acceptation de la chose.

Art. 2606. L'acheteur qui, en connaissance de cause, accepte une chose non conforme, ne peut la refuser pour non-conformité, à moins que l'acceptation n'ait été faite en croyant raisonnablement qu'il y serait remédié.

Art. 2607. Parmi les choses délivrées par le vendeur, l'acheteur peut accepter celles qui sont conformes au contrat et qui constituent une unité commerciale, et refuser celles qui sont non conformes. L'acheteur doit payer les choses acceptées au taux prévu au contrat.

Art. 2608. Lorsque le vendeur n'a ni agent ni bureau au lieu de délivrance, l'acheteur qui est commerçant et a refusé la chose doit suivre les instructions raisonnables reçues du vendeur la concernant. En l'absence de telles instructions, si la chose refusée est périssable ou susceptible de perdre rapidement de sa valeur, l'acheteur commerçant doit faire ce qui est raisonnable pour la vendre au nom du vendeur.

En cas de refus, l'acheteur qui est commerçant doit gérer la chose refusée en administrateur prudent.

Art. 2609. Faute, par le vendeur, d'exécuter l'obligation prévue au contrat de vente de meubles, l'acheteur peut, en toute bonne foi et dans un délai raisonnable, acheter des choses
purchase substitute things within a reasonable time and in good faith. In such a case the buyer is entitled to recover the difference between the contract price and the price of the substitute things. The buyer may recover other damages also, less the expenses saved as a result of the failure of the seller to perform.

Art. 2610. Upon rejection of nonconforming things by the buyer, the seller may cure the nonconformity when the time for performance has not yet expired or when the seller had a reasonable belief that the nonconforming things would be acceptable to the buyer. In such a case the seller must give reasonable notice of his intention to cure to the buyer.

Art. 2611. When the buyer fails to perform a contract of sale of movable things, the seller, within a reasonable time and in good faith, may resell those things that are still in his possession. In such a case the seller is entitled to recover the difference between the contract price and the resale price. The seller may recover also other damages, less the expenses saved as a result of the buyer's failure to perform.

Unless the things are perishable or subject to rapid decline in value, the seller must give the buyer reasonable notice of the public sale at which the things will be resold, or of his intention to resell the things at a private sale.

de remplacement. L'acheteur a alors le droit de recouvrer la différence entre le prix stipulé et le prix des choses de remplacement. L'acheteur peut aussi recevoir des dommages et intérêts additionnels, déduction faite des dépenses évitées du fait de l'inexécution de l'obligation par le vendeur.

Art. 2610. Lors du refus de la chose non conforme par l'acheteur, le vendeur peut remédier à la non-conformité lorsque le délai d'exécution n'est pas expiré ou lorsque le vendeur croyait raisonnablement que la chose non conforme serait acceptable pour l'acheteur. Dans ce cas, le vendeur doit informer l'acheteur de manière raisonnable de son intention d'y remédier.

Art. 2611. Lorsque l'acheteur n'exécute pas le contrat de vente de choses mobilières, le vendeur peut, dans un délai raisonnable et de bonne foi, revendre les choses qui sont encore en sa possession. Le vendeur a alors le droit de recouvrer la différence entre le prix contractuel et le prix de revente. Le vendeur peut également recouvrer des dommages et intérêts additionnels, déduction faite des dépenses évitées du fait de l'inexécution de l'obligation par l'acheteur.

À moins que les choses ne soient périssables ou susceptibles de perdre rapidement de leur valeur, le vendeur doit informer l'acheteur de manière raisonnable de la vente publique à laquelle les choses seront vendues, ou de son intention de les revendre dans une vente privée.
Art. 2612. When the buyer neglects to take delivery of movable things that are the contractual object the seller may request court authority to put the things out of his possession and at the buyer's risk. The seller must give the buyer notice of the time at which the things will leave possession of the seller.

Art. 2613. When, according to the terms of the contract, the seller sends the things to the buyer through a common carrier, the form of the bill of lading determines ownership of the things while in transit.

When the bill of lading makes the things deliverable to the buyer, or to his order, ownership of the things is thereby transferred to the buyer.

When the bill of lading makes the things deliverable to the seller, or to his agent, ownership of the things thereby remains with the seller.

When the seller or his agent remains in possession of a bill of lading that makes the things deliverable to the buyer, or to the buyer's order, the seller thereby reserves the right to retain the things against a claim of the buyer who has not performed his obligations.

Art. 2614. The seller may stop delivery of the things in the possession of a carrier or other depositary when he learns that the buyer will not perform the obligations arising from the contract of sale or is insolvent.

Art. 2615. In an action for judicial dissolution of a sale of movable things the court must grant dissolution, upon proof of the defendant's failure to perform, without allowing that party any additional time to
Art. 2616. When the contract requires the seller to ship the things through a carrier, but does not require him to deliver the things at any particular destination, the risk of loss is transferred to the buyer upon delivery of the things to the carrier, regardless of the form of the bill of lading.

When the contract of sale requires the seller to deliver the things at a particular destination, the risk of loss is transferred to the buyer when the things, while in possession of the carrier, are duly tendered to the buyer at the place of destination.

When the parties incorporate well established commercial symbols into their contract, the risk of loss is transferred in accordance with the customary understanding of such symbols.

Art. 2617. In all cases where the parties have agreed that the seller will obtain a document showing that the things have been delivered to a carrier or a depositary the buyer must make payment against tender of that document and others as required. The seller may not tender, nor may the buyer demand, delivery of the things in lieu of the documents.

Arts. 2618-2619. [Reserved]
sell, or to buy, a thing within a stipulated time.

An option must set forth the thing and the price, and meet the formal requirements of the sale it contemplates.

Art. 2621. The acceptance or rejection of an offer contained in an option is effective when received by the grantor. Upon such an acceptance the parties are bound by a contract to sell.

Rejection of the offer contained in an option terminates the option but a counteroffer does not. [Amended by Acts 1960, No. 30, §1, eff. Jan. 1, 1961; Acts 1993, No. 841, §1, eff. Jan. 1, 1995]

Art. 2622. The assignor of an option to buy a thing warrants the existence of that option, but does not warrant that the person who granted it can be required to make a final sale.

If, upon exercise of the option, the person who granted it fails to make a final sale, the assignee has against the assignor the same rights as a buyer without warranty has against the seller.

SECTION 2. CONTRACT TO SELL

Art. 2623. An agreement whereby one party promises to sell and the other promises to buy a thing at a later time, or upon the happening of a condition, or upon performance of some obligation by either party, is a bilateral promise of sale or contract to sell. Such an agreement gives either party the right to demand specific

d'accepter une offre de vente, ou d'achat, dans un délai convenu. L'option doit préciser la chose et le prix, et remplir les conditions de forme requises pour la vente envisagée.

Art. 2621. L'acceptation ou le refus de l'offre contenue dans l'option prend effet dès la réception par l'auteur de l'option. Suite à l'acceptation, les parties sont liées par une promesse synallagmatique de vente.

Le refus de l'offre contenue dans l'option met fin à l'option. Il n'en va pas ainsi de la contre-offre. [Modifié par la loi de 1960, n° 30, §1, en vigueur le 1er janvier 1961 ; loi de 1993, n° 841, §1, en vigueur le 1er janvier 1995].

Art. 2622. Le cédant d'une option d'achat garantit que l'option existe, sans pour autant garantir qu'il puisse être exigé de l'auteur de l'option de procéder à la vente.

Lorsque l'auteur de l'option ne procède pas à la vente à la levée de l'option, le cessionnaire a les mêmes droits à l'encontre du cédant que l'acheteur sans garantie contre le vendeur.

SECTION 2. DE LA PROMESSE SYNALLAGMATIQUE DE VENTE

Art. 2623. La convention par laquelle une partie promet de vendre et l'autre d'acheter une chose à une date ultérieure, ou à la réalisation d'une condition, ou à l'exécution d'une obligation par l'une des parties, est une promesse bilatérale de vente ou promesse synallagmatique de vente. Cette convention donne à chaque partie le droit d'exiger
A contract to sell must set forth the thing and the price, and meet the formal requirements of the sale it contemplates.

Art. 2624. A sum given by the buyer to the seller in connection with a contract to sell is regarded to be a deposit on account of the price, unless the parties have expressly provided otherwise.

If the parties stipulate that a sum given by the buyer to the seller is earnest money, either party may recede from the contract, but the buyer who chooses to recede must forfeit the earnest money, and the seller who so chooses must return the earnest money plus an equal amount.

When earnest money has been given and a party fails to perform for reasons other than a fortuitous event, that party will be regarded as receding from the contract.

SECTION 3. RIGHT OF FIRST REFUSAL

Art. 2625. A party may agree that he will not sell a certain thing without first offering it to a certain person. The right given to the latter in such a case is a right of first refusal that may be enforced by specific performance.

Art. 2626. The grantor of a right of first refusal may not sell to another person unless he has offered to sell the thing to the holder of the right on the same terms, or on those specified when the right was granted if the parties have so agreed.
SECTION 4. EFFECTS

Art. 2627. Unless otherwise agreed, an offer to sell the thing to the holder of a right of first refusal must be accepted within ten days from the time it is received if the thing is movable, and within thirty days from that time if the thing is immovable.

Unless the grantor concludes a final sale, or a contract to sell, with a third person within six months, the right of first refusal subsists in the grantee who failed to exercise it when an offer was made to him.

Art. 2628. An option or a right of first refusal that concerns an immovable thing may not be granted for a term longer than ten years. If a longer time for an option or a right of first refusal has been stipulated in a contract, that time shall be reduced to ten years. Nevertheless, if the option or right of first refusal is granted in connection with a contract that gives rise to obligations of continuous or periodic performance, an option or a right of first refusal may be granted for as long a period as required for the performance of those obligations. [Acts 1993, No. 841, §1, eff. Jan. 1, 1995; Acts 2003, No. 1005, §1, eff. July 2, 2003; see Acts 2003, No. 1005, §2, relative to application; Acts 2004, No. 24, §2 and §3, relative to application]

Art. 2629. An option, right of first refusal, or contract to sell that involves immovable property is effective against third persons only from the time the instrument that contains it is filed

SECTION 4. DES EFFETS

Art. 2627. Sauf stipulation contraire, une offre de vente destinée au titulaire du droit de préemption doit être acceptée dans les dix jours de réception de la chose lorsqu'elle est mobilière, et dans les trente jours lorsqu'elle est immobilière.

À moins que l'auteur du droit de préemption ne conclue une vente, ou une promesse synallagmatique de vente, avec une tierce personne dans les six mois, ce droit subsiste dans le chef du bénéficiaire qui a manqué de l'exercer lorsque l'offre lui a été faite.

Art. 2628. L'option ou le droit de préemption portant sur une chose immobilière ne peut être consenti pour une durée supérieure à dix ans. Lorsqu'une durée supérieure est stipulée au contrat, cette durée doit être réduite à dix ans. Néanmoins, lorsque l'option ou le droit de préemption sont consentis dans un contrat à exécution continue ou périodique, ils peuvent l'être pour une période égale à celle nécessaire à l'exécution du contrat. [Loi de 1993, n° 841, §1, en vigueur le 1er janvier 1995 ; loi de 2003, n° 1005, §1, en vigueur le 2 juillet 2003 ; voir loi de 2003, n° 1005, §2, sur application et loi de 2004, n° 24, §2 et §3, sur application]

Art. 2629. L'option, le droit de préemption ou la promesse synallagmatique de vente portant sur un bien immobilier n'est opposable aux tiers qu'à compter de l'enregistrement de l'instrument le contenant dans la
for registry in the parish where
the immovable is located.

An option, right of first
refusal, or contract to sell that
involves movable property is
effective against third persons
who, at the time of acquisition of
a conflicting right, had actual
knowledge of that transaction.

Art. 2630. The right to
exercise an option and the right
of first refusal are indivisible.
When either of such rights
belongs to more than one person
all of them must exercise the
right.

Arts. 2631-2641. [Reserved]

CHAPTER 15. ASSIGNMENT
OF RIGHTS

Art. 2642. All rights may be
assigned, with the exception of
those pertaining to obligations
that are strictly personal. The
assignee is subrogated to the
rights of the assignor against the
debtor.

Art. 2643. The assignment of
a right is effective against the
debtor and third persons only
from the time the debtor has
actual knowledge, or has been
given notice of the assignment.

If a partial assignment
unreasonably increases the
burden of the debtor he may
recover from either the assignor
or the assignee a reasonable
amount for the increased burden.
[Acts 1984, No. 921, §1; Acts
1985, No. 97, §1; Acts 1993, No.
841, §1, eff. Jan. 1, 1995]

Art. 2642. Toutes les
créances peuvent être cédées, à
l'exception de celles relatives
aux obligations strictement
personnelles. Le cessionnaire est
subrogé dans les droits du cédant
tl'encontre du débiteur.

Art. 2643. La cession de
créances n'est opposable au
debiteur et aux tiers qu'à
compter du moment où le
debiteur en a une connaissance
effective ou qu'il lui en a été
donné notification.

Lorsqu'une cession partielle
accroît de manière
déraisonnable la charge de
l'obligation, le débiteur peut
recouvrer du cédant ou du
cessionnaire une somme
raisonnable pour la charge ainsi
accru. [Loi de 1984, no 921, §1;
loi de 1985, no 97, §1; loi de
1993, no 841, §1, en vigueur le
1er janvier 1995]

NdT : La Louisiane a conservé la paroisse comme division territoriale. Celle-ci est l’équivalent du comté dans les
autres états.
Art. 2644. When the debtor, without knowledge or notice of the assignment, renders performance to the assignor, such performance extinguishes the obligation of the debtor and is effective against the assignee and third persons.

Art. 2645. The assignment of a right includes its accessories such as security rights.

Art. 2646. The assignor of a right warrants its existence at the time of the assignment. The assignor does not warrant the solvency of the debtor, however, unless he has agreed to give such a warranty.

Art. 2647. [Reserved]

Art. 2648. An assignor who warrants the solvency of the debtor warrants that solvency at the time of the assignment only and, in the absence of agreement to the contrary, does not warrant the future solvency of the debtor.

Art. 2649. When the assignor of a right did not warrant the solvency of the debtor but knew of his insolvency, the assignee without such knowledge may obtain rescission of the contract.

Art. 2650. A person who assigns his right in the estate of a deceased person, without specifying any assets, warrants only his right of succession as heir or legatee.

Art. 2651. [Reserved]

Art. 2652. When a litigious right is assigned, the debtor may extinguish his obligation by paying to the assignee the price the assignee paid for the assignment, with interest from the time of the assignment.

A right is litigious, for that
purpose, when it is contested in a suit already filed.

Nevertheless, the debtor may not thus extinguish his obligation when the assignment has been made to a co-owner of the assigned right, or to a possessor of the thing subject to the litigious right.

Art. 2653. A right cannot be assigned when the contract from which it arises prohibits the assignment of that right. Such a prohibition has no effect against an assignee who has no knowledge of its existence.

Art. 2654. The assignor of a right must deliver to the assignee all documents in his possession that evidence the right. Nevertheless, a failure by the assignor to deliver such documents does not affect the validity of the assignment.

When a right is assigned only in part, the assignor may give the assignee an original or a copy of such documents.

CHAPTER 16. OF THE GIVING IN PAYMENT

Art. 2655. Giving in payment is a contract whereby an obligor gives a thing to the obligee, who accepts it in payment of a debt.

Art. 2656. Delivery of the thing is essential to the perfection of a giving in payment.

Art. 2657. An obligor may give a thing to the obligee in partial payment of a debt.

A giving in partial payment extinguishes the debt in the amount intended by the parties. If the parties' intent concerning the amount of the partial extinguishment cannot be engagé.

Néanmoins, le débiteur ne peut ainsi éteindre son obligation lorsque le cessionnaire est copropriétaire du droit cédié ou possesseur de la chose sujette au droit litigieux.

Art. 2653. Un droit ne peut être cédé lorsque le contrat dont il résulte en interdit la cession. Une telle interdiction est inopposable au cessionnaire qui n'en connaît pas l'existence.

Art. 2654. Le cédant doit délivrer au cessionnaire tous les documents en sa possession constatant le droit. Néanmoins, le défaut de délivrance de tels documents n'affecte pas la validité de la cession.

Lorsqu'un droit n'est cédé qu'en partie, le cédant peut donner au cessionnaire un original ou une copie de tels documents.

CHAPTER 16. DE LA DATION EN PAIEMENT

Art. 2655. La dation en paiement est un contrat par lequel un débiteur donne une chose au créancier, qu'il accepte en paiement d'une dette.

Art. 2656. La délivrance de la chose est essentielle à la perfection de la dation en paiement.

An. 2657. Le débiteur peut donner une chose au créancier en paiement partiel de la dette.

La dation en paiement partiel éteint la dette à hauteur du montant convenu par les parties. Lorsque la volonté des
ascertained, it is presumed that they intended to extinguish the debt in the amount of the fair market value of the thing given in partial payment.

Art. 2658. [Reserved]

Art. 2659. The giving in payment is governed by the rules of the contract of sale, with the differences provided for in this Chapter.

TITLE VIII. OF EXCHANGE
[Acts 2010, No. 186, §1, eff. Aug. 15, 2010]

Art. 2660. Exchange is a contract whereby each party transfers to the other the ownership of a thing other than money.

Ownership of the things exchanged is transferred between the parties as soon as there is agreement on the things, even though none of the things has been delivered.

If it is the intent of the parties that the transfer of ownership will not take place until a later time, then the contract is a contract to exchange.

Art. 2661. Each of the parties to a contract of exchange has the rights and obligations of a seller with respect to the thing transferred by him and the rights and obligations of a buyer with respect to the thing transferred to him.

Art. 2662. A person evicted from a thing received in exchange may demand the value of the thing from which he was evicted or the return of the thing.
he gave, with damages in either case.

Art. 2663. A party giving a corporeal immovable in exchange for property worth less than one half of the fair market value of the immovable given by him may claim rescission on grounds of lesion beyond moiety.

Art. 2664. The contract of exchange is governed by the rules of the contract of sale, with the differences provided in this Title.

Art. 2665-2667. [Repealed Acts 2010, No. 186, §1, eff. Aug. 15, 2010]

avec des dommages et intérêts dans un cas comme dans l'autre.

Art. 2663. La partie donnant un immeuble corporel en échange d'un bien valant moins de la moitié de la valeur marchande de l'immeuble justement appréciée peut agir en rescission pour lésion d'outre-moitié.

Art. 2664. Sauf disposition contraire du présent titre, le contrat d'échange est régi par les règles relatives au contrat de vente.

Art. 2665-2667. [Abrogés, loi de 2010, n° 186, §1, en vigueur le 15 août 2010]
ON CODES, MARRIAGE, AND ACCESS TO JUSTICE: RECENT DEVELOPMENTS IN THE LAW OF ARGENTINA

Julieta Marotta* & Agustín Parise†

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I. INTRODUCTION

The Republic of Argentina is considered to be a member of the Romano-Germanic family, a tradition it inherited from the

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Spanish colonial period. Private law in Argentina, as in other civil law jurisdictions of the Americas, experienced significant developments in recent decades, when, for example, efforts were undertaken to leave behind patriarchal standards and to give equal standing to all members of society. Those developments, however, did take place within a broader context, and were therefore also experienced in public law.

Three developments are of paramount importance and must be included in this report. The first development deals with ongoing efforts towards the adoption of a second generation civil code in Argentina. Those recent efforts reflect that the Argentine legal community is still seeking for a text that would better serve current needs. This report will focus on the reception of the doctrine of abuse of rights within the different revision and re-codification projects of the civil code, illustrating, by means of that example, the shift from a liberal conception towards a social conception of rights. The second development deals with a fundamental pillar of family law: marriage. The report will address the adoption of legislation recognizing same-sex marriages in Argentina, which took place in 2010, and placed Argentina as a regional forerunner in that respect. The report will show how Argentina shifted from religious to civil marriage, and recently welcomed same-sex marriages. The third development deals with the right to access to justice and its interplay with vulnerable groups. The report will focus on two groups (i.e., women victims of violence and immigrants) and reflect how recent regulations aimed at those groups incorporated international law principles and stressed the importance of access to justice as a means to exercise all other

1. The terms Civil Law, Romano-Germanic, and Continental European can be used indistinctly in this report to refer to the prevailing system of private law that applies in Argentina.

2. See the references to the patriarchal elements in Haiti, El Salvador, and Honduras in Olivier Moréteau & Agustín Parise, Recodification in Louisiana and Latin America, 83 TUL. L. REV. 1103, 1157-1159 (2009).
rights. Furthermore, it will address the reception of access to justice within the ongoing efforts towards the adoption of a second generation civil code. These three developments will show readers that the law of Argentina is far from being dormant or static.

II. CIVIL LAW CODIFICATION:
SEEKING A GENERATION SHIFT

Civil law jurisdictions in the Americas are divided between those having first generation civil codes and those having second generation civil codes. The current scenario enables the grouping of jurisdictions into clusters, though not all jurisdictions are clear-cut examples of a particular generation.

A group of jurisdictions resists the adoption of second generation codes. This resistance, as is the case in Argentina, may be motivated because of veneration of the existing first generation codes, which were avant-garde at the time of enactment. The resistance of members of this group may be also motivated due to a lack of consensus on what steps should be followed at the time of alteration or because of a limitation in the allocation of the required resources. Jurisdictions that still preserve their first generation codes were able to update the texts through revision and de-codification, however. Several decades ago, some of those jurisdictions began to feel a need to adopt second generation codes.

3. This paragraph and the two that follow borrow part of their exposition, sometimes drawing verbatim, from the previously mentioned work of Moréteau & Parise and from Agustín Parise, Civil Law Codification in Latin America: Understanding First and Second Generation Codes, in TRADITION, CODIFICATION AND UNIFICATION 183-193 (M. Milo et al. eds. 2014).

4. The U.S. state of Louisiana provides an example of one of the latter jurisdictions. Some may claim that Louisiana adopted a second generation civil code, which resulted from the ongoing revision of the first generation civil code; while others may claim that the ongoing re-codification process has not yet reached a second generation status. See Moréteau & Parise, supra note 2, at 1112-1120.

5. Argentina, Chile, Colombia, Dominican Republic, Ecuador, El Salvador, Haiti, and Uruguay.

6. E.g., Civil Code of Argentina and Civil Code of Chile.

7. E.g., Ecuador and Dominican Republic.
Even if their codes may be far from experiencing a generation shift, they are currently undergoing a thorough revision or entering into a de-codification process, especially, as already mentioned, with regards to family law and the prevailing patriarchal systems. The civil code of Argentina belongs to this first group, because it still does not surrender to replace its current code by one of second generation.

Another group of jurisdictions welcomed second generation codes. The texts of first generation codes, however, had been previously updated through partial revisions and de-codification, and ultimately led to the adoption of texts with second generation status. Many of these new texts incorporated social aspects of law, and their sources were more eclectic. The typifying characteristic of these codes is that they were able to incorporate local elements that distinguished them from codes of other jurisdictions, while also distinguishing them from the texts of their previous generation codes. Second generation codes found a more mature society and were able to highlight their own identity.

