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GOLDEN JUBILEE OF THE CENTER OF CIVIL LAW STUDIES:
CELEBRATING THE DEVELOPMENT OF LEGAL SCIENCE IN LOUISIANA

Agustín Parise*

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I. INTRODUCTION

Louisiana may be considered a “civil law island” partially surrounded by a “sea of common law;” a status that has to be safeguarded to survive.1 The Center of Civil Law Studies2 (CCLS)

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The author of this article is indebted to Alain A. Levasseur, Olivier Moréteau, and Julio Románach, Jr. for the information they shared on the history of the CCLS. He is also indebted to Alexandru-Daniel On for reading an earlier version of this article and to Jennifer Lane for her suggestions and careful editorial work.

at Louisiana State University (LSU) has for 50 years acted as one of the guardians of that status. It has also helped develop scholarship in that southern state of the U.S.: a legal science that responds to the civil law needs of a jurisdiction surrounded by neighboring common-law jurisdictions. The CCLS has further acted for 50 years as a courier of civil law knowledge between that island and the rest of the civil law world. Different actors helped the CCLS deliver and receive civil law knowledge, while they also assisted in the progress of legal science in Louisiana.

This article aims to address some of the landmarks in the history of the CCLS, and hence some actors will be mentioned. It must be noted ab initio that many actors will not be mentioned in the pages that follow. That omission should in no way be interpreted as a dismissal of some actors or their activities, it only corresponds to the selection of landmarks made by the author aiming to offer a balanced overview of the past 50 years: it is impossible to offer an account of all efforts.

The article is divided into three main parts. First, the article mentions the origins of the CCLS. The article therefore tackles the creation of the CCLS in 1965. Second, the article mentions some of the members of the CCLS. Naturally, the directors and other affiliates are mentioned in that part, reflecting that the academic contributions of the CCLS are the result of team work. Third, the article attends the academic corpus offered by the CCLS. In that part the article elaborates on the discussion forums, publications, and legal education efforts in which the CCLS is involved. The article is enriched by an appendix that includes a history of the CCLS by Saúl Litvinoff. That account was originally intended for the website of the CCLS and was written by an iconic former

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2. CCLS, in this article, refers indistinctly to the Center of Civil Law Studies and the Institute of Civil Law Studies. The distinction is explained infra in II of this article.
director of the CCLS, serving as a first-hand exposition of landmarks in the history of the CCLS.

II. ORIGINS

The CCLS can be traced back to the year 1965. The LSU Law Center was particularly active that same decade in fostering studies on civil law and comparative law, with professors visiting in Louisiana and abroad, such as Robert A. Pascal, who visited Rome in the period 1963-1964 to participate in comparative law seminars as a Fulbright scholar. The Louisiana State Law Institute was also active that same decade on translation efforts to enhance the civil law in the English-speaking world. There was a renaissance of the civil law in Louisiana in the 1960s and 1970s. Several events accompanied and/or triggered that renaissance: implementation of comprehensive civil law courses, elaboration of several volumes of the *Louisiana Civil Law Treatise Series*, translations of seminal French texts, ignition of the revision of the Louisiana Civil Code, and the resulting interest of legal actors in the study and application of the civil law in Louisiana. The context was favorable for the creation of an institute that would devote itself to the study of the civil law and comparative law.

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3. See generally the early account in Paul M. Hébert, *Background, Aims, and Objectives of the Institute of Civil Law Studies LSU Law School*, 26 LA. L. REV. 621 (1966) [hereinafter *Background, Aims, and Objectives*].

4. Originally referred to as LSU Law School.


8. Id.

9. Id.
Paul M. Hébert—who was for many years Dean of the LSU Law Center—offered encouragement and support, and was very much interested in the establishment of an institute that would accompany that renaissance.

An Institute of Civil Law Studies was chartered by John A. Hunter—President of LSU—on August 4, 1965. The objectives were indeed to serve as a courier of civil law knowledge between the island and the rest of the civil law world. The newly-created institute also aimed to develop the study of civil law and comparative law. Hébert stated in 1966 that the new institute marked “an initial step toward achieving a better understanding of Louisiana civil law in terms of its relationship to the entire system of which it claims to be a part.” He also stated that same year that:

... there exists a long recognized need in Louisiana for institutionalizing the intimate relationship existing between Louisiana’s private law and the vast world of the civil law, represented on the contemporary scene by the advanced legal systems of Europe and the systems of Latin America oriented to the Roman tradition, and, historically, by the chronicle of development in most parts of the Western World formerly in the Roman Empire.

10. For additional information on the life and work of Paul M. Hébert, see the special supplement to issue 3 of volume 37 of the LOUISIANA LAW REVIEW (1977).
12. It should be noted that the literature refers also to Institute of Advanced Civil Law Studies. See, for example, HARGRAVE, supra note 5, at 191.
14. HARGRAVE, supra note 5, at 191.
15. Id.
17. Id.
The mission of the Institute of Civil Law Studies was expanded in 1976.\textsuperscript{18} That expansion was followed by a change in the name of the institute, which was thereafter the Center of Civil Law Studies.\textsuperscript{19} Joseph Dainow, who acted as the first director, indicated in 1977 that “the name change [was] incident to expansion of the work and program, with increasing activity related to civil law, comparative law, and civil code revision.”\textsuperscript{20}

III. Members

The CCLS consists of a team of professionals who joined their efforts to fulfill the objectives that were chartered as early as 1965. Article 2 of the presidential charter established that amongst the objectives of the CCLS are: “to promote and encourage the scientific study of civil law in the modern world, its history, structure, principles and actualities with a view toward facilitating a better understanding of the civil law of Louisiana and other civil law jurisdictions and making it a better instrument of good order.”\textsuperscript{21} The objectives were more recently expanded to include “theoretical and practical activities, such as publications, translations, sponsorship of faculty and student exchanges, visiting scholars, seminars, and lectures.”\textsuperscript{22} The CCLS also “promotes legal education by sponsoring foreign students who wish to avail themselves of the opportunity of studying a mixed legal system and American students who wish to expose themselves to other legal systems.”\textsuperscript{23}

\textsuperscript{18} Hargrave, supra note 5, at 191.
\textsuperscript{19} Id.
\textsuperscript{20} Dainow, supra note 11, at 643.
\textsuperscript{21} Hébert, Background, Aims, and Objectives, supra note 3, at 622; and Hébert, Biennial Report, supra note 13, at 320.
\textsuperscript{22} See The Center of Civil Law Studies, available at https://www.law.lsu.edu/ccls/ (last visited August 18, 2015).
\textsuperscript{23} Id.
All directors of the CCLS, as their legal studies testify to, have had a solid formation in both civil law and comparative law. Dainow—from Canada—was the first director. He held degrees from McGill University (Canada), Université de Dijon (France), and Northwestern University (U.S.). His term saw the production of, amongst other remarkable academic results, treatises on the law of property and the law of obligations, while translations of seminal works of French doctrine were likewise developed.

Litvinoff—from Argentina—followed Dainow as director of the CCLS after 1975. He held law degrees from Universidad de Buenos Aires (Argentina) and Yale University (U.S.). The publication of volumes of the treatises continued during his term, together with the publication of several monographs on jurisprudence and Louisiana law. The third—and current director—is Olivier Moréteau. He has been director since 2005, and coming from France, holds degrees from Université Jean Moulin Lyon 3 (France). Moréteau is the first holder of the Russell B. Long Eminent Scholars Academic Chair at LSU, and during his term the Journal of Civil Law Studies was launched, while the ongoing translation of the Louisiana Civil Code into

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24. It should be noted that Hébert suggested that Yiannopoulos would be designated General Secretary of the Institute; while Carlos Lazarus would be Assistant General Secretary. That suggestion was made in an address delivered to the organization meeting of the Management Committee of the Institute of Civil Law Studies on December 16, 1965. See Hébert, Background, Aims, and Objectives, supra note 3, at 627-628.


French has been undertaken. Alain A. Levasseur acted as associate director of the CCLS soon after the appointment of Litvinoff and until the creation of the Center for European Studies at LSU. He holds law degrees from Université de Paris (France), Tulane University (U.S.), and honorary degrees from Université d’Aix-Marseille (France) and Université de Paris Panthéon Assas (France). Amongst his many works, beyond the scope of the CCLS, are the *Louisiana Civil Code Précis Series* and the *Dictionary of the Civil Code*.

A number of secretaries, assistants to the director, and coordinators excelled in implementing and facilitating the daily activities of the CCLS. Jude Rouse was secretary until the late 1970s, while Tina Rathcke and then Sandra Saale occupied the position from the early 1980s until mid-1990s. The CCLS also had assistants to the director. In the period of the 1970s-1980s, at least four assistants were involved in the activities and academic efforts of the CCLS: Nancy Dunning, Alejandro M. Garro, Mary Elizabeth Paltron, and Emily Ziober. The CCLS benefited likewise.


34. For additional information on the *Dictionary of the Civil Code*, see The Russell Long Chair and CCLS Newsletter, No. 31, Dec. 2014, at 1.

35. Assistants to the director were later referred to as assistant directors.

36. *See* the reference to the work of Dunning in the preparation of the special issue of the *LOUISIANA LAW REVIEW* that collected papers presented at a Louisiana and Spain Commemorative Congress.


37. His term as assistant to the director produced, amongst other scholarly endeavors, the publication of Alejandro M. Garro, *La registración inmobiliaria en el Estado de Luisiana*, 846 REVISTA NOTARIAL 7 (1979).
from the efforts of coordinators. Jennifer Lane, Allison Sheffield, and Patricia Whittaker have been coordinators, and have been involved in a wide range of projects. For example, Ms. Lane was involved in the celebrations organized on the occasion of the Bicentennial of the Digest of 1808, which involved multiple events that aimed to highlight the importance of that seminal Louisiana legal text.  

Research associates, translators, contributing fellows, and visiting scholars have been affiliated with the CCLS. Research associates joined the different directors in increasing the academic impact of the CCLS in the legal discourse of Louisiana and beyond. The following professionals should be mentioned from the team of research associates attached at different times to the CCLS: Alejandro D. Carrió; Afif Jebara; Richard H. Kilbourne, Jr; Alexandru-Daniel On; Agustín Parise; Nina Nichols Pugh; and Julio Romañach, Jr. The development of scholarship

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41. His term as research associate produced, amongst other scholarly endeavors, the publication of On, supra note 6.

42. His term as research associate produced, amongst other scholarly endeavors, the publication of Agustín Parise, The Place of the Louisiana Civil Code in the Hispanic Civil Codifications: Inclusion in the Comments to the Spanish Civil Code Project of 1851, 68 LA. L. REV. 823 (2008).

43. Her term as research associate produced, amongst other scholarly endeavors, the publication of Nina Nichols Pugh, The Evolving Role of Women in the Louisiana Law: Recent Legislative and Judicial Changes, 42 LA. L. REV.
in Louisiana benefited likewise from the work of translators. More attention will be devoted to the translation efforts of the CCLS later in this article, yet it is important to mention at this point the early work of David Marcantel, Barbara Mayes McManis, and Patricia McKay, and the more recent work of Laura Castaing, Laurie Chalaux, Sarah Charlat, Oriane Defoix, Delphine Drouard, Anne-Marguerite du Doré, Giorgia Fabris, Charlotte Henry, Jean-Pierre Hufen, Anne Perocheau, Melissa Richard, Anne-Sophie Roinsard, Ivan Tchotourian, and Sara Vono. Contributing fellows expanded the role of the CCLS as a courier of civil law knowledge. A number of fellows, including Matthias Martin, Michel Séjean, and Dan Stigall, offer perspectives on the civil law beyond the borders of Louisiana. Comparatists and civilians from across the globe have been visiting scholars at the CCLS, hence promoting and encouraging “the scientific study of civil law in the modern

1571 (1982). Pugh also acted as translator. See the reference to her translation work in Hawkland, supra note 36, at 1471.

44. Romañach later blazed a prolific path as a translator. It has been said that his translations “are indispensable to the Spanish-impaired Attorney.” Frank Christian Olah, Book Reviews, 37 U. M IAMI INTER-AM. L. REV. 597, 599 (2005).

45. See infra IV.B of this note.

46. The CCLS has a long tradition of involving students in academic work. The translation of Marcantel in the article by Imre Zajtay provides an early example. See Imre Zajtay, Reception of Foreign Laws and Unification of Law, 35 LA. L. REV. 1117 (1975).


48. In the early 1980s, McKay was credited with undertaking some translation work under the auspices of the CCLS, such as the translation into English of parts of the work of Raymond-Théodore Troplong on prescription. See Timothy Baucum Burnham, A Restricted Application of Civil Code Article 3482: Bartlett v. Calhoun, 43 LA. L. REV. 1221, 1224 (1983).

49. These contributors were involved in the translation of the Louisiana Civil Code into French. See The Russell Long Chair and CCLS Newsletter, No. 19, June 2011, at 2; The Russell Long Chair and CCLS Newsletter, No. 25, April 2013, at 2; The Russell Long Chair and CCLS Newsletter, No. 29, June 2014, at 1-3; and The Russell Long Chair and CCLS Newsletter, No. 33, Sept. 2015, at 1.

50. It should be noted that Martin and Séjean were also involved in translation projects at the CCLS.
The recent decade has also welcomed, amongst others, Ibrahim Abdouraoufi, Vanessa Barbaro, Seán Patrick Donlan, Aniceto Masferrer, Asya Ostroukh, and Tsvetanka Spassova. Members of the CCLS participated in the efforts and activities of associations beyond LSU. For example, on a number of occasions members of the CCLS were involved in the activities of the Association Henri Capitant des amis de la culture juridique française (AHC). The Louisiana Chapter of the AHC was created in 1978 and has since actively supported the development of the civil law in Louisiana. Michel Grimaldi, former President of the AHC, acknowledged early the role of the LSU Law Center at large in developing the civil law in English language, and facilitated the teaching of courses by French scholars such as Philippe Jestaz and Yves Guyon, who in 1996 taught a course on French Business Law in French. Furthermore, the Louisiana Chapter of the AHC, under the presidency of Levasseur, held the Journées Capitant on Law and Culture in Baton Rouge and New Orleans in May 2008, gathering scholars from across the globe, with support from, amongst others, the Organisation internationale de la francophonie.

The CCLS operates within the LSU Law Center, and the members interact with faculty and students. Furthermore, the Louisiana State Law Institute is located at the LSU Law Center, and naturally experiences close interaction with the CCLS.

51. Hébert, Background, Aims, and Objectives, supra note 3, at 622; and Hébert, Biennial Report, supra note 13, at 320.
53. Id. at 1315.
55. It has been stated, for example, that “the LSU Law Center houses the Louisiana State Law Institute and the Institute of Civil Law Studies. Both of these entities have been instrumental in the maintenance and growth of the civil
should be noted that the CCLS has an interdisciplinary approach in which it aims to attract members from other faculties at LSU. All members, internal and external, offer an amalgam of knowledge that helps achieve the objectives of the CCLS: they all serve as guardians of the civil law.

IV. ACADEMIC CORPUS

The members of the CCLS devote their efforts to the elaboration of an array of academic contributions that together form a corpus of knowledge. That corpus should contribute to the development of legal science, both in Louisiana and beyond. This part of the article examines the main academic contributions of the CCLS, reflecting that their scope is matched only by the broad interests of the different members.

The role of the CCLS as a courier of civil law knowledge requires the building of bridges between jurisdictions. Those bridges have been traditionally laid by means of discussion forums, publications, and legal education. In recent years, however, the technological developments have paved new ways towards bridging the island with the rest of the civil law world. The CCLS developed the Civil Law Online platform that serves as a means to showcase the rich repository of Louisiana scholarship, while also incorporating civil law resources from other sister jurisdictions. That platform includes several sources, of which the Digest Online can be hereby mentioned since it made the text and manuscript notes of the de la Vergne copy of the Digest of 1808—due to the generosity of Louis V. de la Vergne—freely available to

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readers across the globe. That text, being the predecessor of the Louisiana Civil Code of 1825, was one of the earliest efforts to present the laws of Louisiana in a systemized way.

A. Discussion Forums

The CCLS has had a long-standing tradition of hosting conferences and workshops that offer a forum for legal ideas to be exchanged. The results of those discussions may be considered useful tools for the development of legal science and many times result in the publication of articles and monographs.

A number of academic meetings can be traced to the first years of the CCLS. For example, a symposium on the law of obligations was sponsored by the Bailey Lecture Series and the CCLS in 1968. Later, in the early 1970s, annual in-depth seminars examining the role of judges in civil law jurisdictions were hosted, making a “considerable contribution [to] keep Louisiana [as] a civil law system in the best of the civil law tradition.” Further examples are found in the 1980s, when the CCLS was instrumental in hosting, for example, Family Law colloquiums.

The new century brought new forums for legal ideas to be discussed in Louisiana. A series of Civil Law Workshops were implemented, inspired by those held at McGill University. The Civil Law Workshops at LSU focus:

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58. For additional information on the Digest Online, see The Russell Long Chair and CCLS Newsletter, No. 7, March 2008, at 1.
60. See Books Received, 19 CATH. U. L. REV. 389, 389 (1970).
62. Barham, supra note 26, at 361.
64. Olivier Moréteau, Avant-Propos, 1 J. CIV. L. STUD. 1, 2 (2008) [hereinafter Avant-Propos].
... on a broad topic, based on the civil law but to be treated with large comparative and interdisciplinary perspectives. At every session, the contributor is invited to make a presentation, followed by an open discussion [, that is] open not only to the legal community, but also to attendees that are interested in interdisciplinary studies.65

The first series was named after Robert A. Pascal, who at age 100 is still actively interested in the civil law of Louisiana and beyond. The first series was held in 2006-2007, was edited by Moréteau and John Randall Trahan, and attended to the fundamental distinction between persons and things.66 The second series was named after Litvinoff, who as director of the CCLS had explored the civil law and common law divide. The second series was held in 2009-2010, was again edited by Moréteau, though that time working with Ronald J. Scalise, Jr., and focused on the cross influences, contamination, and permeability between those two systems.67 The academic corpus of knowledge that resulted from both series was published in the Journal of Civil Law Studies.68

The Tucker Lecture Series gained reputation as the most traditional forum for civil law discussion in Louisiana. Colonel John H. Tucker, jr. was behind the idea of establishing a research unit to enhance the study of the civil law within the LSU Law Center.69 His discussions with Hébert, early in 1965, resulted in the creation of the CCLS.70 Col. Tucker’s interest in the understanding

65. Id.
68. See volumes 1 (2008) and 3 (2010) of the JOURNAL OF CIVIL LAW STUDIES.
69. For additional information on the life and work of Tucker, see the Supreme Court of Louisiana Memorial Exercises, published in the special issue 5 of volume 45 of the LOUISIANA LAW REVIEW (1985).
70. Hébert, Background, Aims, and Objectives, supra note 3, at 621.
of the sources, doctrine, and meaning of the civil law was overt;\(^\text{71}\) and motivated a group of patrons to establish a lectureship in his honor.\(^\text{72}\) The successful efforts of those patrons were announced to Tucker on the occasion of his birthday on February 25, 1971.\(^\text{73}\) Thirty-eight distinguished scholars have since been invited to present a “Tucker Lecture” at the LSU Law Center on a civil-law-related topic.\(^\text{74}\)

The 1970s offered an optimal time to launch the Tucker Lecture Series. An impressive lineup of lecturers represented Europe and the Americas: two fundamental bastions for the civil law. Panagiotis J. Zepos,\(^\text{75}\) René David,\(^\text{76}\) Paul A. Crépeau,\(^\text{77}\) T.B. Smith,\(^\text{78}\) Julio C. Cueto Rua,\(^\text{79}\) John Henry Merryman,\(^\text{80}\) André Tunc,\(^\text{81}\) and Boris Kozolchyk\(^\text{82}\) offered a mosaic of perspectives on the civil law.

The 1980s continued with exposés by leading scholars, and the CCLS could claim a privileged role as courier of civil law knowledge to and from Louisiana. Genaro R. Carrió,\(^\text{83}\) A.

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71. Id.
73. Id.
80. His unpublished lecture was entitled The Civil Law as an Object of Scholarship.
Mackenzie Stuart,84 Roberto G. MacLean,85 Ferdinand F. Stone,86 Peter G. Stein,87 Arthur T. von Mehren,88 Konstantinos D. Kerameus,89 Alvin B. Rubin,90 and Guy Horsmans91 added their contributions to the corpus of knowledge accumulated by the CCLS.

The 1990s gathered an outstanding number of Tucker Lecturers that shared their knowledge with the legal community of Louisiana. That decade brought the first female Tucker Lecturer: the men’s club was finally over. Francis Delpérée,92 Walter F. Murphy,93 Athanassios N. Yiannopoulos,94 James L. Dennis,95 John Minor Wisdom,96 William D. Hawkland,97 E. Allan Farnsworth,98 Ruth Bader Ginsburg,99 and Pascal100 offered a great

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84. His unpublished lecture was entitled The Civil Law Tradition and the European Communities: All Roads Lead from Rome. A manuscript version of his lecture is on file with the CCLS.
85. Roberto G. MacLean, Judicial Discretion in the Civil Law, 43 LA. L. REV. 45 (1982).
86. His unpublished lecture was entitled Birth, Death and Transplants at Civil Law. A manuscript version of his lecture is on file with the CCLS.
91. His unpublished lecture was entitled Common Civil Law in the European Common Market.
96. His unpublished lecture was entitled Louisiana Law: The Troubled Years.
decade of scholarship. The lineup of Tucker Lecturers also reflected that more Louisianan actors were invited to join the honor role of distinguished speakers.

The 2000s excelled in continuing to offer to Louisiana the contributions by leading scholars on civil and comparative law. That decade finally ended a long-lasting omission, when the first African-American Tucker Lecturer took the stage. Jean-Louis Baudouin, Walter van Gerven, Kathryn Venturatos Lorio, Horacio Spector, Bernette Joshua Johnson, Alan Watson, Moréteau, Helmut Koziol, and Jacques Vanderlinden kept the tradition and helped the CCLS preserve its role as one of the guardians of the civil law.

The Golden Jubilee of the CCLS has been met with enthusiasm. Three outstanding scholars have thus far shared their


102. His unpublished lecture was entitled An Emerging Common Law for Europe? The Future Meeting the Past.


105. Her unpublished lecture was entitled Ruminations on Solidary Liability.

106. Alan Watson, The Great Paradox: The Romans, Not a Legalistic People in ESSAYS IN HONOR OF SAUL LITVINOFF (Olivier Moréteau et al. eds., 2008). The lecture was originally entitled The Great Paradox: Romans Not a Law-driven People.

107. Olivier Moréteau, The Future of Codes in France and Louisiana in ESSAYS IN HONOR OF SAUL LITVINOFF 605 (Olivier Moréteau et al. eds., 2008).


knowledge of civil and comparative law with the Louisiana community. Vernon V. Palmer, Nicholas Kasirer, and Esin Örücü acted as ambassadors of the law in Louisiana, the Americas beyond the Bayou State, and Europe. The new decade should continue welcoming leading scholars from Europe and the Americas, though it should also welcome Tucker Lecturers from Asia and Africa—areas where the civil law developed and its impact and evolution should be explored, expanding the understanding of the civil law in the modern world.

B. Publications

The role of the CCLS as one of the guardians of the civil law in Louisiana is further developed by the publication of scholarly writings. These include law review articles, monographs, translations, and the creation of an official journal. All these components assist in disseminating the academic corpus of the CCLS.

Law-review special issues and autonomous law-review articles are published as a result of research undertaken under the auspices of the CCLS. That research attends—not surprisingly—to seminal areas of private law. At least five special issues were published in collaboration with the Louisiana Law Review. Those issues were completed in 1974, 1975, 1977, 1982, and 2007. The

110. His unpublished lecture was entitled The Quest to Implant Civil Law Method and Restrain Judicial Lawmaking: Tracing the Origins of Judicial Methodology in Louisiana.
111. His unpublished lecture was entitled That Montreal Sound: The Influence of French Legal Ideas and the French language on the Civil Law Expressed in English.
112. Her unpublished lecture was entitled One into Three: Spreading the Word. Three into One: Creating a Civil Law System.
last of these issues invited comparatists of the Americas and Europe to a conference in Louisiana on law making in a global world, targeting one of the main objectives of the CCLS. Autonomous law-review articles are likewise realized through the efforts of the CCLS. For example, as early as 1969, Yiannopoulos wrote on contractual and testamentary freedom in real rights. In the following decade, Pugh wrote on courts of appeal in civil law systems; and in the 1980s, Ronald L. Hersbergen wrote on contracts of adhesion and on clauses found to be unconscionable. Leading journals welcome the work undertaken under the auspices of the CCLS. For example, in the 1970s, the *American Journal of Comparative Law* welcomed an article by David S. Clark on American Supreme Court caseloads. The collaboration is even extended to non-LSU faculty members, since the interests of the CCLS extended to all of Louisiana. For example, in the 1980s, George L. Bilbe wrote on mistake in contract law, while being affiliated to Loyola University in New Orleans. At the same time, Cary G. DeBessonet, from Southern University, conducted an *avant-garde* research project on the structure of codification, a seminal area of the civil law. That

work dealt with “scientific codification,” which was explained by the author as “codification produced in accord with communicative standards set in law and other scientific disciplines, including logic.”

Monographs are an important part of the academic corpus of the CCLS. Several works have been completed under the auspices of the CCLS, as early as the 1960s. Some are collaborative works, such as the ones edited during the terms of Dainow and Moréteau; while others are individual works, such as the ones accomplished by Alejandro D. Carrió, Cueto Rua, Dainow, Garro, Hersbergen, Kilbourne, Hans G. System, 10 Rutgers Computer & Tech. L.J. 31 (1984) [hereinafter An Automated Intelligent]; and Cary G. DeBessonet & George R. Cross, An Artificial Intelligence Application in the Law: CCLIPS, a Computer Program that Processes Legal Information, 1 High Tech. L.J. 329 (1986).


129. Essays in Honor of Saul Litvinoff (Olivier Moréteau et al. eds., 2008).


Leser, and the seminal volumes of the *Louisiana Civil Law Treatise Series* by Litvinoff. A Bicentennial Series was created by the CCLS on the occasion of the Bicentennial of the Digest of 1808, again adhering to the original commitment to “promote and encourage the scientific study of civil law in the modern world, ... with a view toward facilitating a better understanding of the civil law of Louisiana and other civil law jurisdictions and making it a better instrument of good order.”¹³⁸ That series includes two selections of essays, one selection associated with Litvinoff¹³⁹ and another selection associated to Pascal,¹⁴⁰ two of the most important civilians in the centennial history of the LSU Law Center. It is notable that the collection of essays in honor of Litvinoff was edited by Moréteau, Romañach, and Alberto L. Zuppi, and gathered contributions by 46 scholars from twelve different

136. HANS G. LESER, COMPARATIVE LAW SEMINAR ON STATUTORY INTERPRETATION (1979).
138. Hébert, Background, Aims, and Objectives, supra note 3, at 622; and Hébert, Biennial Report, supra note 13, at 320.
139. ESSAYS IN HONOR OF SAÚL LITVINOFF, supra note 129.
140. ROBERT ANTHONY PASCAL: A PRIEST OF RIGHT ORDER (Olivier Moréteau ed., 2010).
countries. The Bicentennial Series also includes a reprint of the seminal work of Kilbourne on the history of the Louisiana Civil Code.

A third pillar of the academic corpus of the CCLS is composed of translations of seminal civil law texts into English, and more recently into French. The give-and-take of civil law knowledge is increased by these translation efforts. The CCLS is currently undertaking a translation project of the Louisiana Civil Code into French, with the support of a three-year grant entitled *Training Multilingual Jurists* (2012-2015), from the Partner University Fund Supporting Transatlantic Partnerships around Research and Higher Education. This project will help promote and make accessible the civil law of the southern state to French-speaking civil law jurisdictions. The Louisiana Civil Code is applicable in a mixed jurisdiction, and it is drafted in the English language. Scholars of both 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.

The current translation project of the Louisiana Civil Code may be placed within the Louisiana translation tradition.

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141. For more information on that book and on the conference that was organized for its presentation, see The Russell Long Chair and CCLS Newsletter, No. 6, April 2008, at 1-2.
For example, Levasseur and Trahan were members of the expert committee for the 2014 translation of the French *Code civil* into English by David W. Gruning, a major step undertaken to showcase the civil law tradition amongst the English-language legal discourse. The CCLS contributed early with the translation efforts of the Louisiana State Law Institute, starting in volume three of the *Louisiana Civil Law Translation Series*. Later, beginning in 1972, the CCLS made available other French works that were translated into English, starting with a translation by Michael Kindred of a seminal work by René David. Gruning, Bachir Mihoubi, and Roger K. Ward completed another set of translations of works by Michel Alter, Christian Atias, Bernard Chantebout, Louis Favoreu, and Jean-Louis Halpérin in the years that followed, led by Levasseur. Thomas E. Carbonneau stated in the pages of the *American Journal of Comparative Law* that the translation of Atias’ *French Civil Law: An Insider’s View*: “is a forceful statement of civilian values and dispositions. It should promote the type of understanding that is necessary to the preservation of civil law where it must cohabit, for reasons of

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history and geopolitics, with a competing juridical lifestyle.” 151 This avowal reflects the role of the CCLS as a guardian of the civil law at its best.

The most recent pillar of the academic corpus of the CCLS is represented by the Journal of Civil Law Studies. The first volume was published in December 2008, 152 though the impetus for its creation can be traced to the first years of the term by Moréteau. In his words, the journal is “devoted to comparative studies, with a focus on the civil law and the common law traditions, bijuralism being what makes LSU so special and unique in the United States academic world. This Journal is intended to promote a multidisciplinary and pluralistic approach.” 153 The Advisory Board of this open-access and peer-reviewed journal is composed of comparatists from across the globe, 154 many of them having undertaken academic visits at the LSU Law Center. LSU Law students are also involved in the activities of the journal, participating in the editorial process of submissions that have been accepted for publication by the Editor-in-Chief. 155 This is indeed a unique characteristic of the journal, and likewise contributes to the legal education efforts of the CCLS. In words of Paul R. Baier, the Journal of Civil Law Studies is part of a jardin de fleurs juridiques that “broadcasts the scholarship of the Center of Civil Law Studies around the globe.” 156

153. Moréteau, Avant-Propos, supra note 64, at 1.
154. Id.
C. Legal Education

The academic corpus of the CCLS is enriched by legal education activities. The objectives of the CCLS, as previously mentioned, include practical activities, such as “sponsorship of faculty and student exchanges, visiting scholars, seminars, and lectures;” and the promotion of “legal education by sponsoring foreign students who wish to avail themselves of the opportunity of studying a mixed legal system and American students who wish to expose themselves to other legal systems.” The CCLS could therefore naturally be considered a “starting point for potential transnational legal training.”

The CCLS has as one of its aims to ignite in students a “scholarly interest in the civil law and an awareness of the breadth of legal materials that can be brought to bear upon issues of code interpretation.” Accordingly, student academic writing is valued by the CCLS. For example, civil law essay contests were organized in collaboration with the CCLS, hence encouraging students to develop academic writing skills from an early stage. Furthermore, the Journal of Civil Law Studies welcomes essays and case notes by LSU Law students, offering a forum for their publications.

157. Article 2 of the presidential charter stated that, “These objectives will be furthered by means of theoretical and practical efforts of all kinds including publications, research and instruction.” Hébert, Background, Aims, and Objectives, supra note 3, at 622.

158. The Center of Civil Law Studies, supra note 22.

159. Id.


The CCLS is also a natural place for LSU Law students to approach when seeking locations at which to pursue exchange studies. Additionally, the Master of Laws (LL.M.) and the Master of Civil Law (M.C.L.) programs at the LSU Law Center have been pioneers nation-wide by offering in-depth knowledge on the cohabitation of the civil law and the common law within a single jurisdiction. The members of the CCLS are involved in those programs, while a number of graduates from those programs have been appointed as research associates at the CCLS, many benefits are derived from the close relationship of the CCLS with the LL.M. program.

Academic visits serve as bridges for the circulation of civil law knowledge between the island and the rest of the civil law world. Many visiting professors taught at the LSU Law Center during the past decades, more recently as part of the Distinguished Global Visitors Program and the CCLS has been instrumental in facilitating some of those visits. Visitors come mainly from Europe and the Americas, and topics cover an array of areas mainly in civil and comparative law. Many visiting professors, while in residence, participate in conferences or workshops organized by the CCLS, hence broadening the impact of their visits.

164. The Master of Civil Law degree was discontinued in the fall of 2009.
165. For example, Alejandro D. Carrió and, more recently, the author of this article and Alexandru-Daniel On, all of whom received their LL.M. degrees from the LSU Law Center and were research associates at the CCLS.
on the academic life of the LSU Law Center. The *island* also welcomes visitors from the rest of the civil law world who aim to benefit from the privileged location of Louisiana within the civil law and common law divide. For example, in 2005 and 2008, the CCLS organized seminars on introduction to the US legal system for Argentine law practitioners that were taught by members of the LSU Law Center. Many bridges have been constructed during the 50 years of the CCLS. Many more bridges are yet to come, since, as John J. Costonis mentioned, the CCLS assisted in giving the LSU Law Center a “broadly global vision.”

V. CLOSING REMARKS

The CCLS devotes efforts to preserve and develop the civil law, both in Louisiana and beyond. It acts as a courier of civil law knowledge between a civil law *island* and the rest of the civil law world. It has further acted for 50 years as one of the guardians of the civil law and has developed scholarship that responds to the needs of a jurisdiction that is surrounded by the common law. All those actions resulted from the work of a team of active professionals.

This article addressed some of the landmarks in the fifty-year history of the CCLS. First, the article traced the origins of the CCLS back to 1965. A renaissance of the civil law took place at that time in Louisiana. The efforts of, amongst others, Tucker and

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170. The Russell Long Chair and CCLS Newsletter, No. 6, April 2008, at 2; and Agustín Parise *Una introducción al sistema legal de los EE.UU*, REVISTA JURÍDICA ARGENTINA LA LEY, SUPLEMENTO UNIVERSIDAD AUSTRAL 1 (May, 2008).


172. See the claim of Ward, though limited to the civil law in Louisiana. Ward, *supra* note 55, at 1312.
Hébert to create an institute for the study of the civil law were amalgamated into that renaissance. Second, the article mentioned different members of the CCLS. The different actors were addressed, highlighting that the efforts of the CCLS encompassed activities from a group of able hands that included the work of directors, secretaries, assistants to the director, coordinators, research associates, translators, contributing fellows, and visiting scholars. Third, the article focused on the academic corpus offered by the CCLS. That part stressed the value of the Tucker Lecture Series and other CCLS conferences as discussion forums on Louisiana civil law and the civil law of sister jurisdictions. That part also showed that the academic corpus of the CCLS is disseminated by means of law-review special issues and autonomous law-review articles, monographs, translations of seminal civil law texts, and the Journal of Civil Law Studies. That part finally addressed the legal education efforts in which the CCLS is involved. Those efforts include the ignition of civil-law interest in students, both from Louisiana and abroad. They also include the building of bridges for academic visits and exchanges: bridges that welcome the circulation of legal ideas and knowledge.

The Golden Jubilee of the CCLS provides a good opportunity to briefly reflect on the place of Louisiana within the civil law world. In 1976, Tunc mentioned in the pages of the Tulane Law Review that:

the legal systems of Louisiana, Quebec, and France, [and to some extent the legal systems of other civil law jurisdictions] all inherited from a common tradition, are comparable to children of one family, with deep common features of character, but each with his own personality. All members of the family should be grateful to the Louisiana branch for its accomplishments in maintaining the ties which connect us.173

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It should be no surprise, finally, that Tunc highlighted in his text the efforts of the CCLS in making possible the connection amongst members of that same family.\textsuperscript{174} The role of guardian, courier, and developer of scholarship are all encapsulated in that early acknowledgment. The future will surely provide new means to fulfil those roles to this still young Center of Civil Law Studies.

VI. APPENDIX: A \textit{HISTORY OF THE CENTER OF CIVIL LAW STUDIES} BY \textsc{Saúl Litvinoff}

\textit{The text that is transcribed in this appendix was drafted by Litvinoff\textsuperscript{175} on May 9, 2007. The text was originally drafted for the website of the CCLS,\textsuperscript{176} and offers a unique account of events from the perspective of an iconic former director of the CCLS.}

The Center was established in 1965 as a division of the then LSU Law School for the purpose of preserving and enhancing the civil law component of the Louisiana legal system. Although the Louisiana Civil Code, for a long time cornered by the challenging American common law, had won over the attention of the jurisprudence starting in the third decade of the Twentieth Century, there was a dearth of civil law doctrine to help in the process of studying, understanding, and applying that code. Against such a background, the Center was created to promote the civil law scholarship necessary to give scientific and intellectual support to the revision and updating of the Louisiana Civil Code, a task by then already undertaken by the Louisiana State Law Institute, an advisory organ of the state legislature.

Professor Joseph Dainow, a distinguished scholar formed as a civilian in his native province of Quebec in Canada, was the first director of the Center and, during his term, the writing of treatises

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{174} \textit{Id.} at 459, n. 1.
\item \textsuperscript{175} Saúl Litvinoff (1925-2010) was Boyd Professor of Law and Oliver P. Stockwell Professor of Law at the LSU Law Center.
\item \textsuperscript{176} \textit{See} A History of the Center of Civil Law Studies, available at \url{http://www.law.lsu.edu/ccls/morehistory/} (last visited August 18, 2015).
\end{enumerate}
\end{footnotesize}
on the law of property and the law of obligations were started, as well as translations of important works of French doctrine such as Baudry-Lacantinerie’s treatise on the law of successions, and seminars for judges, and also for practitioners, were offered with success.

The first director retired in 1975, and Professor Saúl Litvinoff was appointed to succeed him. Along the budgetary bonanza of the seventh and eighth decades of the Twentieth Century, the Center of Civil Law Studies of the LSU Law Center enjoyed an increase of its personnel by the addition of an assistant to the director, a translator, a historian, and research associates. During that period several volumes of the ongoing treatises were finished, and books on jurisprudence, Louisiana substantive law, and numerous monographs saw the light.

At the end of the state and university budgetary bonanza entailed by the crisis of the oil industry in following decades of the same century, the Center of Civil Law Studies suffered casualties in its personnel that for many years was reduced to the director, a research assistant, and a secretary who made efforts to continue the much needed scholarly work.

The Twenty-first Century blessed the LSU Law Center with an important bequest that Chancellor John Costonis decided to invest in giving new life to the Center of Civil Law Studies, and also in establishing a chair of excellence, named after the donor, the holder of which would become the new director of the reborn center.

Professor Olivier Moréteau came from France to occupy the Senator Russell Long Chair of Excellence and assume the direction of the LSU Law Center of Civil Law Studies. The vast renown of Professor Moréteau in the civil law and also the common law worlds makes him especially suitable to bring the Center to the attention of the international legal community as a crucible where different legal systems converge, and the law of the future is in the making with a global tinge.
DRAWING THE LINE OF THE SCOPE OF THE DUTY OF CARE IN AMERICAN NEGLIGENCE AND FRENCH FAULT-BASED TORT LIABILITY

Karel Roynette*

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*  Master’s degree in law, University of Versailles, France (2004); LL.M., Louisiana State University Law Center (2010); Attorney-at-law, Paris & New York.
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I. INTRODUCTION

American tort law, through its wrong of negligence, may apply lower liability than the reasonable person standard to a defendant while French fault-based tort liability will always hold a tortfeasor liable for his unreasonable behavior. Indeed, under American law, the plaintiff must prove four elements to hold the defendant liable: the existence of a duty of care, its breach, damage, and causation which is further divided into two parts: cause in fact (as determined under the “but for” test requiring that the plaintiff’s harm would not have occurred but for the defendant’s conduct) and proximate cause (implying foreseeability of the damage). Thus,

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1. This article is dealing only with wrongful liability and not strict liability, which covers two situations in French law (one’s strict liability for damage caused by things or persons in one’s custody) that probably plays a more important role than in American tort law.
not all unreasonable behavior causing damage to the victim leads to liability for the defendant. The tortfeasor must first owe a duty to act reasonably toward the victim, so that the breach thereof can cause him to be liable in negligence to the plaintiff for the damage he brought about. If he is not under such a duty or is bound to a lighter duty, he is excused from liability, causing American tort law to be relative. American scholars mostly justified this solution through the protection of the country’s common economic good. Certain actors are to be released from the duty to act reasonably or bound only to a lighter duty when such release far better promotes economic competitiveness and efficiency.

To the contrary, France doctrine provides for fault-based tort liability as applied under the single liability clause embodied in the French Civil Code’s articles 1382 and 1383, which governs all of one’s intentional and negligent liability. Here, a defendant is liable if three elements are met: a fault (also known as “breach”), damage, and causation. In other words, everyone is bound to a general duty of reasonable care and is found liable for the damage he caused to a victim as soon as he proved to have behaved unreasonably. It need not be shown that the tortfeasor owed the victim a specific duty of care in the first place for liability to

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5. Civil Code art. 1382 reads: “Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it.” And art. 1383 provides that “[e]veryone is liable for the damage he causes not only by his intentional act, but also by his negligent conduct or by his imprudence.”

Accordingly, French fault-based tort liability is deemed to constitute a “general principle of liability for fault.”

At first sight, this discrepancy of the scope of wrongful liability may be explained by the different ways these two countries deal with one’s liability under multiple torts or a single one. On the one hand, the United States uses separate torts, inherited from English law, to deal with each liability situation. Negligence is just the specific tort that handles the liability of those who behave carelessly. On the other hand, France implements a single liability clause that provides for the liability of all of those who intentionally or negligently breach the duty of reasonable care. Nevertheless, the American tort of negligence is very close to the French single liability clause. Like its French counterpart, it actually creates a general duty of care upon individuals who are held liable if they negligently (or even intentionally) breach it and cause the victim damage. It is a general, “catch-all” liability rule which potentially offers endless protection against all wrongful misconducts to such extent that a duty of (reasonable or limited) care exists. In this sense, it is very similar to the French

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9. MALAURIE ET AL., supra note 7, § 1, at 2-3; Limpens et al., supra note 3, § 2-16 & 2-17, at 10-11.

10. VINEY & JOURDAIN, supra note 6, § 450, at 380; Limpens et al., supra note 3, § 2-5, at 5, §2-23, at 13; VAN GervEN ET AL., supra note 6, at 2-3.

11. However, in practice, when an American lawyer can argue both the existence of an intentional tort and negligence in a case, he will often choose the intentional tort, because it sometimes has a slightly broader scope and appears more outrageous for judges and juries who are inclined to award higher damages.

single liability clause, and the undertaking of a comparison between these two grounds of liability proves very relevant.\textsuperscript{13}

Therefore, the issue of the determination of the scope of tortfeasors’ liability for fault needs to be addressed in both countries to assess whether France really abides by general fault-based tort liability or if it actually implements relative tort liability to ensure its economic well-being, like the United States. This study claims that France departs from its general principle of liability for fault and instead applies relative tort liability like American law by diverting the prima facie case of one’s liability for fault (especially the force majeure defense, causation and the duty itself). Thus, people in France are not always bound to the duty of reasonable care. They may be under limited liability with no duty of reasonable care at all, or only a lighter one. It is up to the plaintiff to prove that the defendant breached a duty and caused him damage in order to hold him civilly responsible. Otherwise, like in American negligence, he is excused from liability.

It must be emphasized that this piece will rely on hypotheses of both French tort and contract liability for the sake of its analysis. This is based on the fact that French contract law has a broader scope than American contract law and provides for liability that is usually covered in torts in America. Indeed, in American contract law, the general rule is that when a party fails to achieve the promised results and breaches the contract,\textsuperscript{14} he is liable for the other contracting party’s lost profit (expectations damages).\textsuperscript{15} If he also happens to be negligent while performing his contract, he will be held accountable in tort for the property damage and personal injury he caused, unless there is an explicit or implied warranty

\textsuperscript{13} GENEVIÈVE VINEY & BASIL MARKENIS, LA RÉPARATION DU DOMMAGE CORPOREL, ESSAI DE COMPARAISON DES DROITS ANGLAIS ET FRANÇAIS § 12, at 11 (Economica 1985).
\textsuperscript{14} This paper does not deal with other remedy issues such as the termination of the contract for material breach.
granting the victim such recovery in contracts as well. On the contrary, in France, when two parties freely enter into a contract, they are usually liable in contracts for the damage they cause to each other in the course of the performance of the contract, especially for the damage that a third party would not otherwise suffer. Tort liability cannot add up in these cases. Accordingly, when a party breaches the contract, the breached party is entitled to expectation damages exactly like in American law. Then, when specifically performing a contract requiring the achievement of some work, a party is deemed to be bound to an additional covenant to act like a reasonable person, causing him to be liable under this covenant to the opposing party for his property damage and personal injury if he fails to do so. This covenant similar to a warranty of workmanlike performance can be express or implied (especially in service contracts) in the law. Sometimes, French case law even adds to the contract a specific warranty to assure the other contracting party’s safety during the performance of the

18. Specifically when based on the warranty to ensure someone’s safety. See VINEY & JOURDAIN, supra note 6, § 501, at 470.
19. This is to offer actors the possibility to provide for liability limits (unless they commit intentional misconduct, or gross negligence, or they are accordingly entitled to a way out of the contract) that are only legal in contracts and not in torts. See VINEY, supra note 17, § 220, at 407.
20. See VINEY & JOURDAIN, supra note 6, § 251-2, at 31.
21. For instance, Civil Code art. 1880 reads regarding a loan for use: “[t]he borrower is bound to take care of the keeping and preservation of the thing loaned like a prudent owner.”
22. Ex.1: A customer enters into a contract with a mechanic to change his car’s brakes under French law. The mechanic fails to install the promised brakes. He is liable for the contract breach to the customer, and the customer may recover from him the extra costs he had to pay to another mechanic to install the right brakes.
Ex. 2: Same facts as in example 1, except that he installs the proper brakes in a defective way, and the customer gets into a car accident causing him to be injured and his car to be damaged. The mechanic is deemed here to be bound to an implied extra warranty of workmanlike performance. Therefore, the customer will recover for his bodily injury and property damage based on the breach thereof by the mechanic.
contract to allow such compensation.23 Moreover, while a party breaching the contract by failing to achieve the promised result is strictly liable for his breach like in American law,24 the party bound to such warranties has usually to use only his best efforts to act reasonably while performing the contract and he is only liable for failing to do so (i.e., for fault).25 Thus, such liability for breach of warranties under French law relates more to tort law like in American law. As a result, this paper will integrate it into its analysis of the scope of limited French torts.

This study will start by emphasizing the American relative principle of negligence liability (Part II). Then, it will describe the traditional general principle of liability for fault in French law (Part III). Furthermore, France’s implied limitations on the scope of the defendant’s liability for fault will be addressed (Part IV). Lastly, a new approach officially establishing the existence of a limited duty of care in French fault-based tort law will be suggested (Part V).

II. AMERICAN RELATIVE PRINCIPLE OF NEGLIGENCE LIABILITY

Inherited from English law, American negligence proves relative through the implementation of the duty element and proximate cause that limit the defendant’s duty of reasonable care.26 The defendant must breach a duty of care to which he owes the plaintiff and be able to foresee the risks created by his conduct to be held liable for the damage he caused to the victim. If he is under no duty or cannot predict the damaging result, he is not guilty of negligence. This paper will first deal with the duty of

23. VINEY & JOURDAIN, supra note 6, § 499, at 453; VAN GERVEN ET AL., supra note 6, at 281.
24. In French law, this party is said to be bound to an obligation de résultat, i.e., to achieve a specific result. See VINEY & JOURDAIN, supra note 6, § 541, at 526.
25. French law qualifies this covenant as an obligation de moyen, i.e., to use one’s best effort to perform it. However, it may be upgraded to an obligation de résultat to enhance the defendant’s liability. See VINEY & JOURDAIN, supra note 6, § 541, at 526.
26. See discussion, supra Part I.
reasonable care as applied in negligence (A). Then, it will address the limits that the existence of a lower duty and proximate cause create on the scope of the defendant’s duty (B). This present study will not talk about cause in fact and damage, because they do not come into play in defining one’s liability limits.

A. Breach of the Duty of Reasonable Care

At first glance, the defendant is held liable when he breaches his duty of reasonable care (1). This breach is assessed according to several methods (2).

1. Definition of the Duty of Reasonable Care

The defendant breaches his duty of reasonable care when he behaves negligently (a). This can be varied by certain circumstances (b).

a. Exercise of Reasonable Care

The default rule is that people owe a general duty of reasonable care to their neighbors.27 This means that they have to avoid injuring others by negligent conduct. It does not impose a duty to avoid all injury to others. The English landmark case *Blyth* v. *Birmingham Waterworks Co.* is one of the first cases to give the definition of reasonable care.28 This case involved a constructor who had installed a water main in the street with fireplugs at various points. During an extremely cold winter, the frost caused the freezing water in the main to break force out the connection between some plugs and the water main. Later, when the main thawed, the water in it leaked out and flooded the plaintiff’s house. The trial court found the constructor guilty of negligence and awarded the homeowner damages.

27.  See Dobbs, supra note 2, § 117, at 277.
The Court of Exchequer reversed the decision. It held that “negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do or doing something which a prudent and reasonable man would not do.” Here, the extreme severity of the frost in the year when the damage occurred proved exceptional compared to the usual weather in the area. A reasonable man would not have taken precautions against such extraordinary frosts. Therefore, the defendant was reasonable in not planning for this weather and could not be accountable for negligence.

The Restatement (Second) of Torts section 282 confirms that the defendant’s failure to exercise reasonable care causes him to be liable for negligence: “Negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. It does not include conduct recklessly disregardful.”

b. Influence of Certain Circumstances

Even though the standard of reasonable care is an objective standard, it depends on specific circumstances. It is said that the defendant must exercise the care that a reasonable and prudent person under the same circumstances would have exercised to avoid risks of harm to others. First, external circumstances can relax the standard of reasonable care. Thus, in case of an emergency, the actor’s behavior is evaluated by comparison to the conduct that a reasonable and prudent person would have adopted in this dangerous situation. He is not liable if the reasonable and prudent person would have acted alike, even though in retrospect another course of action would have avoided the damage.

29. Id.
30. See Dobbs, supra note 2, § 117, at 277.
31. Restatement (Second) of Torts § 296 (ALI 1965); see Dobbs, supra note 2, § 129, at 304.
Secondly, the law takes into account the personal circumstances of the actor. On the one hand, this may lead to lighten the standard of reasonable care, especially for those that are of a young age\textsuperscript{32} or physically disabled\textsuperscript{33} (but not those mentally deficient in intelligence, judgment, memory, etc., the insane, and the intoxicated\textsuperscript{34}). Thus, a minor\textsuperscript{35} or a physically disabled person\textsuperscript{36} is required to adhere to the standard of reasonable care of a minor of the same age or a disabled person affected by the same physical handicap. They are not required to meet the same standard of behavior as adults or those with normal physical capacity. That would be too high a burden to hold them liable for failing to conform to an impossible standard of physical conduct or maturity. On the other hand, special knowledge, skills, and experience may strengthen the standard of reasonable care. This usually involves professionals who perform licensed activities or occupations (physicians, attorneys, pilots, motorists, etc.) which cause the public to rely on them to supply services of quality. Therefore, the actor is held to a specific standard of reasonable care in the sense that he has to act like a reasonable and prudent person with such expertise, and not only with common knowledge\textsuperscript{37}.

2. Method for Determining the Breach of the Duty of Care

The plaintiff has to establish that the defendant breached his duty of reasonable care by failing to act like a reasonable and prudent person in order to hold him liable for negligence. The general method for determining whether the defendant breached

\textsuperscript{32} See DOBBS, \textit{supra} note 2, § 124, at 293.
\textsuperscript{33} \textit{Id}. § 119, at 282.
\textsuperscript{34} \textit{Id}. § 120, at 284.
\textsuperscript{35} Unless he engages in an adult’s activities (such as operating a car or flying an airplane), in which case he is held to an adult standard of care; see, \textit{e.g.}, DOBBS, \textit{supra} note 2, § 125, at 298.
\textsuperscript{36} Unless a reasonable and prudent disabled person would have behaved like a non-disabled person; see, \textit{e.g.}, DOBBS, \textit{supra} note 2, § 119, at 282.
\textsuperscript{37} \textsc{Restatement (Second) of Torts} § 289; see DOBBS, \textit{supra} note 2, § 122, at 290.
such a duty is to apply the risk-utility balancing test, defined by Judge Learned Hand in United States v. Caroll Towing Co. (a). Customs and statutes can also impact the establishment of the duty of reasonable care (b).

\textit{a. Risk-Utility Balancing Test}

In the Caroll Towing case, the owner of a barge hired a tug to move a barge containing a cargo of flooring materials belonging to the United States. However, the tug employees negligently moored the barge to a pier. As a result, the barge broke away from its mooring and hit a tanker’s propeller, which tore a hole in the barge, eventually sinking it. The barge owner sought compensation from the tug owner for the cost of the cargo, for which he was accountable to the United States, and the loss of its barge. Yet the tug owner claimed that the barge owner had been contributorily negligent in not being continuously on board, and that he had to be found partially responsible for the loss of the cargo and the barge. Thus, the issue was whether it was reasonable for the barge owner not to have a bargee or attendant continuously present on board.

Judge Learned Hand set out his formula to determine whether the barge owner was liable:

It is a function of three variables: (1) the probability that [the barge] will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury L; and the burden B; liability depends upon whether B is less than L multiplied by P; i.e, whether B is less than PL.39

Here, the accident occurred during World War II, when war activities caused barges to be constantly moved in and out of the crowded harbor. Therefore, the likelihood that the job of tying up the barge to the pier could not have been done with adequate care

\footnotesize{38. United States v. Caroll Towing Co., 159 F.2d 169 (2d Cir. 1947).  
39. \textit{Id.} at 173.}
was fairly high. Moreover, the injury to the vessel was likely to be significant because of the presence of a large number of boats in comparison to the size of the harbor. Finally, the burden imposed on the barge owner to maintain an attendant on board was low, because the accident happened in winter, when the working hours of the employees in the harbor were shortened as the result of the fewer hours of daylight. Therefore, the burden of continuously having an employee on board was less than the probability of accident multiplied by the expected loss. In conclusion, the barge owner was held contributorily negligent in not having a member of his staff constantly present on board and received only partial compensation for his damage.40

b. Impact of Customs and Statutes on the Duty of Reasonable Care

Courts can also use complementary methods for establishing the duty of reasonable care. First, they can rely on customs. For instance, this covers the situation where the plaintiff argues that the defendant was negligent because he did not follow the customary practices in his business field. In this case, the custom is said to be used as a sword. Conversely, the defendant can assert that he followed the customary practice to prove that he did not act unreasonably and was careful. Here, he uses the custom as a shield. Generally, courts consider that customary practices do not set the standard of care, which remains the standard of a reasonable and prudent person under the same circumstances. It only gives some evidence of what this standard is.41

Second, judges can refer to the standards of conduct prescribed by statutory provisions to determine the duty of reasonable care. Not only do these include statutes passed by Congress and the state legislatures, but they also encompass municipal ordinances,

40. This standard has been adopted by the Restatement (Second) of Torts §§ 291-293.
41. See Dobbs, supra note 2, § 163, at 393.
administrative regulations and even constitutions.\textsuperscript{42} Then, to be admissible as a tort law standard of reasonable care, the statute must have been intended to protect a class of persons that includes the plaintiff against the particular risk of injury neglected by the defendant.\textsuperscript{43} Finally, the statute may have varied weight when it is applied. In a few states, the violation of a statute is negligence per se and the defendant is automatically considered negligent.\textsuperscript{44} In the majority of states, the defendant who violates a statute is presumed negligent, and he can rebut this presumption of negligence with contrary evidence.\textsuperscript{45} In the other states (forming a considerable minority of states), the violation of a statute is merely evidence of negligence, meaning that the statute is considered together with other evidence to determine whether the defendant was negligent according to the Hand Formula.\textsuperscript{46}

To hold the defendant liable, the plaintiff must also prove that the defendant’s negligence in failing to take the reasonable precautions to avoid injuring him falls within the scope of the duty to which the defendant owes the plaintiff.

\textit{B. Means to Limit the Scope of the Defendant’s Duty of Care}

To constitute actionable negligence, the defendant’s negligent conduct must fall within the scope of the duty that he owes to the victim. Traditionally, American law limited the scope of the defendant’s liability by requiring that he was under such a duty to act reasonably and proximate cause was shown (1). Presently, both of these principles are actually considered to relate to the same issue of the delimitation of the scope of the defendant’s duty of care-based public policies (2).

\textsuperscript{42} Id. § 133, at 311.
\textsuperscript{43} Id. § 137, at 323-26.
\textsuperscript{44} Id. § 134, at 315; See Kionka, \textit{supra} note 16, at 78.
\textsuperscript{45} See Dobbs, \textit{supra} note 2, § 134, at 315.
\textsuperscript{46} Id. § 134, at 317.
1. Traditional Limitations by Duty and Proximate Cause

The defendant’s liability was traditionally limited by the application of the duty element (a) and proximate cause (b).

a. Duty

Following the English common law of torts, American negligence law has always applied restrictions on the general duty of reasonable care when its enforcement would lead to unfair results. Many categories of specific duties may actually overcome the general duty of reasonable care. On the one hand, the defendant may owe no duty at all. He can never be held negligently liable, even though his conduct was unreasonably risky. On the other hand, he may owe only a limited duty and the plaintiff will have to prove aggravated negligence. For instance, the orthodox view is that no one owes a duty to act affirmatively to rescue someone else in the absence of some special relationship. Thus, a defendant could not be held liable for negligence because he watched a person with a visual disability step in front of a car and did not call out to him, even if it created no inconvenience or danger to do so.

The determination of the existence and measure of the defendant’s duty is decided by judges based on policy considerations, such as the extent to which the transaction was intended to affect the plaintiff, the foreseeability of the harm to the plaintiff, the degree of certainty of injury to him, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the

47. Id. § 111, at 262.
48. Id. § 225, at 575.
49. Id. § 117, at 277.
50. Id. § 117, at 277.
51. Id. § 227, at 579.
policy of preventing future harm by deterrence, and the administrative problem for courts in enforcing the duty.\textsuperscript{52}

\textit{b. Proximate Cause}

The second mechanism by which the law has cordoned off one’s liability is proximate cause. At the outset, it must be emphasized that proximate cause is different from cause in fact. Here, causation is established as the defendant’s conduct is a necessary antecedent of the victim’s damage.\textsuperscript{53} Proximate cause rather looks upon policy considerations and holds that the defendant is liable only if, at the time he acted, he could reasonably foresee that the specific risk that his negligent conduct created would injure the victim.\textsuperscript{54} It is a jury question that distinguishes it from duty.\textsuperscript{55}

The \textit{Wagon Mound} case, decided in England, illustrates this idea very well.\textsuperscript{56} In this case, a ship discharged some oil into the water of the port of Sydney, near the dock where the plaintiff’s employees were doing welding work. This oil fouled the plaintiff’s dock. However, due to its high ignition point, the oil was unlikely to burn. But, randomly, some cotton waste was floating in the oil underneath the dock and caught fire when the worker dropped some molten metal on it. This ignited the oil, and the plaintiff’s dock burned down. The plaintiff argued that, since the defendant could foresee that his oil spill could cause the plaintiff some injury by fouling his dock, he should be held liable for the entire damage which actually happened, the fire included. Nonetheless, the Privy Council held that the plaintiff could only recover for the injuries that the defendant should have anticipated at the time it released

\begin{itemize}
\item \textsuperscript{53} See Dobbs, \textit{supra} note 2, § 182, at 447.
\item \textsuperscript{54} Id. § 180, at 444.
\item \textsuperscript{55} Id. § 182, at 449.
\end{itemize}
the oil into the water. Thus, he could recover only for the fouled docks, but not for the fire that was unforeseeable.

Following this case, it was later decided that it is the general risk/harm that must be foreseeable and not the special mechanism that brought it about.\textsuperscript{57} In short, it is considered that the defendant is actually released from liability because there is an intervening, superseding event that makes the occurrence of the damage completely unpredictable.\textsuperscript{58} For instance, there is such an unpredictable, superseding cause when “a bizarre, unforeseeable event gives rise to a risk different from the one the defendant should have anticipated.”\textsuperscript{59} The same also happens when a third party unexpectedly commits an intentional tort, such as a crime.\textsuperscript{60}

Accordingly, this actually creates a limit to the duty of reasonable care. One may not be liable while behaving unreasonably by failing to prevent probable damage in general from occurring to the victim. To be held accountable, he still has to be able to foresee the specific damage caused to the defendant as assessed under the reasonable person standard. As a result, he is only bound to a limited duty to preclude the specific damage that he could reasonably foresee.\textsuperscript{61}

2. Modern Means to Limit the Scope of the Defendant’s Duty of Care Based on Public Policies

The modern approach limits the defendant’s liability by requiring that the scope of his duty of care encompass the plaintiff’s damage to hold him liable (a). This delimitation of the scope of his duty of care is based on public policies (b).

\textsuperscript{57} See, e.g., Hughes v. Lord Advocate, A.C. 837 (H.L. 1962); see also Restatement (Second) of Torts § 289; and Dobbs, supra note 2, § 184, at 454.

\textsuperscript{58} Restatement (Second) of Torts § 186, at 460-661.


\textsuperscript{60} See Restatement (Second) of Torts § 442; see Glannon, supra note 59, at 192.

\textsuperscript{61} Restatement (Second) of Torts § 182, at 448.
a. Principle

Both duty and proximate cause achieve the same purpose. They ask the same policy question: should this particular defendant be liable for this precise damage to this specific victim under those special circumstances? Thus, the defendant may no longer be under the general duty of reasonable care. He may owe the victim no duty at all, or he may be bound to a lighter duty that requires the victim to prove aggravated negligence, such as gross negligence. As a result, they should be combined into the united concept of the scope of the defendant’s duty of care.

The famous *Palsgraf* case supports this view. A passenger dropped his package while the railroad company’s employees helped him board a train that was leaving the station. The package contained fireworks that exploded when the luggage hit the ground. Then, a remote scale fell as a result of the blast and hit another passenger, Mrs. Palsgraf, who was waiting further down on the platform.

Justice Cardozo, writing for the majority, ruled that the establishment of the train company’s duty of care and its ability to foresee the risk caused by its conduct are actually related to the same liability issue of the determination of the scope of its duty of care. The defendant is negligently liable if the scope of his duty encompasses the victim’s damage, and this is the case when he is able to foresee the risks created for him. Here, the court deemed that the risk of explosion caused by a passenger dropping his luggage full of explosives while being helped to board the train was foreseeable. However, it was not predictable that the blast would knock a scale down onto a passenger standing hundreds of feet away. Therefore, the railroad did not owe any duty to the

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63. See Shapo, supra note 4, §55.01, at 301.
victim and was excused from liability. Thus, duty and proximate cause constitute the same element requiring the scope of the defendant’s duty of care to encompass the victim’s damage to establish his liability. Whether the victim’s harm falls within the scope of the defendant’s duty is a question of public policy usually decided by judges.

b. Public Policies Driving the Limits on the Scope of the Defendant’s Duty

As seen in Palsgraf case, the first and most common public policy which limits the scope of the defendant’s liability is foreseeability of the risk. Here, similarly to proximate cause, one is no longer required to behave reasonably to prevent probable risk in general from occurring. He is only bound to a limited duty to prevent the specific damage that he could reasonably foresee in order to be held liable for it.

Regarding other public policies shaping the scope of the defendant’s duty, Louisiana’s Pitre case can be cited as an example. Here, a doctor negligently performed sterilization surgery on a woman; she subsequently became pregnant and gave birth to a child with albinism. The parents filed several actions to get their various damages compensated. First, they brought a wrongful pregnancy action. This action included the pain and suffering and the expenses incurred during the unwanted pregnancy and delivery, along with the economic cost of rearing an unplanned child. They also filed a wrongful birth action for the special expenses and the pain and suffering resulting from the child’s deformity. Finally, they took a wrongful life action on behalf of the child for his damage for having to live with a defect.

65. See discussion, supra Part II.B.1.b.
67. Pitre v. Opelousas General Hospital, 530 So. 2d 1151 (La. 1988).
68. Even if Louisiana is a mixed jurisdiction, it applies the common law principles in tort law.
The Louisiana Supreme Court enunciated the different public policies that determine the scope of a defendant’s liability for the damage caused to a victim. This scope depends on the foreseeability of the risk, the moral aspect of the defendant’s conduct, the need for compensation, the need for incentive to prevent future harm, the relative ability of each class of litigants to bear and distribute loss, the historical development of precedent, and the efficient administration of the law.69

In applying these factors, it was decided that the physician’s duty did not extend to compensate the child’s defective life under the wrongful pregnancy action and he was, accordingly, excused from liability for it. Indeed, it would imply that the law values the fact of not being born higher than the fact of being born, which the High Court found inadmissible.70 Then, the surgeon was relieved from the parent’s wrongful birth action for the additional cost and pain of raising a disabled child. This handicap was not deemed foreseeable as a result of the surgery in reference to the scientific knowledge at the time.71 Finally, the court held that the doctor’s duty encompassed the wrongful pregnancy action. But, it allowed recovery only for the financial and psychological cost of the pregnancy and delivery. It denied compensation for the normal expenses of rearing a child, because a child is always “a blessing”.72

Unlike American law, French tort law does not seem to limit the scope of the defendant’s duty of reasonable care in determining his liability.

69. See Pitre, 530 So.2d at 1161.
70. Id. at 1158. Moreover, it is doubtful that causation was established. It was the birth that was the cause in fact of the child’s defective life, and not the doctor’s negligence; see, e.g., DOBBS, supra note 2, § 291, at 792.
71. See Pitre, 530 So.2d at 1162.
72. Id. at 1161-62.
III. Traditional General Principle of Liability for Fault in French Law

The French general principle of liability for fault is laid down in Civil Code articles 1382 and 1383.\textsuperscript{73} According to these provisions, a defendant is held civilly responsible for his intentional or negligent misconduct when three elements are met. First, the defendant must have breached the duty of reasonable care to which everyone is bound. This element is called “fault” in France. Second, the plaintiff has to suffer damages that are of the same types as in American law. Third, some causation similar to American “cause in fact” needs to be proven.\textsuperscript{74} There is no additional element that would limit the scope of the tortfeasor’s liability under certain circumstances. He is liable as soon as he behaved unreasonably and caused the victim damage. This section will address the general issue of fault which sets the general fault-based liability rule by dividing it into two aspects: the definition of fault as objective unlawful conduct (A), and its assessment based on the only standard of reasonable care (B). Damage and causation will not be dealt with in this part, since they apparently do not come into play in defining the limits on one’s liability.

A. Definition of Fault as Objective Unlawful Behavior

The concept of fault has evolved from subjective unlawful behavior (1) to objective illicit conduct (2).

1. Classical Subjective Approach of Fault

In the past, fault consisted of two elements. The first one required a violation of a pre-existing duty by the defendant. In

\textsuperscript{73} See supra note 5.

\textsuperscript{74} In France, this is called “the theory of equivalence of conditions” and it is established when the damage would not have occurred but for the defendant’s negligence. See Viney & Jourdain, supra note 6, § 339, at 188, § 355, at 199; Malaurie et al., supra note 7, § 92, at 44; and Van Gerven et al., supra note 6, at 419.
other words, the fault was established when the actual conduct of the tortfeasor was inconsistent with the conduct required by legal duties. It was an objective element.\footnote{75} The second component demanded that the unlawful conduct be imputable to the actor in order to find him liable. This was the case if the actor had the psychological capacity of understanding and accepting the consequences of his conduct. This element was subjective.\footnote{76}

2. Modern Objective Conception of Fault

Today, to establish the defendant’s fault, the plaintiff only has to prove that he objectively acted in an unlawful way. There is no longer need to demonstrate his conduct was imputable to him, i.e., he could understand that his conduct was unlawful. This evolution took place in two successive steps.

First, the legislature passed the Act of January 1968 to make mentally deficient adults liable for their negligence. This law, which was inserted in the Civil Code at article 489-2, reads: “A person who has caused damage to another when he was under the influence of a mental disorder is nonetheless liable to compensation.” Thus, mentally disabled adults can now be held liable for negligence, even though their mental deficiency prevents them from realizing that their conduct is unlawful. The subjective element of imputability is no longer required for them.\footnote{77}

Then, the French Supreme Court for civil and criminal matters (\textit{Cour de cassation}), sitting in its highest form, overthrew the requirement of imputability for children in four cases decided on May 9, 1984.\footnote{78} For example, in one of them, the Justices held a 13-
year-old child contributorily negligent in being electrocuted after he failed to disengage the circuit-breaker prior to screwing the bulb on a light socket defectively assembled by an electrician. The Supreme Court especially denied having to assess the child’s awareness of the illegality of his conduct to be able to hold him contributorily negligent. Thus, this decision shows that the actor commits a fault as soon as he objectively acts unlawfully. It is no longer required that his conduct was imputable to him. French law only assesses the existence of fault based on a breach of the legal duty of reasonable care.

B. Assessment of Fault Based on the Breach of the Duty of Reasonable Care

The existence of fault is exclusively measured by reference to the breach of the duty to behave as a reasonable and prudent person placed under the same circumstances (1). This includes negligent actions and omissions (2).

1. Benchmark of the Reasonable and Prudent Person Under the Same Circumstances

Fault can first be established by the violation of the duty of reasonable care laid down by statutory provisions. It obviously includes conduct punished by criminal statutes passed by the legislature. It also encompasses behavior prohibited by other legislation enacted by the legislature or regulation decided by the executive or the administration.\(^{79}\) Unlike American law, these statutes are unconditionally admissible as references of the standard of reasonable care.\(^ {80}\) There is no requirement that they were intended to protect the class of persons within which the plaintiff falls against the specific risk created by the defendant. Any violation of a mandatory statutory rule is also irrefutably

\(^{79}\) See Viney & Jourdain, supra note 6, § 448, at 375; Terré et al., supra note 7, § 718, at 694-95; and Van Gerven et al., supra note 6, at 305.