Argentina still applies its first generation code, which has been subject to revision and de-codification. That first generation civil code, which dates from 1871 and was drafted by Dalmacio Vélez Sarsfield (hereinafter, Vélez), may be subject to veneration, having been avant-garde at the time of enactment, and is still generating resistance to replacement. However, Argentina undertook several attempts to adopt a second generation civil code, which can be traced back to the first decades of the twentieth century and are still ongoing. Argentina indeed offers a fertile ground for revision

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8. Bolivia, Costa Rica, Cuba, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Puerto Rico, Québec, and Venezuela.
9. E.g., Civil Code of Mexico, 1932.
10. For more information on generations of civil codes, see generally Parise, supra note 3.
efforts,\textsuperscript{11} and holds a unique record of aborted re-codification attempts.\textsuperscript{12}

\textit{A. First Generation Civil Code}

The first attempts towards civil law codification\textsuperscript{13} in Argentina were undertaken in 1852.\textsuperscript{14} At that time, the head of the executive power delivered a decree ordering the appointment of drafters that would work on the civil, commercial, criminal, and procedural codes.\textsuperscript{15} That effort did not advance, however.\textsuperscript{16} One year later, the Argentine Constitution further stated that the national legislative branch should deliver civil, commercial, criminal, and mineral codes.\textsuperscript{17}

The completion of a civil code was delayed until the following decade. In 1864, Vélez was appointed to draft a project,\textsuperscript{18} and his resulting work was approved without parliamentary debate\textsuperscript{19} by the National Congress on September 25, 1869, taking effect as the \textit{Código Civil de la República Argentina} (hereinafter, Argentine Code) on January 1, 1871.\textsuperscript{20} The Argentine Code had 4051 articles and was divided into two preliminary titles and four books: Book I

\begin{thebibliography}{9}
\bibitem{12} Moréteau & Parise, \textit{supra} note 2, at 1146.
\bibitem{13} Previous efforts were undertaken in the area of commercial law in 1824, with the drafting of a project of a Commercial Code. See Víctor Tau Anzóategui, \textit{La Codificación en la Argentina (1810-1870): Mentalidad Social e Ideas Jurídicas} 125 (1977).
\bibitem{14} Abelardo Levaggi, 2 \textit{Manual de Historia del Derecho Argentino} 265 (1987).
\bibitem{15} Id.
\bibitem{16} Id.
\bibitem{18} Levaggi, \textit{supra} note 14, at 266.
\bibitem{19} Id. at 269. See \textit{also} the complete study by Jorge Cabral Texo, \textit{Historia del Código Civil Argentino} 156-178 (1920).
\end{thebibliography}
of persons (de las personas), Book II of personal rights in civil relations (de los derechos personales en las relaciones civiles), Book III of real rights (de los derechos reales), and Book IV of real and personal rights-dispositions in common (de los derechos reales y personales - disposiciones communes). The Argentine Code overruled all related prior laws that had developed during the Spanish colonial period and the early independent period (e.g., Indiano and Patrio laws). As other nineteenth-century codes, the Argentine Code did not welcome explicitly the doctrine of abuse of rights.

Vélez had an eclectic approach to law, and therefore identified materials from many sources. He worked with legislative acts, drafts of codes, codes, and doctrine that served him as guides. Similar to other drafters, he used the ideas and codes that existed at the time. He was especially interested—as were, for example, Andrés Bello in Chile and Louis Moreau-Lislet in Louisiana—in the jurists and works that theorized on modern law while building from Roman law principles. Finally, Vélez added to those materials the identification of local customs. It can be claimed that the resulting text of the Argentine Code was tinted with an individualistic and liberal conception, as most nineteenth-century civil codes that found a precedent in the Code Napoléon.

The Argentine Code was never replaced, though its text was subject to many alterations that were introduced mainly through

25. Id.
revisions. For example, secular laws were enacted in the 1880s in Argentina. Accordingly, a law on civil marriage was adopted in 1888, together with laws on civil registry that were adopted in 1884 and 1898. The first decades of the new century also brought new legislation that affected the civil code. For example, the national congress adopted a law on agricultural leases in 1921 and a law on the rights of women in 1926. Most partial reforms, however, dealt with specific areas of the civil code and lacked a comprehensive approach.

B. Towards a Second Generation Civil Code

Several major revision and re-codification efforts were undertaken in Argentina starting at the turn of the twentieth century. Three of those efforts were undertaken in 1936, 1954, and 1968, and they paved the way for the formal reception of the doctrine of abuse of rights. Those efforts assisted in leaving behind the liberal conception that had characterized the first generation code.

At the break of the twentieth century scholarly writings indicated a need to harmonize the civil code with the new context. Accordingly, a first re-codification effort was started in 1926 with the appointment of a codifying commission. The latter

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28. For more information on the 1888 law, see infra note 90 and accompanying text. Abel Cháneton, 2 Historia de Vélez Sársfield 335 (1937).
29. Id. at 336.
30. Id. at 335.
31. Id. at 336.
32. LEVAGGI, supra note 14, at 271.
34. Through the ten years of existence, the commission was composed by Juan A. Bibiloni, César de Tezanos Pinto, Mariano de Vedia y Mitre, José A. Gervasoni, Héctor Lafaille, Enrique Martínez Paz, Julián V. Pera, Juan Carlos Rébora, Roberto Repetto, Rodolfo Rivarola, Raymundo M. Salvat, and Gastón Federico Tobal. See ENRIQUE R. AFTALIÓN & FERNANDO GARCÍA OLANO,
delegated to one of its members—Juan A. Bibiloni—the drafting of a pre-project that did not welcome the doctrine of abuse of rights. The pre-project was revised by the commission, and Héctor Lafaille and Gastón Tobal undertook the final drafting of a project that was completed in 1936, was notably brief, and was ultimately never adopted by the legislature. Lafaille indicated that the commission had preferred to work with, amongst others, the Brazilian, Spanish, and Swiss civil codes, and had not excluded from their work the Chilean code and the Code Napoléon. The project welcomed the doctrine of abuse of rights, differently from its predecessor. The concrete applications of the doctrine were increased within the code, and the limitations for its application were removed.

In the 1950s, scholars claimed that there was a need to change civil code provisions to make them reflect current standards. Within that scenario, a second re-codification effort was undertaken in 1950 by the Civil Law Institute of the Ministry of Justice, under the leadership of Jorge Joaquín Llambías. The

INTRODUCCIÓN AL DERECHO 454 (1939); and Juan Carlos Rébora, Nota e informe presentados por el profesor Dr. Juan Carlos RÉBORA al Honorable Consejo Académico de la Facultad de Ciencias Jurídicas y Sociales de la Universidad de La Plata, con motivo de su actuación dentro de la Comisión de Reformas del Código Civil, 5 LA LEY 66, 69 (1937).

35. AFTALIÓN & GARCÍA OLANO, supra note 34, at 454. See generally JUAN ANTONIO BIBILONI, 1-7 ANTEPROYECTO DE REFORMAS AL CÓDIGO CIVIL ARGENTINO (1929).

36. See GUILLERMO A. BORDA, 1 TRATADO DE DERECHO CIVIL PARTE GENERAL 148 (9th ed. 1987); and Moréteau & Parise, supra note 2, at 1145.

37. PROYECTO DE CÓDIGO CIVIL ARGENTINO 523-537 (1938). See also AFTALIÓN & GARCÍA OLANO, supra note 34, at 454; and LEVAGGI, supra note 14, at 272.

38. Parise, supra note 33.


41. ANTEPROYECTO DE CÓDIGO CIVIL DE 1954 PARA LA REPÚBLICA ARGENTINA 7 (1968); and LEVAGGI, supra note 14, at 272.
work resulted in a pre-project that welcomed the developments of the national jurisprudence, and was inspired by the codes of Italy, Peru, Switzerland, and Venezuela. The pre-project was also brief, and was completed in 1954, though never adopted by the legislature. The work included an article that expressly welcomed the doctrine of abuse of rights. That article, numbered 235, read in part that “the law does not tolerate the abuse of rights” and that “the exercise of a right will be deemed abusive when it contradicts the requirements of good faith or the ends towards its recognition.”

The note to that article indicated a thorough review of foreign scholarly writings and legislation, and a survey of Argentine precedents. The proposals of the pre-project paved the way for the formal reception of the doctrine in the subsequent revision effort.

A third major revision effort was completed in 1968. That effort, however, did not aim to achieve re-codification, and was limited to achieve revision of 204 articles. The new texts were adopted by Law 17711 of 1968, and drafted by José F. Bidau, Abel M. Fleitas, and Roberto Martínez Ruiz, with the decisive participation of Guillermo A. Borda. Their revision work introduced principles of social solidarity in a code that had been

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42. LEVAGGI, supra note 14, at 272; and Moréteau & Parise, supra note 2, at 1145.
43. LEVAGGI, supra note 14, at 272.
45. Id. at 19.
46. Id. at 19.
48. See the text of Law 17711, available at http://www.infojus.gob.ar/documentDisplay.jsp?guid=123456789-0abc-defg-g31-11000scanyel&title=reformas-al-codigo-civil-
49. LEVAGGI, supra note 14, at 271.
known as individualistic.\textsuperscript{50} The 1968 revision introduced the doctrine of abuse of rights, mainly in article 1071,\textsuperscript{51} which in its previous wording had defended that the exercise of one’s rights could not turn any act illegal.\textsuperscript{52} The new text, in radically different lines, rephrased the original wording and added a second paragraph indicating that: “the law does not protect the abusive exercise of rights. It will be deemed abusive the exercise that contradicts the aims that the law had when recognizing them or the exercise that exceeds the limits imposed by good faith, morals, and good customs.”\textsuperscript{53}

More recent major revision and re-codification efforts were undertaken since the 1980s in Argentina. Projects of new codes were completed in 1987, 1992, 1993, and 1998, though never took force of law.\textsuperscript{54} The most recent re-codification attempt\textsuperscript{55} was presented before the executive power on February 24, 2012,\textsuperscript{56} and is currently subject to debate before the National Congress. Parts of the proposed text encountered opposition from different groups and members of society,\textsuperscript{57} and have also motivated the

\textsuperscript{50} Id.; and Moréteau & Parise, \textit{supra} note 2, at 1145.


\textsuperscript{52} Law 340, \textit{supra} note 20, at 614-615.


\textsuperscript{55} All relevant information regarding the ongoing re-codification effort is available at http://www.nuevocodigocivil.com.

\textsuperscript{56} Modificaciones del poder ejecutivo nacional al anteproyecto de reforma del código civil elaborado por la comisión de reformas decreto 191/2011, available at http://www.nuevocodigocivil.com/pdf/Fundamentos-de-los-cambios-introducidos-por-el-PEN.pdf at 1.

\textsuperscript{57} \textit{See, e.g.}, \textit{Debate por la reforma del Código Civil}, \textit{LA NACIÓN}, March 7, 2012 at 15; and \textit{CONFERENCIA EPISCOPAL ARGENTINA, REFLEXIONES Y APORTE SOBRE ALGUNOS TEMAS VINCULADOS A LA REFORMA DEL CÓDIGO CIVIL} (2012).
development of copious literature commenting on its virtues and weaknesses. The codifying commission was led by Elena Highton de Nolasco and Aída Kemelmajer de Carlucci, under the presidency of Ricardo Lorenzetti. That re-codification effort...
unified the civil and commercial codes into a single body. The resulting code project \(^{60}\) had 2671 articles and was divided into a preliminary title and six books: Book I of the general part (*parte general*), Book II of family relations (*relaciones de familia*), Book III of personal rights (*derechos personales*), Book IV of real rights (*derechos reales*), Book V of mortis causa transmission of rights (*transmisión de derechos por causa de muerte*), and Book VI of dispositions in common for real and personal rights (*disposiciones comunes a los derechos personales y reales*). \(^{61}\) Each book was divided into titles and chapters, and when necessary, into sections and paragraphs. The new project placed the doctrine of abuse of rights in a paramount position within the preliminary title of the code, continuing with the path taken since 1936 towards the adoption of a less individualistic conception of rights. That doctrine clearly outgrew all different parts of the code and it now applies to all private law. \(^{62}\) The to-be article 10 reproduced without major alterations the two paragraphs of current article 1071, and added a third paragraph stating that the judge must order the necessary measures to prevent the effects of an abusive use of rights, and if necessary, procure the retrocession to the previous status, determining a compensation. \(^{63}\)

\(^{60}\) The resulting text was referred to as pre-project by the codifying commission in its *exposé des motifs*, though in the front page of the proposed code it reads project. Earlier versions of the proposed code indeed referred to it as pre-project.

\(^{61}\) See the complete text of the project, available at [http://www.nuevocodigocivil.com/pdf/Texto-del-Proyecto-de-Codigo-Civil-y-Comercial-de-la-Nacion.pdf](http://www.nuevocodigocivil.com/pdf/Texto-del-Proyecto-de-Codigo-Civil-y-Comercial-de-la-Nacion.pdf) [hereinafter Texto del Proyecto].


\(^{63}\) Texto del Proyecto, supra note 61, at 3-4. See also Graciela Medina, *La contractualización de la familia / Contractualisation of family law* in INFORMES DE LA ASOCIACIÓN ARGENTINA DE DERECHO COMPARADO AL XIX CONGRESO DE LA ACADEMIA INTERNACIONAL DE DERECHO COMPARADO 385, 394 (2014).
The 2012 code project suggested numerous alterations to the existing law. According to Lorenzetti, the codifying commission respected the Roman, Spanish, and French traditions that had an impact on Argentine legal history, yet they also aimed to provide a text immersed in a Latin American cultural identity. The codifying commission also benefited from analyzing all previous major revision and re-codification efforts that had taken place in Argentina. Alterations were proposed for almost all areas of private law (e.g., property law, commercial law), yet it is relevant to highlight the following: (i) incorporation of a title dealing with private international law, in similar lines with modern codes, such as the one of Louisiana, that added a fourth book on that subject; (ii) incorporation of protection of inalienable personal rights (derechos personalísimos), which had already found their way into Argentine domestic legislation by means of the adoption of international conventions, and which were yet not expressly addressed in the Argentine Code; (iii) incorporation of prenuptial agreements, which are currently not included in the Argentine Code; (iv) incorporation of several changes when facing divorce, i.a., the elimination of the impossibility to file for divorce within

64. See the complete text of the exposé des motifs of the 2012 code project, available at http://www.nuevocodigocivil.com/pdf/Fundamentos-del-Proyecto.pdf [hereinafter Fundamentos del Proyecto].
65. Id. at 4.
66. Id. at 6.
69. Inalienable personal rights are addressed, i.a., in arts. 17, 55, 59, 646, paragraph c, and 1738 of the project. See also Fabio Fidel Cantafio, La salud y los derechos personalísimos en el Proyecto de Código, LA LEY 11.16.2012.
70. See Book II, Title II, Section 1, arts. 446-450 and art. 2625 (Texto del Proyecto, supra note 61, at 112-113 and 579). On this topic, see Ana Ortelli, Las convenciones matrimoniales y los convenios reguladores de crisis matrimoniales en el proyecto de Código Civil y Comercial de la Nación, ELDIAL 07.11.2012.
the first three years from the celebration of the marriage;\textsuperscript{71} and (v) incorporation of provisions on assisted reproductive technologies within the civil code.\textsuperscript{72}

It seems clear that Argentine jurists and society at large sense a need to reach a generation shift. The first generation civil code needs a refurbishment that may no longer be achieved by means of revision or de-codification, while the fate of the Argentine Code is now in the hands of the legislature.\textsuperscript{73}

III. SAME-SEX MARRIAGE:
AN AVANT-GARDE PILLAR FOR FAMILY LAW

Argentina experienced in 2010 a very significant change in the area of family law, more precisely in the dispositions dealing with marriage. Law 26618\textsuperscript{74} of that year welcomed same-sex marriage, being the second civil law jurisdiction from the Americas—after

\textsuperscript{71} See Book II, Title I, Chapter 8, Section 2, arts. 436-438 (Texto del Proyecto, supra note 61, at 109). See also Fundamentos del Proyecto, supra note 64, at 64; Eduardo A. Sambrizzi, El divorcio en el anteproyecto de reforma al Código Civil, ELDIAL 04.12.2012; Lidia B. Hernández et al, Matrimonio y divorcio en el Anteproyecto de Código Civil y Comercial, LA LEY 05.30.2012; and Luis María López del Carril, El divorcio en el Proyecto de Código, LA LEY 09.12.2012.

\textsuperscript{72} The provisions are spread throughout the draft (\textit{i.a}, arts. 19, 529, and 2631), though the general rules dealing with that type of filiation are included in Book II, Title V, Chapter 2, arts. 560-564 (Texto del Proyecto, supra note 61, at 138-140). See Aída Kemelmajer de Carlucci et al, El embrión no implantado. Proyecto de Código unificado. Coincidencia de la solución con la de los países de tradición común, LA LEY 07.10.2012; Aída Kemelmajer de Carlucci et al, El embrión no implantado. El Proyecto de Código y su total consonancia con la CIDH, LA LEY 12.28.2012; Fernando López de Zavalia, Técnicas de reproducción humana asistida y el Proyecto de Código, LA LEY 08.23.2012; and Úrsula C. Basset, Incidencia en el derecho de familia del proyecto de Código con media sanción, LA LEY 12.16.2013.

\textsuperscript{73} At the time this Report was submitted for publication (August 12, 2014) the National Congress had not taken yet a decision on the fate of the 2012 code project. See also Julio César Rivera, The effects of financial crises on the binding force of contracts: renegotiation, rescission or revision in INFORMES DE LA ASOCIACIÓN ARGENTINA DE DERECHO COMPARADO AL XIX CONGRESO DE LA ACADEMIA INTERNACIONAL DE DERECHO COMPARADO 285, 295 (2014).

\textsuperscript{74} See the text of Law 26618, available at http://www.infojus.gob.ar/legislacion/ley-nacional-26618-matrimonio_entre_personas_mismo.htm?5#. 

Québec—to do so. These changes are part of a more comprehensive shift, which also provides for recognition of gender identity, as established in Law 26743 of 2012. Accordingly, gender identity might differ from that assigned at the time of birth and should reflect the internal and individual experience of each person. The principle of equality was also welcomed by the democratic conception of family as assured by the constitutional reform of 1994, granting constitutional standing to a series of international Human Rights conventions.

The Argentine Code, as other nineteenth-century civil codes, did not welcome same-sex marriage, and followed a model of the patriarchal family. In addition, its text, as adopted in 1871, did not follow the Code Napoléon conception of marriage as a mere civil contract. Vélez’s code ratified authority to Canon law, and regulated marriage amongst Catholics, and also regulated marriage with and without authorization of the Catholic Church. There were no specific provisions for marriages amongst non-believers, yet it was interpreted that the code dispositions on

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77. Article 1 of the new law established that every person has the right to recognition of its gender identity, to freely develop according to that gender identity and to be treated according to his gender identity. Id.

78. Id. at art. 2.


80. Medina, supra note 63, at 390.

81. LEVAGGI, supra note 14, at 131.

82. Arts. 167-179 (Law 340, supra note 20, at 524-525).


84. Art. 183 (Law 340, supra note 20, at 526).
public instruments in general applied.\footnote{LEVAGGI, supra note 14, at 132.} Article 167 of the code provided the basic tenets by indicating that marriage amongst Catholics should be celebrated according to the canons and solemnities of the Catholic Church.\footnote{Law 340, supra note 20, at 524.} Vélez had indicated in his note to that article that:

Catholics, such as the people of Argentina,\footnote{The 1895 Argentine census indicated that in that country “991 out of 1000 are Catholics, seven are Protestant, and two are Israelites.” SEGUNDO CENSO DE LA REPÚBLICA ARGENTINA. MAYO 10 DE 1895. TOMO II POBLACIÓN cxii (1898) [hereinafter SEGUNDO CENSO].} could not celebrate civil marriage. For them it would be a perpetual concubinage, condemned by their religion and by the customs of the country. A law authorizing such marriages, according to the current state of our society, would disavow the mission of the laws to sustain and increase the power of customs and not to enervate and corrupt them. Such a law would encourage Catholics to ignore the precepts of their religion, with no favorable results for people and families.\footnote{The text of the note, in its relevant part, read in Spanish: Las personas católicas, como las de los pueblos de la República Argentina, no podrían contraer el matrimonio civil. Para ellas sería un perpetuo concubinato, condenado por su religión y por las costumbres del país. La ley que autorizara tales matrimonios, en el estado actual de nuestra sociedad, desconocería la misión de las leyes que es sostener y acrecentar el poder de las costumbres y no enervarlas y corromperlas. Sería incitar a las personas católicas a desconocer los preceptos de su religión, sin resultado favorable a los pueblos y a las familias. Law 340, supra note 20, at 524. See also LEVAGGI, supra note 14, at 131.}

The 1871 text also referred explicitly to husband and wife throughout its articles, not taking a neutral stand by means of the generic term *spouse*.\footnote{See, e.g., arts. 185-193 (Law 340, supra note 20, at 526).}

Argentine society experienced several changes towards the end of the nineteenth century.\footnote{For a comprehensive view on Argentina during the turn of the century and until the 1930s, see THE CAMBRIDGE HISTORY OF LATIN AMERICA VOLUME V C. 1870 TO 1930 327-452 (Leslie Bethell ed. 1998).} For example, the 1895 Argentine census indicated that the country had 4.1 million inhabitants,\footnote{SEGUNDO CENSO, supra note 87, at cxlix.} of
which 24.5% were foreigners, mainly migrants from Europe. The period 1901-1910, alone, resulted in the arrival of 1.1 million permanent immigrants. No other civil law jurisdiction of the Americas received more immigrants than Argentina. In addition, early industrialization resulted in new interaction amongst actors, many of them being immigrant workers. That new interaction lacked economic and normative frameworks, and eventually triggered social unrest and strikes. Agnostic ideas had also developed at that time in Argentina, and there were controversies between Catholics and Liberals, triggered by several governmental measures against the former. Within that context, the already mentioned secular laws were enacted in the 1880s in Argentina. Accordingly, civil marriage was introduced by means of Law 2393, which took effect on November 11, 1888. Since then, only civil marriage was recognized by the state. Furthermore, the new law stated that ministers of the Church would be prosecuted if they celebrated religious marriages without a copy of the civil

92. Id. at cliii.
93. Ernesto Cerro, La migración en la República Argentina y especialmente en Tucumán entre 1869 y 1914 in LA INMIGRACIÓN EN LA ARGENTINA 81, 81-82 (Universidad Nacional de Tucumán 1979).
97. Pérez Vichich, supra note 96, at 140.
98. LEVAGGI, supra note 14, at 134.
99. Id. at 136.
100. Id.
marriage act being produced before them. The law on civil marriage did not welcome unions of same-sex spouses.

The current century saw the emergence of legislation that aimed to grant similar rights to different- and same-sex couples. The path towards same-sex marriage was paved by at least two precedents from as early as 2003, when the city of Buenos Aires and the province of Río Negro introduced the possibility of registering civil unions amongst same-sex couples. A fundamental change, that was avant-garde for the entire region, took place in 2010 with the enactment of Law 26618 on Same-sex Marriage. It took effect on July 22, 2010, and incorporated changes to the civil code; to two special laws (i.e., Law 18248 and Law 26413); and to the entire Argentine legal framework dealing with the requirements, rights, duties, and effects of marriage.

Law 26618 implemented a first set of changes that were introduced exclusively to the civil code. The texts of thirty-four articles from the Argentine Code were replaced by new wordings, which aimed to guarantee full recognition to same-sex marriages. A first example is found in article 172, being the leading article for the chapter dealing with marital consent. It added a second paragraph that clearly eliminated any distinction by stating that “marriage will have the same requirements and effects, not depending on whether the spouses are of the same or different

101. Id.
102. The changes were implemented by means of Law 1004. See the complete text of the law available at http://www.buenosaires.gob.ar/areas/educacion/recursos/ed_sexual/pdf/ley1004.pdf.
103. The changes were implemented by means of Law 3736. See the complete text of the law by searching “Ley 3736” in the search engine available at http://www.legisrn.gov.ar/LEGISCON/conleystanwp.php.
105. The text of the following civil code articles was replaced: 172; 188; 206; 212; 220, par. 1; 264, par. 1; 264 ter; 272; 287; 291; 294; 296; 307; 324; 326; 332; 354; 355; 356; 360; 476; 478; 1217, par. 1; 1275, par. 2; 1299; 1300; 1301; 1315; 1358; 1807; 2560; 3292; 3969; and 3970.
Another example of change is found in new article 206, which indicated that, regardless the age of the child, in same-sex marriages, the judge considers the best interest of the child at the time of granting custody to one of the parents. In similar lines, article 307 indicated that parental rights (patria potestad) may be lost by parents, regardless of their sex, when the security, physical or psychic health, or morality of the child is jeopardized due to bad behavior, pernicious examples, or delinquent misconduct. The changes in the law, therefore, also contemplated the other members of the family, not focusing exclusively on the spouses.

The new law implemented a second group of changes that were introduced in two national laws that regulate fundamental aspects of personality: name and legal capacity of persons. First, the new law implemented a change in the wording of five articles of Law 18248 on Names, aiming to eliminate any distinctions between the effects of different- and same-sex marriages. Second, a modification was implemented to article 36, paragraph C of Law 26413 on the Registry of Civil Status and Capacity of Persons. That article deals with the registration of birth, and according to the new text, the registration of birth for children born from same-sex spouses requires the name and surname of the mother and its spouse.

Article 42 of Law 26618 implemented a final and overreaching provision that affected the entire domestic legal framework. That article stated in its first paragraph that every reference to marriage

106. The article read in Spanish: “El matrimonio tendrá los mismos requisitos y efectos, con independencia de que los contrayentes sean del mismo o de diferente sexo.” Law 26618, supra note 74.
107. Id.
108. Id.
110. Law 26618 replaced arts. 4, 8-10, and 12 of Law 18248. Law 26618, supra note 74.
112. Id. at art. 36, par. C.
within the internal legal framework should be understood as being applicable both to different- and same-sex spouses. The second paragraph extended that understanding to all family members. It therefore stated that family members from different- and same-sex marriages have identical rights and obligations. Finally, the third paragraph of that article stated that no disposition of the Argentine legal framework should be interpreted or applied in a way that limits, restricts, excludes, or eliminates the enjoyment of the same rights and obligations for different- and same-sex marriages. Regardless of this overreaching statement, an imminent re-drafting of many other dispositions of the domestic legal framework would be well received.

Same-sex marriage was also welcomed in the 2012 code project. Lorenzetti had indicated at the time of presenting the 2012 code project that the work had aimed to elaborate a code for a multicultural society, and that in the area of family law important decisions had been made to attend some social conducts that could no longer be ignored. He also defended that taking those decisions did not imply that certain conducts were encouraged or subject to value judgment, because taking those decisions had aimed to regulate options for life in a pluralistic society. It has been claimed, however, that the proposed changes in family law implicitly canceled the role of Argentine legal tradition as a source for that area of law, because of the radical changes proposed, which would result in the need to “discard entire libraries.” A number of proposed articles refer to same-sex marriage and couples. For example, article 402, being fundamental for the interpretation and application of provisions, reproduced almost

113. Law 26618, supra note 74.
114. Id.
115. Id.
117. Id.
118. Úrsula C. Basset, El matrimonio en el Proyecto de Código, LA LEY 09.05.2012.
verbatim the third paragraph of article 42 of Law 26618.\textsuperscript{119} That wording could serve to solve any unattended conflicts between the scope of rights and duties of different- and same-sex spouses. The location of the article within the 2012 code project was also relevant, because it was placed as the second and final article in Book II, Title I, Chapter 1 dealing with the general principles of freedom and equality. The project also dealt with the effects of same-sex marriage in article 69, paragraph C, regulating the instances when surnames can be changed, again a fundamental aspect of personality.\textsuperscript{120} Another reference was found in article 509, which highlighted that the provisions on cohabitation unions (uniones convivenciales) applied equally to different- and same-sex couples.\textsuperscript{121} Finally, the 2012 text eliminated all references to husband and wife throughout its articles.

Marriage in Argentina has changed drastically in a 140 year period. Those changes (i.e., from religious to civil, and welcoming same-sex marriage) provide an example of how partial revisions and de-codification may pave the way for a shift in generation status. In Argentina, the first generation code status is preserved, even when fundamental changes took place in the area of family law. One wonders how many of these fundamental changes can occur until the generation shift eventually takes place.

\textsuperscript{119} The article read in Spanish: 
Interpretación y aplicación de las normas. Ninguna norma puede ser interpretada ni aplicada en el sentido de limitar, restringir, excluir o suprimir la igualdad de derechos y obligaciones de los integrantes del matrimonio, y los efectos que éste produce, sea constituido por dos personas de distinto o igual sexo.
Texto del Proyecto, supra note 61, at 97.
\textsuperscript{120} Art. 69, par. C (Texto del Proyecto, supra note 61, at 19).
\textsuperscript{121} Art. 509 (id. at 128).
IV. IMPROVING ACCESS TO JUSTICE FOR ALL

Access to justice is the vehicle whereby other rights are conveyed.122 Recent legislation and the 2012 code project have addressed that fundamental right by including provisions towards assuring access to justice for all. Special attention was given to those groups more vulnerable to achieve access to their rights. The inclusion of special provisions to assure that right for vulnerable groups reinforced the idea that individual freedoms are seen, in recent legal developments, as social commitments and not as self-responsibility.

Argentina aims to achieve a judicial value of “equality” that materializes in values of non-discrimination and equal opportunities.123 Access to justice is considered in a broad sense, thus allowing justice to be granted by different mechanisms, not limited to the traditional access to courts: “it means access to a solution to a conflict, and not access to trial.”124 Innovations in mechanisms of access to justice were welcomed in the creation of institutions and enactment of laws that tended to eliminate common obstacles to reach the law and available mechanisms to make use of the law and of the judicial system.

Changes in private law were accompanied by changes in public law in Argentina. These changes shaped a new context on access to justice where that right was largely extended by means of the previously mentioned Human Rights conventions that gained constitutional supremacy in 1994. Argentina hence reinforced the right to a fair trial as a necessary step to obtaining an effective and


123. Ricardo Lorenzetti, Acceso a la Justicia de los Sectores Vulnerables in DEFENSA PUBLICA: GARANTIA DE ACCESO A LA JUSTICIA 61, 62 (2008); and MAURO CAPPHELLETTI ET AL., TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES (1975). For a reflection on the introduction of these principles in the law, see Eduardo José Cárdenas, La familia en el Proyecto de Código Civil, LA LEY 08.15.2012.

124. Lorenzetti, supra note 123, at 70.
enforceable remedy.125 International conventions also extended the responsibility of the state to make access to justice achievable.126

Equal opportunity to access to justice for all members of society was recently addressed in Argentina. The regulations took a holistic approach on the issue, considering the particularities of different groups. Accordingly, laws were tailor-made for these groups, as illustrated by Law 25871 of 2003,127 addressing the right of immigrants; and by Law 26485 of 2009,128 addressing the right of women to live free of violence. In addition, access to justice was addressed in the provisions on procedures regarding family matters within the 2012 code project.

A. Law 25871 on Migration Rights

Argentina is a country with a strong tradition of welcoming immigrants.129 Law 25871 of 2003 provided the main legal framework for immigration130 and aimed to harmonize the internal normative framework with the international conventions


129. See, e.g., Parise supra note 95.

subscribed to by the country.\footnote{Alejandro O. Tazza, \textit{Ley 25.871. Extranjeros. Política migratoria}, 2004-E ANALES DE LEGISLACIÓN ARGENTINA (2004).} Some scholars considered that Law 25871 went further in the recognition of international rights to immigrants and hence defended that the right to migrate in Argentina should be regarded as a human right.\footnote{Hines, \textit{supra} note 130, at 509. Several works have compared the innovative approach of this new legislation to that existing in other countries, such as the U.S. (see, e.g., Victoria Slater, \textit{“To Govern Is To Populate”}: Argentine Immigration Law and what it can suggest for the United States, \textit{31 Hous. J. Int’l L.} 693 (2009)).}

Law 25871, a prime example of a tailor-made law, also accorded the right of immigrants to access to justice. Immigrants and their families now enjoy the right to be informed of their obligations and rights, together with the right to be informed of the requirements needed to be admitted, to stay, and to leave Argentina.\footnote{Law 25871, \textit{supra} note 127, at art. 9; and Decree 616/2010, \textit{supra} note 127, at art. 9 (provides implementation requirements).}

The new law also considered access to justice in a broad sense, not limiting it to access to courts. Legal aid offices were incorporated as important intermediary institutions to assure immigrants exercise their right to access to justice. They must provide aid free of charge and, when possible, in a language the immigrant understands. Language interpreters should be appointed to assist non-Spanish speaking immigrants that face administrative or judicial proceedings.\footnote{Law 25871, \textit{supra} note 127, at art. 86; and Decree 616/2010, \textit{supra} note 127, at art. 86 (provides implementation requirements).} There are several offices that render legal aid in Argentina, and they cannot deny legal aid, even when immigrants have an irregular status.\footnote{Decree 616/2010, \textit{supra} note 127, at art. 56 (provides implementation requirements).} For example, the University of Buenos Aires (UBA), CELS, and \textit{Comisión de Apoyo a Refugiados y Migrantes} (CAREF) sponsor, since 2002, a legal
clinic for the protection of rights of immigrants and refugees. Similar legal clinics were established in other universities across Argentina. Legal aid was also encouraged by Decree 836 of 2004, which advocated for the creation of an office to assist and inform immigrants within the scope of the National Migration Office.

In 2007, the public sector opened offices to aid immigrants and refugees, facilitating access to justice to those groups. Those efforts were also addressed by the creation of public offices, commissions, and institutes. For example, the National Institute against Discrimination, Xenophobia, and Racism (INADI) also offers protection to immigrants, having already been created in the late 1990s. Other efforts were implemented in 2008, when a Commission of Migrants was created within the scope of the National Public Defenders’ Office.

Argentina is a pioneer in granting a human right status to migration. Many changes took place in the Argentine legislation on immigration, and the last decades proved to be fruitful in the adoption of tailor-made changes for immigrants. However, a gap between the law and the existing reality for immigrants in

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136. FIDH & CELS, ARGENTINA: AVANCES Y ASIGNATURAS PENDIENTES EN LA CONSOLIDACIÓN DE UNA POLÍTICA MIGRATORIA BASADA EN LOS DERECHOS HUMANOS 34-35 (No. 559e, Feb. 2011). This is a very complete work by Federación Internacional de Derechos Humanos (FIDH) and Centro de Estudios Legales y Sociales (CELS).
137. Id. at 35.
139. FIDH & CELS, supra note 136, at 35.
140. For more information on the National Institute against Discrimination, Xenophobia, and Racism, see http://inadi.gob.ar/promocion-y-desarrollo/publicaciones/documentos-tematicos/migrantes/.
Argentina is perceived. It is now the time to implement specific public policies that will assist in bridging the gap, e.g., human resources will be needed to continue with the implementation (and improvement) of services for access to justice. The immigration scheme in Argentina should certainly accompany the most vulnerable groups, defending the already two-hundred-year-old fundamental notion that in Argentina the constitutional rights are applicable to all men [and women] of the world who wish to dwell on Argentine soil.

B. Law 26485 on Violence against Women

Eradication of violence against women requires that access to justice is granted in an effective and suitable way according to the specificities of each group. Argentina experienced an early start in that respect by dealing with access to justice in situations of family violence. Law 24417 of 1994 was the first federal and comprehensive regulation against family violence. This law defined domestic violence as that which occurred within family members without differentiating genders. The law established the procedural baseline and judicial competency. Article 1 stated that judges with competency to hear family matters could receive petitions, written or oral, related to family violence.

Law 26485 of 2009 reassured and extended the previous statements towards access to justice. The new law included a

144. Gabriel B. Chausovsky, Apuntes jurídicos sobre la nueva Ley de Migraciones in MIGRACIÓN: UN DERECHO HUMANO 159, 171 (Rubén Giustiniani ed. 2004); and FIDH & CELS, supra note 136, at 23.
146. GENERAL SECRETARIAT ORGANIZATION OF AMERICAN STATES, ACCESS TO JUSTICE FOR WOMEN VICTIMS OF VIOLENCE IN THE AMERICAS 122 (2007).
148. Id. at art. 1.
gender perspective to violence at large, and violence within the family. It extended the points of access to submit a claim and allowed all judges, even those without competency, to hear domestic violence cases, to receive the petition, and to grant preventive measures (e.g., restraining orders).\textsuperscript{149}

Human Rights conventions played a key role when addressing access to justice to vulnerable groups. Two international documents were especially relevant for Argentina when implementing public policies to eradicate violence against women: the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)\textsuperscript{150} and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará).\textsuperscript{151} These international documents specifically addressed the role of the state in procuring accurate mechanisms for victims to benefit from a judicial system that deals with the specificities of their problems.\textsuperscript{152}

Law 26485 found inspiration in CEDAW and the Convention of Belém do Pará. This was the first tailor-made law adopted in Argentina at a federal level to prevent, punish, and eradicate violence specifically against women. The law stated the importance to promote and assure access to justice to those women who suffer from violence.\textsuperscript{153} Access to justice was understood in a broad sense, not limited to access to courts.\textsuperscript{154} The laws called for the implementation of public policies by the three branches, at federal and provincial level, to assure a free, expeditious, transparent, and efficient process to access to justice.\textsuperscript{155}

\textsuperscript{149} Law 26485, \textit{supra} note 128, at art. 22.
\textsuperscript{150} See the text of the Convention on the Elimination of all Forms of Discrimination against Women (hereinafter, CEDAW), \textit{available at} \url{http://www.un.org/womenwatch/daw/cedaw/}.
\textsuperscript{151} See the text of the Convention of Belem do Pará, \textit{available at} \url{http://www.oas.org/juridico/english/treaties/a-61.html}.
\textsuperscript{152} \textit{Id.} at arts. 7(d) and 8(d); and CEDAW, \textit{supra} note 150, at arts. 13 and 25.
\textsuperscript{153} Law 26485, \textit{supra} note 128, at art. 2(f).
\textsuperscript{154} \textit{Id.} at art. 11(5.1.a).
\textsuperscript{155} \textit{Id.} at arts. 7(c) and 20.
Furthermore, it promoted the creation of services to provide free, specialized, and holistic assistance.\textsuperscript{156} The executive branch called for the cooperation, through the celebration of agreements, amongst sectors from different jurisdictions, including the Attorney General Office, bar associations, law faculties, and other governmental and non-governmental institutions.\textsuperscript{157} Law 26485 incorporated procedural aspects under Title III, to set a baseline for the federal and provincial regulations of minimal rights and guarantees in the judicial and administrative procedures.\textsuperscript{158}

The new law instructed the Ministry of Justice to implement measures to facilitate access to justice to women, and to create and improve information centers and programs providing legal assistance and representation.\textsuperscript{159} Women can submit a complaint (civil or criminal) without legal representation and before any tribunal.\textsuperscript{160} However, legal representation is an important element for the right to access to justice and to achieve a judicial remedy.\textsuperscript{161} Furthermore, the law stated that access to justice for victims should be free regardless of their economic situation.\textsuperscript{162} This inclusion was in line with the particularities of the problem because many times, even when victims have economic resources, they may not have free disposition.

Access to justice for women victims of violence improved significantly during the last decade in Argentina, by the creation of

\begin{itemize}
\item \textsuperscript{156} Id. at arts. 9(d) and 16(a).
\item \textsuperscript{157} Decree 1011/2010, supra note 128, at art. 16(a).
\item \textsuperscript{158} Law 26485, supra note 128, at arts. 16-40.
\item \textsuperscript{159} Id. at art. 11(5.a).
\item \textsuperscript{160} Id. at art. 21.
\item \textsuperscript{162} Law 26485, supra note 128, at art. 3(i).
\end{itemize}
public funded institutions, such as legal aid offices. For example, in the city of Buenos Aires, women victims of violence can now claim their rights at the Domestic Violence Office, the Attorney General Office, the Access to Justice Office, police stations, and courts. The creation of these offices, together with the recent developments in the law, offered victims new options to claim for rights, beyond the traditional forums (i.a., family courts). The implementation of the new institutional structure resulted in an increase of submission of complaints, though the overall impact is yet to be assessed.

C. Procedures on Family Matters in the 2012 Code Project

The 2012 code project included the principle of equality by recognizing human diversity. Equality and diversity had been previously welcomed in multiple legislations. For example, at the international level, it was welcomed by the American Convention on Human Rights, and at the domestic level, article 19 of the

163. For a study on how legal aid offices can improve accessibility to rights, see UN Secretary-General, Legal Empowerment of the Poor and Eradication of Poverty, Report A/64/133, 07.13.2009.
164. For a description on the operation of the office, see http://www.csjn.gov.ar/ovd/.
165. For a description on the operation of the office, see http://www.fiscalias.gob.ar/.
166. For a description on the operation of the office, see http://www.jus.gob.ar/accesoa lajusticia/caj/centros.aspx.
167. Law 26485, supra note 128, at art. 36.
168. Id. at art. 22.
170. For an understanding on the reception of the concept of equity in the 2012 code project, see Fundamentos del Proyecto, supra note 64, at 4; and Lorenzetti, supra note 62.
Argentine Code addressed one of its dismemberments: the principle of privacy.\textsuperscript{172}

Principles and rights can only be achieved by suitable processes.\textsuperscript{173} The 2012 code project therefore incorporated Title VIII on the general principles for family procedures, which includes articles 705-710. These general principles established the standards for the procedures on family matters. The articles were inspired by the Brasilia Regulations Regarding Access to Justice for Vulnerable People.\textsuperscript{174} Article 706, being the main provision for that section, read that:

The process in family matters should respect the principles of effective judicial protection, immediacy, good faith and procedural fairness, officiousness, oral proceeding, and limited access [only for parties] to the file. The rules governing the procedure must be applied to facilitate access to justice, especially for vulnerable people, and to achieve peaceful resolution of conflicts. Judges before whom these cases must be filed should be specialized and obtain multidisciplinary support....\textsuperscript{175}

\textsuperscript{172} The text of the article 19, in its relevant part, reads in Spanish: “La renuncia general de las leyes no produce efecto alguno: pero podrán renunciarse los derechos conferidos por ellas, con tal que sólo miren al interés individual y que no esté prohibida su renuncia.” Article 19, Argentine Code, available at http://www.infojus.gob.ar/legislacion/ley-nacional-340-codigo_civil.htm.


\textsuperscript{174} Id. at 441. See also Fundamentos del Proyecto, supra note 64, at 97-98. See the text of the Brasilia Regulations Regarding Access to Justice for Vulnerable People, available at http://www.osce.org/odihr/68082?download=true.

\textsuperscript{175} The text of the article, in its relevant part, read in Spanish: “El proceso en materia de familia debe respetar los principios de tutela judicial efectiva, inmediación, buena fe y lealtad procesal, oficiosidad, oralidad y acceso limitado al expediente. Las normas que rigen el procedimiento deben ser aplicadas de modo de facilitar el acceso a la justicia, especialmente tratándose de personas vulnerables, y la resolución pacífica de los conflictos.
The inclusion of Title VIII enabled the 2012 code project to recognize the particularities of family procedures, and the need to regulate resulting specificities. Furthermore, it served as another example of the interplay between private and public law, including vulnerable groups in the text of the seminal private law regulation. Lastly, it shifted the view on conflicts amongst people, placing in a paramount position the characteristics of those facing conflicts. The latter is considered a requirement to assure access to justice for all.

A change in paradigm on accessibility to rights is perceived in the private law of Argentina, and the 2012 code project is no exception. The project changed the traditional paradigm where the subject of private rights is “the person,” to a paradigm that addresses that person in an egalitarian way, without discriminations based on gender, religion, place of birth, or wealth. The proposed text made specific references to different groups of society, amongst others, women, children, persons with disabilities, consumers, and original communities, turning them all into specific recipients of rights. Within family law, the project went even further, with the inclusion of procedural standards, showing a specific interest towards access to justice and dispute resolution for family members.

Los jueces ante los cuales tramitan estas causas deben ser especializados y contar con apoyo multidisciplinario.…. Texto del Proyecto, supra note 61, at 174.


177. Fundamentos del Proyecto, supra note 64, at 4.

178. Id. at 4-6.

179. Id. at 5.

180. Id.

181. The 2012 code project did not provide a conceptualization of what “family procedures” encompass. For a note on this point, see Medina, supra note 173, at 440-449.
V. CONCLUDING REMARKS

Argentine law cannot be considered dormant or static. The report addressed three main developments that took place in the law of Argentina. The first development dealt with the ongoing efforts towards the adoption of a second generation civil code, with special focus on the resulting 2012 code project that aimed to unify the civil and commercial law provisions into a single-fabric text. The second development dealt with the adoption of same-sex marriages in Argentina, which took place in 2010, and placed that jurisdiction as a regional forerunner. The third and final development dealt with the right to access to justice, with a special focus on two vulnerable groups (i.e., women victims of violence and immigrants) and on the reception of that right in the 2012 code project. All developments addressed in this report share common links, being part of a broader policy that aims to give equal standing to all members of Argentine society.

The report helped illustrate that in Argentina, as in other jurisdictions, the division of law into private and public tends to fade. The different areas of law now form part of a broader context that benefits from the interaction of provisions emanated from different areas. That broader context can be sensed, for example, by the constitutionalization of private law as experienced in the inclusion of general principles (i.a., equality) within the new regulations of the 2012 code project. In addition, tailor-made laws also merged private and public law components that provided an integral approach to the daily challenges of society members. Argentina is pursuing a generation shift in code status, building from previous revision and de-decodification experiences. That shift will ultimately also reflect that private and public law are no longer watertight compartments.
POST SCRIPTUM

On October 1, 2014, the Argentine Congress adopted Law 26994, which approved the text of the 2012 code project.\textsuperscript{182} The Argentine President, Cristina Fernández de Kirchner, promulgated the above-mentioned law on October 7 of that same year. According to article 7 of the law, the new code will take effect on January 1, 2016.

J.M. and A.P.

NEW DEVELOPMENTS IN DUTCH COMPANY LAW:
THE “FLEXIBLE” CLOSE CORPORATION

Lars van Vliet*

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I. INTRODUCTION

In the Netherlands the close corporation (besloten
vennootschap, BV) is one of the most important business forms for
small and medium sized businesses, next to partnerships. Different
from these partnerships, the BV has limited liability, meaning that
in principle its directors and shareholders are not personally liable
for the debts of the corporation.1 Another important factor is that
BVs underlie a different tax regime than partnerships.

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colleagues Stephan Rammeloo and Kid Schwarz for their valuable comments on
earlier drafts of this report.
1. In a nutshell, the partnership as such is not taxed, while partners are
subject to taxation. A BV, however, is indeed taxed.
On October 1, 2012 new legislation came into force which made the Dutch rules on BVs more flexible and attractive. Among other things, the minimum capital requirement was abolished. The new regime is often called the “flex BV.” As a result of these changes, the BV, which developed out of the public company limited by shares (naamloze vennootschap, NV), differs more from the parent regime that applies to the NV, which remained unaffected by the changes. There was growing criticism on the rigid regime of the BV and the requirement of a minimum capital. A number of other European jurisdictions did not demand a minimum capital for close corporations. Moreover, under EU law it became possible to use corporations (e.g., BV) established in another EU Member State to do business in the Netherlands. Foreign corporations could be used to circumvent the stringent Dutch regime on BVs. This became the catalyst that made legislative changes even more urgent.2

In order to understand the position of the BV in Dutch law we will first have a look at the historical developments since the early seventeenth century. Paragraph III will discuss the abolition of prior governmental approval, a requirement which has recently been abolished for both the NV and the BV. Paragraph IV will give an overview of some of the most important changes in the legal regime of BVs. Paragraph V will discuss the use in the Netherlands of companies established in other EU Member States. Finally, the report will end with a very short note on the proposed EC Regulation on a European close corporation.

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II. HISTORICAL OVERVIEW

The Dutch East India Company and the later West India Company, both set up in the early seventeenth century, are often regarded as the earliest company type in modern history. The directors and shareholders were not personally liable for the debts of the company. Yet, it would be misleading to see them as the earliest form of NV, in the strict sense of the word. It lacked an important feature of a modern company, which is a general shareholder meeting. Moreover, the government’s influence on the company was so great that the company could be seen as half private law, half a public entity, with far-reaching public powers, such as police and military powers, and public administrative powers. The States General (i.e., the Dutch government) used the company for the financing of their warfare against the Spanish and the Portuguese, and for governing the overseas settlements. The shareholders had only limited influence on the company, and their financial interests were not always the primary interests of the company. There is no straight clear line of development from these companies to the modern company types.