\(^{80}\) Id.
illicit, and amounts to fault. The plaintiff does not need to prove that the tortfeasor acted negligently, imprudently or carelessly, and the defendant cannot bring in contrary evidence to be excused from liability.81

Furthermore, fault can result from the violation of the duty of reasonable care defined by case law. Like American law, French judges find defendants guilty of negligence when they did not act like a reasonable and prudent person. This ideal person is called the *bonus pater familias* or good family father, a standard inherited from Roman law and never rephrased despite its sexist overtone.82 This standard of the reasonable person is an objective one. It is said that courts evaluate the defendant’s behavior *in abstracto*.83

However, this *in abstracto* analysis does not prevent judges from referring to the conduct of the reasonable and circumspect person under *certain similar circumstances* to determine if the defendant was at fault.84 External circumstances of the defendant’s conduct are taken into account to assess his fault. Thus, the defendant’s behavior is compared with that of a person who does the same activity as the defendant and is placed in the same circumstances of time and place. The professional character of the activity falls into this category.85

81. See *Viney & Jourdain*, supra note 6, § 448, at 375; *Terré et al.*, supra note 7, § 718, at 694-695; and *Van Gerven et al.*, supra note 6, at 305.


83. See *Viney & Jourdain*, supra note 6, § 463, at 401; *Malaure et al.*, supra note 7, § 53, at 30; *Terré et al.*, supra note 7, § 729, at 701; and *Van Gerven et al.*, supra note 6, at 307.

84. See *Viney & Jourdain*, supra note 6, § 463, at 402; *Malaure et al.*, supra note 7, § 53, at 30; *Terré et al.*, supra note 7, § 729, at 701; and *Van Gerven et al.*, supra note 6, at 307.

85. See *Viney & Jourdain*, supra note 6, § 464, at 375, § 471, at 410; *Terré et al.*, supra note 7, § 729, at 701; and *Van Gerven et al.*, supra note 6, at 310.
Courts also account for certain internal circumstances. This is the case for the physical characteristics of the defendant. For instance, judges will assess the fault of a child or a disabled person by comparison with a child of the same age or with a person who is affected by the same disability. However, the psychological traits (intelligence, qualities, mental deficiencies, etc.), and cultural and social characteristics (level of education, background, etc.) do not necessarily matter to establish the standard of the reasonable person.

2. Inclusion of Negligent Actions and Omissions

Contrary to American law, the breach of the duty of reasonable care can result, as a general rule, either from an act or from an omission to act. One of the most famous instances where the law creates a duty to take action lies in Criminal Code article 223-6. This provision imposes a duty to act upon anyone who is able “to prevent by immediate action a felony or a misdemeanor against the bodily integrity of a person” or “to offer assistance to a person in danger . . . without risk to himself or to third parties.” Therefore, the defendant who fails to prevent the perpetration of a crime on the victim or save him from a dangerous emergency, without risk to himself or a third party, commits a fault. As a result, the defendant is accountable to the victim for the damage that the crime or the emergency caused him.

In conclusion, French tort law appears general as it always binds the defendant to only one standard of care, the harsh standard of reasonable care, to establish his liability. Nonetheless, it can be doubted that there are no limitations on the tortfeasor’s liability, which therefore proves to be relative.

86. See VINEY & JOURDAIN, supra note 6, §§ 467-468 at 405-408; TERRÉ ET AL., supra note 7, § 729, at 701; and VAN GERVEN ET AL., supra note 6, at 310.
87. See VINEY & JOURDAIN, supra note 6, §§ 469-470 at 408-409; see VAN GERVEN ET AL., supra note 6, at 310.
88. See VINEY & JOURDAIN, supra note 6, § 452, at 381; TERRE ET AL., supra note 7, § 721, at 696-97; and VAN GERVEN ET AL., supra note 6, at 281.
IV. FRANCE’S IMPLIED LIMITATIONS ON THE SCOPE OF THE DEFENDANT’S LIABILITY FOR FAULT

France does recognize that the scope of the defendant’s tort liability can be sometimes limited based on the enforcement of different public policies, and accordingly appear relative. In this case, he no longer owes the general duty of reasonable care. Instead, he is under a lighter duty or does not owe any duties at all. However, unlike American law, these limitations are not clearly expressed in the law. They result from the application of various legal mechanisms that are involved in establishing the defendant’s civil responsibility. Therefore, it is necessary to identify all of these diverse means that cordon off the actor’s liability. First, the defendant can limit his duty of reasonable care by invoking the defense of force majeure (A). Then, causation is used to restrict the scope of tortfeasors’ liability (B). Finally, the law itself sometimes implicitly imposes a limited duty on some defendants (C).

A. Limitations of the Duty of Care Based on the Implementation of the Force Majeure Defense

In French tort law, force majeure is a defense used by defendants who would otherwise be liable for the damage caused to their victims. It consists of an unpredictable, superseding event that makes the defendant unable to foresee and avoid the risk and damage that his behavior actually causes to the victim. It can take three forms. First, it can be a natural event (earthquake, storm, lightening) or third parties’ collective conduct (war). In addition, the victim’s conduct can constitute such an intervening cause. Third, the intervening event may correspond to a third party’s individual conduct (such as the perpetration of a crime).

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89. See Viney & Jourdain, supra note 6, § 392, at 265.
90. Id. § 383, at 251-52; Malaurie et al., supra note 7, §§ 194-195, at 98-99; Terré et al., supra note 7, § 796, at 755; and Van Gerven et al., supra note 6, at 434.
The traditional approach\footnote{See, e.g., Cass. 2e civ., Jan. 5, 1994, Bull. Civ. II, No. 13 (Fr.) (relating to one’s strict liability for damage caused by things in one’s custody, but also valid for one’s responsibility for negligence); see also Ass. plén., Apr. 14, 2006, Bull. civ. Ass. plén. n° 5 (Fr.); JCP, 2006, II, 10087, note P. Grosser (Fr.); D., 2006, p. 1577, note Patrice Jourdain; and Van Gerwen et al., supra note 6, at 331, 334.} considered that force majeure actually exonerated an actor from liability only if it was extraneous (foreign) to the defendant, unforeseeable, and unavoidable.\footnote{See, e.g., Cass. 2e civ., Apr. 6, 1987, JCP, 1988, II, 20828, note F. Chabas (Fr.); D., 1988, p. 32, note C. Mouly (Fr.). Likewise, a third party’s individual conduct which does not meet the force majeure elements may lessen the defendant’s liability. He will still be accountable to the victim for the entire damage according to the French principle of solidarity (joint and several) liability between joint tortfeasors. However, he will have a contribution action against the third party for his respective share of liability (at least when liability is based on fault). See, e.g., Cass. 2e civ., Jun. 25, 1970, D., 1971, p. 494, note F. Chabas (Fr.).} Modern case law and doctrine only require that the tortfeasor did not provoke the event,\footnote{Thus, a happening that is internal to the defendant may constitute force majeure as long as it is not brought about by him (e.g., a disease). See, e.g., Viney & Jourdain, supra note 6, § 385, at 254.} and the intervening cause was unavoidable to immunize him from liability. They especially no longer demand that force majeure be unforeseeable. Indeed, an unforeseeable event is allegedly unavoidable by nature, because no one can prevent something unpredictable from happening. Accordingly, force majeure’s unforeseeability element is considered as being encompassed in the unavoidability aspect which only determines the existence of force majeure.\footnote{Viney & Jourdain, supra note 6, § 396, at 270-73; Malaurie et al., supra note 7, § 195, at 98, cmt. 83; Terret et al., supra note 7, § 798, at 757.}

However, whether unavoidable based on its unforeseeability or by itself, force majeure appears to play out as a limitation on the scope of the defendant’s duty of reasonable care according to different public policies. On the one hand, when it is deemed unavoidable based on its unforeseeability, it circumscribes the defendant’s responsibility to the only risks that he could reasonably anticipate (1). On the other hand, when an unavoidable
event qualifies in itself as force majeure, it releases the tortfeasor from his duty to act reasonably based on the application of other public policies (2).

1. Circumscribing of the Defendant’s Responsibility to the Foreseeable Risks

The general rule will be given (a) and an example will be provided (b).

a. General Rule

French law recognition of unavoidable force majeure based on its unforeseeability actually causes to limit the scope of the defendant’s duty of care to the only reasonably foreseeable risks. Therefore, he is bound to a lighter duty of care and no longer owes a duty of reasonable care.

Classic French doctrine contends that the liability relief created by unavoidable force majeure as a result of its unforeseeability does not constitute an independent limitation on the scope of the liability of the defendant who is still under a duty of reasonable care. It argues that the restrictions established by this form of force majeure rather result from the mere implementation of the elements of the prima facie case for one’s liability for fault, i.e., causation and fault. Thus, on one hand, the existence of unavoidable force majeure due to its unforeseeability allegedly overcomes the defendant’s fault in the causal chain. It is only because a subsequent event later intervened and unexpectedly modified the chain of causation leading to the victim’s injury that the tortfeasor’s conduct “created” this damage. Therefore, the force majeure event is the only cause of the victim’s damage, and the actor’s conduct is not.95 On the other hand, the actor is regarded as not at fault. Indeed, a reasonable and prudent person under the same (external) circumstances would not have foreseen the risk

95. VINEY & JOURDAIN, supra note 6, § 403, at 284-85.
created by unavoidable force majeure based on its unforeseeability, provided that the foreseeability of its occurrence is assessed under the same reasonable person standard. 96 Therefore, it was reasonable for the defendant to behave as he did (i.e., injuring the plaintiff), and he committed no fault. 97

However, it is untrue to assert that the occurrence of unavoidable force majeure based on its unforeseeability terminates the causal relationship between the actor’s defective conduct and the injury in question. According to the equivalence of conditions (cause in fact) theory, there is causation: the victim would not have been injured but for the defendant’s fault. 98 Therefore, the liability relief created by this kind of force majeure is not based on the mere implementation of the causation element within the framework of the establishment of one’s liability for fault.

Likewise, the existence of unavoidable force majeure as a result of its unforeseeability does not necessarily excuse an actor from liability by taking away his fault. He may still have behaved unreasonably in this case by failing to prevent damage in general from occurring to the victim. Therefore, if he is excused from liability based on the occurrence of unforeseeable force majeure proving unavoidable, it is rather because he is only bound to a limited duty to prevent the specific damage that he could reasonably foresee in order to be held liable for it. 99 A slip-and-fall case illustrates this.

b. Instance of Publicly-Owned Common Carriers’ Restricted Duty of Care to Passengers as to the Land Condition

The Cour de Cassation’s ruling of October 9, 1969 shows that the characterization of unavoidable force majeure based on its unforeseeability actually leads to limiting the scope of a

96. Id. § 397, at 273-74, § 399, at 278-80.
97. Id. § 403, at 284-85.
98. See discussion, supra Part III (Introduction)
99. See discussion, supra Part II.B.2.b.
defendant’s duty of care to the only reasonably foreseeable risks. Here, a passenger of the Paris subway system slipped and fell on a banana peel that was on the floor in the hallway and sued the state-owned subway company. It must be specified that at that time courts bound common carriers to a warranty to ensure their passengers’ safety while carrying them (even between connections) and held them liable for a breach thereof, which was actually similar to tort law.

In its ruling, the higher court considered that the metro station had been swept according to the safety instructions provided by the regulatory authority. As a result, it held that the banana peel incident constituted unavoidable force majeure due to its unforeseeability and released the subway entity from responsibility. Nevertheless, if the subway company failed to behave reasonably in sweeping the station to prevent damage in general from occurring to the victim, it should still have been liable to him for his slip-and-fall. Therefore, this actually limits the duty of the subway entity to prevent only the specific damage that it could reasonably foresee as to its premises such as required by the cleaning regulations, especially when it is a state-owned entity. On the other hand, when force majeure corresponds to an irresistible event by itself, it limits the scope of the defendant’s responsibility based on other public policies.

2. Limits on the Defendant’s Duty of Care Based on Other Public Policies

The principle will be laid out (a), followed by a case to illuminate it (b).

101. This liability for warranty breach was even qualified as strict. See Viney & Jourdain, supra note 6, § 553, at 549. Currently, tortious liability applies in this case; see, e.g., Viney & Jourdain, supra note 6, § 553, at 551.
102. See discussion, supra Part I.
103. See discussion, supra Part II.B.2.b.
a. Principle

The existence of unavoidable force majeure in itself, which excuses the defendant from liability, creates a specific limit on the scope of his duty of reasonable care based on different public policies. This is what the analysis of French case law shows despite the opposite assertion of the classical doctrine. To classical French scholars, unavoidable force majeure in itself immunizes the defendant because it takes away his fault. Indeed, the actor usually takes all the necessary precautions to prevent the damage from happening. He acts like a reasonable and prudent person under the same (external) circumstances. It is only because there is an extraneous damaging event which is bound to happen that he causes the victim harm. Therefore, the defendant cannot be considered to have committed any fault nor held liable to the victim.104

However, it may occur that the defendant is still at fault in this type of case. He may prove to have behaved unreasonably by failing to prevent damage in general from occurring to the victim. Therefore, if he is relieved from liability as a result of the occurrence of unavoidable force majeure in itself, it is actually on the basis that he only owes a limited duty to prevent specific damage based on the enforcement of public policies in order to be held liable for it. A case about landowners’ premises liability to third parties shows that.

b. Example of Landowners’ Limited Liability to Third Parties off of their Premises

The Cour de cassation’s decision of January 6, 1982 demonstrates that landowners are bound under French law to a

104. See VINEY & JOURDAIN, supra note 6, § 403, at 284-86; see, e.g., Cass. 2e civ., Mar. 21, 1983, Bull. Civ. II, No. 89 (Fr.) (relating to an aero club not at fault for failing to prevent an inexperienced pilot from flying a plane and crashing it into a house after the novice pilot misled the aero club instructor into giving him control of the plane).
lighter duty than the standard of reasonable care when the natural or altered conditions of their premises create risks for people outside their property. 105 Here, a landowner had erected an embankment with various materials on his property. Later, a strong thunderstorm came. Because of the rain, a brook was turned into a violent torrent which washed away the materials. These objects eventually ended up blocking a dam, which caused the waterway to flood a near warehouse and damage all of the merchandise stored in it. The owner of the warehouse sued the landowner for his negligence in not securing the materials when knowing a severe storm was coming.

Referring to Civil Code Article 1382, the French Supreme Court held that the storm was an irresistible event that qualified as force majeure and released the landowner from liability for the damage caused to this third party as a result of the condition of his premises. However, the landowner may still have acted unreasonably in not preventing damage in general as a result of the failure to properly secure the equipment stored on his property in this hilly area of France where violent storms are frequent. Accordingly, the liability relief applied here means that the landowner is only bound to a lighter duty than the duty of reasonable care as to the specific damage that the condition of his premises may cause to third parties.

The French conception of the land possessor’s liability can be compared to the American approach, which also applies a limited duty rule. The traditional rule is that the landowner does not owe the persons off the premises a duty to protect them against the risks created by the natural condition of the premises. 106 If the possessor or anyone else has altered the natural condition of the land so as to create or aggravate the risks, the possessor may be bound to a light duty of care. 107 The California case Keys v. Romley illustrates this

106. See DOBBS, supra note 2, § 231, at 587.
107. Id. § 231, at 590.
Romley (through his lessee) built an ice rink on his property and paved around the building with asphalt. Around the same time, the Keys also improved their premises by building a store on it. They placed the dirt that they excavated at the rear of the property, which was adjacent to Romley’s parcel. Later, they decided to remove the dirt and the rain run-off started to flow from Romley’s property onto their land, which was located at a lower level. The construction of the rink and the paving on Romley’s premises was found to be the cause of the flooding.

The Supreme Court of California held that the higher-ground owner who changed the natural system of drainage could be liable to the lower-ground owner according to the servitude of natural drainage. However, this was the case only if he did not take the reasonable precautions to avoid flooding the adjacent property, and the lower-ground owner did not reasonably undertake to remedy the nuisance. Thus, the higher-ground landowner is bound to a light duty of care. He is no longer required to behave reasonably to prevent probable risk in general from occurring. It is only if he acted unreasonably and the defendant reasonably tried to solve the problem that he is liable. In this case, the higher court held that this rule was in the support of the public policy of improving the land and remanded the case to the lower court to determine whether Romley’s liability arises from the flow path depending on the reasonableness of the removal of the dirt pile by the Keys.

Judges also use causation as a method for limiting the scope of the defendant’s liability.

B. Application of the Adequacy Theory to Limit Tortfeasors’ Responsibility

French judges may limit the defendant’s duty of care by setting aside the equivalence of conditions theory (or cause in fact theory)

109. Id. at 409.
110. Id. at 411.
and applying other causation standards, such as the adequacy theory. This mostly involves cases where several events combine to cause the plaintiff's indivisible injury. According to the equivalence of conditions theory, each event that is a necessary antecedent of the occurrence of the accident should be recognized as the cause of the damage and lead to the perpetrator's liability. However, under the adequacy theory, courts will qualify as "cause" only those events which, in reference to the scientific knowledge at the time they occur, can normally and foreseeably create the harm. In doing so, courts actually intend to balance the equity and limit certain clumsy actors' duty in order to better punish more delinquent tortfeasors. This especially occurs when defendants commit greatly uneven faults (1) or cause subsequent damage remote in time (2).

1. Exoneration of Slight Faults in Presence of a Grave Fault

Judges use causation to limit the duty of care of actors whose slight faults combine with a more serious one to bring about the victim's damage. They consider that, under the adequacy theory, the gravest fault constitutes the only cause of the injury and excuses all the perpetrators of the slight faults from liability. Nevertheless, all those faults caused in fact the harm and should lead to the defendants' liability. Therefore, this means that France implements relative tort liability and slightly faulty defendants have no duty of care in the presence of a tortfeasor committing a grave fault.

The classical example of an accident caused by a stolen car illustrates this idea. In a March 4, 1981 case, Mrs. X left her car

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111. When defendants’ different conducts caused the plaintiff separate damage, their behavior is regarded as the cause of only the part of the damage they brought about. See VINEY & JOURDAIN, supra note 6, § 381, at 247.
112. See discussion, supra Part III (Introduction).
113. See VINEY & JOURDAIN, supra note 6, § 340, at 188-89; MALAURIE ET AL., supra note 7, § 93, at 45; and TERRÉ ET AL., supra note 7, § 860, at 816.
114. See VINEY & JOURDAIN, supra note 6, § 357, at 202; see VAN GERVEN ET AL., supra note 6, at 420.
with the doors unlocked and the key in the ignition in front of her nephew’s house at night. \(^{115}\) Later, the nephew and his delinquent friends stole the car and collided with another car. The driver of the other vehicle sued the aunt for negligence. The *Cour de Cassation* ruled that only the nephew’s grave negligent driving was the cause of the collision. Mrs. X’s alleged negligence did not constitute the cause of the accident. As a result, it dismissed the claim against the aunt for negligence.

Here, it is of note that negligence on the part of the car owner applies. She unreasonably left her car on a city street, unlocked, with the keys in the ignition, thereby opening the way for a thief to steal it and have a car accident with it. Therefore, cause in fact was established as the thief would not have stolen the car and caused an accident but for the owner’s negligence in leaving it unlocked. \(^{116}\)

Thus, when French Justices consider that the owner’s negligence in leaving his car unlocked with the keys in the ignition may never be the cause of the car accident between the thief and the victim, they actually limit his duty of care. According to the equivalence of conditions theory, there is causation. If car owners are not liable in fact, it is rather because their duty does not extend to third parties’ criminal conduct.

Defendant’s liability is also excluded for subsequent damage too remote in time.

2. Liability Exclusion for Subsequent Damage too Remote in Time

When a prior accident concurred with a second event to bring about new damage, case law often uses the adequacy theory to decide that only the second incident caused the new injury. The previous accident remote in time is left out of the causal chain, though it was a necessary antecedent according to the equivalence

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\(^{116}\) For an example of such a decision in American law, see, e.g., DOBBS, *supra* note 2, § 182, at 449.
of conditions theory. This aims to limit the scope of tortfeasors’ liability by releasing them from indefinite responsibility for the subsequent damage brought about by their original negligence.

A Cour de Cassation ruling of February 8, 1989 emphasizes this point.\textsuperscript{117} Mr. Y became physically disabled after a car accident with Mr. X, who was entirely liable. Mr. Y had to be continuously assisted in moving around. Ten years after the car collision, the bed on which the victim was laying caught on fire, and Mr. Y, who could not move out of his bed, died in the fire. The widow brought a wrongful death and survival action against the negligent driver and his insurance company to recover damages.

The Court of Cassation decided that only the event nearer in time, that is, the fire, was the cause of the disabled man’s death. It rejected the argument that the prior car accident which occurred 10 years earlier also concurred to bring about Mr. Y’s death. Indeed, after the crash, Mr. X and his insurer had paid Mr. Y damages for getting help to especially prevent this kind of disaster from happening. Therefore, the Court excused the negligent driver and his insurance firm from liability.

However, according to the equivalence of conditions theory, the prior accident is the cause of the subsequent damage, since the latter would not have occurred without the former. In real life, this case demonstrates that judges do not intend to extend the scope of initial tortfeasors’ liability to too remote subsequent damage resulting from their original negligence. Otherwise, anyone would be endlessly liable for his negligence.

Finally, French law may itself impose specific limited duty on some tortfeasors to limit the scope of their liability.

\textit{C. Acknowledgement of Defendants’ Specific Limited Duties}

In some instances, defendants may bear a limited duty of care. This is the case for employees’ implied limited liability for damage

\textsuperscript{117} Cass. 2e civ., Feb. 8, 1989, Bull. Civ. II, No. 39 (Fr.).
to third parties arising out of the performance of their job (1) and some parties’ limited warranty liability (2).

1. Employees’ Implied Limited Liability for Damage Arising out of the Performance of Their Job Tasks

Under French law, the general rule is that employees are subject to limited liability as to the damage they cause to third parties during the performance of their job tasks. In the meantime, it must be emphasized that French employers bear vicarious liability for the torts of their employees when there is an employment relationship and the latter were acting within the scope of their employment, as do American employers.\(^{118}\) First, an employment relationship exists when the employer has the right to exercise some degree of direction and control over his employee,\(^{119}\) such as in an employment contract ((whereby the employer determines the physical details (time, place, method, etc.) of the performance of the work and fires his employees))\(^{120}\) but not in an independent agency contract.\(^{121}\) An employee is then considered acting within the scope of his employment when he performs his job tasks (or at least was within the place and time of work or used the company’s tools or other means when the accident occurred) or follows his employer’s instructions or attempts to act for the benefit of the company.\(^{122}\)

It was the French Supreme Court’s case of February 25, 2000 which first decided in favor of French employees’ limited liability

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118. See Viney & Jourdain, supra note 6, § 809, at 1012; and Van Gerven et al., supra note 6, at 469.
119. See Viney & Jourdain, supra note 6, § 792, at 980-82; and Van Gerven et al., supra note 6, at 469.
120. See Viney & Jourdain., supra note 6, § 793, at 982-87.
121. Id. § 795-1, at 988. Also see Malaurie et al., supra note 7, § 160, at 77; and Terré et al., supra note 7, § 830, at 785.
122. Ass. Plén., May 19, 1988, D., 1988, p. 525, note C. Larroumet (Fr.), Also see Viney & Jourdain, supra note 6, § 804, at 1005; Malaurie et al., supra note 7, § 164, at 80; and Terré et al., supra note 7, §§ 834-835, at 789-95.
for damage arising out of the performance of their job tasks.\textsuperscript{123} Here, a pilot of a helicopter spread pesticide over a field during a windy day, in accordance with his job tasks. The wind caused the chemicals to reach adjacent fields. Based on former French case law holding that an employee was jointly and severally liable with his employer for his negligence falling within the scope of his employment, the owners of these lands sued the pilot and his employer, the helicopter company, for the damage to their property. Nevertheless, the Higher Court considered that the pilot’s negligence (spreading the pesticides during a windy day) arose from the performance of his job tasks which his employer had entrusted to him and therefore excused him from liability. Only his employer was to be found liable. Thus, this means that employees, acting within the scope of their employment, have an implied limited duty that excludes liability for the damage caused to victims while performing a specific task which their employer entrusted to them at the time of the accident.

In summary, when an employee follows his superior’s order which falls within with his lawful job description, he is immune from liability, and only his employer is vicariously liable for his negligence under the \textit{respondeat superior} doctrine.\textsuperscript{124} However, when he violates his lawful job description at his employer’s request and commits negligence or intentional torts (that can also be criminal offences), he is liable for the damage to the victim, as is his employer, under vicarious liability. Finally, when he disobeys his superiors’ instruction or pursues his own interest with no advantage to the company, he is liable alone (employer’s vicarious liability does not apply here).\textsuperscript{125} 

\textsuperscript{124} See VINEY & JOURDAIN, supra note 6, § 812-1, at 1025.
\textsuperscript{125} \textit{Id.}
2. Parties’ Limited Warranty Liability

When a party performs his contract requiring the achievement of work or services, he may be bound to a limited warranty lighter than the warranty of workmanlike performance (which is similar to U.S. tort law). As a result, he bears limited liability for the bodily injury and property damage caused to the opposing party while performing the contract.\(^{126}\)

For instance, in a bailment, unless there is monetary consideration or the bailee benefits from it, the bailee is bound to a warranty to care as much for the property in his possession as he does for his own property.\(^ {127}\) As a result, if he is used to caring for his belongings worse than a reasonable person does, he will be bound to a limited warranty causing him to have lighter liability for the property damage to the bailor.

In conclusion, French tort law appears to be based on a misunderstanding. On the one hand, it states that it applies general fault-based tort liability, and everyone is bound to the duty of reasonable care. On the other hand, it diverts the different elements of the prima facie case for people’s liability for fault to limit the scope of their duty of reasonable care and implements relative tort liability. Therefore, it would be better to publicly recognize that there is no longer a general principle of liability for fault and the scope of one’s fault-based liability may be limited for public policy considerations.

V. A NEW APPROACH IN FRENCH LAW: THE INTRODUCTION OF THE (LIMITED) DUTY REQUIREMENT INTO FAULT-BASED TORT LIABILITY

The official acknowledgement of the existence of limitations on the scope of the defendant’s duty would definitively cause French tort law to switch from a system based on general fault-

\(^ {126}\) Noting that parties can also provide for their own liability limitations in the contract. See discussion, supra Part I.

\(^ {127}\) See arts. 1927 & 1928 C. civ.
based tort liability to a system that applies relative responsibility. France could continue to implement a single liability clause providing for the liability of those who intentionally or negligently breach the duty of care. However, tortfeasors would not always be bound to the duty of reasonable care. They could owe a lighter duty or no duty at all. It would be up to victims to prove the existence of duties of care on the part of defendants to hold them liable. According to the French traditional principle of separate power, the legislature should determine the various public policies driving the duties of care, and the judiciary should only implement them.

This relative liability approach would present two main advantages. First, it would improve the organization of the law (A). Second, French tort law would become more consistent with the Principles of European Tort Law and other European countries’ tort law to improve economic efficiency in the European Union (B).

A. Improved Organization of the Law

The adoption of the concept of relative tortious liability leads to better foreseeability of the law (1) and helps draw the line between liability for fault and other liabilities (2).

1. Better Foreseeability of the Law

One of the advantages of circumscribing the scope of individuals’ duty is to establish clear and abstract categories of negligence liability situations according to public policies and a hierarchy between the various protected rights. Everyone would know when he is liable to certain classes of people for specific types of risks, and when he is not. Thus, individuals can predict the

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128. This approach is already implemented when the defendant’s liability is based on a breach of warranties; see discussion, supra Part IV.C.2.

129. As set forth in EUROPEAN GROUP ON TORT LAW, PRINCIPLES OF EUROPEAN TORT LAW (Springer 2005).
outcome of their behavior, and in some cases, adjust it in order to be immunized from liability. This foreseeability enhances the economic efficiency of society.130

For instance, it could be highlighted that economically weaker victims are usually protected by the law. This is illustrated by employees’ liability exclusion for damage caused during the performance of the specific task which their employers entrusted to them within their job descriptions.131 Here, employees are subject to indemnification claims by their employers who compensate victims under the respondeat superior doctrine. However, these employees did not profit from their wrongdoing and are not usually insured for it, unlike their superiors. Therefore, they are the economically weakest parties and are immunized from liability.

At the same time, it could be pointed out that French law promotes economic efficiency. For instance, courts allow business entities to operate at a lower cost to ensure the provision of valuable public services by freeing them from certain unforeseeable liability, such as shown in frivolous slip-and-fall cases.132 In addition, a landowner can reasonably improve his land to conduct affairs without risking unjustified lawsuits.133 Lastly, the law sets limits on people’s liability for subsequent damage resulting from their original negligence. It does not want them to be infinitely liable for their conduct and dissuade all economic ventures.134

2. Drawing the Line between Fault-Based Tort Liability and Other Liabilities

First, the adoption of the relative liability rule could allow French law to better distinguish between fault-based tort liability

130. See DOBBS, supra note 2, § 182, at 450.
131. See discussion, supra Part IV.C.1.
132. See discussion, supra Part IV.A.1.b.
133. See discussion, supra Part IV.A.2.b.
134. See discussion, supra Part IV.B.2.
and strict liability. As a general rule, according to the Latin adage \textit{specialia generalibus derogant}, judges must exclusively rely on the specific law of strict liability when they decide a case which falls within the framework of this regime. They cannot apply fault-based liability in its stead. It said that liability without fault excludes civil responsibility for fault. In other words, if the plaintiff does not meet the requirements to hold the defendant strictly liable, he cannot then invoke his fault as a second shot at the defendant. He is barred from recovery. Liability for fault only applies when there are no other specific regimes which preempt it. However, in practice, judges loosely follow this rule and often turn to fault-based liability when strict liability cannot be established. The remedy for this problem could be that courts neutralize the defendant’s duty of care in civil responsibility for fault (which therefore would no longer apply) when strict liability applies. Thus, judges would be bound to apply only strict liability when they decide a case which falls within the boundaries of this regime. It would be impossible for them to resort to liability for fault in this situation.

Second, it could be argued that the defendant’s limited duty of care under one’s liability for fault is restricted if he fails to act reasonably while performing a contract. As a result, his liability would only be dealt with under warranty breach, so that he can be able to provide for contractual liability limits.

The adoption of the scope of duty approach in French law would make it closer to the Principles of European Tort Law which intend to harmonize the European Union countries’ tort law.

\begin{itemize}
  \item 135. \textit{See supra} note 1.
  \item 136. \textit{See Viney, supra} note 8, at 44-45.
  \item 137. \textit{Id.} at 45.
  \item 138. \textit{Id.} at 45.
  \item 139. \textit{See discussion, supra} Part I.
\end{itemize}
B. Harmonization with the Principles of European Tort Law

The public acknowledgement in France of the existence of limitations on the scope of defendants’ duty within the framework of its single liability clause would line French law up with the Principles of European Tort Law. Indeed, this European tort law project adopts the single liability clause providing for the civil liability of all those who cause damage by intentionally or non-intentionally breaching the duty of care (called fault). It also recognizes that the scope of defendants’ liability may be limited based on the enforcement of public policy considerations. They may not always be bound to a duty of reasonable care—it can be a lighter one. As a result, the Principles of European Tort Law implement the principle of relative tort liability. It is set forth in chapter 3, section 2, article 3:201, which reads:

Art. 3:201. Scope of Liability
Where an activity is a cause within the meaning of Section 1 of this Chapter [cause-in-fact], whether and to what extent damage may be attributed to a person depends on factors such as:

a) the foreseeability of the damage to a reasonable person at the time of the activity, taking into account in particular the closeness in time and space between the damaging activity and its consequences, or the magnitude of the damage in relation to the normal consequences of such an activity;

140. See EUROPEAN GROUP ON TORT LAW, supra note 129.
141. The Principles are an attempt to harmonize the European Union countries’ tort law and create set of united rules to be implemented in European countries. They have been drafted by the European Group on Tort Law mainly composed of European scholars specializing in the field, but also including leading scholars from the United States, Israel, and South Africa. They have not been enacted as such by the different European countries or the European Union itself, and, therefore, do not have statutory authority. They only have the authority as the product of the scholars’ piece of work. In this sense, they are very similar to the American Restatements of the Law. See Bernhard A. Koch, The “European Group on Tort Law” and its “Principles of European Tort Law”, 53 AM. J. COMP. L. 189, 189-93.
142. EUROPEAN GROUP ON TORT LAW, supra note 129, at art. 4:101. However, the comments emphasize that strict liability (risk based liability and liability for others) constitutes an exception to the single liability clause. See id. at art. 4:101, cmt. 6.
b) the nature and the value of the protected interests (article 2:102);
c) the basis of liability (article 1:101);
d) the extent of the ordinary risks of life; and
e) the protective purpose of the rule that has been violated.143

Further, this would not cause an important change in French law. Indeed, when France diverts the different elements of defendants’ liability for fault to limit the scope of their responsibility, it does so based on the enforcement of the same public policies as in the Principles. Thus, the scope of the defendant’s duty can be limited to the foreseeable risks in both systems.144 Conversely, tortfeasors are bound to a full duty of reasonable care when they cause death or severe bodily injury. Finally, the adoption of the limited liability rule in France seems to be highly advantageous to further integration with the other EU countries.

VI. CONCLUSION

The general principle of liability for fault as applied by France proves insufficient to organize people’s liability for their misconduct and allocate the loss caused by each other. Modern societies have to carry on the rule of relative responsibility and limit the scope of individuals’ duty of reasonable care in certain situations. This leads to more efficient apportionment of harm between the different actors. Depending on public policies, France jurisprudence itself already limits the scope of such a duty of care by diverting the elements of one’s liability for fault. This demonstrates that French law should go further in this direction, and French doctrine should openly recognize the existence of limited duties of care under the single clause governing fault-based

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143. Id. at art. 3:201.
144. See, e.g., discussion, supra Part IV.A.1.a.
tort liability in order to be harmonized with its European neighbors’ tort law.
The Journal of Civil Law Studies is proud to publish in French with an abstract in English the five papers presented at the third conference of University of Nantes, Pôle Universitaire Yonnais, on “(Il)legally Recognized Unions: International Approaches” discussing social and legal evolutions and tensions regarding the recognition of same-sex unions and marriages in several countries: China, France, Italy, Spain, and the United States. The conference, enriched by lively comparative debates, took place at La Roche-sur-Yon on December 6, 2013, under the aegis of the Institut de recherche en droit privé (IRDP), University of Nantes, and the supervision of Dr. Enrica Bracchi and Dr. Dominique Garreau. Though the comments presented by students of the Master in Trilingual Legal Studies during a closing panel discussion on Unions in Europe and Outside Europe1 are not published, the present publication is a tribute to the work of faculty and students at both the University of Nantes and Louisiana State University (LSU), united within the “Training Multilingual Students” program, sponsored by the Partner University Fund, supporting transatlantic partnership around research and higher education. Papers were edited at LSU by Diego Anguizola, Shane Buchler, Gaëlle Forget, Tarkan Orhon, and Sara Vono.

The present issue also features the work of two LSU students: an essay by Kacie F. Gray and a case note by Tiffany S. Bush, discussing same-sex marriage cases in Louisiana and the U.S.

The Editors

1. Bernadette Bella-Abega (Jersey), Delphine Drouard (Italy), Sophie Levitt (Canada), Charlotte Rocher (Pologne), and Lucie Talal (Spain).

Le présent numéro publie aussi le travail de deux étudiantes de LSU: un essai par Kacie F. Gray et une note d’arrêt par Tiffany S. Bush, portant sur des décisions louisianaises et américaines en matière de mariage entre personnes de même sexe.

*La rédaction*

2. Bernadette Bella-Abega (Jersey), Delphine Drouard (Italie), Sophie Levitt (Canada), Charlotte Rocher (Pologne) et Lucie Talal (Espagne).
LES UNIONS EN FRANCE : L’EMBARRAS DU CHOIX ?

Dominique Garreau*

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ABSTRACT

French law regulates two types of unions, marriage and civil union (Civil Solidarity Pact or PACS), and tolerates free union, which is regarded as a de facto situation. Originally, marriage was the only option. Social evolution has led the French legislature to create the PACS (1999), but this did not fully satisfy homosexual couples who, in 2013, obtained full access to marriage. Why then keeping two institutions? While similarities exist as to the formation of both forms of union, marriage remains more formalistic because rooted in tradition. Effects are not similar: while both marriage and civil union oblige to community of life, duty of mutual assistance, contribution to expenses and solidary liability for the couple’s debts, a few effects are limited to marriage alone. Those include the duty of fidelity, the possibility of using the spouse’s name and the protection of matrimonial

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housing. Indeed, the Civil Code keeps promoting and protecting the family dimension of marriage.

RÉSUMÉ

Le droit français consacre deux types d’union, le mariage et le Pacte Civil de Solidarité, acceptant, mais à la marge, le concubinage, situation de fait plus que de droit. Si originairement, seul le mariage avait droit de citer, l’évolution de la société a poussé le législateur français à créer le PACS en 1999, qui n’a pas entièrement satisfait les couples homosexuels qui ont obtenu le droit de se marier en 2013. Pourquoi deux institutions ? S’il est aisé de constater la similitude des conditions de formation de ces deux unions (là où le concubinage ne pose aucun cadre juridique) en notant un plus grand formalisme attaché au mariage, antique socle de la famille, il devient intéressant de comparer les effets attachés à ces deux « contrats ». Si certaines obligations sont communes au mariage et au PACS (communauté de vie, devoir d’assistance entre époux, contribution aux charges du couples, solidarité au regard des dettes du ménage), d’autres aspects sont propres au mariage (devoir de fidélité, usage du nom de l’époux, protection du logement familial) car le mariage a une dimension familiale revendiquée et protégée par le Code civil.

Qui n’a pas entendu parler du mariage pour tous, la loi du 17 mai 20131 ? Une loi qui, à écouter et lire les commentaires, a révolutionné le petit monde juridique de la famille française. Notre propos n’étant pas l’étude stricto-sensu de cette loi, nous l’aborderons en nous intéressant aux diverses formes d’union existant dans le paysage juridique français. En effet, le mariage n’est pas la seule union consacrée par la loi française qui, depuis relativement peu, a donné un statut aux couples ne désirant pas se

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marier, et ce en créant le pacte civil de solidarité (PACS)² à défaut de donner un statut au concubinage qu’elle se contente de mentionner dans un seul article du Code civil³. En conséquence, plutôt que nous attarder sur les tenants et les aboutissants d’une loi qui a fait tant écrire et défiler, intéressons-nous à ces trois types d’union en commençant par un rapide historique du mariage et de son évolution au regard des mouvances sociétales qui ont permis la reconnaissance tant du concubinage que du PACS, trois situations faisant dorénavant fi des sexes des deux candidats. Puis, pour avoir une vision panoramique de ces situations, nous comparerons leurs conditions de formation et de validité et bien évidemment leurs effets afin de cerner les différences à même de permettre à chacun de choisir la forme d’union qui lui convient le mieux.

Tout est partie de la notion de famille. Dès lors que l’on envisage le mariage, le PACS ou le concubinage, rapidement le débat quitte la stricte relation entre deux personnes pour envisager les conséquences au regard des enfants ; on glisse ainsi du couple vers la famille, comme si pour certains, le couple ne pouvait exister sans enfants et que la famille nécessairement entendait parents et enfants, ce que suggèrent les articles 215 et 213 du Code civil⁴. Évoquons rapidement la notion de famille ce qui nous permettra de mieux comprendre les enjeux des évolutions légales.

La famille suppose le groupement. C’est là le trait commun à toutes les sciences qui étudient cette situation. En droit, la famille se comprend donc comme un groupement. Mais le Code civil ne définit pas la famille ; le mot famille est quasiment absent du Code de 1804 sauf dans l’expression conseil de famille. Les premiers commentateurs du Code n’ont pas non plus envisagé la famille en


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elle-même, sans pour autant qu’ils aient ignoré les règles juridiques qui gouvernent cette famille. Il faut chercher ailleurs le support de ces règles juridiques et s’attacher aux articles relatifs au mariage et au divorce (donc le mariage), à la filiation de préférence légitime (donc encore le mariage) et la fameuse présomption de paternité (même si la filiation hors mariage est acceptée avec limites) et à la puissance paternelle (dans le mariage). Les deux sources de la famille s’avèrent donc être le mariage et la filiation, celle légitime étant privilégiée mais pas exclusive, l’article 311-21 du Code civil issu des lois du 4 mars 2002 et 18 juin 2003 posant les règles de dévolution du nom de famille en ne faisant plus de distinction sur l’origine de la filiation, la famille est alors entendue au regard de la filiation. La famille pourrait donc être définie comme le groupement formé par les personnes qui, en raison de leur lien de parenté ou d’époux, sont soumises à la même communauté de vie ; il ne s’agit pas d’une notion juridique et il n’existe pas de droit propre à protéger la famille. Alors, le réflexe est peut-être de revenir à la conception de base de cette notion, conception entendue juridiquement : le mariage.

L’histoire du mariage est passionnante et révoltante à la fois quand elle est lue avec nos yeux de juriste actuel et qui plus est de juriste femme. La décadence romaine (perte de l’autorité patriarcale, multiplication des divorces, femme mariée résidant ailleurs que chez son mari : anarchie familiale) a donné naissance à une nouvelle conception de la famille (début du IVe siècle) : la conception chrétienne de la famille conjugale comprenant le mari, la femme et les enfants avec pour points de cohésion le mari (en

6. Le Code civil actuel évoque la famille sous cet angle dans le régime primaire (résidence de la famille, logement de la famille), dans la filiation (nom de famille, adoption) et les régimes de protection (conseil de famille) ; quelques expressions du Code de 1804 subsistent telles « besoins de la famille » (Art. 630), « y demeure avec sa famille » (Art. 632), « destination du père de famille» (Arts. 672, 692, 693)... Seuls 129 articles de ce Code utilisent le mot famille, beaucoup dans l’expression conseil de famille.
7. LAURENT LEVENEUR, LEÇONS DE DROIT CIVIL, TOME 1, VOLUME 3, LA FAMILLE (Montchrestien, 7e éd., 1995).
s’appuyant sur la Genèse) et le sacrement du mariage. Le caractère sacramentel faisait du mariage un lien sacré, établi par Dieu et assurant la permanence de la famille. Le mariage était alors indissoluble et les époux devaient être fidèles, mais l’Église peinait à imposer son modèle. Au Xe siècle, l’affaiblissement du pouvoir séculier permit à l’Église de rendre ses tribunaux compétents en la matière tout en hésitant sur la condition permettant de reconnaître un mariage : consentement des époux ou cohabitation. Le décret de Gratien tenta une conciliation (vers 1140) en présentant le mariage comme exigeant un consentement préalable suivi de la consommation ; cette idée fut reprise par Lombard dans ses sentences quelques années plus tard : le mariage était alors un sacrement que se conféraient les époux par un acte de volonté. Mais la difficulté restait la preuve de ce mariage, ce qui incita les canonistes à imposer certaines formalités. Ainsi en 1215, le Concile de Latran décida l’excommunication des époux mariés clandestinement, mais le mariage demeurait valable ! Les légistes royaux tentèrent de dissocier le mariage d’une part en un sacrement dont la validité appartenait à l’Église et à ses tribunaux et d’autre part en un contrat ayant des effets civils de la compétence des juridictions laïques. Cette doctrine gallicane était condamnée par Rome et le Concile de Trente exigea une formalité en 1563 : l’échange des consentements donnés en présence du curé de la paroisse de l’un des époux ; tout mariage non célébré ainsi était nul, ce qui faisait de cette règle non une règle de forme mais une règle de fond8. L’Édit de Nantes (1598) permit aux protestants de se marier devant leurs pasteurs ; mais la révocation de l’Édit de Nantes ramena l’obligation pour tous de se marier devant un prêtre catholique ; les mariages protestants étaient frappés de nullité. Un édit de 1787 énonça que les non-catholiques pouvaient contracter des mariages avec des effets civils à l’égard des époux et de leurs

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8. Le Code de droit canonique de 1917 considérait que l’échange des consentements devant deux témoins suffisait s’il n’était pas possible d’y procéder devant un prêtre.
enfants, mariages constatés par les officiers royaux. La Constitution de 1791 étendit cette mesure à tous quelle que soit la religion ; Constitution qui définissait le mariage comme un acte purement civil. Les révolutionnaires considéraient le mariage comme un simple contrat, la seule condition étant l’accord des futurs époux ; le mariage fut sécularisé. Cette définition ne fut pas reprise dans le Code de 1804 car elle semblait une évidence, les rédacteurs ne se préoccupant que de nier la valeur du mariage religieux en interdisant à tout ministre du culte de procéder au mariage religieux si les époux ne justifiaient pas au préalable du mariage civil et ce sous peine de sanctions pénales. Les révolutionnaires en laïcisant le mariage ont accru la rigueur des formalités en imposant que le mariage fut célébré devant un officier de l’état civil qui le prononça (et non pas simple témoin comme le prêtre).

Ce très rapide historique montre que le mariage nécessite l’accord des deux parties mais qu’il doit satisfaire à des formes imposées par la religion puis par l’État. On peut alors raisonnablement se demander si le mariage est un simple contrat soumis à la seule volonté des époux ou une institution encadrée par la loi imposant des obligations aux époux avec un objectif propre. Dès le Concile de Trente, il est évident que le consentement des deux époux est indispensable, consentement devant le ministre du culte qui n’est alors qu’un témoin ; le contrat consensuel devient ainsi un contrat solennel mais le mariage demeure un contrat. Avec les révolutionnaires, le mariage est prononcé par l’officier de l’état civil, c’est l’autorité publique qui lie les époux. Disparition du contrat ? Pas pour autant car l’élément consensual demeure essentiel, les rédacteurs du Code civil ayant édicté des règles protectrices du consentement. Ainsi, le mariage tel qu’il est dans le Code civil est assujetti à des règles qui gouvernent les époux durant leur vie conjugale, règles impératives qui ne peuvent être modifiées, donnant au mariage un caractère institutionnel. Mais la possibilité de divorcer d’un commun accord dès le Code civil
(mais quasiment impossible à appliquer), supprimée en 1816 puis rétablie dès 1884 (mais pour faute exclusivement) laisse à penser à une résiliation pour inexécution d’une de ses obligations par l’un des contractants, en l’occurrence l’un des époux. La loi de 1975 sur le divorce a renforcé cet aspect du mariage contractuel en admettant le divorce par consentement mutuel. Donc contrat ou institution, le mariage est un mixte dont la qualification varie selon la sensibilité des auteurs en ayant quelques constantes : le mariage est un acte civil, un acte solennel et un droit d’ordre public auquel nul ne peut s’opposer. Ceci n’est pas une évidence pour toutes les législations comme nous le verrons dans les autres interventions.

Le mariage est donc le groupement de base de notre société et ce historiquement. Mais il n’est pas le seul à permettre à deux personnes de s’unir ou tout au moins de vivre ensemble au sens juridique du terme. Depuis longtemps et certainement depuis la nuit des temps, le mariage côtoie une autre forme de famille, une autre forme d’union ou plutôt de réunion de deux personnes animées d’un même objectif : vivre ensemble avec ou sans enfant. Il s’agit de l’union libre à ne pas confondre avec la simple union fortuite sans lendemain, ni avec le mariage. Cette situation non juridique a été reconnue par le législateur français seulement en 1999. Les rédacteurs du Code civil avaient choisi clairement le mariage qui « seul assure la stabilité nécessaire à la vie d’une famille. Le mariage, c’est la société de l’homme et de la femme qui s’unissent pour perpétuer leur espèce, pour s’aider par des secours mutuels à porter le poids de la vie, et pour partager leur commune destinée ».

se passent de la loi, la loi se désintéresse d’eux ». De tous temps, les opposants à l’union libre n’ont de mots trop durs pour qualifier le concubinage, mots et considérations qu’il est encore possible d’entendre ou lire. Ainsi l’union libre a-t-elle été considérée comme un danger pour les membres du couple non-marié et surtout pour le plus faible (ainsi la femme lâchement abandonnée après avoir consacré sa jeunesse à son compagnon ou l’homme qui s’était attaché à ses enfants et qui ne supportait pas la rupture qui le séparait d’eux ; à croire que ceci ne se rencontrait pas avec le mariage et le divorce). Danger également pour les enfants car l’union libre n’offrait aucune garantie de stabilité puisque les concubins qui n’avaient voulu se marier gardaient l’entièreté liberté de se séparer à tout moment (le divorce avait des conséquences identiques mais avec une procédure dissuasive). Danger démographique : la montée du concubinage comme celle du divorce avait amené une baisse de la natalité, les démographes constatant que le concubinage était moins fécond que le mariage ; à cette époque le travail des femmes se développait avec pour conséquence sociale normale qu’elles aspiraient à avoir moins d’enfants pour pouvoir poursuivre leur travail ; mais peut-être pourrait-on considérer que les femmes mariées n’aspiraient pas pareillement à travailler et qu’elles considéraient qu’il était de leur mission d’avoir des enfants, objectif traditionnel du mariage. Ces propos pourraient se résumer ainsi « l’intérêt général commande que le mariage soit protégé et même favorisé mais que ce soit par manque de lucidité ou de courage, le législateur ne le fait pas »10. Cependant, force est de constater qu’au fil des années et de l’évolution de la société, le législateur n’a pas pu rester ignorant de l’existence des couples en concubinage. Tout en refusant toute assimilation, il a ponctuellement créé des droits semblables à ceux

10. LEVENEUR, supra, note 7, p. 39.
du mariage et ce dès avant la loi de 1999\textsuperscript{11}. Mais c’est la jurisprudence qui s’est intéressée la première à ce type de relations établies. En effet, en 1931\textsuperscript{12}, la Cour de cassation rejeta la possibilité pour une concubine de demander des dommages et intérêts pour préjudice moral au motif qu’elle ne justifiait pas d’un intérêt d’affection né du lien de parenté ou d’alliance avec le défunt (n’étant pas de sa famille, ni par le mariage, ni par le sang). Mais les tribunaux persistèrent « dans leur position scandaleuse » d’accorder une indemnisation à la concubine\textsuperscript{13}. Il fallait définir le concubinage et ses effets. En 1937, la chambre criminelle de la Cour de cassation, relevant l’existence du « faux-ménage » depuis 13 ans, un enfant reconnu et la concubine vivant dans la famille de son concubin, a été amenée à faire la différence entre concubinage stable et instable, digne et indigne\textsuperscript{14}. La même année, un arrêt de principe de la Chambre civile considéra que la victime ne pouvait demander réparation que pour « la lésion certaine d’un intérêt légitime, juridiquement protégé »\textsuperscript{15}, excluant les dommages résultant de la rupture du concubinage. Cependant la chambre criminelle maintenait la distinction concubinage stable et concubinage précaire, le premier permettant la réparation du préjudice. Il faudra l’arrêt de la chambre mixte du 27 février 1970 pour que la concubine obtienne réparation après décès accidentel de son concubin, dès lors que « le concubinage offrait des garanties de stabilité et ne présentait pas de caractère délictueux »\textsuperscript{16}.

\begin{itemize}
\item \textsuperscript{11} Par exemples le recours à la Procréation Médicalement Assistée en 1994 permis aux couples mariés ou non, le droit au bail au profit du concubin survivant ou abandonné en 1982.
\item \textsuperscript{12} Cass. req., 2 fév. 1931, D. 1931, 1, 38.
\item \textsuperscript{13} Le tribunal de la Seine, le 21 février, refusa toute réparation à la femme légitime alors qu’il accordait des dommages-intérêts à la concubine à la suite du décès du mari adulterin (12 fév. 1931, D. 1931, 2, 57) - ou encore la Cour d’appel de Paris qui, en 1932, accorda des dommages-intérêts aux deux concubines du même homme, légitimant ainsi, pour la doctrine, la polygamie et l’union libre (18 mars 1932, D. 1932, 2, 88 note Voirin).
\item \textsuperscript{14} Cass. crim., 13 fév. 1937, D. 1938, 1, 5 note Savatier.
\item \textsuperscript{15} Cass. civ., 27 juil. 1937, D. 1938, 1, 5, 4ème espèce, note Savatier.
\end{itemize}
Les mœurs évoluant, des couples non-mariés ont voulu une reconnaissance sociale et légale, demande qui, au fil des ans, a concerné les couples de même sexe. En 1999, la loi a semblé accéder à cette requête en reconnaissant l’existence du concubinage et en créant le pacte civil de solidarité (PACS). Le concubinage est dorénavant socialement visible et acceptable mais sans statut légal, la loi de 1999 le définissant comme une société de fait et ce au sein du seul article 515-8 du Code civil : « le concubinage est une union de fait caractérisée par une vie commune présentant un caractère de stabilité et de continuité, entre deux personnes, de sexe différent ou de même sexe qui vivent en couple ». La même loi instaure le PACS qui est un contrat conclu entre deux personnes de sexe différent ou de même sexe destiné à organisé matériellement leur vie commune. Les unions entre personnes de même sexe sont alors possibles mais ces unions, qui sur certains points peuvent ressembler au mariage, ne sont pas le mariage, ni dans l’état d’esprit, ni dans les effets ; la place des articles dans le Code civil est révélatrice, non pas à la suite du mariage mais après la protection des majeurs protégés. Dès lors, considérant cette loi comme inachevée, les couples homosexuels n’ont cessé de demander qu’ils soient éligibles au mariage, comme dans d’autres États, au motif que réserver le mariage aux couples de sexe différent était discriminant et contraire aux réalités sociales. En mai 2013, non sans récriminations politiques et traditionalistes, la loi crée le mariage pour tous ouvrant le mariage à tous les couples quel que soit leur sexe.

Ainsi la loi française reconnaît trois types d’union mais avec des traitements juridiques différents. Le mariage, depuis 1804 dans le Code civil, a droit au titre V « Du mariage » de l’article 143 à l’article 227. Le pacte civil de solidarité et le concubinage, ont leur propre titre XII - mais très loin du mariage après la filiation, l’autorité parentale, la minorité et les majeurs protégés – et les articles 515-1 à 515-7, l’article 515-8 étant réservé au concubinage. Nous pouvons d’une part raisonnablement nous
demander pourquoi le PACS et le concubinage n’ont pas été ajoutés à la suite du mariage-divorce et d’autre part constater que le concubinage est un fait « sans intérêt » pour le législateur et que le PACS semble n’être qu’un contrat parmi d’autres mais ressemblant parfois au mariage.

Afin d’avoir une vision panoramique de ces trois situations nous allons nous attacher à comparer les conditions auxquelles chaque union doit satisfaire afin d’être qualifiée de mariage, PACS ou concubinage avant de constater que les régimes juridiques du mariage et du PACS présentent des similitudes sans être identiques ce qui peut justifier que le mariage pour tous ait été demandé et obtenu.

I. DES CONDITIONS SOUVENT SIMILAIRES

Comparer les trois formes d’ unions se fera en prenant comme appui le mariage compte-tenu de son antériorité juridique et de sa valeur sociologique. L’histoire nous a montré que le législateur a été soucieux de formaliser cette union afin de la reconnaître et de rendre le mariage opposable à tous. Ce formalisme impératif, parfois qualifié de cérémonial, destiné à s’assurer que les consentements ont été donnés de façon éclairée (B) ne sera efficace que dans la mesure où les candidats au mariage ou au PACS auront satisfait à certaines conditions de fond (A), conditions physiques et conditions de capacité.

A. Des conditions de fond quasi-identiques

Qu’il s’agisse du concubinage, de PACS ou du mariage, la règle est unique, il faut deux personnes physiques. Pour le mariage, ceci se retrouve dans l’article 143 du Code civil qui évoque « deux personnes de sexe différent ou de même sexe », ce qui exclut les personnes morales qui n’ont pas de sexe. Pour le PACS et le concubinage, les articles 515-1 et 515-8 du Code civil prennent
soin de préciser « deux personnes physiques » et « deux personnes de même sexe ou de sexe différent vivant en couple ».

Mais ces deux personnes doivent-elles être de sexe différent ? A la différence du PACS et du concubinage qui acceptent les couples de même sexe, le mariage était jusqu’en mai 2013 l’union d’un couple de sexes différents. Cette condition n’était pas posée expressément, mais certains articles du Code civil laissaient entendre implicitement qu’une telle condition existait : ainsi l’ancien article 144 selon lequel « L’homme et la femme ne peuvent contracter mariage avant 18 ans révolus » (la modification de la loi du 4 avril 2006 ne concernant que l’âge) et l’ancien article 75 en vertu duquel, lors de la célébration du mariage, l’officier de l’état civil recevait de chacun « la déclaration qu’elles veulent se prendre pour mari et femme ». Pareillement, l’article 12 de la Convention européenne des droits de l’Homme laisse entendre qu’il faut être de sexe différent : « À partir de l’âge nubile, l’homme et la femme ont le droit de se marier et de fonder une famille selon les lois nationales régissant l’exercice de ce droit ». A priori la législation française ne semblait pas vouloir changer sur ce point, quand bien même une partie importante de la société le demandait... plus ou moins. Pour répondre à ces demandes, le législateur créa le PACS en 1999 et dans le même mouvement reconnu le concubinage. L’avancée est très importante. D’une part, le PACS peut être conclu par des partenaires de même sexe ou de sexe différent, l’article 515-1 du Code civil reconnaissant sans aucune ambiguïté la possibilité pour deux homosexuels de conclure un tel pacte, d’autre part cette loi déclare que le concubinage est une situation de fait entre deux personnes physiques peu important leur sexe. Notons qu’à cette époque le mariage est toujours interdit aux homosexuels et que le principe du mariage hétérosexuel est rappelé fermement par la jurisprudence qui annule les mariages homosexuels prononcés le plus souvent pour provoquer le législateur et lui faire prendre conscience de
l’absurdité de la situation\textsuperscript{17}. Par contre, le transsexualisme n’est nullement un obstacle au mariage dans la mesure où seul l’état civil au moment du mariage compte. Ainsi, biologiquement, les deux époux peuvent avoir le même sexe d’origine, mais le jour du mariage, seuls les états civils faisant apparaître des sexes différents sont pris en compte\textsuperscript{18}.

La loi du 17 mai 2013 fait table rase de tous ces questionnements et discordances en rédigeant ainsi l’article 143 du Code civil : « le mariage est contracté par deux personnes de sexe différent ou de même sexe », les articles 75 et 144 sont modifiés faisant disparaître la différence de sexe et l’article 6-1 est créé annonçant que « le mariage et la filiation adoptive emportent les mêmes effets, droits et obligations... que les époux ou les parents soient de sexe différent ou de même sexe ». Dorénavant, la différence de sexe n’est plus une condition de fond du mariage ni un élément de distinction avec le PACS et le concubinage.

Peu importe donc le sexe des protagonistes mais sont-ils soumis à une restriction, une condition d’âge ? La loi française impose depuis toujours un âge minimum pour se marier. Depuis la loi du 4 avril 2006, hommes et femmes sont à égalité puisque doivent avoir 18 ans accomplis pour se marier\textsuperscript{19}. Si l’un des époux est mineur, le procureur de la République du lieu de célébration du mariage peut exceptionnellement et pour des « motifs graves » accorder une dispense d’âge\textsuperscript{20} ; cette dispense d’âge nécessitera


\textsuperscript{19} Art. 144 C. civ. Auparavant l’homme devait avoir 18 ans et la femme 16 ans, ce qui nécessitait l’accord de ses parents.

\textsuperscript{20} Art. 145 C. civ.
l’accord des parents. Pour le PACS, il faut être majeur pour s’engager ou mineur émancipé (ce dernier ayant la capacité du majeur). Cette nécessaire capacité nous rappelle la nature purement contractuelle du PACS. Le concubinage quant à lui n’étant pas une situation juridique, rien n’a été envisagé sur ce point ; le concubinage peut donc concerner des mineurs.

Etre majeur est-il suffisant pour pouvoir se marier, se pacs er ? L’existence du consentement de chaque époux ou partenaire ne pose pas de souci lorsque l’époux ou le partenaire a son entière capacité juridique. Qu’en est-il pour le majeur protégé, sous tutelle ou curatelle ? Un majeur sous tutelle ne peut se marier ou se pacs er qu’avec l’autorisation du juge des tutelles ou du conseil de famille s’il a été constitué et après audition des futurs conjoints ou partenaires, voire, le cas échéant, le recueil de l’avis des parents et de l’entourage. La situation est plus subtile pour un majeur sous curatelle qui, pour se marier, doit obtenir l’autorisation du curateur ou à défaut celui du juge des tutelles alors que pour le PACS, il doit signer la convention avec l’assistance du curateur ; notons qu’aucune assistance n’est requise lors de la déclaration conjointe au greffe du tribunal d’instance. Bien évidemment, le majeur sous sauvegarde de justice peut se marier ou se pacs er, car ayant la pleine capacité juridique, ses actes ne sont contrôlés qu’a posteriori.

Si le Code interdit de se marier avant 18 ans, il interdit également la polygamie et les unions incestueuses. En effet, tant dans le PACS que dans le mariage la monogamie est la règle. L’article 147 du Code civil interdit de contracter un second mariage avant la dissolution du premier ; il n’y a aucune possibilité de régulariser ultérieurement. Dans le même esprit, l’article 515-2 du même code interdit le PACS quand l’un des deux candidats est

22. Arts. 460 et 462 C. civ.
soit marié soit lié par un pacte avec autrui ; le mariage d’une personne liée par un PACS met fin à celui-ci. Pareillement, l’inceste est un interdit que l’on retrouve tant pour le mariage que pour le PACS. Ainsi les articles 515-2 et 161 et suivants du Code civil prohibent et frappent de nullité absolue le pacte et le mariage entre ascendant et descendant en ligne directe, entre alliés (les alliés sont les personnes qui ont un lien juridique par l’effet du mariage, donc le lien existant entre un conjoint et les parents de son époux) en ligne directe et entre collatéraux jusqu’au troisième degré inclus (donc entre parent et enfant, grand-parent et enfant, entre membres d’une même fratrie, l’oncle ou tante et la nièce ou le neveu,...). Notons que ces interdits sont pour certains désuets car s’expliquaient souvent par le fait que les familles vivaient regroupées sous un même toit et que l’on craignait les désagrément de la consanguinité. Récemment, la Cour de cassation a refusé d’annuler le mariage entre une femme et son beau-père après qu’elle ait divorcé du fils (qui demandait l’annulation du mariage pour qu’elle ne soit pas légataire universelle de son père) de ce dernier au motif :

que le prononcé de la nullité du mariage de M. Y et Mme X revêtait, à l’égard de cette dernière, le caractère d’une ingérence injustifiée dans l’exercice de son droit au respect de sa vie privée et familiale dès lors que cette union, célébrée sans opposition, avait duré plus de vingt ans.

Remarquons qu’en matière de mariage, s’il existe des causes graves, le Président de la République peut lever l’interdiction de mariage entre alliés en ligne directe lorsque la personne qui a créé l’alliance est décédée et entre oncle ou tante et nièce ou neveu, alors qu’aucune dispense n’est possible dans le cadre du PACS,

parce que nous sommes alors dans un domaine purement contractuel.

B. Des formalismes distincts pour une même protection des consentements

Le mariage et le PACS étant des contrats se formant par l’accord de volontés des futurs conjoints ou partenaires, les articles 1108 et suivants du Code civil imposent que soit recueilli le consentement de chaque époux, de chaque partenaire et que ce consentement soit exempt de tout vice. Alors que l’article 146 du Code civil prend soin de préciser qu’« il n’y a pas de mariage lorsqu’il n’y a point de consentement », la seule qualification de contrat pour le PACS impose les articles 1109 et suivants du Code civil sur la protection des consentements des parties.

L’absence de l’un des deux consentements entache le mariage ou le PACS de nullité, nullité pouvant être demandée par l’une des deux parties. Ceci se rencontre avec le mariage simulé par lequel les époux aspirent non à vivre ensemble mais à obtenir quelques avantages découlant du mariage tels la nationalité française26, un avantage fiscal, des avantages patrimoniaux non obtenus par simple testament27, voire la fortune de l’époux28... La même sanction peut s’appliquer aux partenaires qui se pacsent essentiellement pour bénéficier d’avantages fiscaux. Notons que dans ces circonstances, il y a absence de consentement, mais également cause illicite car ces contrats (mariage ou PACS) poursuivent un objectif totalement étranger à celui de la loi et détournent les effets de celle-ci.

Curiosité française, l’article 171 du Code civil permet le mariage avec un seul des deux consentements ; il s’agit du mariage posthume, situation exceptionnelle qui permet de se passer du consentement d’un des époux et qui doit être autorisé par le Président de la République dans des circonstances graves (souvent la naissance d’un enfant après le décès) si l’un des futurs époux est décédé et que son consentement au mariage peut être établi sans équivoque\(^{29}\), ce mariage produit ses effets à la date du jour précédant le décès sans que l’époux survivant ne puisse profiter d’un contrat de mariage ni de droit de succession. Ceci ne peut être reproduit avec le PACS car celui-ci étant un contrat, il ne peut souffrir d’absence de consentement. Nouvel élément qui nous montre que le mariage est un peu plus qu’un simple contrat.

Le PACS et le mariage étant des contrats, ils obéissent aux conditions générales de validité de droit commun des contrats\(^{30}\). Par conséquent, le consentement des partenaires comme celui des époux doit exister comme nous l’avons vu et ne pas être vicié. La jurisprudence exigeant un consentement libre et éclairé en matière de mariage est aisément transposable au PACS. Chacun est libre de se marier ou non, de se pacser ou non, et de se mettre ou non en concubinage puisque cette situation est plus factuelle que juridique. Rien ne doit faire obstacle à la rencontre des volontés\(^{31}\). La liberté de contracter nécessite que, conformément à l’article 1109 du Code civil, les consentements ne soient pas viciés que ce soit pour le mariage ou pour le PACS, en remarquant que tous les vices du consentement (erreur, dol et violence) ne sont pas perçus pareillement.

\(^{29}\) Cass. 1re civ., 28 fév. 2006, Dr. Fam. 2006, comm. 79, V. Larribau-Terneyre.

\(^{30}\) Arts. 1108 et suivants C. civ.

Ainsi, en vertu de l’adage « en mariage, trompe qui peut » (Loysel), la jurisprudence ne retient pas le dol et donc l’application de l’article 1116 du Code civil ; peu importe que l’un des époux ait provoqué une erreur chez son conjoint et ce par manigance ou mensonge voire silence ; cela peut cependant permettre le divorce. Par contre, le dol est une cause de nullité que tout partenaire d’un PACS peut invoquer car soumis au régime commun du droit des contrats.

Concernant l’erreur, dès l’origine, le Code civil a prévu dans l’article 180 (article propre au mariage) la possibilité pour un époux de demander la nullité du mariage pour ce motif. Cependant la jurisprudence retient avec prudence l’erreur sur l’identité du conjoint ou sur une de ses qualités essentielles (erreur sur la santé mentale ou physique\(^{32}\), sur l’aptitude aux relations sexuelles\(^{33}\), sur la situation familiale\(^{34}\) voire sur la religion de l’époux\(^{35}\)) et seulement si ces erreurs ont été déterminantes du consentement de l’époux et ce au moment du mariage. Pour le PACS, il est nécessaire de se fonder sur l’article 1110 du Code civil et de démontrer que l’erreur porte sur une qualité essentielle de la personne et que chacun connaissait l’importance de cette qualité, qu’elle été déterminante du consentement et qu’elle est excusable.

L’erreur n’est pas le seul vice du consentement commun au mariage et au PACS, la violence, plus exactement la crainte inspirée par la violence, est un vice du consentement classiquement reconnu par la jurisprudence,\(^{36}\) la violence morale émanant le plus souvent des ascendants pour forcer de jeunes gens à se marier\(^{37}\).

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loi n° 2006-399 du 4 avril 2006 relative à « la prévention et la répression de la violence au sein du couple et contre les enfants » est venue modifier l’article 180 du Code civil en ajoutant que « L’exercice d’une contrainte sur les époux ou l’un d’eux, y compris par crainte révérencielle envers un ascendant, constitue un cas de nullité du mariage » et en ouvrant l’action au Ministère public. Les partenaires du PACS peuvent également demander la nullité de leur pacte en se fondant sur la violence et donc les articles 1112 et suivants du Code civil.

Là où le concubinage se forme et se rompt sans aucun formalisme, étant le fruit de la liberté du couple, le PACS et le mariage sont des contrats solennels pour lesquels la loi impose un formalisme *ad validitatem*. Ainsi pour être valable, le mariage doit satisfaire à une procédure formelle tant avant que lors de la célébration de l’union. Afin de permettre à l’officier de l’état civil de s’assurer que les conditions de fond du mariage sont remplies, les futurs époux remettent une copie de leur acte de naissance. Si l’officier de l’état civil l’estime nécessaire, il procédera à l’audition des futurs époux pour s’assurer qu’il n’y a pas fraude au mariage dans l’objectif pour l’un des époux d’obtenir la nationalité française ou un titre de séjour. Une publicité de la célébration du mariage est assurée par voie d’affichage à la mairie du lieu du mariage pendant 10 jours, en indiquant « les prénoms, noms, professions, domiciles et résidences des futurs époux, ainsi que le

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38. Cette loi a été complétée par la Loi n° 2010-769 du 9 juillet 2010 « relative aux violences faites spécifiquement aux femmes au sein des couples et aux incidences de ces dernières sur les enfants ».

39. Il peut également être nécessaire de produire l’acte autorisant le mineur à se marier, voire l’autorisation du Président de la République levant une interdiction au mariage.

40. À la suite de cette audition, s’il apparaît que le mariage est susceptible d’être annulé, l’officier de l’état civil peut saisir sans délai le procureur de la République et il en informe les intéressés. Dans les quinze jours de saisine, le procureur doit soit laisser procéder au mariage, soit former opposition, soit surseoir à la célébration dans l’attente des résultats de l’enquête à laquelle il fait procéder (Art. 175-2 C. civ.).
lieu où le mariage devra être célébré »41 afin de permettre aux personnes concernées d’exercer leur droit d’opposition ou d’informer l’officier de l’état civil d’un empêchement à ce mariage. Enfin, l’officier de l’état civil célébrera le mariage publiquement à la mairie de la commune où l’un des deux époux a son domicile ou sa résidence depuis au moins un mois42, en présence43 des futurs époux et d’au moins deux témoins (quatre au plus) et ce quelle que soit son opinion. Aussi les maires refusant de célébrer les mariages homosexuels dans leur commune s’exposent-il à une peine de cinq ans d’emprisonnement et 75000 euros d’amende44. Ce formalisme parfois qualifié de cérémonial, indispensable pour la validité du mariage, met en exergue que le mariage est plus qu’un contrat.

Également contrat solennel, le PACS est assujetti à un formalisme impératif (article 515-3 Code civil) exigeant que les partenaires rédigent un écrit sous seing privé ou sous la forme authentique. Lorsque l’acte est sous seing privé, les partenaires en font la déclaration personnelle45 et conjointe au greffe du tribunal d’instance dans le ressort duquel ils ont leur résidence commune en fournissant obligatoirement la convention et leurs actes de naissance attestant qu’ils ne sont ni mariés ni pacsés. Pour toute cérémonie, le greffier s’assure que les conditions sont remplies, vise la convention et inscrit la déclaration sur un registre spécial lui donnant date certaine et rend le PACS opposable aux tiers en le faisant mentionner en marge de l’acte de naissance de chacun des partenaires. Lorsque le pacte est fait sous la forme authentique, le

41. Art. 63 C. civ.
42. Art. 165 C. civ.
43. La présence des époux n’est pas requise en cas d’empêchement grave ou de péril imminent de mort de l’un d’eux et dans ces cas l’officier de l’état civil devra se déplacer au domicile ou à la résidence de l’un des futurs conjoints
44. Art. 432-1 C. pén. - Circulaire du 13 juin 2013 relative aux conséquences du refus illégal de célébrer un mariage de la part d’un officier de l’état civil.
45. Cependant, s’il existe un empêchement grave, le procureur de la République peut requérir le greffier de se transporter chez l’une des parties afin d’enregistrer le PACS (Art. 515-3, al. 2 C. civ.).
notaire recueille la déclaration conjointe des partenaires, enregistre
le PACS et procède aux formalités de publicité auprès du greffe.
Le mariage comme le PACS ne prennent effet qu’au jour de leur
enregistrement et l’un et l’autre sont mentionnés en marge de l’acte
d’état civil de chacun des époux ou partenaires.

Après avoir constaté qu’il n’y a pas de condition pour être
concubins et que les conditions légales de validité du mariage et du
PACS ont de fortes ressemblances, en ce sens qu’ils sont tous les
deux des contrats solennels, le premier étant empreint d’une plus
grande attention du législateur, intéressons-nous aux effets de ces
situations pour faire apparaître des différences significatives.

II. DES EFFETS DIFFÉRENTS

Le législateur de 1804 avait pris soin d’imposer diverses
obligations qui ont été maintenues voire aménagées pour tenir
compte de l’évolution de la société, obligations qui sont un socle
pour les conjoints et qui donnent au mariage sa spécificité, sa force
et son attractivité. Le Code civil organise les effets du mariage en
prenant soin de distinguer les rapports personnels entre époux de
celui pécuniaires, distinction qui n’apparaît pas aussi distinctement
dans le régime du PACS qui, comme le mariage, a pour but
d’organiser la vie des partenaires, mais se préoccupe plus des
effets pécuniaires que des rapports personnels entre partenaires.
Quant au concubinage, le principe est qu’il n’existe aucun régime
juridique propre au concubinage46 ; les concubins peuvent
organiser leur relation par une convention, ce que la pratique
notarielle encadre ; la réforme récente du pacte civil de solidarité47
a amonddri l’intérêt de ces actes juridiques. Pour comparer ces trois
possibilités de vivre ensemble plus ou moins encadrées par la loi,

46. En conséquence, quand les concubins n’ont rien organisé, il est
impossible de leur appliquer par défaut ou analogie le régime primaire du
mariage. Cass. 1re civ., 17 oct. 2000, pourvoi n° 98-19527, Dr. Fam. 2000,
comm. 139.
47. Loi n° 2006-728 du 23 juin 2006 portant réforme des successions et des
libéralités.
nous partirions des obligations du régime primaire du mariage pour la simple raison que la législation sur le PACS semble s’en être inspirée, ce qui est logique compte-tenu de l’antériorité du mariage. Nous distinguerons les rapports personnels (A) entre époux, partenaires ou concubins de ceux plus pécuniaires (B) qui parfois vont au-delà du couple puisque concernent les enfants.

A. Les rapports personnels

Avant tout, le mariage, le PACS et le concubinage impliquent un couple, donc une communauté de vie. Cette communauté de vie va donner naissance à des obligations de respect, de fidélité, de secours ou d’assistance que l’on rencontre dans les articles du Code civil consacrés au mariage. Mais est-ce le cas dans les autres unions ?

Pour le mariage l’article 212 du Code civil dispose que « les époux se doivent mutuellement respect, fidélité, secours, assistance ». Pour le PACS, la loi du 23 juin 2006 dans l’article 514-4 alinéa 1 du Code civil énonce que « les partenaires liés par un pacte civil de solidarité s’engagent à une vie commune, ainsi qu’à une aide matérielle et une assistance réciproques... ». Et le concubinage ? Compte tenu de la seule définition donnée à l’article 515-8 du Code civil, les concubins n’ont, en principe, aucun devoir réciproque de fidélité, d’assistance, de secours ou de contributions aux charges. Voyons maintenant le contenu de ces obligations, de ces devoirs propres à chaque union ou plus exactement comment les obligations du PACS ressemblent parfois étrangement à celles du mariage.

La communauté de vie est le premier effet factuel de la vie de couple que l’on soit dans le mariage, dans le PACS ou le concubinage ; mais est-ce un effet juridique attaché à chacune de ces situations ? Il s’avère que la loi impérative (donc impossibilité pour les époux de s’entendre conventionnellement pour en disposer autrement) est beaucoup plus précise pour le mariage pour lequel
l'article 215 alinéa 1 du Code civil énonce que « les époux s’obligent mutuellement à une communauté de vie », l’alinéa 2 précisant qu’ils choisissent ensemble le logement de la famille, même si exceptionnellement ils peuvent avoir deux résidences48. Ce devoir de cohabitation implique « la communauté de lit » autrement dit le devoir conjugal49, voire le devoir de procréation50. La loi impose également aux partenaires du PACS une obligation de vie commune, définie par le Conseil Constitutionnel dans sa décision du 9 novembre 1999 sur la loi relative au pacte, cette vie commune ne se limitant pas à une simple cohabitation mais supposant une vie de couple. Rien de tel pour le concubinage sauf à remarquer que la vie commune est un des éléments permettant de qualifier une situation de fait de concubinage puisque la jurisprudence refuse de qualifier de concubinage des relations intermittentes, passagères. En conséquence, la communauté de vie n’est pas un effet mais un préalable indispensable pour sa reconnaissance et donc logiquement pour sa continuité, la communauté de vie sous-tendant alors la communauté de lit.

Cette communauté de vie doit s’accompagner du respect de l’autre membre du couple. Pour lutter contre toutes les violences faites aux femmes au sein du couple, la loi a fait du devoir de respect mutuel la seule obligation communes aux trois situations et ce depuis la loi du 4 avril 200651 renforçant la prévention et la répression des violences au sein d’un couple ou commises contre les mineurs, dont la portée juridique a été accentuée par la loi du 9 juillet 2010 relative aux violences faites spécifiquement aux

51. Loi n° 2006-399 - Cette nouvelle obligation de l’article 212 du Code civil a été proposée par Robert Badinter, pour lequel le respect doit être considéré comme la « base d’une vie de couple harmonieuse et préalable indispensable à la prévention des violences conjugales », Rapport n° 160 de M. Henri de Richemont.
femmes, aux violences au sein des couples et aux incidences de ces dernières sur les enfants\textsuperscript{52}.

De l’obligation de vie commune, découle l’obligation de fidélité tout au moins pour le mariage et ce depuis toujours. En effet, les époux se doivent fidélité, obligation énoncée dans l’article 212 du Code civil ce qui bannit l’adultère et fait de ce dernier une cause de divorce\textsuperscript{53} voire une faute réparable sur le fondement de l’article 1382 du Code civil. Pour le PACS, la loi ne dit rien si ce n’est qu’il doit y avoir vie commune et donc vie de couple. Même si rien n’est écrit, il semble logique de penser que chaque partenaire puisse attendre de l’autre qu’il lui soit fidèle dans cette vie commune. Faute de texte en la matière, certains juges du fond saisis d’une demande de résiliation du PACS ont retenu que le fait de ne pas avoir des relations sexuelles exclusivement avec son partenaire est une inexécution du devoir de loyauté pesant sur chaque partenaire et qu’en conséquence cette résiliation se fait aux torts du partenaire fautif\textsuperscript{54}, la forme contractuelle de l’union permettant de recourir au devoir de loyauté présidant à toute exécution contractuelle. D’autres juges ont fermement exclu cette obligation\textsuperscript{55}, considérant peut-être que ce devoir n’est pas expressément prévu et que le PACS n’a pas la finalité familiale du mariage, finalité exigeant la fidélité. Mais, rien de tel en matière de concubinage sauf à considérer qu’il pourrait s’agir d’un engagement moral sous-entendu dans le caractère de stabilité évoqué comme élément de caractérisation, mais qui n’aura aucun effet juridique.

Obligation plus morale que pécuniaire, le devoir d’assistance se retrouve dans le mariage et dans le PACS, l’article 515-4

\textsuperscript{52} Loi n° 2010-769 - Pour la procédure, voir les articles 515-9 et suivants du Code civil.


\textsuperscript{54} TGI Lille, 5 juin 2002, Dr. Fam. 2003, comm. 57, note B. Beignier.

\textsuperscript{55} Montpellier 4 janv. 2011, Dr. fam. juin 2011, comm. 89.
reprenant l’article 214 du Code civil. Ce devoir imposse aux partenaires comme aux époux de se soutenir mutuellement dans la vie en œuvrant ensemble pour le bien de la famille ou du couple (aide dans le travail, les tâches ménagères) et également de fournir une assistance, une aide matérielle ou morale à l’époux ou partenaire en situation difficile. Cette dimension personnelle et affective a été introduite en 2006 pour le PACS, la loi de 1999 ne donnant au pacte qu’une dimension purement matérielle. Pour le concubinage, rien de tel n’existe. Mais il est intéressant de noter que la loi de 2006 sur la protection juridique des majeurs désigne le partenaire et le concubin pour être curateur au même titre que le conjoint.56

Vie commune, respect, fidélité et assistance sont des obligations que l’on retrouve avec plus ou moins de force dans le mariage et le PACS, parfois dans le concubinage non comme obligation mais comme condition de qualification. Il est des effets que l’on ne trouve que dans le mariage, effets propres qui vont permettre de distinguer nettement cette situation des autres situations de couple et de donner au mariage un caractère supérieur au PACS et au concubinage.

Il en est ainsi de la possibilité pour chaque époux de porter par usage le nom de son conjoint. Un petit plus qui permet à certaines de ne plus porter leur nom et « de former une vraie famille avec mari et enfants portant le même nom » ; notons que les lois de 2002 et 200357 permettent dorénavant que l’enfant porte le nom de ses deux parents, laissant ainsi la possibilité dans une famille « pacsée » ou dont les parents sont concubins d’avoir un nom reflet de la famille car celui des deux parents. Mais il reste à la seule femme mariée ou à son époux la possibilité de porter le nom de l’autre époux. Autre spécificité du mariage, la représentation mutuelle permet à un époux de représenter son conjoint

56. Art. 449 C. civ.
indisponible et ce après autorisation du juge des tutelles\textsuperscript{58}, alors que dans le cadre du PACS il sera nécessaire de faire mettre le partenaire sous tutelle et donc de remplir les conditions exigées. Enfin, le devoir de secours prévu à l’article 212 du Code civil n’a pas d’équivalent dans le PACS. Ce devoir se manifeste après le divorce avec la prestation compensatoire qui vient prendre la suite de la contribution aux charges du mariage pendant le mariage. En effet, pendant le mariage, les époux contribuent en fonction de leurs revenus s’obligéant à assurer les besoins de celui qui n’a rien : la prestation compensatoire poursuit cet objectif social, solidaire après le mariage ce qui en fait une spécificité montrant que le mariage est plus qu’un contrat.

B. Les rapports pécuniaires

Dans le Code civil, le mariage est le socle de la famille, ce sont les époux qui « assurent ensemble la direction... matérielle de la famille »\textsuperscript{59}. Ils vont donc avoir des devoirs pécuniaires réciproques pour assurer cette vie familiale, devoirs de contribuer aux charges du mariage et d’assurer un logement à la famille. Dans le PACS, les partenaires ont également quelques obligations similaires à celles du mariage même si le mot famille n’apparaît pas, limitant ainsi le domaine d’intervention des obligations. La communauté de vie va engendrer des charges, des dettes que les époux ou partenaires vont devoir supporter à la fois chacun pour sa part mais également pour l’intégralité et ce par le biais de la solidarité.

Qu’il s’agisse du PACS (article 515-4 Code civil) ou du mariage (article 214 du Code civil), la loi impose que chacun participe aux charges matérielles engendrées par la vie du couple, et ce « à proportion de leurs facultés respectives ». Dans le mariage, chaque époux doit contribuer aux charges du mariage voire de la famille, le juge pouvant être amené à statuer sur la

\textsuperscript{58} Arts. 217 et 219 C. civ.
\textsuperscript{59} Art. 213 C. civ.
participation de l’époux indélicat. La notion n’étant pas définie par la loi, c’est la jurisprudence qui a dessiné les contours de cette obligation très importante dans la vie des couples mariés, y intégrant les dépenses nécessaires à la famille comme les dépenses d’agrément et de loisir. A défaut de pouvoir déroger à l’obligation de contribuer aux charges du mariage, les époux peuvent aménager les modalités de la contribution dans leur convention matrimoniale en précisant à quelle proportion ils contribuent à ces charges, proportion modifiable si la situation financière des époux change. Les partenaires sont soumis à cette même obligation même si les termes sont évidemment différents puisqu’il s’agit d’une aide matérielle réciproque également proportionnelle aux facultés de chacun. Pareillement, les partenaires peuvent convenir, dans la convention, de répartir autrement ces charges. Le contenu de ces charges n’est pas encore défini dans la jurisprudence ce qui fait s’interroger sur l’ampleur qu’elle donnera à cette obligation somme toute très proche de celle du mariage. Rien dans le texte ne laisse à penser que l’appréciation doive être différente, mais notons qu’il n’est pas fait référence aux dettes concernant l’éducation des enfants, le PACS n’étant pas une structure à vocation familiale. Pour les concubins, la situation étant factuelle, chacun assume les dépenses dont il est à l’origine sans pouvoir obliger l’autre à participer aux dépenses communes engendrées par toute vie commune.

La participation aux charges du mariage ou l’aide matérielle proportionnelle ne doivent pas occulter que chaque époux, chaque partenaire est tenu solidairement des dettes ménagères pour le premier et de celles contractées pour les besoins de la vie courante pour le second. En effet, l’alinéa 1 de l’article 220 énonce que

60. Loyer de l’habitation principale : Cass. 1re civ., 7 nov. 1995, pourvoi n° 92-21276.
« chacun des époux a pouvoir de passer seul les contrats qui ont pour objet l’entretien du ménage ou l’éducation des enfants : toute dette ainsi contractée par l’un oblige l’autre solidairement ». L’indépendance de gestion de chaque époux dans la vie quotidienne de la famille trouve son pendant dans la solidarité qui lie les époux face à ces dettes. Cette solidarité permet aux créanciers de poursuivre l’un quelconque des deux pour l’intégralité de la dette dès lors que les dettes ne sont pas manifestement excessives au regard du train de vie du ménage, inutiles, ou dues à un tiers de mauvaise foi, ni des achats à tempérament ou des emprunts sauf à ce qu’ils soient modestes et nécessaires aux besoins de la vie courante. Pour le PACS, l’alinéa 2 de l’article 515-4 du Code civil impose une solidarité entre partenaires pour certaines dettes, celles « contractées par l’un d’eux pour les besoins de la vie courante ». Peut-être peut-on se demander si cette notion est plus vaste que les dettes dont l’objet est l’entretien du ménage ou l’éducation des enfants. A priori rien ne le laisse entendre, surtout que les causes d’exclusion de la solidarité sont les mêmes que dans le cadre du mariage. Notons cependant comme précédemment une différence conceptuelle : les partenaires sont tenus pour les dettes de la vie courante sans précision de celles pouvant concerner d’éventuels enfants qui sont expressément cités pour le mariage. Ces dettes seront-elles concernées et si oui, pourquoi ne pas l’avoir précisé ? sauf à laisser comprendre que le mariage a toujours pour finalité la famille alors que le PACS n’est qu’un contrat gérant la vie matérielle de deux individus voulant simplement vivre ensemble. Pour les concubins, la dette contractée pour l’entretien du couple ou des enfants n’engage que celui qui l’a contractée.

Afin que la famille ait un lieu dans laquelle s’épanouir, le Code civil dans son article 215 protège le logement de la famille d’un couple marié en imposant une cogestion et interdisant aux époux de conclure seuls tout acte mettant en danger ce logement et son contenu. Ainsi, un époux dont le consentement n’a pas été sollicité
pour la vente du logement, la résiliation du bail, la prise d’une hypothèque sur le logement voire la vente des meubles meublants du logement peut demander la nullité de ces actes dans l’année qui suit sa connaissance de l’acte ou la dissolution du régime matrimonial. Tous ces actes requièrent le consentement des deux époux. Les concubins et les partenaires du PACS ne bénéficient pas de régime de protection du logement comme les époux63. Notons cependant que l’article 14 de la loi du 6 juillet 1989 prévoit la continuation du bail au profit du conjoint, du partenaire ou du concubin, en cas d’abandon du domicile par celui des deux qui est locataire ou de décès de ce dernier et l’article 15 I de la même loi permet au propriétaire d’un logement loué, de donner un congé afin d’attribuer ensuite l’habitation à son conjoint, son partenaire ou son concubin, étant précisé que le concubinage doit avoir au moins un an au jour de la date du congé.

Concernant les effets patrimoniaux tant du mariage que du PACS ou du concubinage, la loi pose des régimes très distincts. Ainsi, il faut se référer au régime matrimonial choisi par les époux ou à défaut, appliquer le régime de la communauté des biens acquis pendant le mariage, ce qui multiplie les possibilités, alors que pour le PACS la situation est clairement posée dans l’article 515-5 du Code civil. Comme dans le mariage, chaque partenaire conserve la propriété de ses biens personnels et chacun d’eux reste tenu des dettes personnelles nées avant le pacte. Pendant le PACS, hormis les dettes de la vie courante, chacun est tenu des dettes qu’il a contractées et les biens acquis sont soumis au régime choisi dans la convention d’origine ou dans une convention modificative postérieure, soit le régime séparatiste, soit l’indivision. Aucune publicité ne permet aux tiers de connaître le régime patrimonial auquel sont soumis les partenaires contrairement au mariage qui voit le régime matrimonial précisé en marge du mariage. Cependant, comme pour le mariage avec l’article 222 du Code

63. Arts. 215, 1751 C. civ.
civil, l’article 515-5 alinéa 3 pose une présomption mobilière en vertu de laquelle le partenaire qui détient individuellement un meuble est réputé, à l’égard des tiers de bonne foi, avoir le pouvoir de faire sur ce bien tout acte d’administration, jouissance ou de disposition. Encore un effet copié sur ceux du mariage. S’agissant des rapports patrimoniaux entre les concubins, le principe est que chacun est propriétaire des biens qu’il acquiert. En conséquence, un bien acheté ensemble est indivis à moins qu’il n’en soit stipulé autrement dans l’acte d’acquisition ; pareillement un bien pour lequel aucun ne peut prouver sa propriété sera présumé indivis.

Pour comparer et distinguer les trois unions, mais cela ne peut être un critère de choix, nous aurions pu évaluer les moyens d’y mettre fin. Mais qui choisirait le concubinage à la seule considération de la facilité de se séparer en veillant à ce que la rupture ne soit pas abusive ? Qui choisirait le mariage, pensant que la procédure de divorce étant compliquée, son couple sera certain de tenir jusqu’à la mort ? Enfin, qui choisirait plutôt le PACS au motif qu’il s’agit d’un contrat à durée indéterminée, auquel nul ne peut être contraint de rester et qui peut être résilié à tout moment ? Nous aurions également pu comparer les régimes successoraux et fiscaux, en notant que le mariage protège mieux l’époux survivant mais que la fiscalité peut fortement évoluer pendant la vie commune au risque d’anéantir les aspects positifs de la forme d’union choisie. Tant de choses pourraient être dites, mais un constat s’impose : quoi que l’on dise, le mariage a des atouts qui font de lui une forme d’union supérieure au PACS et au concubinage et qui explique pourquoi les couples homosexuels se sont battus pour avoir le droit d’y accéder ; dans le mariage, il y a une dimension familiale affichée, revendiquée64 que l’on ne trouve pas ailleurs.

64. Aux termes de l’article 213 du Code civil, « les époux assurent ensemble la direction morale et matérielle de la famille. Ils pourvoient à l’éducation des enfants et préparent leur avenir ». 
IL MATRIMONIO PER TUTTI?
LE DROIT ET LA SOCIÉTÉ ITALIENS FACE AUX UNIONS
ENTRE PERSONNES DE MÊME SEXE

Enrica Bracchi* et Carolina Simoncini†

ABSTRACT

Unlike many other European Union countries, in Italy a legislation governing same-sex couples marriages still lacks. This legal vacuum is mainly due to the strong influence of the Catholic Church on Italian politics. A progressive gap between the demand of the civil society asking for equal treatment between heterosexual and homosexual couples, and the backwardness of the internal positions of the Italian Parliament appears. However, several isolated attempts have been and are still being made to fill that gap: various judgments of the Italian Court of Cassation affirmed the equal treatment of all "social formations", some municipalities have set up special registers for unmarried couples, some members of the Italian parliament have tried to introduce (unsuccessfully) legal rules governing homosexual unions but the road to full equalization is still long.

RÉSUMÉ

À la différence de nombreux pays appartenant à l’Union européenne, l’Italie reste encore aujourd’hui un pays dépourvu d’une législation qui réglemente les unions entre couples homosexuels. Ce vide juridique peut être expliqué à la lumière de la forte influence exercée, depuis toujours, par l’Église catholique sur la politique italienne. On peut donc observer un progressif écart entre les exigences de la société civile qui invoque une

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égalité de traitement entre couples hétérosexuels et homosexuels et le retard des positions du Parlement italien. Il y a eu et il y a toujours des tentatives (isolées) pour essayer de combler ce vide juridique : plusieurs arrêts rendus par la Cour de cassation italienne ont affirmé l’égalité de traitement entre toutes les « formations sociétales », quelques communes ont introduit des registres pour les couples non mariés, quelques membres du Parlement ont essayé (sans succès) d’introduire des normes juridiques qui réglementent les unions homosexuelles mais le chemin pour une pleine égalité est encore long.

RIASSUNTO

A differenza di molti altri Paesi appartenenti all’Unione europea, l’Italia rimane ancora oggi sprovvista di una legislazione che disciplini le unioni tra coppie omosessuali. Questo vuoto giuridico è principalmente imputabile alla forte influenza che da sempre la Chiesa cattolica esercita sulla politica italiana. Si osserva così un progressivo scarto tra le esigenze della società civile che invoca una parità di trattamento tra coppie eterosessuali e omosessuali e l’arretratezza delle posizioni interne al Parlamento italiano. Diversi ma isolati tentativi sono stati e sono tutt’oggi compiuti per tentare di colmare questa mancanza: diverse sentenze della Corte di Cassazione italiana hanno affermato l’uguaglianza di trattamento tra tutte le “formazioni sociali”, alcuni comuni hanno istituito degli appositi registri per le coppie non sposate, alcuni parlamentari hanno cercato di introdurre (senza successo) norme giuridiche che disciplinano le unioni omosessuali ma la strada per una piena parificazione appare ancora lunga.

Est-ce qu’en Italie Il matrimonio (è) per tutti1, le mariage est pour tous ? Le droit italien ne reconnaît que le mariage comme
union entre deux personnes de sexe différent. Si le Code civil en vigueur en Italie n’explicitait pas que les conjoints doivent être de sexe différent\(^2\), c’est le Code de droit canonique qui souligne, à l’article 776, ce qui suit :

Le contrat matrimonial, fondé par le Créateur et muni de ses lois, par lequel l’homme et la femme décident l’un vis-à-vis de l’autre l’union de toute leur vie par un accord personnel et irrévocable, de par sa nature propre, est conçu, en vue du bien des époux, pour la procréation et pour l’éducation des enfants\(^3\).

De plus, le mariage reste dans l’imaginaire collectif italien — tout comme dans beaucoup d’autres pays — une union entre un homme et une femme et seules les unions entre un homme et une femme fondées sur le mariage trouvent une reconnaissance sur le plan juridique, aucune réglementation n’existant pour les couples non mariés, en union libre, hétérosexuels ou homosexuels.

Qu’en est-il donc des couples et des familles non fondées sur le mariage qui d’après une enquête de 2008/2009 s’élevaient à 500.000, soit 5,9% des couples\(^4\). La Constitution italienne de 1948 ne reconnaît, en effet, que « la famille fondée sur le mariage », comme énoncé à l’article 29 et en Italie, il existe un vide législatif.
Concernant la reconnaissance juridique de ces unions qu’elles soient formées par des personnes de sexe différent ou de même sexe. Dans le présent article, nous allons notamment nous concentrer sur la (non) reconnaissance des couples et des familles homoparentaux dont la présence sur le territoire italien n’est pas négligeable. En 2007 le nombre d’enfants et jeunes adultes grandis dans des familles italiennes où les figures parentales sont de même sexe s’élevait à 100.000. D’après une récente enquête publiée en 2012 et intitulée La popolazione omosessuale nella società italiana/"La population homosexuelle dans la société italienne" et menée par l’Institut italien de statistique, environ un million d’Italiens (sur 60 millions au total) se sont déclarés homosexuel ou bisexuel. Lors de cette même enquête, 62,8% des personnes interviewées (tranche d’âge 18-74 ans) est d’accord sur le fait que les couples de même sexe aient les mêmes droits qu’un couple marié et que, s’ils le souhaitent, ils puissent se marier (43,9% des répondants). Malgré cette (apparente) ouverture des Italiens vis-à-vis des unions entre personnes de même sexe, en Italie, le mariage homosexuel représente, encore de nos jours, une sorte de « tabou » que la politique ne veut pas évoquer et dont elle veut encore moins parler ouvertement.

Comme nous l’avons annoncé auparavant, la législation italienne ne prévoit aucune loi visant à réglementer les mariages entre personnes de même sexe ou les couples de fait. Par ailleurs, cela pourrait être expliqué, dans un premier temps, au vu du rôle du Vatican dans les décisions politiques italiennes. Le Vatican étant un État indépendant, ses interventions constituent une ingérence illégitime dans l’activité d’un autre État. Deuxièmement, les interventions du Vatican porteraient atteinte au principe de laïcité de l’État italien5. Si la Constitution italienne de 1948

prévoit, parmi les principes fondamentaux, la séparation de l’État et de l’Église\(^6\) et la liberté de toutes les confessions religieuses\(^7\), il convient de souligner que c’est seulement depuis 1984, à la suite du Concordat entre l’État italien et le Vatican, que la religion catholique n’est plus la seule religion officielle de la péninsule.

Le Vatican s’est toujours opposé aux prévisions normatives concernant la reconnaissance de familles « non naturelles », « non traditionnelles » et la politique a toujours été très sensible aux requêtes provenant du milieu catholique, selon une attitude propre à l’État italien qui se rapprocherait, dans sa manière de suivre la parole du Vatican, de celle des pays de droit islamique, comme l’a souligné Franco Grillini, parti des démocrates de gauche L’Ulivo/L’Olivier, député homosexuel dont l’activité politique est marquée par le combat pour la reconnaissance juridique de tout type d’union\(^8\). Rappelons par exemple que l’Église catholique s’était opposée au fait que la loi de réforme du droit de la famille (1975) supprime la figure du pater familias — et par conséquent toute subordination au sein de la famille entre mari et femme/père et enfants — car éliminant cette figure, l’ordre naturel aurait été perturbé et faussé, comme l’affirme l’avocat Antonio Rotelli\(^9\).

Aujourd’hui, en Italie, on peut donc parler d’un véritable écart entre la politique et la société italienne contemporaine, qui demande d’une manière de plus en plus « pressante » une protection juridique pour les couples non mariés (hétérosexuels ou homosexuels). Cet écart devient davantage évident si l’on considère que, progressivement, presque tous les autres pays européens — y compris très catholiques comme l’Espagne — ont adopté une réglementation à ce propos.

C’est notamment à partir des années 1980 que les famiglie di fatto/concubinages et, plus largement, les « unions libres » —

\(^{6}\) Art. 7 Const.
\(^{7}\) Art. 8 Const.
\(^{8}\) Dans Improvvissamente l’inverno scorso, supra note 4.
\(^{9}\) Id.
c’est-à-dire les unions entre personnes de sexe différent ou du même sexe non fondées sur le mariage — prennent place à côté de la famille traditionnelle et se montrent dans la société italienne. Pour la première fois en Italie, en 1986, on commence à parler des unions civiles au Parlement, grâce à l’Interparlamentare donne Comuniste/« Commission interparlementaire des femmes communistes » et à l’Arcigay, association pour les droits des personnes homosexuelles. Le sénateur Ersilia Salvato et les élues Romana Bianchi et Angela Bottari présentent alors un projet de loi sur les unioni civili/unions civiles. En 1988, l’avocat et parlementaire Alma Agata Cappiello présente la proposition de loi n° 2340 Disciplina della famiglia di fatto/« Règles sur la famille de fait »10, pour la reconnaissance des concubinages entre deux « personnes ». Cette proposition n’est jamais devenue une loi, mais elle a eu une forte résonance, tout particulièrement dans les médias, où la famiglia di fatto a été définie comme un matrimonio di serie B/« mariage de seconde catégorie », comme un piccolo matrimonio/« petit mariage », en masquant la possibilité d’unions homosexuelles de par l’utilisation du terme mariage.

Dans les années 1990, le Parlement européen invite les états membres à légiférer pour mettre à égalité le statut des couples mariés et des couples de fait ainsi que des couples du même sexe et de sexe différent. C’est ainsi qu’en Italie, dans la même période, une dizaine de projets de loi sont présentés au Sénat et au Parlement sans pour autant qu’ils se traduisent en loi. Dans le même temps, certaines villes ont essayé d’adopter des initiatives autonomes pour protéger les couples de fait. Dans des périodes différentes, les communes de Pise, Florence et Empoli en Toscane, de Cogoletto en Ligurie, de Bolzano en Trentin-Haut-Adige et enfin de Milan en Lombardie ont créé, au sein du bureau de l’état civil, des registres pour les couples non mariés. Cette inscription a des

effets juridiques. Toutefois, à cause des compétences administratives très limitées des communes en la matière, ces registres n’ont pas permis une véritable reconnaissance juridique aux couples homosexuels.

En l’absence d’une loi spécifique, ce sont les lois existantes et l’interprétation qu’en fait la jurisprudence qui permettent de trancher et de résoudre des conflits, notamment lorsque l’équilibre social et l’ordre public peuvent être troublés. En 1988, par exemple, la Cour Constitutionnelle considère qu’il est opportun d’appliquer, par analogie, la législation de la famille légitime à la famille de fait, en admettant la possibilité pour le concubin *more uxorio* — expression latine qui se réfère aux personnes qui vivent « à la manière des couples mariés, des conjoints » — de continuer à louer un appartement, même si le bail avait été signé par son compagnon. En 1994, la Cour de Cassation considère qu’il est possible de condamner un tiers à payer au concubin les dommages et intérêts consécutifs à la mort de son compagnon, à condition de prouver l’existence d’un ménage stable, soudé comparable à la vie d’un couple marié.

À la fin des années 1990, entre en scène le député Franco Grillini¹¹, dont l’activité politique est depuis marquée par le combat pour la reconnaissance juridique de tout type d’union et grâce auquel on commencera à véritablement envisager une sorte de Pacs à l’italienne. En 1997 Grillini fonde la *Liff* (*Lega italiana famiglie di fatto*/*Ligue italienne familles de fait*¹²), dont la finalité consiste d’une part à protéger des couples non mariés, et d’autre part à appuyer une loi sur le Pacs dits « à l’italienne ».

Dans les premières années du XXIᵉ siècle, une législation visant à réglementer, outre les familles fondées sur le mariage, tout rapport existant entre deux personnes de sexe différent ou du

¹¹. Parti des démocrates de centre-gauche *L’Ulivo/L’Olivier*.

mêmes de sexe unies par une communion de vie matérielle et
spirituelle, se révèle nécessaire, y compris pour mettre en
conformité le droit italien avec le droit des autres pays européens.

Tout comme dans les années 1990, différents projets de loi — provenant notamment du
Gouvernement — ont été présentés devant le Parlement afin de
donner une réglementation aux unions homosexuelles. Ces projets,
aux appellations hétéroclites, ont été présentés à l’initiative de
différents partis politiques à des intervalles très rapprochés.

Les premières années du nouveau millénaire ont ainsi été
marquées par de nombreux projets de loi. La XIVe législature
(2001 à 2006) s’est trouvée confrontée au phénomène des famiglie
di fatto, des unions libres, des concubinages, c’est-à-dire à des
modèles d’union fondés sur le simple consensus entre deux
individus. En dépit des nombreux projets de loi déposés, le premier
gouvernement Berlusconi n’a pas réussi à adopter une législation

13. Parmi les propositions de loi les plus significatives, nous rappelons: n°
795, du 13 juin 2001 – Disciplina dei patti di convivenza/« Règles sur les pactes
de concubinage », présentée par la députée Katia Bellillo (parti des Democratici
di sinistra, et à l’époque ministre de l’égalité des chances). Disponible sur :
http://www.arcigaymilano.org/dosart.asp?ID=18511 ; n° 3296, du 21 octobre
2002 – Disciplina del patto civile di solidarietà e delle unioni di fatto/« Règles
sur le pact civil de solidarité et sur les unions de fait », présentée par le député
Franco Grillini (Parti démocrate de gauche). Disponible sur :
http://www.arcigaymilano.it/speciale_pacs/Polo/proposte/Grillini_PACS.pdf ; n°
3308, du 23 octobre 2002 – Norme in materia di unione registrata, di unione
civile, di convivenza di fatto, di adozione e di uguaglianza giuridica tra
coniugi/« Règles en matière d’union enregistrée, d’union civile, de cohabitation
de fait, d’adoption et d’égalité juridique entre les conjoints », présentée par les
députés Franco Bertinotti et Titti De Simone (parti Rifondazione comunisti).
Disponible sur : http://legxiv.camera.it/_dati/leg14/lavori/stampati/sk3500/
frontesp/3308.htm ; n° 3893, du 14 avril 2003 – Disciplina dell’unione
affettiva/« Règles sur l’union affective », présentée par le député Franco Grillini.
Disponible sur : http://legxiv.camera.it/_dati/leg14/lavori/stampati/sk4000/
frontesp/3893.htm ; n° 4334, du 2 octobre 2003 – Disciplina del patto civile di
solidarietà/« Règles sur le pact civil de solidarité », présentée par le député
Dario Rivolta (parti Forza Italia). Disponible sur : http://www.fotopride.net/
pacs/PDL/4334-rivolta.htm ; n° 4399 du 20 octobre 2003 – Disciplina della
convivenza familiare/« Règles sur la cohabitation familiale », présentée par la
député Alessandra Mussolini, petite-fille de Benito Mussolini, du parti de droite
Alleanza Nazionale et seul projet où l’adjectif familiare/« familial » est
employé.
ad hoc. Au niveau local, en 2004, certaines régions (la Calabre, la Toscane, l’Ombrie, l’Émilie-Romagne) ont approuvé des « statuts » inspirés de la Charte des droits fondamentaux de l’Union européenne, qui sont favorables à une loi sur les unions civiles, y compris entre personnes du même sexe. Le second gouvernement Berlusconi a contesté ces « statuts », les déclarant constitutionnellement illégitimes.

Pourquoi une telle prolifération de projets de loi dans un si bref laps de temps et par des partis politiques, dont les positions sont très divergentes ?

Il nous semble que la pression sociale joue un rôle de premier plan dans la rédaction de ces textes, qui ont tout au moins un point en commun : ils prennent toujours comme référence les droits et les devoirs propres au mariage. Ainsi, ils établissent l’obligation réciproque de contribution, la présomption *iuris tantum* de communion des biens concernant les biens achetés lors de la cohabitation, l’assimilation du concubin au conjoint dans plusieurs cas, l’extension de la protection pénale au concubin, et l’obligation alimentaire pendant la durée du lien, voire après la dissolution de ce dernier. De nombreuses critiques ont accueilli ces projets, accusés principalement de violation de la liberté individuelle, car ils feraient produire au concubinage des effets légaux comparables aux effets du mariage entre deux personnes ayant choisi cette solution justement parce qu’elles sont opposées au mariage.

Nous observons également une transversalité dans ces propositions articulées autour de trois lignes directrices majeures, comme le fait remarquer le juriste Tommaso Auletta. Tout d’abord, les projets de loi italiens veulent reconnaître à toute personne, indépendamment de son orientation sexuelle, le droit de se marier et de fonder une famille, comme établi par l’article 9 de la Charte des droits fondamentaux de l’Union européenne (7 décembre 2000). Ceci conformément au 1er alinéa de l’article 21 de la même Charte, qui dispose que toute discrimination fondée sur l’orientation sexuelle est interdite. La reconnaissance des droits
desdits articles se traduirait par la création d’une institution différente du mariage, mais qui aurait les mêmes effets légaux, avec des limitations par exemple en matière d’adoption d’enfants (cf. projets de loi De Simone-Bertinotti et Grillini). Ensuite, en ligne générale, les projets mentionnés prévoient un modèle de *convivenza registrata/cohabitation enregistrée*, une sorte de cohabitation ouverte aux couples homosexuels et hétérosexuels, caractérisée par une série de droits et de devoirs explicitement listés (par exemple, la pension alimentaire, les droits de succession). Enfin, les propositions souhaitent faire reposer sur un accord entre les deux personnes les règles de la cohabitation, cette dernière n’étant pas nécessairement caractérisée par une union affective, et donc non soumise à l’interdiction d’unions incestueuses. C’est la solution qui se rapproche le plus du PACS français (cf. projets de loi Bellililo et Rivolta).

Et la religion dans tout cela ? De son côté, l’Église réagit immédiatement aux propositions sur la reconnaissance des Pacs et d’autres formes d’union pour hétérosexuels et homosexuels. Le cardinal Camillo Ruini, lors de l’ouverture du Conseil permanent de la Conférence épiscopale italienne (Cei)\(^\text{14}\), dont il était le Président, qualifie le Pacs d’inconstitutionnel, car contraire au modèle de famille prévu par la Constitution. De plus, même s’il se fonde sur le modèle du mariage, il ne serait qu’un « petit mariage » : c’est-à-dire quelque chose dont on n’a pas vraiment besoin et qui occulterait en revanche la nature et la valeur de la

famille, et provoquerait un très grave dommage au peuple italien ».

Aucun des différents projets mentionnés auparavant n’a jamais été approuvé. Récemment c’est encore la jurisprudence qui a essayé de faire progresser le système juridique italien dans cette direction. La Cour de cassation a reconnu l’importance de protéger les couples « de fait », en les considérant en tant que « formations sociétales » évoquant notamment la protection prévue à l’article 2 de la Constitution italienne de 1948.

On peut ainsi constater que le droit, en tant que tel, essaye de jouer son rôle favorisant le progrès de la société. Il œuvre afin de comprendre et, d’une certaine façon, d’inclure dans ses catégories abstraites la réalité qui, par définition, est dynamique et change souvent. Si bien que, si la protection des mariages homosexuels pouvait ne pas sembler urgente et peut-être peu importante jadis, aujourd’hui nous ne pouvons plus affirmer la même chose et c’est au droit de s’en rendre compte.

En revanche, la politique, comme nous l’avons évoqué auparavant, démontre ne pas « vivre avec son temps ». Les convictions de certains hommes politiques empêchent la reconnaissance juridique des couples de fait à cause de raisons religieuses qui, théoriquement, ne devraient pas influencer les décisions du Parlement.

On essayera donc de mettre en lumière les progrès menés par le droit, et cela malgré la politique.

Allons voir dans le détail quelques projets de loi présentés dans le but de protéger les couples de fait et les unions entre personnes du même sexe.

En 2005, le Sénateur Gavino Angius (Parti socialiste) présente le projet n. 3534/2005 « Pactes civils de solidarité ». Il s’agissait

15. « “piccolo matrimonio”: qualcosa cioè di cui non vi è alcun reale bisogno e che produrrebbe al contrario un oscuramento della natura e del valore della famiglia e un gravissimo danno al popolo italiano ». Luigi Accattoli, Ruini: Pacs incostituzionali. La convivenza non è famiglia, IL CORRIERE DELLA SERA, 20 septembre 2005.
d’une initiative plutôt ouverte : l’article 1 précisait que la loi « protège l’actuation du droit inviolable de l’homme et de la femme à la pleine réalisation personnelle dans le cadre du couple ». Dans ce but « le pacte civil de solidarité » était défini comme « l’accord entre deux personnes de sexe différent ou du même sexe, conclu pour régler les rapports personnels dans le cadre du couple ». L’article 2 réglait les « unions de fait » considérées comme un « concubinage stable et continu dans le temps entre deux personnes, de sexe différent ou du même sexe, qui mènent une vie de couple ».

Les effets juridiques liés aux pactes civils de solidarité étaient tout autant ouverts : les unions étaient mises sur un plan d’égalité avec le mariage en ce qui concerne la possibilité de choisir entre la communauté ou la séparation des biens, les questions concernant l’héritage et la succession, les problèmes de santé et de l’assistance réciproque.

Entre-temps, en juin 2006, en réaction à la crise de la structure familiale et à sa mise en cause par l’adoption, par des pays européens pourtant très catholiques, de lois considérées comme trop permissives — pensons à nouveau à l’Espagne où le 30 juin 2005, le gouvernement Zapatero a modifié le Code civil, autorisant le mariage entre personnes du même sexe, et l’adoption d’enfants mineurs par ces mêmes couples — le Conseil pontifical pour la famille publie le texte le plus sévère de ces dernières années : Famiglia e procreazione umana16/ « Famille et procréation humaine ». Dans ce document, le Saint-Siège rejette les « Pacs à l’italienne », l’avortement, la contraception et la recherche sur les cellules souches, qui seraient l’expression de l’« éclipse de Dieu »17. Cette image très sombre renvoie à l’absence de toute référence à Dieu dans les pratiques mentionnées ; elle reflète une

profonde crise de la vérité et de la société italienne contemporaine ; elle annonce la catastrophe morale et culturelle d’un Occident, caractérisé par la baisse des naissances.

Les débats restant très vifs, en particulier quant à la reconnaissance de la *famiglia di fatto/*« famille de fait »¹⁸ non fondée sur le mariage, en mars 2007, les évêques du Conseil épiscopal permanent italien présentent une note qui réaffirme la doctrine de l’Église : la famille consacrée par le mariage, protégée par la Constitution, est irremplaçable et son but est la procréation des enfants. Les unions homosexuelles restent inconcevables ; la légalisation des « familles de fait » est considérée comme « inacceptable au plan du principe, dangereuse au plan social et éducatif. Quelle que soit l’intention de la personne qui propose ce choix, l’effet serait inévitablement délétère pour la famille »¹⁹.

Pour résumer, la vie humaine, dès sa conception embryonnaire, et la famille traditionnelle légalement ou religieusement ratifiée restent pour l’Église des principes non négociables²⁰.

Successivement, la politique a essayé de proposer un projet de loi beaucoup plus « timide » par rapport au projet de Gavino Angius de 2005. Le 8 février 2007, le Conseil des ministres approuve le projet de loi sur le DICO, acronyme qui signifie *Diritti e doveri delle persone stabilmente conviventi/*« Droits et devoirs des personnes qui cohabitent de façon stable ». Ce projet eut une retombée médiatique comme jamais auparavant. Une retombée


médiatique qui se traduit par des réactions de la part des Italiens — contre ou en faveur — de ce projet de loi qui, rapidement, fut présenté par les journalistes comme un projet notamment — voire presque exclusivement — pour les couples homosexuels. Cette information faussée et imprécise eut, entre autres, comme conséquence une montée de l’homophobie à la limite du racisme, comme les metteurs en scène Gustav Hofer et Luca Ragazzi ont pu le montrer dans Improvvisamente l’inverno scorso/Soudain l’hiver dernier. Dans ce film documentaire sorti en 2008, ce couple gay de journalistes a suivi et a montré les travaux concernant les DICO, d’abord au Gouvernement, puis au Parlement, mais aussi la réaction des différents représentants politiques et des associations pro ou contre la reconnaissance des familles « non naturelles, non traditionnelles », entre autres formées par deux hommes ou par deux femmes.

Revenons au projet de loi. Certains représentants de la majorité parlementaire ont demandé au ministère de la famille de l’époque de ne réglementer que les droits individuels et non les droits du couple concubin, le but étant de cacher une réalité sociale et relationnelle derrière un besoin individuel. C’est pour cela que le projet de loi était intitulé « droits et devoirs des personnes en concubinage stable ». Bien que le projet de loi présentât des innovations dans la législation sur les nouvelles formes familiales, par exemple, les droits des concubins sont certifiés en matière de sécurité sociale, il est prévu la délivrance d’un permis de séjour pour concubinage, il est reconnu le droit au rapprochement familial des concubins (depuis au moins trois ans), fonctionnaires ou employés du secteur privé, afin de faciliter le maintien de la résidence commune, ainsi que le droit de succession pour les contrats de location et en cas d’héritage, mais il ne s’agissait que des innovations vis-à-vis de chaque membre du couple et non du couple dans son unité. Cela bien que, nous le rappelons, au sens de l’article 2 de la Constitution, les droits de la personne en concubinage doivent être protégés en tant que droits de la personne
faisant partie d’une « formation sociale » dont la famille — terme qui à notre avis doit désormais être considéré dans son sens le plus large — en est un exemple.

L’article 1 du projet de loi de 2007 reconnaissait la possibilité de stipuler un DICO « entre des personnes majeures, y compris de même sexe, qui sont concubines d’une façon stable et qui se soutiennent au niveau matériel et moral ». Les destinataires de ce projet de loi ne sont pas seulement les concubins more uxorio et les couples homosexuels mais également et potentiellement les membres d’une même famille. Comme le législateur n’a pas voulu prévoir une réglementation clairement pour les couples homosexuels, il a forcément créé des ambiguïtés. Par le biais de ce projet de loi, trois ou quatre personnes qui cohabitent, qui vivent ensemble comme s’ils étaient concubins pourraient, en effet, être soumises au régime des DICO. Le résultat est que le but de protéger les couples homosexuels, perd, par cela, son sens.

Un autre élément incohérent est que la loi acte le « minimum syndical » parce qu’elle ne prévoit pas l’introduction des registres d’état civil pour l’inscription des couples qui ont stipulé un DICO. Une partie de la majorité parlementaire a demandé expressément au Gouvernement de ne pas envisager un registre spécial dans le but de cacher un possible moyen de reconnaissance publique des couples en concubinat. Pourtant, le Gouvernement a trouvé une solution de compromis, valorisant un registre déjà existant, le registre de l’état civil, réalisé par le Décret du Président de la République n. 223/1989 dont l’article 4 aurait dû également programmer l’inscription des couples qui ont stipulé un DICO.

En ce qui concerne les rapports juridiques qui naissent au sein du couple, le projet prévoit une obligation réciproque d’assistance et de solidarité matérielle et morale (article 2). En outre, dans le cas où l’un des membres du couple se trouverait dans un état de besoin, l’autre membre du couple doit l’entretenir selon les conditions prévues à l’article 12. En revanche, en ce qui concerne la dimension « extérieure » au couple, il est prévu le droit d’accès
aux soins médicaux (article 4) ; la possibilité de choisir l’autre membre du couple comme celui qui doit prendre des décisions concernant l’hospitalisation ; le droit de demander un permis de séjour en raison du concubinat ; on protège aussi le droit fondamental au logement.

Par contre, les droits de succession ne sont pas reconnus directement au couple par le biais de la stipulation du pacte : il faut attendre 9 ans après l’inscription dans un registre de l’union pour obtenir ces droits.

Quelques mois plus tard, les Diritti e doveri delle persone stabilmente conviventi et ayant pour acronyme Dico, sont remplacés par les Contratti di Unione Solidale/« Contrats d’union solidaire », et l’acronyme CUS21. Le 12 juillet 2007, après des mois de discussions au Parlement, le président de la Commission Justice du Sénat Cesare Salvi, de la Gauche démocratique (Sinistra democratica) présente un nouveau projet de loi dont la finalité reste de mieux réglementer les unions libres, en portant une attention particulière aux unions homosexuelles. Quelles sont les principales nouveautés des CUS? Tout d’abord, les « unions solidaires » peuvent être établies ou modifiées par un acte public rédigé devant un notaire ou un juge de paix22 ; les deux parties contractantes s’engagent ainsi à s’aider réciproquement et à contribuer aux nécessités de la vie en commun en fonction de leurs revenus. Le projet de loi prévoit également l’institution d’un registre de ces unions. Dans ce registre, qui est tenu par le juge de paix, les contrats d’ unions solidaires seront inscrits. Les parties peuvent choisir le régime matrimonial applicable, c’est-à-dire l’ensemble des règles régissant toutes les questions pécuniaires relatives au ménage, et les insérer dans leur contrat. Il est prévu

22. Le Giudice di Pace/Juge de paix est un magistrat honoraire et non de carrière, nommé par le Conseil supérieur de la magistrature. Parmi ses compétences en matière civile, il peut par exemple exercer une fonction conciliatoire dans des décisions concernant le mariage.
aussi qu’en cas de maladie avec incapacité, même temporaire de l’une des parties, et en l’absence d’une volonté contraire manifestée par écrit ou d’une procuration, l’autre partie peut prendre toute décision à caractère sanitaire concernant le malade. Enfin, en cas de décès et en l’absence d’une volonté contraire manifestée par écrit, il est reconnu la faculté de l’autre partie à prendre des décisions pour le traitement du corps, y compris le don d’organes, ainsi que pour l’organisation des funérailles.

En 2008, un nouveau gouvernement s’installe (gouvernement Berlusconi IV) et ces questions de famille ne semblent pas faire partie de ses priorités. Cependant, deux ministres de cette XVIᵉ législature s’intéressent toujours à la réglementation des « couples de fait ». Le 8 octobre de la même année, deux représentants du Polo della Libertà/Pôle de la liberté — regroupement de centre-droit dont l’ancien Président du Conseil Silvio Berlusconi était le chef — proposent le projet de loi n. 1756/2008 appelé DiDoRe – Disciplina dei diritti e dei doveri di reciprocità dei conviventi/« Règles sur les droits et les devoirs réciproques des concubins ». Ce projet de loi fixe des conditions très nuancées qui suppriment presque l’objectif de protection des couples homosexuels : en effet, l’expression « du même sexe » n’apparaît pas une seule fois. Il s’agit donc de normes qui pourraient être appliquées seulement par le biais de l’interprétation du juge aux couples homosexuels. D’ailleurs, les prévisions ont une portée juridique très limitée parce qu’elles ne concernent que « les personnes majeures en concubinat stable depuis au moins trois ans, unies par des liens d’affection et de solidarité » : une union protégée seulement après une certaine période de temps et qui peut recevoir une tutelle juridique ne concernant que les décisions sanitaires et le droit à l’habitation. Quant au manque de référence à l’orientation sexuelle des concubins, certains porteurs du projet pour un « nouveau » droit de la famille (2009) ont lu dans cela plutôt un « passage soft à des normes gender neutral », affirmant que si le législateur avait voulu limiter la loi aux couples
hétérosexuels, il l’aurait dit explicitement (*ubi lex voluit, dixit*), mais il est aussi vrai que *ubi noluit tacuit*, quand la loi ne l’a pas voulu elle se tait…

Revenons à la jurisprudence italienne qui, comme nous l’avons vu, a récemment essayé de faire progresser le système juridique italien. À ce propos, il convient de noter que dans la récente sentence n. 601 de 2013, la première section civile de la Cour de cassation italienne a jugé le cas d’un enfant mineur dont la garde a été attribuée à la mère concubine d’une personne du même sexe. À travers cette décision le juge voulait protéger le mineur qui avait assisté à un épisode de violence du père envers la concubine de la mère. Cela avait provoqué un sentiment de rage de l’enfant à l’égard de son père. Ce dernier avait ainsi fait appel de la décision devant le Tribunal et la Cour d’appel de Brescia (en Lombardie), affirmant, entre autres, qu’un foyer composé par deux femmes n’était pas adapté à l’épanouissement équilibré d’un enfant. La Cour de cassation a rejeté le pourvoi affirmant que la plainte du père est fondée exclusivement sur un préjudice personnel. D’après la Cour, au contraire, l’apport du père n’est pas nécessairement indispensable et doit être vérifié au cas par cas, et cela sur la base d’éléments d’expérience. La Cour s’éloigne ainsi de la notion de famille « naturelle », composée d’une femme et d’un homme, comme prévu dans la Constitution, en considérant la famille comme une formation sociétale qui peut se composer selon les goûts et la volonté des personnes et qui peut pénaliser ou favoriser l’épanouissement d’un enfant selon des éléments contingents qui n’ont rien à voir avec l’orientation sexuelle des parents.

Dans l’arrêt n. 4148 de 2012, de la première section civile, la Cour de cassation se montre davantage ouverte et réceptive aux évolutions des organisations familiales contemporaines. Les juges ont démontré que, au niveau théorique, le système juridique italien est prêt pour reconnaître des nouvelles formes de famille.

La Cour souligne que l’Italie doit observer les principes du droit de l’Union européenne et, notamment, l’article 9 de la Charte
des droits fondamentaux de l’Union européenne selon lequel, nous le rappelons, « le droit de se marier et de fonder une famille selon les lois nationales qui en régissent l’exercice ». L’article 117 alinéa 1 de la Constitution italienne prévoit que « le pouvoir législatif est exercé par l’État et les régions dans le respect de la Constitution et des limites provenant du système de l’Union européenne et du droit international ». Si bien que, pour que le système juridique italien respecte le système européen, il suffirait de modifier les normes du droit interne. Toutefois, les juges ont observé que la jurisprudence ne peut pas adopter toute seule cette décision : il faudra attendre l’initiative du Parlement à ce propos. Combien de temps faudra-t-il encore attendre ?
L’ÉVOLUTION HISTORIQUE DU MARIAGE EN ESPAGNE :
DE LA SECONDE RÉPUBLIQUE AU FRANQUISME

Ana Conde*

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ABSTRACT

Until the late fifteenth century, the Iberian Peninsula was characterized by a diversity of matrimonial regimes. However, the Spanish society underwent profound changes after the Reconquista, particularly due to the introduction of religious unification processes and to the new political configuration of the Iberian Peninsula. The Council of Trent promoted the religious ceremony in order to fight illegal unions, so that between 1564 and 1870, only the canonical marriage was recognized in Spain.

Under the First Republic, the civil marriage was established and became mandatory, so as to become the only recognized form of marriage. Then, in 1875, with the restoration of the monarchy, the canonical marriage became mandatory for Spanish Catholics.

Family law was deeply transformed during the Second Republic, which was founded in 1931: new laws were passed on divorce and civil marriage. However, after the victory of Franco's troops in 1939, new legislation was adopted, marking the return to

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traditionalism and morals advocated by national-Catholicism. The norms imposed by the Franco regime to the family institution brought the Second Republic avant-garde period to an end.

It was not until Franco's death in 1975, followed by a democratic transition and by the new Constitution of 1978 that divorce would be reestablished and that civil marriage would be recognized again, by the law of 7 July 1981.

Throughout the study, which provides a description of the historical evolution of marriage in Spain, the focus will be on the analysis of the relationship between legislation and social policies implemented between 1931 and 1975.

RÉSUMÉ

Jusqu'à la fin du XVᵉ siècle, la péninsule Ibérique se caractérisa par une diversité de régimes matrimoniaux. Cependant, la société espagnole subit de profonds changements à l'issue de la reconquête, notamment en raison de la mise en place du processus d'unification religieuse et de la nouvelle configuration politique de la péninsule Ibérique. Le Concile de Trente mit au premier plan la célébration religieuse du mariage afin de lutter contre les unions clandestines, de sorte qu'entre 1564 et 1870, seul le mariage canonique fut reconnu en Espagne.

Sous la Première République fut instauré le mariage civil qui devint obligatoire et seul mariage reconnu. Puis, en 1875, avec la restauration de la monarchie, le mariage canonique redevint obligatoire pour les catholiques espagnols.

Pendant la Seconde République qui vit le jour en 1931, de nombreuses transformations touchèrent la cellule familiale, notamment avec l'approbation des lois sur le divorce et le mariage civil. Cependant, après la victoire des troupes franquistes en 1939, l'État mit en place une nouvelle législation qui marqua le retour au traditionalisme et aux mœurs prônées par le national-catholicisme. Les normes imposées à l'institution familiale par le franquisme mirent fin à la période avant-gardiste que constituait la Seconde République.

Il fallut attendre la mort de Franco en 1975, et plus précisément la transition démocratique, la nouvelle Constitution
de 1978 et la loi du 7 juillet 1981 pour que le divorce fut de nouveau institué et le mariage civil reconnu.

Tout au long de la présente étude, qui dresse un descriptif de l'évolution historique du mariage en Espagne, nous centrerons notre attention sur l'analyse des relations entre la législation en vigueur et la politique sociale mise en place entre 1931 et 1975.

Ce travail porte sur l’évolution du mariage en Espagne, plus particulièrement sur les relations entre la législation en vigueur et la politique sociale mise en place entre 1931 et 1975, c’est-à-dire de la Seconde République espagnole à la fin du franquisme.

Dans une première partie, nous nous efforcerons de dresser un bref descriptif historique de l’évolution de l’institution du mariage en Espagne, du Moyen Âge au début du XXe siècle.

Dans un deuxième temps, nous porterons notre attention sur les transformations qui touchèrent la cellule familiale sous la Seconde République, avec l’approbation des lois sur le divorce et le mariage civil.

Enfin, nous nous intéresserons aux normes imposées par le franquisme à l’institution familiale, normes qui mirent fin à la période avant-gardiste que constituait la Seconde République.

I. ÉVOLUTION DE L’INSTITUTION DU MARIAGE : DU MOYEN ÂGE AU DÉBUT DU XXe SIÈCLE

Jusqu’à la fin du XVe siècle, la péninsule Ibérique se caractérise par une diversité de régimes matrimoniaux, laquelle s’explique par la cohabitation des chrétiens et des musulmans1 pendant le Moyen Âge. Cependant, la société espagnole subit de profonds changements à l’issue de la Reconquête, notamment en raison de la mise en place du processus d’unification religieuse et

de la nouvelle configuration politique de la péninsule Ibérique qui devint un État moderne.

En 1492, la prise de Grenade, dernier royaume entre les mains des musulmans, marqua la fin de la Reconquête. Les Rois catholiques publièrent cette même année un décret d’expulsion ou de conversion des juifs. Dix ans plus tard, la communauté musulmane fut à son tour forcée de se convertir ou de s’exiler.

Par ailleurs, les dispositions sur la réforme du mariage adoptées par le Concile de Trente en 1563 puis par Philippe II en 1564 par le biais d’une ordonnance, marquèrent un réel tournant dans l’histoire du mariage en Espagne. Le Concile de Trente mit en premier plan la célébration religieuse du mariage afin de lutter contre les unions clandestines et de faire droit aux demandes des pouvoirs civils sur le regard des parents. Ainsi, le mariage n’était valide et sacramentel que s’il avait lieu en présence d’un prêtre et de deux ou trois témoins. À cela s’ajoutait l’obligation de publier les bans de mariage dans les paroisses des époux.

Entre 1564 et 1870, seul le mariage canonique fut reconnu en Espagne, si bien que tel que le souligne le juriste Javier Ferrer Ortiz, l’on peut affirmer que « cette reconnaissance a constitué jusqu’à la fin du XXe siècle un indice de degré d’acceptation ou de refus de l’État confessionnel en Espagne et lorsqu’on se penche sur l’histoire constitutionnelle espagnole, force est de constater l’extrême importance de la question religieuse au regard du fonctionnement de l’État ».

La Révolution de 1868, également connue comme « La Glorieuse » ou la « Révolution de septembre », ne constituait qu’une parenthèse dans l’évolution du mariage en Espagne. En effet, pendant six ans, de 1868 à 1874, il y eut plusieurs tentatives visant à créer en Espagne un système de gouvernement révolutionnaire. Au milieu des années 1860, le mécontentement à l’égard du régime

2. *Id.* p. 398.
3. *Id*.
4. *Id.* p. 399.
monarchique d’Isabelle II dans les milieux populaires, politiques et militaires était grandissant. À cette situation s’ajoutaient une grave crise économique et des coups d’État. En exil, libéraux et républicains parvinrent à des accords en 1866 et 1867, accords qui étaient destinés à alimenter les troubles et à conduire au renversement de la reine Isabelle II. Cette dernière finit par abdiquer en 1870. Le duc Amédée de Savoie fut choisi pour lui succéder, mais il abdiqua en 1873. Face à cette situation inextricable, la Première République fut proclamée le 11 février de cette même année et prit fin en janvier 1974. Ce fut donc pendant cette période révolutionnaire que fut instauré, en 1870, le mariage civil qui devint obligatoire et seul mariage reconnu. Cependant, l’on remarque que ce dernier se présentait comme une simple version laïque du mariage canonique. La loi du 18 juin 1870 établissait le mariage civil obligatoire tout en affirmant qu’il demeurait indissoluble, sauf en cas de décès de l’un des conjoints. Il existait en effet de claires similitudes entre l’ancien mariage canonique et le nouveau mariage civil en matière de capacité, de consentement et de forme, de causes de nullité et de séparation. Sans compter que cette nouvelle loi affirmait d’entrée dans l’article 1 que le mariage civil était indissoluble. Aussi peut-on affirmer que la loi de 1870 se contenta, à quelques exceptions près, de remplacer les tribunaux ecclésiastiques par les tribunaux civils. Les Espagnols se mariaient donc civillement, mais presque dans les mêmes conditions qu’avant la promulgation de cette loi.

Cependant, en 1875, après la chute de la Première République et la restauration de la monarchie avec à sa tête Alphonse XII, le mariage canonique redevint obligatoire pour les catholiques et les couples mixtes comprenant un catholique. De ce fait, le mariage

5. Id.
6. Id.
7. Cette loi ne reconnaît pas la promesse de mariage (article 3). Voir aussi: Ortiz, supra note 1, p. 401.
8. Ortiz, supra note 1, p. 402.
civil fut réservé aux non catholiques qui étaient néanmoins soumis au droit canon et par conséquent ne pouvaient divorcer.

Par ailleurs, l’abrogation de la loi du 18 juin 1870 valida rétroactivement tous les mariages religieux célébrés sous la Première République espagnole. Ces dispositions furent reprises par le Code civil de 1889. La loi sur le mariage de 1870 ne fut donc qu’une très brève parenthèse dans l’histoire du mariage en Espagne depuis le XVIᵉ siècle et il fallut attendre l’avènement de la Seconde République pour que l’institution du mariage connaisse de profonds changements en Espagne.

II. L’INSTITUTION FAMILIALE SOUS LA SECONDE RÉPUBLIQUE ESPAGNOLE

Le 14 avril 1931, la Seconde République fut proclamée en Espagne, deux jours après les élections municipales, dont les résultats furent interprétés comme une défaite de la monarchie. Cependant, la coalition antimonarchiste ne se trouvait essentiellement que dans les grandes villes ; les zones rurales, soit la majorité de la population, sous l’influence des caciques, votèrent davantage pour la monarchie. Très en retard et pauvre, l’Espagne était donc un pays rongé par d’importantes divisions idéologiques.

Dès leur arrivée au pouvoir, les socialistes et les républicains formèrent un gouvernement qui fut le fer de lance de plusieurs réformes importantes, lesquelles portaient notamment sur les relations entre l’Église et l’État. La modernité politique et sociale

9. Sous la Première République, la grande majorité des Espagnols avait continué à se marier religieusement et ce même si le mariage canonique n’avait pas d’effets civils. *Id.* p. 402:

Bastará añadir que la Ley resultó a todas luces impopular, que el matrimonio civil resultaba una parodia del matrimonio canónico y que la ciudadanía mostró mayoritariamente su rechazo y continuó contrayendo matrimonio religioso, por más que careciera de efectos civiles. Esta actitud motivó la derogación parcial de la Ley, mediante Real Decreto de 9 de febrero de 1875, que restableció el matrimonio canónico y mantuvo el matrimonio civil *para quienes no profesaran la religión católica*. [souligné par l’auteur]

10. *Id.* p. 402.
prônée par le gouvernement républicain allait violemment à l’encontre des intérêts de l’oligarchie traditionnelle, mais aussi de l’immobilisme d’une société essentiellement rurale et analphabète, étouffée par le traditionalisme et par la très forte influence de l’Église.

Les diverses actions que ce gouvernement mit en place pour traiter les questions sociales firent que la Constitution espagnole de 1931 devint la plus avant-gardiste d’Europe. La Seconde République mit en place le suffrage universel avec le vote des femmes, le divorce par consentement mutuel, l’égalité entre les enfants légitimes et illégitimes. La Constitution de 1931 institua le mariage civil en lui conférant la même validité légale que le mariage religieux. L’institution familiale fut aussi transformée par la suppression des délits d’adultère et de concubinage.

L’on peut affirmer que la situation des femmes espagnoles évolua de manière très significative sous la Seconde République, du moins pour ce qui est de la législation qui faisait d’elles, pour la première fois dans l’histoire espagnole, des citoyennes de plein

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12. Constitution de 1931, art. 1 : « España es una República democrática de trabajadores de toda clase, que se organiza en régimen de Libertad y de Justicia. Los poderes de todos sus órganos emanan del pueblo. »

13. Constitution de 1931, art. 25 : « No podrán ser fundamento de privilegio jurídico: la naturaleza, la filiación, el sexo, la clase social, la riqueza, las ideas políticas ni las creencias religiosas. »

14. Constitution de 1931, art. 43 : « La familia está bajo la salvaguardia especial del Estado. El matrimonio se funda en la igualdad de derechos para ambos sexos, y podrá disolverse por mutuo disenso o a petición de cualquiera de los cónyuges, con alegación en este caso de justa causa. »

15. Constitution de 1931, art. 43 : « Los padres tienen para con los hijos habidos fuera del matrimonio los mismos deberes que respecto de los nacidos en él […] No podrá consignarse declaración alguna sobre la legitimidad o ilegitimidad de los nacimientos ni sobre el estado civil de los padres, en las actas de inscripción, ni en filiación alguna.

16. La loi du 2 mars 1932 sur le divorce est une conséquence directe de l’article 43 de la Constitution espagnole de 1931.

droit ayant désormais accès au droit de vote et à une série de droits civils que le Code civil de 1889 ne prévoyait pas pour elles\textsuperscript{18}. Aussi, si nous nous intéressons de plus près à la Constitution de 1931, l’article 43 nous révèle un point intéressant. Ce dernier proclame que le mariage est fondé sur l’égalité des droits entre les sexes, ce qui a pour effet d’interdire, lors de la célébration du mariage civil, la lecture d’un passage de l’article 57 du Code civil de 1889\textsuperscript{19} : « Le mari doit protéger son épouse et cette dernière doit obéir à son époux »\textsuperscript{20}. Ainsi, la femme espagnole n’était-elle plus reléguée au plan de subalterne de l’homme. Cependant, les mentalités n’évoluant pas au même rythme que la législation, les femmes espagnoles demeurèrent, pour la grande majorité d’entre elles, prisonnières de la tradition.

La loi du 2 mars 1932 ordonnait que le divorce prononcé par les tribunaux civils rompe définitivement le lien matrimonial ; elle adoptait le système du divorce sanction et prévoyait le divorce par consentement mutuel, à condition que les époux soient majeurs et que le mariage ait au moins duré deux ans. Cette loi prévoyait aussi le divorce pour faute déterminée\textsuperscript{21} : les conjoints divorcés pouvaient de nouveau se marier, à condition que le fautif respecte un délai d’un an à compter du jugement définitif, et que la femme

\textsuperscript{18} Constitution de 1931, art. 36 : « Los ciudadanos de uno y de otro sexo, mayores de veintitrés años, tendrán los mismos derechos electorales conforme determinen las leyes ».


\textsuperscript{20} Voir : José María Rives Gilabert, Antonio Pablo Rives Seva, Evolución histórica del sistema matrimonial español, NOTICIAS JURÍDICAS (octobre 2001).

\textsuperscript{21} Il pouvait s’agir d’adultère, de bigamie, de la tentative de prostituer son épouse ou sa fille, de la corruption des enfants, de l’abandon injustifié, de l’éloignement coupable pendant un an, de l’atteinte à la vie du conjoint ou des enfants, des mauvais traitements ou injures graves, des maladies vénériennes ou contagieuses, de la séparation depuis plus de trois ans, ou encore de l’aliénation mentale incurable, à condition que soient assurés les moyens de subsistance de la personne aliénée, Pierre Sanz de Alba, La question du divorce en Espagne : une évolution en voie d’achèvement, 33 REVUE INTERNATIONALE DE DROIT COMPARÉ 69 (1981).
respecte un délai de viduité de 301 jours. Les coupables d’incitation à la prostitution à l’égard de leur épouse ou de leur enfant ne pouvaient contracter un nouveau mariage.