During the eighteenth century the Dutch company developed more and more in the direction of a modern company type. There was no legislation giving any structure to companies, enabling the company to develop freely. Next to the Dutch East India Company and the Dutch West India Company, which had strong governmental influence, a new type of company developed which had no governmental influence. It was set up purely for

4. De Jongh, supra note 3, at 69, 72.
5. Id. at 63-67, 102-10.
commercial reasons, but which in some cases retained some form of personal liability of directors and supervisors.\textsuperscript{6} For that reason they had more similarity with partnerships than with companies. During this period only thirty-nine companies were set up, mainly insurance companies. Some of these companies were the first to issue bearer shares. Whereas the Dutch East India Company had already issued bearer bonds, its shares were not on bearer but registered in the name of its holder.\textsuperscript{7}

A major change in Dutch legislation was caused by the annexation of the Netherlands by the French Empire in 1810. Not only the French \textit{Code civil} of 1804, but also the \textit{Code de commerce} of 1807, became applicable in the Netherlands from 1811 onwards. It introduced the French \textit{société anonyme} into Dutch law, a company type based on contract\textsuperscript{8} and called “anonymous” because the names of the participants were not mentioned in the company name.\textsuperscript{9} Its structure hardly differed and was not any clearer than that of the Dutch private law companies of the late eighteenth century. Moreover, the \textit{Code de commerce} introduced a form in between the \textit{société en commandite} and the \textit{société anonyme} by acknowledging the \textit{société en commandite par actions},\textsuperscript{10} a company form that was not adopted in the Dutch Commercial Code (\textit{Wetboek van Koophandel}) of 1838. The shares in this type of company could even be bearer shares, according to French case law.\textsuperscript{11}

The Netherlands have had their own legislation on companies since the enactment of the Dutch Commercial Code in 1838. The relevant provisions on companies were updated in 1929, when new

\textsuperscript{6} Id. at 161-164.
\textsuperscript{7} EGI\textsc{d}IUS J. J. V\textsc{A}N D\textsc{E}R H\textsc{E}IJDEN, H\textsc{A}NDBOEK VOOR DE N\textsc{A}MLOOZE V\textsc{E}N\textsc{N}OOT\textsc{S}CHAP NAAR N\textsc{E}DERLANDSCH RECHT nr. 6-7 (3d ed. 1936); and P\textsc{U}NT, supra note 3, at 112, 212.
\textsuperscript{8} Article 18 Code de commerce (1807). See also FRANÇOIS MALEPEYRE \& CHARLES JOURDAIN, TRAITÉ DES SOCIÉTÉS COMMERCIALES nr. 265 (1836).
\textsuperscript{9} Article 29 Code de commerce (1807).
\textsuperscript{10} Id. at art. 38.
\textsuperscript{11} Cour Royale de Paris (02.07.1832), XXIV JOURNAL DU PALAIS 682 (3d ed. 1841). See also MALEPEYRE \& JOURDAIN, supra note 8, at nr. 235.
provisions on companies with a smaller number of shareholders were introduced, welcoming a more private form of company. In 1971, a separate regime for BVs was introduced into Dutch law. A few years later, in 1976, the provisions on limited companies were removed from the Commercial Code and were made part of a new Book 2 of the Civil Code (*Burgerlijk Wetboek, BW*).

III. GOVERNMENTAL APPROVAL

Since the early nineteenth century, governmental approval for the incorporation of a company has been controversial. The French *Code de commerce*, which was introduced in the Netherlands in 1811, required royal (governmental) approval in order to protect the company’s shareholders against misuse of the company. At first the royal approval was little more than a formality, but from around 1828 the requirements for royal approval became much stricter. The government actively demanded changes in various articles of association in order to protect creditors and to strengthen the position of minority shareholders against larger shareholders. In the Dutch Commercial Code of 1838 the requirement of governmental approval was maintained, but the approval could only be withheld if the articles of association violated the law or were contrary to the public order or good morals (article 37). The

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12. This was part of a trend that developed since the end of the nineteenth century to remove the differences between commercial law and civil law. It also aimed to eliminate the need for a separate commercial code. However, the commercial code is still partly in existence. Large parts have already been removed (e.g., the law of bankruptcy, which since 1895 forms a separate bankruptcy statute). Some of the remaining parts of the commercial code, such as the law of commercial partnerships, will remain in existence for many years to come. Civil partnerships (*societas*) are still governed by provisions from the 1838 BW.


15. *Id.* at 185.
requirement survived the 1929 changes in the Commercial Code, the introduction of the BV into Dutch law in 1971, and the renewal of both the regime on public companies limited by shares and on BVs in 1976, when the current Book 2 of the Civil Code was enacted. Gradually, the reason for governmental approval had changed into the prevention of defrauding creditors (bankruptcy fraud), more recently also money laundering and, very recently, the financing of terrorist activities.

As a result of continued criticism, the system of governmental approval was finally abolished on July 1, 2011. It was replaced with a system of permanent supervision by the Ministry of Safety and Justice. The new supervision system is based on linking information from various electronic databases. At the time of drafting this report the system still did not function adequately as a result of technical problems.

IV. NEW REGIME FOR CLOSE CORPORATIONS

A. Capital Requirements

Minimum capital requirements for NVs and for BVs were introduced in 1978. As a result of the second EEC Directive on company law of 1976, the introduction of minimum capital requirements had become necessary for public companies limited by shares, but the Dutch legislator voluntarily also introduced a

16. Wet controle op rechtspersonen (Statute on Supervision of Legal Persons).
17. See also for a recent overview of the new Dutch regime on BVs: Stephan Rammeloo, The Law of Close Corporations in NETHERLANDS REPORTS TO THE NINETEENTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW (Lars van Vliet ed. 2014).
18. As from June 1, 1978, a BV or NV could only be set up with a minimum capital of 35,000 guilders. As from September 1, 1981, the minimum capital for the NV was raised to 100,000 guilders. The minimum capital for the BV was raised to 40,000 guilders on January 20, 1986. Before 1978, there was indeed no minimum capital requirement, yet directors of the company could be held personally liable for all acts taken place before at least 10% of the share capital had been contributed to the company (art. 36g Dutch Commercial Code).
minimum capital requirement for BVs. The main reason for introducing such a requirement was to protect creditors of the company.\textsuperscript{20} However, it appears that a minimum capital requirement is not a very effective way of protecting creditors, because it only demands a certain minimum for setting up a company. It does not guarantee that after incorporation the minimum capital will be maintained.\textsuperscript{21} Moreover, it does not require corporations to file for bankruptcy once the capital sinks below the minimum threshold.

Until the 2012 amendment, a minimum capital of €18,000 was needed for the incorporation of a BV. Under the new regime, that minimum capital requirement has been abolished. The legislature preserved the requirement of a minimum capital of €45,000 for NVs because EU law\textsuperscript{22} requires all Member States to set a minimum capital requirement for public companies limited by shares, such as the NV.

B. Capital Controls

To compensate for the abolition of the minimum capital requirement for BVs, the new regime introduced two capital controls. The first one is a balance-sheet test: according to article 2:216(1) BW, the general meeting of shareholders can only agree on paying out the profits exceeding the reserves prescribed by law and by the articles of incorporation.

The second capital control is called the payment test. Article 2:216(2) BW provides that a decision of the general meeting of shareholders to pay out profits has no consequences unless the


\textsuperscript{21.} De Kuijer et al., \textit{supra} note 2, at 88; and Reinier H. Kraakman et al., \textit{The Anatomy of Corporate Law: A Comparative and Functional Approach} §5.2.2 (2d ed. 2009).

board of directors has given its permission. The next sentence of the provision adds that this permission shall only be withheld if the board of directors knows or reasonably can foresee that after the payment the corporation will no longer be able to pay the debts that are due.

Article 2:216(3) BW adds a severe sanction to this. If, after a payment, the corporation is no longer able to pay its debts that are due, and at the time of payment the directors knew or should reasonably have foreseen that consequence, the directors are personally and jointly liable. A director, however, who proves that he cannot be blamed for the payment and that he has tried to counteract the consequences of the payment, will not be held liable. The persons who accepted the payment, and who at the time of payment knew or should reasonably have foreseen that the corporation would no longer be able to pay its debts that are due, should pay the shortage of the corporation’s capital to a maximum of the amount received by them. If the directors already paid the shortage, the recipients of the payment should make this payment to these directors.

C. New Types of Shares

Since 2012, the BV may have shares without voting rights and shares with multiple or limited voting rights, and shares that give no right or only a limited right to the profits and reserves of the company (e.g., right to payment of dividends), as prescribed in articles 2:228(4)-(5) and 2:216(7) BW. The new law introduces, for example, the possibility of issuing non-voting shares, conditional voting shares and preferred non-voting shares. It allows, for instance, founders of businesses to issue and transfer

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23. The need for introducing non-voting shares had already been demonstrated a long time before by Schwarz. See Christiaan Anton Schwarz, Aandeelen zonder stemrecht (1990). Whereas he advocated non-voting shares for both the NV and the BV, it has now been introduced only for the BV.
shares to members of their families without giving them voting rights at the same time. To give another example: if two companies, A and B, set up a joint venture with equal voting rights, but A invests more capital into the joint venture than B, the joint venture corporation can issue non-voting rights to A to reflect the larger investment by A.24 A similar result can be achieved by issuing to A and B an equal amount of shares with equal voting rights, and by attaching to the A-shares a larger right to profits and reserves.

In addition, the new legislation allows the company to stipulate in the articles of incorporation that the shareholder is subjected to a duty in his capacity as a shareholder in such a way that the duty passes on to a new shareholder in the case of sale and transfer of the share. For example, the articles of incorporation may oblige the shareholder to make an additional contribution to the corporation’s capital when the capital sinks under a certain threshold of solvability,25 or a duty to buy goods or supply goods to the company, a duty to buy shares in the company from another shareholder or a non-competition clause.26 It is also possible to stipulate, for example, that if the shares are inherited, the heirs should sell and transfer their shares to the other shareholders (article 2:192(1)(c) BW). That article reads as follows:

The articles of incorporation may as to all shares or as to shares of a certain sort or denomination:

a) stipulate that obligations, as against the company or third parties or between shareholders, are connected to the status of shareholder;

b) subject the status of shareholder to certain requirements;

c) stipulate that the shareholder is in certain cases, mentioned
in the articles of incorporation, under a duty to offer and transfer
his shares or a part thereof.

The Minister of Justice indicates that the obligations mentioned
in article 2:192 BW are not connected to the shares but rather to
the status of shareholder. The reason for the remark is as follows:
if the obligation is introduced into the articles of incorporation
already in existence and the shareholder voted against the change
of the articles of incorporation, or at least did not agree to the
change, the shareholder is not bound by the obligation, even if
afterwards the shareholder acquires additional shares in the
company. For that reason the Minister regards the freedom of this
obligation personal.27 If, however, this free shareholder transfers
his or her shares to a bound shareholder or a third party (who is not
yet a shareholder) the transferee will be bound by the obligation.
We can, therefore, conclude that the obligation burdens and runs
with the share.28 Yet, in that case, the Minister’s remark that the
obligation is not linked to the share but rather to the status of
shareholder is misleading.

In property law it is sometimes said that owners of property are
bound in their quality of owners of that property. For example, in
the case of servitudes, the owners of servient tenements are bound
to an obligation in their quality of owners. Another way of
expressing the same situation is saying that the obligation burdens
the servient tenement. Both expressions are regarded as equivalent.
In the law of servitudes, often only negative duties are permitted
(duties to tolerate or not to act) and positive duties cannot run with

27. GERARD VAN SOLINGE & MARCO NIEUWE WEME, 2-IIa ASSER'S
HANDLEIDING TOT DE BEOEFENING VAN HET NEDERLANDS BURGERLIJK RECHT
nr. 298 (2013).
28. Kamerstukken II 2008/2009, 31058, nr. 6, at 38; Kamerstukken II
2006–2007, 31 058, nr. 3, at 4 and 47. It also follows from art. 2:192a BW,
which mentions exceptional cases in which the third party, like the transferor, is
not bound to the obligation.
the land. This Roman law principle is still valid in many modern jurisdictions, although Dutch law recognizes a few minor exceptions. However, the new regime for the flexible BV allows positive duties to run with the shares in the company, something which historically has been regarded as unacceptable in property law.

D. Transfer Restriction

Under the old regime, every BV had to have a transfer restriction for the voluntary transfer of the shares (e.g., upon sale). The new regime, however, allows the articles of association to stipulate that there will be no transfer restriction (article 2:195(1) BW). Another innovation is that the articles of association may also provide that (a certain class of) shares in the corporation cannot be transferred for a certain time. In the past these lock-up rules were often laid down in shareholder agreements, but it was uncertain whether they were valid. Similarly, it was uncertain whether a lock-up time could be validly laid down in the articles of association. A lock-up time is especially important for joint-ventures with large initial investments.

Under the new regime, the default rule is still that there will be a transfer restriction. If the articles of association do not provide otherwise, there will be a transfer restriction demanding that shareholders who plan to transfer their shares should first offer these shares to the other shareholders (article 2:195(1) BW). The articles of association can also impose a different form of transfer restriction in which any transfer should be approved by a body mentioned in the articles of association, e.g., the general meeting.

29. D. 8.1.15.1. There was an exception to the rule in the form of the servitus oneris ferendi: the duty to maintain or rebuild a wall that gives support to a neighboring building (D.8.5.6.2).
30. SCHWARZ, supra note 25, at 35-36.
31. DE KLUIVER ET AL., supra note 2, at 54-56.
of shareholders. Any transfer in contravention of the transfer restriction will be void (article 2:195(4) BW).

It should be noted that the possibility to subject the status of the shareholder to certain requirements (article 2:192(1)(b) BW) may also restrict the transferability of the shares by limiting the number of parties to whom the shares may be offered. An example is a BV which owns an electricity plant and whose shareholders should all be certain public bodies, like city councils or provinces.32 Another example, which is especially relevant for joint-ventures, is the requirement that all shareholders should be a party to a certain shareholder agreement. This ensures that the contractual rights and duties from the shareholder agreement, which do not run with the shares automatically, pass to any new shareholder.

A transfer of the shares to heirs does not fall within the scope of article 2:195 BW. A transfer restriction, therefore, cannot block a transfer to the heirs. However, as mentioned earlier, the articles of association may stipulate that heirs who inherit shares should offer them to the other shareholders (article 2:192(1)(c) BW). Indirectly, it has a somewhat similar effect of restricting the free transferability.

V. Numerus Clausus and the Use of Foreign Company Types in the Netherlands

Dutch company law as laid down in the BW has a numerus clausus of legal persons. This means that Dutch law only awards legal personality to those structures recognized in the civil code as legal persons. Similarly to the numerus clausus in Dutch property law, Dutch law not only limits the types of legal persons under national law but also made the rules applicable to these types, in principle, mandatory.

As a result of case law of the European Court of Justice, however, this numerus clausus has been watered down

considerably. One can run a business in the Netherlands making use of a legal person established in another EU member state or one of the European Economic Area states according to the law of that other EU member state or EEA state. Dutch private international law applies the so-called incorporation principle, according to which corporations are governed by the law of the state in which the corporation was established (the seat mentioned in the contract of partnership or the articles of incorporation).\(^{33}\)

The Pro-Forma Foreign Companies Act\(^{34}\) indeed does form a hurdle, but in the case *Inspire Art*, the European Court of Justice\(^{35}\) held that this statute is contrary to the principle of freedom of establishment as laid down in articles 49 and 54 TFEU.\(^{36}\) As a result, this hurdle has almost completely been removed for corporations with a registered seat in another EU or EEA member state. The ECJ held, among other things, that:

> The reasons for which the company was formed in that other Member State, and the fact that it carries on its activities exclusively or almost exclusively in the Member State of establishment, do not deprive it of the right to invoke the freedom of establishment guaranteed by the Treaty, save where abuse is established on a case-by-case basis.\(^{37}\)

The Pro-Forma Foreign Companies Act has been changed so that, apart from article 6, it no longer applies to corporations from other EU and EEA member states (article 1(2)).\(^{38}\)

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34. *Wet op de formeel buitenlandse vennootschappen*.


38. Via art. 6 (liability for annual account and report) some of the liability provisions from Book 2 of the BW are applicable.
One of the aims of the *numerus clausus* of legal persons is the protection of creditors. In some cases, the directors of a NV or BV can be held liable in person for the debts of the company.

In the area of liability the relaxation of the *numerus clausus* by EU law is compensated by the standardization of the liability regime in insolvency. Articles 2:138 and 2:149 BW—which deal respectively with liability of executive directors and liability of non-executive directors—apply via article 10:121 BW, and are applicable in the bankruptcy proceedings of a “corporation” that has been declared bankrupt in the Netherlands.39 This article covers, among other things, NVs and BVs (article 10:117 BW). Moreover, creditors of a company seated in the Netherlands, but set-up in a foreign state, can hold the directors of the company liable in tort, according to article 6:162 BW, which applies via article 4(1) Rome II.40

The uniform regime of liability is not even pierced by the introduction of the European Company (*Societas Europaea, SE*). Article 51 of the EC Regulation 2157/2001 provides that internal liability (liability as against the legal person) is subject to national law. As the external liability (liability against creditors) is not covered by the EC Regulation, it is equally subject to national law under articles 9 and 10 of the EC Regulation.41

VI. THE EUROPEAN CLOSE CORPORATION

The recent changes in Dutch company law aim at making Dutch company forms, especially the BV, more attractive. As foreign company types can be used in the Netherlands, especially

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but not only company forms of other EU and of EEA member states, there is international competition of company forms. In 2008, the European Union proposed a Regulation introducing a European close corporation, called the European private company, also referred to as SPE (Societas Privata Europaea). The aim is, among other things, to lower the costs of incorporating a close corporation and the costs of operating throughout the European single market. This new European close corporation should facilitate small and medium sized businesses. The proposed regulation should also complement the SE, which was already introduced in 2001.

VII. CONCLUSIONS

One of the age-old problems of company law is the danger that companies are used to defraud creditors and the danger that large shareholders act against the interests of minority shareholders. In protecting the interests of creditors and minority shareholders the legislator often runs the risk of making the mandatory rules of company law too rigid. However, under EU law it is now possible to do business in the Netherlands with a corporation set up according to the laws of another EU or EEA member state and, by doing so, evade the Dutch regime on BVs. This scenario was the catalyst for the 2012 changes. In order to make the Dutch BV less rigid and thus more attractive to businesses, the Dutch legislator enacted a new regime which abolished the minimum capital requirement and instead introduced a different way of protecting the interests of creditors.

The changes also introduced new types of shares, such as shares without any voting rights and shares with multiple or limited voting rights, and also shares that give no right or only a limited right to the profits and reserves of the company (e.g., the

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right to payment of dividends). Close corporations now have the possibility of issuing non-voting shares, conditional voting shares and preferred non-voting shares. In addition, it is now possible to link obligations to shares so that they run with the shares upon their sale and transfer.
NEWS FROM SWITZERLAND (2012-2014): MAJOR
REFORM OF THE RULES ON UNFAIR COMPETITION AND
OF DOMESTIC AND INTERNATIONAL FAMILY LAW

Thomas Kadner Graziano and Michel Reymond

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Switzerland is a federal state with a civil law tradition. Like in all civil law jurisdictions, the law is highly codified, and legislation is the authoritative backbone of the law. The major centerpieces of Swiss private law are the Civil Code and the Code of Obligations, in force since 1912.1 Swiss private law belongs to the Germanic legal tradition, but French law has also had an impact on its development, in particular in the southwest of the country. In recent decades, Switzerland has reformed its law in many areas (such as consumer protection) in order to make it more EU-compatible. However, Switzerland is not a Member State of the European Union and its legal system is still largely independent.2

The present Chronicle covers recent legislative developments in Switzerland for the years 2012–2014. The first part will be devoted to the revision of the Loi contre la concurrence déloyale (LCD), which was related to the law of antitrust, but also had effects on the whole of Swiss contract law. The second part will focus on family law, and on two distinct revisions: the first concerning the issue of forced marriage, the second concerning the procedure of changing names for marrying spouses.3

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1. Available in English at www.admin.ch/ch/e/rs/210/ (Civil Code) and www.admin.ch/ch/e/rs/c220.html (Code of Obligations) (last visit on the March 27, 2014).


3. For further recent developments in Swiss law not covered here, see Pascal Pichonnaz, Le point sur la partie générale du droit des obligations / Entwicklungen im Obligationenrecht, Allgemeiner Teil, 109 Revue Suisse de Jurisprudence 189-194 (2013).
II. THE REVISION OF THE “LOI CONTRE LA CONCURRENCE DÉLOYALE”

A. Introduction

The LCD, or Loi contre la concurrence déloyale (Law against unfair competition) is one of the two federal laws dealing with issues of unfair competition and antitrust law. The second law, the LCart, or Loi sur les cartels (Law on cartels), which deals with monopolies and illegal price agreements, will not be discussed in this article as it was not part of the reform.

In order to better understand the multiple aims of this legislative endeavor, the basic tenets of the LCD need to be explained. As mentioned above, this law deals with acts that, when committed by commercial businesses in the course of their dealings, are considered as “unfair competition”. The Article 2 of the LCD states that such acts can be recognized by three distinctive negative effects on the economic marketplace: first, they distort the relationship between competitors vying for the same market(s); second, they tend to mislead and weaken the position of buyers, a term which includes consumers; and third, they reduce the general sense of trust in the economy, and in the concept of fair dealing. Any act that falls under this definition, and thus under the ambit of article 2 of the LCD, can form the basis of a legal civil action, which can be brought before the Swiss courts by any private entity whose interests were affected by that act.

4. Recueil Systématique (RS) 241. Translation by the authors.
5. RS 251. Translation by the authors.
6. Article 2 of the LCD states that “any commercial behavior or practice which is misleading or which is contrary to the principle of good faith, and which affects the relationship between competitors or between business entities and their clients” (translation by the authors).
7. Conseil Fédéral, Message concernant la modification de la loi fédérale contre la concurrence déloyale (Message related to the modification of the federal law on unfair competition), FF 2009 5539, p. 5544 (all translations of the titles of the Swiss legislative documents are done by the authors).
8. Article 9 LCD.
The Article 2 of the LCD is a “catch-all” provision that deals with any case falling into its definition. Nonetheless, the law provides in the following articles a non-exhaustive list of acts that constitute unfair competition. For example, demeaning competitors in the course of marketing communications, publishing misleading advertising about the merits of one’s products, or ignoring a consumer’s stated wish not to be presented with advertisement constitute such infringements of the LCD. As the original version of the current LCD dates from 1986, it has sometimes been deemed necessary to update this list in order to better include emerging unfair practices. For example, in 2006, the act of e-mail spamming has been included in the list of unfair acts, subject to an “opt-in” principle.

The reform discussed in this contribution entered into force on April 1, 2012. It is a major update of the law regarding four sensitive areas of today’s business landscape: the validity of clauses contained in general terms and conditions (B), the description of goods and prices in electronic commerce (C), the practice of directory listing frauds (D), and, finally, the issue of pyramid (“Ponzi”) schemes (E). Alongside these substantive points, the new text of the law also provides a new procedural scope, as it now allows the Swiss Federal State to bring both penal and civil claims (F). Each of these points will be dealt separately in the following paragraphs.

B. Validity of Clauses Contained in General Terms and Conditions

The new version of the LCD first deals with the validity of certain clauses that are inserted into general terms and conditions.

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9. Article 2 LCD.
10. Article 3, §1.a LCD.
11. Article 3, §1.b LCD.
12. Article 3, §1.u LCD.
13. Article 3, §1.o LCD. According to the “opt-in” principle, spam is illegal as long as the recipient has not expressly agreed to receive commercial offers from that professional.
Since general terms and conditions are often drafted in advance and included into a contract by the way of a general reference, it is often assumed that these clauses have not been negotiated by the parties. Because of the risk that commercial businesses might insert unfair clauses into their general conditions, and because this risk is even more acute in cases of consumer contracts, the LCD has, since its original 1986 version, contained a provision banning such unfair clauses. However, this rule has been regarded as largely ineffective in practice, a conclusion which prompted its rewriting in the reform discussed here. In order to better frame the pros and cons of this reform, both the old and the new provision will be discussed in the following paragraphs.