La Seconde République arbitra sans aucune réserve la question historique de fond « Religion/État » en séparant officiellement l’Église et l’État ; elle proclama dans la Constitution que l’Espagne n’avait pas de religion officielle et mit en exergue une conception laïque de l’État, nouvelle en Espagne, mais nécessaire aux changements que voulait apporter le gouvernement républicain.

L’Église espagnole ne tarda pas à réagir face à la forte pression anticlérical exercée par les Républicains, si bien que le mariage civil et le divorce se trouvèrent au centre des débats. Ainsi fut publiée, le 20 décembre 1931, la déclaration collective de l’épiscopat espagnol. Dans le deuxième paragraphe, ce dernier rappelait que:

Le mariage est le père et non pas le fils de la société civile et pour cette raison, il mérite d’être respecté. […] Le contrat nuptial est indissociable du sacrement dans le mariage chrétien, de sorte que tout législateur qui prétend régir le lien conjugal des baptisés s’octroie le droit de décider de ce qui est sacré. Ceci constitue une grave atteinte à la souveraineté spirituelle de l’Église, qui en vertu de la loi divine et de la nature même du mariage chrétien, est la seule compétente dans ce domaine22.

Finalement, pour que les Espagnols, surtout les moins instruits d’entre eux, comprennent bien ces propos, l’Église devenait plus explicite et menaçante dans le Paragraphe IV: « Il ne faut pas oublier que, pour les catholiques, le seul mariage reconnu et légitime est le mariage canonique et sacramental célébré in facie Ecclesia. […] Ceux qui vivront maritalement, sans tenir compte du mariage canonique, manqueront gravement à leurs devoirs de catholiques et seront excommuniés. »23

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23. Id.
Dans un pays qui demeurait divisé, le gouvernement ne parvint à assurer ni l’ordre constitutionnel, ni l’ordre public. Les années 1931-1936 préfigurèrent l’une des plus grandes périodes du XXe siècle. En effet, au terme de cette courte période d’expérience démocratique, la Seconde République dut faire face à une nouvelle menace: le coup d’État des 17 et 18 juillet 1936 qui marqua le coup d’envoi de la guerre civile en Espagne.

III. L’ÉVOLUTION DU MARIAGE SOUS LE FRANQUISME

Avant même la fin de la guerre civile, la loi de 1932 – inconciliable avec les principes du nouveau régime franquiste en préparation – conduisit le ministère de la Justice à suspendre les instances en cours devant les juridictions de première instance.

Après la victoire des troupes franquistes en 1939, l’État mit en place une nouvelle législation qui marquait très clairement le retour au traditionalisme et aux mœurs prônées par le national-catholicisme.

La loi du 23 septembre 193924 abrogea la loi sur le divorce du 2 mars 1932 et la loi du 12 mars 1938 abrogea celle de 1932 sur le mariage civil, ce dernier étant de nouveau régi par le Code civil de 1889.

L’indissolubilité du mariage devenait le point d’orgue de cette loi qui annulait les mariages célébrés civilement ainsi que les jugements définitifs de divorce prononcés sous la Seconde République et cela même si les conjoints avaient contracté une union postérieure au divorce. Tout conjoint divorcé ne pouvait donc contracter une nouvelle union puisque, d’après cette loi, il était toujours lié matrimolement à son premier conjoint. Aussi, suite à ces nouvelles dispositions – qui annulaient rétroactivement les unions civiles et accordaient au mariage les pleins effets civils –

les Espagnols qui s’étaient mariés civilement ou qui avaient divorcé sous la Seconde République, se retrouvèrent dans des situations inextricables, puisqu’ils étaient considérés comme des concubins et leurs enfants devenaient illégitimes.

De plus, la Charte du Travail de 1938\textsuperscript{25} interdit aux femmes d’accéder au marché du travail. L’État franquiste se présentait comme le garant des valeurs morales de la société espagnole en prônant un modèle familial patriarcal qu’il considérait comme unique référence possible. Le régime franquiste fustigea la dimension féministe de la Seconde République et replongea la femme dans une situation d’infériorité juridique et sociale. Enfermée dans une sphère familiale et domestique, la femme espagnole devint ainsi la gardienne de la pureté des mœurs et des valeurs du national-catholicisme. Pour se faire, l’Église et la sanction féminine de la Phalange entreprirent son endoctrinement: elle se devait d’être une épouse obéissante et une mère dévouée. La Charte du Travail et la Loi des réglementations de 1942 plaçaient à vie la femme sous la tutelle de l’homme, d’abord sous celle de son père, puis sous celle de son époux. L’autorité de l’Église fut reconnue en 1953 par la signature du Concordat avec le Saint-Siège, ce qui affirmait le confessionnalisme de l’État espagnol et la complète reconnaissance de l’Église catholique en Espagne\textsuperscript{26}.

La loi du 25 avril 1958\textsuperscript{27} reconnaissait deux sortes de mariages: le mariage religieux et le mariage civil\textsuperscript{28}. Le mariage devait être

\begin{footnotesize}
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\item 25. Il s’agit de l’une des sept lois fondamentales promulguées sous le régime franquiste. \textit{Voir:} La legislación social de la España de Franco, texto íntegro del «Fuero del Trabajo» La Vanguardia Española, 10 mars 1939, \url{http://hemeroteca-paginas.lavanguardia.com/LVE07/HEM/1939/03/10/LVG19390310-003.pdf}.
\item 26. Cette union de l’Église et de l’État demeura jusqu’au Concile de Vatican II.
\item 28. Code civil, art. 42: La Ley reconoce dos clases de matrimonios: el canónico y el civil. El matrimonio habrá de contraerse canónicamente cuando uno al menos de los contrayentes profese la religión católica. Se autoriza el
\end{itemize}
\end{footnotesize}
célébré dans le respect des règles canoniques si l’un des conjoints était catholique. Si les deux conjoints n’étaient pas catholiques et en présentaient la preuve, le mariage civil était alors autorisé.

Quant aux causes de nullité, ces dernières furent beaucoup plus souples et nombreuses en matière de mariage canonique. Pour le mariage civil, l’erreur sur la personne, la violence exercée par l’un des conjoints (qui annule le consentement) constituèrent des causes de nullité. La nullité d’un mariage catholique pouvait être obtenue en cas de vices de formes substantiels, en cas d’empêchements dirimants, de mariage consenti par crainte révérencielle et de mariage simulé. Ainsi, comme le souligne Pierre Sanz de Alba, « cette faveur pour la nullité des mariages canoniques a pu être considérée comme un élément grave de discrimination entre les Espagnols, portant ainsi atteinte au principe d’égalité devant la loi ».

Vers la fin du franquisme, les pressions internationales et économiques (tourisme, émigration, ouverture de l’économie espagnole vers l’extérieur) forcèrent le régime à assouplir ses positions sur de nombreux aspects de l’institution familiale et il fallut réexaminer le rôle des époux au sein de la cellule familiale.

Afin d’obvier aux différences de traitement entre les hommes et les femmes, la loi qui entra en vigueur le 22 juillet 1961...
assouplit l’interdiction du travail féminin en dehors du foyer. Il s’agissait cependant d’une relative avancée car les femmes ne pouvaient toujours pas accéder à de nombreux postes dans la fonction publique.

Il fallut en effet attendre la mort de Franco en 1975, et plus précisément la transition démocratique, pour que les femmes commencent à récupérer leurs droits civils. La nouvelle Constitution, approuvée par référendum le 6 décembre 1978, et ses effets sur la jurisprudence, constituèrent une réelle transition quant à l’évolution de la notion d’ordre public. La Constitution de 1978 marqua le passage à un État aconfessionnel et de nouvelles relations Église-État s’établirent en rupture avec une grande partie du passé de l’Espagne. Ces nouvelles relations furent d’ailleurs définies par les accords signés avec le Saint-Siège entre 1976 et 1979. Ainsi, un accord conclu avec le Vatican en 1979 reconnaît la nouvelle Constitution dans laquelle figure une disposition importante et étroitement liée au droit de la famille. En effet, le premier paragraphe de l’article 32 dispose que « l’homme et la femme ont le droit de se marier avec une totale égalité juridique ». Le second paragraphe ajoute que « la loi réglera les formes du mariage, l’âge et la capacité pour contracter le mariage, les droits et obligations des conjoints, les motifs de séparation et de dissolution du mariage ». Il fallut attendre l’approbation de la loi du 7 juillet 1981, laquelle modifie la réglementation du mariage dans le Code civil et reconnaît le mariage civil et le mariage religieux, pour que soit de nouveau

32. Constitution du 6 décembre 1978, art. 32 : « 1. El hombre y la mujer tienen derecho a contraer matrimonio con plena igualdad jurídica. 2. La ley regulará las formas de matrimonio, la edad y capacidad para contraerlo, los derechos y deberes de los cónyuges, las causas de separación y disolución y sus efectos. », http://www.senado.es/web/conocersenado/normas/constitucion/detalleconstitucioncompleta/index.html#t1c2s2.
33. Cette loi reconnaît le mariage civil et le mariage religieux qui produisent, dès leur célébration, les mêmes effets civils. Loi 30/1981, 7 juillet
institué le divorce et pour que soient déterminées les procédures à suivre en cas de séparation, de divorce et de nullité.

LES UNIONS ENTRE GENS DE MÊME SEXE OU DE SEXE DIFFÉRENT EN DROIT CHINOIS :
PERSPECTIVE HISTORIQUE

Yuan Fang*

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ABSTRACT

While putting emphasis on the legalization of unions between same-sex individuals, the present paper has to address heterosexual unions as they are the norm in China. The evolution of matrimonial law is explored following a chronological order, without omitting the longstanding existence of cohabitation in Chinese history, the evolution of the social status of women, as well as the legal issues related to the idea of marriage in its current definition. The situation of same-sex couples is then studied, with a focus on its social recognition throughout history, as well as on the present situation, and on the legal expectations it

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generates. Moving from the connections between traditional custom and the legalization of unions, the paper tentatively concludes on a forthcoming legal consideration of homosexuality.

RÉSUMÉ

Tout en mettant l’accent sur la légalisation des unions entre les personnes du même sexe cette communication se doit d’aborder l’union hétérosexuelle qui est la norme en Chine. L’évolution du droit du mariage est présentée de manière chronologique, sans omettre la longue existence du concubinage dans l’histoire chinoise, l’évolution de la position sociale des femmes et les problèmes juridiques liés au mariage dans sa conception actuelle. La situation des couples homosexuels est ensuite étudiée, l’accent étant mis sur la reconnaissance sociale dans l’histoire, la situation présente et les attentes juridiques qu’elle suscite. La conclusion aborde, dans la perspective des rapports entre la coutume traditionnelle et la légalisation des unions, une évolution possible vers une prise en compte juridique de l’homosexualité.

I. INTRODUCTION

Lors de la troisième journée du cycle « Droit(s), langue(s) et civilisation(s) » à l’université de Nantes, dans une perspective internationale, de nombreux échanges ont eu lieu sur les unions hétérosexuelles et homosexuelles, à travers des cultures différentes, des coutumes de mariage et des attentes sur la légalisation (ou non). Nous avons pris davantage conscience des différences entre les cultures chinoise et occidentale concernant ce sujet. Contrairement à l’influence traditionnelle de la religion sur les unions dans le monde occidental, ainsi que dans le monde islamique, les unions en Chine se développent d’une manière assez différente, souvent influencée par la coutume.
L’existence des deux formes d’ unions en Chine sera présentée dans cet article à travers l’histoire. L’ union hétérosexuelle, qui est la norme en Chine, a évolué d’une façon particulière par rapport à celle du monde occidental. De plus, l’évolution des unions hétérosexuelles peut également expliquer d’une certaine manière le manque d’attention sur l’ union homosexuelle. L’évolution historique de l’ union homosexuelle sera traitée dans la seconde partie. Cette comparaison faite entre les deux unions permettra de mieux comprendre comment elles sont développées dans la Chine d’aujourd’hui. En conclusion, nous discuterons des attentes juridiques sur ces sujets dans la société chinoise moderne.

Cet article a donc pour l’ objectif de présenter la situation générale des unions en Chine à travers l’évolution historique, et ensuite de discuter des attentes juridiques. Les questions posées par les étudiants lors de la journée d’ études et l’ intérêt qu’ ils portaient sur ces sujets, nous ont beaucoup motivée à rédiger cet article. La recherche des réponses à toutes ces questions a permis de donner du sens avec comme vertu au moins d’ essayer de diminuer les malentendus culturels autour de ce thème.

II. LES UNIONS HÉTÉROSEXUELLES

L’évolution des unions hétérosexuelles va être retracée jusqu’à nos jours. Le système marital chinois est remarquable en raison de sa particularité. Une attention particulière est à porter sur l’ évolution de la position sociale des femmes. Les unions d’ aujourd’hui sont un lieu de tension entre les valeurs traditionnelles et les changements liés à un développement très rapide.
A. Le système marital dans l’histoire

La monogamie est pratiquée en Chine depuis la dynastie Zhou selon *Le livre des rites*. Avant cela, c’était la polygamie. Il s’agissait toutefois d’une monogamie différente de la définition commune. En effet, c’était une monogamie avec de multiples concubines légales, qui a duré depuis les Zhou. Ce système reconnu par la loi, dit qu’un homme ne peut se marier qu’avec une femme dite « principale » qui vient d’une famille de la même classe sociale et qu’il est autorisé à avoir plusieurs concubines. Nous trouvons déjà une description de ce système dans la dynastie Shang (1570 av. J.-C. – 1045 av. J.-C.), mais c’était plus de la polygamie compte tenu du fait qu’il n’existait pas de vraie hiérarchie entre les femmes. Le premier vrai document sur ce système marital concerne la famille royale et se trouve dans *Le livre des rites*. Seule la femme « principale » de l’empereur peut être nommée comme impératrice ; les nombreuses concubines de l’empereur seront bien reconnues, mais elles seront nommées différemment (ex. dames, femmes, concubines etc.). Elles auront des privilèges différents selon leur classe. Le nombre de concubines dans chaque classe sera limité surtout dans les classes les plus hautes. Cette forme d’union en Chine antique apparaît en raison de la responsabilité sociale à l’époque. « Le mariage permet

1. La dynastie Zhou, la troisième dynastie chinoise qui prend le pouvoir vers 1046 av. J.-C. et l’exerce jusqu’en 256 av. J.-C.
2. *Le livre des rites*, *Liji*, une des trois parties de *Classique des rites*, considérée comme une des œuvres confucéennes les plus importantes.
4. 《礼记·曲礼》：天子有后，有夫，有世妇，有嫔，有妻，有妾。《礼记·昏礼》：古者天子后立六宫，三夫人，九嫔，二十七世妇，八十一御妻。
de joindre l’intérêt de deux familles afin d’avoir des héritiers qui portent le nom de famille et qui saluent et servent les ancêtres en leur offrant des sacrifices »

Nous voyons donc qu’au lieu que le mariage soit basé sur une raison d’amour, il est plus fait pour répondre au besoin de l’héritage. Dans le contexte d’une société agricole qui était la norme principale chinoise durant plus de deux mille ans, un élargissement de la famille était toujours le plus avantageux, ce qui explique que l’accent était mis sur une union basée sur l’héritage.

La monogamie est née de la concentration des richesses importantes dans une même main - la main d’un homme -, et du désir de léguer ces richesses aux enfants de cet homme, et d’aucun autre. Il fallait pour cela la monogamie de la femme, non celle de l’homme, si bien que cette monogamie de la première ne gênait nullement la polygamie avouée ou cachée du second.

Ce point de vue justifie donc pour la Chine antique, cette forme de société paternaliste, puisque la femme était considérée comme un objet ou, comme le disait Engels, « une esclave », répondant à l’intérêt de l’homme, qui plus il était marié à des femmes plus il avait d’héritiers. Mais la polygamie aurait pu causer des problèmes au moment de la succession ; c’est pourquoi la notion de femme principale a permis de hiérarchiser l’ordre de succession. C’est ainsi que ce système de monogamie avec multiple-concubines a pu prospérer pendant plus de deux mille ans en Chine.

Cette forme familiale n’était pas seulement un privilège royal ou noble mais était assez présente dans la population durant l’histoire en Chine. Les lois de la dynastie Qin (221 av. J.-C. – 207 av. J.-C.) et Han (202 av. J.-C. – 220 apr. J.-C.) sont assez floues, le système marital suivant plutôt les coutumes influencées par Le livre des rites. Donc il est probable que la monogamie avec

5. 《礼记·昏义》：昏礼者，将合二姓之好，上以事宗庙而下以继后世。
7. Ping Lei & Jing Wang , supra note 3.
multiple-concubines a été d’abord pratiquée par la classe des fonctionnaires pour ressembler à la noblesse. Après, du fait que l’héritier était considéré comme la plus grande responsabilité sociale, il semble normal que ce modèle soit appliqué partout au final. D’un autre côté, avoir une plus grande population était un élément important pour la classe dirigeante, ce qui explique que ce système ait pu être encouragé par elle.

Dans le Code Tang, pendant la dynastie Tang (618-987), nous commençons à voir une bonne définition des droits familiaux. Puis dans les dynasties suivantes, l’union est souvent prévue par la loi, avec seulement de petites modifications sur les détails. Par exemple, dans le Code Ming, pendant la dynastie Ming (1368-1644), il était interdit pour un fonctionnaire de se marier avec une prostituée.

Sans que la loi l’oblige vraiment, la femme principale devait normalement venir d’une famille de la même couche sociale que celle de l’homme. Dans tous les cas, la coutume orientait plutôt la famille de l’homme à choisir. L’épouse idéale était censée rester toujours à la maison et savoir s’occuper de la famille. Une personnalité soumise, et une bonne maîtrise des tâches destinées aux femmes, étaient très appréciées. L’homme, ou plutôt la famille de l’homme, devait passer par six étapes cérémonielles afin de se marier avec sa femme principale. Ce sont les familles du futur couple, notamment les parents, qui prenaient toutes les décisions, les jeunes ne pouvant qu’accepter. Donc une fois une fille d’une famille correcte « ciblée », les parents du garçon devaient chercher premièremen une femme intermédiaire professionnelle et l’envoyer à la famille de la fille avec des cadeaux significatifs. Si la famille de la fille approuvait l’union à l’intermédiaire, les parents du garçon demandaient ensuite le nom de la fille et sa date de naissance. Puis la famille du garçon transmettait les informations au temple devant les ancêtres pour prédire le mariage

8. Des statues ou des viandes d’oie sauvage en nombre pair étaient souvent exigées car c’est un animal plutôt monogame.
et « faire connaître » aux ancêtres cette nouvelle arrivante potentielle dans la famille. Si la divination semblait favorable, la famille du garçon préparait une grande série de cadeaux significatifs9 pour la famille de la fille et les fiançailles étaient alors faites. À la suite des fiançailles, les parents du futur couple devaient discuter et décider du jour du mariage. La cérémonie du mariage était souvent assez solennelle, mais bruyante. Elle contenait une manifestation de la famille du marié à la famille de la mariée pour lui déclarer la bienvenue. La mariée entrait alors par la porte principale et les nouveaux mariés devaient saluer les parents et les beaux-parents. Un grand festin de noces avec des invités concluait la cérémonie. Dans Le livre des rites, les étapes sont brièvement décrites de cette manière : la proposition, la demande, la prédiction, la date et la cérémonie. Tous ces gestes étaient considérés comme une nécessaire politesse à la famille de la mariée ainsi qu’une déclaration officielle annonçant que la mariée devenait la femme principale de l’homme. Néanmoins, c’était beaucoup plus simple quand il s’agissait d’une concubine. D’abord, une concubine ne pouvait être mariée, elle était « prise » par son homme. Seulement une petite cérémonie était faite. Les cadeaux offerts à la famille de la concubine étaient plus simples et considérés comme une gentillesse. Elle ne pouvait entrer dans la famille que par un portillon, et elle devait saluer l’homme et la femme principale. Il n’existait pas de vraie contrainte concernant le choix d’une concubine. Un prétexte commun était que la femme principale n’avait toujours pas donné de fils après quelques années de mariage. Mais souvent dans les familles riches ou de haute classe sociale, un homme pouvait déjà avoir plusieurs concubines avant son vrai mariage. En effet, il était très fréquent qu’une concubine soit prise pour sa beauté. Les étapes maritales pouvaient être réduites chez les familles pauvres, mais la communication aux

9. Les cadeaux sont souvent présents en nombre pair, par exemple quatre bouteilles d’alcool, deux pièces de porc, des poissons par paire etc. Normalement, il doit y être inclus des bijoux et une certaine somme d’argent.
ancêtres, les fiançailles avec les cadeaux et la cérémonie solennelle était toujours indispensables même sans concubine. Les deux dernières étapes du rituel sont toujours réalisées aujourd'hui, comme un geste respectueux à la famille de la fiancée.

Une concubine est prise à la base pour l'héritage, elle a donc une position spéciale dans la famille. Pour les serviteurs, elle fait partie des maîtres dans la famille, mais pour le maître de maison et la femme principale, elle fait partie des serviteurs. Même pour ses propres enfants, qui peuvent être potentiellement de futurs maîtres de maison, elle fait toujours partie des serviteurs. Le droit d’héritage suivait un ordre strict entre les fils de la femme principale et ceux de la concubine lors du décès du maître de maison, comme le montre le tableau ci-dessous. Une confirmation, par exemple une cérémonie, était nécessaire concernant le droit de succession suite au décès du maître de maison. En effet, un enfant « produit » d’une relation sans cérémonie n’a pas de droit de succession. Imaginons par exemple, une servante qui se fait violer par le maître, et donne naissance à un fils. Il ne pourra avoir la possibilité d’hériter des biens que si sa mère est prise comme concubine ou si lui-même se fait adopter par la femme principale de la maison. Sinon le garçon ne sera pas reconnu par la famille et sera considéré comme un enfant bâtard d’une relation adultère. Les filles, elles, n’ont généralement pas le droit d’hériter. En revanche, la fille de la femme principale et la fille d’une concubine n’auront pas les mêmes choix pour se marier10

10. 《唐律疏议》: “无嫡子及有罪疾，立嫡孙，无嫡孙，以次立嫡子同母弟，无母弟，立庶子，无庶子，立嫡孙同母弟，无母弟，立庶孙。曾、玄以下准此。”
Il existe sept interdictions concernant les femmes. Elles précisent les cas dans lesquels un homme peut abandonner sa femme. Ce sont : la désobéissance aux beaux-parents, l’absence de fils, la luxure, la jalousie, l’atteinte d’une maladie grave, le bavardage et le vol. Comme les autres règles rituelles, elles étaient d’abord présentes dans Le livre des rites. Les sept interdictions n’étaient pas strictement reconnues par la loi avant d’apparaître dans le Code Tang. Cependant elles étaient toujours plutôt appliquées par les Chinois comme les autres règles écrites dans Le livre des rites. La condition qui permettait à une femme de quitter son mari était très exigeante. Cela ne pouvait se produire que si l’homme commettait un crime très grave, par exemple l’assassinat de ses beaux-parents.

11. Le chiffre avant le nom indique l’ordre de succession. Ce n’est pas l’ordre de naissance qui est important, mais la mère qui compte le plus. Le fils ainé de la femme principale peut être plus jeune que le fils ainé de concubine, mais il sera toujours le premier héritier.

12. 妇人七去： 不顺父母，为其逆德也；无子，为其绝世也；淫，为其乱族也；妒，为其乱家也；有恶疾，为其不可与共粢盛也；口多言，为其离亲也；窃盗，为其反义也。
B. Le système marital contemporain

La réelle monogamie est officiellement reconnue par la loi en 1930 en Chine. Elle est présente au chapitre de la codification du droit de la famille dans le Code civil de la République de Chine, indiquant que l’existence de la concubine n’est pas légale. Le Code civil de la République de Chine se rattache au droit coutumier. Effectivement, ce code montre l’influence, dans une certaine mesure, des anciens codes traditionnels, mais il commence quand même à montrer une prise de conscience des nouveaux sujets familiaux. Non seulement la monogamie, mais aussi le droit pour les jeunes non mariés de pouvoir librement rechercher leur futur époux/épouse au lieu d’être dépendant de la décision de leurs parents. En outre, il facilite aussi les conditions du divorce.

Cela a pris du temps pour mettre en place la monogamie en Chine. D’une part, le Code civil de la République de Chine a laissé des possibilités de négocier. Par exemple, d’après ce code, un homme marié qui commet le crime de bigamie, avant la rupture officielle avec une concubine, ne peut pas nier son statut de concubine. D’ailleurs, si sa femme principale confirme l’acceptation de cette concubine, elle ne peut plus demander le divorce pour cette raison. D’autre part, le chaos de la Seconde Guerre mondiale et de la guerre civile qui a suivi a causé encore plus de difficultés au niveau de l’adoption d’une nouvelle loi sur le mariage. Les dirigeants ont tenté de commencer le changement par la classe haute comme les fonctionnaires du parti Kuomintang (le parti nationaliste), puisqu’un certain nombre d’entre eux étaient très influencés par la culture occidentale avec par exemple une formation supérieure en Europe. Prenons l’histoire de Tchang Kaï-chek, l’ancien président de la République de Chine. Lors de son mariage

13. Le premier article du Code civil de République de Chine indique : concernant des affaires civiles, si un cas n’est pas déterminé par la loi, il faut juger selon la coutume.
mariage avec sa femme Song Meiling, il a annoncé son mariage dans le fameux journal Shen Bao, ainsi que la déclaration de divorce avec son ancienne femme Mao Fumei (sa femme principale choisie par ses parents) et la déclaration de reniement de ses deux concubines. Au moment de son mariage, le Code civil n’était pas encore en vigueur ; il a fait ce choix car la famille de Song était méthodiste. Mais après, il donna un exemple de monogamie. De même pour le premier président, le docteur Sun Yat-sen, avant de se marier avec Song Qingling, connue internationalement comme Madame Sun Yat-sen, il a aussi divorcé de sa femme, choix de ses parents et de sa concubine qui l’avait quitté déjà à l’époque pour sa réputation. Toutefois, la loi n’était pas appliquée dans la vie réelle au niveau du peuple. Au final, la monogamie n’a pas pu s’étendre au niveau national avant la fondation de la République Populaire de Chine en 1949.

Le premier Code du mariage en Chine est né en 1950. Il précise que la monogamie est une obligation, que les hommes et les femmes ont le même droit civil, que la recherche du mariage d’amour est encouragée et que le choix imposé par les parents est interdit, et que les femmes ont droit de sortir de la maison et de travailler. Ainsi des mouvements massifs se sont déroulés en Chine, et des millions de cas de demandes de divorce furent traités entre 1950 et 1953. Beaucoup de femmes recouvrirent leur liberté, et pourtant des concubines se retrouvèrent dans une situation compliquée. Elles eurent des difficultés à s’adapter à leur nouvelle position sociale, compte tenu des discriminations qu’elles subirent pendant la grande révolution culturelle. D’ailleurs, après la vague de divorce entre 1950 et 1953, le taux brut de divorce ne fut plus jamais supérieur à 0.35‰, en raison de l’influence des valeurs traditionnelles.

Le cas de Hong Kong est un peu différent, en raison de la colonisation par le Royaume-Uni au moment où la Chine

15. Anqi Xu, Wenzhen Ye, Divorce Rates: Temporal Changes and Provincial Differences, 26 POPULATION RESEARCH, no 4, p. 28 (juillet 2002).
continentale passait la loi concernant la monogamie. Ce n’est qu’à partir de 1971 que le concubinage légal ne fut plus reconnu par la loi. Cette règle n’est pas rétroactive, et donc il peut encore y avoir des familles sous l’ancien système même aujourd’hui.

C. Les unions hétérosexuelles à présent

Depuis la loi sur le mariage de 1950 et surtout après l’ouverture de la Chine en 1978, la monogamie est devenue très naturelle. Des problèmes d’une autre nature se sont produits en Chine moderne, avec le développement très rapide de l’économie\textsuperscript{16} et l’influence de la culture occidentale. Les deux cultures se sont rencontrées. La liberté donnée par la loi est de plus en plus utilisée. Le taux brut de divorce a ainsi augmenté en Chine pour atteindre 2.58\% en 2013, ce qui fait 3,5 millions de couples divorcés\textsuperscript{17}.

Avec l’ouverture en 1978, l’économie s’est développée très rapidement en Chine. L’intérêt économique a influencé énormément de domaines, donc aussi les unions. Parallèlement, l’influence des parents existe toujours sur les jeunes futurs mariés. Évidemment, ils ne sont plus obligés de se marier avec un inconnu pour l’intérêt de la famille, mais l’idée traditionnelle de l’héritage reste. Ainsi, quand un/une jeune passe un certain âge\textsuperscript{18}, la pression sociale le/la pousse à se marier au plus vite, le manque de connaissance de la personne pouvant par la suite conduire vers un divorce. Ensuite, l’amélioration générale de la situation financière en Chine peut avoir des conséquences négatives pour les jeunes mariés. Par exemple, le cadeau de mariage offert par la famille du garçon, qui est toujours considéré comme le respect dû à la famille de la fille, reste exigé comme une obligation. Cela pose ainsi plus

\textsuperscript{16} Cuihuan Miao, Longhai Li, \textit{La valeur du mariage des concubines modernes : la perte de valeur des femmes en Chine moderne dans la période du changement de la forme sociale \textcopyright{ 二奶 } 的婚姻观: 现代中国转型期女性价值观的迷失}, 22 \textit{JOURNAL OF CHONGQING INSTITUTE OF TECHNOLOGY (SOCIAL SCIENCE)}, no 9, p. 97 (sept. 2008).
\textsuperscript{17} Journal Xinhua, \textit{Chine : 3,5 millions de couples ont divorcé en 2013}, le site Peuple, (18 juin, 2014).
\textsuperscript{18} Souvent vers 25 ans, début de « l’âge d’or » pour avoir des enfants.
de contraintes pour les jeunes mariés et complique le problème du partage des biens lors d’un éventuel divorce. Le concubinage avant le mariage existe mais ne dure pas : il est plutôt considéré comme un mariage à l’essai avant la vraie vie commune en couple. D’une part, le mariage avec une cérémonie continue traditionnellement à symboliser le début d’une vraie famille et, d’autre part, les enfants hors relation maritale ne sont pas protégés par la loi, et craignent, sous l’influence de la tradition, d’être considérés comme des enfants bâtards. D’un autre côté, malgré la monogamie imposée, un autre genre de concubinage est apparu en raison d’intérêts financiers. Des filles se mettent volontairement en position de concubines avec des riches afin de satisfaire une avidité de richesse. Ce genre de relation est tellement présent, que cela est devenu un sujet très souvent discuté par les journaux. On les appelle des bombes de mariage.

En raison de tous ces nouveaux problèmes, la loi sur le mariage a été modifiée en 1980, et a encore subi de grands changements en 2001. De plus, des articles complémentaires ont été ajoutés ces dernières années, reflétant une prise de conscience de l’existence de ces soucis liés en grande partie à la survie de la coutume traditionnelle.

III. LES UNIONS HOMOSEXUELLES

L’évolution des unions homosexuelles en Chine doit être décrite, avant toute tentative de présenter la situation actuelle des unions homosexuelles et des attentes juridiques qu’elles font naître. Nous porterons notre attention sur les manques juridiques ainsi que la reconnaissance liée à l’influence de la tradition et de l’histoire.

A. La reconnaissance sociale dans l’histoire

L’homosexualité existe évidemment depuis toujours en Chine. Nous en voyons déjà des traces dans les ouvrages classiques...
confucéens comme le *Classiques des vers* 19. Ce qui est intéressant, c’est que la reconnaissance sociale de cette sexualité humaine ne se présente pas de la même manière en Chine que dans le monde occidental. Selon les documents historiques, nous voyons qu’elle est plutôt considérée comme une amitié particulière, un accompagnement supplémentaire ou une nouvelle expérience.

La compréhension d’un poème peut être différente selon les personnes, mais les documents historiques laissent moins de place au doute. Dans le livre *Mémoires historiques* 20, dans la catégorie *Liezhu* (Liezhuan), chapitre Ningxing 21, il y a beaucoup d’histoires d’empereurs avec leurs aimables vassaux (ex : l’histoire de l’empereur Han Wendi avec Deng Tong, l’histoire de Han Jingdi avec Zhou Wenren, les histoires de l’empereur Han Wudi avec Han Yan, Li Yannian, même avec son général célèbre Wei Qing). Et dans la dynastie Jin (265-420), sous l’influence du mode de vie hédoniste à l’époque, « la beauté des hommes est appréciée encore plus que celle des femmes, la classe dirigeante considère cette expérience comme très chic, et cette tentative se déroule aux quatre coins de l’empire 22. » Dans les dynasties Sui (581-618) et Tang (618-907), les documents montrent des histoires de la classe dirigeante comme l’empereur avec ses vassaux ou les fonctionnaires avec leurs serviteurs. Depuis la dynastie Song (960-1279) et Yuan (1279-1368), dans les ouvrages (note ou texte de théâtre), il est remarquable de constater que la prostitution des

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19. Une anthologie des textes du XIe au Ve siècle av. J.-C. éditée par Confucius. *Voir*, dans la catégorie des chansons populaires, un poème : 彼狡童兮，不与我言兮。维子之故，使我不能餐兮。彼狡童兮，不与我食兮。维子之故，使我不能息兮。Le coquin, qui ne parle pas avec moi, c’est pour toi, que l’appétit me manque. Le coquin, qui ne mange pas avec moi, c’est pour toi que le sommeil me quitte. Il décrit l’amour pour un beau garçon, et la façon dont l’auteur parle semble plus un ton masculin.


21. Ningxing, Sima Qin a défini, dès le début du chapitre, que c’est l’homme qui sert l’empereur avec sa beauté tout comme une femme.

hommes commence à être présentée, et devient une réalité quotidienne. Dans les dynasties suivantes, des Ming et des Qing, l'homosexualité était tellement présente qu’il est très facile de trouver des documents narrant des histoires dans toutes les classes sociales. De plus, du fait que les fonctionnaires s’étaient vus interdire par la loi de fréquenter les prostituées, une mode s’était développée pour les fonctionnaires de garder des serviteurs comme concubins. Dans son livre «Travels in China», Sir John Barrow écrit :

... In China it seems to have the contrary effect of promoting that sort of connection which, being one of the greatest violations of the laws of nature, ought to be considered among the first moral crimes—a connection that sinks the man many degrees below the brute. The commission of this detestable and unnatural act is attended with so little sense of shame, or feelings of delicacy, that many of the first officers of state seemed to make no hesitation in publicly avowing it. Each of these officers is constantly attended by his pipe-bearer, who is generally a handsome boy, from fourteen to eighteen years of age, and is always well-dressed. In pointing out to our notice the boy of each other, they made use of signs and motions, the meaning of which was too obvious to be misinterpreted ...

23. Ainsi, d’après le Code Ming, si un fonctionnaire est accusé de cousiner avec une prostituée, il perd son travail et ne peux plus être fonctionnaire de toute sa vie.

24. SIR JOHN BARROW, TRAVELS IN CHINA, 100 (1805) [souligné par l’auteur]. Traduction: En Chine, il semble avoir l’effet contraire de promouvoir ce genre de propos qui, étant l’une des plus grandes violations des lois de la nature, doit être considéré parmi les premiers crimes, une connexion morale qui fait chuter l’homme au degré en dessous de la brute. La commission de cet acte détestable et contre nature fait l’objet de si peu de honte ou des sentiments de délicatesse, qu’un bon nombre des premiers officiers de l’État semble n’avoir aucune hésitation à l’avouer publiquement. Chacun d’entre eux est constamment assisté par son porte-pipe, qui est souvent un beau garçon, âgé de quatorze à dix-huit ans, et toujours bien habillé. Dans la désignation mutuelle du garçon de l’un ou de l’autre, il est fait usage de signes et de mouvements dont le sens est bien trop évident pour être faussement interprété.
Ignorons son ton critique car il était missionnaire. Nous voyons surtout dans les mots en caractères gras la tolérance et l’acceptation de cette sexualité entre deux hommes.

Les documents historiques concernant les unions entre les personnes du même sexe montrent plutôt les relations entre des hommes. C’est en raison de la société paternaliste, ce qui montre aussi un manque d’attention aux femmes. Mais, il existe quand même quelques documents témoignant d’homosexualité féminine. C’est souvent entre la maîtresse de maison (même l’impératrice) et les servants voire même les concubines, ou entre les servantes elles-mêmes. Dans la partie traitant de l’union hétérosexuelle, nous avons vu qu’il n’y a qu’un maître de maison, donc un seul homme, pour plusieurs femmes, et plusieurs servantes. Au palais royal, c’était l’empereur lui-même qui avait des centaines de femmes, et des milliers de servantes. Afin de satisfaire leurs besoins physiologiques, certaines femmes décidèrent de le faire entre elles. Surtout pour les servantes au palais royal, il existait même un terme spécial qui décrivait ces servantes vivant à deux comme duishi, ce qui veut dire « manger face à face » pour décrire le choix de mode de vie.

Les unions entre les personnes du même sexe sont donc reconnues depuis longtemps en Chine. Cette union n’était critiquée par les confucéens, que si la personne qui la pratiquait tentait de l’utiliser afin d’obtenir du pouvoir en échange (souvent chez les vassaux). En effet, ils étaient considérés comme troublant avec des manœuvres spéculatives, la justice politique avec leur beauté. Au-delà, ce genre d’unions était même considéré comme une amitié spéciale, pure et fidèle. De plus, dans bon nombre de dynasties, cette nouvelle expérience était même très chic.

Peut-on pour autant parler d’unions homosexuelles ? En effet, pour les unions entre les femmes duishi, nous voyons bien que c’était un choix par défaut causé par le manque d’hommes. Quant aux hommes, très peu d’entre eux pratiquaient une vraie homosexualité : à part leurs « nouvelle expérience très chic », rien
ne les empêchait d’avoir une épouse, des concubines et évidemment des enfants. Pour toutes ces raisons, c’était plus de la bisexuality que de l’homosexualité. N’y avait-il pas l’existence d’une vraie homosexualité dans l’histoire de la Chine ? Probablement non. En effet, l’influence du confucianisme était tellement forte, qu’il était inimaginable pour une personne de ne pas continuer la lignée de la famille : couper la transmission familiale, ne pas transmettre le sang de la famille, faire disparaître le nom de famille, c’était aller contre l’ancêtre et commettre un péché. Cette valeur était partagée par les Chinois depuis toujours. En revanche, tant que l’hérité était garantie, peu d’attention était portée sur la forme de la sexualité. Encore une fois, l’homosexualité n’a jamais été un crime en Chine antique.

B. La situation présente

Malgré la tolérance en Chine antique, l’homosexualité n’a pas pu obtenir une reconnaissance facile en Chine contemporaine après la prise de pouvoir du communisme. L’homosexualité était définie comme une maladie mentale, et les homosexuels ont surtout beaucoup subi pendant la grande révolution culturelle. Ce n’est qu’en 2001 que l’homosexualité n’a plus été considérée comme une maladie. Avant cela, et avec l’influence de la forme traditionnelle de la famille, très peu de gens homosexuels osaient faire leur coming out : la plupart choisissaient un « mariage » en cachette contre leur nature et aussi pour avoir des enfants. Il est probable que la plupart des homosexuels en Chine n’étaient même pas conscients de leur vraie sexualité, et se sont forcés à respecter la norme.

La situation moderne s’est beaucoup améliorée. Depuis le début du siècle, avec la correction de la définition médicale de l’homosexualité ainsi que la liberté d’internet, son existence commence à être prise en compte. Beaucoup de fictions racontant l’histoire de couples homosexuels sont consultables facilement en ligne. Des recherches montrent une meilleure compréhension, surtout chez les étudiants : « l’attitude des étudiants vis-à-vis de l’homosexualité est assez positive et raisonnable »27. « Plus de 50% des étudiants participant considèrent l’homosexualité comme un acte normal »28. Il est de plus en plus commun que la jeune génération homosexuelle fasse son coming out devant ses amis, mais cache toujours ce « secret » à leurs parents :

La culture traditionnelle chinoise refuse de considérer une personne comme un individu, mais toujours comme un élément familial. Il lui faut se mettre dans un contexte des relations humaines donc évidemment de relation parentale. Quand un jeune fait son coming out, non seulement lui-même, mais aussi ses parents sont face à la pression sociale expliquant qu’il est différent des autres, et sont devant l’embarras qu’il aurait trahi les valeurs traditionnelles29.

Au niveau des mass-médias, l’homosexualité reste un sujet plus ou moins tabou même aujourd’hui. Elle est rarement présentée sur les chaînes officielles, sauf quand cela concerne un personnage commettant un crime ou un patient infecté par le SIDA. Le premier traitement officiel du sujet de l’homosexualité a été fait par la chaîne centrale (CCTV) en décembre 2004. C’était une émission qui avait comme titre « Mieux faire face sérieusement plutôt qu’éviter ». Aujourd’hui, il n’existe pas plus de trois émissions concernant le sujet. Ce n’est pas improbable que ce soit pour éviter de causer un sentiment désagréable à une grande partie du peuple.

27. Xiaoxiao Zhang, Xiaoli Yang, Qi Zhang, The Attributions and Attitudes toward Homosexuality among the Chinese University Students, 26, EDUCATION SCIENCE, no 2 (avril 2010).
À part les médias officiels plutôt silencieux, le sujet est assez fréquemment traité sur les sites et les forums. « Plus de 100.000 inscrits se retrouvent dans des célèbres sites sur le thème homosexuel »

C. Les attentes juridiques

Bien qu’acceptées historiquement, les unions homosexuelles ne restent finalement qu’un complément des unions hétérosexuelles. L’homosexualité véritable, qui va à l’encontre des valeurs traditionnelles confucéennes n’est pas historiquement reconnue. Comme cela reste un tabou, l’attention sociale portée reste faible sur ce sujet. Tout cela fait que l’aspect juridique est quasiment vide autour de l’homosexualité. Il n’existe pas de loi qui la punisse mais il n’existe pas de loi qui la protège. Un simple exemple, la définition du crime de viol en Chine est la suivante : c’est le fait d’avoir un rapport sexuel contre le désir d’une femme en utilisant la violence. Autrement dit, un homme ne peut pas être violé. Ce n’est pas un exemple direct, mais il est révélateur de l’ignorance juridique de l’homosexualité en Chine.

Ce vide juridique a compliqué certaines affaires récentes, en particulier relatives à des personnes ayant fait un mariage en cachette. Par exemple, selon la loi sur le mariage, si l’une des parties pratique un concubinage avec une autre personne de sexe différent, l’autre partie peut demander d’une indemnité lors du divorce. Mais si ce concubinage est avec une autre personne de même sexe, il n’existe rien dans la loi qui le prévoit. Ou encore, si l’une des parties a recours à une fécondation artificielle et accouche d’un enfant, élève cet enfant avec son partenaire hors mariage, cela correspond à la condition définissant le crime de bigamie, mais si son partenaire est du même sexe, le crime n’est

31. Code pénal, art. 236.
La sexologue Li Yihe a proposé la légalisation du mariage entre les personnes du même sexe en 2006 à la Conférence consultative politique du peuple chinois, mais cela n’a jamais été discuté.

IV. CONCLUSION

La société chinoise a forgé un système législatif spécifique influencé par le confucianisme. Nous voyons qu’avant le Code Tang, la loi était assez floue. Le peuple a, alors, vécu en suivant principalement les modèles confucéens. D’après Confucius, il est préférable de diriger le peuple vers une bonne éducation au lieu de le contraindre par la loi. Il a créé des règles rituelles à suivre pour le peuple, qui fait que la coutume joue un rôle très important, encore aujourd’hui en Chine. La question que nous nous posons maintenant, c’est comment trouver un équilibre entre les valeurs traditionnelles et la situation actuelle.

Du côté des unions hétérosexuelles, une évolution favorable de la position sociale des femmes a été constatée. La femme, qui avait juste la « fonction » d’objet, d’esclave ou d’outil et était seulement censée garantir l’hérédité, a pu obtenir la liberté de choix du mariage, puis le droit de travailler. Aujourd’hui, elle est respectée et a les mêmes droits que l’homme, et encore plus, est protégée par la loi en tant que future mère. La tradition influence toujours, dans une certaine mesure, le positionnement des femmes, mais la loi sur le mariage les rassure de plus en plus. L’existence des concubinages amoureux ou immoraux est inévitable, et une meilleure reconnaissance par la loi de ce fait pourrait être plus juste qu’une punition.

Du côté des unions homosexuelles, l’ignorance de son existence ne semble plus normale. Avec de plus en plus des couples qui font leur coming out ces dernières années, la société

commence à prendre conscience de ce sujet surtout à travers l’internet, malgré une attention insuffisante et l’aspect tabou. Les mass-média, pour rompre le silence, montrent un peu ce sujet dans quelques émissions encore trop rares mais qui ont le mérite d’exister. La légalisation est donc toujours en attente. Nous attendons déjà une première définition concernant leurs droits civiques, puis leur protection sociale, et peut-être la possibilité de l’adoption d’enfant. Sans contrainte religieuse et avec une longue existence historique, il serait assez souhaitable que ce vide juridique des unions homosexuelles soit comblé dans un temps proche.

Pour conclure, malgré son existence millénaire et son émergence économique, la Chine reste une jeune république sur l’aspect juridique et législatif. De petites modifications aux codes sont régulièrement faites pour prendre de plus en plus en compte la situation sociale actuelle. Il est probable que progressivement l’évolution des unions dans la société s’orientera vers plus de considération pour chaque modèle.
MARIAGES ET UNIONS DE PERSONNES DE MEME SEXE AUX ETATS-UNIS: UNE AFFAIRE COMPLIQUEE PAR LE FEDERALISME

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ABSTRACT

In the United States of America, because of federalism, the power to legislate on marriage and to decide who can marry and with whom, belongs to the legislature of the individual states. However, state legislative power may be curbed by state constitution (under the control of state courts and possible review

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by the state supreme court) and the United States Constitution (under the control of federal courts and possible review by the United States Supreme Court). The question whether homosexual couples have access to marriage was bound to become a constitutional issue. More and more states opened marriage to same-sex couples, either amending their legislation or by the effect of judicial review of restrictive legislation, found unconstitutional at state or federal level. In the meantime, other states remained adamantly opposed, some of them amending their constitution to make same-sex marriage unconstitutional at least within the state. Dealing with a flow of appeals, though mostly holding any ban to same-sex marriage unconstitutional, U.S. Circuit Courts of Appeals ended up being divided, forcing the U.S. Supreme Court to make a decision. With a short majority of five to four, same-sex marriage was made legal nationwide. While showcasing the American dimension of a social debate, this article explains how federalism made this a complex legal issue and development.

**RESUME**

En raison de l’organisation fédérale des États-Unis, le droit du mariage relève de la compétence législative des états, qui sont en principe libres de fixer les règles relatives à qui a le droit de se marier et avec qui. Le pouvoir législatif de chaque état doit cependant s’exercer dans les limites de ce qu’autorise la constitution de l’état (avec un contrôle de constitutionnalité des cours de l’état et au niveau ultime de la Cour suprême de l’état) et la Constitution fédérale (avec un contrôle de constitutionnalité des cours fédérales et au niveau ultime de la Cour suprême des États-Unis). L’accès au mariage des couples homosexuels n’a pas manqué de devenir une affaire constitutionnelle, les états étant de plus en plus nombreux à admettre les unions de même sexe, en modifiant la loi ou en reconnaissant judiciairement l’inconstitutionnalité du refus d’accès au mariage aux couples de même sexe, alors que d’autres proclamaient leur attachement au mariage hétérosexuel, parfois en modifiant leur constitution afin d’affirmer l’inconstitutionnalité du mariage homosexuel au moins au niveau étatique. En raison des divergences d’opinion des cours
d’appel fédérales en majorité favorables au mariage de même sexe, la Cour suprême fut acculée à se prononcer pour décider, avec une courte majorité d’une voix, qu’interdire l’accès au mariage aux homosexuels est contraire à la Constitution des États-Unis. Tout en mettant en évidence la dimension américaine de ce débat de société, cet article explique comment le fédéralisme a compliqué les données du problème et le processus qui a conduit à une solution.

I. INTRODUCTION

Vus de l’extérieur, les États-Unis sont perçus comme un monde assez homogène, dont les séries télévisées nous offrent une image stéréotypée. De l’intérieur, c’est un milieu d’une grande diversité où toutes les cultures du monde se combinent et se recombinent et où l’on trouve les positions les plus extrêmes et les plus inattendues. Berceau de la révolution sexuelle, les États-Unis sont aussi un univers de conservatisme social. Même si les couples non mariés sont de plus en plus nombreux, surtout parmi les jeunes, il reste mal vu, en bien des lieux et milieux, pour un couple de vivre ensemble sans être marié. Et pourtant il n’y a pas de honte à s’afficher avec sa liaison du moment (date), de parler librement de ses liaisons passées, et même de les inviter toutes à son premier, deuxième ou troisième mariage.

Quant à l’homosexualité, elle s’affiche volontiers dans les villes, mais jusqu’en 2003, la sodomie était punie par la loi pénale dans plusieurs états, même quand elle était pratiquée à l’abri des regards entre adultes consentants. Les LGBT (lesbian, gay,

1. BERNARD-HENRI LEVY, AMERICAN VERTIGO (Grasset 2006).
bisexual, transgender) sont aujourd’hui encouragés à faire leur coming out. Les partenariats entre compagons de même sexe furent autorisés dès 1999 en Californie\(^3\) et le Massachusetts fut le premier état à légaliser le mariage entre personnes de même sexe, suite à une décision judiciaire rendue fin 2003\(^4\). Dans le même temps, plusieurs états, dont la Louisiane, modifièrent leur constitution pour interdire les partenariats ou les unions entre personnes de même sexe\(^5\), et le Président Bill Clinton signa une loi fédérale excluant les bénéfices fédéraux aux conjoints de même sexe\(^6\). En droit des États-Unis, la validité et la reconnaissance des unions de même sexe ne résultent pas de l’adoption d’une ou deux lois mais sont le fruit d’une longue évolution dialectique combinant activité législative et recours judiciaires. Lorsque j’ai présenté ce papier à La Roche-sur-Yon le 6 décembre 2013, 14 des 50 états reconnaissaient le mariage entre personnes de même sexe, alors accessible à 33% de la population. Le nombre avait atteint 25 lors de ma présentation à Lyon le 28 novembre 2014, et est de 36 alors que ce texte est révisé pour la publication.

Revenons à décembre 2013 : six états reconnaissaient alors les unions avec le même effet que le mariage, en même temps qu’environ vingt états, dont la Louisiane, avaient une disposition dans leur constitution interdisant le mariage ou les unions de même sexe. Le 26 juin 2013, la Cour suprême des États-Unis avait déclaré inconstitutionnel (contraire à la Constitution fédérale) l’article 3 du Defense of Marriage Act, loi fédérale de 1996, disposition par laquelle le Congrès interdisait à l’administration fédérale de reconnaître les mariages entre époux de même sexe\(^7\). La Cour suprême laissait cependant intacte la disposition de la même loi autorisant les états à ne pas leur reconnaître d’effets et

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4. *Infra* III-A.
5. *Infra* III-C.
évitait de se prononcer sur la validité du mariage de même sexe en Californie\(^8\).

Pour comprendre, il faut se souvenir que les États-Unis se sont constitués en une fédération d’états autonomes sinon pleinement souverains, qui se réservèrent une large compétence législative quand ils acceptèrent de devenir des états fédérés\(^9\). Adoptée par les treize états d’origine en 1787, la Constitution en fédère aujourd’hui cinquante, suite aux élargissements successifs de l’Union. L’État fédéral est principalement chargé de la sécurité extérieure, de l’armée, de la politique étrangère, de la monnaie. Toutes les compétences législatives qui ne sont pas déléguées au Congrès, dont la presque totalité du droit civil, restent entre les mains de la législature des états. Certains domaines sont partagés. Ainsi le droit pénal relève-t-il en principe des états mais le Congrès peut créer des infractions fédérales dans ses domaines de compétence. Le droit commercial est de la compétence des états, mais la Constitution permet au Congrès de légiférer en matière de commerce interétatique et international et de droit des faillites. Les états peuvent légiférer lorsque le Congrès ne le fait pas (compétence résiduelle), mais la loi fédérale l’emporte sur la loi de l’état en cas de contrariété de solution (primauté du droit fédéral, dérivé de la supremacy clause (preemption)\(^10\).

Chaque état a sa constitution, laquelle ne saurait contredire la constitution fédérale. Toute disposition constitutionnelle ou législative d’un état contredisant la loi fédérale peut être annulée par la Cour suprême des États-Unis, qui vérifie aussi la constitutionnalité des lois et règlements fédéraux\(^11\). Chaque état a un système institutionnel complet, avec pouvoir législatif, exécutif et judiciaire. La loi est votée par la législature et promulguée par le gouverneur, elle est appliquée par les tribunaux de l’état à la tête

\(^8\) Hollingsworth v. Perry, 133 S.Ct. 2652 (2013).
\(^10\) U.S. Const. Art. VI, § 2.
desquels se trouve une Cour suprême de l’état. En principe les Américains sont soumis à la loi de leur état de résidence, mais ils peuvent faire appel aux tribunaux fédéraux en cas de violation de leurs droits fondamentaux protégés par la Constitution des États-Unis. Quand ils ont un litige important avec un résident d’un autre état, ils ont le choix de saisir ou bien le juge d’un état qui se reconnaît compétent, ou bien le juge fédéral¹², qui doit alors déterminer la loi applicable et appliquer cette loi de l’état comme le ferait un juge de ce même état¹³. Par exemple, dans un litige entre un résident du Kansas et une société immatriculée dans le Delaware, si le juge fédéral saisi détermine que la loi du Kansas est applicable au litige, il doit l’appliquer, ainsi que toute la jurisprudence développée par les cours du Kansas¹⁴. Une cour fédérale n’applique donc pas que du droit fédéral, elle applique aussi le droit des états. En revanche, quand un litige relève de la loi fédérale, celle-ci sera appliquée aussi bien par le juge des états que par le juge fédéral.

La coexistence du droit fédéral et du droit des états, d’une part, et des juridictions fédérales et étatiques d’autre part, rend les chevauchements inévitables et complique l’administration de la justice. Dans nombre d’affaires, les avocats américains passent plus de temps à déterminer le juge compétent et la loi applicable qu’à argumenter sur le fond du litige.

Cela explique qu’il ne peut y avoir de réponse législative unique aux unions de même sexe : le Congrès n’est pas compétent pour légiférer sur la question de qui peut ou non avoir accès au mariage. Le seul organe fédéral qui puisse unifier le droit en la matière, du moins dans une certaine mesure, est la Cour suprême des États-Unis, par exemple en jugeant que l’interdiction ou la limitation de l’accès au mariage aux gens de même sexe violerait le principe de l’égalité de traitement (*equal treatment*) proclamé

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¹⁴ Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).
par le 14e Amendement de la Constitution. Une telle décision sera vraisemblablement rendue dans les semaines qui suivront la publication de cet article. À supposer qu’elle le soit, le droit du mariage et de la famille continuera quand même à relever de la compétence des états. La compétence fédérale restera limitée en la matière, nous y reviendrons.

Supposons qu’aujourd’hui un couple valablement marié en Californie déménage et vienne résider en Floride. Le certificat de mariage (marriage license) sera reconnu en Floride comme dans tout autre état de l’Union, la Constitution obligeant les états à reconnaître à première vue tout acte officiel valablement accompli dans un autre état (full faith and credit)\textsuperscript{15}. Les choses se compliquent si le couple est de même sexe et vient s’installer dans un état dont la constitution interdit non seulement de célébrer des mariages de même sexe, mais aussi de reconnaître les effets de tels mariages pourtant valablement conclus dans un autre état. C’est le cas par exemple de la Louisiane\textsuperscript{16}. Ce couple californien sera donc valablement marié dans certains états (y compris en Floride depuis le 6 janvier 2015\textsuperscript{17}) et pas dans d’autres. Tel est le désordre qui règne depuis plusieurs années aux États-Unis, en raison même du fédéralisme. Nous verrons pourtant que la Constitution fédérale porte aussi le remède aux problèmes qui seront exposés, mais que la mise en œuvre des solutions prend du temps.

La bonne nouvelle est que la durée favorise le débat qui doit nécessairement avoir lieu avant de trancher les délicats problèmes de société. Le débat d’idée en la matière est largement commun à l’ensemble des pays occidentaux, pour nous limiter à ceux-ci. La première partie de cet article n’en abordera que la dimension américaine. La deuxième partie promènera le lecteur dans diverses régions des États-Unis, pour mettre en évidence les tensions entre

\textsuperscript{15} U.S. Const. Art. IV, § 1.
\textsuperscript{16} \textit{Infra} III-C.
\textsuperscript{17} Par l’effet d’une injonction d’une Cour de district fédérale, dans l’arrêt Brenner v. Scott, 999 F. Supp. 2d 1278 (N.D. Fla. 2014), rendu le 21 août 2014 ; un appel est en cours devant la Cour d’appel fédérale pour le 11e Circuit.
partisans et opposants au mariage de même sexe et la manière dont elles s’expriment dans le débat législatif et judiciaire. La troisième partie présentera les options ouvertes pour l’avenir, à l’heure où la Cour suprême s’apprête à trancher sur le fond de l’affaire.

II. LES TERMES DU DÉBAT

Cette section ne prétend pas à l’exhaustivité. Elle reflètera trois points de vue rencontrés par l’auteur au fil de ses lectures, dont certains peuvent sembler paradoxaux.

A. Le paradoxe du conservatisme social

On imagine volontiers les conservateurs américains dans une posture de lutte contre le mariage homosexuel. Il serait facile de trouver des positions en ce sens de politiciens et intellectuels liés au parti républicain. Le discours du P’r Dale Carpenter, professeur à la Law School de l’Université du Minnesota, est à cet égard déroutant. Cet auteur fait la promotion du mariage de même sexe dans une perspective néo-conservatrice. Son discours montre l’évolution du mariage avec le passage d’une vision monolithique vers une approche pluraliste. Il montre toutefois que même si la société est passée d’une conception très conservatrice d’un mariage durable et souvent arrangé vers une conception ouverte au mariage d’amour et plus facilement dissoluble, l’union matrimoniale reste dans la société actuelle un facteur de stabilité économique et sociale. Statistiquement, les enfants de couples mariés font plus souvent des études, accèdent plus facilement à des emplois stables et bien rémunérés et errent moins sur les chemins de la délinquance. Il y a plus de stabilité économique et donc moins de recours à l’État providence dans la famille mariée que dans les familles monoparentales. Comme les néoconservateurs cherchent à diminuer la dépense publique, ils doivent logiquement, d’un point

de vue pratique, être favorables au mariage homosexuel, qui stabilisera une partie supplémentaire de la population.

Le fait que des dizaines de milliers d’enfants soient élevés dans des familles homosexuelles est une réalité sociale qui doit être prise en compte, quel que soit le jugement moral que l’on porte sur la question. Les considérations pratiques doivent l’emporter sur les jugements de valeur, ce qui est typique de la culture américaine, de même qu’au final, dans une société qui repose sur l’individualisme, les choix personnels ont plus de valeur que les décisions collectives.

B. Les tensions du catholicisme institutionnel

Dans un essai très controversé publié dans un magazine catholique, l’essayiste Joseph Bottum, qui collabore aussi avec le Wall Street Journal, explique que le combat de l’Église catholique contre le mariage homosexuel est perdu d’avance19. Selon lui, l’Église catholique aurait tort de s’engager dans ce combat alors qu’elle devrait accepter la pleine sécularisation du mariage. Il analyse comment la sécularisation du mariage est en cours depuis le mouvement des Lumières.

Même s’il est évident que le magistère catholique n’accepte pas cette vue et ne révise pas ses positions, la pastorale du pape François ne met plus l’accent sur ce que l’Église s’attachait à condamner (rapports sexuels hors mariage, divorce, avortement, remariage des catholiques etc.) mais sur l’essence du message d’amour de l’Évangile qui est de laisser de côté le troupeau pour s’occuper de la brebis égarée : « il y aura de la joie dans le ciel pour un seul pécheur qui se convertit plus que pour quatre-vingt-dix-neuf justes qui n’ont pas besoin de conversion »20.

Si l’homosexualité n’est pas en elle-même un péché, vivre dans les actes sa tendance homosexuelle est aux yeux de l’Église

20. Luc 15, 7.
l’Église catholique évoluer sur ce point, l’accent mis sur la miséricorde fait évoluer le regard vers la compréhension plutôt que le rejet. Une pastorale de la miséricorde vide moins les églises que celle du doigt dénonciateur. Ce tournant ne change pas le regard que le catholicisme institutionnel porte sur le péché. De même, il est peu probable que l’analyse de Joseph Bottum conduise la hiérarchie catholique à embrasser pleinement la sécularisation du mariage qui reste qualifié de sacrement et symbolise l’union de la chrétienté à son créateur.

C. La troisième voie

Terminons ce bref survol avec l’ouvrage d’un maître en philosophie politique, professeur à Harvard. Michael J. Zandel nous fait comprendre, dans un ouvrage sur la justice, que la société n’est pas confrontée à une alternative, mais à un choix à trois branches. On ne peut répondre convenablement à la question de savoir si la société doit ou ne doit pas ouvrir le mariage aux gens de même sexe sans explorer une troisième voie. La société pourrait en effet décider de se désengager du processus et de ne plus reconnaître le mariage, se posant ainsi la question de fond : pourquoi reconnaître le mariage ? Cette analyse fait apparaître le mariage comme un brevet d’honorabilité, une reconnaissance particulière donnée à certains couples.

Qu’est ce qui justifie ce brevet d’honorabilité conféré aux seuls gens mariés ? Il s’agissait autrefois de la procréation et de la transmission des patrimoines de génération en génération. Aujourd’hui, le mariage est de plus en plus dissocié de la procréation. Non qu’il ne la favorise, mais celle-ci est de plus en

plus assurée hors mariage. En outre, les États-Unis acceptent assez facilement la maternité de substitution, ce qui a par ailleurs pour effet d’ouvrir la procréation aux couples homosexuels. Il semble que les valeurs aujourd’hui privilégies dans le mariage soient l’amour et la promesse de fidélité, au moins autant que dure le mariage, ainsi que le devoir de secours et d’assistance qui est intrinsèquement lié à l’institution matrimoniale.

Si amour, fidélité et assistance sont les engagements justifiant la promotion du mariage, pourquoi le refuser aux couples homosexuels qui préfèrent une stabilité responsable au vagabondage sexuel ? Pourquoi ne pas leur permettre de s’engager et recevoir le brevet d’honorabilité autrefois réservé à ceux qui assuraient la continuité des générations ? Cette reconnaissance ne devient-elle pas encore plus importante lorsqu’il y a prise en charge et amour de l’enfant conçu ou adopté par l’autre ?

Du fait de sa diversité ethnique et religieuse, la société américaine n’évolue pas en un seul bloc sur le chemin de la reconnaissance des couples de même sexe, comme nous allons le voir en explorant certains états. Certaines tribus amérindiennes sont d’ailleurs les premières à accepter les unions de même sexe, comme par exemple les Atakapas-Ishak du sud de la Louisiane et du Texas.

III. PROMENADE AUX ÉTATS-UNIS : LA DIVERSITÉ DANS TOUS SES ÉTATS

Nous traverserons les États-Unis d’Est en Ouest, de Boston à San Francisco, puis descendrons vers le Sud jusqu’à la Louisiane, non sans faire référence à d’autres états de l’Union.

A. D’abord le Massachusetts

Foyer du puritanisme et de la mentalité WASP (White Anglo Saxon Protestant), le Commonwealth du Massachusetts est aussi un état démocrate aux idées progressistes ou libérales au sens
américain du terme. Le mariage entre époux de même sexe fut rendu possible par l’effet d’une décision judiciaire rendue le 18 novembre 2003 par la Cour suprême de l’état, ce qui fit du Massachusetts le premier état à ouvrir le mariage aux couples homosexuels. Toutefois, jusqu’aux années récentes, les couples de même sexe valablement mariés à Boston ne voyaient pas leur mariage reconnu quand ils venaient s’installer dans les autres états.

Tous les états de Nouvelle-Angleterre emboîtèrent le pas au Massachusetts, suivi ensuite d’autres états de la côte Est, tels que l’état de New York, le New Jersey, le Maryland, le Delaware, et le District of Columbia, siège de la capitale fédérale. La Pennsylvanie fut le dernier état de la région à suivre le mouvement.


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25. Public Act No. 09-13 (2009), supprimant toute référence à la différence de sexe dans les textes de loi relatifs au mariage.
27. Act to amend Title 13 of the Delaware Code Relating to Domestic Relations to Provide for Same-Gender Civil Marriage and to Convert Existing Civil Unions to Civil Marriages (2013). Notons que cette loi étend les effets du mariage aux unions civiles entre gens de même sexe.
29. Loi signée le 20 novembre 2013 entrée en vigueur le 1er juin 2014.
30. Loi signée le 6 mai 2009, la première en date aux États-Unis à légaliser le mariage de même sexe.
32. Loi signée le 14 mai 2013 prenant effet le 1er août 2013.
33. Les unions civiles entre gens de même sexe, rendues possibles en 2008, furent transformées en mariage à compter du 1er janvier 2011.
35. Loi du 2 mai 2013, en vigueur le 1er août 2013.
B. Puis la Californie

L’état phare de la libération sexuelle, foyer du progressisme américain, fut le second à autoriser le mariage entre personnes de même sexe. Le 16 juin 2008, la Cour suprême de Californie déclara qu’interdire le mariage aux couples de même sexe était une violation de la constitution de l’état\textsuperscript{38}. La constitution californienne contient une clause de traitement égalitaire, calquée sur celle contenue au 14\textsuperscript{e} Amendement de la Constitution fédérale\textsuperscript{39}.

Toutefois, contrairement au Massachusetts, cet arrêt ne marqua pas la fin de la lutte. Durant cette même année 2008, les opposants au mariage homosexuel firent passer, par référendum d’origine populaire, la « Proposition 8 » visant à modifier la constitution, afin de limiter le mariage à l’union de l’homme et de la femme\textsuperscript{40}. La modification fut attaquée par des couples homosexuels devant la juridiction fédérale pour violation du 14\textsuperscript{e} Amendement de la Constitution fédérale, le gouverneur de l’état étant le défendeur désigné dans cette action. La District Court (juridiction fédérale de première instance) déclara la modification faite sur la base de la Proposition 8 inconstitutionnelle\textsuperscript{41}. Par la voie d’une injonction, elle ordonna à l’administration de l’état de reconnaître les mariages entre époux de même sexe. L’administration de l’état accepta la décision, mais appel fut interjeté par les partisans et promoteurs de la fameuse Proposition 8.

Même si l’enjeu du litige était la validité du mariage de gens de même sexe, la bataille juridique devint purement procédurale : les partisans de la modification constitutionnelle avaient-ils le droit

\begin{itemize}
\item \textsuperscript{36.} Marriage Equality Act (Vermont) 2009.
\item \textsuperscript{37.} Loi signée le 13 février 2012, confirmée par référendum populaire le 6 novembre et en vigueur le 6 décembre 2012.
\item \textsuperscript{38.} In re Marriage Cases, 43 Cal. 4\textsuperscript{th} 757 (Cal. 2008).
\item \textsuperscript{39.} Constitution de Californie, art. I, § 31(a).
\item \textsuperscript{40.} Proposition 8, d’ajouter les mots suivants à la constitution de l’état: « Only marriage between a man and a woman is valid or recognized in California ».
\item \textsuperscript{41.} Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1004 (N.D. Cal. 2010).
\end{itemize}
d’interjeter appel ? La réponse à cette question technique n’était pas si simple. La Cour d’appel fédérale (9e Circuit) pensa que la réponse relevait du droit californien et non du droit fédéral, et préféra poser une question préjudicielle à la Cour suprême de l’état\textsuperscript{42}. Cette dernière déclara que les appelants avaient le droit d’agir au regard de la loi locale\textsuperscript{43}, décision qui fut acceptée par la Cour d’appel fédérale. Toutefois, sa décision relative au droit de faire appel fut attaquée devant la Cour suprême des États-Unis, laquelle jugea que la question de la qualité pour interjeter appel relevait du droit fédéral, et que dans son opinion les partisans de la Proposition 8 n’avaient pas le droit d’interjeter appel\textsuperscript{44}. Il résulta de cette saga judiciaire que le jugement de la Cour de district devint définitif : les homosexuels californiens pouvaient de nouveau se marier, mais cela en vertu d’une jurisprudence fédérale ayant valeur de jugement de première instance.

Toutes les décisions rendues à un niveau supérieur dans cette affaire ne portaient en effet que sur un point de procédure et non sur la question de fond, à savoir si l’interdiction du mariage gay violait ou non la Constitution fédérale. La Cour suprême ne se prononça que sur le droit de faire appel, en s’abstenant, dans un jugement rendu par une courte majorité de cinq contre quatre\textsuperscript{45}, de se prononcer sur la conformité de l’interdiction du mariage gay au 14\textsuperscript{e} Amendement.

\textit{C. Pendant ce temps en Louisiane}

La Louisiane est le seul état de l’Union à n’avoir pas adopté pleinement la common law. Peu après la cession par la France en 1803, l’extrémité sud du vaste territoire acheté par les États-Unis fut organisée en Territoire d’Orléans, pour devenir le 18\textsuperscript{e} état de l’Union.