Under the old article 8 of the LCD, in order to be considered as unfair, a clause inserted into general terms and conditions had to meet two conditions. First, it had to be misleading; second, the rule it contained either had to notably diverge from the standards of the otherwise applicable law, or to impart rights and obligations to the parties in such a way that would notably diverge from the usual conduct of that type of contract. Only if these two conditions were met, would a clause be considered as unfair, and thus unenforceable. This proved to be too restrictive: in particular, the requirement of a “misleading” clause was almost never fulfilled in practice, as even the most egregiously unbalanced clause is usually written clearly and plainly. Thus, in practice, article 8 of the LCD fell short of its intended goal. As a consequence, until the reform of the LCD, Swiss law has been quite tolerant towards businesses which rely on general terms and conditions.


15. This does not mean that, prior to the reform of the LCD, Swiss law allowed all standard terms. While art. 8 LCD was largely ineffective, a judge-made rule, called the exception of the unusual clause or clause insolite, struck down terms which greatly diverged from usual contractual clauses and which were not specifically brought to the attention of the other contractual party. For
This long standing position—which endured from 1986 to 2012—also needs to be put into the perspective of European law, which opted for a far more efficient (and restrictive) regime. Under the Council Directive on unfair terms in consumer contracts, any terms that have not been individually negotiated and have been inserted in a consumer contract, and which cause a significant imbalance in the parties’ rights and obligations to the detriment of the consumer, are regarded as unenforceable. The Directive also includes a list of terms that are deemed unfair; for example, a clause completely excluding liability in cases of non-performance, or a clause allowing its drafters to alter the terms of the contract unilaterally and without a valid reason, fall into this definition. Furthermore, some European countries, such as France, have devoted significant resources to inform consumers of their rights when considering standard terms. All these foreign developments have been noted by the Swiss legislature, and have indeed been a basis for the reform of article 8 of the LCD—as they are directly mentioned in the motives of the Federal Council (Conseil Fédéral).

According to the new version of article 8 of the LCD, a contractual clause contained in standard terms is deemed unfair if, under the principle of good faith, it causes a significant imbalance in the parties’ rights and obligations to the detriment of the

more details, see the Federal Court cases: ATF 119 III 334, §1a); ATF 109 II 457, §4; Kuonen, Le contrôle des conditions générales, supra note 14, at 23-26.


18. See annex to the Directive 93/13/EEC, supra note 16, in particular letters (a), (b) and (j), (k).

19. See the official French website on unfair clauses, which offers a list of clauses deemed unfair, and includes related case law, at http://www.clauses-abusives.fr/ (last visit on March 27, 2014).

20. Conseil Fédéral, supra note 7, at 5561. The Conseil Fédéral, which is composed of seven members, is the government of Switzerland. For its current members, see http://www.admin.ch/br/org/index.html?lang=en (last visit on March 27, 2014).
consumer. The new formulation eliminates the requirements of a “misleading” term that “notably diverges from the otherwise applicable law,” thus allowing for a stronger legal basis against unfair clauses.\(^{21}\)

That being said, some elements of this new regime remain unclear.\(^{22}\) First, while the new formulation is inspired by the European Directive on unfair terms in consumer contracts\(^{23}\), it has not yet been determined to what extent European law will have an impact on the practice under the LCD. Most notably, it is not sure that the list of unfair terms may be imported into Swiss law. Second, one can question the scope of the new article 8 of the LCD, as it is now exclusively applicable to consumer contracts, as opposed to the more general regime of the old article 8 of the LCD. Given that the LCD does not provide a definition of the consumer, the exact effect of the new regime thus remains unknown. Finally, the revised text relies on the principle of good faith, a reference which gives some grounds for uncertainty, when considering the rather unclear boundaries of this concept.

C. Rules for E-commerce

The second topic covered by the reform of the LCD—that is, electronic commerce—has for a long time been a sticking point for Swiss lawmakers. Efforts made to adapt Swiss law to this field can be traced as far back as thirteen years ago. Indeed, in 2001, the legislature envisioned a thorough revision of general Swiss contract law in order to adapt it to the emerging online landscape.\(^{24}\)

\(^{21}\) Supra note 7, at 5565-5568.

\(^{22}\) For comments on this new article, see Kuonen, Le contrôle des conditions générales et Marchand, Art. 8 LCD, supra note 14.

\(^{23}\) Article 8 LCD (current) is inspired by Art. 1, §1 of the 93/13/EEC Directive, supra note 16.

\(^{24}\) Projet de loi fédérale sur le commerce électronique (révisions partielles du code des obligations et de la loi sur la concurrence déloyale) (Draft of the federal law on electronic commerce (partial revision of the code of obligations and the law on unfair competition)), Janvier 2001; Rapport explicatif sur le projet de loi fédérale sur le commerce électronique (révisions partielles du code
This ambitious proposal, had it been accepted, would have clarified the relationship between the traditional rules of Swiss contract law and e-commerce, and it would also have strengthened the protection of e-consumers by offering them a right of withdrawal from the contract. However, due to a lack of support, the project failed in 2005 when the Federal Council (Conseil Fédéral) signaled its abandonment. The same fate befell a parliamentary motion made shortly thereafter, which also aimed at strengthening the consumer’s rights in e-commerce. Because of this legislative reluctance, Swiss law did not, until the reform of the LCD, contain any specific rule regarding electronic commerce.

As a matter of fact, the issue of electronic commerce was not even part of the initial project submitted by the Conseil Fédéral. It is only during the Parliamentary debates that the idea of using the ongoing revision to fill this gap in Swiss law came up. As such, the LCD now contains a new provision specifically aimed at businesses operating through the Internet. Under the revised law, any e-commerce website offering goods or services now has to: (1) clearly indicate the identity of its operator, including its full name, address, and e-mail; (2) describe in detail the different steps leading to the conclusion of the contract; (3) detect input errors, and allow its users to correct them; and (4) send a confirmation e-
mail at the moment of the users’ final assent. If a website does not respect these requirements, it is deemed to commit an act of unfair competition.

These four elements are embedded in European Union law, as they are required by the Directive on e-commerce. However, this incorporation is only partial, as the Swiss legislature chose not to adopt other more stringent requirements found in the European regime. For example, the aforementioned directive also requires website owners to provide any code of conduct they are required to respect, and to provide a printable version of their terms and conditions. Furthermore, under the Directive on consumer rights, European consumers are also granted a right of withdrawal, which allows them to terminate the contract within a period of fourteen days without giving any reason for doing so.

As these elements are currently absent from Swiss law, Switzerland retains a more favorable regime for e-commerce businesses than its neighboring countries.

D. Scams Involving Directory Listings

The third element of the revision of the LCD concerns directory listing scams. They involve documents, sent by mail or by fax, offering business companies the opportunity of being

32. Id. at art. 10 al. 2 and 10 al. 3.
34. Id. at art. 9–16.
35. For a comparison between the Swiss and European regimes regarding electronic commerce, see Sylvain Marchand, Commerce électronique: la manifestation de volonté au bout du doigt, in DROIT DE LA CONSOMMATION ET DE LA DISTRIBUTION: LES NOUVEAUX DÉFIS 1-31 (Blaise Carron ed., Helbing Lichtenhahn 2013).
included in a “yellow pages”-style directory listing. These offers—which are more often than not directed towards young, start-up companies—are misleading as they seemingly only ask for a confirmation of the business’ contact information, but in reality provide for a long-term, expensive service which is contracted into once the offeree responds. Other forms of this scam involve the use of pre-printed payment forms, closely modeled after the ones used by the Swiss Federal Institute of Intellectual Property, sent to companies having recently registered for an IP to mislead them into paying for a nonexistent supplementary registration service; instead of forms, some scams use fraudulent representatives who claim that the contract that the victim accepted is completely free of charge.\textsuperscript{36}

Directory listing scams have been recognized as a considerable problem in Switzerland. In 2008, no less than 940 cases were reported by the official authorities.\textsuperscript{37} Their prevalence at that time can be explained by the absence of any specific legal regulation, effectively forcing the companies that were victims of these practices to rely on the slow and expensive judicial court system in order to terminate one of these fraudulent contracts. In order to curb these practices, their inclusion in the list of acts deemed unfair competition in the sense of the LCD was one of the key points of the reform.

The new version of the law now requires that any advertisement that contains a firm offer should clearly mention its character as a binding offer, and detail the length, the cost, and the specifics of the directory service agreed to.\textsuperscript{38} Furthermore, the act of sending a payment form, devoid of any prior contact with the

\textsuperscript{36} Conseil Fédéral, supra note 7, at 5545-5546. See also an informative brochure on this topic, published by the State Secretariat for Economic Affairs, http://www.seco.admin.ch/dokumentation/publikation/00035/00038/02243/?lang=fr (last visited: March 12, 2013).

\textsuperscript{37} Conseil Fédéral, supra note 7, at 5579.

\textsuperscript{38} Article 3, §1 p LCD.
addressed, is now also, in itself, considered an act of unfair competition under the LCD.\(^\text{39}\)

This development is to be welcomed, as it strengthens the position of Swiss business companies against a practice which undoubtedly has no redeeming qualities whatsoever. It is interesting to note, however, that this does not mirror any similar movement found in the European Union: as the Conseil Fédéral noted in its legislative project, EU law as a whole does not contain any specific rule against directory listing scams.\(^\text{40}\)

**E. Pyramid Schemes**

The last substantive point included in the revision concerns so-called pyramid or “Ponzi” schemes. While some definitional issues still exist regarding them, pyramid schemes can be generally described as fraudulent, hierarchical business schemes in which the participants are expected to pay an entry fee upon their inclusion in the scheme’s structure, and from which revenue is generated through the upward flow of these fees through the pyramidal structure, rather than through any legitimate business activity. Due to their high risk of collapsing when no more participants can be recruited, and due to the disastrous financial consequences suffered by the victims, these schemes are widely acknowledged as illegal — both in the United States\(^\text{41}\) and in the European Union.\(^\text{42}\)

\(^{39}\) Article 3, §1.q LCD. For more detail on these provisions, see Conseil Fédéral, Message concernant la modification de la loi fédérale contre la concurrence déloyale, FF 2009 5539, 5562-5563.

\(^{40}\) The Conseil Fédéral drew, however, inspiration from the national law of Liechtenstein, which, along with Belgium, is one of the few European countries with a specific position on this issue. See Conseil Fédéral, supra note 7, at 5560.

\(^{41}\) In re Amway Corp., 93 F.T.C. 618 (1979).

Swiss law is no different in this regard, as pyramid schemes have been banned since 1938.43 Two points, however, have been addressed by the revision of the LCD. The first point is merely formal. Because the LCD itself did not exist back in 1938, the legal provision banning pyramid schemes was included in a secondary law attached to the Federal Law on lotteries. The law reform thus moved it from this text to the LCD.44

The second point concerns the issue of defining what a pyramid scheme is. The regime in force before the revision of the LCD contained a restrictive definition of pyramid schemes, as it defined them as organizations which derive their revenue only through the recruitment of new members. The new rule broadens this definition, and only requires that the revenue be derived principally through these means. This allows the LCD to be effective against structures which engage in some business activity, such as the supply of goods and services, but in which the underlying pyramidal structure remains the principal source of revenue. This change also allows for better interaction with the rules currently in force in the European Union, which retain a similar, open-ended definition of illegal pyramid schemes.45

F. Right of Action by the Federal State

Under the previous regime, the right to bring an action against a business entity that was in violation of the LCD was reserved to private entities whose interests were affected by the illegal act. In contrast, the Swiss Federal State could only bring an action against a business entity whose violation of the LCD was so severe that the country’s international reputation would be at stake.46

43. See Ordonnance relative à la loi fédérale sur les loteries et les paris professionnels (executive order related to the federal law on lotteries and professional betting), RS 935.511, état au 1er Août 2008, art. 43, num. 1.
44. Conseil Fédéral, supra note 7, at 5547.
45. Id. at 5564-5565.
46. Article 10, §2.c LCD (former version).
The old system thus mostly relied on an effort of self-regulation on the part of the private sector, as the task of exposing and pursuing unfair business practices was left to entities such as competitors, business consortiums and consumer groups.\(^{47}\) This meant, however, that the LCD was effectively used only when private interests so required, and only when these interests were strong enough to justify the cost of litigation. In practice, this system was unsatisfactory, because important public interests were not sufficiently represented and enforced. When addressing this issue during the reform, the *Conseil Fédéral* expressly acknowledged that the goal of the LCD, which is to protect the market at large, was not reached.\(^{48}\)

Consequently, the recast contains a provision which broadens the scope of action of the Swiss Federal State. The right of action in cases where national reputation is at stake is retained, and a new cause of action is created, allowing it to bring action in cases where collective interests are affected by acts of unfair competition.\(^{49}\) The term “collective interests” is to be interpreted broadly, and can include the interests of a certain age range, of a certain type of professionals, or even of the market at large.\(^{50}\) Also included in the reform is a specific choice-of-law clause that guarantees the application of the LCD to all judicial proceedings brought by the Federal State under these provisions, even in cases where the unfair act has been committed abroad. All in all, the new LCD both broadens and strengthens the role of the Swiss public authorities in maintaining a healthy marketplace.\(^{51}\)

\(^{47}\) Article 10, §2 LCD (former version).

\(^{48}\) *Conseil Fédéral*, *supra* note 7, at 5548-5549.

\(^{49}\) Article 10, §2 LCD.

\(^{50}\) *Conseil Fédéral*, *supra* note 7, at 5568-5570.

\(^{51}\) This does not, however, change the nature of the LCD as a tool of private law. Even with this extended outreach to public authorities, any claim made by them will be a civil one, rather than criminal or public one. Under art. 23.c LCD, the Swiss Federal State can join both a civil claim under the LCD and a claim in criminal law against the same unfair activity.
Finally, the reform also reviews some minor points related to procedure, such as the right for the Federal State to warn the public of ongoing unfair acts, and its cooperation with foreign states in matters of antitrust.

III. FAMILY LAW

Both reforms discussed in the following chapter deal with aspects of the institution of marriage. They extend, *mutatis mutandis*, to the institution of registered partnership (*partenariat enregistré*) for same-sex couples.

**A. New Measures against Forced Marriages**

The first development in family law worth mentioning concerns the topic of forced marriages. On June 15, 2012, the two chambers of Parliament adopted several changes of the law with the aim of hardening Switzerland’s position on this practice. The reform, which entered into force on July 1, 2013, was the result of a longstanding effort by the Swiss legislature to curb such marriages, whether they are concluded domestically or abroad. After a short summary of the events leading to this reform (1), the new legal provisions will be presented (2, 3).

1. **Legislative History**

The phenomenon of forced marriages — understood as the marriage of a person against his or her own will by the way of coercion or duress—is a considerable problem in Switzerland.

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52. Article 10, §4 LCD.
53. Article 21 and 22 LCD.
54. See *Loi sur le Partenariat* du 18 juin 2004, RS 211.231.
56. See also art. 23 al. 3 of the International Covenant on Civil and Political Rights, and point 1.3.2.2 of the 2005 Resolution on forced marriages and child marriages of the Council of Europe for similar definitions. The definition of a forced marriage has been a sticking point during the legislative process of the
According to a study conducted in 2010 by the University of Neuchâtel, around 1300 to 1900 individuals per year are either forced into, or forced to remain in marriage; around 90% of these cases are directed against women, and around 30% against children of less than 18 years of age. Tragic examples of this unfortunate reality have been numerous and well-publicized by the press. To cite just two notorious cases: in 2001, a young Turkish woman who fled to Switzerland to avoid being married against her will was murdered by agents of her family; in 2006, a Pakistani man murdered his wife when she filed for divorce in order to escape their forced union. Needless to say, the public outcry against this practice has been strong.

Aware of this sentiment, and considering that current Swiss law was too lenient on this matter, Parliament filed several motions in favor of a stricter regime. In 2008, the Conseil Fédéral published a report laying the groundwork for reform. The project envisaged a thorough modification of Swiss law, which would affect civil law but also related fields such as private international reform, as the initial proposal concerned both forced marriages and arranged marriages, i.e., marriages that are organized and helmed by another member of the family or a third party. It was finally considered that these marriages would not be targeted by the reform, as they did not per se lead to coercion or duress towards one of the spouses. See Conseil Fédéral, Répression des mariages forcés et des mariages arrangés ; Rapport du Conseil fédéral en exécution du postulat 05.3477 du 9.9.2005 de la Commission des institutions politiques du Conseil national (Repression of forced and arranged marriages ; Report of the Conseil Fédéral according to postulate 05.3477, formulated on the 9.9.2005 by the Commission of political institutions of the Conseil National), 9-10 and 17-18; Conseil Fédéral, Message relatif à une loi fédérale concernant les mesures de lutte contre les mariages forcés du 23 février 2011 (Message related to a federal law on measures against forced marriages of the 23th of February 2011), FF 2011 2045, 2075.

59. Id. at 7-9. See also, for example, the transcript one of these motions: http://www.parlament.ch/f/search/pages/geschaefte.aspx?gesch_id=20053477 (last visited: February 21, 2014).
law, criminal law and immigration law. This law “package” was accepted by the two chambers of Parliament without major changes. In the following paragraphs, only the topics that fall under the ambit of the present chronicle, civil law and private international law will be covered.

2. Changes in Civil Law

In regard to civil law, the reform mostly addressed the grounds for the annulment of a marriage.\footnote{While the rules concerning the preparatory procedure preceding the marriage have also been amended by the reform, the modification made thereof was mostly of a formal, rather than substantial, nature. Indeed, even before the advent of this reform, the civil register office was bound to refuse the celebration of any marriage which was affected by coercion or duress. Since 2011, it also had the duty of reminding the spouses that consent is the cornerstone of marriage. These rules, however, were not directly set out in the civil code: the first being deduced from the general rules of marriage formation (art. 35 par. 2 CC) and the second being contained in art. 65 par. 1bis of the ordonnance sur l’état civil (executive order on civil status) (RS 211.112.2), which is a supplement to the Civil Code focused on the functioning of the civil register office. The reform thus allowed for the inclusion of these rules into the code itself (art. 99 al. 1 n. 3 CC). See Message relatif à une loi fédérale concernant les mesures de lutte contre les mariages forcés du 23 février 2011, FF 2011 2045, 2053.} Under Swiss law, a marriage can only be annulled if there is either an absolute ground\footnote{Article 105 CC.} or a relative ground for annulment\footnote{Article 107 CC.}. Both sets of grounds are exhaustive, meaning that any marriage falling outside the scope of these two provisions cannot be annulled at all.

The absolute grounds\footnote{Article 105 CC.} cover situations in which there is a strong public interest in the annulment of the marriage; for example, if one of the spouses was already married at the time of the wedding celebration, or if he or she lacked capacity of judgment at that moment, or if the marriage is prohibited because of kinship, article 105 of the Civil Code will apply. Marriage annulment procedures resting under an absolute ground may be initiated at any time by any interested party. In particular, the
Swiss civil authority of the current domicile of the spouses may bring such an action by its own accord (*ex officio*).

The relative grounds cover situations where the interest of only one of the spouses is affected. These include cases where one of the spouses was deceived or induced into an error by the other spouse, or if he or she temporarily lacked capacity of judgment during the wedding celebration. Only the afflicted spouse may bring an action for annulment under relative grounds, and it is subject to two time limits. It will be time barred if not made within six months starting from the moment of the discovery of the grounds, and within five years starting from the wedding celebration. Once either of the delays expires, the only recourse left is an action for divorce.

Before the reform, the fact that a marriage was concluded without the consent of one of spouses was, in itself, not considered as a ground for annulment. Only in cases of qualified coercion—i.e., if the spouse proves the marriage was concluded under a clear threat against his or her physical integrity, life, or the well-being of his or her relatives—would a relative ground for annulment be given. This was deemed to be insufficient by the legislator, because the standard of qualified coercion was difficult to prove for the victim, and because the relative nature of this ground made it subject to the two time limits discussed above. In practice, it was extremely difficult for the victim of an arranged marriage to achieve an annulment.

In response to this situation, the reform introduced three major changes. First, it eliminated the problematic concept of qualified coercion. Second, it added a new absolute ground for annulment concerning situations in which a spouse has not married out of his

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64. Article 107 CC.
65. Article 107, n° 4 CC.
67. Article 107, n° 4a CC was removed.
or her own free will. 68 Third, it introduced another absolute ground, addressing cases where one of the spouses is a minor. 69 These changes not only allow victims of forced marriage to bring an annulment action regardless of any time limit, they also strengthen the position of the Swiss civil authorities, which will now be able to annul, ex officio, any forced marriage or any marriage in which one of the spouses is a minor. 70

3. Changes in Private International Law

Other changes were made in the field of Private International Law. The reform addressed a) the law applicable to marriages celebrated in Switzerland, and b) the procedure of marriage annulment.

In regard to the law applicable to marriages celebrated in Switzerland, the system in force at the time of the reform allowed, under certain circumstances, for the application of foreign marriage laws. While the conditions of admissibility of a marriage celebrated in Switzerland were, in principle, to be found in domestic law, 71 it also allowed the application of a foreign law if the two spouses were foreign nationals and if Swiss law did not permit their union. 72 This exception was however still subject to the general exception of public policy. The goal was to favor the conclusion of marriage (favor matrimonii). It allowed for the celebration of marriages that would otherwise not have been accepted under the Swiss Civil Code, namely, marriages involving minors. 73

68. Article 105, no 5 CC.
69. Article 105, no 6 CC.
70. Conseil Fédéral, Message contre les mariages forcés, supra note 66, at 2073-2076.
71. Article 44, §1 of the Federal Act on Private International Law (LDIP), RS 291.
73. Other cases which were envisaged as relevant for the purposes of art. 44 par. 2 were marriages concluded with a nephew or a niece, marriages with the
Because of the (high) risk that a marriage involving a minor would be concluded against his or her own will, the legislature considered that these cases would no longer be compatible with Swiss public policy. As a result, the exception contained in article 44 §2 of the LDIP was abolished. Under the new rules, all marriages celebrated in Switzerland must conform to Swiss law.74

Finally, the reform addressed the issue of marriage annulment, which was previously not specifically covered by the Private International Law Act. Indeed, prior to the reform, one had to look under the rules of divorce in order to find both the rules on international jurisdiction and on the applicable law to an action for annulment. The legislature introduced a new provision in the Private International Law Act.75 At the same time, the rules themselves were reformed: while the rules on divorce open a forum at the Swiss domicile of each spouse, the new rule on annulment adds a new forum, located at the place of the wedding celebration, in order to give more options to a victim of a forced marriage; and while foreign law may be applicable to a divorce concluded in Switzerland under certain conditions, actions for annulment are governed by Swiss law exclusively.76

74. This stricter stance about marriages involving minors brought about by the reform also signaled the disappearance of another rule, formerly contained in art. 45a LDIP, which allowed a minor to reach majority when successfully married under foreign law. See Conseil Fédéral, Message contre les mariages forcés, supra note 66, at 2068-2069.

75. The legislature introduced a new article 45a in the Private International Law Act.

76. Conseil Fédéral, Message contre les mariages forcés, supra note 66, at 2077-2078.
B. Revision of the Rules Governing the Name(s) of Marrying Couples

The second development in family law concerns the name of married couples. The new regime applies to all marriages and partnerships concluded after January 1, 2013. It is designed to comply with the principle of gender equality and to offer spouses a large degree of independence in the choice of their post-marital surname.\(^\text{77}\) The reform responded to severe criticism of the previous system by supranational entities. We will thus first provide a short description of the circumstances leading to this reform (1). Then, the new rules will be presented (2).

1. Legislative History

Since the entry into force of the Civil Code of 1907, under Swiss law, the wife of a marrying couple automatically took the surname of her husband.\(^\text{78}\) There were two exceptions: first, the wife could choose to retain her last name as a component, which would then be followed by the couple’s common surname;\(^\text{79}\) second, the couple could instead choose to use the surname of the wife as their shared surname. This last option, however, required both parties to take part in a name-changing procedure, and required that they had a legitimate interest in doing so.\(^\text{80}\) Children would also automatically be given the surname of the father,

\(^{77}\) The reform also touched on the issue of droit de cité (citizenship), which determines the canton of origin of a given person. Given that this topic is rather peculiar to Switzerland, it will not be covered in this article.