\textsuperscript{42} Perry v. Schwarzenegger, 628 F.3d 1191, 1193 (9th Cir. 2011).
\textsuperscript{43} Perry v. Brown, 52 Cal. 4th 1116, 1127 (Cal. 2011).
\textsuperscript{44} Hollingsworth v. Perry, 133 S.Ct. 2652 (2013), décision dans laquelle toutes les étapes précédentes sont résumées; rendue le 26 juin 2013.
\textsuperscript{45} L’opinion de la majorité fut rendue par le Chief Justice Roberts.
l’Union sous le nom de Louisiane en 1812. La population locale exigea le maintien du droit civil, qui avait été appliqué pendant la colonisation française puis espagnole. Un code fut adopté en 1808, refondu en 1825 puis révisé en 1870\textsuperscript{46}. A l’occasion d’une révision récente (le Code civil louisianais est révisé titre par titre depuis le milieu du XX\textsuperscript{e} siècle), l’article 86 fut réécrit dans les termes suivants : « Le mariage est une relation juridique entre un homme et une femme créée par un contrat civil. Cette relation et ce contrat sont soumis à des règles spéciales prévues par la loi »\textsuperscript{47}.

La Louisiane est un état conservateur dominé aujourd’hui par le parti républicain. L’auteur a entendu le président du parti démocrate de l’état dire, sur le ton de la plaisanterie, qu’en Louisiane, il est plus embarrassant d’admettre qu’on est démocrate que de faire son coming out et avouer qu’on est gay. Cela ne veut pas dire que la culture locale soit favorable aux homosexuels. À Baton Rouge, capitale de l’état, le sheriff fit arrêter douze hommes entre 2011 et 2013, après qu’ils aient accepté d’avoir des relations intimes avec un agent ne portant pas l’uniforme, venu les provoquer en faisant mine de les séduire dans un parc. Le chef d’accusation était la violation de la loi réprimant la sodomie, pourtant déclarée inconstitutionnelle dix ans plus tôt par la Cour suprême des États-Unis dans l’affaire Lawrence v. Texas\textsuperscript{48}. Le sheriff donna pour excuse que la loi était toujours dans le code pénal, comme d’ailleurs dans une douzaine d’autres états du Sud des États-Unis\textsuperscript{49}. En 2014, la législature de l’état refusa d’abroger

\textsuperscript{46} Olivier Moréteau, Le Code civil de Louisiane, traduction et retraduction, 28 INTERNATIONAL JOURNAL FOR THE SEMIOTICS OF LAW 155 (2015).

\textsuperscript{47} Loi de 1987, n° 886, §1, en vigueur le 1\textsuperscript{er} janvier 1988 (traduction du Centre de droit civil, Louisiana State University, \url{http://www1.law.lsu.edu/clo/louisiana-civil-code-online}).

\textsuperscript{48} Supra note 2.

\textsuperscript{49} \url{http://nation.time.com/2013/07/31/louisiana-sodomy-sting-how-invalidated-sex-laws-still-lead-to-arrests/}.
la disposition litigieuse, pourtant inapplicable quand les rapports ont lieu à l’abri des regards entre adultes consentants.  

La Louisiane a une histoire de résistance au progrès ou au changement pourtant inévitable. L’état résista à l’abolition de l’esclavage alors que celui-ci était non seulement contraire aux droits de l’homme mais que son maintien avait perdu toute pertinence économique. La Louisiane résista à la déségrégation, la législature votant en 1960 des lois manifestement contraires à la Constitution fédérale telle qu’interprétée dans l’arrêt Brown v. Department of Education. En 2004, la constitution louisianaise fut modifiée pour renforcer la prohibition du mariage entre personnes de même sexe pourtant déjà affirmée aux articles 86 et 89 du Code civil. L’amendement de 2004 ne fait pas que limiter le mariage à l’union de l’homme et de la femme, il interdit la reconnaissance par les autorités louisianaises de tout mariage entre époux de même sexe pourtant valablement conclu dans un autre état, au mépris de la règle de full faith and credit exposée en introduction.

Une affaire est actuellement en cours devant les juridictions de l’état de Louisiane, suite à un jugement autorisant l’adoption de

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52. Loi de 1987, §1.
53. Defense of Marriage Act 2004, article XII, §15 de la Constitution de Louisiane:
   
   Marriage in the state of Louisiana shall consist only of the union of one man and one woman. No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman.
54. Supra I.

L’Attorney General de Louisiane obtint l’annulation de l’adoption et le renvoi à l’audience, car il n’avait pas été appelé à soumettre ses conclusions. La Cour du 15ᵉ district judiciaire de Louisiane (Lafayette) valida finalement l’adoption, en déclarant l’article XII section 15 de la constitution de l’état (amendement de 2004) et les articles 86 et 89 du Code civil contraires au 14ᵉ Amendement de la Constitution fédérale (Due Process et Equal Protection Clauses).

Les mêmes textes violent aussi l’article IV, section 1 de la Constitution des États-Unis (Full Faith and Credit). Un appel suspensif a été interjeté par l’Attorney General, renvoyant l’affaire directement devant la Cour suprême de Louisiane, seule compétente pour réviser un jugement déclarant que le droit de l’État est inconstitutionnel. La cause fut plaidée en Cour suprême le 29 janvier 2015, et le jugement est en délibéré. Dans le même temps, la décision d’un juge fédéral refusant de reconnaître l’inconstitutionnalité du droit louisianais était frappée d’appel, le

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jugement du juge Feldman ayant été discuté devant la Cour d’appel fédérale pour le 5e Circuit le 9 janvier 2015.60

La Louisiane pourrait évoluer vers l’admission du mariage homosexuel par une décision de sa propre Cour suprême sur le fondement de la Constitution des États-Unis, sauf à préférer attendre la décision de la Cour suprême fédérale, ce que les juges ont envisagé de faire durant les débats. Dans cinq autres états du Sud ou du Centre, dont la Géorgie, le Tennessee, le Kentucky, l’Ohio, le Michigan, le Nebraska et le Dakota du Nord, la constitution de l’état limite le mariage à l’union de l’homme et de la femme. Ces états étaient une vingtaine il y a deux ans, mais les choses ont évolué suite à des décisions de cours fédérales. Ainsi, au Texas, la prohibition constitutionnelle a été déclarée inconstitutionnelle par un juge fédéral de première instance et l’appel vient d’être entendu par la Cour d’appel fédérale (5e Circuit), à La Nouvelle-Orléans.61 En Alabama, des refus de reconnaissance de statut d’époux ont été attaqués avec succès devant des juridictions fédérales, mais les contés qui refusent toujours de reconnaître la validité de mariages valables dans d’autres états viennent de recevoir le soutien de la Cour suprême de l’état.61

C’est donc finalement dans le district fédéral, à Washington, que la fin de la partie va se jouer.

63. Le 3 mars 2015, la Cour suprême de l’Alabama a été la première Cour suprême d’état à s’opposer à l’ordre donné par un juge fédéral de reconnaître les mariages de même sexe et délivrer des certificats de mariage, au nom de la défense des droits des états (Campbell Robertson, Alabama Court Orders a Halt to Same-Sex Marriage Licenses, NEW YORK TIMES, 3 mars 2015) : Ex parte State ex. rel. Alabama Policy Institute, No. 1140460 (Ala. 2015).
IV. VERS UN DENOUEMENT JUDICIAIRE A WASHINGTON

La contradiction existe entre les cours d’appel des différents circuits, situation qui rend inévitable la saisine de la Cour suprême, qui est libre d’accepter ou refuser les recours, en décidant ou non d’ordonner la transmission du dossier par une ordonnance de certiorari. Alors que la plus haute juridiction fédérale a jusqu’ici tergiversé et renoncé à se prononcer sur le fond, sa décision est devenue inévitable.

La Cour suprême s’était déjà prononcée par deux fois le 26 juin 2013, dans deux décisions dont une seulement constitue une avancée vers la reconnaissance du mariage entre personnes de même sexe. Le premier arrêt mettait une fin favorable à l’affaire californienne, mais sur la simple base de règles de procédure. La Cour jugea qu’il était trop tôt pour prendre position sur le fond s’agissant de la validité et de la reconnaissance du mariage dans le droit des états. Le second arrêt était relatif à l’application du droit fédéral.


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64. Supra III-B; see Hollingsworth v. Perry, 133 S.Ct. 2652 (2013).

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife. and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.
demandé mais engagea une action contre les États-Unis pour violation de la Constitution fédérale. Elle eut gain de cause en première et seconde instance, la Cour d’appel du 2e Circuit confirmant l’ordre de remboursement de l’impôt, ayant constaté l’inconstitutionnalité de la disposition du Defense of Marriage Act. Par une courte majorité de cinq contre quatre, la Cour suprême confirma la décision attaquée, les trois femmes de la Cour se rangeant au jugement majoritaire rendu par Justice Kennedy.67

L’effet contesté du Defense of Marriage Act était de priver les couples homosexuels valablement mariés selon le droit d’un état des droits et avantages que la loi fédérale confère aux époux à condition qu’ils soient mari et femme, notamment en matière fiscale ou sociale. Car si les états fédérés (ou étrangers, comme en l’espèce) établissent le droit du mariage et disent qui peut se marier, l’état fédéral taxe les résidents des États-Unis et leur donne accès à des programmes fédéraux, par exemple en matière de santé. En limitant la définition du mariage à l’union de l’homme et de la femme, la loi fédérale violait la clause d’égalité de traitement contenue au 14e Amendement de la Constitution.

La conséquence de l’arrêt Windsor était que depuis juin 2013, les époux de même sexe peuvent être reconnus comme foyer fiscal au regard de l’impôt fédéral sur le revenu, ou comme couple marié au regard des programmes fédéraux favorisant la prise en charge des dépenses de santé, et cela que leur état de résidence reconnaissa ou non les unions de même sexe.

L’ultime verrou restait donc la question litigieuse de la constitutionnalité des lois des états qui limitent l’accès au mariage ou aux partenariats civils aux gens de sexe différent, au regard du 14e Amendement.

Plusieurs cours d’appel fédérales se sont prononcées sur la question mais leurs avis divergent. Les 4e, 7e et 10e Circuits ont

tranché en faveur de l’inconstitutionnalité des restrictions. Le 6 octobre 2014, la Cour suprême a refusé de se saisir des appels de leurs décisions, ce qui peut être vu comme un signal dans le sens de la reconnaissance 68. En revanche, elle a accepté d’entendre les appels de quatre arrêts de la Cour d’appel fédérale pour le 6e Circuit (Kentucky, Michigan, Ohio, Tennessee) qui ont validé les lois restreignant l’accès au mariage. Ces quatre affaires furent réunies en une seule, Obergefell v. Hodges, inscrite à la date du 28 avril 2015.


L’affaire Windsor de 201370 fut tranchée à une courte majorité de quatre contre cinq, le résultat reposant sur le swing vote du juge Kennedy qui fait souvent basculer la majorité quand la Cour suprême est divisée : dans les plus grandes démocraties, les décisions les plus importantes dépendent parfois du choix d’un seul homme. Une majorité plus forte en 2015 aurait renforcé l’autorité de la décision. Avec la même courte majorité de quatre contre cinq, la Cour suprême ne s’est pas opposée à une évolution devenue inéluctable71.

L’opinion de la Cour, délivrée par Justice Kennedy72, conclut dans les termes suivants :

Nulle union n’est plus profonde que le mariage, en ce qu’il incarne les idéaux les plus élevés d’amour, de fidélité, de dévotion, de sacrifice et de famille. En formant une union maritale, deux personnes s’élèvent au-dessus de ce qu’elles étaient auparavant. Comme certains des requérants le

68. Les appels concernaient l’Indiana, l’Oklahoma, l’Utah, la Virginie et le Wisconsin, portant à 24 le nombre des états acceptant le mariage de même sexe (plus le District of Columbia), le nombre devant monter à 30 dans les semaines suivantes. Adam Liptak, Supreme Court Delivers Tacit Win to Gay Marriage, NEW YORK TIMES, 6 octobre 2014.
70. Windsor, 133 S.Ct. 2675.
démontrer dans ces affaires, le mariage incarne un amour durable même au-delà de la mort. Ce serait mal comprendre ces hommes et ces femmes que de dire qu’ils manquent de respect pour l’idée de mariage. Leur plaidoyer révèle qu’ils le respectent, et même si profondément qu’ils y recherchent leur propre épanouissement. Leur espoir est de ne pas être condamnés à vivre dans la solitude ni exclus de l’une des plus anciennes institutions de la civilisation. Ils demandent l’égalité de dignité devant la loi. La Constitution leur accorde ce droit 73.

Plusieurs opinions dissidentes furent émises 74, celle de Justice Scalia étant particulièrement virulente, reprochant à la Cour de se substituer à la volonté populaire. La discussion qui précède montre pourtant la faiblesse de l’argument démocratique dans un système où elle ne peut se manifester que dans les limites de chaque état. Ce serait condamner les citoyens des États-Unis à vivre dans un étrange pays où le même couple pourrait être tantôt marié, tantôt en concubinage, selon l’état dans lequel il réside, avec tous les inconvénients possibles s’agissant de la situation des enfants. Que l’on soit ou non favorable au mariage homosexuel, il était raisonnable de donner le dernier mot à la Cour suprême, et la décision prise est la seule à donner sens à l’Union, que l’on vise la fédération ou le mariage.

Voyant qu’ils perdent la partie, les conservateurs font passer, dans certains états, des lois supposées renforcer la liberté religieuse 75, dont les termes alambiqués pourraient permettre à ceux dont les convictions religieuses s’opposent au mariage de même sexe, de refuser de vendre des produits ou fournir des services à l’occasion du mariage d’un couple de même sexe. Les opposants au mariage de même sexe font feu de tout bois, mettant en avant les droits des états et la liberté religieuse. L’histoire

73. Id.
74. Par Justices Alito, Scalia, Thomas et Chief Justice Roberts.
75. Voir par exemple, en Indiana, le Religious Freedom Restoration Act 2015. L’Arkansas fait de même, et le gouverneur de Louisiane a soutenu un projet similaire qui, ayant été rejeté lors de la session parlementaire de printemps 2015, a été partiellement mis en œuvre par la voie administrative.
américaine montre que si la justice finit normalement par triompher, les partisans des causes perdues déposent rarement les armes et continuent longtemps le combat.
THE ROLE OF OBJECTIVE GOOD FAITH IN CURRENT CONTRACT LAW: FOR A GENERAL DUTY OF INTER PARTES COOPERATION AND SOLIDARITY

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ABSTRACT

Seen from the historical-cultural perspective, theoretical models of modernity, still present in law, are anachronistic before the increasingly complex and dynamic contemporary reality. In this scenario, and with the aim of providing a renewal of Brazilian Civil Law, the 2002 Civil Code was developed with several general clauses. Among them is the general clause of objective good faith and in the midst of its practical uses is its role in establishing the “attached duties”. The doctrine that discusses this topic, however, runs counter to the epistemological assumptions adopted in this study and thereby is insufficient and contradictory in relation to the understanding of today's contractual reality. Therefore, it is important to build a new rationale for objective good faith, starting from the critical-methodological approach. In

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This note serves as an introduction to an ongoing research project. It was translated from Portuguese into English by Kennedy Matos.
this perspective, there is the need to think of an *inter partes* general duty. This, in turn, should find its foundation on cooperation and solidarity, in view of the prospective constitutionalization of the national civil law and the quest for civil law as an effective tool of autonomous but responsible human fulfillment.

I. INTRODUCTION

The legal phenomenon, a cultural product of humanity, has an inherent connection with the standards which exist at any given place or time. In addition to political and sociological thought, it is closely related to the dominant concepts within a historical and social context, and obtains from this context the vectors that will illuminate the development of its basic concepts.¹ In this sense, law was perceived in different ways at various historical moments in Western civilization—after all, the Roman jurist’s approach towards legal issues was very different from that of the medieval jurist, whose attitude, in turn, differed from that of the modern age jurist.² Therefore, and in view of the aim of the research project proposed by the advisor for this sub-project, the contemporary jurist, without losing sight of contributions of the past legal thought, must also assume his historicity. He should also seek to respond to new demands—arising out of the progression of society—in a way that is consistent with the cultural context in which he operates.

In this sense, it may be asserted that theoretical models constructed in modernity, characteristic of the industrial age, are in crisis because they no longer match the current reality, which is marked by pluralism, cultural and economic globalization, and the

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complexity of the social texture.\textsuperscript{3} Thus, the mathematical concept of law is unfounded. That concept identified law as a closed system through which legal reasoning was regulated by logical deduction and whose applied methodology had a markedly exegetical nature. Now, legal thought must take account of a new epistemological paradigm, characterized by complexity, and that challenges the truths and dogmas established by traditional legal doctrine.\textsuperscript{4}

Given this renewed view of reality, and in the face of the need to readjust legal thought, new legislative techniques have arisen, of which the general clauses are a powerful example. Due to the imprecise meaning caused by vague terminology and expressions contained in their normative hypotheses, these clauses have the function of making the legal system more open and flexible to new social demands.\textsuperscript{5} The current Civil Code of 2002 was prepared precisely in this spirit and, for this reason, is filled with general clauses which, in theory, favor the approximation of the legal text to the mutability of everyday human relations.

Specifically in the field of civil law, the general clause of objective good faith reflects such a systematic opening, and determines a range of developments not only in the obligational and contractual context, but also in civil law as a whole.\textsuperscript{6} That is because “the advancement of civil law, in terms of concrete solutions during the present century, is due to the recourse to good faith”\textsuperscript{7} and “at present, the growth areas of civil law . . . keep connected with good faith.”\textsuperscript{8}

\footnotesize
\begin{itemize}
\item \textsuperscript{3} Francisco Amaral, \textit{O direito civil na pós-modernidade} in \textsc{DIREITO CIVIL: ATUALIDADES} 61-77 (Bruno Torquato de Oliveira Naves, César Fiuza, & Maria de Fátima Freire de Sá (coords.), Del Rey 2003).
\item \textsuperscript{4} Francisco Amaral, \textit{O direito civil no paradigma da complexidade}, 40/41 \textsc{Revista Brasileira de Direito Comparado} 67-68 (1\textsuperscript{a} e 2\textsuperscript{a} sem., 2011).
\item \textsuperscript{5} Francisco Amaral, \textit{Objeto e método no direito civil brasileiro}, 36 \textsc{Revista Brasileira de Direito Comparado} 35 (1\textsuperscript{a} sem., 2009).
\item \textsuperscript{6} \textsc{Código Civil} [C.C.] (Brasil), art. 422 (2002).
\item \textsuperscript{7} Menezes Cordeiro, \textit{Da Boa Fé no Direito Civil} 396 (1st ed., 3d reprint, Almedina 2007).
\item \textsuperscript{8} \textit{Id.}, at 397.
\end{itemize}
Amidst the multiple purposes of the above clause, its role in establishing duties for the parties during the existence of the contract stands out. However, such duties, according to traditional doctrine would have only an ancillary, attached, integrative or parallel function to contractual obligations. In other words, they would simply be a means of providing correct progress or an optimization to the unfolding of the contractual relationship, acting to assist in the development of obligational prestations contractually established.

However, if there is recognition that the duties established because of objective good faith are housed in much deeper levels of law based on the very nature of good faith as the “general vector of the legal system,” how does one speak of it as having a merely auxiliary nature? After all, if concrete solutions based on good faith express a true return to the ultimate purposes of law, it seems appropriate to reflect on the profound role of this institution, as opposed to the strictly ancillary action of the duties extracted from it. More than that, it is necessary to investigate to which areas of the legal life good faith allegedly connects and are manifested in its realization. Such investigations, because of the growing phenomenon of constitutionalization of the Brazilian Civil Law, require conjugation with the fundamental objective of “building a free, just and solidary society,” and the republican foundation of the dignity of the human person.

II. OBJECTIVES

Having demarcated the assumptions and issues of this research, we stress that the study of the proposed theme hints at the need to...
identify not accessory duties imposed by objective good faith, but a general duty which is consistent with the socio-cultural fluctuations impacting contracts and civil law as a whole. Thus, the research sub-project is aimed primarily at determining whether, from objective good faith and the plexus of utilities that it represents, it would be possible to extract the idea of a general duty of cooperation and solidarity to be observed by the parties in the course of the contractual relationship. Moreover, the study seeks to determine if such a duty represents a need in current Brazilian law that the parties cooperate during contract performance in the name of objective good faith and based on solidary constitutional dictates.

As for specific objectives proposed in the original sub-project, it is possible to summarize them as follows: (i) to deepen the understanding of the social context of post-modernity that arises as a backdrop to the changes undergone by law—such a purpose, as discussed in the results and discussion section, was vitally important to guide the improvement of conclusions; and (ii) to understand the relevance of objective good faith in establishing a possible general duty of cooperation and solidarity—a duty founded on constitutional dictates—investigating the limits and limitations of such theoretical construct.

These are the objectives of this sub-project, which are expected to have been achieved successfully and consistently from the methodology applied and theoretical references used.

III. METHODOLOGY

This research adopted the critical-methodological line of investigation,14 as it was done based on theses that have emerged from the developments affecting both legal thought and the methodology of realization of law in post-modernity. Within this

line, we have chosen the *legal-theoretical* perspective,\(^\text{15}\) to delineate a possible new duty, of general character, from the comparison between the theoretical constructs already made about objective good faith and the new demands arising from social practice. Therefore, the rationale employed was based on the vision of law as a practical science, focused on its implementation and the effective solution to concrete problems. Moreover, *legal-exploratory* and *legal-interpretative* types of research were conducted to outline an initial overview of the problem and, from that, to interpret the data of legal reality and its needs.\(^{16}\)

Having presented the perspectives adopted in the development of the sub-project, we emphasize that the reflection on the theme was based primarily on bibliographical research in the works cited herein. Books and papers of importance in regard to contracts and objective good faith were used. The highlights are the works of António Manuel da Rocha Menezes Cordeiro (2007) and Judith Martins-Costa (1999), which are references required on this subject, and also those books that helped us understand the legal phenomenon in a way that was largely different from the one that guided us in the beginning of this research. Emphasis is placed on the study of the writings of Francisco Amaral and António Castanheira Neves,\(^\text{17}\) whose ius-philosophical ponderings largely contributed to rethinking the current sense of law and its problems, promoting the investigation of the reflexes of these meditations on the results of this sub-project.

In addition, meetings between the advisor and members of the research group linked to the main project were conducted during which it was possible to exchange information of mutual relevance

\(^{15}\) Id. at 22.

\(^{16}\) Id. at 28-29.

\(^{17}\) Arising from the study of the thought of this philosopher of Portuguese law, the following summary, presented orally at the I Semana Científica do Direito UFES, was produced: Laio Portes Stel & Morgana Neves de Jesus, *A razão prática como uma solução possível para a atual crise do Direito*, SEMANA CIENTÍFICA DO DIREITO UFES: GRADUAÇÃO E PÓS-GRADUAÇÃO (2012), available at [www.periodicos.ufes.br/ppgdir-semanajuridica/article/view/9810](http://www.periodicos.ufes.br/ppgdir-semanajuridica/article/view/9810).
for the advisees and to obtain input from debates and discussions aimed at better understanding law in the current historical and cultural context as well as understanding its reverberations on the theme of this sub-project.

Finally, it is noted that due to the highly theoretical direction given to this research, the jurisprudential research proposed in the sub-project became unnecessary. For this reason, the research on the rulings of the Superior Court of Justice was not carried out, in order to maintain consistency with the search for legal and theoretical foundations for the proposed theme.

IV. RESULTS AND DISCUSSIONS

Just as the legal phenomenon is not divorced from the historical and cultural reality that surrounds it, in light of what was already presented in the introduction of this report, so objective good faith must also be observed from the perspective of a certain understanding of law in space and time. As Menezes Cordeiro asserts, good faith cannot be reduced to the idea of a common legal institution, but rather expresses the completeness of an “. . . important cultural factor, linked closely to a certain understanding of the legal phenomenon.” 18 Given the depth and relevance of Cordeiro’s study, it is worth investigating this Portuguese jurist’s understanding of law and good faith as well as his contributions to the overall comprehension of good faith and of the panorama surrounding it.

In the introduction to his work, Menezes Cordeiro lays the epistemological postulates on which he will build the development of his thought about good faith. From the defense of legal dogmatics and of the eminently scientific character of law, the Portuguese jurist explains that every legal phenomenon is positive and that although it is not exhausted in the legal order given,

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18. CORDEIRO, supra note 7, at 371.
dogmatics plants its roots in the same positiveness. Thus, even if good faith does not conform to the classical subsumptive interpretation/application, and even if it is impossible to define it in legal and positive terms—the role of jurisprudence being to fill its content in the concrete case—good faith should be seen in a dogmatic way to escape from what the author calls a methodological unreality and the ensuing mythification of this civil institution. These phenomena, pointed out and criticized by the author under discussion, emanate from the difficulty of the scientific understanding of the developments concerning good faith obtained from jurisprudence: the jurists who proposed to study it are guided by merely formal, grandiose propositions that do not provide sufficient material criteria for a decision, which therefore leads to mythification of the concept of objective good faith—i.e., an institution “... where all hopes are possible.”

Thus, to circumvent these methodological difficulties, Menezes Cordeiro starts from German jurisprudence in order to extract the duties that the parties must observe in the unfolding of the contractual relationship, establishing a tripartite division into duties of protection, loyalty and information or clarification. However, he points out that the duty of protection, as it is designed in a unified way by German legal thought, has no applicability in legal systems where there is the possibility of extracting the same practical result from the rules relating to extra-contractual liability, as is the case of Brazil.

Therefore, it is possible to infer that the attached duties would be restricted to the others: (i) loyalty—the duty to assume behavior that provides an accurate and honest negotiation, encompassing duties of care, confidentiality and consequent action, and (ii)

19. *Id.* at 30-31.
20. *Id.* at 41-43.
21. *Id.* at 401.
22. *Id.* at 603-607.
23. *Id.* at 636-37.
information or clarification—the duty to provide all information necessary for the contract to be finalized and performed honestly.\textsuperscript{25} The consideration of these duties emerges from the already-consolidated visualization of the intra-obligational complexity that surpasses the traditional bipolar view of debit and credit to recognize the obligation as a reality also composed of other elements.\textsuperscript{26} Thus, besides the main prestation, embodied in human behavior to be performed by the debtor in favor of the creditor, there would exist various other material operations and conducts to be taken by the contracting parties—among them compliance with certain legal requirements, such as the attached duties of objective good faith.\textsuperscript{27}

Incidentally, as Menezes Cordeiro puts it, the nature of these duties under discussion is essentially legal, because objective good faith comes from within the positive legal system, i.e., it reminds all under its jurisdiction that we are still dealing with the application of positive law and its science.\textsuperscript{28} Moreover, the same author argues that to achieve good faith, it is necessary to bear in mind two principles: the protection of trust and the materiality of legal regulation. The first principle turns to the protection of legitimate expectations generated in the other contracting party or adherence to representations that this party deems effective,\textsuperscript{29} while the second principle represents the fight against legal formalism and its blind obedience to the legal rules and against pure syllogism.\textsuperscript{30} These would, in short, be the vectors to be followed in achieving good faith in cases being decided.

As one can see, Menezes Cordeiro does not shun the idea that law is essentially positive and therefore systematic, even if it is still

\begin{itemize}
  \item \textsuperscript{25} CORDEIRO, \textit{supra} note 7, at 583.
  \item \textsuperscript{26} \textit{Id.} at 586.
  \item \textsuperscript{27} \textit{Id.} at 590-91.
  \item \textsuperscript{28} \textit{Id.} at 650.
  \item \textsuperscript{29} \textit{Id.} at 1234.
  \item \textsuperscript{30} \textit{Id.} at 1252.
\end{itemize}
an open, mobile, heterogeneous and cybernetic system. In this conception, good faith appears as a legal element that provides the entry of extra-systematic elements into the set of prescriptive propositions legally established, enriching the legal system and allowing its malleability when facing concrete cases. The attached duties thus would be inserted into this dogmatic conception of law, serving as a way to model contractual relationships in the senses that the legal system itself and its ultimate purposes would provide.

Judith Martins-Costa, another prominent name in the study of objective good faith, understands the matter in a similar fashion. We will now discuss her views in order to complete the study of the state of the art the theme is in the dominant legal thought. In fact, the above-mentioned Brazilian jurist sees good faith as a useful way to “... the construction of a substantial sense of law, acting as a model able to develop an open system ...” or rather, a relatively open system or a system of relative self-reference, since the full opening could result in an incongruent desystematization.

Thus, objective good faith, set in a general clause in the civil code, could cause this systematic opening of the legal system—making it porous to the insertion of elements then regarded as extra-legal. At the same time, good faith would generate an internal mobility. That is, it would provide the return or re-forwarding of the solution given in the concrete case to the provisions within the legal system. Effectively, according to the author mentioned, objective good faith should be praised for dispensing with the closed design of law, allowing, in addition to this internal system modification, a re-systematization of the elements which escape the boundaries of positive legal rules.

31. To better understand these terms, see Cordeiro, supra note 7, at 1260-63.
32. Martins-Costa, supra note 9, at 382.
33. Id. at 275.
34. Id. at 341.
rearranging them within the very system.\textsuperscript{35} Consequently, from this line of thinking, it follows that objective good faith would favor an intermittent readjustment and a constant innovation of law.

With respect to the attached duties themselves, Martins-Costa is also guided by the changes in the obligational process to substantiate their existence. She adds, thus, that the obligational relationship must be seen through the prism of its intrinsic dynamics, from an overall and process-based view of the obligation: this would “... encompass, in a permanent flow, all the vicissitudes, ‘cases’ and problems that may be taken to it—[an obligation] that moves processually, once invented and developed in light of a purpose . . . .”\textsuperscript{36} Among these events are the attached, accessory or instrumental duties, whose dependence on the specific case for their determination and consequent changeability is stressed by Martins-Costa with the aim of justifying—unlike Menezes Cordeiro—her preference for not reducing and numbering them dogmatically. In fact, the quoted jurist lays out an illustrative list of such duties, into which she even inserts a duty of “collaboration and cooperation” and refers to the fact that such duties, in general, are called “duties of cooperation and protection of mutual interests.”\textsuperscript{37}

For the application of the general clause of objective good faith and, consequently, to determine the duties to be followed by contracting parties in a specific case, Martins-Costa defends a required distance from the axiomatic-deductive method: in her opinion, the most appropriate methodology to be adopted is juridical topics coming from Theodor Vieweg’s theories.\textsuperscript{38} Although criticized by Menezes Cordeiro,\textsuperscript{39} “topic reasoning” is presented by Martins-Costa as essentially problem-oriented (and

\begin{itemize}
\item \textsuperscript{35} Id. at 22, 369.
\item \textsuperscript{36} Id. at 394.
\item \textsuperscript{37} Id. at 439.
\item \textsuperscript{38} Id. at 355 et seq.
\item \textsuperscript{39} CORDEIRO, supra note 7, at 1132 et seq.
\end{itemize}
therefore operative and pragmatic), conforming very well to the way objective good faith demands its implementation, \(^40\) without abandoning the systematic thinking altogether. Both are complementarily dialectical and are at the root of the development of an open system.\(^41\)

Thus, comparatively, it is observed that while maintaining the defense of a distinct methodology for the realization of objective good faith and the “attached duties”, both authors based their epistemological assumptions on similar pillars. Menezes Cordeiro is firm in the conviction that the principles of materiality of legal regulation and trust must be adopted as guiding tools for the achievement of objective good faith, whereas Martins-Costa prefers juridical topics for achieving this desideratum. Here lie some of the main difficulties encountered during the research proposed by the sub-project: the jurists discussed here, representatives of the dominant legal current on the subject, see objective good faith from a dogmatic and systematic view of the legal phenomenon, nevertheless they start from an open understanding of this phenomenon. This way, even though both reject the mere subsumptive logic of application of law, their conceptions collide with the gnosiological bases already outlined in the introduction to this report, which illuminated the continuation of this research and the studies conducted between the advisor and advisees. Thus, as we search for a different foundation for objective good faith, it is imperative to note how contractual reality and its underlying economic dimension—regulated by such institution and its attached duties—have been faced.

Like any legal institution, the contract is subject to what can be termed as “... the principle of historical relativity...”\(^42\) This is meant to say that the contract is also subject to historical

\(^40\) MARTINS-COSTA, supra note 9, at 371-72.
\(^41\) Id. at 376-77.
contingencies that mark its understanding. And any position intending to establish an alleged unitary and universal “essence” of contract, extracted from a single strand of legal knowledge, is open to criticism. In fact, today the fragmentation that permeates postmodern contract theory is recognizable; as the contract is marked by varied facets, it becomes impractical to obtain a concept that is unique and revealing of its structure. Even the standardization of exchanges do not determine the “death” of the contract, but the readjustment of its discipline in face of today's dynamic socio-economic requirements.

This, however, does not preclude the possibility to outline some general lines of the profile of contracts. These, incidentally, are traditionally defined as “. . . two or more parties agreeing to constitute, regulate or extinguish a legal patrimonial relationship.” Thus, the patrimonial nature, or better, the economic nature is the element that marks the contract, as the contract is realized solely in relationships that have the economic nature as their basic component. This does not mean that the contractual universe is tied to a mere idea of exchange; a donation, for example, is also characterized as being a contract, because it is also a means of the circulation of wealth.

In this sense, the contract is a genuine legal-formal garment for economic operations—where such garment is not present, one cannot identify the existence of a contract. Therefore, as a legal concept, the contract is intended to regulate the objective

44. Pietro Perlingieri, O direito civil na legalidade constitucional 397 (Maria Cristina De Cico trans., Renovar 2008).
45. Cesare Bianca, Derecho civil: El contrato 23 (Fernando Hinestrosa & Édgar Cortés trans., Universidad Externado de Colombia 2007). (Free translation from Spanish. Original text: “...el acuerdo de dos o más partes para constituir, regular o extinguir entre ellas una relación jurídica patrimonial”)
47. Roppo, supra note 42, at 11.
circulation of wealth, whether current or potential, from one person to another, depending on the direction and organization one wants to give to the interests involved in the realization of the economic operations.\textsuperscript{48} It is seen, accordingly, that the contract appears as an instrument immersed in the economic and social context: it is the legal and formal translation of such context, with a view to the formation of a complex body of rules that protect the interests of the contracting parties.

In terms of legislative developments, it is known that the classical contractual paradigm, derived from the Enlightenment context of the eighteenth century, influenced the first legal contract systematics, inserted into the Napoleonic Code of 1804. However, the strictly conceptual overview outlined earlier did not prevent contractual theory, since its origin, from playing an ideological role. The contract actually became “... the flag of societies born out of bourgeois revolutions and, ultimately, an element of their legitimacy.”\textsuperscript{49} So, one understands the deep connection between the conceptual roots of contract theory and the economic goals of the emerging bourgeois class, aimed, ultimately, at the consolidation of the capitalist system as a prevailing mode of production.

This perspective becomes even more latent when we better analyze the core of primal contract theory, namely, freedom of choice, today recognized as private autonomy.\textsuperscript{50} To begin with, private autonomy can be defined as the power by which the legal system establishes the possibility of holders of rights to determine the juridicization of their activities, choosing the legal effects to be

\textsuperscript{48} Id. at 9, 13.
\textsuperscript{49} Id. at 28.
\textsuperscript{50} As a result of in-depth studies on private autonomy and its current problems in face of the concrete contractual relations, we co-authored the following scientific article for the XXI National Congress of CONPEDI: Jussara Gomes & Laio Stel, \textit{O atual dilema da autonomia privada: entre a teóretica contratual e a efetividade das práticas sociais} in \textit{Relações Privadas e Democracia} 164-83 (Otávio Luiz Rodrigues Jr.; Giordano Bruno Soares Roberto & Nelson Luiz Pinto (coords.), FUNJAB 2012).
produced.\textsuperscript{51} However, and beyond this purely doctrinal construct, one sees that, at its root, the defense of autonomy to all individuals had been determined by the need to declare the freedom of workers from the bonds that harnessed them to the land of the feudal lords in order that they might serve as free labor to the rising bourgeoisie.\textsuperscript{52} In the words of Ana Prata, “the connection between the worker and the means of production is only possible by agreement between the worker and the owner of these means.”\textsuperscript{53}

It is noted, however, that the defense of private autonomy and its legal significance emerged at the time of the final collapse of feudalism and of the capitalist expansion, thus determining the universalization of the latter and of other favorable concepts to the consolidation of this economic system of production. In such context, the juridical transaction, under which the contract is the largest exponent, is revealed as true affirmation of individual freedom and economic freedom of all.\textsuperscript{54} However, it must be said that the exaltation of freedom and equality among individuals, at that juncture, did not leave the theoretical field; the abstraction of these principles, in fact, served to conceal the deep substantial inequalities, in particular relating to the economic and social power between the parties, so as to disguise the existence of materially unfair agreements of the will, hence the affirmation of the ideological function embedded in the origins of the legal construct of contracts.\textsuperscript{55}

Thus, having made this historical digression on classical contract theory and its essential pillar, private autonomy, we need to emphasize that such a bourgeois-liberal paradigm does not seem so far away from the civilian legal thought in contemporary times.


\textsuperscript{52} ANA PRATA, \textit{A TUTELA CONSTITUCIONAL DA AUTONOMIA PRIVADA} 9 (Livraria Almedina 1982).

\textsuperscript{53} \textit{Id.} at 8, emphasis added.

\textsuperscript{54} \textit{Id.} at 10.

\textsuperscript{55} \textit{ROPPO, supra} note 42, at 37-38.
Indeed, although there is a plurality that permeates the contractual phenomenon, which is felt in the presence of different paradigms in action, it is important to point to the fact that, in light of Maria Luiza Feitosa’s views, the image of the contract extracted from liberal rationality would still prevail. This author adds that “in the national context, for example, contracts that objectively fit in the legal system and do not involve consumer relationships have not changed, to the point of seeing in that system, the exhaustion of the classical paradigm.” Thus, the concept of contract as a meeting of free wills based on a formal freedom and equality continues to influence civilian doctrine and pertinent legislation.

This fact, in turn, must be taken into account when analyzing the basis given to objective good faith. Effectively, throughout the development of the research, the analysis of the contract panorama proved of great value in that it hinted at how the theory that embraces it remains imbued, in many respects, with nineteenth-century liberal-bourgeois individualism. Thus, to affirm the strictly incidental and integrative nature of the attached duties is to adopt an acritical position on the very reality with which one is dealing. After all, if such duties are simple guidelines directed to the “... exact processing of the obligational relationship ...”, i.e., the pursuit of contractual purposes embodied in the due performance, nothing else they will be doing than condone the ideological bias found in the intricacies of contract theory and which hides the actual inter partes inequalities.

Following this conclusion, how may law resolve this problem more fully if it is regarded—in the view adopted by Menezes Cordeiro—as lacking of a reductionism to become operative in the face of the growing complexity of modern societies? Now, the

56. MARIA LUIZA PEREIRA DE ALENÇAR MAYER FEITOSA, PARADIGMAS INCONCLUSOS: OS CONTRATOS ENTRE A AUTONOMIA PRIVADA, A REGULAÇÃO ESTATAL E A GLOBALIZAÇÃO DOS MERCADOS 566 (Coimbra Editora 2007).
57. Id. at 569.
58. MARTINS-COSTA, supra note 9, at 440 (emphasis added by author).
59. CORDEIRO, supra note 7, at 1258.
legal phenomenon, according to what has been repeatedly asserted in this report, cannot be taken as the product of an axiomatic and simplified perspective. Law must essentially confront this complexity, since it emanated from it. After all, if today's laws no longer exclusively form a legal statute, becoming the result of political contingencies and partisan forces, it is necessary, according to the teachings of António Castanheira Neves, that:

. . . [T]he (committedly) political nature of the legislative function must have its counter-pole in the (autonomously legal) nature of the jurisdictional function. In this sense, but only in this sense, one can speak of the ‘Vom Gesetzesstaat zum Richterstaat’ evolution (R. Maric) which, since thus understood, is beyond the question of the (democratic) legitimacy of the jurisdictional function in terms of its legally creative manifestations, because it is not a dispute between powers, it is not even assigning ‘Alle Macht den Richtern’ and thus the eventual emergence of the ‘government of judges’, but it is to assert law to power, the possibility to ultimately recognize law as a constitutively unfailing dimension of the state and so truly [recognize] the state as rule-of-law.60

Therefore, if the desire to keep law as an effective counterpoint to power in its political-legislative manifestation still exists, law cannot be returned to mere legality, nor to a dogmatics said to be, paradoxically, open to what is called “meta-legal concepts.” It is noteworthy that, regarding the author mentioned, not even the general clauses served to overcome the alienation suffered by formalist rationality when closing law in on itself.61

From these conclusions, this research sought to lay a renewed foundation to objective good faith so that it is observed through a prism of a practical and jurisprudential analysis in which its usefulness in the judicative-decisory realization of law becomes a

60. ANTÓNIO CASTANHEIRA NEVES, 3 DIGESTA: ESCRITOS ACERCA DO DIREITO, DO PENSAMENTO JURÍDICO, DA SUA METODOLOGIA E OUTROS 173 (Coimbra Editora 2010) [hereinafter DIGESTA VOL. 3] (emphasis added by authors).
61.  Id. at 51.
time of full reach of the major objectives of legal existence. Bearing in mind the growing movement of constitutionalization of civil law, in which “values proposed by the Constitution are present in every corner of the normative fabric,”\textsuperscript{62} we recognize the direct application of constitutional principles to legal relationships established in a traditional civil rights context.\textsuperscript{63} Starting from this premise we need, therefore, to reflect on the influence of the precepts contained in the 1988 Major Law [The Constitution] on the study of objective good faith and on the outlining of the duties arising out of it.

Constitutional civil law may be understood as the culmination of a renewal in the fundamentals of this branch of private law, favored by the democratic Constitution. Its central axis is the existential domain of the human being, i.e., the humanization of national civil law.\textsuperscript{64} Thus, by the proclamation of justice and social solidarity,\textsuperscript{65} and human dignity,\textsuperscript{66} the current Constitution helped us see the demand for democratization of civil law, starting from its change of basic foundation, i.e., from patrimoniality to the human person as the ultimate foundation of private law. In this sense one can say, in the words of Paulo Lôbo, “the restoration of the primacy of the human person in civil relationships is the first condition to adapt law to reality and to the constitutional foundations.”\textsuperscript{67} Incidentally, the caveat is that the constitutionalization of civil law does not intend to eliminate patrimoniality from relationships regulated by it, but to give them new significance in favor of a legal protection that is qualitatively

\footnotesize{\textsuperscript{62} Giselda Hironaka, Flávio Tartuce & José Fernando Simão, O código civil de 2002 e a constituição federal: 5 anos e 20 anos in Os 20 ANOS DA CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL 463-519 (Alexandre Moraes (coord.), Atlas 2009).
\textsuperscript{63} PERLINGIERI, supra note 44, at 589.
\textsuperscript{64} Barroso, supra note 43, at 156, 160.
\textsuperscript{65} F.C., art.3, I. (1988).
\textsuperscript{66} F.C., art.1, III. (1988).
\textsuperscript{67} Paulo Luiz Netto Lôbo, Constitucionalização do direito civil in DIREITO CIVIL: ATUALIDADES 206 (Bruno Torquato de Oliveira Naves, César Fiuza & Maria de Fátima Freire de Sá (coords.), Del Rey 2003).}
different, so that the economic situation may serve as support for people’s full development, and not vice versa.\textsuperscript{68}

Moreover, it is necessary to emphasize that, to avoid falling back into a dogmatic legalism, the Brazilian Constitution should also be seen as a product of historical and political contingencies. It would not be consistent, therefore, to visualize it absolutely blindly and acritically. We advocate that the Basic Law, like any other piece of legislation, be seen as one (not the only) axis of realization of law and it must justify itself before legal principles and the concrete case itself.\textsuperscript{69} It is in this sense, finally, that the prospective constitutionalization is accredited, i.e., it firms up the commitment to the “. . . steady journey that captures the historical, cultural meanings of codes and rewrites, through the re-signification of these linguistic beacons, the limits and the emancipatory possibilities of law itself.”\textsuperscript{70}

In this step, the study of objective good faith undertaken in this research reaps its foundations on such a perspective, since good faith, as any civil legal institution, cannot escape the social commitments, already constitutionally assumed. Only then will we be able to see the importance of objective good faith as a legal principle governing the exercise of contractual prerogatives by making private autonomy, and therefore contracts, essentially subjected to social solidarity.\textsuperscript{71} It is in this sense, finally, that the findings of this research will be established.

V. CONCLUSIONS

Given the relevance of objective good faith in the design of the current profile of today’s contracts,\textsuperscript{72} its study becomes important

\textsuperscript{68} Perlingieri, supra note 44, at 121-22.
\textsuperscript{69} Neves, Digesta Vol. 1, supra note 2, at 48.
\textsuperscript{70} Luiz Edson Fachin, Apresentação to 2 Apontamentos Críticos para O Direito Civil Brasileiro Contemporâneo 13 (Ércuiths Cortiano Júnior; Jussara Maria Leal de Meirelles &Paulo Nalin (coords.), Juruá 2009).
\textsuperscript{71} Bianca, supra note 45, at 57.
\textsuperscript{72} Feitosa, supra note 56, at 557.
due to the sense that one wants to give to contractual relations and their underlying economic transactions. At the end of this research, it is therefore possible to summarize the conclusions as follows:

1) The systematic understanding of objective good faith intended to emphasize its importance in the methodological renewal of the realization of law, from a dogmatic bias and therefore, reductionist. However, we hope to have demonstrated that the current human reality is much more complex and dynamic than the legal system can assume. The legal system will always be doubly exceeded, either by the principles that determine the evaluative agenda of the community project, or by the historical reality that it is intended.73 Thus, the understanding of objective good faith must be based on another perspective which is historical-problematic and that effectively put civil law and its institutions at the service of the human person.

2) The doctrine of attached duties becomes insufficient and barely profitable when contrasted with the epistemological assumptions on which this research was based. Indeed, to defend the idea that duties coming out of objective good faith have an ancillary nature is to serve the mere achievement of individualistic purposes of contracts. Therefore, the end result is corroborating with the old classical liberal paradigm that still permeates the dominant contractual theory, without having a critical perspective on actual reality regulated.

3) To avoid this problematic subordination of good faith to classical contract theory, it is therefore necessary to enforce a general duty that—beyond purely individualistic impulses of the parties—stands as an actual curb to private autonomy. In view of the foregoing, it is concluded that the perspective outlined at the end of this research can provide the concept of objective good faith as an ethical-normative element of effective re-signification of

73. NEVES, DIGESTA VOL. 1, supra note 2, at 47.
contractual relations established in our times, serving as a sufficient basis for what is advocated here.

4) This general duty, in view of the increasing constitutionalization of civil law, should pass through the ideals of solidarity and cooperation, so that the contracting parties seek the satisfaction of their goals with concern for the legal position of the other. It is in this sense that economicity, inherent to the idea of economic transactions to which the contracts serve as a legal garment, must follow. Only then may objective good faith be consistent with the renewal suffered by civil law, especially in regard to the search for its concept as an instrument of autonomous but responsible human fulfillment.
The Journal of Civil Law Studies continues the publication of the Louisiana Civil Code in English and in French. Volume 5 (2012) 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 (2013). Sale (Title 7) and Exchange (Title 8) were published in Volume 7 (2014). We now publish Matrimonial Regimes (Title 6).

Le Journal de droit civil poursuit la publication du Code civil louisianais en anglais et en français. Le Titre préliminaire et les trois titres du Livre III couvrant la partie générale du droit des obligations : Titre III (Des obligations en général), Titre IV (Des obligations conventionnelles ou des contrats) et Titre V (Des engagements qui se forment sans convention) furent publiés au volume 5 (2012). Les Titres XV (De la représentation et du mandat) et XVI (Du cautionnement) furent publiés au Volume 6 (2013). Les Titres VII (De la vente) et VIII (De l’échange) furent publiés au Volume 7 (2014). Nous publions ici le Titre VI (Des régimes matrimoniaux). La traduction est faite au Centre de droit civil, avec le soutien du Partner University Fund, supporting transatlantic partnership around research and higher education, within the ‘Training Multilingual Jurists’ Project, in cooperation with the University of Nantes, France.1

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CHAPTER 1 - GENERAL PRINCIPLES

Art. 2325. A matrimonial regime is a system of principles and rules governing the ownership and management of the property of married persons as between themselves and toward third persons. [Acts 1979, No. 709, §1]

Art. 2326. A matrimonial regime may be legal, contractual, or partly legal and partly contractual. [Acts 1979, No. 709, §1]

Art. 2327. The legal regime is the community of acquets and gains established in Chapter 2 of this Title. [Acts 1979, No. 709, §1]

Art. 2328. A matrimonial agreement is a contract establishing a regime of separation of property or modifying or terminating the
Spouses are free to establish by matrimonial agreement a regime of separation of property or modify the legal regime as provided by law. The provisions of the legal regime that have not been excluded or modified by agreement retain their force and effect. [Acts 1979, No. 709, §1]

Art. 2329. Spouses may enter into a matrimonial agreement before or during marriage as to all matters that are not prohibited by public policy.

Spouses may enter into a matrimonial agreement that modifies or terminates a matrimonial regime during marriage only upon joint petition and a finding by the court that this serves their best interests and that they understand the governing principles and rules. They may, however, subject themselves to the legal regime by a matrimonial agreement at any time without court approval.

During the first year after moving into and acquiring a domicile in this state, spouses may enter into a matrimonial agreement without court approval. [Acts 1979, No. 709, §1. Amended by Acts 1980, No. 565, §1]

Art. 2329. Les époux peuvent conclure, avant ou pendant leur mariage, une convention matrimoniale portant sur toute matière quelle qu’elle soit, pourvu qu’elle ne soit pas contraire à l’ordre public.

Les époux peuvent conclure une convention matrimoniale qui modifie ou met fin au régime matrimonial pendant le mariage, uniquement s’ils en font la demande conjointe et si le tribunal est d’avis que la convention sert au mieux leurs intérêts et qu’ils en comprennent les règles et les principes. Toutefois, ils peuvent décider de se soumettre à tout moment au régime légal par le biais d’une convention matrimoniale, et ce, sans l’approbation du tribunal.

Au cours de la première année suivant l’installation et l’établissement de leur domicile dans cet état, les époux peuvent conclure une convention matrimoniale sans l’approbation du tribunal. [Loi de 1979, n° 709, §1 modifié par la loi de 1980, n°565, §1]
Art. 2330. Spouses may not by agreement before or during marriage, renounce or alter the marital portion or the established order of succession. Nor may the spouses limit with respect to third persons the right that one spouse alone has under the legal regime to obligate the community or to alienate, encumber, or lease community property. [Acts 1979, No. 709, §1]

Art. 2331. A matrimonial agreement may be executed by the spouses before or during marriage. It shall be made by authentic act or by an act under private signature duly acknowledged by the spouses. [Acts 1979, No. 709, §1]

Art. 2332. A matrimonial agreement, or a judgment establishing a regime of separation of property is effective toward third persons as to immovable property, when filed for registry in the conveyance records of the parish in which the property is situated and as to movables when filed for registry in the parish or parishes in which the spouses are domiciled. [Acts 1979, No. 709, §1]

Art. 2330. Les époux ne peuvent, par convention conclue avant ou pendant le mariage, renoncer à la quarte maritale ou à l’ordre établi pour la succession. Ils ne peuvent non plus limiter, à l’égard des tiers, le droit que le régime légal confère à un époux seul d’engager la communauté et d’aliéner, grever ou louer des biens de la communauté. [Loi de 1979, n°709, §1]

Art.2331. La convention matrimoniale peut être conclue par les époux avant ou pendant le mariage. Elle doit être rédigée par acte authentique ou par acte sous seing privé dûment reconnu par les époux. [Loi de 1979, n°709, §1]

Art. 2332. La convention matrimoniale, ou le jugement établissant le régime de séparation des biens est opposable aux tiers, s’agissant des immeubles, à partir du dépôt pour enregistrement au registre foncier de la paroisse* où ils se situent et, s’agissant des meubles, à partir du dépôt pour enregistrement dans les paroisses où les époux sont domiciliés. [Loi de 1979, n°709, §1]

* NdT: La Louisiane a conservé la paroisse comme division territoriale. Celle-ci est l’équivalent du comté dans les
Art. 2333. Unless fully emancipated, a minor may not enter into a matrimonial agreement without the written concurrence of his father and mother, or of the parent having his legal custody, or of the tutor of his person. [Acts 1979, No. 709, §1]

Art. 2333. Le mineur non pleinement émancipé ne peut conclure de convention matrimoniale sans le concours écrit de ses père et mère, du parent en ayant la garde ou de son tuteur. [Loi de 1979, n°709, §1]

CHAPTER 2 - THE LEGAL REGIME OF COMMUNITY OF ACQUETS AND GAINS

SECTION 1 – GENERAL DISPOSITIONS

Art. 2334. The legal regime of community of acquets and gains applies to spouses domiciled in this state, regardless of their domicile at the time of marriage or the place of celebration of the marriage. [Acts 1979, No. 709, §1]

Art. 2334. Le régime légal de la communauté réduite aux acquêts s’applique aux époux domiciliés dans cet état, indépendamment de leur domicile au moment du mariage ou du lieu de célébration du mariage. [Loi de 1979, n°709, §1]

Art. 2335. Property of married persons is either community or separate, except as provided in Article 2341.1. [Acts 1979, No. 709, §1; Acts 1991, No. 329, §1]

Art. 2335. Les biens des époux sont soit communs, soit propres, sauf dans les cas prévus à l’article 2341.1. [Loi de 1979, n°709, §1; loi de 1991, n°329, §1]

Art. 2336. Each spouse owns a present undivided one-half interest in the community property. Nevertheless, neither

Art. 2336. Chacun des époux a un droit indivis sur la moitié des biens de la communauté. Cependant, il ne saurait y avoir
the community nor things of the community may be judicially partitioned prior to the termination of the regime.

During the existence of the community property regime, the spouses may, without court approval, voluntarily partition the community property in whole or in part. In such a case, the things that each spouse acquires are separate property. The partition is effective toward third persons when filed for registry in the manner provided by Article 2332. [Acts 1979, No. 709, §1. Amended by Acts 1981, No. 921, §1; Acts 1982, No. 282, §1]

Art. 2337. A spouse may not alienate, encumber, or lease to a third person his undivided interest in the community or in particular things of the community prior to the termination of the regime. [Acts 1979, No. 709, §1]

Art. 2338. The community property comprises: property acquired during the existence of the legal regime through the effort, skill, or industry of either spouse; property acquired with community things or with community and separate things, unless classified as separate property under Article 2341; property donated to the spouses jointly; natural and civil fruits of community property; damages
awarded for loss or injury to a thing belonging to the community; and all other property not classified by law as separate property. [Acts 1979, No. 709, §1]

Art. 2339. The natural and civil fruits of the separate property of a spouse, minerals produced from or attributable to a separate asset, and bonuses, delay rentals, royalties, and shut-in payments arising from mineral leases are community property. Nevertheless, a spouse may reserve them as his separate property as provided in this Article.

A spouse may reserve them as his separate property by a declaration made in an authentic act or in an act under private signature duly acknowledged. A copy of the declaration shall be provided to the other spouse prior to filing of the declaration.

As to the fruits and revenues of immovables, the declaration is effective when a copy is provided to the other spouse and the declaration is filed for registry in the conveyance records of the parish in which the immovable property is located. As to fruits of movables, the declaration is effective when a copy is provided to the other spouse and the declaration is filed for registry in the conveyance records of the parish.

Art. 2339. Les fruits naturels et civils des biens propres d’un époux, les minéraux produits par un actif propre ou en provenant, les primes, les loyers différés, les redevances d’exploitation et d’immobilisation résultant de baux miniers sont des biens communs. Cependant, un des époux peut les conserver comme biens propres dans les conditions prévues par le présent article.

Un époux peut les conserver comme biens propres au moyen d’une déclaration par acte authentique ou par acte sous seing privé dûment reconnu. Une copie de celle-ci doit être remise à l’autre époux préalablement à son dépôt.

S’agissant des fruits et des revenus des immeubles, la déclaration prend effet dès la remise de la copie à l’autre époux et lorsque la déclaration est déposée pour enregistrement au registre foncier de la paroisse où se situe l’immeuble. S’agissant des fruits des biens meubles, la déclaration prend effet dès la remise de la copie à l’autre époux et lorsque la déclaration est déposée pour enregistrement au registre de la
in which the declarant is domiciled. [Acts 1979, No. 709, §1; Amended by Acts 1980, No. 565, §2; Acts 2008, No. 855, §1]

*NdT : La Louisiane a conservé la paroisse comme division territoriale. Celle-ci est l’équivalent du comté dans les autres états.

Art. 2340. Things in the possession of a spouse during the existence of a regime of community of acquets and gains are presumed to be community, but either spouse may prove that they are separate property. [Acts 1979, No. 709, §1]

**Art. 2340.** Les choses en possession d’un époux pendant la communauté réduite aux acquêts sont présumées être communes, mais l’un ou l’autre des époux peut prouver qu’elles sont des biens propres. [Loi de 1979, n° 709, §1]

Art. 2341. The separate property of a spouse is his exclusively. It comprises: property acquired by a spouse prior to the establishment of a community property regime; property acquired by a spouse with separate things or with separate and community things when the value of the community things is inconsequential in comparison with the value of the separate things used; property acquired by a spouse by inheritance or donation to him individually; damages awarded to a spouse in an action for breach of contract against the other spouse or for the loss sustained as a result of fraud or bad faith in the management of community property by the other spouse; damages or other

**Art. 2341.** Les biens propres d’un époux lui appartiennent exclusivement. Ils comprennent : les biens acquis avant l’établissement de la communauté ; les biens acquis avec des actifs propres, qu’ils soient ou non combinés avec des actifs communs, à condition que la valeur des actifs communs soit insignifiante par rapport à celle des actifs propres utilisés ; les biens acquis par héritage ou par donation à lui faite particulièrement ; les dommages et intérêts reçus suite à une action en inexécution contractuelle contre l’autre époux ou à un dommage résultant d’une activité frauduleuse ou de la mauvaise foi de l’autre époux dans l’administration des biens.
indemnity awarded to a spouse in connection with the management of his separate property; and things acquired by a spouse as a result of a voluntary partition of the community during the existence of a community property regime. [Acts 1979, No. 709, §1; Amended by Acts 1981, No. 921, §1]

Art. 2341.1. A. A spouse's undivided interest in property otherwise classified as separate property under Article 2341 remains his separate property regardless of the acquisition of other undivided interests in the property during the existence of the legal regime, the source of improvements thereto, or by whom the property was managed, used, or enjoyed.

B. In property in which an undivided interest is held as community property and an undivided interest is held as separate property, each spouse owns a present undivided one-half interest in that portion of the undivided interest which is community and a spouse owns a present undivided interest in that portion of the undivided interest which is separate. [Acts 1991, No. 329, §2]

Art. 2342. A. A declaration in an act of acquisition that things are acquired with separate funds as the separate property of a spouse.
spouse may be controverted by the other spouse unless he concurred in the act. It may also be controverted by the forced heirs and the creditors of the spouses, despite the concurrence by the other spouse.

B. Nevertheless, when there has been such a declaration, an alienation, encumbrance, or lease of the thing by onerous title, during the community regime or thereafter, may not be set aside on the ground of the falsity of the declaration.

C. (1) The provision of this Article that prohibits setting aside an alienation, encumbrance, or lease on the ground of the falsity of the declaration of separate property is hereby made retroactive to any such alienation, encumbrance, or lease prior to July 21, 1982.

(2) A person who has a right to set aside such transactions on the ground of the falsity of the declaration, which right is not prescribed or otherwise extinguished or barred upon July 21, 1982, and who is adversely affected by the provisions of this Article, shall have six months from July 21, 1982 to initiate proceedings to set aside such transactions or otherwise be forever barred from exercising such right or cause of action. Nothing contained in this Article shall be construed to limit or prescribe any action or proceeding which may arise with des fonds propres en qualité de biens propres peut être contestée par l’autre époux à moins qu’il n’ait concouru à l’acte. Elle peut aussi être contestée par les héritiers réservataires et les créanciers des époux, en dépit du concours de l’autre époux.

B. Toutefois, lorsqu’une telle déclaration a été faite, l’aliénation, le louage d’une chose ou la création de charges grevant celle-ci, à titre onéreux, pendant le régime de communauté ou postérieurement, ne peuvent être invalidées pour cause de fausseté de la déclaration.


(2) La personne dont le droit d’invalidier de telles transactions pour cause de fausseté de la déclaration n’est pas prescrit, ou autrement éteint ou forcé au 21 juillet 1982, et qui est défavorablement affectée par les dispositions du présent article, dispose de six mois à compter du 21 juillet 1982 pour engager une procédure en vue de l’invalidation sous peine de forclusion dans l’exercice de tels

Art. 2343. The donation by a spouse to the other spouse of his undivided interest in a thing forming part of the community transforms that interest into separate property of the donee. Unless otherwise provided in the act of donation, an equal interest of the donee is also transformed into separate property and the natural and civil fruits of the thing, and minerals produced from or attributed to the property given as well as bonuses, delay rentals, royalties, and shut-in payments arising from mineral leases, form part of the donee's separate property. [Acts 1979, No. 709, §1; Amended by Acts 1981, No. 921, §1]

Art. 2343.1. The transfer by a spouse to the other spouse of a thing forming part of his separate property, with the stipulation that it shall be part of the community, transforms the thing into community property. As to both movables and immovables, a transfer by onerous title must be made in writing and a transfer by gratuitous title must be made by authentic act. [Added by Acts 1981, No. 921, §1]
1981, No. 921, §2]

Art. 2344. Damages due to personal injuries sustained during the existence of the community by a spouse are separate property. Nevertheless, the portion of the damages attributable to expenses incurred by the community as a result of the injury, or in compensation of the loss of community earnings, is community property. If the community regime is terminated otherwise than by the death of the injured spouse, the portion of the damages attributable to the loss of earnings that would have accrued after termination of the community property regime is the separate property of the injured spouse. [Acts 1979, No. 709, §1]

Art. 2345. A separate or community obligation may be satisfied during the community property regime from community property and from the separate property of the spouse who incurred the obligation. [Acts 1979, No. 709, §1]

SECTION 2 - MANAGEMENT OF COMMUNITY PROPERTY

Art. 2346. Each spouse acting alone may manage, control, or dispose of community property unless otherwise provided by

Art. 2344. Les dommages et intérêts résultant de préjudices personnels subis par un époux pendant la communauté sont des biens propres. Toutefois, la part des dommages et intérêts couvrant les dépenses encourues par la communauté en raison du dommage, ou compensant la perte de revenus de la communauté, appartient à la communauté. Lorsque la communauté prend fin autrement que par la mort de l'époux victime du préjudice, la part des dommages et intérêts compensant la perte de revenus postérieure à la dissolution de la communauté, fait partie des biens propres de cet époux. [Loi de 1979, n° 709, §1]

Art. 2345. Une obligation propre ou commune peut être exécutée pendant la communauté sur des actifs communs ou propres à l'époux lié par l'obligation. [Loi de 1979, n° 709, §1]

SECTION 2 – DE L’ADMINISTRATION DES BIENS DE LA COMMUNAUTÉ

Art. 2346. Chaque époux agissant seul a l’administration, le contrôle ou la disposition des biens communs, lorsque la loi
Art. 2347. A. The concurrence of both spouses is required for the alienation, encumbrance, or lease of community immovables, standing, cut, or fallen timber, furniture or furnishings while located in the family home, all or substantially all of the assets of a community enterprise, and movables issued or registered as provided by law in the names of the spouses jointly.

B. The concurrence of both spouses is required to harvest community timber. [Acts 1979, No. 709, §1; Acts 2001, No. 558, §1]

Art. 2348. A spouse may expressly renounce the right to concur in the alienation, encumbrance, or lease of a community immovable or some or all of the community immovables, or community immovables which may be acquired in the future, or all or substantially all of a community enterprise. He also may renounce the right to participate in the management of a community enterprise. The renunciation may be irrevocable for a stated term not to exceed three years. Further, any renunciation of the right to concur in the alienation, encumbrance, or lease of a

n'en dispose pas autrement. [Loi de 1979, n° 709, § 1]

Art. 2347. A. Pour l’aliénation, le louage ou la création de charges grevant les immeubles, les arbres sur pied, coupés ou abattus, le mobilier situé dans le logement familial, lorsque ceux-ci sont communs, le concours des deux époux est requis. Il en est de même de tous ou presque tous les actifs d’une entreprise commune et des meubles acquis ou légalement enregistrés conjointement au nom des deux époux.

B. Le concours des deux époux est requis pour l’abattage des arbres communs. [Loi de 1979, n° 709, § 1 ; loi de 2001, n° 558, § 1]

Art. 2348. Un époux peut expressément renoncer au droit de concourir à l’aliénation, au louage ou à la création de charges grevant un ou plusieurs immeubles communs, actuels ou futurs, ou l’ensemble ou une grande partie de l’entreprise commune. Il peut aussi renoncer au droit de participer à l’administration de l’entreprise commune. La renonciation peut être irrévocable pendant une durée certaine ne pouvant excéder trois ans. Par ailleurs, toute renonciation au droit de concourir à l’aliénation, au louage ou à la création de charges grevant un ou plusieurs
community immovable, or some or all of the community immovables or community immovables which may be acquired in the future, or all or substantially all of a community enterprise which was proper in form and effective under the law at the time it was made shall continue in effect for the stated term not to exceed three years or if there was no term stated, then until it is revoked.

A spouse may nonetheless reserve the right to concur in the alienation, encumbrance, or lease of specifically described community immovable property. [Acts 1979, No. 709, §1; Amended by Acts 1981, No. 132, §1; Acts 1984, No. 554, §1, eff. Jan. 1, 1985; Acts 1984, No. 622, §1, eff. Jan. 1, 1985]

Art. 2349. The donation of community property to a third person requires the concurrence of the spouses, but a spouse acting alone may make a usual or customary gift of a value commensurate with the economic position of the spouses at the time of the donation. [Acts 1979, No. 709, §1]

Art. 2350. The spouse who is the sole manager of a community enterprise has the exclusive right to alienate, encumber, or lease its movables unless the movables are issued in the name of the other spouse or the concurrence of the spouses is required. [Acts 1979, No. 709, §1]
Art. 2351. A spouse has the exclusive right to manage, alienate, encumber, or lease movables issued or registered in his name as provided by law. [Acts 1979, No. 709, §1]

Art. 2352. A spouse who is a partner has the exclusive right to manage, alienate, encumber, or lease the partnership interest. A spouse who is a member has the exclusive right to manage, alienate, encumber, or lease the limited liability company interest. [Acts 1979, No. 709, §1; Acts 1993, No. 475, §1, eff. June 9, 1993]

Art. 2353. When the concurrence of the spouses is required by law, the alienation, encumbrance, or lease of community property by a spouse is relatively null unless the other spouse has renounced the right to concur. Also, the alienation, encumbrance, or lease of the assets of a community enterprise by the non-manager spouse is a relative nullity. [Acts 1979, No. 709, §1]

Art. 2354. A spouse is liable for any loss or damage caused by
fraud or bad faith in the management of the community property. [Acts 1979, No. 709, §1]

Art. 2355. A spouse, in a summary proceeding, may be authorized by the court to act without the concurrence of the other spouse upon showing that such action is in the best interest of the family and that the other spouse arbitrarily refuses to concur or that concurrence may not be obtained due to the physical incapacity, mental incompetence, commitment, imprisonment, temporary absence of the other spouse, or because the other spouse is an absent person. [Acts 1979, No. 709, §1; Acts 1990, No. 989, §2, eff. Jan. 1, 1991]

Art. 2355.1. When a spouse is an absent person, the other spouse, upon showing that such action is in the best interest of the family, may be authorized by the court in a summary proceeding to manage, alienate, encumber, or lease community property that the absent spouse has the exclusive right to manage, alienate, encumber, or lease. [Acts 1990, No. 989, §2, eff. Jan. 1, 1991]

par dol ou mauvaise foi dans l'administration des biens de la communauté. [Loi de 1979, n° 709, §1]

Art. 2355. Un époux peut, lors d'une procédure simplifiée, être autorisé par le tribunal à agir sans le concours de l'autre époux en démontrant qu'une telle action sert au mieux les intérêts de la famille et que l'autre époux refuse arbitrairement de concourir ou que ce concours ne peut être obtenu pour cause d'incapacité physique, d'altération des facultés mentales, d'internement, d'emprisonnement, d'absence temporaire de l'autre époux, ou parce que l'autre époux est un absent. [Loi de 1979, n° 709, §1 ; loi de 1990, n° 989, §2, en vigueur le 1er janvier 1991]

Art. 2355.1. Lorsqu'un époux est un absent, l'autre époux peut, s'il démontre qu'une telle action sert au mieux les intérêts de la famille, être autorisé par le tribunal, dans le cadre d'une procédure simplifiée, à administrer, aliéner, grever ou louer les biens communs que l'absent a le droit exclusif d'administrer, aliéner, grever ou louer. [Loi de 1990, n° 989, §2, en vigueur le 1er janvier 1991]
SECTION 3 - TERMINATION OF THE COMMUNITY

Art. 2356. The legal regime of community property is terminated by the death or judgment of declaration of death of a spouse, declaration of the nullity of the marriage, judgment of divorce or separation of property, or matrimonial agreement that terminates the community. [Acts 1979, No. 709, §1; Acts 1990, No. 989, §2, eff. Jan. 1, 1991]

Art. 2357. An obligation incurred by a spouse before or during the community property regime may be satisfied after termination of the regime from the property of the former community and from the separate property of the spouse who incurred the obligation. The same rule applies to an obligation for attorney's fees and costs in an action for divorce incurred by a spouse between the date the petition for divorce was filed and the date of the judgment of divorce that terminates the community regime. If a spouse disposes of property of the former community for a purpose other than the satisfaction of community obligations, he is

SECTION 3 – DE LA DISSOLUTION DE LA COMMUNAUTÉ

Art. 2356. La communauté se dissout par le décès ou le jugement déclaratif de décès de l’un des époux, par la déclaration de nullité du mariage, par le jugement prononçant le divorce ou la séparation de biens, ou par une convention matrimoniale mettant fin à la communauté. [Loi de 1979, n° 709, §1 ; loi de 1990, n° 989, §2, en vigueur le 1er janvier 1991]

Art. 2357. Lorsqu’un époux est lié par une obligation avant ou pendant la communauté, celle-ci peut être exécutée après la dissolution de la communauté au moyen de biens de la communauté dissoute et de biens propres à l’époux lié par l’obligation. La même règle s’applique à l’obligation de payer les frais du procès lors d’une action en divorce introduite par un époux entre la date du dépôt de la demande de divorce et la date du jugement qui le prononce et met fin à la communauté.

Lorsqu’un époux dispose de biens appartenant à la communauté dissoute dans un but autre que celui de satisfaire à une obligation commune, il est
liable for all obligations incurred by the other spouse up to the value of that community property.

A spouse may by written act assume responsibility for one-half of each community obligation incurred by the other spouse. In such case, the assuming spouse may dispose of community property without incurring further responsibility for the obligations incurred by the other spouse. [Acts 1979, No. 709, §1; Acts 1990, No. 1009, §3, eff. Jan. 1, 1991]

Art. 2357.1. [Blank]

Art. 2358. A spouse may have a claim against the other spouse for reimbursement in accordance with the following Articles.

A claim for reimbursement may be asserted only after termination of the community property regime, unless otherwise provided by law. [Acts 1979, No. 709, §1; Acts 1990, No. 991, §1; Acts 2009, No. 204, §1]

Art. 2358.1. Reimbursement shall be made from the patrimony of the spouse who owes reimbursement. [Acts 1990, No. 991, §1]

Art. 2359. An obligation incurred by a spouse may be either a community obligation or tenu des obligations liant l’autre époux jusqu’à concurrence de la valeur de ces biens communs.

Un époux peut, par acte écrit, prendre en charge la moitié de chaque obligation commune liant l’autre époux. Dans ce cas, cet époux peut disposer de biens communs sans engager de nouveau sa responsabilité pour les obligations liant l’autre époux. [Loi de 1979, n° 709, §1 ; loi de 1990, n° 1009, §3, en vigueur le 1er janvier 1991]

Art. 2357.1. [Blanc]

Art. 2358. Un époux peut avoir le droit de demander récompense à l’autre époux conformément aux articles suivants.

Il ne peut le faire qu’après dissolution de la communauté, sauf dispositions contraires de la loi. [Loi de 1979, n° 709, §1 ; loi de 1990, n° 991, §1 ; loi de 2009, n° 204, §1]

Art. 2358.1. Récompense est faite avec le patrimoine de l’époux qui la doit. [Loi de 1990, n° 991, §1]

Art. 2359. L’obligation liant un époux peut être soit commune soit propre. [Loi de 1979, n°
a separate obligation. [Acts 1979, No. 709, §1]

Art. 2360. An obligation incurred by a spouse during the existence of a community property regime for the common interest of the spouses or for the interest of the other spouse is a community obligation. [Acts 1979, No. 709, §1]

Art. 2361. Except as provided in Article 2363, all obligations incurred by a spouse during the existence of a community property regime are presumed to be community obligations. [Acts 1979, No. 709, §1]

Art. 2362. An alimentary obligation imposed by law on a spouse is deemed to be a community obligation. [Acts 1979, No. 709, §1]

Art. 2362.1. An obligation incurred before the date of a judgment of divorce for attorney fees and costs in an action for divorce and in incidental actions is deemed to be a community obligation. [Acts 1990, No. 1009, §3, eff. Jan. 1, 1991; Acts 2009, No. 204, §1]

Art. 2363. A separate obligation of a spouse is one incurred by that spouse prior to the establishment of a community property regime, or
one incurred during the existence of a community property regime though not for the common interest of the spouses or for the interest of the other spouse.

An obligation resulting from an intentional wrong or an obligation incurred for the separate property of a spouse is likewise a separate obligation to the extent that it does not benefit both spouses, the family, or the other spouse. [Acts 1979, No. 709, §1; Acts 1990, No. 1009, §3, eff. Jan. 1, 1991; Acts 2009, No. 204, §1]

Art. 2364. If community property has been used during the existence of the community property regime or former community property has been used thereafter to satisfy a separate obligation of a spouse, the other spouse is entitled to reimbursement for one-half of the amount or value that the property had at the time it was used. [Acts 1979, No. 709, §1; Acts 2009, No. 204, §1]

Art. 2364.1. [Repealed. Acts 2009, No. 204, §3]

Art. 2365. If separate property of a spouse has been used either during the existence of the community property regime or thereafter to satisfy a community obligation, that spouse is entitled to reimbursement for one-half of the amount or value that the property had at the time it was used. [Loi de 1979, n° 709, §1 ; loi de 1990, n° 1009, §3, en vigueur le 1er janvier 1991 ; loi de 2009, n° 204, §1]
The liability of a spouse who owes reimbursement is limited to the value of his share of all community property after deduction of all community obligations. Nevertheless, if the community obligation was incurred for the ordinary and customary expenses of the marriage, or for the support, maintenance, or education of children of either spouse in keeping with the economic condition of the spouses, the spouse is entitled to reimbursement from the other spouse regardless of the value of that spouse's share of all community property. [Acts 1979, No. 709, §1; Acts 1990, No. 991, §1; Acts 2009, No. 204, §1]

Art. 2366. If community property had at the time it was used.

If the community obligation was incurred to acquire ownership or use of a community corporeal movable required by law to be registered, and separate property of a spouse has been used after termination to satisfy that obligation, the reimbursement claim shall be reduced in proportion to the value of the claimant's use after termination of the community property regime. The value of that use and the amount of the claim for reimbursement accrued during the use are presumed to be equal.

The liability of a spouse who owes reimbursement is limited to the value of his share of all community property after deduction of all community obligations. Nevertheless, if the community obligation was incurred for the ordinary and customary expenses of the marriage, or for the support, maintenance, or education of children of either spouse in keeping with the economic condition of the spouses, the spouse is entitled to reimbursement from the other spouse regardless of the value of that spouse's share of all community property. [Acts 1979, No. 709, §1; Acts 1990, No. 991, §1; Acts 2009, No. 204, §1]
property has been used during the existence of the community property regime or former community property has been used thereafter for the acquisition, use, improvement, or benefit of the separate property of a spouse, the other spouse is entitled to reimbursement for one-half of the amount or value that the community property had at the time it was used.

Buildings, other constructions permanently attached to the ground, and plantings made on the separate property of a spouse with community property belong to the owner of the ground. The other spouse is entitled to reimbursement for one-half of the amount or value that the community property had at the time it was used. [Acts 1979, No. 709, §1; Acts 1984, No. 933, §1; Acts 2009, No. 204, §1]

Art. 2367. If separate property of a spouse has been used during the existence of the community property regime for the acquisition, use, improvement, or benefit of community property, that spouse is entitled to reimbursement for one-half of the amount or value that the property had at the time it was used. The liability of the spouse who owes reimbursement is limited to the value of his share of all community property after

Art. 2366. Lorsque des biens communs ont été utilisés pendant la durée de la communauté ou que des biens de la communauté dissoute l’ont été par la suite pour l’acquisition, l’usage, l’amélioration ou au bénéfice des biens propres d’un époux, l’autre époux a droit à récompense à hauteur de la moitié du montant ou de la valeur des biens communs au moment de leur utilisation.

Les bâtiments ou autres constructions attachées au sol de manière permanente, ainsi que les plantations réalisées sur les biens propres d’un époux avec des biens communs, appartiennent au propriétaire du terrain. L’autre époux a droit à récompense à hauteur de la moitié du montant ou de la valeur des biens communs au moment de leur utilisation. [Loi de 1979, no 709, §1 ; loi de 1984, no 933, §1 ; loi de 2009, no 204, §1]

Art. 2367. Lorsque des biens propres d’un époux ont été utilisés pendant la durée de la communauté pour l’acquisition, l’usage, l’amélioration ou au bénéfice de biens communs, cet époux a droit à récompense à hauteur de la moitié du montant ou de la valeur des biens au moment de leur utilisation. L’époux qui doit récompense est seulement tenu à la valeur de sa part dans tous les biens communs
deduction of all community obligations.

Buildings, other constructions permanently attached to the ground, and plantings made on community property with separate property of a spouse during the existence of the community property regime are community property. The spouse whose separate property was used is entitled to reimbursement for one-half of the amount or value that the separate property had at the time it was used. The liability of the spouse who owes reimbursement is limited to the value of his share in all community property after deduction of all community obligations. [Acts 1979, No. 709, §1; Acts 1984, No. 933, §1; Acts 1990, No. 991, §1; Acts 2009, No. 204, §1]

Art. 2367.1. If separate property of a spouse has been used during the existence of the community property regime for the acquisition, use, improvement, or benefit of the other spouse’s separate property, the spouse whose property was used is entitled to reimbursement for the amount or value that the property had at the time it was used.

Buildings, other constructions permanently attached to the ground, and plantings made on the land of a spouse with the separate property of the other spouse whose separate property was used is entitled to reimbursement for the amount or value that the separate property had at the time it was used. The liability of the spouse who owes reimbursement is limited to the value of his share in all community property after deduction of all community obligations. [Acts 1979, No. 709, §1; Acts 1984, No. 933, §1; Acts 1990, No. 991, §1; Acts 2009, No. 204, §1]

Art. 2367.1. Lorsque les biens propres d’un époux ont été utilisés pendant le régime de communauté pour l’acquisition, l’usage, l’amélioration ou le bénéfice des biens propres de l’autre époux, l’époux dont les biens ont été utilisés a droit à récompense du montant ou de la valeur des biens au moment de leur utilisation.

Les bâtiments, les autres constructions attachées au sol de manière permanente, et les plantations réalisées sur le terrain d’un époux avec les biens
spouse belong to the owner of the ground. The spouse whose property was used is entitled to reimbursement for the amount or value that the property had at the time it was used. [Acts 1984, No. 933, §1; Acts 1990, No. 991, §1; Acts 2009, No. 204, §1]

Art. 2367.2. When a spouse with his own separate property incorporates in or attaches to a separate immovable of the other spouse things that become component parts under Articles 465 and 466, Article 2367.1 applies. [Acts 1984, No. 933, §1; Acts 2009, No. 204, §1]

Art. 2367.3. If a spouse uses separate property during the existence of the community property regime to satisfy the separate obligation of the other spouse, the spouse whose property was used is entitled to reimbursement for the amount or value the property had at the time it was used. [Acts 2009, No. 204, §1]

Art. 2368. If the separate property of a spouse has increased in value as a result of the uncompensated common labor or industry of the spouses, the other spouse is entitled to be reimbursed from the spouse whose property has increased in value one-half of the increase attributed to the common labor. [Acts 1979, No. 709, §1]
Art. 2369. A spouse owes an accounting to the other spouse for community property under his control at the termination of the community property regime. The obligation to account prescribes in three years from the date of termination of the community property regime. [Acts 1979, No. 709, §1]

Art. 2369.1. After termination of the community property regime, the provisions governing co-ownership apply to former community property, unless otherwise provided by law or by juridical act.

When the community property regime terminates for a cause other than death or judgment of declaration of death of a spouse, the following Articles also apply to former community property until a partition, or the death or judgment of declaration of death of a spouse. [Acts 1990, No. 991, §1; Acts 1995, No. 433, §1]

Art. 2369.2. Each spouse owns an undivided one-half interest in former community property and its fruits and products. [Acts 1995, No. 433, §1]

Art. 2369.3. A spouse has a duty to preserve and to manage prudently former community property under his control, including a former community property regime. [Acts 1995, No. 433, §1]

[Loi de 1979, n° 709, §1]

Art. 2369. Un époux doit rendre compte à l’autre époux des biens communs qui sont sous son contrôle au moment de la dissolution de la communauté. Cette obligation se prescrit par trois ans à compter du jour de la dissolution de la communauté. [Loi de 1979, n° 709, §1]

Art. 2369.1. Sauf disposition contraire de la loi ou d’un acte juridique, les dispositions régissant la copropriété s’appliquent aux anciens biens communs après dissolution de la communauté.

Lorsque la communauté se dissout autrement que par le décès ou le jugement déclaratif de décès de l’un des époux, les articles suivants s’appliquent aussi aux anciens biens communs jusqu’au partage, ou jusqu’au décès ou jugement déclaratif de décès d’un des époux. [Loi de 1990, n° 991, §1 ; loi de 1995, n° 433, §1]

Art. 2369.2 Chaque époux a un droit indivis sur la moitié des biens de la communauté dissoute ainsi que sur leurs fruits et produits. [Loi de 1995, n° 433, §1]

Art. 2369.3. Un époux a le devoir de conserver et d’administrer de façon prudente les biens de la communauté
enterprise, in a manner consistent with the mode of use of that property immediately prior to termination of the community regime. He is answerable for any damage caused by his fault, default, or neglect.

A community enterprise is a business that is not a legal entity.

[Acts 1995, No. 433, §1]

Art. 2369.4. A spouse may not alienate, encumber, or lease former community property or his undivided community interest in that property without the concurrence of the other spouse, except as provided in the following Articles. In the absence of such concurrence, the alienation, encumbrance, or lease is a relative nullity. [Acts 1995, No. 433, §1]

Art. 2369.5. A spouse may alienate, encumber, or lease a movable issued or registered in his name as provided by law. [Acts 1995, No. 433, §1]

Art. 2369.6. The spouse who is the sole manager of a former community enterprise may alienate, encumber, or lease its moveables in the regular course of business. [Acts 1995, No. 433, §1]
Art. 2369.7. A spouse may be authorized by the court in a summary proceeding to act without the concurrence of the other spouse, upon showing all of the following:
   (1) The action is necessary.
   (2) The action is in the best interest of the petitioning spouse and not detrimental to the interest of the nonconcurring spouse.
   (3) The other spouse is an absent person or arbitrarily refuses to concur, or is unable to concur due to physical incapacity, mental incompetence, commitment, imprisonment, or temporary absence. [Acts 1995, No. 433, §1]

Art. 2369.8. A spouse has the right to demand partition of former community property at any time. A contrary agreement is absolutely null.
   If the spouses are unable to agree on the partition, either spouse may demand judicial partition which shall be conducted in accordance with R.S. 9:2801. [Acts 1995, No. 433, §1]
CHAPTER 3 - SEPARATION OF PROPERTY REGIME

Art. 2370. A regime of separation of property is established by a matrimonial agreement that excludes the legal regime of community of acquets and gains or by a judgment decreeing separation of property. [Acts 1979, No. 709, §1]

Art. 2371. Under the regime of separation of property each spouse acting alone uses, enjoys, and disposes of his property without the consent or concurrence of the other spouse. [Acts 1979, No. 709, §1]

Art. 2372. A spouse is solidarily liable with the other spouse who incurs an obligation for necessaries for himself or the family. [Acts 1979, No. 709, §1]

Art. 2373. Each spouse contributes to the expenses of the marriage as provided in the matrimonial agreement. In the absence of such a provision, each spouse contributes in proportion to his means. [Acts 1979, No. 709, §1]

Art. 2374. A. When the interest of a spouse in a
community property regime is threatened to be diminished by the fraud, fault, neglect, or incompetence of the other spouse, or by the disorder of the affairs of the other spouse, he may obtain a judgment decreeing separation of property.

B. When a spouse is an absent person, the other spouse is entitled to a judgment decreeing separation of property.

C. When a petition for divorce has been filed, upon motion of either spouse, a judgment decreeing separation of property may be obtained upon proof that the spouses have lived separate and apart without reconciliation for at least thirty days from the date of, or prior to, the filing of the petition for divorce.

D. When the spouses have lived separate and apart continuously for a period of six months, a judgment decreeing separation of property shall be granted on the petition of either spouse. [Acts 1992, No. 295, §1; Acts 1993, No. 25, §1; Acts 1993, No. 627, §1; Acts 2010, No. 603, §1, eff. Jul. 25, 2010]

Art. 2375 A. Except as provided in Paragraph C of this Article, a judgment decreeing separation of property terminates the regime of community property retroactively to the day époux, sa fraude, sa faute, sa négligence ou son incompétence, il apparaît que le maintien de la communauté met en péril les intérêts de l’autre époux, celui-ci peut obtenir un jugement ordonnant la séparation de biens.

B. Lorsqu’un époux est un absent, l’autre époux peut obtenir un jugement ordonnant la séparation de biens.

C. Lorsque une demande en divorce a été déposée à la demande de l’un ou l’autre époux, un jugement ordonnant la séparation de biens peut être obtenu s’il est prouvé que les époux ont vécu séparés l’un de l’autre sans réconciliation pendant au moins trente jours à compter du dépôt de la demande en divorce, ou préalablement à celui-ci.

D. Lorsque les époux ont vécu séparés l’un de l’autre sans interruption pendant une période de six mois, un jugement ordonnant la séparation de biens peut être accordé à la demande de l’un ou l’autre des époux. [Loi de 1992, no 295, §1 ; loi de 1993, no 25, §1 ; loi de 1993, no 627, §1 ; loi de 2010, no 603, §1, en vigueur le 25 juillet 2010]

Art. 2375 A. À l’exception des dispositions contenues au paragraphe C du présent article, la séparation de biens prononcée en justice emporte dissolution du régime de communauté.
of the filing of the petition or motion therefor, without prejudice to rights validly acquired in the interim between filing of the petition or motion and rendition of judgment.

B. If a judgment has been rendered on the ground that the spouses have lived separate and apart either after the filing of a petition for divorce without having reconciled or for six months, a reconciliation reestablishes the regime of community property between the spouses retroactively to the day of the filing of the motion or petition therefor, unless prior to the reconciliation the spouses execute a matrimonial agreement to the contrary. This agreement need not be approved by the court and is effective toward third persons when filed for registry in the manner provided by Article 2332. The reestablishment of the community is effective toward third persons when a notice thereof is filed for registry in the same manner.

C. If a judgment is rendered on the ground that the spouses were living separate and apart without having reconciled for at least thirty days from the date of, or prior to, the filing of the petition for divorce, the judgment shall be effective retroactively to the date the petition for divorce was filed, without prejudice to rights validly acquired in the
Art. 2376. The creditors of a spouse, by intervention in the proceeding, may object to the separation of property or modification of their matrimonial regime as being in fraud of their rights. They also may sue to annul a judgment of separation of property within one year from the date of the rendition of the final judgment. After execution of the judgment, they may assert nullity only to the extent that they have been prejudiced. [Acts 1979, No. 709, §1]


du dépôt de la demande en divorce, sans préjudice des droits valablement acquis entre-temps. Toute conclusion ou requête supplémentaire concernant des questions incidentes au divorce doit être jointe à la première action intentée. [Loi de 1992, n° 295, §1; loi de 1993, n° 25, §1; loi de 1993, n° 627, §1; loi de 1997, n° 35, §1 ; loi de 2010, n° 603, §1, en vigueur le 25 juillet 2010]

Art. 2376. Les créanciers d’un époux peuvent, par intervention dans la procédure, s’opposer à la séparation de biens ou à la modification du régime matrimonial qui serait effectuée en fraude de leurs droits. Ils peuvent également demander l’annulation du jugement ordonnant la séparation de biens dans un délai d’un an à compter du jour où le jugement définitif est rendu. Une fois le jugement exécuté, ils ne peuvent en demander la nullité que dans la mesure où ils ont subi un préjudice. [Loi de 1979, n° 709, § 1]

Art. 2377 à 2431. [Abrogés par la loi de 1978, n° 627, §6; loi de 1979, n° 709, §1]
CHAPTER 4 - MARITAL PORTION

Art. 2432. When a spouse dies rich in comparison with the surviving spouse, the surviving spouse is entitled to claim the marital portion from the succession of the deceased spouse. [Acts 1979, No. 710, §1]

Art. 2433. The marital portion is an incident of any matrimonial regime and a charge on the succession of the deceased spouse. It may be claimed by the surviving spouse, even if separated from the deceased, on proof that the separation occurred without his fault. [Acts 1979, No. 710, §1]

Art. 2434. The marital portion is one-fourth of the succession in ownership if the deceased died without children, the same fraction in usufruct for life if he is survived by three or fewer children, and a child's share in such usufruct if he is survived by more than three children. In no event, however, shall the amount of the marital portion exceed one million dollars. [Acts 1979, No. 710, §1; Acts 1987, No. 289, §1]

Art. 2435. A legacy left by the deceased to the surviving spouse and payments due to him

CHAPITRE 4 – DE LA QUARTE MARITALE

Art. 2432. Lorsque le premier mourant des deux époux est plus riche que le conjoint survivant, celui-ci est en droit de réclamer la quarte maritale sur la succession de l'époux prédécédé. [Loi de 1979, n°710, §1]

Art. 2433. La quarte maritale est attachée à tout régime matrimonial et est une charge de la succession de l’époux prédécédé. Elle peut être réclamée par le conjoint survivant, quand bien même les époux seraient séparés, dès lors qu’il démontre que la séparation ne résulte pas de sa propre faute. [Loi de 1979, n°710, §1]

Art. 2434. La quarte maritale représente un quart de la succession en pleine propriété si le prédécédé n’a pas laissé d’enfants, la même portion en usufruit s’il a laissé trois enfants ou moins, et la part d’un enfant en usufruit s’il a laissé plus de trois enfants. Cependant, le montant de la quarte maritale ne peut, en aucun cas, excéder un million de dollars. [Loi de 1979, n°710, §1; loi de 1987, n°289, §1]

Art. 2435. Le legs laissé par le prédécédé au conjoint survivant ainsi que les sommes
Art. 2436. The right of the surviving spouse to claim the marital portion is personal and noninheritable. This right prescribes three years from the date of death. [Acts 1979, No. 710, §1]

Art. 2437. When, during the administration of the succession, it appears that the surviving spouse will be entitled to the marital portion, he has the right to demand and receive a periodic allowance from the succession representative. The amount of the allowance is fixed by the court in which the succession proceeding is pending. If the marital portion, as finally fixed, is less than the allowance, the surviving spouse is charged with the deficiency. [Acts 1979, No. 710, §1]
AN ANALYSIS IN EMPATHY: WHY COMPASSION NEED NOT BE EXILED FROM THE PROVINCE OF JUDGING SAME-GENDER MARRIAGE CASES

Kacie F. Gray*

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I. INTRODUCTION

When the methods of decision-making point in different directions, Justice Benjamin Nathan Cardozo tells us that no one decision-making “formula” should be followed. “If you ask how [the judge] is to know when one interest out weighs the other, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself.”1 What Justice Cardozo did not explicitly say, however, is

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This note was written prior to the judgment delivered on June 26, 2015, by the U.S. Supreme Court in Obergefell v. Hodges, 135 S. Ct. 2584 (2015), ruling that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

that beyond experience, study, and reflection reside empathy and compassion. In formulating judgments, the court’s angle of vision makes all the difference.

The law is rooted in the ethical treatment of persons, and the underlying basis of ethics is empathy. In the absence of empathy, the law is merely a tool for rationalization, and fails to act as an instrument for social justice. There is, however, a widely held—but fallacious—belief in the “purely objective ruling.” Incontrovertibly, each decision implicitly reflects the bias that each judge carries. Such bias expresses itself as the inclination to give the “benefit of the doubt” to those with whom they identify and to be skeptical of those with whom they share little mutuality. Nevertheless, while judges’ decisions must be in accord with the Constitution, it is essential that they have a sense of empathy such that the law may accomplish its ultimate purpose—to preserve human dignity.

Justice Harry A. Blackmun’s jurisprudence has been marked by a similar insight. Judging is much more than a process of pristine deductive analysis. Compassion, wisdom, and common sense are as essential to the judicial role as scholarship and technical mastery of the law. Expressing this notion in his opinions, Justice Blackmun acknowledges the inevitable limitations of judges while also exposing the cruel reality of the law as a mathematical application of legal “axioms and corollaries” that “ignores the consideration of its impact on the lives of real people.” In his separate dissent in *DeShaney v.

Winnebago County Department of Social Services,\textsuperscript{5} Justice Blackmun scolds the majority for purporting to be the dispassionate oracle of the law, unmoved by “natural sympathy.”\textsuperscript{6} Justice Blackmun observes that the Court's precedents left questions unanswered and, in response, suggests a “sympathetic” reading of the Due Process Clause: “One which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging.”\textsuperscript{7}

Same-gender marriage is a socially diversory topic, and the controversy surrounding it finds prominent expression in law, politics, and personal beliefs.\textsuperscript{8} The inextricable nature of same-gender marriage encompasses matters of family structure, gender roles, justice, and equality. The Due Process Clause of the Fourteenth Amendment, which resides at the forefront of the proponents’ arguments, guarantees that no person shall be deprived of life, liberty, or property without due process of law. The Supreme Court of the United States dedicates a considerable amount of time to itemizing specific liberties protected by this guarantee, including those related to marriage. Crucially, in \textit{Loving v. Virginia}\textsuperscript{9} the Supreme Court held that states could not ban interracial marriage since “the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”\textsuperscript{10} To “deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes,” Chief Justice Earl Warren writes, is “directly subversive of the principle of equality

\begin{itemize}
\item [6.] \textit{Id.} at 212.
\item [7.] \textit{Id.} at 213.
\item [9.] Loving \textit{v.} Virginia, 388 U.S. 1 (1967).
\item [10.] \textit{Id.} at 13.
\end{itemize}
at the heart of the Fourteenth Amendment.” 11 Thus, “under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual, and cannot be infringed by the State.” 12

Where political discourse surrounding same-gender marriage has become convoluted by religion and arguments of morality, the legal treatment of same-gender marriage under a sympathetic reading of the Due Process Clause holds the potential to provide a more direct path to the legalization of same-gender marriage.

II. United States v. Windsor: A Love Story

The Supreme Court’s 2013 decision in United States v. Windsor 13 significantly altered the legal landscape for same-gender marriage in the United States. 14 The Supreme Court held Section 3 of the Defense of Marriage Act (DOMA) unconstitutional as a violation of equal protection pursuant to the Due Process Clause of the Fifth Amendment. As a result of this landmark decision, marriages performed in those states recognizing same-gender marriages were to be treated equally for purposes of federal law.

Windsor involves the individual, the institution, and competing points of view. From one point of view there is the individual plaintiff, Edith Windsor, and the love story of her same-gender marriage. From the other point of view, the case is about institutional power and the conflict between federal and state definitions of marriage. In a broader sense, the case is a reflection of the constant tension between the rights of the individual versus the “best interests” of the government, and the perpetual conflict regarding the division of political power between the state and the federal government.

11. Id. at 12.
12. Id.
14. DOMA (Pub.L. 104–199, enacted Sep. 21, 1996) defines “marriage” as union between a man and a woman, and “spouse” to refer to a person of the opposite sex.
Thea Spyer and her surviving spouse, Edith Windsor, were married under Canadian law, a marriage recognized by the state of New York. After the death of Thea Spyer, Edith Windsor was denied the benefit of a spousal estate tax exemption under the DOMA. In bringing suit against the federal government for a refund of federal estate taxes paid, Edith Windsor challenged the constitutionality of DOMA. Although the Department of Justice refused to defend the statute, the Bipartisan Legal Advisory Group (BLAG) intervened in the litigation to defend DOMA’s constitutionality.

The complaint filed by Edith Windsor in the Southern District of New York focused on “Edie and Thea.” Edie and Thea’s love story spans four pages of the complaint, while a description of DOMA required only one page of the response. The story begins with the following excerpt:

"Edie and Thea’s life stories are in one sense remarkable for the extraordinary times through which they lived, and at the same time quite typical of the lives of gay men and lesbians of their generations given the pervasive discrimination and homophobia that Edie and Thea encountered on a routine basis. Yet despite obstacles nearly unimaginable today to the generations of gay men and lesbians who followed in their wake, Edie and Thea went on to live lives of great joy, full of dancing, love, and celebration."

When a protagonist like Edith Windsor drives the story of the opinion, the emotion invoked by her character becomes the impetus that energizes and commands the reader. Scholarship indicates that narratives “influence beliefs and attitudes by encouraging empathetic and emotional connections with story characters.” Having a character in the opinion allows the reader to distance himself from any existing preconceptions and to

empathize with the narrative of the story. Identifiable characters facilitate the “receiver’s identification with and potential empathy for the characters” because the readers “vicariously experience characters’ beliefs and emotions, empathize with them, and become engrossed in the story.”

In discussing the Defense of Marriage Act, the Windsor Court continuously links the impact of the Federal statute to all persons, including Edie Windsor. In examining the relationship between the federal and state powers to define marriage, the Court explains that DOMA’s impact on the individual: “Diminishes the stability and predictability of the basic personal relations the State has found it proper to acknowledge and protect.”

Justice Kennedy writes, “The federal statute is invalid, for no legitimate purpose overcomes the effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.” Writing for the majority, Justice Kennedy reasons:

DOMA’s principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency... Responsibilities, as well as rights, enhance the dignity and integrity of the person... By this dynamic, DOMA undermines both the public and private significance of state-sanctioned same-gender marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition...

When the federal government treats heterosexual marriages differently than those state-sanctioned same-gender marriages, the court holds that the Constitution prevents the distinction. “Such a

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20. *Id.* at 2696.
21. *Id.* at 2681.
differentiation,” Justice Kennedy exclaims, “demean[s] the couple, whose moral and sexual choices the Constitution protects.”

Though the word “dignity” cannot be found in the language of the Constitution, Justice Kennedy uses it no fewer than ten times in his majority opinion. Justice Kennedy emphasizes human dignity as a constitutional value; one that stands at the heart of the Court’s longstanding commitment to equal protection. In refusing to engage in a solely methodical and dispassionate analysis, the Court situates itself to deliver an opinion that contemplates human dignity, compassion, and the impact on the lives of very real people, including those children affected by the decision.

“DOMA,” Justice Kennedy writes, “humiliates tens of thousands of children now being raised by same-gender couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and the concords of daily life.” Justice Kennedy describes the anticipated harms of DOMA, beyond those financial consequences, and contemplates a clear identification of the victims of the Defense of Marriage Act and their suffering. In rendering an opinion that takes cognizance of these consequences, arguably, Justice Kennedy recognizes that the right to same-gender marriage is implicit in the Constitution. Nevertheless, underlying tones of federalism in the opinion have caused some confusion in lower courts.

III. MUDDLING IN LOUISIANA

A. Robicheaux v. Caldwell: Abandoning the “Pageant of Empathy”

The same-gender marriage situation in Louisiana has now become somewhat muddled, among recent conflicting rulings by different courts—one federal, one state. Judge Martin Leach-Cross Feldman of the Eastern District of Louisiana was the first federal

22. Id. at 2675.
23. Id. at 2694.
judge to uphold a state prohibition against same-gender marriage since the landmark decision striking down the Defense of Marriage Act in *Windsor*.

The petitioners in *Robicheaux v. Caldwell* include seven Louisiana same-gender couples, several of whom are raising children, and the Forum For Equality, a statewide organization whose members include Louisiana same-gender couples and their families. The petitioners allege that Louisiana’s constitutional ban on same-gender marriage forbids them access to the status, rights, and protections of marriage; disparages their families; and inflicts harms on their children. Such a ban, they argue, denies petitioners who are unmarried the right to marry within the state and denies petitioners who have legally married outside of the state all legal recognition of their marriages. The descriptions of each petitioner are limited to, at most, four to five lines of the complaint. In brief, they argue that Louisiana’s marriage ban infringes upon their constitutional right to due process and equal protection and, accordingly, that the ban should be struck down.

While most federal judges responsible for striking down same-gender marriage prohibitions incorporate arguments of love, equality, empathy, and compassion into their opinions, Judge Feldman’s opinion provides an unadulterated contrast. In upholding Louisiana’s prohibition on same-gender marriage, Judge Feldman concludes that same-gender couples have no “fundamental right to marry” and that Louisiana’s Constitutional amendment should be judged by the lowest standard of judicial scrutiny, rational basis.

In his nearly thirty-two page opinion, Judge Feldman exiles compassion from his judgment and fails to employ a sympathetic reading of the Due Process Clause, as advocated by Justice Harry

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25. Id.
A. Blackmun. Judge Feldman dispassionately argues that being homosexual is a choice, compares same-gender marriage to incest and polygamy, and, most offensively, labels same-gender marriage as “inconceivable.”28 “No authority dictates,” Feldman writes, “that same-gender marriage is anchored to history or tradition. The concept of same-gender marriage is ‘a new perspective, a new insight,’ nonexistent and even inconceivable until very recently ....”29 Despite the fact that the majority of federal courts are currently striking down same-gender marriage bans, Judge Feldman explicitly disagrees. “The federal court decisions,” Feldman wrote “thus far exemplify a pageant of empathy; decisions impelled by a response of innate pathos . . . . It would no doubt be celebrated to be in the company of the near-unanimity of the many other federal courts that have spoken to this pressing issue, if this court were confident in the belief that those cases provide a correct guide.”30

Judge Feldman’s opinion goes beyond that of legal analysis and delivers a demoralizing and personal insult to marriage equality proponents. In invoking his “moral slippery slope” argument, Judge Feldman implies that expanding the definition of marriage to include same-gender couples might “open the door” to the legalization of incest and polygamy—two behaviors explicitly prohibited by existing law. In proffering the following questions, Judge Feldman grossly mischaracterizes same-gender marriage and implies that such a right is distinct and inferior to the fundamental right of marriage enjoyed by heterosexual couples:

Must the states permit or recognize a marriage between an aunt and niece? Aunt and nephew? Brother/brother? Father and child? May minors marry? Must marriage be limited to only two people? . . . Such unions would undeniably be equally committed to love and caring for one another, just

28. Id. at 926.
29. Id. at 923 (citing Windsor, 133 S. Ct. 2689) (emphasis added).
30. Id. at 925.
like the plaintiffs.31

At no point in Loving v. Virginia,32 however, did the Supreme Court engage in such an attenuated, impertinent analysis of whether allowing interracial couples the right to marry would lead to such obscure consequences, notwithstanding the illegality of interracial sexual relations at that time in history. In Lawrence v. Texas, Justice Kennedy indicated that private, consensual sexual intimacy between two adult persons of the same gender may not be punished by the State, and it can form “but one element in a personal bond that is more enduring.”33

Misapplying the language of the majority in Windsor, Judge Feldman relies upon the first portion of Justice Kennedy’s opinion that speaks to the states’ power to define marriage.34 The States’ interest in defining and regulating the marital relation, subject to constitutional guarantees, proceeds from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits. Relying on Windsor as a shield, Judge Feldman writes:

This court finds it difficult to minimize, indeed, ignore, the high court’s powerful reminder in Windsor: ‘The definition of marriage is the foundation of the State’s broader authority to regulate the subject of domestic relations with respect to the protection of offspring, property interests, and the enforcement of marital responsibilities . . . The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.’35

Judge Feldman blatantly takes portions of the Windsor decision out of context and errs in disregarding the second portion of Justice Kennedy’s opinion, which reiterates that state laws must respect

31. Id. at 926.
32. 388 U.S. 1 (1967).
the constitutional rights of persons, and that same-gender marriage bans offend the basic principles of equality.

Greatly persuaded by the argument that same-gender marriage should be a product of the democratic process, Judge Feldman lends legitimacy to the disposition of social issues by prevailing popular opinion and agrees that, “fundamental social change . . . is better cultivated through democratic consensus.”

Relying upon a dissenting opinion from the Tenth Circuit Court of Appeals, Judge Feldman invokes the words of Judge Paul J. Kelley which, he claims, “ought not be slighted”:

[W]here, as here, the language of the applicable provision provides great leeway and where the underlying social policies are felt to be of vital importance, the temptation to read personal preference into the Constitution is understandably great . . . . But it is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the Court’s giving effect to its own notions of what is wise or politic.

Classical legal scholar John Chipman Gray would argue, instead, that the limits of jurisprudence include not only subject matter, but also a consideration what the law should be. “The opinions of judges on matters of ethics and policy,” Gray argues, “are the ‘chief engines’ of legal development.” Thus, emotion is and ought to be understood as part of the legal process, and not as merely a “personal preference.” In accepting a judge’s use of discretion we must understand who the judge is. This understanding includes his sociological, political, ideological, and psychological aspects; none of which can be thought of independently of emotion. In the case of same-gender marriage,

36. Id. at 918.
37. Id. at 926 (citing Kitchen v. Herbert, 755 F.3d 1193 (2014)).
however, love is a human experience, not a political statement for which Judge Feldman’s own notion is required.

Beyond Judge Martin Feldman’s exile of empathy from judgment lies another aspect of the case that, arguably, contributes to its adverse outcome. Like the same-gender cases that preceded it, the plaintiffs in Robicheaux are several. While it is true that the consolidation of cases may act as a mechanism for legal expediency, it does so to the detriment of the parties. The result is a dilution of the personal narrative. The personal stories of the plaintiffs, which are critical in invoking empathy and compassion, become lost amongst the legal argument. As a result, the narrative is uneven and judges like Martin Feldman, then, are less likely to empathize with a seemingly unidentifiable main character. Because the interests at stake are so closely tied to the personal lives of each character affected, it is imperative that marriage equality proponents place the story of the individual at the forefront of their arguments.

B. Costanza v. Caldwell: The Intact, Same-Gender Family

In a Louisiana state court action, Costanza v. Caldwell (2014), Judge Edward Rubin of the Fifteenth Judicial District Court overturned Louisiana’s ban on same-gender marriage in declaring the law unconstitutional as a violation of the Due Process and Equal Protection Clauses of Fourteenth Amendment, as well as the Full Faith and Credit Clause. Judge Rubin ordered state officials to recognize the marriage of a lesbian couple, Angela Costanza and Chastity Brewer; to officially approve their adoption of a boy, N.B., born in 2004; and to allow the couple to file a joint state income tax return.

The case involves a same-gender couple (Costanza and Brewer) married in California in 2008, who petitioned the state of

Louisiana to have their marriage recognized and to allow Mrs. Costanza to adopt the biological child of Mrs. Brewer through an intra-family adoption. In denying their request, the State notes that same-gender marriage is expressly prohibited under Louisiana law.\footnote{LA. CONST. art. XII, § 15.} In their petition, Costanza and Brewer argue that by forbidding same-gender couples to marry and adopt, the state of Louisiana violates the Equal Protection Clause of the Fourteenth Amendment because such a prohibition denies same-gender couples those rights afforded to similarly-situated heterosexual couples. The petitioners also argue that Louisiana’s failure to recognize their marriage and its refusal to grant the intra-family adoption of their ten-year old son, N.B., deprives them of their fundamental right to marry and raise their child in violation of the Due Process Clause of the Fourteenth Amendment.

Judge Rubin in Costanza, like Justice Kennedy in Windsor, utilizes the symbolic meaning of children in creating the personal narrative and crafting a persuasive argument. The three means of effecting persuasion, according to Aristotle, are to understand emotions, to name them and describe them, and to know their causes and the way in which they are excited.\footnote{ARISTOTLE, \textit{On Rhetoric}, Book 1, at 8.} If the reader is sympathetic to those negatively affected by Louisiana’s ban on same-gender marriage, such as young N.B., they are generally more agreeable to the court’s determination of the ban as unconstitutional. Moral emotions, including sympathy, are highly correlated and related to vulnerability. In the case of same-gender marriage, the most readily identifiable and vulnerable victims are the children.

Contradicting Judge Feldman, Judge Rubin dismisses the state’s proposition that the ban on same-gender marriage has a rational relationship to its goals of linking children with their biological parents. In evidencing that Louisiana allows adoptions by foster parents, Judge Rubin reasons that it would be “illogical”
to say that intact families are only those formed by a child's biological parents. “There can be no distinction between linking children to ‘intact families,’ formed by their biological parents and linking children to already intact families involving same-gender marriages, such as the Costanza-Brewer family.” Finding that the petitioners are best positioned to make familial decisions regarding the custody and care of their young child, N.B., Judge Rubin declares that the result of holding otherwise would constitute an infringement upon Chastity and Angela’s liberty interest in raising their child, as guaranteed by the Due Process Clause of the Fourteenth Amendment. In his last remarks relating to the adoption of young N.B., Judge Rubin explains that while the children of same-gender couples may only have biological ties to one parent, “Biological relationships are not the exclusive determinant of the existence of a family.”

In addition to possessing the requisite legal expertise, Judge Rubin displays a compassionate recognition of how legal decisions impact the lives of ordinary people, particularly those involved in same-gender marriages. While the last eight pages of the opinion contain a mechanical recitation of the relied upon jurisprudence, Judge Rubin devotes a considerable portion of the opinion to affirming that the right sought by same-gender couples is not a new right, but merely the fundamental right to marry that is similarly enjoyed by heterosexual couples. In contrast, by denying the applicability of *Loving v. Virginia* to *Robicheaux*, Judge Feldman scornfully treats the notion of same-gender marriage as

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43. In his reasons for opinion, Judge Edward Rubin chooses to include parentheticals around “intact family” when it precedes a description of a heteronormative family. When describing a family structure, whose composure is that of a same-gender couple, the words “intact family” are not surrounded by parentheticals. It would appear, here, that Judge Rubin’s grammar choice is purposeful; highlighting that the scope of intact families includes both hetero and homosexual couples.


45. *Id.* at 19.

46. *Id.*

47. *Id.*
“inconceivable,” non-traditional, and secondary to the fundamental right of marriage afforded to heterosexual couples—depriving those same-gender couples of their dignity. By comparison, relying upon the majority opinion in *Kitchen*, Judge Rubin explains that the relevant question presented in *Loving* is not whether interracial marriage is deeply rooted in tradition, or whether interracial marriage is implicit in the concept of ordered liberty. Rather, he submits that the relevant right at issue in *Loving* is “the freedom to marry.”

Judge Rubin’s empathetic opinion recognizes that although the right to same-gender marriage is not deeply rooted in tradition, a history of discrimination against homosexuals is ever present:

Lest we forget, there was a time in America’s history when gays and lesbians were not permitted to even associate in public….We are past that now, but when it comes to marriage between persons of the same sex, this nation is moving towards acceptance that years ago would have never been contemplated.

Compassion in the province of judging becomes increasingly important to address the issues of stigma and discriminatory attitudes:

There are those that might argue that gays and lesbians can be treated differently, and yet be considered to be equal among the rest of Americans. [B]ut . . . fortunately for this country, the U.S. Supreme Court was presented with the case of *Brown v. Board of Education*, which overruled

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48. *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. June 25, 2014). In 2013, three same-gender couples (Derek Kitchen and Moudi Sbeity, Karen Archer and Kate Call, and Laurie Wood and Kody Partridge) filed suit challenging Utah’s ban on same-gender marriage. The U.S. District court held that the ban was unconstitutional. The state appealed to the Tenth Circuit Court of Appeals, who ruled in June, 2014, that the ban violates the U.S. Constitution’s guarantees on equal protection and due process. In October, 2014, the U.S. Supreme Court declined to hear a review of the Appeals Court decision.

49. *Id.*


51. *Id.* at 20.

any doctrine of ‘separate but equal.’

In comparing Brown v. Board of Education to Costanza v. Caldwell, Judge Rubin brilliantly links the deprivation of equal protection experienced by homosexual couples to the same deprivations of dignity experienced by racial minorities during the civil rights era; a moral evil deeply rooted in our nation’s history.

Judge Rubin likewise dismisses the notion, relied upon by Judge Feldman, that widespread democratic consensus is required before adopting such social change. Notwithstanding the approval of Louisiana voters to ban same-gender marriages and civil unions in 2004, “It is the opinion of this court that widespread social consensus leading to acceptance of same-gender marriage is already in progress. The moral disapproval of same-gender marriage is not the same as it was when Louisiana first defined marriage as a union between one man and a woman.” Further, and more importantly, public consensus does not guarantee that public policy comports with the rights guaranteed by the United States Constitution.

IV. BASKIN v. BOGAN: SARDONICISM IN THE SEVENTH CIRCUIT

Writing for a unanimous three-judge panel, in Baskin v. Bogan (2014), Judge Richard Posner of the Seventh Circuit rendered an opinion providing that Wisconsin and Indiana have “no reasonable basis” for forbidding same-gender marriage. In Judge Posner’s opinion, there is no question that homosexuals constitute a suspect class of persons. Tantamount to the line of reasoning employed by Judge Rubin, same-gender couples constitute a group of persons with an immutable characteristic who have historically faced discrimination. “It was tradition to not allow blacks and whites to

56. Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014).
57. Id.
marry—a tradition that got swept away,” Posner says. “Prohibition of same-gender marriage is [rooted in] a tradition of hate ... and savage discrimination.”

To achieve a ruling that firmly provides for marriage equality, Judge Posner recognizes that federal judges in other circuits may have revised the constitutional framework for marriage by either requiring heightened judicial scrutiny or declaring same-gender marriage a fundamental right. Posner, however, is not interested in reformulating the constitutional framework. Rather, he seeks to emphasize the constitutionally offensive nature of the state statutes. In doing so, he underscores that such statutes offend the Constitution under any interpretation of the equal protection clause, regardless of the level of judicial scrutiny.

Although unnecessary, Judge Posner performs a review of “the leading scientific theories” about homosexuality to illustrate that being homosexual is not a choice, an opinion held by notable jurists, including Justice Antonin Scalia and Judge Martin Feldman. The review, however, reinforces Posner’s analytical framework that a suspect class may not be constitutionally disadvantaged without a rational basis. Even at such a low threshold, he condemns the viability of prohibitions against same-gender marriage.

During oral arguments in Baskin v. Bogan, the recurring theme of the state’s arguments included “responsible procreation.” In summarizing and dismissing the states’ arguments, Judge Posner exclaims:

[The] government thinks that straight couples tend to be sexually irresponsible, producing unwanted children by the carload, and so must be pressured (in the form of government encouragement of marriage through a combination of sticks and carrots) to marry, but that gay couples, unable as they are to produce children wanted or

60. Id. at 648.
unwanted, are model parents—model citizens really—so have no need for marriage.61

“Heterosexuals,” Judge Posner responds, “get drunk and pregnant, producing unwanted children; their reward is to be allowed to marry. Homosexual couples do not produce unwanted children; their reward is to be denied the right to marry. Go figure.”62

Despite the entertaining and amusing juxtaposition of Judge Posner’s opinion, in more serious terms, Posner describes the case as being one “at a deeper level,” about “the welfare of American children.” The mere fact that gay couples in America are raising more than hundred thousand children suggests a compelling interest in support of gay marriage, since actively banning it, demonstrably harms children. During oral arguments, Judge Posner frequently interrupts Indiana Solicitor General Thomas Fischer, just moments into his presentation to outline a number of psychological strains endured by the children of unmarried couples, including the struggle to understand “[W]hy their schoolmates’ parents are married, yet theirs are [not].”63 “What horrible stuff,” Posner says.64 In describing the harmful effects on children, Posner comprehensively contributes to the vivid imagery of their victimization.

Assuming that same-gender couples constitute a suspect class, Judge Posner recognizes that a law that harms such a class may be constitutional if it has offsetting benefits. Judge Posner, recognizing this possibility, then asks what group of persons could possibly benefit from a ban on same-gender marriage. Quoting John Stuart Mill, Posner writes,

To be the basis of legal or moral concern . . . the harm must be tangible, secular, material—physical or financial, or, if emotional, focused and direct—rather than moral or

61. Id. at 662.
62. Id.
64. Oral Argument at 42:17, Judge Posner, id.
an analysis in empathy

spiritual. . . . [W]hile many heterosexuals (though in America a rapidly diminishing number) disapprove of same-gender marriage, there is no way they are going to be hurt by it in a way that the law would take cognizance of. Wisconsin doesn’t argue otherwise. Many people strongly disapproved of interracial marriage, and, more to the point, many people strongly disapproved (and still strongly disapprove) of homosexual sex, yet Loving v. Virginia\(^\text{65}\) invalidated state laws banning interracial marriage, and Lawrence v. Texas\(^\text{66}\) invalidated state laws banning homosexual sex acts.\(^\text{67}\)

“There is simply no harm,” Posner writes, “tangible, secular, material—physical or financial, or . . . focused and direct done to anybody by permitting gay marriage. Conservative Christians may be offended, but there is no way they are going to be hurt by it in a way that the law would take cognizance of.” A lot of people, after all, objected to interracial marriage in 1967—but that didn’t stop the court from invalidating anti-miscegenation laws in Loving v. Virginia.\(^\text{68}\)

In his opinion, Judge Posner makes his points with sardonic humor, but he emphasizes the profound harm that marriage bans inflict on same-gender couples and their families. In humanizing the parties central to his opinion, Judge Posner “restores the equal protection clause to its rightful place as the safeguard for all whom the state seeks to harm unjustly.”\(^\text{69}\) In the words of Mark Joseph Stern, a constitutional law blogger for Slate Magazine:

Posner does not sound like a man aiming to have his words etched in the history books or praised by future generations. Rather, he sounds like a man who has listened to all the arguments against gay marriage, analyzed them cautiously and thoroughly, and found himself absolutely disgusted by

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\(^{65}\) Loving v. Virginia, 388 U.S. 1 (1967).


\(^{67}\) Baskin v. Bogan, supra note 56, at 670.

\(^{68}\) Loving v. Virginia, 388 U.S. 1 (1967).

their sophistry and rank bigotry. The opinion is a masterpiece of wit and logic that doesn’t call attention to—indeed, doesn’t seem to care about—its own brilliance. Posner is not writing for Justice Anthony Kennedy, or for judges of the future, or even for gay people of the present. He is writing, very clearly, for himself.\textsuperscript{70}

V. CONCLUSION

Human sympathy and compassion are vital in the work of the Court. Justice Harry A. Blackmun’s vision focuses upon human details and on the problems, worries, and predicaments of individuals. This has been the hallmark of his vision of constitutional law and his interaction with the world around him.\textsuperscript{71} This practical yet compassionate view adds to the scope of the Court’s work and its angle of vision. Where political discourse surrounding same-gender marriage has become muddled by religion, morality, public policy, and personal prejudice, the legal treatment of same-gender marriage under a sympathetic reading of the Due Process Clause holds the potential to provide a more direct path to the legalization of same-gender marriage. We must never forget, “Compassion need not be exiled from the province of judging.”\textsuperscript{72}

\textsuperscript{70} \textit{Id.}
\textsuperscript{72} Deshaney v. Winnebago Cnty. Dep’t of Soc. Services, \textit{supra} note 5, at 213.
MODERN FAMILY: INTRAFAMILY ADOPTION IN LOUISIANA AND THE U.S. CONSTITUTION
(COSTANZA AND BREWER v. CALDWELL)

Tiffany S. Bush*

I. INTRODUCTION

When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature.¹ This code article illustrates one of the most fundamental notions of the civil law tradition. Louisiana’s Civil Code and the state’s constitution often have run-ins with each other, but issues have often been resolved by reference to the civil code’s idea that clear meaning should be adopted where reasonable and unless clear meaning leads to strange results, it should always be followed.

But, when the clear meaning of the Civil Code and Louisiana’s constitution conflict with the less clear meaning of the 14th Amendment of the U.S. Constitution, a conflict arises that is not so easily resolved. Over time, the federal courts have interpreted 14th Amendment to provide various protections of citizens’ rights.² The

¹  LA. CIV. CODE. art. 9.
² The Fourteenth Amendment, in relevant part, states:
   No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due
Supreme Court of the United States, several times, has extended these protections to individuals who were previously unrepresented, but due to a widespread change in societal attitudes, there was a shift in societal norms that warranted change. Louisiana and states like it have been resistant to these periodic shifts of societal norms.

This case presents a particularly confounding disagreement between the Code, Louisiana’s Constitution and the U.S. Constitution on the issue of same-sex marriage. Though the Civil Code is clear on the status of same-sex marriage in Louisiana, the changing face of the family structure in our society may mean that the relevant code articles are outdated. Historically, Louisiana has been reluctant to change their laws in the face of an evolving society and many times, Louisiana has been one of the last states to change its laws and customs, especially in cases where the debate is on a substantial issue such as marriage and society seems to take an approach in opposition of that accepted in Louisiana. Interestingly, Louisiana judges make their voices heard in the debate and the opinions issued may come as a surprise. This case note will briefly discuss the issues at play in the case and analyze the way in which the court tackled issues and produced an opinion that strategically dismantles the archaic norms that are currently adhered to in Louisiana.

II. BACKGROUND

In 2004, Chasity Brewer gave birth to a baby boy while living in California. At the time, Brewer was unmarried, and the child
was conceived as a result of insemination by an anonymous sperm donor.\textsuperscript{4} In 2008, Brewer and her partner, Angela Costanza, were married in California, where same-sex marriages are permitted.\textsuperscript{5} By 2013, the couple came to live in Lafayette Parish in the state of Louisiana and in July 2013, Angela Costanza filed a petition for intrafamily adoption so that she may have parental rights to Brewer’s son.\textsuperscript{6}

In January of 2014, counsel for Costanza and Brewer presented the couples’ entire adoption file to the court.\textsuperscript{7} Costanza, Brewer and their child were present, but the Attorney General for Louisiana was not.\textsuperscript{8} The court reviewed the entire adoption file and, after finding that all contents were in the proper form, granted the intrafamily adoption on January 27, 2014.\textsuperscript{9}

In March 2014, the Attorney General for Louisiana, James Caldwell, filed an appeal in the Third Circuit Court of Appeals.\textsuperscript{10} Citing Louisiana’s Code of Civil Procedure, the Attorney General stated that he was not given notice or any opportunity to be heard and the judgment should be vacated and remanded because of this.\textsuperscript{11} Costanza and Brewer (the “petitioners”) asked the court to

\textsuperscript{4} “According to the California Uniform Parentage Act, the anonymous sperm donor bears no rights to and no responsibilities for children born through donor insemination using his semen. The biological father remains to be unknown.” Minute Entry Ruling, Costanza and Brewer v. Caldwell, No. 2013-0052 D2, [15th JDC] (Feb. 22, 2014).

\textsuperscript{5} At the time of their marriage, both women were at the age of majority.

\textsuperscript{6} Minute Entry Ruling, Costanza, \textit{supra} n. 3.

\textsuperscript{7} The Fifteenth Judicial District Court of Louisiana, In re Adoption of N.B., 140 So.3d 1263 (2014).

\textsuperscript{8} Minute Entry Ruling, Costanza, \textit{supra} n. 3.

\textsuperscript{9} The court reviewed a number of documents, including: an Authentic Act of Consent to Adoption from the biological mother (Chasity Brewer), a criminal records check from the Sheriff of Lafayette Parish, and a Child Welfare State Central Registry Check. The final decree of adoption and judgment was signed on February 5, 2014.

\textsuperscript{10} Attorney General Caldwell moved the court for a Suspensive Appeal from the final adoption decree signed in February. Additionally, the Attorney General and the Governor (the “defendants”) also filed a peremptory exception of no cause of action and both sides filed motions for summary judgment. See Minute Entry Ruling, Costanza and Brewer v. Caldwell, No. 2013-0052 D2, [15th JDC] (Feb. 22, 2014).

\textsuperscript{11} \textsc{La. Code Civ. Proc. art. 1572}: 
reaffirm the February 2014 judgment of adoption and alleged that
their rights to Due Process and Equal Protection guaranteed by the
14th amendment of the United States Constitution would be denied
if the final decree of adoption was thrown out. Additionally,
petitioners asserted that the state of Louisiana violated Article IV,
Section 1 of the U.S. Constitution, known as the Full Faith &
Credit Clause, by refusing to recognize their California marriage.
Lastly, petitioners challenge the constitutionality of Louisiana’s
Defense of Marriage Act and several articles of the Louisiana
Civil Code.

The clerk shall give written notice of the date of the trial whenever a
written request therefore is filed in the record or is made by registered
mail by a party or counsel of record. This notice shall be mailed by the
clerk, by certified mail, properly stamped and addressed, at least ten
days before the date fixed for the trial. The provisions of this article
may be waived by all counsel of record at a pre-trial conference.
12. Minute Entry Ruling, Costanza, supra n. 3.
13. “Full Faith and Credit shall be given in each State to the public Acts,
Records, and judicial Proceedings of every other State. And the Congress may
by general Laws prescribe the Manner in which such Acts, Records and
Proceedings shall be proved, and the Effect thereof.” U.S. CONST. art. IV, § 1.
14. LA. CONST. art. XII, § 15:
Marriage in the state of Louisiana shall consist only of the union of one
man and one woman. No official or court of the state of Louisiana shall
construe this constitution or any state law to require that marriage or
the legal incidents thereof be conferred upon any member of a union
other than the union of one man and one woman. A legal status
identical or substantially similar to that of marriage for unmarried
individuals shall not be valid or recognized. No official or court of the
state of Louisiana shall recognize any marriage contracted in any other
jurisdiction which is not the union of one man and one woman.
15. The challenged civil code provisions are as follows:
“Marriage is a legal relationship between a man and a woman that is created
by civil contract. The relationship and the contract are subject to special rules
prescribed by law.” LA. CIV. CODE art. 86.
“Persons of the same sex may not contract marriage with each other.” LA.
CIV. CODE art. 89.
LA. CONST. art. XII, § 15:
A purported marriage between persons of the same sex violates a strong
public policy of the state of Louisiana and such a marriage contracted
in another state shall not be recognized in this state for any purpose,
including the assertion of any right or claim as a result of the purported
marriage.
III. DECISION OF THE COURT

The court addressed four issues set forth by the parties:

– Whether Louisiana Constitution Article XII, Section 15 (the Defense of Marriage Act), and Louisiana Civil code Articles 86, 89, and 3520(B) violate the Due Process and Equal Protection Clauses of the 14th Amendment of the U.S. Constitution;

– Whether, for purposes of the federal Due Process Clause, the right to marry someone of the same sex is a right deeply grounded in our Nation’s history and tradition;

– Whether the authority to recognize out-of-state marriages falls within the traditional authority of States over domestic relations law; and

– Whether Louisiana Constitution Art. XII, Section 15, Louisiana Civil Code Articles 86, 89, and 3520(B) violate Article IV, Section I, the Full Faith and Credit Clause, of the United States Constitution.16

The court ruled that Louisiana’s Defense of Marriage Act (DOMA) violates the Equal Protection and Due Process Clauses of the 14th amendment and is therefore unconstitutional.17 Additionally, Louisiana Civil Code Articles 86, 89, and 3520(B) were also declared unconstitutional for violating the same provisions of the U.S. Constitution.18

With regard to the question of whether the right to marry someone of the same sex constitutes a fundamental right for purposes of the Due Process Clause, the court appears to conclude that the right is fundamental. The court’s analysis of this issue was largely made up of an analogy drawn between this case and Kitchen v. Herbert, a case that came out of the Tenth Circuit Court of Appeals, where a same-sex couple sought to have their marriage recognized in Utah.19

16. Minute Entry Ruling, Costanza, supra n. 3.
17. Id.
18. Id.
The court also relied on similar reasoning that was adopted by a number of other cases to bolster their position.\textsuperscript{20} Last, the court held that the authority to recognize out-of-state marriages does not fall within the traditional authority of States over domestic relations law and, as such, the relevant provisions of the Louisiana Constitution and Civil Code violate the Full Faith and Credit Clause of the Constitution and is unconstitutional.\textsuperscript{21}

IV. COMMENTARY

Same-sex marriage has been a hot-button issue for scholars, legislators and the judiciary. Though the primary focus for the courts has been the constitutionality of same-sex marriage bans,\textsuperscript{22} with many states moving to legalize same-sex marriage, focus has slowly been shifting towards the legal effects of same-sex marriage in states that continue to ban gay marriage. This court methodically analyzed each constitutional issue and by drawing on several strong policy concerns of Louisiana, issued a ruling that should stand if reviewed by an appellate court.\textsuperscript{23}

According to the judgment, the Louisiana provisions that outlaw same-sex marriage (art. 86 La. CC and La. Const.) and forbid the recognition of same-sex marriages contracted out of state (La. Const.) violate two clauses in the U.S. Constitution.\textsuperscript{24}

The court found Louisiana DOMA’s tendency to “make unequal a subset of state-sanctioned marriages” violated the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause requires that no state shall deny a person equal protection under its laws. Louisiana’s DOMA, as well as the Civil Code articles, specifically article 86, does just that. Equal

\textsuperscript{20} See Minute Entry Ruling, Costanza, supra n. 3.
\textsuperscript{21} Id.
\textsuperscript{22} The United States Supreme Court is expected to address the issue in Summer 2015.
\textsuperscript{23} The Attorney General appealed the judgment to the Louisiana Supreme Court and the appeal is currently pending.
\textsuperscript{24} Minute Entry Ruling, Costanza, supra n. 3.
protection has not been interpreted to tolerate equal application of facially discriminatory laws. Instead, the Equal Protection Clause requires that states protect the constitutional rights of all individuals. The right to marry has been identified as a fundamental right protected by the United States Constitution. Additionally, some courts have recognized other rights bearing close relation to the right to marry, such as a parent’s right to raise their children, without undue interruption from the state, as being protected by the Constitution as well.

Both provisions of Louisiana law expressly limit legal recognition of marriage between a man and woman only. These provisions unduly interfere with the rights of same-sex couples to marry by not allowing their marriage to be recognized legally. In turn, same-sex couples are unable to benefit from the civil effects of marriage, including intrafamily adoption like Constanza and Brewer are trying to attain here. Furthermore, the additional Civil Code articles at issue here blatantly violate the Equal Protection Clause of the Constitution because they facially discriminate against a certain class of individuals by not allowing them to marry, simply because of who they choose to marry.

Next, the court tackled the issue of Louisiana’s refusal to recognize a same-sex marriage lawfully entered into in California. The petitioners asserted that the state’s refusal to recognize their marriage violated Article IV, Section I, the Full Faith and Credit Clause, of the United States Constitution, stating that the denial is “unmerited and does not fall within the discretion of a State” and further, Louisiana has not cited any compelling public policy that would allow the state to deny valid marriages

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26. Here, the court quoted the Tenth Circuit case, Kitchen v. Hebert, saying: “Thus childrearing, a liberty closely related to the right to marry, is one exercised by same-sex and opposite-sex couples alike, as well as by single individuals.” Minute Entry Ruling, Constanza, supra n. 3 (quoting Kitchen, supra n. 19).
27. Minute Entry Ruling, Constanza, supra n. 3.
28. Id.
from other states.\textsuperscript{29} The defendants contended that the Full Faith and Credit Clause does not require the state of Louisiana to recognize the out-of-state marriage because “[o]ne State’s marriage is not a ‘judgment’ that merits full faith and credit in another State.”\textsuperscript{30} Citing two older Supreme Court cases directly on point,\textsuperscript{31} the court agreed with the petitioners’ arguments on this point, finding that marriage has, historically, been recognized as a judgment that merits full faith and credit in another state.\textsuperscript{32}

The constitutional analysis set forth by the court is very strong on its own, but the court increases the strength of the argument by using the state’s strong policy of promoting intact families and making decisions in the best interest of the children.\textsuperscript{33} The defendants argued that Louisiana’s marriage and adoption laws are linked to the furtherance of two state interests: “a) linking children to intact families formed by their biological parents, and b) ensuring that fundamental social change occurs through widespread social consensus.”\textsuperscript{34} Citing the ruling from \textit{Meyer v. Nebraska}, the court stated that the right to marry and raise children is a fundamental right and that the petitioners “are in a better position than the state to make decisions regarding the custody and care of the child.”\textsuperscript{35} The court added that “there is no rational connection between Louisiana’s laws prohibiting same-sex marriage and its goal of linking children to intact families formed by their biological parents, or ensuring that fundamental social

\textsuperscript{29.} \textit{Id.}
\textsuperscript{32.} In \textit{Milwaukee County}, the Court held that “the public policy of the forum state must give way,” because the “very purpose of the full-faith and credit clause was to alter the status of the several states as independent foreign sovereignties.” In \textit{Sherrer}, the Court ordered Massachusetts to give full faith and credit to a Florida divorce decree.
\textsuperscript{33.} Minute Entry Ruling, Costanza, supra n. 3.
\textsuperscript{34.} \textit{Id.}
\textsuperscript{35.} \textit{Id. (citing Meyer v. Nebraska).}
change occurs through widespread social consensus.”36 Since Louisiana already allows adoptions by foster parents and those with no biological link to the child, according to the court here, it would be illogical to say that intact families are only those that are formed by a child’s biological parents.”37

The court addressed Louisiana’s Defense of Marriage Act and adopted the reasoning set forth in United States v. Windsor, where the U.S. Supreme Court struck down the Defense of Marriage Act because “it found that the purpose of that Act [was] to influence or interfere with the state’s sovereign choices about who may be married.”38 Quoting Windsor, the court added: “DOMA’s principal effect is to identify and make unequal a subset of state-sanctioned marriages. It contrives to deprive some couples married under the laws of their state, but not others, of both rights and responsibilities. [T]hough Congress has great authority to design laws to fit its own conception of sound national policy, it cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment.”39 Though U.S. v. Windsor struck down the federal DOMA for violating the Due Process Clause of the Fifth Amendment, the state laws and legislation must comport with the Due Process Clause of the Fourteenth Amendment.40 Finding that Louisiana’s DOMA was drafted with almost the exact language of the federal DOMA, the court ruled that the constitutional provision is unconstitutional under the Due Process Clause of the Fourteenth Amendment.

V. CONCLUSION

There is no question that the face of what constitutes a “family” is changing. Our society’s view of same-sex marriage has

36. Id.
37. Id.
38. Id. (citing United States v. Windsor).
39. Id.
40. The Fourteenth Amendment of the United States Constitution incorporated the Bill of Rights against the states.
slowly shifted from disapproval and prejudice towards same-sex couples to an attitude of tolerance and many are proponents of equal protection of gay couples under our laws. With increasing pressure from the public to change the laws that discriminate against same-sex couples and increasing splits in the state court system, the final word on same-sex marriage may soon be pronounced by the Supreme Court of the United States. Though there is a large portion of the population who advocate for marriage rights for same-sex couples, there are still those who favor the traditional recognition of marriage between a man and woman only.

This case illustrates a coming change in the United States and a remarkable turn in state court adjudication. Southern states, in general, strongly favor the traditional approach. This makes the courage displayed by the Honorable Judge Rubin ruling all the more commendable. In order to effect widespread change, the state courts need to keep producing opinions striking down the state laws that unconstitutionally deprive same-sex couples of their rights. There will be more rulings like Judge Rubin’s, moving up through the court system and signaling the need for the Supreme Court to hear and ultimately decide the legality of same-sex marriage in the United States. Until that time, state court judges will play a prominent role in applying pressure to state legislatures to repeal their discriminatory laws.41

41. Since the presiding district judge, the Honorable Judge Rubin, declared provisions of Louisiana’s state law unconstitutional, the Attorney General was entitled to a direct appeal to the state’s Supreme Court. The appeal is currently pending and was argued before the Louisiana Supreme Court January 25, 2015.
LESION BEYOND MOIETY; LA MOITIÉ DE QUOI, EXACTEMENT?

RESCISSION NOT SUPPORTED BY MINERAL SPECULATION: HARRUFF V. KING

Leona E. Scoular*

Recently, in Harruff v. King,1 the Louisiana Third Circuit Court of Appeal considered whether sellers may seek rescission for lesion beyond moiety when the fair market value of the land is later estimated to be much higher on account of the speculated value of undeveloped minerals in the land.2 In its analysis, the Harruff court relied on several provisions of law, including the articles of the Civil Code that pertain to rescission of sales for lesion beyond moiety;3 the sections of the Mineral Code that prohibit rescission of sales of mineral rights for lesion beyond moiety;4 Louisiana jurisprudence regarding, first, the evidentiary standard required for rescission for lesion beyond moiety,5 second, the rights that accompany ownership of immovable property,6 and, finally, the “speculative nature” of minerals.7 The analysis takes a significantly different turn than the First Circuit used in the case of Hornsby v. Slade, which dealt with the same general issue.8

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1. Harruff v. King, 2013-940 (La. App. 3 Cir. 5/14/14), 139 So. 3d 1062.
2. Id. at 1064.
3. LA. C.C. art. 2589.
5. See Cascio v. Twin Cities Development, LLC, 45,634–CA (La. App. 2 Cir. 9/22/10) 48 So. 3d 341; and Dosher v. Louisiana Church of God, 71 So. 2d 868 (La. 1954).
I. BACKGROUND

Plaintiffs in this case are the sellers, two sisters, Tammy Renea Martin Harruff and Amy Lynn Bilodeau (hereinafter "the sisters"), who sold their undivided interests in two tracts of land located in Natchitoches Parish and Red River Parish, near the Haynesville Shale, to defendants, Richard King, Kyle King, and Renee King (hereinafter "the Kings"). A subsequent purchaser of the same undivided interests in the same immovable property, Edgar Cason, is also a plaintiff in this matter. The first sale, to the Kings, was executed on July 21, 2009 for the price of $175,000.00. The second sale, to Edgar Cason, was executed on November 30, 2009 for the price of $375,000.00. After the second sale, plaintiffs filed a petition seeking rescission of the first sale for lesion beyond moiety in the Tenth Judicial District Court for the Parish of Natchitoches. The sisters presented testimony by expert witnesses as to the fair market value of the property sold and the trial court acknowledged that there was evidence of the value of mineral rights in the area. The trial court granted rescission for lesion beyond moiety, finding the fair market value of the sisters’ undivided interests in the two tracts of land totaled $687,061.08. 