\(^{78}\) Article 160 al. 1 CC (previous version, dated 01.01.12, hereafter “aCC”). For a summary of the legislative history of the reform, see also Commission des affaires juridiques du Conseil national, Initiative parlementaire, Nom et droit de cite des époux, Égalité, Rapport de la Commission des affaires juridiques du 22 Août 2008 (Parliamentary motion, Name and citizenship of spouses, Equality, Report of the Commission of legal affairs of the 22nd of August 2008), FF 2009 II 365, 368-370 [hereinafter “Nom et droit de cité des époux”].

\(^{79}\) Article 160, §2 aCC.

\(^{80}\) Article 30, §2 aCC.
except if they were born out of marriage, in which case they would take the mother’s surname.81

While obviously inappropriate with respect to gender equality, this rule was for a long time maintained in legislation because of its strong link with the traditional depiction of marriage, which promoted family unity through a shared name. In 1984, during an otherwise thorough revision of matrimonial law aimed at promoting gender equality, the Conseil Fédéral decided to keep the rules on family names as they were, explaining that it would be too difficult to alter such well-accepted rules. While the Conseil Fédéral was well-aware of its clear bias in favor of the husband, it added that reaching complete gender equality on this topic was impossible as no other option was viable: choosing the name of the wife would only reverse the inequity, and introducing a new, alternative system of shared, hyphenated names would be too complicated to maintain in situations of multiple, successive marriages.82

This position, however, was hardly defensible under international law. The situation ultimately led to the landmark judgment Burgharz of the European Court of Human Rights.83

The case concerned a Swiss couple who had married in Germany. Under German law, they chose the common surname “Burgharz”, which was the maiden name of the wife. The husband chose to keep his own surname as a middle component, as “Schnyder Burgharz”. However, the Swiss registry office recorded the husband’s surname, “Schnyder”, as their joint surname. The couple then motioned to have their choice approved by the Swiss

81. Article 270, §1 and 2 aCC.
82. Message concernant la révision du code civil suisse (effets généraux du mariage, régimes matrimoniaux et successions) du 11 juillet 1979 (Message related to the revision of the Swiss Civil Code (general effects of marriage, matrimonial regimes and inheritances) of the 11th July 1979), FF 1979 II 1179, 1227-1229. The Parliament, however, used this revision to introduce the exception contained in article 160, §2 of the aCC. See Nom et droit de cité des époux, Egalité, supra note 78, at 369. 83. Burgharz v. Switzerland, no. 16213/90, ECHR 1994.
authorities. Their request was denied at first, as they could not point out any inconvenience arising from the “Schnyder” name. On appeal, the Federal Court (Tribunal Fédéral) accepted “Burgharz” as their joint surname, using a general clause permitting a name change when justified under the circumstances. The husband’s request to retain the double name “Schnyder Burgharz”, however, was denied on the ground that only the wife was permitted to retain her previous name as a middle particle; as the system was deliberately lopsided to safeguard familial unity, the husband could not benefit from an exception which was available for wives only.84 This part of the judgment led to the appeal before the ECHR.

Reasoning in two steps, the European Court concluded that Swiss law was breaching the Convention. The Court held that a person’s name falls under the ambit of the protection of family and personality rights granted by article 8 of the Convention. It also held that the name-changing regime for marrying couples in Switzerland was discriminatory and that the arguments of family unity and tradition fell short before the need for an equal treatment of both sexes. At the very least, Swiss law could have allowed for husbands to take on a double-barreled name without seriously compromising these values.85

Following the ECHR judgment, the Swiss legislature added, in an executive regulation, the possibility for a husband to keep his previous name as a component when both spouses decide to undergo the procedure to designate the wife’s name as the shared surname. The Parliament, not satisfied with this “tacked-on” solution, introduced the system that is now in force in Switzerland.

84. Tribunal Fédéral, 08.06.89, Burgharz Schnyder und Schnyder gegen Kanton Basel-Stadt, ATF 115 II 193.
2. Changes Introduced by the Reform

Under the new system, each spouse keeps his or her previous name after the marriage. In other words, marriage has now no bearing upon one’s surname. However, a couple may decide to share a common surname, which can be the birth name of either of the spouses. This requires no specific procedure, as just a declaration to the civil registrar will suffice.

Some complications arise with respect to the surname of children. If the parents are married and share the same surname, then the child will have this name as well. If the parents decide to keep their previous names, then, at the moment of their marriage, they will need to decide in advance on which one of their birth names they will pass on to their children. Should they change their mind in the meantime, they can still opt for the surname of the other spouse, within one year starting from the birth of their first child. Lastly, if, at the moment of the marriage, they do not manage to decide on which name to pass on, they then can request the civil registrar to choose in their stead. One interesting feature of this new system is that it can lead to discrepancies when one or both of the spouses have kept a surname acquired through a previous marriage, as only a birth surname, and not an acquired one, can be passed on to their children.

Children born out of marriage acquire the birth name of the mother; they can nonetheless acquire the surname of their father,
even without a marriage, if the child protection authority assigns parental care to both parents.\textsuperscript{93}

IV. CONCLUSION

This brief survey of the changes made in Swiss law in the last two years allows us to make two observations.

First, while Swiss law is undeniably affected by foreign law, and most notably by the law of the European Union, one cannot say that Switzerland has been moving towards full harmonization with its EU neighbors. The reform of the LCD shows that the Swiss legislature still prefers to adopt the rules of foreign law that it deems necessary, while discarding others. Furthermore, the reform on forced marriages shows that Switzerland is not reluctant to rely exclusively on its \textit{lex fori} to tackle issues of controversial nature.

Second, a look at the legislative history of all of the reforms described in this Chronicle shows that the Swiss legislature heavily relies on a comparative law methodology when making its own choices and shaping its own rules. Consequently, the existing differences with the EU law are the result of an informed, calculated choice, leading to a selective and soft harmonization of the law while preserving some specific features and characteristics of Swiss law.

\textsuperscript{93} Article 270a, §1-3 CC.
INTRODUCTORY ESSAY ON THE TRANSLATORS’ PREFACE TO LAS SIETE PARIDAS

Agustín Parise*

I. INTRODUCTION

Louisiana has welcomed translations of legal materials for over 200 years. The long-lasting tradition has helped both to promote the unique Louisiana civil law heritage and to benefit the state with the developments that took place in other civil law jurisdictions. The Center of Civil Law Studies at Louisiana State University is

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currently undertaking a translation project of the Louisiana Civil Code into French.¹ This project will help promote the civil law of the southern state amongst French-speaking civil law jurisdictions. The Louisiana Civil Code is applicable in a mixed jurisdiction, and it is drafted in the English language. This interaction of systems may be valued by jurists and businessmen who intend to implement continental European principles while undertaking their practices in the common law and vice versa.² In addition, scholars both of continental European and common law systems may look to Louisiana for civil-law terminology in English. It must be acknowledged that Louisiana civil law scholars have important know-how, and the more than two hundred-year old tradition of English language civil-law codification in Louisiana should be valued.³

The current translation project of the Louisiana Civil Code may be placed within a Louisiana translating tradition.⁴ For example, from the same Center of Civil Law Studies, French works were translated into English, starting in 1972, with a translation by Michael Kindred of a seminal work by René David.⁵ Bachir Mihoubi, Roger K. Ward, and David W. Gruning completed another set of translations in the years that followed, led by Alain Levasseur.⁶ Earlier translations were undertaken by the Louisiana State Law Institute in the period 1959 to 1972.⁷ The Institute

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⁵. Id. at 91.
⁶. Id. at 91-92.
⁷. Id. at 83.
devoted efforts to translate European legal materials that encapsulated the tenets of the civil law, and translations were directed by, amongst others, Carlos E. Lazarus and Jaro Mayda. Those efforts included translations of the works by Charles Aubry and Charles Rau, Gabriel Baudry-Lacantinerie, François Gény, and Marcel Planiol. Those translations from French into the English language are still useful tools for judges in Louisiana, when interpreting the civil law.

Louisiana legal history provides a very early translation effort that aimed to make the civil law available to the legal community. That translation effort, however, was not from French or into the French language. One of the first examples of civil law translations in Louisiana was provided by the English translation of the Spanish Partidas of Alfonso X. That translation work, which motivated this new introduction, was undertaken in the early nineteenth century by Louis Moreau-Lislet and Henry Carleton, and predated by more than a century the well circulated 1931 English translation by Samuel Parsons Scott.

This new introduction is followed by a transcription of the Translators’ Preface and is divided into two parts. First, it provides an historic evolution of the laws applicable in Louisiana. This aims to explain why the Partidas were used in Louisiana, and why an English translation was beneficial for the local legal community. Second, it provides information on the two English translations of the Partidas that were produced in Louisiana during the first decades of the nineteenth-century. This part also welcomes biographical information about the authors of the translations, and

8. Id. at 83-90. See generally Joseph Dainow, Use of English Translations of Planiol by Louisiana Courts, 14 AM. J. COMP. L. 68 (1965).
10. See, for example, the recent reference by the Louisiana Supreme Court to the translation of the work of Aubry and Rau in Eagle Pipe and Supply, Inc. v. Amerada Hess Corporation, et al., 79 So.3d 246, 286 (2011).
11. SAMUEL PARSONS SCOTT, LAS SIETE PARTIDAS (1931).
analyses the content of the preface to the 1820 translation. The entire content of the new introduction aims to place the translation of the Partidas within the legal and social context of early nineteenth-century Louisiana.

II. HISTORICAL REASONS FOR TRANSLATIONS IN LOUISIANA

France ceded Louisiana to Spain in 1762. Seven years later, the Spanish Governor, Alejandro O'Reilly, implemented the Spanish Colonial system of government and replaced the French laws (v.g., Coutume de Paris) with the Spanish-Indiano laws. Hence, Spanish laws were since then the law in Louisiana. Amongst the new provisions were the Ordinances and Instructions and the Instructions as to the Manner of Instituting Suits, both of November 25, 1769, which regulated procedure in the region.

Napoléon Bonaparte secured the return of Louisiana to France on October 1, 1800. During that second French period, the

13. For additional readings on O'Reilly, see Bibiano Torres Ramírez, Alejandro O'Reilly en las Indias (1969).
There is some debate on the abrogation of French law. See Gustavus Schmidt, Were the Laws of France, which Governed Louisiana prior to the Cession of the Country to Spain Abolished by the Ordinances of O'Reilly?, 1:4 LA L.J. 23 (1842); and Alain Levasseur, Louis Casimir Elísbeth Moreau-Lislet: Foster Father of Louisiana Civil Law 8-12 (1996). The memoirs of Laussat (Papeles de Cuba, Legajo, 220. 5 Louisiana) include a document that seems to put an end to the debate. Id. 34-35.
applicable law was still Spanish and no significant changes were
made to the jurisprudence of the region. The territory would live
briefly under French domain, because during the first days of May
1803, the Treaty of Paris took place, resulting in the Louisiana
Purchase. The first proclamation of W.C.C. Claiborne, then
Commissioner, was to preserve the laws that applied at the time of
the Purchase (i.e., Spanish laws and the French Code noir).

Louisiana adopted a digest of its laws in 1808. Two years
before, James Brown and Moreau-Lislet were appointed to draft a
project of a civil code. According to the resolution, the “two
jurisconsults shall make the civil law by which this territory is now
governed, the ground work of said code.” In February 1808, the
different books of the projected text were presented by the
committee before the local legislature for debate. On March 31,
1808, the Legislature promulgated the Digest of the Civil Laws
now in force in the territory of Orleans (Digest of 1808). The
Digest of 1808 was drafted in French and then translated into
English.

19. A.N. Yiannopoulos, The Civil Codes of Louisiana in 1 WEST’S
LOUISIANA CIVIL CODE li, liii (Yiannopoulos ed. 2008); and Elizabeth Gaspar
Brown, Law and Government in the Louisiana Purchase: 1803-1804, 2 WAYNE
20. The documents were dated April 30, 1803. See THOMAS MAITLAND
MARSHALL, A HISTORY OF THE WESTERN BOUNDARY OF THE LOUISIANA
PURCHASE 1819-1841 at 7-8 (1914).
21. MARTIN, supra note 18, at 319.
23. Id. at 214.
24. GEORGE DARGO, LEGAL CODIFICATION AND THE POLITICS OF
TERRITORIAL GOVERNMENT IN JEFFERSON’S LOUISIANA, 1803-1808 at 321
25. 1808 La. Acts 122. See generally A DIGEST OF THE CIVIL LAWS NOW IN
FORCE IN THE TERRITORY OF ORLEANS, WITH ALTERATIONS AND AMENDMENTS
ADAPTED TO ITS PRESENT SYSTEM OF GOVERNMENT (1808). The text of the
Digest of 1808 is available at www.law.lsu.edu/digest (last visited December 6,
2013).
26. E.B. Dubuisson, The Codes of Louisiana (Originals Written in French;
Errors of Translation, LA. BAR ASSN. ANN. REP. 143 (1924); and John M.
Shuey, Civil Codes-Control of the French Text of the Code of 1825, 3 LA. L.
REV. 452 (1941).
The Spanish laws were not abrogated with the enactment of the Digest of 1808 or with the enactment of the Civil Code of 1825 that followed. The former had no general abrogation clause of Spanish laws. In addition, the Act of March 31, 1808 stated that “whatever in the ancient civil laws of this territory, or in the territorial statute, is contrary to the dispositions contained in the said digest, or irreconcilable with them, is hereby abrogated.” Pierre Derbigny addressed the derogation of previous laws in the 1817 case of Cottin v. Cottin. He decided that the laws that were not contrary to the Digest of 1808 were not repealed with its enactment. Therefore, the Digest of 1808 had not completely repealed the civil laws that had existed in Louisiana. Consequently, a state of uncertainty was generated concerning the laws that should be applied by the courts. The Digest of 1808 was replaced by the Civil Code of 1825, the predecessor of the current Louisiana Civil Code. That code tried to terminate, by including article 3521, the debate on the application of Spanish laws. Article 3521, however, could be read as not repealing all previous laws but only those “for which it has been especially provided in this Code.” That language opened the door to different interpretations, allowing some lawyers and members of the judiciary to interpret this as an open door in cases of lacunae, and

27. The work of Vernon V. Palmer (Vernon Valentine Palmer, The Death of a Code - The Birth of a Digest, 63 TUL. L. REV. 221, 244-245 (1988)) was especially influential for the drafting of this paragraph.
29. Cottin v. Cottin, 1819, 5 Mart. (o.s.) 93.
30. Article 3521 of the Civil Code of 1825 read:
   From and after the promulgation of this Code [of 1825], the Spanish, Roman and French laws, which were in force in this State, when Louisiana was ceded to the United States, and the acts of the Legislative Council, of the Legislature of the Territory of Orleans, and of the Legislature of the State of Louisiana, be and are hereby repealed in every case, for which it has been especially provided in this Code, and that they shall not be invoked as laws, even under the pretense that their provisions are not contrary or repugnant to those of this Code.
31. Id.
hence, limiting the express repeal.\textsuperscript{32} Therefore, when faced with silence in the code, it would have been admissible to look for solutions in the previous laws.\textsuperscript{33} To end interpretation problems, the Legislature of Louisiana enacted two acts\textsuperscript{34} that were intended to achieve a great repeal.\textsuperscript{35} There is still debate on the effects of both acts, especially since the Louisiana Supreme Court claimed that the acts only repealed the previous positive law and not the principles derived from them, which had been acquired by the practice of the courts.\textsuperscript{36}

Louisiana courts relied on Spanish sources during the period 1809 to 1828.\textsuperscript{37} The Superior Court of the Territory of Orleans and the Louisiana Supreme Court “cited Spanish codes, customs or ordinances four times more frequently than French codes, customs or ordinances.”\textsuperscript{38} Those same courts cited “Spanish statutes twelve times more frequently than French statutes.”\textsuperscript{39} However, French treatises and commentaries were cited “only slightly more frequently than Spanish treatises and commentaries.”\textsuperscript{40} The references to Spanish materials focused mainly in the Partidas, the Librería de Escribanos, and the Curia Filípica.\textsuperscript{41} These works represented 60\% of citations to Spanish texts.\textsuperscript{42} The Curia Filípica, by Juan de Hevia Bolaños, had a strong presence in Spain.

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\textsuperscript{32} Palmer, supra note 27, at 246.
\textsuperscript{33} Id.
\textsuperscript{34} 1828 La. Acts 66; and 1828 La. Acts 160.
\textsuperscript{38} Id. at 1504.
\textsuperscript{39} Id.
\textsuperscript{40} Id.
\textsuperscript{41} Id. at 1505.
\textsuperscript{42} Id.
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and Spanish America. For example, Gustavus Schmidt, who owned one of the most complete law libraries in the southern United States, had a copy in his library. The work of José Febrero, *Librería de Escritanos é instrucción jurídica teórica práctica de principiantes*, was also well circulated in America (from Louisiana to Río de la Plata) and played an important role in the practice before courts.

III. TWO LOUISIANA TRANSLATIONS OF THE *PARTIDAS*

The nineteenth-century interest for Spanish law demanded a translation of the *Partidas* into the English language. Courts and practitioners would benefit from the availability of an English translation of that seminal Spanish body of law. The *Partidas* are traditionally attributed to the reign of Alfonso X, being drafted during 1256-1265. They were subject to several text alterations through time, and the most circulated edition is the one of 1555, containing glosses by Gregorio López. The name derives from their division into seven parts—and not into books—as was the case with other legal bodies that predated their publication. The *Partidas*, different from other corpus of that time, were systematical and integral. Each *partida*, or part, was divided into titles and laws, and dealt with an area of the law: (i) sources of law,
Catholic faith, and church; (ii) kings, royal officials, and war; (iii) administration of justice and rights on things; (iv) marriage and persons; (v) contracts and other civil institutions; (vi) successions; and (vii) crimes and punishments. 52

A first translation of a selection of titles of the Partidas was dated 1818. 53 Louis Moreau-Lislet and Henry Carleton translated the titles of the Partidas that dealt with promises and obligations (Partida V, Title XI), sale and purchase (Partida V, Title V), and exchange (Partida V, Title VI). That work was published in New Orleans by Roche Brothers. The single volume filled 197 pages, placing the original Spanish text on the verso and the English translation on the recto. That first translation included a short preface 54 that started by summarizing the contents of the work by Alfonso X. The translators further stated that the “Partidas may then be considered as the principal code of the Spanish laws.” 55 They also stated that:

[M]any important provisions of the ancient laws of the land [i.e., Louisiana] still in force are not to be found in that code [i.e., Digest of 1808], and as its principles and maxims are delivered in a manner so succinct as not to be easily understood in their application without mounting to the sources whence they are derived, we hope we have undertaken a work useful to the public and to those who frequent the bar. 56

Moreau-Lislet and Carleton acknowledged that the structure, terms, and orthography of the Spanish language they translated were 500 years old, and even difficult to understand by a nineteenth-century native Spanish speaker. 57 They tried to follow the order of the Digest of 1808 when dealing with contracts, and

52. Enumeration translated from the work of Levaggi. *Id.*
54. *Id.* at iii-vi.
55. *Id.* at iv.
56. *Id.* at v.
57. *Id.* at v-vi.
annotated the Spanish laws with the articles of the Digest of 1808, while providing Roman laws that related to each title of the Partidas, together with modern Spanish texts.

A second translation of other titles of the Partidas was dated 1820. On March 3, 1819, the Legislature of Louisiana decided, upon the proposal of Moreau-Lislet and Carleton, to translate the remaining parts of the Partidas that were considered to have force of law in the state. The Legislature stated in that occasion that: “it is of great importance to the citizens of this State, not only that the copies of the laws by which they are governed should be multiplied, but also that they should have them in a language more generally understood than the Spanish.” The legislature aimed to allow the legal community to gain “knowledge of this important branch of our civil jurisprudence contained in the said works.”

The second translation, also by Moreau-Lislet and Carleton, included titles from six of the seven partidas, neglecting attention to the second partida, which dealt mainly with matters related with

58. See, for example, the reference in the English translation to Book III, Title VI, Article 1 of the Digest of 1808. The text in the English translation reads “c.1, 344” (i.e., article 1, page 344 of the Digest of 1808). Id. at 87.

59. See, for example, the reference to Book III, Title XXIV of the Institutes of Justinian in the English translation. The text in the English translation reads “Institutes lib. 3. tit. 24. De emptione et venditione.” Id. at 80. The translators probably followed the English text of the Institutes by Thomas Cooper, which Moreau-Lislet had in his library. See Mitchell Franklin, Libraries of Edward Livingston and of Moreau Lislet, 15 TUL. L. REV. 401, 408 (1941).

60. See, for example, the reference to sale in Part I, Chapter X, Section I of the work of Febrero. The text in the English translation reads “Febrero libreria de escribanos, part. 1. chap. 10, § 1. De las ventas.” Id.

n.b., the 1783 edition of Febrero deals with sale in Chapter VII, Section I. (JOSEF FEBRERO, LIBRERIA DE ESCRIBANOS, PARTE PRIMERA, TOMO SEGUNDO 406 (3d ed. 1783).

61. 1-2 LOUIS MOREAU LISLET & HENRY CARLETON, THE LAWS OF LAS SIETE PARTIDAS WHICH ARE STILL IN FORCE IN THE STATE OF LOUISIANA (1820).

The legislative history indicates that the translation work, especially for volume 2, was not completed by 1820 (1820 La. Acts 20 and 1821 La. Acts 22; and LEVASSEUR, supra note 12, at 141-143).

62. 1819 La. Acts 44.

63. Id.

64. Id.
the king. That work was published in New Orleans by James McKaraher. The translation was presented in two volumes, continuously paginated until page 1248, included an index of titles for each volume, included a general index, and did not include the original Spanish text. The first volume also included a Translators’ Preface, which motivated this new introduction. In the Act of 1819, the Legislature also appointed Pierre Derbigny, Étienne Mazureau, and Edward Livingston to examine the “manuscript of the translation, and to compare it with the original language and see that it is faithfully done and contains all such parts of the laws of the Partidas as are considered to have the force of law in this state.” The legislator was therefore not only aiming to assess the language but also the substance of the translation. In that same Act, the payment to the translators was set in the amount of 7000 dollars. The editio princeps of the translation would be of 500 copies as stated by the Legislature, and the copyright would be assigned to the governor for the use of the state.

The English translations of the Partidas had an impact in the legal community of Louisiana. In February 1822, the Legislature instructed the distribution of copies of the 1820 translation. Copies were to be sent to, amongst others, the judges of the different Louisiana state courts, to the US district court for Louisiana, and to

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65. Headings for the titles of the second partida were included in the English translation. 1 MOREAU LISLET & CARLETON, supra note 61, at 17-19.
66. Volume one included the translator’s preface, included the text of partidas I, III, and IV, and reached page 605; volume two included the text of partidas V to VII, and included a general index.
67. The general index was not part of the continuous pagination, extending for 73 pages, and followed an alphabetical order for entries.
68. 1 MOREAU LISLET & CARLETON, supra note 61, at iii-xxv.
70. Id.
71. The 1819 Act described the procedure to follow when settling the payment (id.). The 1821 supplementary Act allowed for a further sum to be paid to the translators (1821 La. Acts 22). See also John W. Cairns, The de la Vergne Volume and the Digest of 1808, 24 TUL. EUR. & CIV. L.F. 31, 76 (2009).
72. 1819 La. Acts 44.
73. Id.
the Legislature. Copies were also to be distributed beyond Louisiana, being sent to the executive branches of other US state and to the US President. A number of copies were to be preserved by the office of the secretary of state, and the remaining copies were to be sold to the general public. The aim was, as originally stated in the 1819 Act, to allow the legal community to gain “knowledge of this important branch of our civil jurisprudence.” A study shows that, after the publication of the translations, there was an increase of 100% in the frequency with which the Partidas were cited by courts in Louisiana. For example, Justice George Mathews of the Supreme Court of Louisiana, stated in a case that “it may not be improper to advert to a note in the translation of the Partidas, by Moreau & Carleton.” The English translation also reached other U.S. states, being cited by courts beyond the borders of Louisiana.