Defendants appealed alleging six assignments of error. Pertinent to the discussion of lesion beyond moiety are the first three assignments of legal error and manifest error. The first asserts that the trial court erred by allowing the valuation of speculative gaseous minerals. The second asserts that the trial court erred by valuing the property as a mineral-producing property rather than a recreational property, the valuation being of

9. Harruff, 139 So. 3d at 1064.
10. Id.
11. Id. at 1064-65.
12. Id. at 1065.
13. Id.
14. Id.
15. Id.
16. Id. at 1065-66.
17. Id.
a different state than the property was in at the time of the challenged sale. 18 The third asserts that the trial court erred in making a finding of fact regarding the valuation reports by mixing the reports of two experts and adding a purported mineral valuation to achieve the amalgamated value awarded. 19 The Third Circuit’s ruling on the first assignment of error determined the second and third assignments of error. 20

II. DECISION OF THE COURT

The Third Circuit reversed the decision of the Tenth Judicial District Court, that had granted rescission of a sale of land based on lesion beyond moiety, on the grounds that lesion beyond moiety does not apply to the speculated value of minerals in the land that have not been accessed. 21 The court determined that the value of undeveloped minerals is too speculative to be included in the fair market value considered as the basis of a claim for rescission for lesion beyond moiety. 22 The competing facts of the case were opposing expert witness valuations of the immovable property that was the subject of the July 21, 2009 sale to the Kings. 23 The court reviewed whether the Tenth Judicial District Court’s decision was legally correct or incorrect 24 and reviewed findings of fact under the manifest error rule. 25

The Harruff court first considered Louisiana Civil Code article 2589, which provides for rescission of the sale of a corporeal

18. Harruff, 139 So. 3d at 1066.
19. Id.
20. Id. at 1070-71.
21. Id. at 1070.
22. Id.
23. Id. at 1068-69.
24. Id. at 1066 (citing Dugan v. Gen. Servs. Co., 01-511 (La. App. 3 Cir. 10/31/01) 799 So. 2d 760, 763, writ denied, 841 So. 2d 942 (La. 2002) (trial court’s erroneous application of law eliminates trial court’s entitlement to deference by the reviewing court)).
25. Id. at 1066 (citing Cormier v. Comeaux, 98-C-2378 (La. 1999) 748 So. 2d 1123 (setting forth a two-part test for reversing factual findings: no reasonable factual basis for finding in record and record shows finding is manifestly erroneous or clearly wrong)).
immovable for lesion beyond moiety. The seller may rescind the sale of a corporeal immovable when the price is less than one half of the fair market value of the thing.\(^{26}\) The Louisiana Supreme Court held in *Jones v. First National Bank, Ruston, Louisiana* that the value of an immovable includes the value of mineral interests or rights when the mineral interest or right is sold with the immovable.\(^{27}\) The mineral rights in an immovable are included in the bundle of rights that make up the ownership of the underlying immovable and are therefore part of the corporeal immovable.\(^{28}\) A seller petitioning for rescission for lesion beyond moiety must show “clear and exceedingly strong evidence” that the fair market value of his property is more than twice the price in the challenged sale.\(^{29}\)

Second, the *Harruff* court shifts its analysis over to mineral rights and away from corporeal immovables.\(^{30}\) The court states that the nature of minerals is speculative\(^ {31}\) and this prevents the valuation of minerals.\(^ {32}\) Louisiana Mineral Code article 6 provides that the ownership of land does not include the ownership of liquid or gaseous minerals, but only the exclusive right to explore and develop the land for the production of minerals and to reduce them to possession and ownership.\(^ {33}\) Louisiana Mineral Code article 17 prohibits rescission of a sale of a mineral right for lesion beyond moiety.\(^ {34}\)

The Third Circuit comes back to the plaintiffs’ failure to meet the high evidentiary standard of “clear and exceedingly strong evidence” as reason for reversing the lower court’s judgment for

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26. LA. C.C. art. 2589.
28. *Harruff*, 139 So. 3d at 1067.
29. *Id.* at 1067-68 (citing *Pierce v. Roussel*, 79 So.2d 567, 571 (La. 1955)).
30. *Id.* at 1069.
31. *Id.* at 1069 (citing *Wilkins v. Nelson*, 99 So. 607 (La. 1924)).
32. *Id.* at 1069 (citing *Cascio v. Twin Cities Development, LLC*, 45,634-CA (La. App. 2 Cir. 9/22/10) 48 So. 3d 341).
33. *Id.* at 1069.
34. *Id.* at 1070.
lesion beyond moiety. The estimates of the sisters’ expert witness were based on many assumptions beginning with the assumption that the mineral rights would ever be leased and that minerals would ever be produced. The Third Circuit determined that the sisters’ expert witness testimony was merely “speculation laced with hopeful thinking.” The Third Circuit held that the trial court erred in relying on the sisters’ expert witness and found that the sisters’ real estate expert’s estimate of the value of the land, without any consideration of the value of mineral interests, was the best evidence of the fair market value of the land, that is $166,400.00.

III. COMMENTARY

The Third Circuit in Harruff discusses provisions of the Louisiana Mineral Code and the “speculative nature of minerals” more than the basic evidentiary burden. The discussion of the treatment of mineral rights does not assist in resolving the issue in the case. Louisiana Mineral Code article 17 applies to mineral rights, which are the exclusive rights discussed in Louisiana Mineral Code article 6 once they have been segregated from the ownership of the underlying immovable. In this case, the plaintiffs sold the whole ownership of the immovable property including those exclusive rights discussed in Louisiana Mineral Code article 6. Even considering the sale of land valued primarily

35. Id. at 1069.
36. Id. at 1070.
37. Id. at 1069.
38. Id. at 1070-71.
39. Id. at 1069.
40. See also LA. MIN. CODE art. 16 (providing an illustrative list of mineral rights and that all mineral rights are created by the landowner), and LA. MIN. CODE art. 2 (providing that the provisions of the Mineral Code only apply when the Mineral Code expressly or impliedly provides for a particular situation), and LA. MIN. CODE art. 2, cmt. (explaining that the article was intended to prevent the application of the Mineral Code to other types of controversies properly resolved under the Civil Code because the Mineral Code was tailored to meet the special needs of Louisiana’s mineral industries).
on speculation that there may be minerals accessible from that land falls within the scope of Louisiana Mineral Code article 17, this would preclude the remedy of lesion in all such cases, defeating the public policy concerns reflected in Louisiana Civil Code article 2589. Therefore, Louisiana Mineral Code article 17 does not apply to this case. Further, the Third Circuit discussed jurisprudence recognizing the “speculative nature of mineral exploration” without any authority to connect a speculative nature with an absolute inability to meet the evidentiary standard and in spite of the case of Jones v. First National Bank, Ruston, Louisiana. The trial court relied on Jones for the rule that when land and mineral interests are sold together, the mineral interests are to be included in the value of the immovable property. The Louisiana Supreme Court in Jones reversed the dismissal of a petition for rescission for lesion beyond moiety when, considering mineral interests, the property value was increased by more than twice as much. The one significant distinction between Jones and this case is that mineral leases were executed between sale and the lesionary claim in Jones, providing more evidence of value for the Jones court to consider than was available to the Third Circuit in Harruff.

The approach taken by the Third Circuit to the lesion issue presented in this case can be contrasted with that taken by the Louisiana First Circuit Court of Appeal in Hornsby v. Slade in 2003 on similar facts. Plaintiff-appellee Hornsby sold her interest in a tract of land to defendant-appellant Slade and later sought rescission for lesion beyond moiety. Hornsby asserted that the fair market value of the land, which featured significant deposits of gravel (a kind of mineral), was more than double the sale price considering the value of the gravel. The First Circuit majority concluded, consistent with the Louisiana Supreme Court’s holding

41. Hornsby v. Slade, 2002 CA 2138 (La. App. 1 Cir. 8/20/03) 854 So. 2d 441.
42. Id. 442.
43. Id.
in *Jones*, that when the passing of mineral rights was with the sale of the underlying immovable, the sale is subject to rescission for lesion beyond moiety because the value of the minerals increases the value of the land.\(^44\) The First Circuit majority distinguished this from the sale of segregated mineral rights, which are incorporeal immovables, and not subject to rescission for lesion beyond moiety.\(^45\) The analysis of the First Circuit majority turned on corporeality, perhaps because it considered the value of the mineral rather than the value of the mineral right.\(^46\) Gravel is a solid mineral; solid minerals are an integral part of the land and therefore corporeal movables.\(^47\) The mineral right to gravel, when segregated from the bundle of rights belonging to the owner of the underlying immovable, is an incorporeal immovable and not subject to rescission for lesion beyond moiety.\(^48\) The First Circuit majority specifically referred to “mineral rights” as being insusceptible of lesionary inquiry because of their speculative nature, not the estimated fair market value of minerals in the sale of an underlying immovable.\(^49\) The *Hornsby* majority affirmed the lower court’s judgment for rescission for lesion beyond moiety because the sale was of a corporeal immovable and the fair market value of the immovable was more than twice the sale price.\(^50\)

Judge McClendon dissented from the majority opinion in *Hornsby*, reasoning that Louisiana Mineral Code article 17 may apply to the sale of immovable property in cases where there are minerals beneath the surface of the property.\(^51\) The underlying argument, which is perhaps not as clearly articulated as one might have hoped, seems to be that the Mineral Code provisions apply in this case because the disputed amount contributing to a fair market

\(^{44}\) Id. at 445.
\(^{45}\) Id. at 445-46.
\(^{46}\) Id.
\(^{47}\) Id. at 445.
\(^{48}\) Id. at 445.
\(^{49}\) Id. at 445-46.
\(^{50}\) Id. at 446.
\(^{51}\) Id.
value more than double the sale price is based on the value of minerals or mineral rights. Judge McClendon criticizes the majority for considering the value of gravel instead of considering the value of the mineral right to explore, mine, and remove gravel; and thereby stopping the analysis because the sale of mineral rights are not subject to rescission for lesion beyond moiety. Indeed, because the minerals do not exist for the purpose of ownership until they are extracted, it may seem illogical to consider their value in a valuation of the land containing them. Further, because what is sold is the mineral right in the bundle of rights that comprise ownership of the land and because lesion beyond moiety is not a ground for rescission of a sale of mineral rights, it seems to follow logically that a sale of land may not be rescinded when the difference in value is based on the valuation of mineral rights.

The Harruff court did not follow the approach suggested by Judge McClendon, and with good reason. His approach requires us to treat a contract of one type as though it were really a different type of contract. Judge McClendon is essentially proposing that, under certain circumstances, we treat a deal that is structured as a sale of immovable property as though it were a sale of a segregated mineral right. There is no sound legal basis for treating one conventional obligation as though it were some other conventional obligation, save, perhaps, where the obligation is simulated. It is a settled principle that even when a conventional obligation purports to be something other than the type of conventional obligation it really is, a simulation, the obligation must be treated as it really is between the parties. But in Hornsby, as in Harruff, there was no

52. Id. at 447-48.
54. Jones, 41 So. 2d at 813 citing La. C.C. art. 505.
55. LA. MIN. CODE art. 17.
57. See La. C.C. arts. 2026-2027.
simulation: the parties did not really intend to transfer just a mineral interest on the land in question; rather, they intended to transfer the entire ownership of that land. Unfortunately, the Third Circuit likewise muddled the distinction between valuation of minerals as part of the value of immovable property and the value and sale of a mineral right.

Nor did the Harruff court follow the approach suggested by the Hornsby majority. The Harruff court examined the mineral value as though it were the value of a mineral right segregated by the owner of the underlying immovable. The court need not seek to extend the limitation to only corporeal immovables of lesion beyond moiety to exclude mineral values in all cases because the evidentiary standard is high enough to prevent rampant lesionary claims that may be lacking in merit. Further, the case may arise wherein the value of undeveloped minerals in immovable property can be shown with clear and exceedingly strong evidence, but in the Third Circuit, that case will now have to challenge the precedence set by Harruff.

The Harruff court could have used the same analysis as the Hornsby court and determined that lesionary inquiry is appropriate, but the court still could have held that rescission is not appropriate in this case. Considering the high evidentiary standard, requiring “clear and exceedingly strong evidence,”58 and the court’s determination that the sisters’ expert witness testimony was merely “speculation laced with hopeful thinking,”59 it was not necessary for the court to discuss the “speculative nature of minerals” as a general principal that would apply to any case of undeveloped minerals.60 The evidentiary standard was simply not met in this case,61 but this should not preclude all future sellers from proving

58. Harruff, 139 So. 3d at 1067 (quoting Pierce v. Roussel, 79 So.2d 567, 571 (La. 1955)).
59. Id. at 1069.
60. Id. at 1070.
61. Id. at 1069-70.
by clear and exceedingly strong evidence the fair market value of undeveloped minerals in immovable property they have sold.
RECENT EVOLUTION OF THE CIVIL LAW IN CHILE:
THE RISE OF DOCTRINE

Carlos Felipe Amunátegui Perelló*

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I. INTRODUCTION

The latest developments in private law in Chile do not come from anything as exciting as a legal reform of the Civil Code\(^1\) or from the enactment of any miscellaneous legislation. On the contrary, Private law seems to have kept its same legal framework, while the political powers have refrained from introducing radical innovations. This would appear as a rather uninteresting atmosphere for a comparatist, but this is not really the case. Under this quiet appearance, legal developments have been emerging at a faster pace than at any previous point in Chile’s History,\(^2\) and

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1. The last amendment of the Civil Code was a fairly anodyne modification of the rules concerning presumptive death (L.20577 of February 2012). Before that, there was the massive reform of filiation, which was done in 1998 (L. 19.585), but being so old, it should not concern us, for it’s not what one would call a recent development.

2. Just to quote some recent developments, Immissions theory has appeared in Chilean Private law as a way to deal with environmental issues (see Carlos Felipe Amunátegui Perelló, Derecho Civil y Medio Ambiente (Thomson Reuters 2014)); economic analysis of law has entered the reasoning of judges in the distribution of the risks (see Cristián Aedo Barrena, El concepto normativo de la culpa como criterio de distribución de riesgos. Un análisis...
some developments that were intended to be introduced by legislation, have been implemented by the Chilean Supreme Court for strictly dogmatic considerations before any reform was enacted.3

This is rather surprising for a country that has always been proud of its strictly positivistic tradition.4 Just twenty-two years ago, in 1992, when I happened to begin my legal studies, the President of the Supreme Court declared in his inaugural speech: “The law is determined by the political powers—the Legislative power and the Executive Power—and it is for them to declare what is just and what is not. The judge may not discuss nor doubt the fairness of the Law.”5

3. A very controversial case was recently decided by the Supreme Court regarding the prohibition of hiring strike-breakers. This issue was on the legislative agenda, but it was still not enacted. The Supreme Court decided on the 4th of December 2014 that the interpretation of the statute allowing an employer to hire such personnel (art. 381 of the Labour Code) did not fulfil Chile’s international obligations according to the ILO Conventions Nos. 87 and 98, and that the Labour Code should be interpreted harmoniously with Chile’s international responsibility.


5. “ . . . [L]a ley la dicta el poder político—Poder Legislativo y Poder Ejecutivo—y ellos dicen lo que es justo, sin que sea permitido al juez discutir o dudar de la justicia que la ley encierra” (Diario Oficial de Chile, 15th of March, 1992). The speech was given by the President of the Supreme Court on the 1st of March, 1992. See comments in: Bravo Lira, supra note 4 and Barahona González, supra note 4.
This statement, which seems to be taken straight out of the nightmares of the École de l’Exégèse, was actually the very state of art in legal science in the post-dictatorial Chilean atmosphere. Twenty years ago, civil law was a rather sleepy subject. Most of the reference works were decades old—mainly from the early 30’s and ‘40s—while the law courts were accustomed to applying a rather simplistic reasoning inherited ultimately from long-gone Pandectism. Comparative approaches were rare and historic perspectives were simply out of reach. Nevertheless, this unpromising panorama has radically changed during the last two decades in a completely unpredicted fashion. Nowadays, private law has become one of the most vibrant areas in Chile. This is due to the emergence of a new element in Chilean legal tradition, academic research.

Although the role of the jurist in Civil law traditions can never be overstated, one of the main problems of Chilean private law was the lack of legal research. Generally speaking, there was little research done in universities, for legal scholars were usually lawyers recruited from the bar who had little academic training. Publications were usually handbooks, small in scope, which intended to simplify earlier (European) works and make them accessible to students.

To put some numbers on it, we would like to recall an interesting work published by Joel Gonzalez in 2005. It was an index of all private law literature published from Chilean independence (1810) through the day of its publication. It included some twelve hundred works. Its second edition is now almost complete, and the number of entries in the book has more than doubled. That is to say, in the last ten years more legal literature

6. On the matter, Peter Stein’s opinion remains a classic, which puts the jurist at the core of the difference between Civil law and Common law. See Peter Stein, Judge and Jurist in the Civil Law: A Historical Interpretation, 46:2 La. L. Rev. 241-57 (1985).

has being produced than in the preceding two hundred years. These numbers are eloquent: legal research is rising at a fairly fast pace. This is the result of very recent developments in legal education, which this report intends to summarize. To do so, we will take an historical perspective by examining legal education and legal scholarship in Colonial Chile; the nineteenth and twentieth centuries; and finally the current developments.

II. JURISTS AND LEGAL EDUCATION IN COLONIAL CHILE

The role of jurists in the Spanish colonies begins in a rather bizarre way. At the beginning of the conquest, lawyers were forbidden to cross the ocean and enter the Spanish possessions in America. In 1509, a royal order (Real Cédula) was enacted by Charles V forbidding lawyers to enter America unless they held a special license given by the king. The argument given was that lawyers promote litigation and social unrest. Probably, this potential unrest must be seen in the light of the brutal behaviour of the conquistadors and the emerging controversy about the legitimacy of the Spanish conquest. In any case, in 1526, the prohibition was replaced by the need of a special license from the Crown, after it received a petition from the Mexican city house (cabildo).

During the conquest of Chile, in the royal charter given to the Conquistadors to occupy the territory that will eventually become

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9. The document was published in Colección de Documentos Inéditos Relativos al Descubrimiento, Conquistarte y Organización de las Antiguas Posesiones Españolas de Ultramar (Real Academia de la Historia 1890) 187-93.
10. The relevant part says in archaic Spanish:
   ... [A]nsi mismo porque yo he seydo ynformado que a cabsa de aver pasado alas dichas yndias algunos letrados abogados han subcedido en ellas muchos pleitos e diferencias yo vos mando que de aquí adelante no dexeys ny consyntays pasar a las dichas yndias ningund letrado abogado syn nuestra licencia e especial mandado que sy necesario es por esta presente cédula lo vedamos e proyvimos.
Chile,\textsuperscript{11} this prohibition was maintained and lawyers were forbidden to enter the territory. However, a few years later, in 1560, the disposition was relaxed and replaced with a general licence for anyone who wished to go into the Spanish colonies.\textsuperscript{12} This included lawyers, who were thus no longer specifically forbidden to enter America. Nevertheless, even before that time, many lawyers were in fact present in the Spanish colonies. The first one to enter Chile did so in 1549.

While the literacy levels in the Spanish Empire were never high, in sixteenth-century Chile they were definitely poor. Some of the founders of Santiago were not even able to write their names, and most of them did so only with difficulty.\textsuperscript{13} The only places where their children could get some kind of education were in the schools founded by religious orders. Given the absence of any institution that could provide higher education in the entire South Cone region during this historical period, these religious orders, backed by the authority of canonical regulations,\textsuperscript{14} established two pontifical universities in Santiago. However, neither of these taught law, and the descendants of the Conquistadors had to travel to Lima in order to get a legal education at the Royal University of San Marcos, an extremely expensive endeavour, according to the

\begin{footnotesize}
\begin{enumerate}
\item These are the \textit{capitulaciones} made for Simón de Alcazaba in 1526, Diego de Almagro, Pedro de Mendoza and again Simón de Alcazaba in 1534, Francisco de Camargo in 1536 and Sancho de la Hoz in 1539. See González Echeñique, \textit{supra} note 8, at 26.
\item See \textit{RECOPILACIÓN DE LEYES DE LOS REYNOS DE LAS INDIAS}, law 1, tit. 26.b. IX (A. Ortega 1774) [hereinafter \textit{RECOPILACIÓN DE LEYES}].
\item JOSÉ TORBIO MEDINA, \textit{LA INSTRUCCIÓN PÚBLICA EN CHILE} 13 (Elzeviriana 1905) [hereinafter \textit{INSTRUCCIÓN PÚBLICA}].
\item These regulations established that in territories which were at least 500 miles away from a Royal University, the religious orders could found one (\textit{RECOPILACIÓN DE LEYES}, \textit{supra} note 12, at law 2, tit. 22, book 1). Following this provision, both the Dominicans (1621) and the Jesuits (1617) established their own private universities. On the matter, see MEDINA, \textit{id.} at 168-69; González Echeñique, \textit{supra} note 8, at 82-89; and Bravo Lira, \textit{supra} note 4, at 85-106.
\end{enumerate}
\end{footnotesize}
documents of the period. In fact, this was one of the main reasons cited by Santiago’s town hall (cabildo) when it asked King Phillip V to establish a Royal University in Santiago in 1713. According to the cabildo, there were very few lawyers in Chile and it was almost impossible for Chilean families to send their sons to Lima.

After twenty-five years of struggle—and the complete assumption of all the costs by the cabildo of Santiago—on the July 28th 1738, the King allowed a grant to found the University for Chile. It was named after the king, Real Universidad de San Felipe.

Although there are many reasons to give credit to the Spanish Crown for the quality of its universities in America, the Real Universidad de San Felipe should not be counted as an achievement. It was probably one of the poorest universities in the whole of the Spanish Empire, and also one of the most corrupt. The total budget (5000 pesos) was less than the salary of the president of the University of Salamanca at the time (8000 pesos). In any case, this admittedly small budget was administered irresponsibly\(^\text{17}\) and the University was unable to pay its

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15. There were even some scholarships awarded, but they seem not to have been enough for the needs of the kingdom. See González Echeñique, supra note 8, at 60.

16. The text of the petition was published for the first time in Medina, Instrucción pública, supra note 13, at 381. On the matter it says:

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\text{Y que lo persuadió al dicho señor alcalde el hacer esta propuesta el considerar que los vecinos de esta ciudad, que con tanta liberalidad contribuyen á la dicha balanza, escaseándolo aún de lo preciso de sus familias, se hallen atrasados y sumamente pobres, y que por falta de medios dejan de remitir sus hijos á la Real Universidad de San Marcos de Lima, donde, después del peligros y contingencias de una dilatada embarcación, son los gastos excesivos y que no pueden sofrir sus caudales . . . y que bien les constaba á los dichos señores cuan falto se hallaba el reino de personas peritas en la Facultad de Cánones y Leyes para cualquier duda ó consejo que se pudiese tomar, y que los negocios eran muchos y muy graves, y que hoy sólo se hallaban tres abogados seglares y dos eclesiásticos, y que no discurria que por ahora hubiese vecino de este reino que tuviese ánimo de remitir un hijo suyo á estudiar á la dicha Universidad de los Reyes, por los crecidos gastos, que cada día van en aumento.}
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17. The University used to spend a large part of its budget in expensive ceremonies and parties, as for instance, on the reception of a new governor of Chile. See Alejandro Fuenzalida Grandón, Historia del desarrollo intelectual en Chile 23-24 (Universitaria 1903).
To solve its economic problems, the University sold doctoral titles under the name of indulgencies (*indulgencias*). Although this procedure was not unique to the University of San Felipe, being in use at other Spanish universities, nowhere else was the practice so widespread and systematic. Starting with its first president, Tomás de Azua, who gave himself the title of *doctor utrusque iuris* immediately after being appointed and eight years before any law lesson was given in the University (1748), many members of the Chilean aristocracy paid good money for the privilege of being called doctor.

In fact, the construction of the University’s building was paid for through the selling degrees. This was so notorious that in 1758, when the University finally was opened for students, its council decided to never again give the title of doctor to anyone who had not completed the proper studies. Of course, this decision was not followed and soon the university lapsed back into its old business. In 1785, the ruinous economic state of the University propelled its authorities to push matters even further. The University opened a market of degrees (*feria de grados*) where 25 titles were auctioned. This procedure was repeated several times during its history. Some of these titles were transferrable, so the fortunate doctor could even sell it again!

Regardless, the model followed in the creation of the University was the Real Universidad de San Marcos in Lima, whose constitutions were adopted by the Real Universidad de San Felipe. Law was by far the most important subject at the

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18. Fuenzalida, one of the most important historians that studied the institution, says that the most frequent excuse given by the professors not to give their lectures was that they were not paid on due time. See Fuenzalida Grandón, *id.* at 34.
20. Miguel Luis Amunátegui reports that some of the building materials were brought to the Monjes Mercedarios in exchange for three titles of doctor in Theology. See Amunátegui, *id.* at 16.
University, and out of ten chairs, there were four for law. 23 These were: 1) Institutas, where the basics of Roman law was taught through the Institutes of Justinian, and perhaps the comments by Vinnius; 2) Prima de Leyes, for Digestum Infortiatum; 24 3) Prima de Cánones, for Gregory IX’s Decretals; and 4) Decreto, 25 for the Decretum Gratiani. 26 It should be noted that both professors and students systematically skipped classes and that the University was never able to impose a strict schedule. Just two years after its inauguration, the President of the University, José Valeriano Ahumada, decided to check the contents of the student’s notebooks. Most of them were simply blank and no notes had been taken. 27 In fact, very few lessons were probably ever given in the University. A description of its academic activities given in 1795 says that the whole academic year was reduced to four months of one-and-a-half hours of daily classes. 28

We should add that the University lacked a library, and it was only able to get one after the Jesuits were expelled from Chile in 1767 and the University finally got their books in 1771. 29 Of course, the Jesuits were not teaching law, so their library was focused on philosophy and theology. In these conditions, with very few classes, no notes taken and no library, it seems rather difficult to imagine what kind of legal education could be given. The University was basically focused on taking exams while the

23. See the Real Cédula that created the University in Amunátegui, supra note 19, at 5.
25. The Governor of Chile appointed these chairs. They were granted for the first time in 1755, a year before the University was formally opened for students. See Fuenzalida Grandón, supra note 17, at 5.
26. See Alejandro Guzmán Brito, La enseñanza de Derecho en Chile. Historia y perspectivas, 25 Anales del Instituto de Chile 315 (2005-6) [hereinafter Enseñanza de Derecho].
27. See José Torbío Medina, 1 Historia de la Real Universidad de San Felipe de Santiago de Chile 66-67 (Universo 1928).
28. The description was given by Francisco Javier Errázuriz in 1795. It was published in Fuenzalida Grandón, supra note 17, at 102.
29. See Fuenzalida Grandón, supra note 17, at 54.
students learned the subjects privately, either with private teachers or in the Colegio de San Carlos, which was established in 1769, after the expulsion of the Jesuits. In 1813, shortly after gaining independence, this was the critical judgement made by congress to the University: “The University, considering its constitution, is more of a house for tests than an educational establishment.”

Not surprisingly, no legal work is known from Colonial Chile. There were, however, some written by Spanish public servants who happened to be in Chile during Colonial period. None of these were published in Chile, for there was no printing press there until 1812, just two years after the beginning of the Independence process.

III. Bello’s University

During the struggle for Independence, which started in 1810, public education was one of the many targets addressed by the spreading revolution. In fact, in 1811 a complete plan to replace the Colonial educational model was presented to the newly established Congress. The plan consisted of the fusion of all public educational establishments in Chile into a unified institute, which would be responsible for all branches of higher education. This institution, the Instituto Nacional, would conduct classes and give exams, leaving the old Royal University as a mere academy with the task of giving degrees. In 1813, during the thick of the

30. González Echeñique, supra note 8, at 163.
31. 1 SESIONES DE LOS CUERPOS LEJISLATIVOS DE LA REPÚBLICA DE CHILE, 1811 A 1845 at 297 (Cervantes 1887) [hereinafter 1 SESIONES DE LOS CUERPOS LEJISLATIVOS].
32. We know of eight works. The first one was written in 1633, and the last one was published after the Independence. See González Echeñique, supra note 8, at 189.
33. See 1 SESIONES DE LOS CUERPOS LEJISLATIVOS, supra note 31, at 173-78.
Independence wars, the proposed Institute was founded by order of the Junta de Gobierno, the Senate and Santiago’s cabildo.\textsuperscript{34}

Although the educational model had the appearance of a seminary, for students were supposed to pray daily and perform many kinds of spiritual exercises, the foundation of the Instituto Nacional meant a massive reorganization of legal education. The old vice of selling university titles was strictly forbidden and the grant of any degrees without taking the proper exams banned.\textsuperscript{35} In fact, the doctor title altogether fell into oblivion, probably due to the monarchical overtones and tradition of doubtful value.\textsuperscript{36}

As we have noted, the old University of San Felipe, following the medieval tradition, did not teach positive law, but centred its studies in Roman and cannon law. The newly founded Instituto did precisely the opposite and supressed Roman law, replacing its study with positive law. It consisted of two chairs, one for Natural Law and ius Gentium, where Political Economy was also taught, and another one for Positive and Cannon Law. One of the main innovations was the use of printed texts for classes.\textsuperscript{37} During the colonial period, there were no printing presses in Chile, and the importation of books was difficult due to the Colonial administration system. The lack of books forced legal teaching to depend heavily on oral transmission and tradition. In the newly

\textsuperscript{34} See 1 SESIONES DE LOS CUERPOS LEJISLATIVOS, supra note 31, at 289-322.
\textsuperscript{35} See DOMINGO AMUNÁTEGUI SOLAR, LOS PRIMEROS AÑOS DEL INSTITUTO NACIONAL (1813-1835) at 153 (Cervantes 1889).
\textsuperscript{36} The title was not formally abolished. In fact O‘Higgins, promulgated a decree restricting legal profession to those who held a doctoral degree in 1821, but it was never enforced. In 1832 the doctoral degree was simply not contemplated in Higher Education and it was absent from legal studies until the 21st century. See Guzmán Brito, supra note 26, at 289.
\textsuperscript{37} Natural Law was taught using ELEMENTA IURIS NATURAE ET GENTIUM by Johann Gottlieb Heineccius, Political Economy through Adam Smith’s classic THE WEALTH OF NATIONS, and Jean-Baptiste Say’s CATÉCHISME D’ÉCONOMIE POLITIQUE. In Positive law, which was nothing more than Castilian law, Ignacio Jordan de Asso and Miguel de Manuel’s INSTITUCIONES DEL DERECHO DE CASTILLA was the preferred text. Cannon law was taught with the aid of Giovanni Devoti’s INSTITUTIONUM CANONICARUM LIBRI QUATUOR. See Guzmán Brito, Enseñanza de Derecho, supra note 26, at 316.
founded Instituto, however, books were finally at the core of legal studies.

The Instituto Nacional was closed shortly after its inauguration due to the success of Loyalist faction in the battle of Rancagua (1814), but when the country was finally under the control of the revolutionaries, it was reopened in 1819, closely following its original model.

The inauguration of the Instituto Nacional left two oddities in the newly borne Chilean educational model. First, the University was kept solely as a Science Academy, which awarded higher education degrees but had no direct role in legal education. Second, it was possible for a student to learn all of the subjects privately and still earn a degree by taking the proper exams in the Instituto. These two features will be central to the Chilean educational system during the whole period being reviewed.

The low educational quality of the Universidad de San Felipe left a stigma on the University system. During the early Republic, the competences of the University were restricted to a minimum. In fact, when the President of the University of San Felipe claimed that students of the University could take exams independently from the Instituto, the University was simply closed. The Universidad de Chile, which was established to replace it, was more of an academy than a University, but it had more control over the education given at the Instituto than the University of San Felipe did; its professors could integrate the commissions that administered the exams and the University established the educational curricula, which led to university degrees. So, in a

38. The professors of the University of San Felipe and even some of the students pressed the Spanish general Mariano Osorio into re-establishing the old educational regime. See AMUNÁTEGUI SOLAR, supra note 35, at 183.
39. This was the famous Decreto Egaña that also created the Universidad de Chile. For details, see AMUNÁTEGUI SOLAR, supra note 35, at 475.
40. Mario Baeza Marambio, ESQUEMA Y NOTAS PARA UNA HISTORIA DE LA FACULTAD DE CIENCIAS JURÍDICAS Y SOCIALES DE LA UNIVERSIDAD DE CHILE 100 (Talleres gráficos Valdés 1944; published as part of the COLECCIÓN DE ESTUDIOS Y DOCUMENTOS PARA LA HISTORIA DEL DERECHO CHILENO series).
way, the Instituto should teach what the University approved. In any case, the University only gained direct supervision over the higher education regime at the Instituto in 1852, when a University Section (Sección Universitaria) was created as a separate branch of the Instituto. This section was dependent of the president of the University of Chile through an appointed delegate. This section was formally incorporated into the University structure in 1879, when the Ley de Instrucción Secundaria y Superior gave educational competence to the University of Chile. From this year onwards, the University of Chile began teaching law formally.

The possibility of studying in private academies was left unaffected by the foundation of the Instituto Nacional. In fact, in 1832 the government explicitly decreed that the students of any private institution could take their exams in the Instituto Nacional. The foundation of the University of Chile (formally opened in 1843) did not introduce any changes into the situation, and the regulations of the University specifically prescribed in article 15 of its charter that the University should oversee the exams of the private institutions.

At the beginning of 1830 there were at least two private academies in Santiago that taught law: the Liceo de Chile, organized by the liberal Spanish émigré José Joaquín Mora, and the conservative Colegio de Santiago, where Andrés Bello, the author the Chilean Civil Code, taught and eventually became president. These two institutions were fundamental for the restructuring of legal studies in Chile and their influence extended throughout the entire 19th century. Although their existence was

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41. Id. at 102.
42. 2 Boletín de las Leyes y de las Ordenes y Decretos del Gobierno de Chile 93 (El Mercurio 1846).
43. By that time there were ten private institutions that taught higher education in Santiago. Although only two taught law, the number of their students was significantly inferior to that of the Instituto Nacional’s. The Liceo had 12 law students, while the Colegio had only 8. The Instituto, on the other side, had 66 law students. See Amunátegui Solar, supra note 35, at 443.
rather brief, Roman law was reintroduced into legal studies in these institutions. Also, International law was updated in their core curriculum. In fact, their programs were partly followed by the curriculum reform of the Instituto Nacional in 1832. Obviously, given the presence of Andrés Bello, the influence of the Colegio de Santiago was longer lasting.

It seems rather curious that the most important legal scholar of Chile in the 19th century was not only not Chilean, but never formally studied law. It was mere chance that brought such a character to Chile. Andrés Bello was born in Caracas in 1781 and graduated with a bachelor in arts in 1800. He started to study law, but had quit under pressure from his father. He tutored Simon Bolívar, with whom he maintained a somewhat distant relationship—especially once the old pupil became a leading figure in the various Independence movements in the Americas. He was a man built upon self-study, learning English and French by his own means. Because of his language skills, he found himself placed in quite an exceptional position in 1810, when Venezuela was looking for English support for its independence. Probably due to his knowledge of the English language, very uncommon at that time in Caracas, the government sent him, along with Bolívar and Luis López Méndez to London to try to convince England to aid Venezuela.

Soon enough, it became evident that England would never support Venezuela’s claim for independence, for, once Spain had been invaded by Napoléon, it had become an ally against France. Therefore, Bolívar returned to Venezuela and left Bello in England. Bello, without any economic support from Venezuela, lived at the very edge of poverty for the next twenty years. Eventually, he entered John Mill’s circle. Mill hired him to put

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44. The Liceo was closed after the Conservative’s victory in the Civil war of 1830. The Colegio de Santiago also disappeared when most of its authorities took control of the Instituto Nacional in the early 1830’s.
45. An interesting description of this scene can be found in JOAQUÍN EDWARDS BELLO, EL BISABUELO DE PIEDRA 14 (Nascimento 1978).
Jeremy Bentham’s notes in clear handwriting. At this time, Bello became aware of codification and its tenets, due to the fact that Bentham was not only an active promoter of the phenomenon, but had also personally coined the term “codification” to describe the process.

Bello’s law studies seem to have come about in a peculiar fashion. His own philology studies were focused on the *Cantar del Mio Cid*, a medieval epic poem composed in the 12th century and finally written on paper by order of Alphonse X (“the Wise”). In order to understand the language of the poem, he started studying the *Siete Partidas*, which had been written during the same historical period. His contact with Bentham brought him under the influence of Blackstone and Kent, whom he quotes on several occasions. Regarding Roman legal thinking, he studied Vinnius and Heineccius. He even made a Spanish translation of Heineccius’ *Elementa iuris civilis* to teach Roman law in Chile, which was printed in 1843. This translation was used in Chile for the remainder of the 19th century and even the first years of the 20th, until 1912, when the Pontificia Universidad Católica de Chile adopted a new text.46

In 1822, he was hired by the Chilean diplomatic delegation in London. In 1829, he finally abandoned England and moved to Chile—where he performed the bulk of his scholarship—and never again left until his death in 1865. In Chile, he was appointed to write its new Civil Code, was elected senator, and was the first president of the newly founded Universidad de Chile in 1843.

Following Bello’s influence, the Instituto reformed its legal education program in 1832.47 This new curriculum not only re-established Roman law as a fundamental subject in the formation

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46. See Hugo Hanisch Espíndola, Andrés Bello y su obra en Derecho Romano 14 (Consejo de Rectores de las Universidades Chilenas 1983).

47. For the details of the program, see Amunátegui Solar, supra note 35, at 521; Baéza Marambio, supra note 40, at 111; Hanisch Espíndola, supra note 46, at 28; and Guzmán Brito, Enseñanza de Derecho, supra note 26, at 318.
of lawyers, but also included some new features, such as Universal Legislation, a subject based on Andrés Bello’s understandings of Jeremy Bentham’s ideas, and international law, which was also taught through Bello’s book on the matter. In short, out of the five years that the law program encompassed, three of them were devoted exclusively to studying works written by Andrés Bello; and when Chilean codification was finally completed, the fourth year of legal studies was also devoted to the study of Bello’s work.

The reform of 1832 suffered various modifications during the 19th century, especially in order to suppress Universal legislation (which was considered too revolutionary by the President of the Instituto, the old realist and conservative priest Juan Francisco Meneses), to include Procedural law (1853), and other subjects that were codified during the century (in 1859, 1863, 1866, 1872, and 1887).

In any case, in the late 19th century two major reforms came about which definitely altered the character of legal studies. The first one was intended to relax the control that the University of Chile had over any private institution of higher education. In 1872,

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48. It was based on Bentham’s TRAITÉ DE LÉGISLATION CIVILE ET PÉNALE, which was edited in French in 1802 by Étienne Dumont in Paris, and was very influential in Latin America during the first half of the 19th century. We know of the contents of Bello’s course through the hand-written notes taken by his pupil Ramón Briseño Calderón. According to Domingo Amunátegui, it was taught following Bello’s notes on the matter; AMUNÁTEGUI SOLAR, supra note 35, at 563.

49. It was called PRINCIPIOS DE DERECHO DE GENTES when it was first published in 1832, but in accordance with Bentham ideas, the name was changed to PRINCIPIOS DE DERECHO INTERNACIONAL in the third edition (1864). On the matter, see GUILLERMO LAGOS CARMONA, ANDRÉS BELLO, ÉL MAESTRO DEL DERECHO INTERNACIONAL 33-36 (Andrés Bello 1982).

50. When the Civil Code was finally went into force in 1856, there was a lot of debate on whether old Castilian law should be studied at all. Finally, in 1857 the study of Spanish law was abolished and replaced by the newly-created subject of Civil law (significantly, the subject was not called Civil Code). See Alejandro Guzmán Brito, LOS DOS PRIMEROS LIBROS CHILENOS DE DERECHO CIVIL PATRIO, 11 REVISTA DE ESTUDIOS HISTÓRICO-JURÍDICOS 148 (1986).

51. This modification came around in 1850. See BAEZA MARMAMBIO, supra note 40, at 137.
a statute was enforced that allowed any private institution to validly take exams independently from the University of Chile’s external evaluation. In practice, this meant that law studies could take place in any private institution without any supervision of the State. This statute enabled the creation of the Pontificia Universidad Católica de Chile (1888) and the Pontificia Universidad Católica de Valparaíso (1888). In the same year, the students of the Instituto were permitted to take their exams in any order they wished. In practice, this meant that the programs lost much of their structure for the students could study the subjects in any order they wished.

During this period, law was taught in an increasingly exegetical manner. While law was codified, the legal subjects came to be studied in the order presented in the codes, occasionally adding some comments to its dispositions. It was significant that the subject “Civil Law” was renamed to “Civil Code” in the 1863 reform, just five years after the enactment of the Code. In fact, in the subsequent reforms, the inclusion of new subjects closely followed the enforcement of new codes. This style of teaching, which at the time was referred to as literal re-exposition (reexposición literal), came to be associated with the École du Exégèses, although it lacked the philosophical framework of the famous French school and seems to be a rather simplistic view of the very basic legal knowledge that existed in Chile at the time. In fact, during the colonial times, one of the few things that students of law knew were Justinian’s Institutes, almost by heart and with very little commentary, due to the lack of printed books. This same

52. Originally, to exercise this option, they had to pass classes in Roman law and Natural law, but this requirement was relaxed in 1876 and 1878. This option was only abolished in 1917.
54. Alejandro Guzmán Brito, El Código Civil de Chile y sus primeros interpretantes, 19:1 REVISTA CHILENA DE DERECHO 86 (1992) [hereinafter El Código Civil de Chile].
kind of memorization learning seemed to persist at the core of the 19th century Chilean university, not so much because of an ideological perspective on the nature of law, but for the simple inability to do much better. In fact, there was no sharp break from the traditional Spanish law, and the Siene Partidas were still known and quoted during the entire 19th century.55

Although the production of academic legal work was rather scarce, it is remarkable that the first legal works appeared shortly after Independence.56 One of them was a concordance between the Civil Code, its projects and some foreign codes,57 following the example of Saint Joseph’s Concordances. Another is a legal dictionary of the Civil Code.58 These were, in fact, comparative exercises, for they took into account French and Spanish laws. The two first complete expositions on the Chilean Civil Code were published shortly after its enactment, in 1863.59 These works were very basic in their content and attempted simply to explain the dispositions of the Civil Code, following its order and system. These were followed by more in-depth studies known as commentaries (Comentarios), which attempted a more ambitious goal: to explain the dispositions of the Civil Code in the light of jurisprudence and comparative exercises with French and Spanish

55. See id. at 81-88.
56. The first legal work ever published in Chile was basically a republication of a handbook of wills originally published in the Phillipines by Pedro Mujillo Valverde. Regardless, since 1843 the journal Anales de la Universidad de Chile published legal papers, some of which were the results of the research done by law students to get their degrees. By reading them, one can get a very complete idea of the legal culture that existed in 19th century Chile.
57. For example, VITALICIO A. LÓPEZ, RAZÓN I FUENTE DE LA LEI O CONCORDANCIA DEL CÓDIGO CIVIL CON EL PROYECTO DE QUE SE FORMÓ (Ferocarril 1858).
58. FLORENTINO GONZÁLEZ, DICCIONARIO DE DERECHO CIVIL CHILENO O EXPOSICIÓN POR ORDEN ALFABÉTICO DE LAS DISPOSICIONES DEL CÓDIGO CIVIL DE CHILE Y DE AQUELLAS LEYES . . . QUE ES IMPORTANTE CONOCER (El Comercio 1862).
59. These are: JOSÉ VICTORINO LASTARRIA, INSTITUTO DEL DERECHO CIVIL CHILENO (El Comercio 1863); and JOSÉ CLEMENTE FABRES, INSTITUCIONES DE DERECHO CIVIL CHILENO (El Universo 1863).
During the final period of the 19th century, Chile’s first legal journal appeared, the *Revista Forense Chilena*, which was published regularly between 1885 and 1892. Although the journal did not last, soon, by the beginning of the 20th century, legal journals became an important way of presenting research to a wider legal community.

Nevertheless, by the mid-19th century, the restricted scope of legal teachings became a matter of debate. Fernandez Concha, in a speech made upon the assumption of his chair as professor of the University of Chile in 1857, sharply criticized the lack of philosophical explanations in legal studies and its restricted legalistic scope. Although the professor, from his conservative position, did not tackle the deeper problems of exegetical legal studies, such as its complete dependence on statutes for dogmatic analysis, he still made an important point when he called for a wider perspective in legal studies.

During the late 19th century there was a tendency towards leaving aside the strong legalistic approach that legal studies had acquired. It was noticed that by 1880, classes ceased to be a textual repetition of statutory dispositions and that professors started innovating in their legal approaches. This brought major changes in legal education during the 20th century.

**IV. A LOST CHANCE?**

By the end of the 19th century legal, education had matured and its old structure was no longer suitable to express the legal

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60. The first one, unfortunately incomplete, is Jacinto Chacón, *Exposición Razonada y Estudio Comparativo del Código Civil Chileno* (El Mercurio 1868). It was followed by another incomplete study: Paulino Alfonso, *Explicaciones del Código Civil* (Cervantes 1882). Although there were other attempts of restricted scope, the first complete commentary on the Civil Code is: Robustiano Vera, *Comentario del Código Civil* (Gutenberg 1894), in seven volumes.


62. This observation is included in a report of 1880 done by Ignacio Domeyko. See 60 *Anales de la Universidad de Chile* 209 (1881).
knowledge that had accumulated over the century. The old exegetical method seemed to be unable to show the complexities of the interpretation the legal codes had acquired. In this context, the influence of the late 19th century and early 20th century French doctrine was fundamental for the renovation of private law. Pandectism entered Chilean universities, not through German authors, who remained largely unknown until later times, but thanks to Charles Aubry and Frédéric Charles Rau’s *Cours de droit civil français*. As is well known, this is an adaptation of the famous work of Karl Salomo Zachariä, *Handbuch des französischen Civilrechts*, which explained the French civil code in the light of German Pandectism. Following their methods and example, Luis Claro Solar wrote the first systematic commentaries on the Civil Code in his monumental work *Explicaciones de Derecho Civil Chileno y Comparado* (1898–1927). These commentaries remain in use after a century and are still the most complete analysis of the Chilean Civil Code. As their title suggests, they contain a comparative approach, mainly (but not exclusively) considering the Bürgerliches Gesetzbuch (BGB) and the Code Napoléon, as also up-to-date French legal doctrine (with especial emphasis in Planiol, Josserand and Ripert). More surprisingly, it took into account traditional Spanish law, considering the Siete Partidas and early 19th century legal doctrine as important influences in the Chilean Civil Code, as well as Roman law. It is in itself an important exercise of historical and comparative effort, which was immediately adopted by the practicing lawyers and had an overwhelming influence in legal studies.

Legal education came under debate in that same period. A proposition to update it was put forward in 1901, which included

63. This was made by Alejandro Álvarez (see: ALEJANDRO ÁLVAREZ, LA NUEVA TENDENCIA EN EL ESTUDIO DEL DERECHO CIVIL: SEGÚN LA PEDAGOGÍA MODERNA Y SEGÚN EL RESULTADO DE LAS CIENCIAS POLÍTICAS Y SOCIALES (imprenta Moderna 1900)). His plan was basically to replace the exegetical model with a systematic exposition of private law in order to elaborate legal constructions. For more details, see BAEZA MARAMBIO, supra note 40, at 195.
the abandonment of the exegetical method in order to embrace a systematic perspective of private law, following the Pandectist model. In 1902 the University council approved the plan. The name of the main subject of Private law, “Civil Code”, was changed to “Civil Law”, in order to make explicit the methodological change. A strong component of the methodological change was the inclusion of a comparative perspective in legal studies. In fact, the new curriculum included for the first time Comparative Law as a University subject in the last year of legal studies. Legal History replaced Cannon Law, which had lost its original importance in a secularized country. Bello’s old handbook of Roman law was replaced with up to date literature. The whole reform could be summarized—as it was, some years after—in the motto “beyond the codes”.

During the following years, the reform was applied and gave Chile an increasingly complex legal environment. Legal literature

64. The influence of Pandectism, which was called “constructivism” in Chile, can be attested to in the comments made to the Legal Education program made by Tomás A. Ramírez, who considered this the only valid way to interpret legal dispositions. In his exposition, he expressly says that the method was taken from Zachariä through Aubry and Rau ((see Sesión de 22 de Abril de 1907 del Consejo de Instrucción Pública, 120 ANALES DE LA UNIVERSIDAD DE CHILE 67 (1907)). For more details, see Leonardo Enrique Valdivieso Lobos, Historia de la cátedra de Derecho civil en la Universidad de Chile (Memoria para optar al grado de licenciado de la Universidad de Chile, 2005), p. 67.

65. The President of the University in his report on the State of the University explicitly says: Como lo indica el nombre de los ramos establecidos en el nuevo plan de estudios, al comentario del Código se ha sustituido la enseñanza del derecho correspondiente, dando así mayor generalidad a esta enseñanza y elevándola por encima de nuestra propia legislación, la cual no debe presentarse al criterio del alumno como única e inmovible base de sus conocimientos jurídicos, sino como la expresión de ideas más fundamentales y sintéticas, aplicadas a un estado social determinado.

Manuel Barros Borgoño, Memoria del Rector de la Universidad Correspondiente al año 1901, 110 Anales de la Universidad de Chile 123 (1902).

flourished and gained consistency, while universities expanded. Nevertheless, the system had a fatal flaw that was going to limit the development of Chilean legal culture: there was no attention paid to the formation of jurists at a higher level, who could develop legal research. In fact, it must be remembered that there had been no doctoral program in Chile since its Independence. Accordingly, legal academics were simply well-trained lawyers who spent part of their free time teaching law. There was no professorship, as the role is understood in most civil law countries, nor could there have been any spirited scholarly debate on legal matters.

This lack of intellectual room for legal development was deeply felt among students, and one of the main points of the next attempt to reform the legal education system was undertaken to establish a proper legal academy. The ideas proposed to overcome this difficulty were to send students abroad in order to deepen their studies and to start a Doctorate program in Chile.

In the 1920’s, new reform was proposed. It included some minor reforms in the undergraduate program, but at its core was the proposition to create a doctorate program in law and to

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67. The Revista de Derecho y Jurisprudencia, established in 1904, was meant to be the expression of these new tendencies. Although it finally disappeared in 1988, it created new standards for legal journals and a tradition regarding law studies.

68. To the three already-existing (Universidad de Chile, the Pontificia Universidad Católica de Chile and the Pontificia Universidad Católica de Valparaíso), the Universidad de Concepción was added in 1928.

69. The most convincing analysis in this sense was made by Iribarren, who advocated for the creation of a professorship following German standards. He also proposed the creation of a doctorate program which would focus on Comparative law and Legal History. See Iribarren, supra note 66.

70. Both of them appear for the first time in the work of Iribarren, supra note 66, but they are insistently repeated several times in the forties (Baeza Marambio, supra note 40, at 206) and in the sixties (ANÍBAL BASCUÑAN VALDÉS, PEDAGOGÍA JURÍDICA 112-13 (Editorial Jurídica 1954)).

71. The idea was put forth during the first decades of the 20th century. It was proposed as a way to improve the quality of academia in 1914 (see Iribarren, supra note 66, and a doctorate program was even approved by the Pontificia Universidad Católica de Chile in 1915, but was never put into practice. The same happened with the doctoral program approved by the University of Chile in 1924 (see Guzmán Brito, supra note 26, at 306-307).
systematically send brilliant students abroad. Finally, in 1927,72 a statute provided the legal basis for the establishment of doctoral programs in Chile. Nevertheless, no doctorate program in law would commence for the next seventy years.

Legal scholars have not investigated the reasons for this neglect. It remains a brutal fact of Chilean legal history, which is rendered even more intriguing since the idea was repeatedly proposed during the 1940’s and 1960’s. In fact, the lack of a proper academic environment in legal studies was still felt during the 1990’s and the early 2000’s.73 From my point of view, the initial failure to establish a proper legal academic environment in Chile during the late 20’s and 30’s is due to the enormous impact that the Great Depression had on Chilean economic life. In fact, Chile was so deeply affected by the 1930’s depression that its effects were still visible decades later. This brought political instability to Chilean politics, where a succession of unstable governments followed each other until the late 30’s, and included several military coups and a Socialist Republic. In fact, this political instability can be perceived in the changing legal education programs that were put forward during the time.74 Political instability is not compatible with scholarly academics, and a peaceful environment was not restored until the late 1930’s, when properly elected presidents became the rule again.

Nonetheless, the political atmosphere was dominated by economic needs. Poverty became rampant and the achievements of government were measured in economic terms. During the 50’s and 60’s, Chile became a battlefield between competing economic and political ideologies. In this scenario, law had a secondary role,

72. This is the Decreto con Fuerza de Ley No. 7500.
73. See de la Maza G., supra note 53, at 17; and Baraona González, supra note 4, at 440.
74. The curriculum was changed in 1924, 1926, twice in 1928, 1930, twice again in 1933 and finally in 1934. This means 8 different curricula in 10 years!
and legal specialists were not a priority in the government’s political agenda.\textsuperscript{75}

Nevertheless, during the late 60’s, some attempts were made to change the legal profession in order to broaden its curriculum and incorporate other branches of social science into professional formation.\textsuperscript{76} These attempts were finally brought down by 1973’s coup, which ended any attempt at reform for the next years.

In addition, the legal education system was deeply affected by overcrowding.\textsuperscript{77} Between 1907 and 1970 the total population grew from roughly three million to almost nine, with an increasing level of urbanization and higher overall education levels, since primary school became compulsory in 1920. Nevertheless, the number of law schools was still four—the same as in 1928.

V. REBIRTH

I started studying law during the early 1990’s, immediately after the transition from a military dictatorship to democracy. As was previously stated, the legal atmosphere was dominated by a very narrow positivistic perspective, which held a naïve faith in the supremacy of statutes as the only source of law. Most teachers were famous lawyers who played the role of part-time scholars. None had the time to do serious research, and many lacked the abilities. A doctor in law was an \textit{avis rara}, to the extent that I can only count one of my teachers who held a doctorate. Something striking during those years, however, was the continuous increase in the number of law schools and law students around the country.

\textsuperscript{75} In fact, law specialists lost their political predominance during this period. See Bravo Lira, \textit{supra} note 4, at 85-106; and de la Maza G., \textit{supra} note 53, at 5-17.

\textsuperscript{76} This was done by diminishing the importance of the traditional dogmatic approaches in legal formation and incorporating economic and sociological analysis into the curriculum. Its main achievement was the 1966 reform. See Valdivieso Lobos, \textit{supra} note 64, at 96.

\textsuperscript{77} For a wider perspective, see José-Joaquin Brunner, \textit{La idea de Universidad en tiempos de masificación}, 3:7 \textit{REVISTA IBEROAMERICANA DE EDUCACIÓN SUPERIOR} 130-43 (2012).
In 1981 the government enacted a whole new regulation for universities in Chile. This regulation allowed the creation of new private universities, in addition to the old ones created before this statute, which are now called traditional universities. During the 80’s and 90’s, the numbers changed from four to almost thirty law schools. Therefore, what was a few thousands law students rapidly became more than twenty-four thousand. Most of these law faculties were the result of precarious private initiative, where little or no research took place.

In this context, some legal professionals became aware that they could actually make a living by professionally working in universities. Many of them taught in two or three universities, for the demand for professors was much greater than the actual supply. By the late 90’s it became rather common for some law students to go abroad in order to study in a doctoral program. Some were sent with scholarships by their own universities, which expected to rehire them at the end of their studies. Others simply asked for bank loans in order to pay for the adventure. When returning to Chile, these newly trained doctors were usually hired by newly-founded law schools and became the core of their staff.

By the late 90’s the perception of an on-going crisis in legal education was commonplace. Reforms were pushed from two sides: the market and the State. On one side, the university market became segmented. Higher education was divided into elite and non-elite universities, where faculties that could employ a higher number of full-time professors, with better qualification and the best academic profiles, effectively improving their ability to attract students and charge a higher tuition. For any law faculty to become

78. This was the Decreto con Fuerza de Ley No. 1.
attractive in a competitive educational market, large investments in human capital were needed and all kinds of market mechanisms to attract new talent into their staff were implemented. In a few years, the most prestigious law faculties in Chile passed from having very few full-time professors with a doctorate degree, to being predominantly composed by them.\textsuperscript{80} Doctorate programs were opened\textsuperscript{81} and legal journals flourished.\textsuperscript{82}

On the other side, the State intervened in two ways, by creating economic incentives for academics and institutions in order to promote research,\textsuperscript{83} and through the creation of an accreditation program that gave access to public funding for those institutions that passed an assessment exercise.\textsuperscript{84} Although some major changes in the system can be expected,\textsuperscript{85} the steady increase of legal scholarship will probably continue.

This meteoric rise of legal scholarship is one of the most important events in Chilean legal history. For the first time in its

\textsuperscript{80} For instance, my own Faculty only had six full time professors with a doctoral degree during the early 2000’s. Ten years later, it had twenty-five. The number is still growing and it will probably arrive at forty by the end of the decade. Recently, I was informed about formal plans of Universidad de Chile to increase their number of full time professors with a doctoral degree to a mastodontic 108 by the end of the current decade, but there are still too many uncertainties on the matter.

\textsuperscript{81} The same Decreto con Fuerza de Ley No. 1 of 1981 regulated doctoral degrees and legally reinstated them. Anyway, the first doctoral program was not open until 2001. Now, there are seven doctoral programs in Chile, which are experiencing fast development.

\textsuperscript{82} There are about thirty legal journals, of which eight are included in relevant international indexes.

\textsuperscript{83} A number of different competitive research funds were created, primarily through CONICYT, a national council for the development of research. These programs benefit not only the researchers, who compete to receive funding to finance their research, but also the university institutions, for they improve their chance to get additional State funding.

\textsuperscript{84} Enacted by the statute L20.129 of 2006.

\textsuperscript{85} Currently, the whole Chilean educational system is under discussion. It is likely that some major reforms can be expected from Bachelet’s administration, which will probably lead to the State assuming the tuition costs in universities that have completed their assessment exercise, whether they are public or private. If the right decisions are made, this could lead not only to more egalitarian access to higher education, but also to a significant improvement in the overall quality of the system.
history, law has a serious academic perspective as is demonstrated by the rise in the number of journals and legal books published each year. This will influence the future legal developments in unexpected ways, and hopefully, for the better.
DEVELOPMENTS IN PERSONAL INJURY LAW IN POLAND:
SHAPING THE COMPENSATORY FUNCTION OF TORT LAW

Ewa Bagińska*

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This report from the Polish jurisdiction will focus on the legally and socially most significant developments in civil liability law, more specifically in the field of personal injury law, which took place after the political-economic change in 1990.

Polish personal injury law embraces rules that are contained in the part of the civil code (*kodeks cywilny*, hereinafter k.c.) governing torts as well as in some other special legislation. Contrary to referring to the subject matter of the rules as “personal injury law,” as American lawyers do, Polish lawyers refer to these on “reparation or compensation of damage to person.” Compensation is possible only when the claim is sought in the tort regime. However, under the principle of concurrence of liabilities, if the breach can be qualified as a tort, the victim who suffered damage arising from a breach of contract may choose the tort regime in order to seek compensation for personal injuries.

After a short introduction to the historical underpinnings of Polish civil law and a brief description of Polish tort rules and remedies, this article presents the topic of damages in cases of personal injury law in light of its development by courts after 1990. Some of the most important legislative changes, spurred by the demand of legal practitioners, are then presented. Both substantive law and procedural law changes will be discussed.

I. THE HISTORICAL DEVELOPMENT OF POLISH PRIVATE LAW AND THE INFLUENCE OF THE FRENCH LEGAL TRADITION

Polish private law is a “hybrid civil legal system”—a system in which there were developed uniform solutions superseding the first classical European civil codes, like the French civil code (Code Napoléon), the Austrian civil code (ABGB) of 1711 and the

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German civil code (BGB) of 1896. Until 1795 Polish civil law was mainly customary and under very limited influence of Roman law, which was considered as limiting the privileges of nobility. After three partitions of the Republic of Poland by the Russian, Prussian and Austrian Empires (1772, 1793 and 1795, respectively), the Polish state ceased existing for 123 years. During the time of partition, the whole of the Polish territory was under the influence of five legal systems: the ABGB, the Code Napoléon, the Prussian civil code (later replaced by the BGB), the Collection of Laws of the Russian Empire (volume X) of 1835, and Hungarian law (in the small southern parts of Poland—Spiš and Orava). All of the above were official sources of law in the territory of Poland. The Duchy of Warsaw, created in 1807 by Napoléon, formally adopted his code civil as its general civil law in 1808. The code also continued to be binding law in the semi-independent Congress of Poland (1815-1832). Cultural and political ties with France were to a great extent influenced by the continental exploits and legend of Napoléon. The reception of the Code Napoléon in toto serves as a great example of the reception of a foreign legal system. Polish doctrinal views were strongly influenced both by the general ideas of the Code Napoléon and by

5. Established in 1807, the Duchy of Warsaw was subordinated to France. Napoleon ordered the application there of the liberal constitution and the French civil code of 1804; whereas the Congress (Kingdom of) Poland created at the Congress in Vienna (1815) was under the Russian regime, its civil law remained French civil law until 1964, with the modification of mortgage law in 1818 (replacing title XVIII of the Code Napoléon), as well as personal and matrimonial law that were replaced in 1925 with the Civil Code of the Congress of Poland. For more detail, see Dajczak, Historical development of private law in Poland, supra note 3, at 43-44.
the French judiciary. French commentaries and case law were translated into Polish, which facilitated the proliferation of French law in Poland. The Code Napoléon is regarded as an element inseparable from the Polish system of civil law.\(^6\)

As the three codes (Code Napoléon, ABGB and BGB) commonly derived from the Roman law tradition, Polish private law eventually became a civilian country as well. The Roman tradition is the main reason why the Polish law of obligations followed both the ideas of the French Code Napoléon and the Germanic legal culture.\(^7\)

When Poland regained its independence in 1918, substantial legal reforms were undertaken immediately. The Polish Codification Commission first codified the law of obligations in the code of obligations of 1933 (kodeks zobowiazan, hereinafter k.z.), borrowing many elements of the regulation from the then-most modern Swiss code of obligations of 1911, as well as from the French-Italian draft civil code of 1927.\(^8\) The codification also embraced commercial law (the code of commercial companies of 1934), private international law, the law on bills of exchange and cheques, the law on unfair competition, and the copyright law.

In 1964, the code of obligations (kodeks zobowiazan, k.z.) was replaced by the civil code (kodeks cywilny, k.c.).\(^9\) As far as the sources of obligations are concerned, the civil code of 1964 followed more closely the structure of the BGB, although it generally continued the substance of the code of obligations. The Polish law of torts, found primarily in the code of obligations, did not go through many changes under of the socialist regime. After

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8. Including, in particular, the French-Italian draft civil code of 1927; see Bagińska & Kowalewski, *id.* at 446-48, and the Polish literature cited therein.

the change of the political-economic regime in 1990, the main improvements include the introduction of strict product liability, reform of the liability of public authorities, and modifications of the rules governing recovery for non-pecuniary loss in non-personal injury cases. Some solutions contained in the code of obligations were brought back to the Polish private law after 1990.

II. GENERAL FEATURES OF POLISH TORT LAW

Polish tort law represents the “general clause model,” not the German “protected interests model.” The general clause of article 415 k.c. establishes tortious liability based upon proven fault. It is supplemented by a number of separate provisions located in the civil code and in other pieces of legislation that regulate tortious liability in specified situations. While some of them are also based on fault, others are examples of strict liability, absolute liability, or liability based on equity. Fault was at first the dominant basis of liability but this has evolved in the direction of the other civil law systems—towards the approval of the principle of risk as an equally important and autonomous ground for liability. This notwithstanding, there must be a specific rule providing for strict liability cause of action, or otherwise the general clause for liability (i.e., fault liability) will govern the case. The principle of equity (fairness), on the other hand, is definitely supplemental. It is available only in the realm of tort liability, in three cases: public authority liability for legal conduct that caused personal injury (art. 417[2] k.c.), liability for animals (art. 431 § 2 k.c.), and personal liability of minors or incompetent persons (art. 428 k.c.). In all those situations, the courts tend to relax the burden with respect to proving adequate

11. See generally BAGIŃSKA & TULIBACKA, supra note 4.
causation, in addition to the fact that they impose the obligation to redress harm (which is usually personal injury) on the defendant who neither committed any fault nor is strictly liable.

In contrast to French law, contractual and tortious liability are clearly separated. These two liability regimes are regarded as independent and distinct from one another in many respects, and yet they remain subject to some common rules and principles applicable to the law of obligations in general. These common rules are contained in Book III of the civil code (“Obligations”), but placed in two different titles: Title III (“General Rules on Contractual Obligations”), and Title VI (“Illicit Acts/Torts” (czyny niedozwolone)). Title I, which regulates general matters within the area of obligations, applies to both. It contains provisions concerning:

- the determination of the extent of liability and compensation;
- adequate causation (art. 361 §1 k.c.);
- the principle of full compensation (art. 361 §2 k.c.);
- contributory negligence (art. 362 k.c.); and
- methods of repairing damage (art. 363 k.c.).

In common with other European jurisdictions, the main factual elements of tortious and contractual liability for damages in Polish law are the same. First, there must be an event triggering damage, second, there must be damage, and third, causation should exist between the event and the damage. With regard to the procedural issues, one should note that there is no jury in the Polish system. The court evaluates the evidence and rules on the issues of facts and on questions of law.

In Polish law there is no legal definition of damage. The concept of damage is closer to that of the French and Swiss traditions, rather than the German approach. In the legal literature and case law, damage is considered to be every wrong upon an interest protected by law, be it property or personality interests,
suffered by a person against her will. Both legal writers and courts generally refer to both pecuniary and non-pecuniary loss when discussing the notion of “damage” in the civil code (as in, “liability for damage”).

The notion of personal injury has not been given a detailed definition. Nevertheless, the civil code provides a short description in article 444 which includes “bodily injury or damage to health.” Thus, it is clear that any physical injuries are covered, as are any circumstances where a person’s internal organs are not functioning properly even though no apparent injury occurred. The latter types of damage to health include mental conditions and even mental trauma (which can be temporary).

It is commonly accepted that in Polish law there are three types of compensable damage: damage to person, damage to property, and damage to the environment. In this context it is not settled whether the notion of personal injury (damage to person) includes the violation of personal interests, which are of course embraced by the wide definition of damage. Modern doctrine seems to incline towards accepting this wider definition of personal injury. Nevertheless, in this article I will employ the traditional, strict definition of personal injury (i.e., embracing bodily harm and mental harm), hence leaving aside problems relating to compensation for the violation of personal interests (such as in defamation, slander, invasion of privacy, etc.)

Causation, as the third requirement of liability, is based on the theory of adequate causation. Article 361 § 1 k.c. stipulates that

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14. See Bągińska & Tulibacka, supra note 4, at 169, no. 329.

15. With respect to damage to the environment, account should be taken of arts. 322–28 of the Environmental Protection Law, Act of 27 April 2001, Dz.U. 2001, no. 62, item 627, with amendments.
“the person obliged to pay compensation is liable only for the normal effects of the act or omission from which the damage resulted . . . .” This is known as the principle of “adequate causation.” It plays two roles in the Polish civil law: the role of establishing the premise of liability (causal link between the damage and the harmful event) and the role of limiting damages. The courts use objective criteria flowing from life experience and science for the establishment of adequate causation.

With regard to the burden of proof, article 6 k.c. imposes the burden of proving causation on the injured person. There is no codified rule regarding the standard of proof. The courts have traditionally required “a probability bordering on certainty,” which means the judge must be convinced beyond reasonable doubt. Over the past decades the standard has shifted from “probability bordering on certainty” to “a sufficient degree of probability,” with the approval of legal scholarship. The shift has allowed the courts to award compensation in more complex scenarios involving personal injuries. Nowadays, courts typically state that the plaintiff has proved causation with a “sufficient (sufficiently high) degree of probability.” There are only subtle differences between the names given to the degree of probability. The question of what is a “sufficient degree” or a “significant degree” of probability depends on the individual case.

16. “The burden of proof relating to a fact rests on the person who attributes legal consequences to that fact.”
18. SN judgment of 17 June 1969, II CR 165/69, Orzecznictwo Sądów Polskich (Decisions of the Polish Courts, OSP or formerly OSPiKA) OSPiKA 7-8/1969, item 155.
The principle of full compensation governs damages, although it is subject to many exceptions (both statutory and contractual). Compensation ought to be equivalent to and not higher than the damage established. The scope of liability is determined by the following rules: articles 361–363 and, with respect to personal injury, articles 444–449 k.c. From a general principle of full compensation it follows that all kinds of damage must be redressed. Material (pecuniary) loss is to be repaired in every case. According to article 361 § 2 k.c., the scope of pecuniary damage comprises damnum emergens and lucrum cessans. The so-called consequential loss is redressed as long as the test of adequate causation is met.

Further, Poland belongs to the group of legal systems where non-pecuniary loss is compensable only when it is permitted by the law. As a rule, non-pecuniary loss may not be compensated in the contractual regime unless the violation of a contract constitutes concurrently a tort (concurrence of liabilities), in which case the tort regime applies in toto to the claim for non-pecuniary loss damages.

Hence, the claim can be raised in personal injury cases sensu largo:

a) bodily harm or health disorder, article 445 § 1 k.c;

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22. Article 361 § 2 k.c. reads: “Within the limits specified above, in the absence of any legal or contractual provision to the contrary, damages shall include the losses suffered by the injured person and the profits which he could have gained had he not sustained the damage.”
b) deprivation of liberty, article 445 § 2 k.c.;
c) sexual assault or misconduct, article 445 § 2 k.c.; and
d) infringement upon personal rights (interests), article 448 k.c.

Pursuant to article 448 k.c., to which other rules of the civil code or outside the code refer, in the case of infringement of personal interests the court may award an injured person an adequate sum as compensation for non-pecuniary loss or, if she so demands, award an appropriate sum for a designated social purpose, irrespective of other means necessary to eliminate the effects of the damage caused.

Special laws provide for other cases of compensation for non-pecuniary loss, in particular in the sphere of medical liability (e.g., cases of infringement of patient rights, compensation for a blood donor), intellectual property law, and criminal law (unjust conviction, arrest or detention), as well as in the worker’s compensation system.26

Moreover, compensation can be awarded to persons in close relationships with the victim in case of death (art. 446 § 3 k.c.), which is the equivalent of bereavement damages available in common law systems.

Finally, punitive damages are not accepted by Polish law. Courts have held that damages are not intended to amount to a penalty, and damages awarded in civil proceedings may not, in any case, exceed the actual damage.

In general, Polish tort law does not provide for liability caps. Any limitation with respect to personal injury claims does not arise from national legislation, but originates in binding international conventions,27 or EU directives, such as the 374/85 Product Liability Directive (which imposes a €500 threshold for property damage).