A. Authors of the Second Translation

Five jurists, at least, were involved in the second translation project of the Partidas in Louisiana. The English translations, dated 1818 and 1820, indicated that the authors were Moreau-Lislet and Carleton, and there was no individual claim of authorship for the different parts of that translation work. Edward Livingston, Pierre Derbigny, and Étienne Mazureau were also involved in the translation project, being appointed examiners of the second translation by the Legislature. They had to produce a

75. Id.
76. Id.
77. 1819 La. Acts 44.
78. Rabalais, supra note 37, at 1505.
Moreau-Lislet indicated an early interest in translating the Partidas. In April 1813, he made public his intention of translating, together with Étienne Mazureau, the Partidas into French language. He was a successful lawyer who acted as judge, attorney general, and senator for Louisiana. He also played an important role as editor. He spoke the three fundamental languages for a Louisiana jurist: English, French, and Spanish. Those skills helped him participate of the drafting of, amongst others, the Digest of 1808, the Civil Code of 1825, and the Code of Civil Procedure of 1825. Moreau-Lislet died in Louisiana on December 3, 1832.

Henry Carleton Cox was the co-author of the two translations. He graduated from Yale University in 1806, after having attended two years at the University of Georgia. He settled in New Orleans in 1814, and read law in the law offices of his brother-in-law, Edward

82. Cairns, supra note 71, at 51. See also LEVASSEUR, supra note 12, at 130-131, 189-191.
83. For additional readings on Moreau-Lislet, see the complete study by LEVASSEUR, supra note 12, at 69-166.
84. There is some debate; however, that is the most probable date. Id. at 80 and 83.
87. LEVASSEUR, supra note 12, at 114.
88. Id. at 83.
89. 2 DICTIONARY OF AMERICAN BIOGRAPHY 491 (Allen Johnson & Dumas Malone eds. 1964).
Livingston. He was a U.S. district attorney from 1832 to 1837, and associate justice of the Louisiana Supreme Court from 1837 to 1839. He is also known for his writings of a biblical, metaphysical, and philosophical nature, such as *Liberty and Necessity* (1857) and *Essays on the Will* (1863). He died in Pennsylvania on March 28, 1863.

Edward Livingston may be included amongst the most brilliant minds in the legal history of the U.S. He was born in New York on May 26, 1764, and was brother of Robert Livingston (negotiator during the Louisiana Purchase). He studied at Princeton University and read law with Judge Lansing, being admitted to practice in 1785. He moved to New Orleans in 1804, where he became a successful lawyer. While in Louisiana, he also drafted key legislative provisions, such as the projected Commercial Code of 1825, the Code of Civil Procedure of 1825, and the Civil Code of 1825. Livingston was appointed senator for Louisiana to the U.S. Congress in 1828, and was appointed Secretary of State in 1831 by President Andrew Jackson. Livingston died in New York on May 23, 1836.

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93. *Id.*
94. *A Dictionary of Louisiana Biography*, *supra* note 90, at 34.
95. *Id.*
100. Carleton Hunt, *supra* note 98, at 50.
102. *Id.* at 161.
106. *Havens Hunt, supra* note 98, at 432.
Pierre Auguste Bourguignon Derbigny was born on June 30, 1769, in France and studied law at Saint Geneviève. He went into exile to the Caribbean during the French revolutionary period, and from there immigrated to the US. After living in several regions of the country, he settled in Louisiana. His ability with the English and French languages helped explain his appointment as official interpreter of Governor Claiborne. Throughout his life he acted on the three branches of government in Louisiana, being, amongst others, member of the legislative council, Justice of the Supreme Court, and Governor. He confronted his colleague Livingston in several judicial cases, most notably the Batture case. He was also involved in the drafting of the Civil Code of 1825 and the Code of Civil Procedure of 1825. Derbigny died in Louisiana on October 6, 1829.

Étienne Mazureau was born in France in 1777. He had early contact with the law, being employed at a French law office at age

108. 2 APPLETON'S CYCLOPÆDIA OF AMERICAN BIOGRAPHY 146 (Wilson & Fiske eds. 1888).
109. Id.
111. 2 APPLETON'S CYCLOPÆDIA, supra note 108.
112. HERMAN, supra note 110, at 60.
114. The positions of Livingston and Derbigny were included in a proclamation of October 21, 1808. See EDWARD LIVINGSTON, ADDRESS TO THE PEOPLE OF THE UNITED STATES, ON THE MEASURES PURSUED BY THE EXECUTIVE WITH RESPECT TO THE BATTURE AT NEW-ORLEANS (1808). For more information on the Batture, see Gustavus Schmidt, The Batture Question, 1:2 LA L.J. 84 (1841).
115. Ira Flory, Edward Livingston’s Place in Louisiana Law, 19 LA. HIST. Q. 3, 7 (1936).
thirteen. 119 While in Europe, he gained knowledge of Spanish law and language. 120 He moved to Louisiana at the beginning of the nineteenth century, where he was admitted to practice law in 1805. 121 Mazureau was a successful lawyer in the region, who practiced law in partnership with Edward Livingston, acted as attorney general for three terms, and served as Secretary of State of Louisiana. 122 He had command of the English, French, and Spanish languages. 123 Mazureau is known also for delivering in 1836 a speech in honor of the prominent Justice George Mathews. 124 Mazureau died in Louisiana on May 30, 1849. 125

The background of the five jurists involved in the translation project is a clear example of the rich Louisiana legal culture. Jurists not only occupied prominent positions as practitioners or judges, but also occasionally occupied alternatively positions as members of the legislative and executive powers. In addition, they represented both continental European and common law doctrines, some being trained in the common law, others receiving a civil law education, while others being proficient in both systems. The jurists were also familiar with several languages, mainly the ones used in Louisiana legal discourse. The different skills and characteristics of jurists were valuable assets at the time the translation project was pursued.

120. 12 DICTIONARY OF AMERICAN BIOGRAPHY 469 (Dumas Malone ed., 1933).
122. *Id.* at 6-7.
123. *Id.* at 6.
124. The speech was translated into English and later published in Henry Plauché Dart, *Mazureau’s Oration on Mathews*, 4:2 LA. HIST. Q. 155 (1921).
B. Translators’ Preface to the Second Translation

The Translators’ Preface is a very rich document. It helps reflect the legal context of the time when it was drafted. The preface addressed various topics, while it also referred to the work of several jurists and cited court decisions and legislation. Moreover, it was related to other legal works that were elaborated at that time in Louisiana.

The Translators’ Preface was also included in a 1978-reprint of the translation of the Partidas. That reprint of the 1820 translation was undertaken in Baton Rouge by Claitor’s Publishing Division, and included an Introduction by Mitchell Franklin. The law professor explored the struggle in Louisiana between adopting Spanish feudal Romanism or French bourgeois Roman law, and claimed that Moreau-Lislet and Carleton had produced an embourgeoisified English translation of the Partidas. The translation, according to Franklin, was of institutional value, because English was not the historical Roman and civil law language, and the translation would assist the English-speaking legal discourse. He also indicated that the Translators’ Preface did not include references to the Project of 1806. This was an important document he identified in the National Archives in 1942, and that reflected an early example of the struggle for the adoption of the civil law or the common law systems in Louisiana.

126. 1-2 THE LAWS OF LAS SIETE PARTIDAS WHICH ARE STILL IN FORCE IN THE STATE OF LOUISIANA 1, 8-11 (L. Moreau Lislet & Henry Carleton, trans., 1978) (1820).
128. Id.
129. In May 1806, the Legislature adopted a bill, also referred to as the Project of 1806, by which the pre-existing Spanish and Roman laws would govern the Territory of Orleans. Governor Claiborne, however, vetoed the bill. Yiannopoulos, supra note 19, at liv. See also Mitchell Franklin, Some Considerations on the Existential Force of Roman Law in the Early History of the United States, 22 BUFF. L. REV. 69, 69-70 (1972); and Mitchell Franklin,
1. Content

The Translators’ Preface can be divided into several parts. Initially, the authors stated the auspices received by the Legislature, and indicated that they translated the laws they considered as “having force of law” in the state.

The preface continued with a historic sketch of Spanish legislation. It extended from pre-Roman times until the eighteenth century. The narrative described seminal legislative bodies and compilations, amongst others, the Leyes de Toro (1505) and the Recopilación de las Leyes de Indias (1680), which applied in the Americas. Spanish compilations resulted in a unique body that made access possible to all rules and included all dispositions in a chronological order. Although the compiled laws maintained their independence and substance within the compilations, confusion resulted from the variety and disorder of existing legislation. Practitioners, scholars, and courts welcomed literature that would succeed in making the law accessible, and historic outlines aided in achieving that common objective. For example, the Instituciones de Derecho Civil de Castilla (1771), by Ignacio Jordán de Asso and Miguel de Manuel, included a useful historic outline, which was translated into...
English by Lewis Johnston, a judge of the island of Trinidad, and published in London in 1825. 138 A second example was provided by the Teatro de la Legislación Universal de España e Indias (1791-1798), by Antonio Javier Pérez y López. The Teatro included an extensive historic introduction (within the Discurso Preliminar) 139 that was used by Moreau-Lislet and Carleton. 140 A third example, this time from Louisiana, was provided by The Civil Law of Spain and Mexico (1851), by Gustavus Schmidt. That work included an historic outline, and also circulated in other US states. 141 Approximately 2000 years of history and legislation were therefore included in those useful historical sketches. 142

The historic account, as expected, dealt with the Partidas and their content. 143 The authors worked with the glossed edition by Gregorio López, 144 and stated that the Partidas were the “most perfect system of Spanish laws, and [could] be advantageously compared with any code published in the most enlightened ages of the world.” 145 The content of the different parts of the Partidas was also addressed by Moreau-Lislet and Carleton. 146 They even indicated that the principles of natural law, as contained in the Partidas, were still applicable, not having been modified by particular laws. 147

The Translators’ Preface also dealt with matters of jurisdiction. Firstly, it acknowledged that maritime and

139. 1 MOREAU LISLET & CARLETON, supra note 61, at i-lviii.
140. Cairns, supra note 71, at 73 & 80.
142. Id.
143. 1 MOREAU LISLET & CARLETON, supra note 61, at vii-xii.
144. Id. at xxiii.
145. Id. at vii.
146. Id. at ix.
147. Id. at x.
commercial matters should be decided by local courts. That statement indicated that the codes included in the historic sketch did not apply to that area of law. Appropriate references were made to the Spanish *Ordenanzas del Consulado de Bilbao* (1737), which had applied in the territory when dealing with commercial matters. Secondly, it addressed the use that Louisiana courts should make of the *Partidas* and of the different codes. The authors mainly relied on the work of Pedro Murillo Velarde when dealing with that issue. Thirdly, it aimed to explain why the laws of Spain were still in force in Louisiana. Starting with the first French period, and reaching the decision of *Cottin v. Cottin*, Moreau-Lislet and Carleton explained why they considered that Spanish laws applied in Louisiana. They claimed that the second French period “did not for a moment, weaken the Spanish laws” in Louisiana. They further stated that after *Cottin* “it thus appeared that a much greater portion of the Spanish laws remained in force than had been at first supposed,” and that it was “then doubtless the desire of the legislature to spread generally the knowledge of such of these laws.”

The plan pursued by the translators aimed to relate the *Partidas* with the Digest of 1808, as well as to relate them with other Spanish and Roman texts. Each title of the *Partidas* was

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148. *Id.* at xvi.
150. 1 MOREAU LISLET & CARLETON, supra note 61, at xvi-xviii.
151. *Id.* at xviii-xxiii.
152. When dealing with the Spanish period, the translators provided an early translation of part of the Ordinances of O’Reilly (*id.* at xx). Compare with the translation by Schmidt, *supra* note 16.
153. 1 MOREAU LISLET & CARLETON, supra note 61, at xxi.
154. *Id.* at xxiii.
155. *Id.*
156. *Id.*
therefore associated with the titles of those other three sources.\textsuperscript{157} Notes were also added to different laws of the Partidas, linking them with Spanish,\textsuperscript{158} Roman,\textsuperscript{159} or Louisiana\textsuperscript{160} sources.\textsuperscript{161} Moreau-Lislet and Carleton did not translate the laws of Partidas that had been expressly repealed by the Legislature and those that conflicted with the US and Louisiana constitutions.\textsuperscript{162} Finally, the translators explained the criteria they followed when facing difficulties in providing accurate translations of Spanish terms.\textsuperscript{163}

2. References to Other Works

Multiple editions of the existing laws had appeared in Spain by the nineteenth century, while auxiliary literature developed to assist readers in the interpretation of the existing laws. Encyclopedias and analytical works, such as the Teatro by Pérez y López, excelled in assisting the legal community in the interpretation of the laws; while they provided the legal community with small libraries of the multiple volumes of Spanish legislation. The Translators’ Preface clearly reflected that nineteenth-century Spanish legislation was in a state of confusion, and even identified early origins for that confusion. They expressed, for example, that before the Partidas were drafted,

\begin{itemize}
  \item Id. For example, Partida III, Title V was related to, amongst others: Book II, Title XIII, Code of Justinian; Book II, Title III, Fuero Juzgo; and Book III, Title XIII, Digest of 1808 (id. at 108).
  \item See, for example, the reference to the work of Juan Sala in the note to Partida III, Title II, Law 32 (id. at 52); and the reference to the work of Febrero in the note to Partida III, Title XIX, Law 9 (id. at 251).
  \item There were very few references to Roman law that related to the individual laws of the Partidas. See, for example, the reference to Book XXIV, Title I, Law 1 of the Digest of Justinian in the note to Partida IV, Title XI, Law 3 (id. at 510-511).
  \item See, for example, the reference to Book III, Title XVII of the Digest of 1808 in the note to Partida III, Title IV, Law 24 (id. at 94); and the reference to Pierce v. Curtis, 6 Mart. (o.s.) 418, in the note to Partida III, Title XXX, Law 8 (id. at 398).
  \item Id. at xxiii-xxiv.
  \item Id. at xxiv.
  \item Id. at xxiv-xxv.
\end{itemize}
“disorder rose to such a height”\textsuperscript{164} that the king had to indicate clearly which body of law prevailed in Castile. They also stated that Alfonso X found the laws of Spain in a “distracted state.”\textsuperscript{165}

Moreau-Lislet and Carleton referred in their preface to Louisiana court decisions and Spanish legislation. Regarding the former, the translators referred, in the body of the text, to the already mentioned 1817 decision of \textit{Cottin v. Cottin}\textsuperscript{166}. They also cited, though in a footnote, the 1813 decision in \textit{Pizerot et al. v. Meuillon's Heirs}.

Spanish legislation was also cited in the \textit{Translators’ Preface}. For example, there are references to the \textit{Autos Acordados} (since 1723),\textsuperscript{168} a work that was also available in the library of Moreau-Lislet.

The preface was drafted after consulting the works of several jurists, surely benefiting from the contents of the library of Moreau-Lislet.\textsuperscript{170} The translators explicitly mentioned the works of jurists within the text of the preface. For example, Juan Sala\textsuperscript{171} and Pedro Murillo Velarde\textsuperscript{172} were mentioned in the body of the text, while Domenico Alberto Azuni\textsuperscript{173} and Alonso de Azevedo\textsuperscript{174} were mentioned in the footnotes. Other jurists were not explicitly mentioned in the text of the preface, though their work was influential for the translators. For example, John Cairns indicated that the translators relied on the extensive historic introduction included in the \textit{Teatro} by Pérez y López.\textsuperscript{175} The name of the author of the \textit{Teatro} was not explicitly mentioned in the preface. His

\begin{footnotes}
\item 164. \textit{Id.} at vii.
\item 165. \textit{Id.} The \textit{Translators’ Preface} incorrectly referred to Alfonso IX.
\item 166. \textit{Id.} at xxii-xxiii.
\item 167. \textit{Id.} at xvii. 3 Mart. (o.s.) 97.
\item 168. \textit{Id.} at v & xviii. The \textit{Translators’ Preface} correctly referred, in the first footnote, to Book II, Title I, Auto 1. \textit{See TOMO TERCERO DE AUTOS ACORDADOS 68 (1772).}
\item 169. Franklin, \textit{supra} note 59, at 406.
\item 170. \textit{Id.} at 405-409.
\item 171. \textit{Id.} at vii-xvii.
\item 172. \textit{Id.} at vii-xvii.
\item 173. \textit{Id.} at xvi. The \textit{Translators’ Preface} incorrectly referred to Azum.
\item 174. \textit{Id.} at xvi.
\item 175. Cairns, \textit{supra} note 71, at 73.
\end{footnotes}
work, however, was indeed mentioned, when Moreau-Lislet and Carleton referred in their preface to the “author of the theatre of Spanish legislation.”

3. Relations with Other Works

The Translators’ Preface related to other legal works that were elaborated at that time in Louisiana. That connection was identified recently by Cairns, and helps better describe and understand the legal and social context of early nineteenth-century Louisiana. The southern state, as previously mentioned, offered a context in which an interest for Spanish laws was welcomed. The work of Moreau-Lislet and Carleton was related to two copies of the Digest of 1808 that included manuscript notes. The latter legal body did not include an exposé des motifs. Nevertheless, there are an uncertain number of copies of the editio princeps of the Digest of 1808 that contain interleaves between the French and English texts. Even though there are some copies with interleaves that have no annotations, other copies of the Digest of 1808 contain manuscript notes that seem to have been dictated by Moreau-Lislet, or in some cases, even written by him. One of these manuscripts, referred to as the de la Vergne copy, included an Avant-Propos that was closely linked to the Translators’ Preface. The 1820 preface, mainly when describing the different Spanish legislative bodies, built upon the shorter 1814 Avant-Propos. Cairns also indicated that the de la Vergne copy and the Avant-Propos were concurrently related to the Teatro by Pérez y

176. 1 Moreau Lislet & Carleton, supra note 61, at xiv.
177. See generally Cairns, supra note 71.
179. The LSU Law Library holds such a copy.
181. Cairns developed an exhaustive study on that copy. See generally, id.
182. Id. at 73.
183. Id. at 73, 79-80.
López, and that the translators found in the introduction of the Teatro a rich source for their historic account. Another manuscript, though with no interleaves, is referred to as the LSU Copy. It was probably drafted before the de la Vergne copy, and it was found by Robert A. Pascal in May 1965 in the LSU Library. Cairns stated that Moreau-Lislet and Carleton used the annotations of that manuscript when drafting the list of sources and annotations to their translation of the Partidas.

IV. CONCLUDING REMARKS

The need for translations of legal materials in Louisiana can be explained by looking at its legal history. This new introduction provided an historic evolution of the laws applicable in Louisiana, and explained why the Spanish Partidas were welcomed in Louisiana. The new introduction also provided information on the 1818 and 1820 English translations of the Partidas, together with biographical information about the jurists involved in those translation projects. Special attention was devoted to the Translators’ Preface to the 1820 translation. Its content, its sources, and its connection with other legal materials were explored.

There has always been, and should always be, a connection between Louisiana and other civil law jurisdictions. Louisiana is an isolated “Civil Law island” partially surrounded by a “sea of Common Law.” However, Louisiana must build bridges with

184. Id. at 73.
185. Cairns indicated that the participation of Carleton in the drafting of the Translators’ Preface could be challenged. Id. at 79-80.
186. Id. at 73, 80.
187. Id. at 64.
189. Cairns, supra note 71, at 65 & 72.
other civil law territories to keep developing its civil law heritage. It must benefit from developments in other jurisdictions, and it must share its own developments with the world-wide civil law discourse. The translations of the *Partidas* provided an early example of that bridge-building activity, in that case with Spain and its legislation. Translations of other materials, such as the Louisiana Civil Code, may lay down new bridges.
TRANSLATORS’ PREFACE TO THE LAWS OF LAS SIETE PARTIDAS†

Louis Moreau-Lislet & Henry Carleton*

THIS work has been undertaken under the patronage of the legislature of Louisiana, which passed a law on the 3d of March, 1819, authorising it to be executed at the expense of the state. It contains a translation of all that portion of Las Siete Partidas, which is considered as having the force of law in Louisiana. Those parts which relate to the Catholic faith, and to matters of a criminal nature having been repealed, are therefore entirely omitted.

The translators have compiled the following short historic sketch of Spanish legislation, hoping that it may afford some gratification to those who have not an opportunity of consulting the authors from which it is taken.

The laws of Spain are contained in various codes, the most complete of which is that known under the name of Las Siete Partidas. The other codes are the Fuero Juzgo, Fuero Viejo and Fuero Real; to which may be added the laws regulating the practice of courts, the Royal Ordinances, and those of Alcala; the laws of Toro, the Recopilacion de Castilla, and the Recopilacion de las Indias. We will notice these codes in the order in which they were

† The text of the Translators’ Preface was proof-read, for purposes of publication in the Journal of Civil Law Studies, by Mr. Shane Büchler. It was further revised by the author of this introduction. See Agustín Parise, Introductory Essay on the Translators’ Preface to Las Siete Partidas, above.

The transcribed text tried to preserve as close as possible the form of the original text, including typographical errors. Footnotes in the original text were restarted on every page, and shifted from numbers to letters. The transcribed text does not follow that criteria, and adopted a continuous numbering for footnotes. The transcribed text, however, indicates by means of square brackets, the number or letter and page of the corresponding footnote within the original text.

* First published as Translators’ Preface to the work of Moreau-Lislet and Carleton in New Orleans by James McKaraher, 60 Chartres Street, in 1820.
made and published, and the degree of authority ascribed to them in Spain, and the countries under her dominions.

Spain and Portugal, before they submitted to the power of the Romans, were governed by no other laws, than their customs and usages, traces of which are still to be found in the codes subsequently enacted by the kings of Spain. But after these countries were rendered tributary to the Roman empire by Augustus Cæsar, they were governed by the civil law alone, until the Romans themselves were expelled by the Goths, about the year 466 of the Christian æra. These barbarians, more devoted to arms than to science, suffered several years to elapse before they substituted a system of their own laws to those of the Romans.

Several Spanish authors who have treated this subject, and among others Don Juan Sala⁠¹ pretend that the Goths for some time after their conquest, permitted the Spaniards to preserve the civil law, to which they had been accustomed, and which was then contained in the Theodosian Code, or in an abridgement, (el Breviario), made from it, from the Gregorian and Hermogenian codes, and from the decrees and institutes of Paul and Caius, by the Gothic jurisconsult Anien, about the year 506, under the reign of king Alaric.⁠²

All these authors, however, agree that Euric who died about the year 483, and the first king of that dynasty, established a small number of laws, which were the first that could be called Spanish. But under his successors, and particularly Leogivilde, they multiplied so fast, that Resevinde, desirous of effacing every vestige of Roman power, prohibited the use of the civil laws, by imposing a fine of thirty pounds upon every person who should cite them in court, and the judge who should found his judgments upon their authority. This barbarous severity was afterwards

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¹. In the abridged history of Spanish laws, entitled Illustación del Derecho de España [note 1, at iv].
². The Pandects of Justinian had already disappeared in Italy, at the period of the incursions of the barbarians [note 2, at iv].
pushed so far as to inflict the punishment of death for that
offence.3

Yet literature began early to make progress among the clergy,
and the intimate union that prevailed at that time between them and
the government, soon produced divers rules and regulations in the
national councils, upon subjects both of a spiritual and temporal
nature: these together with others, enacted by the Gothic kings,
formed the Fuero Juzgo which was published about the year 693.

This code, the first made by the Spanish nation, is divided into
twelve books, and each book into different, titles. It was first
published in Latin under the title of Forum Judicum, and was not
translated into Spanish until the reign of Ferdinand III in the
thirteenth century. It was originally called the Book of the Judges,
(El Fuero de los Juéces) which name has been changed by a
corruption of words, into Fuero Juzgo, the title under which it was
printed in Madrid in the year 1600.

But about the year 714, soon after the publication of this code,
its authority was almost entirely overthrown by the invasion of the
Moors, who conquered with incredible rapidity, the whole of
Spain, except the Asturias, whither the Spaniards who had escaped
their fury, fled under Don Pelage, a descendant of the Gothic
kings. These invaders were not driven from the kingdom, until
about the year 1492, when Grenada, their last refuge, was taken
after eight centuries of almost continual warfare.

During this bloody struggle, the kings of Spain, having
frequent need of the nobles and grandees who followed them in the
field, were under the necessity of granting them many important
privileges, and of establishing a code in their favour. Hence the
origin of El Fuero de los hijos dalgos, the code of the nobles. So
likewise, in order to encourage those who fought the enemy under
their banners, or to people the conquered countries, they granted to
various towns and surrounding territories, the enjoyment of certain

3. Auto 1. Tit. 1. lib. 2 of the Autos Accordados, make mention of
this law [note 1, at v].
particular customs, and usages, from which great confusion often arose in the construction and application of the laws. In order to remedy this evil and establish a uniform mode of judicial procedure in civil matters, \textit{El Fuero Viejo} the ancient code was published in the year 992. This code is divided into five books, containing the ancient customs and usages of the Spanish nation, and rules and regulations concerning the administration of justice. But its promulgation, far from affording a remedy to the evil it was intended to cure, served only to increase the confusion which distracted all the tribunals of the kingdom; some of them taking for the rules of their decision, the laws of the \textit{Fuero Juzgo}, and others those of the \textit{Fuero Viejo}, and others again deciding according to the ancient customs.

In this state of things, the disorder rose to such a height, that Ferdinand the III. was under the necessity of directing that the \textit{Fuero Juzgo} should prevail in the kingdom of Castille; while the \textit{Fuero Viejo} should remain in force in the kingdom of Leon. Such was the distracted state of the laws of Spain, when Alphonso the IX. generally called the wise, or the learned; wishing to establish a uniform system of jurisprudence in all his dominions, published a third code under the name of the \textit{Fuero Real}, the Royal Law.\footnote{The Fuero Real is, to the Partidas, what the institutes are to the Digest of Justinian [note a, at vii].} This code may be considered as the precursor of the laws of the Partidas which we have translated, and which that prince had already ordered to be compiled. The Fuero Real is divided into four books, each of which contains several titles.

The Partidas, of which we will now speak, is the most perfect system of Spanish laws, and may be advantageously compared with any code published in the most enlightened ages of the world. These laws, the unceasing subject of the praise and admiration of every jurist acquainted with them, were compiled in imitation of the Roman Pandects, and may be considered as the digest of the laws of Spain, containing in addition to the canonical ordinances,
all the civil laws in force in that kingdom at the time of their promulgation. Ferdinand the III. had projected that great work, in order to prevent confusion and diversity in the jurisprudence of the empire, by establishing uniform rules of legal decision. But the sudden death of that monarch prevented the execution of a project which was afterwards accomplished by the wisdom of Alphonso, his son and successor. Alphonso nominated four Spanish jurisconsults to whom he committed the execution of the intended work.— These enlightened men, whose names have not come down to us, entered upon this arduous task in the year 1256, and actually accomplished it, in the space of seven years. They borrowed from the canonical laws of Spain, all those parts of the new code which relate to matters of a religious nature. Those which relate to civil and criminal matters, were taken from those usages and customs which the lawgiver thought fit to preserve, but principally from the Roman laws, which the compilers freely translated almost literally, although they carefully avoid confessing that fact.5

Owing to the perpetual wars and revolutions by which Spain was agitated, the laws of the Partidas were not promulgated until the year 1343, during a session of the Cortez held at Alcala de Henares, under the reign of Alphonso the XI. And even after their promulgation, the death of that prince prevented them from going into full operation until the year 1505, when Ferdinand and Joanna gave them their sanction, at the Cortez held that year in the city of Toro.

The laws of the Partidas are divided into seven parts, *Siete Partidas*: from this division, this code takes its name. Each part is divided into titles, and each title subdivided into laws. The first contains the canonical laws and liturgy of the Catholic church. The second is a summary of the ancient usages and customs of the

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5. The compilers often speak of the ancient sages, *Sabios Antiguos*, whose maxims they borrowed, and by referring to the Civil laws, it is evident that the sages alluded to, are the Roman jurists [note a, at viii].
Spanish nation, and of the rules of its government, and political administration. The 3d, 5th and 6th Partidas, contain an abridgement of all the principles and maxims of the Roman laws, on the subject of actions, suits, judgments, contracts, successions, testaments, minority, and tutorship; together with decisions on points which had been considered as doubtful, by the commentators on the civil law. The 4th is a compendium of the laws relative to betrothings and marriages, and of those which treat of the social relations of man, as regards paternal power, legitimate and illegitimate filiation, freedom, slavery, and enfranchisement. The 7th treats of crimes, offences, and punishments, and concludes, as do the Pandects, by two titles, the one, on the signification of words, and the other on the rules of law.

Since the promulgation of the Partidas, some of its provisions have been abrogated, or amended by subsequent laws, particularly by the laws of the Recopilacion of Castille, of which we shall presently speak. But these alterations have not, in any way, changed the great principles of natural law, contained in the Partidas. They relate to certain laws only of a positive nature, which nations establish, modify, and repeal, as their wants, interests, or situation may require.

The Partidas may therefore be considered as containing the fundamental principles of the laws of Spain. And when we reflect that they were compiled amid the tumult of arms and almost perpetual wars waged by that kingdom against the Moors, and in an age when most of the states of Europe were without any regular systems of jurisprudence, our admiration of this code is raised to the highest pitch. Yet we should reflect that even at that time, the Spaniards were preparing themselves to act the wonderful part they sustained under the reign of Ferdinand and Isabella, and the still

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6. As these two first parts have no relation to our system of government, they have not been translated [note a, at ix].
7. As we proceed with the translation of the laws of the Partidas, we shall point out the alterations they have undergone, from laws of a subsequent date [note a, at x].
more brilliant one of Charles V; that the spirit of chivalry had already softened the asperity of early manners; that the Moors had introduced in Spain, the arts, and the love of letters, which they had brought over with them from Africa, and that the pandects of Justinian had, some time before, been found at Amalfi, and were everywhere studied, so as greatly to facilitate the execution of this work.

A learned writer\(^8\) speaking of the Partidas observes,

“we find in every page of that work the highest wisdom, and the most stern justice. It gave to the monarch under whose auspices it was executed, titles more just to the epithet of wise, bestowed upon him by his contemporaries, than his astronomical researches, and physical knowledge, however surprising the one and the other may have been considered, in an age, when all studies were so much disregarded. It is in that precious code, that we must seek the early treasures of the Spanish language; there we shall find the characteristic features of that idiom, at a time when it retained, yet a simplicity, and turn, and form of expression, which gave it more freedom and ease than it now possesses, though written in an age, when the language yet unpolished, preserved much of its primitive rudeness. We however perceive in the stile of the work, a grace, a facility, worthy the elevated sentiments that pervade it; and in spite of some defects, we believe, that the Spanish language, such as it was, when the Partidas were compiled, had already arrived to a degree of perfection which the Italian writers did not attain till many years after.”

In the Partidas are contained these remarkable words: “despotism tears the tree up by the roots; a wise monarch prunes its branches.”

We shall pass rapidly over the different laws and ordinances promulgated in Spain after the appearance of the Partidas, until the

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promulgation of the Recopilacion of Castille, as all those laws and ordinances are to be found in that work.

During the period which elapsed from the commencement of the Partidas, to their first publication in the Cortes of Alcala in the year 1348, the laws relative to the forms of legal proceedings (del Estilo) made their appearance in the year 1310. That work contains two hundred and fifty laws, not divided however, into books or titles. Most of them relate to suits civil and criminal; to those who are parties to them; to the proofs to be given, as well as to the formalities to be observed in conducting them. It is for that reason they are called the laws of judicial proceedings, because they relate to the usages and customs of courts, and to the manner of conducting causes in them.

Since the publication of the laws of the Partidas, at the Cortes held at Alcala, and particularly since the Cortes of Toro in 1505, several laws and rescripts were published, as circumstances required. When their numbers increased, they were, at several epochs collected in one or more volumes, in virtue of a royal ordinance which gave them a legislative sanction. It was then that the ordinance of Alcala, the laws of Toro, and the royal ordinance were published.

The ordinance of Alcala (El ordinamiento de Alcala) appeared in 1348, the very year the Partidas were first published. This ordinance is divided into 32 titles, and each title is subdivided into laws, relating to the manner of proceeding in courts; regulating certain contracts and wills; and providing for the suppression of crimes, and their punishment by adequate penalties.

The laws of Toro, (Las leyes de Toro) eighty in number, were published at the Cortes held in the city of Toro, in 1505, with a view to regulate the forms to be observed in making wills; to establish rules relative to testamentary successions, and successions ab intestato; to fix the donations of the third and fifth
parts;\(^9\) the manner of succeeding to estates by the law of primogeniture in Spain, and the alimony due from the father to his illegitimate children. These laws are inserted in the Recopilacion of Castille, in the titles in which they are classed, according to their order.

The Royal Ordinance (\textit{El ordinamiento real}) made in imitation of that of Alcala, was sanctioned, and published by Ferdinand and Isabella in 1496. Don Juan Sala\(^{10}\) pretends that this ordinance has never received the royal sanction, though it appears to have been drawn up in obedience to the order of the sovereign. But this opinion is not embraced by other Spanish writers, among whom the author of the theatre of Spanish legislation, positively asserts, that the Royal Ordinance was authorised and published by Ferdinand and Isabella.

Without deciding this controversy, it will suffice to observe, that all the Spanish jurists agree that in the tribunals of Spain, this ordinance, of which the greatest part has been inserted in the Recopilacion of Castille, is received as the highest authority. It is divided into eight books, which are again divided into titles.

We have now arrived at the code of laws, the Recopilacion of Castille (\textit{Las leyes de Recopilacion}) which completes the system of Spanish legislation. It was published in the year 1567, under the authority of Philip II, who gave it the legislative sanction, and caused to be inserted in it the laws of the ordinance of Alcala, and those of the Royal Ordinance, which had not been repealed as well as the whole of the laws of Toro, and those which had been promulgated in the intervening period. From the year 1567 to 1777, several new editions of the Recopilacion have appeared, to

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9. Donations which a father or mother might make of a part of their estate, to some of their children, to the prejudice of the others—these were called donations of the third and fifth part, because they could not exceed these proportions [note a, at xiii].

which the different laws, edicts and receipts published since its first promulgation, have been added at different times.

The title of Recopilacion (compilation) was equally given to the (Autos Accordados); that is to say the edicts and orders in council, which the king sanctioned and caused to be published by virtue of a Royal Decree, in one volume, divided into books and titles, in the same order which had been observed in the publication of the Recopilacion of Castile. This work was published for the first time, in the year 1745, and now forms the last volume of the Recopilacion, with which it has been incorporated, in the 4th edition, with some unimportant additions. The two works are each composed of nine books, divided into various titles.

The most important book of the Recopilacion is the 5th, which treats of marriage and dowry; of the single and married life; of wills and successions; of the mode of dividing estates; of donations of the third and fifth parts; of the property and gains acquired by the husband and wife during marriage, and of the cession of goods by debtors.

Spain possessing immense dominions in North and South America, felt the necessity of regulating the government of those provinces, and of securing, by general and permanent laws, the obedience and welfare of the nations who inhabited them. The scattered laws therefore which had been promulgated for that purpose, at different periods, were collected, and digested by order of Phillip IV. in the same form as the Recopilacion of Castile, under the title of the Recopilacion of the Indies, (La Recopilacion de las Indias) and published in the year 1661.

We have thus given a concise view of the history of Spanish jurisprudence, as relates to spiritual and temporal matters. It is, however, proper to remark that the different codes, of which we have spoken, contain only general principles of law, leaving all questions which arise, concerning commercial and maritime affairs, to be decided by local laws. The Consulado del Mare, governs in all those ports in Spain, which are situated on the
Mediterranean sea, where also the Capitulations of Barcelona are observed in all matters relating to insurance; while the Ordinance of Bilbao is the law in all maritime causes arising on the shores of the Atlantic. Commercial and maritime controversies, arising in the Indies, form a third class, and are governed by what is called the Contractacion, or Consulate of Seville and Cadiz, and by the ordinances and regulations of the Supreme Council of the Indies.¹¹

After this short account of the several codes of the laws existing in Spain, it is now proper to say something of the degree of authority, they respectively enjoy, in the tribunals of that country; and especially in what manner they are to be received, and enforced in the courts of this state, in matters of a civil nature.

The third law, title 1st, book 2d, of the Recopilacion of Castille, prescribing the manner in which the laws of that code, of Partidas and of other codes, are to be observed, declares that the first in order, are the laws of the Recopilacion of Castille, and those that have been subsequently enacted: next the laws of the Fuero Real, and the municipal customs; and finally, the laws of Las Siete Partidas. This law does not speak of the Recopilacion of the Indies, which was not compiled until long after the promulgation of the Recopilacion of Castille.

Murillo, an able Spanish law writer, speaking on that subject in his treatise entitled Cursus Juris canonici, Hispani et Indici, after having repeated what is said in law 3d, title 1, book 2 of the Recopilacion of Castille, says that the laws of the Recopilacion, of Toro, and the Partidas, ought to be enforced by judges, in all causes submitted to their decisions, even when it is alleged, that they have not been usually observed in the place. But that when the authority of the Fuero Real and of the laws of Estilo is invoked, it is necessary to prove that they are conformable to the usages of the

¹¹. Azum’s Maritime Law, vol 1, p. 404, No. 5 [note 1, at xvi].
place, unless they be found in the Recopilacion; for then it is only necessary to plead them.  

Murillo speaks likewise of the manner in which the Spanish laws ought to be received in both Indies. On that subject he says, that in the Spanish dominions in the Indies, courts of justice should first have recourse to the Royal and Special Edicts (Cedulas,) which may have been directed to the chancery of the city or place where the cause is pending; and if there are none, they should then decide according to the common law, which is to be found in the laws of the Recopilacion of the Indies: and where these last are silent, recourse must be had to the Recopilacion of Castille and the Partidas. This author also observes, that the rescripts, or Royal Ordinances, are of no authority in the Indies, unless they have been directed to Supreme Council of these countries: and finally he thinks (what must be considered as a general rule for all the Spanish dominions, either in Europe or in the Indies) that when all the royal laws are silent, it is better for judges to have recourse to the commercial than the civil or Roman laws; because it was formerly enacted in Spain, that whoever would cite in court the Imperial or Roman laws, should suffer death; and that therefore, the civil law could not be cited, as a law, but only as written reason. Murillo, Vol. 1, No. 23, p. 9.

It remains now to state, how it happened, that the laws of Spain, are still in force in Louisiana, since its transfer to the United States of America.

12. Such is the opinion of Azevedo, in his commentaries on the Recopilacion of Castille. This appears to be now a settled point, notwithstanding there are some authors who support the contrary doctrine. So likewise it has been determined, by the supreme court of this state, in the case of Pizerot vs. the heirs of Meuillon, 3. Mart. Rep. page 120 [note a, at xvii].

13. It appears that much of the rigor of the ancient laws of Spain on this subject, has ceased, as the study of the civil law, was tolerated in the Universities of that kingdom, even previous to the Edict in Council (Auto) of the 24th May 1774, which ordered, that the Royal Code, or Statute, should be taught in the Universities, together with the Roman laws. Auto 3, tit. 1, book 2, of Los Autos Accordados [note a, at xviii].
The customs of Paris and the ordinances of the kingdom, were observed in Louisiana, while it remained under the dominion of France, and by them all civil and criminal suits were determined. Justice was administered by a Supreme Tribunal composed of several judges, called the Superior Council, (Le Conseil Supérieur) and one attorney general. This state of things, existed until the month of August 1769, when count O'Reilly took possession of that country, in the name of the king of Spain, in virtue of the treaty of cession, which France had made to that power. It is well known, that this treaty, though concluded and signed on the 3d of November 1762, was not made public before the 23d of April 1764; and that Spain did not take actual possession of the country before the year 1769, when count O'Reilly arrived, vested with extraordinary powers, and at the head of three thousand regular troops. The disaffection which the inhabitants of the country manifested when they heard of the treaty of cession, and that they were to pass under a foreign government; and the opposition which they intended to make, as it was supposed, to the landing of the Spanish troops when they arrived at the mouth of the Mississippi, gave rise to excessively rigorous measures against them, on the part of O'Reilly; one of which was to cause to be arrested, twelve of the most respectable citizens of New Orleans, six of whom paid with their lives, for the affection which they had shown for their mother country, while the others were thrown into dungeons at Havana. It was under these circumstances that O'Reilly issued a proclamation, changing the form of the government of Louisiana, abolishing the authority of the French laws, and substituting those of Spain, in their stead. This proclamation which was

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14. The father of James Villere, the present governor of this state was among the number of the victims [note a, at xix].

15. As this proclamation has become very scarce, we here insert a translation of it.

"Don Alexander O'Reilly, Commander of Benfagan of the Order of Alcantara, Lieutenant-General of the Armies of his Majesty, Inspector General of the Infantry, and by Commission, Captain General of the Province of Louisiana."
accompanied by an ordinance, establishing the several branches of
the new government of Louisiana, and defining their respective
powers, appears to have been published on the 26th November
1769. From the time of its promulgation until now, the French laws
ceased to have any authority in this country, and all controversies
were tried and decided conformably to the Spanish laws, by a

“Whereas, the prosecution which took place in consequence of the rebellion
raised in this colony, have fully proved, the part and the influence the council
had therein, by supporting contrary to their duty, acts of the greatest atrocity,
while it was incumbent on them, to have used their endeavours, to maintain the
people in that fidelity and subordination, which they owe to their sovereign; for
these reasons, and wishing to prevent such evils for the future; it has become
indispensable, to abolish said council, and to establish in its stead, the form of
the political government, and administration of justice, which our wise laws
prescribe, and by all which all the states of his majesty in America, have ever
been maintained in the most perfect tranquility, content, and subordination. For
these considerations using the powers, which the king our Lord; (whom may
God preserve) has confided in us by a patent, issues as Aranjuez the 16th of
April of this year, to establish in the army, the police, and in the administration,
of justice, and of his finances, that form of government, dependance and
subordination, which is consonant with his service and the happiness of his
subjects in the colony; we do hereby establish in his royal name a city council or
cabildo, composed of six perpetual regidors, agreeably to the law 2d. tit. 10,
book 5, of the Recopilacion of the Indies, and among whom shall be distributed
the offices of Alfarez Royal, Alcalde, Mayor Provincial, Alguazil Mayor,
depository general, and receiver of the Penas de Camara or fines accruing to the
Fisc; and these shall elect on the first day of every year, two judges who shall be
called, ordinary alcaldes, a syndic, attorney-general, and an administrator of the
city rents, and taxes, such as they are established by our laws, for the good
government, and administration of justice. And whereas the want of lawyers in
this country, and the little information these new subjects have of the laws of
Spain, may render their faithful observance very difficult, which would be
entirely contrary to the intention of his majesty, we have thought it useful, and
even necessary, to cause an abstract of these laws, to be formed, in order to
serve for the instruction of the public, and as elementary rules for the
administration of justice, and municipal government of this city, until the
knowledge of the Spanish language can be introduced, and thereby afford to
every one, by the reading of these laws, the means of extending their
information in that matter; and therefore, and under the good pleasure of his
majesty, we do order and command, that all judges, cabildoes, and their officers,
do comply punctually with that, which is prescribed in the following articles.
(here follows the ordinance establishing the new government, and their powers,
all terminating with this subscription.)

“At New Orleans, on the 25th of November 1769.
“Signed) DON ALEXANDRE O’REILLY,
“Printed by order of his excellency Francois Xavier Rodriguez, secretary to the
expedition.” [note a, at xx].
tribunal; of which the governor was the only judge, though he was bound to take the advice of a lawyer (*lettrado*) appointed and commissioned to that effect, by the king of Spain, and called the Auditor of War. From all the judgments of the governor’s tribunal, there was an appeal to the Royal Audience, sitting at Puerto Principe, in the Island of Cuba, and presided by the capt. general of that Island.

The return of Louisiana under the dominion of France, and its transfer to the United States, did not for a moment, weaken the Spanish laws in that province. The French, during the short continuation of their power, from the 30th November to the 20th December 1803, made no alteration in the jurisprudence of the country; and the government of the United States, left the task of legislation to the people of Louisiana themselves, giving to them, the right to make whatever changes they might deem necessary in the existing system of their laws, (see sect. 11, of the act to divide Louisiana into two territories, passed by Congress on the 26th of March 1804, and the fourth section of another act passed the 2d March 1805, to provide for the government of the territory of Orleans. See likewise sect. 4 of the schedule annexed to the constitution of this state.)

However the legislature of the territory of Orleans, as early as the year 1807, considering that the ancient laws secured to the inhabitants of Louisiana by the acts of Congress, were written in a foreign language, and contained in books difficult to be procured, ordered a digest of those laws to be made and prepared in the English and French languages, by two jurisconsults. This digest was adopted, by an act passed the 31st March 1808, but was not promulgated before the month of November of the same year, when printed copies of it were officially sent to all the tribunals of the territory of Orleans. This code commonly known under the name of the Civil Code, is therefore become a part of our statute laws. But it is easy to perceive, that a work of that nature, however excellent it may be, can only contain general rules and abstract
maxims, still leaving many points doubtful in the application of the law; hence the necessity of going back to the original source, in order to obtain new and additional light. It was moreover perceived that the Civil Code did not contain many and important provisions of the Spanish laws still in force, nor any rules of judicial proceedings; that the statutes regulating these proceedings had proved insufficient; and that the Superior Court had in divers instances, and particularly in the case of Cottin vs. Cottin, Martin’s Rep. vol. 5, p. 93, determined that the Spanish laws “must be considered as untouched, whenever the alterations and amendments introduced in the digest do not reach them; and that such parts of those laws only are repealed, as are either contrary to, or incompatible with the provisions of the code.” It thus appeared that a much greater portion of the Spanish laws remained in force than had been at first supposed. It was then doubtless the desire of the legislature to spread generally the knowledge of such of these laws, as are not to be found in the Civil Code, or in the digest of our statutes, that induced them to make provisions for the printing of this translation. They felt the force and justice of that acknowledged rule of reason that in order to inforce obedience to the laws, it is necessary that they should be fully understood by the people.

The plan pursued by the translators in this work is very simple. Each title of the Partidas, is preceded by a list of the titles of the Roman and Spanish laws, and of the Civil Code, relative to the subject it treats of, together with an index of the articles therein contained.

Each law is accompanied by a note, referring to the corresponding laws of the Recopilacion, and of the *Autos Accordados* according to the quotations contained in the edition of the Partidas, published with the commentaries of Gregorio Lopez. The Recopilacion of Castille will be designated by the letter R, followed by Arabic ciphers, the first designating the law, the second the title, the third the book referred to. The *Autos*
Accordados, will be designated by the word Auto, followed by the number of the law, title, and book, cited.

The laws in accordance, or at variance, with those of the Civil Code, are likewise accompanied by notes, referring to the provisions of the latter, which treat of the same subject. The Civil Code will be designated by the letter C, followed by ciphers, the first designating the law, the second the title, and the third the book. When no reference is made to the Civil Code, it is to be inferred, that it contains no law similar to that of the Partidas.

As it is often a difficult task, even for lawyers, to determine, whether a law is in force or not, the translators have thought proper to give the translation of all those laws which have not been expressly repealed by the legislature, or which are not repugnant to the constitution of the United States, or to that of this state, leaving to the proper tribunals to determine whether they are in force or not.

When a proper term could not be found in the English language, to render the legal sense of a Spanish word, the translators have made use of the Spanish word itself, after giving an explanation of it, whenever its meaning is not set forth in the law, in which it is used. And when the term could not be translated by one precisely equivalent in English, the word in Spanish is given between parenthesis, in order that the reader may determine for himself.

When the notes found in various parts of this translation, are quoted from Spanish authors, the names of such authors are given. Those which are not accompanied by any name, are the notes of the translators themselves.

Such is the plan adhered to in this translation, which will be terminated by a general index of all the matters contained in the two volumes of which it will consist. The particular care and attention which the translators have bestowed, in order to render this work as perfect as possible, will, they hope, secure to them, the praise of having faithfully discharged the honorable task imposed
on them by the legislature. They will consider themselves as fully
rewarded for their labour, if they are so happy as to have been the
means of making the public acquainted with the justly celebrated
code of the Partidas, which, if it is not the best, is certainly equal to
any the world has ever seen.