26. See Bagińska & Nesterowicz, id. at 174.
27. Most importantly, in the Warsaw-Montreal system governing the liability of air-carriers and the respective EU laws (e.g., Regulation no. 889/2002) apply, with similar conventions governing transportation by other means.
With regard to procedural issues, one should recall that there is no jury in the Polish system. The court evaluates the evidence and decides both the issues of facts and the questions of law.

III. CATEGORIES OF DAMAGES IN PERSONAL INJURY CASES

In Polish law the categories of damages in cases of personal injury are regulated in much more detail than the in general categories of damage to property (real loss and lost profits, art. 361 § 2 k.c.). A list of claims that can be drawn from articles 444–446 k.c., is presented below. It should be noted here that sums awarded as expenses and costs of treatment, annuity, as well as non-pecuniary loss damages must be listed separately in the judgment. In particular, damages for pecuniary loss and non-pecuniary loss must always be awarded as separate elements, with independent justification in the motives.

Where the damage already occurred and its extent is relatively clear, but it is impossible to determine its exact scope or assess its money value, the court can in these conditions use discretion and award a sum it considers adequate taking into account all the circumstances, using article 322 of the Code of Civil Procedure. This margin of discretion cannot be used to adjudicate non-pecuniary loss damages (detailed below).

A. Claims of the Directly Injured

1. Pecuniary Losses

A general rule provides that in the case of bodily injury or a disturbance of health, the redress of damage covers all resulting costs (art. 444 § 1 k.c.). This includes all necessary and suitable expenses causally linked to the injury and paid out directly by the victim, as well as by other persons (for instance, the victim’s family, if the victim is a minor), if they are all included in the victim’s claim. Judicial decisions and scholarly writings construed the notion of ‘all costs’ broadly. Accordingly, it includes hospital
treatment, doctors, nurses and other medical practitioners’ visits, travel and accommodation related to treatment, expenses relating to rehabilitation, purchasing medicines, implants, other medical devices, and any other equipment necessary for treatment or the daily living needs of the victim (such as a pair of glasses, a hearing aid, a wheelchair, or a special needs vehicle required by the victim for attending treatment and carrying out business activities).\(^{28}\) It also extends to differences in income suffered by a person unable to work for a period of time.\(^{29}\)

The person obliged to redress the damage shall pay the sums required for the costs of medical treatment in advance.

Second, the Polish system has established a distinguished model of reparation of damage in the form of annuity. Pursuant to article 444 § 2 k.c., if a victim completely or partially loses her ability to work or if her needs have increased or her future prospects have been diminished, she may demand an appropriate annuity from the person obliged to redress the damage. Any of the three grounds for an annuity, whether existing alone or concurrently with others, constitutes a sufficient ground for the claim. However, according to case law, an annuity based on the loss of earning capacity or on the loss of future prospects (e.g., inability to carry out a profession or obtain specialization), may not be awarded to a minor who can claim an annuity on the ground that his/her needs have increased (this includes, for instance, permanent expenses for treatment or care and assistance by third persons). On the other hand, an annuity for the loss of ability to work should reflect the shortfall in income, taking into account what the injured person would be expecting to earn if the injury did not occur; it can also be awarded to a person who is not employed but runs a household (usually a stay-at-home mother).

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28. SN judgment of 14 May 1997, II UKN 113/97, OSP 1998, no. 6, item 121.
29. See Bagińska & Tulibacka, supra note 4, at 169, no. 331.
When awarding an annuity to the victim of a personal injury a court usually makes an overall assessment of different elements of pecuniary damage, including loss of earnings and loss of earning capacity. Polish courts have emphasized that in the case of a diminution of working capacity, the damage cannot be purely theoretical. Some pecuniary consequences of the loss must be proven. Accordingly, this damage should be understood as the difference between what the victim could have received from her work if the damaging event had not occurred and what she will actually receive after this occurrence. The income of a victim after a damaging event is not to be compared to the pre-accident earnings or the lack of them, but to those she would have earned if there had been no accident. It is sufficient that the victim proves a high probability of receiving this income.\(^{30}\)

An annuity must be “appropriate”; the court enjoys a margin of discretion in the assessment of its extent. If, at the moment of adjudication, the damage cannot be accurately assessed, the plaintiff may be awarded a temporary annuity.

By way of exception, pursuant to article 447 k.c., a court may for important reasons and upon the victim’s request award a lump sum instead of an annuity or a part thereof. In particular, this applies to a case where the injured person became disabled and the award of a lump sum would help her to engage in another profession. The victim carries the burden of establishing the existence of “important reasons.” The assessment of a lump sum is based on the annuity to which the plaintiff would be entitled. The payment of a lump sum must equate with the obligation to pay an annuity (hence, as long as the victim is entitled to an annuity he may request a lump sum).

2. Victim’s Claim for Non-Pecuniary Loss (Pain and Suffering)

The direct victim has a pecuniary claim for non-pecuniary loss stemming from bodily injury, i.e., for pain and suffering and moral damage (art. 445 §1 k.c.). The same legal basis applies when no injury occurred to the person concerned and the only type of detriment is moral suffering and trauma.

Anyone may demand redress for non-pecuniary loss. This extends to a foetus’ claim for prenatal damages (art. 446[1] k.c.). The latter claim can be made against a third person or against the mother.\(^{31}\)

In Polish law an award of compensation for non-pecuniary loss is discretionary (left to the court) and an assessment is made in light of the circumstances of the case. This does not mean that the court is free to award or not award damages. It can deny an award only when some objective criteria are met; in particular, when: i) the damage was inappreciable and the tortfeasor cannot be held negligent, ii) the injured person largely contributed to the damage, or iii) bodily injury ensued from the injured person’s blameworthy, criminal conduct. The denial of damages for non-pecuniary loss would not release a tortfeasor from liability for compensation of pecuniary loss.

The courts use objective standards to determine the amount of compensation. Courts should consider all circumstances of a particular case in assessing compensation,\(^ {32}\) in particular: the degree of physical and mental suffering and how long it lasted, how permanent the injuries are, what the future prospects are concerning life expectancy and quality of life (for instance regarding social life, travel or work), and the age of the victim. Courts have also emphasized that a high degree of the tortfeasor’s fault should result in an increased sum of damages. Moral suffering may well be amplified by the tortfeasor’s insensible

\(^{31}\) See Bagińska & Tulibacka, supra note 4, at 174, nos. 343-44.

\(^{32}\) See Bagińska & Nesterowicz, supra note 25, at 176 et seq.
behaviour after the tortious event in failing to undertake an action mitigating the damage.\textsuperscript{33}

The extent of the damages cannot be attributed to the current material status of the victim.\textsuperscript{34}

Damages for non-pecuniary loss first play a compensatory role as they purport to make good for the moral harm. Relating the amount of the award to an average salary may be helpful, but this cannot be done mechanically. The aim of the damages is to compensate non-pecuniary harm, which is very difficult to measure. Courts have recently rejected the criterion developed in the nineteen-sixties and -seventies, according to which the size of the award should reflect “the current living conditions of an average member of society.” The present jurisprudence and doctrine underline that this factor is only supplementary and may not lead to the frustration of the compensatory function of damages for moral harm.\textsuperscript{35}

\textit{B. Claims upon the Victim’s Death}

Damage remedies for the close persons (family members) in the case of the victim’s death (the so called victims \textit{par ricochet}) are governed by article 446 k.c. and include five kinds of claims.

First, the costs of treatment and the funeral are to be refunded to the person who has incurred them (art. 446 § 1 k.c.). This claim does not belong to the estate of the deceased, but is an autonomous claim by the person who actually incurred the expenses, unless the costs were paid by the decedent herself.

Second, those in respect of whom the deceased had a statutory duty of maintenance have the right to an annuity from the person liable. This type of annuity is referred to as a “mandatory annuity,”

\textsuperscript{33} See BAGIŃSKA & TULIBACKA, \textit{supra} note 4, at 160, 174, nos. 309, 344.
\textsuperscript{34} SN judgment of 17 September 2010, II CSK 94/10, OSNC 4/2011, item 44.
because if all the conditions for tortious liability specified in the provision applicable in the case are met, the court must make an award. Duties of maintenance are regulated by the Family and Care Code of 1964, and include descendants, and, in some cases, siblings, other relatives, and divorced or separated spouses. With regard to actual spouses the position was clarified by the Supreme Court’s decision of 20 December 1990. The obligation to satisfy the financial needs of the family rests upon every married person (Art. 27 of the Family and Care Code). This, of course, extends to situations where one of the spouses does not work and runs the household, rearing the children. However, prior to the Supreme Court decision mentioned above, it was generally accepted that tortfeasors who caused death were not liable to pay an annuity to the surviving spouse where the latter was working, or at least was capable of working, and there were no dependent children. Maintaining the latter’s lifestyle was not seen as an adequate basis for an obligation to compensate. In the 1990 decision the Court held that spouses can be awarded annuity until they are in a financial position to sustain themselves and their family.

Third, an annuity may also be claimed by persons who were in a close relationship with the deceased and whom he voluntarily maintained on a regular, long-term basis (art. 446 § 2 k.c.). This type of annuity is referred to as a “voluntary/facultative annuity.” The court can award a voluntary annuity as long as the principles of community life so require (considering the financial position of both parties, the relationship between the deceased and the beneficiary, and the context in which the voluntary support was taking place, especially its purposes). This provision is particularly relevant in case of cohabitees.

37. Kodeks rodzinny i opiekuńczy [Family and Care Code], 25 February 1964, arts. 128-34 & 60.
38. SN judgment of 20 December 1990, II PR 61/90, Praca i Zab. Spol. 1991, nos. 5-6, p. 64.
39. See BAGIŃSKA & TULIBACKA, supra note 4, at 172-73, nos. 338-41.
For all those who are entitled to payments, the annuity is assessed by taking into account the needs of the claimant and the earnings and financial means of the deceased. The nature of claims for an annuity is compensatory; they are not a type of maintenance claim. The persons are entitled to enforce those claims *sui generis*, thus the cause of action is independent of the rights of the directly injured and of the pecuniary and non-pecuniary loss compensation that she has received before her death. If the directly injured person, while still alive, relinquishes or settles the claims, these acts will have no legal effect after her death.

Fourth, the code also allows immediate family members of the deceased to claim compensation for a considerable deterioration of their living standards (art. 446 §3 k.c.). The compensation extends to the damage which is not grounds for an annuity. These are types of pecuniary damage in a broad sense, often difficult to assess exactly, as well as non-pecuniary damage, both leading to substantial deterioration of an immediate family member’s financial position. For example, the loss of maternal care and support constitutes a worsening in the child’s situation, and merits the indemnity on the basis of article 446 §3 k.c.\(^{40}\) Such losses include not only changes in the actual economic position, but also losses of the realistically foreseeable prospects for improvement of the living conditions: for instance death of a son whose financial help in the near future could be counted on by his parents,\(^ {41}\) or death of a person thanks to whom the claimant planned to improve his living conditions.\(^ {42}\) Although, in general, mere grief is not to be compensated, a severe mental trauma (for instance, in case of the spouse’s or the long-time partner’s death), or feeling of solitude (for instance, the loss of a mother by a minor) may increase the degree of the decline in one’s quality of life and therefore should merit an award.

\(^{40}\) SN judgment of 6 February 1968, OSNC 1969, item 14.
\(^{41}\) SN judgment of 13 May 1969, OSPiKA 1969, item 122.
\(^{42}\) SN judgment of 8 July 1974, OSPiKA 1975, item 204.
Finally, the ability to obtain compensation of non-pecuniary damage caused by the death of a close relative (bereavement damages) is a new addition to the civil code. It was introduced by the Act of 30 May 2008 (amending the civil code), and in force since August 3, 2008,\textsuperscript{43} although throughout the 1970s, 1980s and 1990s, courts utilized the ability to award compensation of pecuniary damage mentioned above to include some purely non-pecuniary losses as well. Close relatives are entitled to bereavement damages if the victim of a tort died on or after August 3, 2008.

If the directly injured has survived, there is no explicit claim for non-pecuniary loss of the close persons under Polish law. They may demand damages only upon proof of their own personal injury (a physical injury or a health disorder, such as depression or other similar medically recognized conditions). It is sufficient to prove that the causative factor simply exacerbated an existing health disorder or increased physical suffering. With regard to psychiatric injury, Polish law does not set any special threshold for a qualifying claim.

IV. THE MAIN TRENDS IN COURT PRACTICE (2000–2014)

A. The Cost of Future Treatment and the Assessment of Annuities

The actual amounts awarded to injured victims with regard to pecuniary losses reflect the true cost of medical care, treatment and rehabilitation in Poland. A large part of such costs is borne by the state-funded health care system (with the exception of pharmaceuticals, which are as a rule co-paid by the insured).\textsuperscript{44} The public health care system is open to all citizens and is mandatory; it is the so-called universal health insurance system based on


\textsuperscript{44} For a detailed analysis of the health care system in Poland, see MIROSŁAW NESTEROWICZ, EWA BAGIŃSKA & ANDRÉ DEN E XTER, INTERNATIONAL ENCYCLOPAEDIA OF LAWS: MEDICAL LAW, 20-26, nos. 27-46 (Herman Nys ed., Kluwer Law Int’l 2013).
premiums paid by all employees and entrepreneurs. Other persons (for example, foreign students) can get access to the system as well by paying the premium. The specific feature of Polish health care, however, is the relative importance and popularity of private medical care that exists alongside the state-funded system. Patients often use private healthcare, particularly in urgent situations. As long as the private alternative can realistically, based on sound medical prognosis, improve the patient’s chances of recovery from a serious medical condition, the patient is not obliged to use the public system. Moreover, the more serious the condition, the more likely it is that a medical service unavailable in Poland will be sought abroad, whether in another EU Member State or outside the EU. Consequently, the tortfeasor may be obliged to reimburse much higher costs.

This approach was confirmed in a judgment of the Supreme Court of 13 December 2007 (I CSK 384/07). In this case the plaintiff suffered from brachial birth palsy. His disability was at that time 60%, but he had a positive medical prognosis. He was operated on twice in the US, which was paid for by the State, and consulted with specialists in Leeds and Paris at his parents’ cost. In the lawsuit he demanded inter alia $55,000 to cover the cost of a third operation in Houston, TX. The hospital and its insurer questioned the obligation to pay the treatment cost in advance, referring the plaintiff to the Ministry for Health and Public Resources. After six years of trial the Regional Court awarded PLN 237,000 ($78,000) for pecuniary damage and PLN 200,000 ($66,000) for non-pecuniary loss (as demanded). On appeal, however, the damages for pain and suffering were reduced to PLN 120,000 ($40,000) and the claim for future medical expenses was dismissed because the plaintiff did not prove that they would not

45. See Bagińska & Tulibacka, supra note 4, at 171, no. 335.
be refunded ex post by the State. The Supreme Court reversed the verdict and remanded the case. It regarded the damages for non-pecuniary loss as too low to fulfill the purpose of adequate compensation. As to the medical expenses, the Court held that under article 444 § 1 k.c. the plaintiff must only prove that he has a valid claim for all necessary costs arising from a tort. The burden of proof that the costs of the operation in the U.S. were to be covered ex post from public resources was on the defendant. The Court emphasized that a victim of a tort had no obligation to use the public health care system in order to restore his/her health condition to its previous state. After all, the public health care system may be used only by the insured (through the compulsory universal health insurance), and the conclusion reached by the Court of Appeals would put the insured victim of a tort at a disadvantage in comparison with the uninsured victim. This decision is correct and confirms the long-established case law. In the former regime, a claim for advance payment of treatment costs was rarely raised because of the generous public health care system. Presently, with scarce public resources, many specialized procedures are available only by request and granted by the National Health Fund or the Ministry for Health on a case-by-case basis.

It should be explained further that future loss (when at the time of adjudication not all the harmful effects of the tort have materialized) and future costs that are highly likely to occur can be sought as part of an annuity. If, at some point in the future, circumstances change (for instance, the victim’s health deteriorates significantly), either of the parties may request modification of the annuity (art. 907 § 2 k.c.). The plaintiff may also ask for a determination of liability for future losses.

47. See Bagińska & Tulibacka, supra note 4, at 171, no. 334.
In the judgment of 17 June 2009 (IV CSK 37/09),\(^{49}\) the Supreme Court ruled that negligent omissions of the health care providers can lead to damages that take the form of lost or reduced chances for healing or improvement of the health condition. The standard of proof in such cases should be a sufficient degree of probability. In this case, a minor lost his chance to reduce the disability, for which no-one was to blame. He was diagnosed with cerebral palsy and epilepsy in December 1999. The early signs of the disease, reported by the mother shortly after his birth in 1998, were either ignored or misdiagnosed by the attending doctors. If cerebral palsy had been diagnosed at an early stage, the effectiveness of rehabilitation could have been 20\% better. Adequate causation between the negligent delay in discovering of the cause of the disability and the lost chance of improvement through rehabilitation was established; nevertheless, the lower courts did not find grounds for awarding an annuity. The Supreme Court held that the minor plaintiff was entitled to both compensation for non-pecuniary loss and an annuity based on the increase of needs as a result of a tort. Cerebral palsy is a life-long disease, and any improvement in the child’s condition that can be made is reached principally through proper and constant rehabilitation. The late diagnosis may lead to increased expenses, as delayed rehabilitation is less effective and more difficult. This case can be seen as a loss of chance case. Polish courts approach cases of this kind from the perspective of damage rather than causation. If the damage is personal injury, the standard of proof is lowered to a sufficient degree of probability. The Polish courts have awarded damages for a lost chance of healing or a lost chance of improvement of the patient’s condition either under the category of a pecuniary damage (in the form of an annuity) or as

compensation for non-pecuniary loss.\textsuperscript{50} From the perspective of a minor with a life-long, incurable disease, whose harm takes a form of losing or reducing the chances for health improvement, an annuity guarantees better protection for the future. The amount of an annuity is subject to revision by a court in case of a change in circumstances.\textsuperscript{51}

Another interesting case that marks a victim-friendly approach is represented by the judgment of the Court of Appeals in Poznan judgment of 15 December 2009 (I ACa 848/09).\textsuperscript{52} In this decision the court applied article 447 k.c. and awarded lump-sum compensation instead of an annuity to an older woman who was hit by a truck while negligently crossing the street. The injuries suffered as a result of the accident eventually led to a 50% permanent disability. The lower court established that the plaintiff contributed to her damage by 90%, but the Court of Appeal assessed the contribution to be 75%. The demand for non-pecuniary loss was justified under the circumstances, but the award was ultimately reduced to PLN 30,800 ($10,200) due to the contributory negligence. Moreover, instead of an annuity, the plaintiff demanded PLN 125,000 ($41,600) as a lump sum. That claim was dismissed as unsubstantiated by a lower court, but the Court of Appeals, after having found that the plaintiff met her burden of proof, considered the prerequisites of article 447 k.c. Pursuant to that provision, for important reasons the court may, at the request of the injured person, award him lump-sum compensation instead of an annuity or a part thereof. However, none of the typically accepted “important reasons” were present in


\textsuperscript{51} Based on art. 907 k.c., the person responsible, or the victim, may ask the court to adjust the amount or duration of the annuity or to discontinue it completely in the case of changed circumstances.

\textsuperscript{52} See Ewa Bagińska, Poland in EUROPEAN TORT LAW 2011 at 514-15, no. 79 (K. Oliphant & B.C. Steininger eds., De Gruyter 2012) [hereinafter Poland (2011)].
Nevertheless, the Court regarded the difficult financial situation of the plaintiff as an important reason. According to the facts, the seventy-two-year-old victim was retired, but a part of her very low pension was taken away by the court executor to pay for her debts, and the rest was fully consumed by monthly expenditures. The annuity, if awarded, would amount to PLN 75 per month (as reduced by 75% due to contributory fault), which obviously would not cover her increased needs. Conversely, a lump sum would allow her to pay her debts and raise the actual net income from her pension, which in turn would allow her to cover the current and future increased expenses due to the tort. The payment of a lump sum must be equivalent to the obligation to pay an annuity and cover both present and future damage. However, the law does not state what period of time should be taken into account in the calculation of the award. The Court thus referred to the average life expectancy in Poland, which is 80 years for women, and calculated that the annuity for eight years equaled PLN 7,200 ($2,400). The reasoning of the Court is compelling and should be approved of as it fulfills the aims of damages and takes into account the individual situation of the victim.

A final issue, although of lesser importance, concerns the consideration of illicit profits. In the case of 20 January 2004, the defendant questioned the inclusion of the “grey zone” income of the deceased into the computation of an annuity. The income was not revealed in a personal income declaration, nor was it taxed. The Supreme Court held that, although the phenomenon of the “grey zone” in the labour market should meet with disapproval, the computation of an annuity in wrongful death cases is not dependent on the taxed income, but on the earning capacity of the deceased and on his financial standing, including, but not limited

53. Article 447 k.c. shall especially apply in a case where the injured person has become disabled, and the award of a lump-sum payment would facilitate his exercise of a new occupation.
54. II CK 360/02, Lex no. 173557.
to, his actual income. However, on similar facts, the Court of Appeals in Bialystok in a judgment of 18 September 2002\(^5\) ruled to the contrary. It held that regular illicit earnings received by the deceased victim within “the grey zone” might not lead to an increase in the sum of damages. The court stated that failure to pay personal income tax is a fiscal criminal offence. Such an income also contradicts the principles of community life (principles of equity and justice).

**B. The Scope and Function of Compensation of Non-Pecuniary Loss Awarded to Direct Victims**

1. **Medical Malpractice Cases**

One should clarify here that in medical cases there are two independent bases for awarding non-pecuniary loss damages: (i) medical malpractice which inflicts pain and suffering (art. 445 k.c.), and (ii) the infringement of a patient’s right (art. 4 of the Patients’ Rights Act, in conjunction with art. 448 k.c.).\(^6\) There has been some litigation recently regarding the relationship between these two bases of a claim. It has been held that article 445 k.c. aims at compensation for pain and suffering due to personal injury and that article 4 of the Patients’ Rights Act protects dignity, privacy and the autonomy of a patient, regardless of the diligence and effectiveness of medical intervention.\(^7\) Hence, the two claims can be cumulated.\(^8\) Below we focus on the pure malpractice cases.

In present practice, the level of compensation in personal injury cases is increasingly high. The following cases are illustrative examples of this trend.

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\(^{55}\) I ACa 399/02, OSAB 2003, at 7.


\(^{58}\) See Ewa Bagińska, Remedy for moral harm arising from an infringement of patients’ rights, 15 COMP. L. REV. (NICOLAUS COPERNICUS UNIV.) 45 (2013).
In 2001, in a case where the plaintiff’s leg was amputated because the doctors failed to diagnose artery damage incurred in a motorcycle accident, the Regional Court in Krakow awarded PLN 50,000 ($16,600) for non-pecuniary loss. In 2006, the wrongful removal of a kidney resulted in the award of PLN 150,000 ($50,000) by the Supreme Court. The same amount was adjudicated in 2007 to a 50-year-old victim of negligence in a standard procedure for the removal of kidney stones which resulted in the victim’s 45% permanent disability and a total loss of working capacity. In the decision of 13 June 2007 (VI ACa 1246/06) the Court of Appeals in Warsaw established the hospital’s liability for the lack of informed consent to cardiac surgery, during which the patient suffered a stroke. The patient became disabled due to the neurological damage. No medical error was established. The plaintiff claimed PLN 250,000 ($83,000), the Regional Court awarded PLN 50,000 ($16,600) as damages for moral harm, but the sum was doubled on appeal (final award: $33,000).

A striking example of the change in the trend concerns hospital infections. In the late 1990s, compensation for infection with Hepatitis B amounted to PLN 5,000 ($1,600) for adult patients and as much as PLN 8,000 ($2,600) for minors; PLN 20,000 to 50,000 ($6,600 to $16,600) was awarded for Hepatitis C infections. In the last decade these amounts were doubled or even tripled; in

59. Published in RZECZPOSPOLITA, 3 April 2001. The amount was converted into dollars based on the average rate $1 = 3 PLN.
62. SA in Warsaw judgment of 13 June 2007, VI ACa 1246/06, OSA 12/2009, item 64.
63. See Kinga Bączyk-Rozwadowska, Medical Malpractice and Compensation in Poland, 86 CHI.-KENT L. REV. 1217, 1251 (2011).
2010 the average compensation for a non-pecuniary loss resulting from hepatitis C amounted to PLN 375,000 ($125,000). 64

In contrast, cases of birth-related injuries can presently trigger successful non-pecuniary claims as high as PLN 500,000-1,000,000 ($166,000-$333,000), which may be compared with ten years previously, when amounts between PLN 50,000 and 90,000 ($16,600 to $30,000) were considered adequate. 65 It is well-established case law that the younger the age of the victim, the greater the moral harm. Apart from birth-related injuries, we can refer to a case where a young girl who, after several months of inadequate treatment, suffered necrosis of parts of her skin and permanent scarring (50% disability), was awarded (at the age of eleven) $83,300 for non-pecuniary loss. 66

Finally, in a rare case a comatose victim of malpractice at birth who had no contact with the outside world and did not feel pain was awarded $166,000 in 2008. 67 Thus, it is relatively unimportant whether the victim is, because of her mental state, unable to realize the full impact of what happened, or whether the victim has particularly acute sensitivity and thus suffered a much more intense mental trauma.

In a groundbreaking decision of March 24, 2011, 68 the Supreme Court dealt with the issue of succession of a child’s claim for non-pecuniary loss by its parents. On the facts, a medical malpractice at childbirth (in particular, the failure to perform a Caesarean section) led to enormous injuries to the child who, while

64. Id. at 1251.
67. See SA in Rzeszow judgment of 12 October 2006, I ACa 377/06; Bagińska, Poland (2009), supra note 46, at 493-94, nos. 57-59.
never conscious, was kept alive by doctors for 14 months before dying. Before the child’s death, the parents sued the hospital for compensation on the child’s behalf, and then continued the trial as successors of the child’s right of action (art. 445 § 3 k.c.\(^{69}\)). The patent fault of the doctors was established and the court of first instance awarded a record sum of PLN 1 million ($333,000) as damages for non-pecuniary loss (arts. 446[1] and 445 k.c.), having ruled that the child’s harm was unspeakably grave. On appeal the award was reduced by 80\% due to the fact that the money was to be paid to the parents seeking compensation *de iure hereditatis*; hence it should not enrich them. Moreover, the court held that the child had died so early in its life that it could not be argued that it had suffered moral harm, as its psyche had not been shaped; accordingly the child was only able to experience physical pain and suffering. That decision was attacked in cassation to the Supreme Court, who did not agree with the reduction of the award by the court of appeal. The Court recalled that, pursuant to article 446[1] k.c., after its birth a child can claim compensation for any prenatal damage it suffered, including damage stemming from medical malpractice directed at the child’s mother before its birth. The compensation calculated by the lower court rightly took into consideration all the horrendous conditions of the child’s painful life and in this respect the court met the criteria of compensating non-pecuniary loss. Although objectively very high, the award correctly took into account the primary compensatory function of the claim. The principle that compensation must be adequate (i.e., proportionate) to the harm suffered does not give permission to recklessly disregard human life, as had happened in this case. The Court also held that whether or not a newborn is able to suffer moral damage or physical pain and suffering is irrelevant and cannot be a reason to reduce the compensation. The fact that the

\(^{69}\) “A claim for compensation for non-pecuniary harm shall pass to the heirs of the deceased only if this was agreed in writing or the action was commenced when the deceased was still alive.”
child died during the trial and the parents stepped into the proceedings as successors to the child’s right of action is not grounds to lower the compensation for the child’s harm. The Supreme Court deviated from early cases\textsuperscript{70} which endorsed the view that a court, when calculating damages for moral harm, should take into account the fact that the damages awarded were to be paid to the successors of a victim who died during the trial. In the commented decision the Court ruled that the claim passes to the heirs by way of exception provided for in article 445 § 3 k.c., since in principle all claims for personal injuries become extinct upon the death of the injured person. The claim for compensation of moral harm does not change due to the fact that the victim dies before the award has been issued. The extent of reparation may not be determined by such an unforeseeable and uncertain event as death before or after the award. The parents also have their own (\textit{sui generis}) claims for bereavement damages as indirect victims (art. 446 § 4 k.c.) and this compensation claim is different to that which the victim is entitled to pursue. The case calls for the legislative intervention and introduction of a clear-cut rule concerning the award of damages for non-pecuniary loss in wrongful death cases. Presently, it is uncertain whether the parents can collect twice: once as heirs and once as indirect victims.\textsuperscript{71} One should also emphasize the hopefully preventive effect toward avoidable medical errors by the highest ever award in such a case in Poland. Despite their compensatory function, the damages aim at the deterrence of reprehensible conduct, and in this case the doctor’s malpractice amounted to gross negligence.

\textsuperscript{70} See, e.g., SN judgment of 12 April 1972, II CR 57/72, OSNCP 10/1972, item 183.

\textsuperscript{71} See Mirosław Nesterowicz, Comment, 7-8 Przegląd Sądowy 200 et seq. (2012).
2. Traffic Liability Cases

Traffic accidents make up the majority of personal injury cases in Poland. According to statistics, Poland unfortunately led the EU countries in 2011 with the death rate of 109 killed in car accidents per one million inhabitants, while in 2012 it was 93 per one million inhabitants. Over 40,000 victims per year suffer personal injuries, 21% of these being pedestrians. There are approximately 25.5 million registered vehicles in Poland; the motorization index is 470 cars per 1000 inhabitants.

With regard to more serious injuries, we should mention the case where a 51-year-old man who suffered serious injuries in a car accident and was declared 77% disabled, with a complete, irreversible loss of working capacity and the loss of sexual functions, was awarded $66,000 by the Court of Appeals; the verdict was, however, reversed by the Supreme Court in 2008. In another case, the victim of a traffic accident, who became quadriplegic and regained consciousness only after several months of hospitalization, filed a claim for PLN 400,000 ($133,000) for non-pecuniary damage. After his death his successors (a wife and two children) continued the lawsuit and the Court of Appeals in Lublin awarded them the demanded sum in equal shares; the decision was affirmed by the Supreme Court in 2008.

Additional problems have been caused by the introduction of bereavement damages in 2008, as will be seen below.

73. SN judgment of 27 November 2008, IV CSK 306/08, OSP 11/2009, item 121; Bagińska, Poland (2009), supra note 46, at 497, no. 65.
3. Individual versus Uniform Approach to Compensatory Claims

As it was mentioned earlier, when assessing a claim for pain and suffering, Polish courts apply general and abstract criteria to the individual situation of a given plaintiff in the assessment of a claim for pain and suffering (such as the victim’s age and personal situation, the degree and duration of physical and mental suffering, the long-term effects of the tortious conduct and similar circumstances). The main principle is that each case of bodily injury and mental harm requires an individual approach, with regard to the facts of the case. Due to the specific criteria for the evaluation of non-pecuniary loss, an award of damages may successfully be attacked in cassation to the Supreme Court only when it flagrantly violates these criteria. Such a situation took place in a case decided by the Supreme Court on April 20, 2006 (IV CSK 99/05). The plaintiff (a 53-year-old woman) was diagnosed with hepatitis C infection and subsequent liver cirrhosis. She was declared 70% disabled, suffered from great pain and nervous shock; the probability of developing liver cancer was 5%. The Court of Appeals awarded PLN 100,000 ($33,000) as damages for pain and suffering (the plaintiff claimed the equivalent of $60,000). The Supreme Court allowed cassation and held that, although the lower courts had used proper general criteria of assessment, they had failed to apply them correctly to the facts of the case. The Court raised the compensation to PLN 150,000 ($50,000) in order to more adequately redress the plaintiff for the suffering, the anxiety, the actual moral harm and for the negative future prognosis. The Court determined that only the higher sum would perform the compensatory function properly.

More importantly, the Supreme Court ruled that the amount of awards adjudicated in other cases should not be taken into account as a factor to reduce compensation in a given case. An interesting

74. OSP 4/2009, item 40.
issue arises in a not-so-rare situation (considering the movement of persons within the European Union) where the victim is a foreign citizen. According to the Supreme Court the standard of living in the country where the victim lives should be taken into consideration in the evaluation of damages. The case decided on February 14, 2008 (II CSK 536/07), involved a German citizen who was injured in a car accident in Poland. He claimed PLN 185,000 ($60,000) for serious injuries (multiple fractures, several operations, altogether four years of medical treatment and 75% disability), arguing that an award of non-pecuniary damages should reflect the living standard in Germany (the country of his habitual residence). The Regional Court awarded PLN 82,000 and the Court of Appeals raised this to PLN 120,000 ($40,000), because compensation of non-pecuniary loss should have a real economic value in order to fulfill its compensatory function. However, the Court determined that the standard of living in Germany, which “is not dramatically different than in Poland,” is not a proper criterion of assessment of these damages. On review, the Supreme Court emphasized that damages for non-pecuniary loss should first of all relate to the injury and take into account all the relevant circumstances, in particular the gravity of pain, duration of the disease and permanent effects of the damaging act. Therefore, the plaintiff was entitled to PLN 150,000 ($50,000).

Second, taking into account the current living conditions in the victim’s home country for determining the size of the award is generally acceptable, but the application of this criterion may not lead to the frustration of the compensatory function of damages for moral harm. It may only be treated as a supplementary criterion to reduce the non-pecuniary damages. The Supreme Court concluded that even after considering the standard of living in Germany, the sum of PLN 150,000 was still adequate within the meaning of article 445 k.c.

75. OSP 5/2010, item 47; Bagińska, Poland (2010), supra note 49, at 475-76, no. 76.
In another case of November 26, 2009, (III CSK 62/09), the Supreme Court held that the amount of awards adjudicated in other cases can help to evaluate whether the award in a given case was not unreasonably high. Therefore, they may be used as a guideline, provided however, that each case of moral harm is given an individual assessment, with regard to the facts of the case. This is, of course, a quite Solomonic solution. On the facts, the Supreme Court raised the non-pecuniary damages for a nineteen-year-old victim of a car accident to PLN 550,000 ($180,000), (the victim demanded PLN 1,000,000 for extremely severe brain injuries causing permanent physical and mental damage, and 100% disability).

C. Non-Pecuniary Loss in Wrongful Death Cases

The close persons (victims *par ricochet*) are entitled to compensation of the moral damage arising from the victim’s death (art. 446 § 4 of k.c.). The bereavement claim was introduced by the revision of the Civil Code on May 30, 2008. Since then a major theme in personal injury jurisprudence has been the problem of compensating moral harm of family members of the deceased when the death happened before August 3, 2008. It should be noted that the legislature did not introduce any special intertemporal provisions in the revision of 2008, hence the regular rules of intertemporal law apply (in particular, the *tempus regit actum* rule).

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76. OSNC ZD C/2010, item 80.
77. A similar sum of damages was granted to a widow for the deterioration of her life due to the death of her husband in a car accident on the basis of article 446 § 3 k.c. See SN judgment of 14 March 2007, I CSK 465/06, OSP 11/2008, item 123. On remand the Court of Appeals awarded PLN 500,000 with interest, which made a total of PLN 1 million. The average awards in similar cases hover around PLN 200,000 ($66,000).
In the case of January 14, 2010 (IV CSK 307/09) the Supreme Court allowed bereavement damages to be pursued on the basis of the violation of the personal right to family ties (art. 24 in conjunction with art. 448 k.c.). Such a construction of articles 24 and 448 k.c. has caused a vast flow of claims arising from events that happened prior to August 3, 2008, in particular in the light of the Court’s recent liberal approach to accumulation of claims for compensation of non-pecuniary loss on the basis of article 448 k.c. The scenario almost exclusively involves death arising from a traffic accident. The idea of making use of the provisions regulating the protection of personal rights in order to create a ground for awarding compensation for the moral damage arising from the victim’s death was first applied shortly before 2008 in a few judgments of the courts of appeal. In fact, this trend in case law contributed to the legislative change in 2008. The protection of personal rights as a legal ground for such claims was, however, called into question by scholars. Since the revision of the civil code in 2008, the common opinion is that indirectly injured persons have finally been vested with a right to seek redress of moral harm arising from the death of a family member.

Nevertheless, since 2010 the Supreme Court has repeatedly held that a “special family tie between the living persons” may be violated by wrongfully causing death to one of the family members. The catalogue of the interests included in article 23

79. OSNC-ZD C/2010, item 91; Bagińska, Poland (2010), supra note 49, at 467-70, nos. 52-59.
82. See SN judgment of 21 October 2010, III CZP 76/10, OSP 9/2011, item 96; SN judgment of 10 November 2010, II CSK 248/10, OSNC-ZD B/2011, item 44; SN judgment of 3 June 2011, III CSK 279/10; Bagińska, Poland (2011), supra note 52, at 493-97, nos. 13-26; similarly, also in SN judgment of 13 July 2011, III CZP 32/11 (unpublished); SN judgment of 15 March 2012, I CSK 314/11 (unpublished); SN judgment of 7 November 2012,
k.c. is open-ended and the Supreme Court found no reason to exclude emotional family ties from the sphere of legal protection.

It is hard to contest the Court’s argument referring to unequal treatment of claimants. Without question, those victims who were “unlucky enough” to lose their next-of-kin before August 3, 2008 are “discriminated” against by the system. They form a substantial group of actual and future claimants. Why are they to be treated differently with respect to entitlement to bereavement claims than those who lost their relative after August 3, 2008? From the constitutional perspective, such a situation is unacceptable. On the other hand, the tempus regit actum rule was not modified by the legislature and it has to be applied. This policy decision is now attenuated by the refreshed construction of the provision of article 448 k.c. in the shape it has existed in since 1996.\(^\text{83}\) According to the Court, the fact that indirect victims were finally vested with a right to claim bereavement damages in 2008 does not mean that they had been prevented from seeking compensation pursuant to the rules on the protection of personal interests before that date. In the Court’s view, the legislative change only confirmed the admissibility of compensatory claims based on the protection of personality rights.

That entirely new interpretation was created and maintained in the context of the indemnity paid under third party liability motor insurance,\(^\text{84}\) as the scope of guarantee liability of an insurer is identical (albeit capped) to the scope of civil liability of the insured towards any victim. In all cases where the Supreme Court equated the civil liability for wrongful death with the violation of a personality right (i.e., a special emotional family tie), the

\(^{83}\) III CZP 67/12, OSN IC 4/2013, item 45; SN judgment of 20 December 2012, III CZP 93/12, OSN IC 7-8/2013, item 84.

\(^{84}\) See Bagińska, Poland (2010), supra note 49, at 468-69, nos. 56-58.
defendant, sued directly by the next-of-kin, was a third party traffic liability insurer, whose liability has a cap of €5 million (until June 10, 2012, the cap was €2.5 million). Nevertheless, in no single case can one find any overt policy argument indicating that the insurers’ deep pockets had a great impact on the ruling. A similar decision against a “normal” defendant (e.g., against a doctor for medical malpractice which resulted in death, or a recourse claim of the insurer towards a drunken driver) has not yet been reported.\textsuperscript{85} It ought to be noted that this case law, despite meaningful criticism in legal writings, is well established.

From a practical angle, pursuing “old” cases, where the claims have not yet expired, has become a huge problem for the insurance sector. Most of the cases from before August 2008 were adjusted and paid out to the claimants—next-of-kins. Hence, now insurers face the necessity of safeguarding millions of Polish zlotys to cover the claims grounded in the theory of an infringement of a new personality interest. The average award ranks between PLN 100,000 and 120,000 ($33,000–40,000), but not infrequently the sums reach the ceiling of $120,000. This higher level of compensation reflects the sums paid by the Polish government to the members of families of the victims of a governmental plane crash in Smolensk (Russia) in 2010, in which 98 persons were killed. The sum of PLN 300,000 ($100,000) is also a maximal cap in the new system of seeking compensation for losses due to medical incidents in the event of a patient’s death (discussed below).

Finally, a victim-oriented approach also concerns the scope of entitlement to bereavement damages. In a landmark decision of March 9, 2012 (I CSK 282/11),\textsuperscript{86} the Supreme Court has extended the understanding of the “next-of-kins” who may claim non-

\textsuperscript{85} See Ewa Bagińska & Izabela Adrych-Brzezińska, Poland in EUROPEAN TORT LAW 2013 at 510-13, nos. 88, 90-92 (E. Karner & B.C. Steininger eds., De Gruyter 2014) [hereinafter Poland (2013)].

\textsuperscript{86} OSP 11/2012, item 106; Bagińska & Krupa-Lipińska, Poland (2012), supra note 68, at 539-42, nos. 59-71.
pecuniary compensation on the basis of article 446 § 4 k.c. The Supreme Court ruled that a baby who is stillborn may be declared a descendant according to the said provision. In this case, a baby was stillborn due to the injuries that its mother suffered in a car accident. At the time of the accident, the mother was in her 34th week of pregnancy and the fetus was a viable baby that could have lived outside the womb. Due to the loss of the baby, its parents suffered bereavement; the mother was traumatized, not able to work, and taking psychotropic medication. She claimed PLN 150,000 ($50,000) and the father PLN 100,000 ($33,000) as bereavement damages. The Supreme Court awarded compensation holding that an unborn baby might be considered as next-of-kin under a factual test. Hence, it should be established in each case whether strong, positive and deep emotional bonds existed between the plaintiffs and the deceased—that is, whether it was an expected and wanted baby. It was the first time that the Supreme Court awarded non-pecuniary damages for parents as secondary victims who have had a stillborn baby. In 1966 the Supreme Court considered an opposite situation: whether a baby might claim for bereavement damages as a secondary victim if it was in its mother’s womb at the time of the death of its father. The court then answered in the affirmative.  

The decision of March 2012 has been criticized in legal academic writings. According to Mirosław Nesterowicz, the final result (the award of bereavement damages) is correct and just, but the legal reasoning of the Court is wrong: the parents’ claims should have been classified as those of primary victims (on the basis of art. 445 § 1 k.c.), as they had

87. SN judgment of 4 April 1966, II PR 139/66, OSPIKA 12/1966, item 279. The case was based on article 166 of the Code of Obligations (1933), which was equivalent to article 446 § 4 k.c.

88. See Mirosław Nesterowicz, Dziedziczenie roszczenia o zadośćuczynienie za krzywdę wyrządzoną dziecku w łonie matki. Głos do wyroku SN z 24 marca 2011 r. (I CSK 389/10) [Inheritance claims for compensation for the harm done to the child in the womb. Commentary on the judgment of the Supreme Court of 24 March 2011. (I CSK 389/10)]. 7 PRZEGŁAD SĄDOWY 197 (2012); see also cmt by Bączyk-Rozwadowska, OSP 11/2012, item 106.
suffered moral damage (physical and mental pain) due to the death of their unborn baby, and not as those of secondary victims (on the basis of art. 446 § 4 k.c.). To justify its decision, the Supreme Court pointed to the distinction between the terms “injured” and “deceased” used in article 446 k.c. Some commentators approve of this as the correct approach, coherent with the ratio legis of the Code provision, which implies that a deceased person does not need to have legal capacity. Other arguments hold that the term “deceased” used in the article is a logical consequence of the regulatory scheme in articles 444-446 k.c.: articles 444-445 k.c. concern claims of a primary victim, while article 446 k.c. concerns claims of an indirectly injured person, resulting from the death of the primary victim. To be classified as “deceased”, however, the baby needs to live at least for a moment.

V. THE REFORM OF THE RULES ON CLAIMS PRESCRIPTION IN PERSONAL INJURY CASES

Until recently tort claims were limited to three years from the date that the victim learned of the damage and the person responsible, but in any case to ten years since the tort occurred (art. 442 §1 k.c.). The key practical problem was compensating personal injuries stemming from events that took place more than ten years before the occurrence of the damage. Lower courts had tackled this problem differently, following the grammatical construction of article 442 §1 k.c., although the case law was largely inconsistent. In the Resolution of the Full Civil Chamber of

89. See cmt by Bączyk-Rozwadowska, supra note 88, at 749.
90. See Nesterowicz, supra note 88, at 108.
91. In Polish law prescription of claims does not result in the termination of a right. The right (claim) survives the lapse of time, but the debtor, when sued, may raise a defence of limitation of action and the court will thus dismiss the claim (i.e., the claim is time-barred). Should the debtor not raise the defence, the court will enforce the claim, as it has no competence to apply the statute of limitations ex officio.
February 17, 2006, the Supreme Court held that the maximum ten-year period must always be counted from the day of the tort (a tempore facti), and not from the day of the awareness of the damage. This interpretation applied equally to future losses and to losses that the victim was unaware of. When construing article 442 §1 k.c., no reference should be made to the notion of “accrual of claims.” This judgment preceded the ruling of the Constitutional Tribunal (Trybunał Konstytucyjny or TK). The Constitutional Tribunal, in the judgment of 1 September 2006 (SK 14/05), declared that the situation where some claims may be limited in time before the victim is even aware of the damage was unconstitutional. The Tribunal thus repealed article 442 §1 sentence 2 k.c. because of its unconstitutionality.

Consequently, the rules on prescription of tort claims placed in the Title on Torts were modified in 2007 by the Act of 16 February 2007 on the Revision of the Civil Code. Pursuant to the new article 442[1] §1 k.c., a claim for redress of damage caused by a tort shall be barred after a period of three years from the date on which the injured person learned of the damage and about the person obliged to redress it. However, this period cannot extend beyond ten years from the date on which the event causing damage occurred. This means that the three-year period stops running after ten years from the day of the tort. The ten-year period must always be counted from the day of the tort (a tempore facti), and not from the day of the awareness of the damage (a tempore scientiae).

94. Article 442 k.c. originated in the 1933 Code of Obligations, and despite strong criticism has not been changed with the exception of shortening of the prescription period from twenty to ten years in 1950.
95. Dz.U. 2007, no. 80, item 538; see Bagińska, Poland (2007), supra note 60, at 451-52, nos. 1-5. The revision did not modify the interpretation of Article 449[8] k.c.—the special rule on prescription in the product liability regime which must be construed in conformity with Product Liability Directive 85/374/EEC.
Pursuant to article 442[1] §2 k.c., if damage resulted from a crime or misdemeanour, compensation claims are barred after a period of twenty years from the date when the crime or misdemeanour was committed, regardless of when the person who suffered the damage learned about it and about the person obliged to redress it.

A new rule stipulates that a personal injury claim cannot expire before the lapse of three years from the day on which the injured person learned about the injury and about the person obliged to redress it (art. 442[1] §3 k.c.). This means that regardless of the lapse of the time a tempore facti, whether ten or twenty years, the claim arising from personal injury will not be time-barred for three years since tempore scientiae. Hence, the absolute periods of ten or twenty years are “suspended” in personal injury cases. Nevertheless, the periods running a tempore facti may remain more convenient for the injured party with regard to evidentiary burdens.

Finally, the claims of minors for redress of personal injury may not expire earlier than two years from the day when they reached maturity.96

Under the new regime on prescription, the ‘suspension’ of the period of prescription in personal injury cases (art. 442[1] §3 k.c.) does not preclude obtaining a declaratory judgment that the defendant is liable for any future damage originating from the same event (tort). The Supreme Court, in the ruling of February 24, 2009,97 held that the amendment of the Civil Code had not caused a substantial difference in this respect as compared to the former regime.98 Damage caused by injury to persons is dynamic and the consequences of tortious conduct may appear long after the event. The rule stated above performs two functions. First of all, it enables the injured person to claim compensation for distant

96. See Bagińska & Tulibacka, supra note 4, at 127-29, nos. 228-30.
98. This was well-established case law under the former regime; see SN judgment of 17 April 1970, III PZP 34/69 OSNCP 12/1970, item 217.
consequences of a tort. The second aim is to facilitate the burden of proving all conditions of liability for those consequences. Therefore, an injured person has, in principle, legal standing to ask for a declaratory judgment if she pursues her interest simultaneously with a claim for actual damages.

VI. RECENT DEVELOPMENTS IN THE MANAGEMENT OF PERSONAL INJURY CASES

A. Group Actions Law

In 2010 the legislature introduced class (group) actions into Polish law. A class action may only be brought with respect to claims for consumer protection, claims based on product liability and claims based on tort law (except for claims for protection of personal interests). A class action is allowed where single-type claims are asserted by at least ten persons and are based on the same facts or on the same legal bases, provided that material circumstances that substantiate the claim are common for all the claims. There is no maximum limit of claimants. However, with regard to claims for payment of money, all the group’s members have to agree on the unified amount per person being claimed. Diversified amounts are still possible, provided that they are settled within subgroups of at least two persons. This requirement entails a detraction from the idea of full compensation and is rather uncommon among other class action models. Some class members will need to modify their claims and adjust them to the amounts claimed by other class members. In practice, this means decreasing the claim amount to the level of the lowest in the class or sub-

100. The distinction of product liability claims from tort claims is artificial. A product liability claim is a tort claim under Polish law. Perhaps it is due to the fact that torts are regulated in Chapter VI and the product liability regime in Chapter VI prim of Book Three of the Civil Code. Chapter VI prim implemented the EU Directive 374/85/EC (it was technically more convenient to create an additional chapter in the code).
group, because courts will not award compensation above the actual damage.  

If claims are pecuniary, the plaintiffs may request that instead of demands for payment, the court establish the liability of the defendant (art. 2). It is an opt-in procedure. The claimants must be defined (not anonymous) and they have to make a declaration of willingness to participate in the class action before the court. The regime of a class action does not exclude the right to pursue individual claims under the general rules of civil procedure.

Clearly, the aim of the new mechanism is to simplify and facilitate actions by large numbers of people seeking compensation. In spite of this attempt at approaching damages more “globally”, the Act does not detract from the main premise of compensatory rules: each class member is to be awarded damages individually. The first Polish class action suit was filed in a case of over 400 patients who were infected with the hepatitis C virus through the administration of a medication (the class is seeking approximately PLN 75 million = $25 million in damages) and is still ongoing.

B. Alternative Route for Seeking Compensation for Personal Injury Arising from Hospital Medical Incidents

For the past 20 years Polish legal writers have strongly supported the introduction of an alternative compensatory scheme to deal with the large number of claims arising from health care services. Both the Swedish No-Fault Patient Insurance system of 1975 (as amended in 1997) and the French model were suggested as best suited to Polish juridical, economic and social conditions. Such a special scheme would enhance, in particular,
the protection of victims of hospital infections, infections stemming from blood transfusions, medical accidents and vaccinations.\textsuperscript{104} It is beyond doubt that such high awards have rendered budget management by public hospitals problematic.

The Act of 28 April 2011, on the Revision of the Law on Patients’ Rights and the Patients’ Ombudsman, introduced a new, extra-judicial procedure for patients’ personal injury claims arising from a medical incident.\textsuperscript{105} This procedure aims to enable hospital patients to seek compensation relatively swiftly directly from the insurer (or from the hospital, if the insurance coverage is unavailable). The subject matter of the procedure is the establishment of a “medical incident” for which a hospital is liable. The hospital’s liability is still considered a civil liability for medical malpractice or a medical accident. However, the compensation available via this legal pathway is capped. Concurrently, a new Law on Healthcare Activity\textsuperscript{106} obliged all healthcare entities that manage hospitals to obtain patient insurance against damages caused by medical incidents.

This extra-judicial, administrative (or quasi-administrative) system is based on sixteen regional medical boards (commissions). The boards consist of sixteen lawyers and physicians in equal numbers. They are appointed by the Ministry of Health (one member), the Patients’ Ombudsman (one member), and the head of a region (fourteen members) from the candidates recommended by professional corporations and patients’ organisations active in a given region.


\textsuperscript{105} Dz.U. 2011, no. 113, item 660. The system became effective as of January 1, 2012 and applies to all medical incidents that occur on or after that date.

A patient, or his or her statutory representative or heirs, may file a claim. The process of seeking redress through a medical complaints board is not synonymous with contemporary forms of alternative dispute resolution. The procedure is neither arbitration nor mediation because the patient may commence the proceedings without the consent of the other party. The legislature thus describes the procedure as alternative, because a patient has a choice: he or she can either follow this procedure, taking his or her matter before a regional board and agreeing to the proposal made by the responding insurer (or hospital), or take his or her claim through the general court system. The legislation does not provide for any judicial control over the decisions of medical boards or the compensation proposals made by the insurers.

The Act introduced the first domestic statutory caps on damages in personal injury cases: the maximum cap of PLN 100,000 ($33,000) for personal injury, and PLN 300,000 ($100,000) in the case of a patient’s death. The Ministerial Regulation of February 10, 2012, concerning the scope and conditions of evaluation of compensation for a medical incident provides tables for personal injuries and sub-caps in the case of a patient’s death: PLN 200,000 ($66,000) for pecuniary losses of the successors, and a maximum of PLN 100,000 ($33,000) as non-pecuniary loss damages. More specific tables are also included. Insurers are required to refer to the tables when making an offer of compensation in the special procedure.

These is serious criticism as to the inconsistencies between the Act and the civil code, the establishment of compensation caps that are either too low or too high, or the unreasonably limited scope of application of the procedure. The nature of the procedure also raises serious constitutional questions. This notwithstanding, the general direction of the new law appears to meet the expectations of both legal and social actors. In Poland, more than 60% of all

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persons infected with the Hepatitis B virus (including approximately 80% of children under two years old) were infected in a health care institution. The second common source of injury is related to childbirth: between 2001 and 2009, approximately 330 lawsuits annually were brought to court.\(^{108}\) However, many more cases, especially those involving full or partial disability following a hospital-related injury, were in fact handled within the framework of the social security system. This means that a substantial number of injured patients were either uncompensated or under compensated. The system has been in operation for two years and patients have been successful in approximately 25% of the cases filed.

VII. CONCLUSION

The evolution of Polish tort law in the last two decades clearly shows that—contrary to what was argued in the previous political system—money damages can play an important social function. They supplement the social benefits paid out from the (public) social security system as well as the public health care system. Damages for non-pecuniary loss aim to compensate victims, as far as money can, for moral harm. In general, in the present practice the sums awarded by Polish courts as compensation for non-pecuniary loss are increasingly high. In certain cases this is the only type of damages received by the victim. Although the awards adjudicated by Polish courts may seem relatively insignificant to American readers, especially when compared with amounts awarded for similar injuries in the U.S., they have sufficient buying power in Poland. The emphasis on the compensatory function has led to the rejection of “moderate” sums or “average standard of living” as an additional yardstick for computing the

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award. This is one of the most important developments in the court practice in the last decade.

The other important development is the explicit basis for bereavement damages. It has immediately led to a change in the courts’ interpretation of the already-existing rules on personal rights protection in order to ameliorate the lacuna caused by the failure of the legislature to embrace existing, yet unexpired, claims of the next-of-kins.

Another significant legislative reform, brought about by a decision by the Constitutional Tribunal, relates to the extension of, as well as substantial modification in, computing the prescription periods in personal injury cases. The new procedural instruments that have been made available to the victims remain to be assessed. The alternative path for victims of medical incidents seems to have become popular with patients, in contrast to group actions.
This is not a review in an ordinary sense of the word, i.e.: “7. a. A general account or criticism of a literary work (esp. a new or recent one) …”¹ or, according to Geoffrey Samuel, “a critical piece aimed at the public on a particular book by a particular author”.² Comparing (or is it juxtaposing?) these definitions, they include a common idea behind a radical: the review must be “critic-al.” Here I am, sent back to my *Shorter English Concise Dictionary* in two volumes, which gives me no solace, as the first two definitions—a apparently the most relevant—imply a judgment, even if it is a “careful” one. To pass a judgment on anyone or anything is something I intensely dislike. My first reaction was indeed to send the book back to the *Journal*, as it was so completely overwhelming me.

At the same time, it attracted me irresistibly as, due to my limited knowledge, I was willing to agree that it was “the single (my underlining) introductory work exclusively devoted to comparative law methodology” (at back cover). Thus I could only infer that I had in my hands a rare thing and my curiosity was even more awakened than it was permanently by nature.

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Further, the book immediately revealed at first sight in some places a use of figures; their quality delighted my inner self interested in teaching. I personally had rarely been fully satisfied by my quasi-total incapacity at concretizing imaginations that frequently erupted in my personal work. Finally, why should not Geoffrey Samuel’s work provide an answer to questions which sometimes appeared to be of paramount importance whenever I was confronted with the wish or the obligation to compare a piece of law foreign to the one I had been taught at university—if ever so—many, many years ago? These were my expectations. They certainly contributed to my final decision to embark on this non-review. All things having been considered with due care, I decided accordingly to roam in the book leisurely according to my mood and my personal remembrances, leaving to the Editor of the Journal the responsibility to incur or not the wrath of the Author by publishing or not these pages.

1. I had an immediate question. Why, in 2014, should one keep in the title of such a fundamental and innovative book a reference to a “strange,” and for me non-existent, topic: “comparative law?” Could it not be adequately replaced in English by “comparing laws”? Especially since Pierre Legrand—one of, if not, the most quoted authors in the book—has for five years proposed replacing these two words in French with the more adequate “comparer les droits.” To which, quite unusually, he added in the title of his book, the adverb “résolument,” which leaves me perplexed and of which I would dispose easily if I was Samuel. Was he referring to his own determination—this is doubtful as he never appeared as someone cultivating shyness—or did he only wish his work not to be confused too easily (at first sight of course) with that of Vanderlinden bearing the same title but for the adverb? Let us

3. *Id.* at 8.
only hope that Legrand did not imply that the latter was irresolute—for whatever it means—in his approach to comparative law! *Chi lo sa?*

2. Quite quickly I realized that I was confronted with a monument of sophistication of which I had no previous idea whatsoever. For one more time indeed (but this had happened in other branches of law), it came to my mind that I had been for decades in the position of Molière’s Mr. Jourdain, comparing without knowing what the verb really meant and thus ignoring what I was really doing. Since 1953 indeed, when René Dekkers—then a professor of Roman Law at Brussels Free University—threw a young student (with two years’ experience at swallowing essentially literature in the humanities and trying to reproduce it to the letter for two years in June) into the cauldron of the comparison of laws by suggesting that he start a thesis devoted to a study of codification without any limit throughout space and time, I never, never bothered either with methodology or with legal theory concerning what I was doing, which I believed was a kind of comparison of laws. I was a simple avowed empiricist. Full stop.

3. Furthermore, I never claimed that any of my publications was either a “significant and influential contribution to legal knowledge” or “ranked amongst the most elegant and insightful contributions” to the same. My only excuse for having possibly been part of “a tradition in comparative legal writing that can at best be described as theoretically weak and at worst startlingly trivial,” is that, obviously, the book under (non-) review had not yet been published, and also that, as Sacco wrote in 1996, any of my “proposal[s] could have been richer if [I] had taken advantage of the analyses that others had sketched previously.” If I was an empiricist, the circumstances of my life were such that I rarely had

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7. *Id.*
much time to spend on “some serious preliminary reading and research” as defined in five lines by C. Hart and adopted by the author. For some time the necessities of earning a living, followed by a huge diversity in my teachings in different places, some of them with quasi-inexistent legal documentation, a variety of administrative tasks either in faculty or in running international associations, and a respectable number of publications which had no other pretence than ensuring that I would not perish, certainly prevented me from reading the normally required “analyses that others had sketched previously.”

4. My only concern today is for the undergraduate student, or even the postgraduate one, “whose work involves comparison between legal systems” or who should have reached that stage in his studies in order “to look beyond law as a discipline” and to take a course in comparative law. He has first to reassess and master what law is (i.e. being able to choose between, in alphabetical order, Dworkin, Hart and Kelsen, among others) before being “introduced” to comparative law by the author, even if “the concerns of the comparatist are different” of those of the legal theorist. My concern is also for all those—far more numerous—who are apparently excluded from the magic kingdom where law is being compared. I have, of course, been one of them, whenever I erred in accordance with the rule model (or any other) without knowing of the existence of the latter, or even of what law truly is since the Humanists (by the way, who are they?). Clearly this “introduction” is conceived—and again this is a choice which lies within the complete freedom of the author—for a self-proclaimed intellectual elite and this (non-)review should never have been entrusted to me. And yet, I am fascinated by the book, as it deals with two words (although I would have preferred the

10. Sacco, supra note 8, at 667.
12. Id. at 5.
13. Id. at 121.
following three: comparison of laws) with which I have been familiar for slightly more than half a century.

5. This fascination is tinged with some regrets as my own experience has been mostly outside the limits that the author—and again this is his privilege—has assigned to his work. He seems to deal most not with “law” as such, but with laws as they developed in Western Europe and spread in the academic world around the globe from the Renaissance onwards, i.e. the ones he mentions when presenting the rule model: “a matter of propositional knowledge expressed in symbols (natural language) themselves conforming to a system (linguistic) and thus being capable of treatment and manipulation, to a greater or lesser extent depending upon the system, by logical operations. It is this logical aspect of propositional knowledge that has traditionally inspired jurists since the Humanists to construct ever more coherent systems based on analogy between law and mathematics.”

There we are.

6. This definition clearly has a merit which is too rarely met among comparatists: being careful that things compared are comparable. Dworkin, Hart and Kelsen may differ as to what exactly they consider “law”; they all refer to the same basic social material and way of thinking. After having practised taxonomy on a very formal basis and having frequently criticized particular taxonomic approaches, including those of David or Zweigert and Kötz, I tend, under a radical pluralist’s view of laws, to limit the usage of the word “law” in a comparative approach to very near that adopted by Samuel. I do not believe that Islam (the only “exotic” “law” he refers to indirectly, citing Glenn) has enough in common with the law as defined at the end of the previous paragraph to be “comparable” with the latter. Let me only bring back to the attention of the reader three more or less explicit definitions of the shari’a by three specialists: a) “The Shari’a is the path laid down by the creator; in following it men will find

14. Id. at 122.
15. Id. at 50.
both moral and material well-being. The *Shari’a* regulates in great
detail the dealings of individuals with each other and with the
community; it encompasses all man’s duties to God and his fellow-
men.”

b) “Floating above Muslim society as a disembodied soul,
freed from the currents and vicissitudes of time, it represents the
eternal valid ideal towards which society must aspire.”

c) “The sacred Law of Islam [*shari’a*] is an all embracing body of religious
duties, the totality of Allah’s commands that regulate the life of
every Muslim in all its aspects; it comprises on an equal footing
ordinances regarding worship and ritual, as well as political and (in
the narrow sense) legal rules.”

Would any of these definitions fit the one quoted in the above paragraph? Asking the question is
answering it. This is, of course also true, of what Glenn has absent-
mindedly called “chtomic” legal tradition, providing us with a good
example of cultural and legal imperialism to which the author quite
rightly and frequently objects and where I completely share
Legrand’s views about “alterity” as much as he does.

7. Thus, there is no room in Samuel’s theory and method of
comparisons for space and time beyond the most classical
theoretical limits of the Western world. This limitation has my
complete sympathy, because it avoids the indescribable confusion
which has spread in “legal” science by putting in the same basket
pre-colonial African, American, Asian or Australasian, without
forgetting religious laws. The comparative taxonomy, which René
David fathered from the 1950’s onwards, was in many cases
unjustifiable whatever method or scheme one adopted. It
unfortunately necessitated a rag-bag in which to forget whatever
was left hanging after categorization or, even worse, was
eliminated from the field of laws and systems, as was the canon
law of the Catholic Church. Yet, Islamic law, was kept in good

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16. H. Aïcharr, The Muslim Conception of Law in INTERNATIONAL
ENCYCLOPEDIA OF COMPARATIVE LAW, VOL. II 86 (Rene David ed., 1975).
18. JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 1 (1964).
19. See, e.g., Samuel, supra note 2, at 129-130 and 165-166.
place, being admitted that one, in this instance, did not refer to its parts kept in force in colonial systems; the latter were an integral part of the state system of colonial powers and were denied the quality of “Islamic” law by some experts in the field, among them Schacht.

8. Having personally experimented—for better and for worse—with the space and time dimensions of comparison at the very beginning of my research activity when working on a comparative history of the concept of code (1954) and African customary laws in the field (1959), and when comparing the drafting of customary laws in France and the Netherlands from the 15th to the 18th century as a teacher, I immediately met the problem of a) defining the object of my comparisons and b) transferring notions from one language to another, be they African or European. In the former was also included the task of deciding where was law, as my freshly and poorly acquired legal education had led me to believe it laid. I had, of course no real training in anthropology or history. In the eyes of Samuel and Legrand, who, happily enough for me, were still young, I would have been one of the many who even did not figure that a problem of method existed and just went along discovering comparison “by gradual trial and error.” 20 No wonder that, in front of Samuel’s book, I feel like a dinosaur in front of Rosetta (not Champollion’s stone, but the latest space vehicle.)

9. This does not mean that I did not occasionally discover in Samuel’s work situations where it would have been most useful by opening new windows and qualifications on facts I have met in the past. It also means that I could appreciate the connexion between some of them and my own attempts at comparing or relativize them in the light of an enlarged comparison. Among the latter stands the problem of acquiring the basic knowledge required for the comparison to take place. Admitting that one cannot ask many people to be sufficiently familiar with the language, the law and

20. Id. at 3.
the social fabric of more than two laws, the consequence of it is that apparently not many would qualify as comparatists according to Legrand’s requirement, which Samuel seems ready to accept. The way he presents it is quite satisfying, but, if it was strictly applied, one may wonder how many people would still qualify as comparatists, if only at the level of linguistic and cultural aptitudes.21 As early as 1985, I was meeting the English word “home” and could only escape the immediately realized near-impossibility of translating the word into French by reference to a popular English song.22 In order to go much further, i.e. in Japanese law, I was fortunate to have the assistance of a friend and colleague who had a doctorate in both law and Far Eastern languages. When confronted with the Japanese “honkyo” we started with dictionaries: they sent us to the equivalents “tower of a castle” and “headquarters of an army.” The possible difference between the two appeared in two different translations of the Japanese Civil Code, the one into French using the word “siège” and the other into English using the word “centre.” Having discussed the problem in a conference attended by some Japanese colleagues that I presented at the Institute of Advanced Legal Studies of the University of London, no consensus could be reached among them as to a definite choice. Beyond the dictionaries, I had brought into the picture the military character of traditional Japanese society, the partly French, partly German education of Japanese lawyers at the time of the drafting of the Code, the mittelpunkt (hence centre) dear to Dernburg and in conflict with the wording of the B.G.B., etc. Thus, I was exploring avenues in the same way that I had been trying to identify the sende or the ira in the Zande land tenure system as early as 1959.23

21. Id. at 144-147.
But this was apparently not comparative law as Samuel defines it. The only positive point could perhaps be that in both cases I was decidedly, but perhaps not sufficiently and thus unsuccessfully, fighting an automatic direct projection of my own prejudices into foreign legal systems. But was I therefore an imperialist in the depth of my multiple selves? God, in whom I do not believe, will decide on the day of Judgment.

10. Yet one point still leaves me puzzled. How does one decide to subject two notions or concepts to comparison before starting the job? The more so as we know and agree that “focusing on words and dictionaries is not comparative law.”24 But is it totally excluded at the very beginning of a jump into the unknown? When René Dekkers launched me on the path of codification, what was I looking for? Anything, called in a Romance language, codex, code, codice and codigo? This would have provided a very limited answer to his concern. The more so as the word had been attributed by comparatists and historians to many documents without much reflexion as to what it covered. Having read Samuel, I have the feeling that I still do not know what was in theory my solution of solving the problem by creating a group of “unnamed” codes on the basis of a first identification of words found in dictionaries.

12. Reading Samuel also led me to some introspection regarding the reason why one is attracted by the comparison of laws, a point which, ultimately is not necessarily of interest for his purpose. As mentioned before, I was pushed into it by the hazards and necessities of life, and believed that I had entered into comparison long before getting my first law degree, as I am sure a majority of students are led to believe by their teachers, including myself, while studying comparative civil law.

But what about the objectives of comparison? Going through the volume, one finds:

24. Samuel, supra note 2, at 147.
– the advancement of knowledge which, as the Author understands it, is not only acquiring the knowledge of any law, but also exploring beyond the words of the law and going “deeper into the histories, sociologies, economics and politics” of the compared law.  

25. Id. at 10-11.

This being done, comes:

– the “access to legal mentalities” which comes from a curiosity about the “other” and especially his inner selves, which some “critical” or “radical” pluralists (to whose I belong) consider to be the place where anything legal, normative or willingly factual starts.  

26. Id. at 6.

– the acquisition of a relative look at things legal, including one’s own system and, consequently, pushing away any attempt to “normatively imposing one’s own epistemological interests on others” (citing Jansen, and immediately punctuated by Samuel’s “Quite so.”)  

27. Id. at 6.

In fact, the comparatist might believe that he has become a social anthropologist, which of course is not true. But between affirming the interest of acceding to foreign mentalities and realizing such objective there is evidently a formidable gap, even for an excellent postgraduate student. And, finally:

– the realization of “a dialectic between the domestic body of law and a foreign body of law” in order to give the comparison of laws its “meaning and sense”.  

28. Id. at 11.

Here comes again the already mentioned Legrand’s idea of “alterity” with which I am in full sympathy.

The three objectives just mentioned do not exclude more limited ones, of which a characteristic is their relativity. Such is the case for the elucidation of information between two laws which may have “some practical value”.  

29. Id. at 12.

But this is immediately discarded, as either, with the support of Sacco, it can “verge on the
ridiculous,”30 or, with the support of Legrand, “often be just vacuous.”31 Samuel points at the considerable development of the discipline in the last twenty years and suggests that the existing literature may contribute to a more theory-oriented discipline with the risk of a closing itself on itself with the result that “students may never actually ever get to compare any laws.”32

But these are far less contestable objectives than the one which is often concealed behind questionable alibis (the need for “development” is one of them, which followed the detestable one for “civilisation”, both under the rags of “modernisation”): imperialism, be it academic, cultural, ideological, intellectual or legal.33 Happily enough, the author has no pardon for comparison covering such justifications.

13. All in all, comparison blows up the young lawyer’s mind, and I strongly believe that this can be done without too much theory or method. As Samuel quite rightly underscores: “comparative law, at every level, is by no means easy,”34 the more so because if one wishes to enlarge the scope of comparison to societies distant in space and time, the scholar is confronted with a dramatic lack of the reliable empirical data needed for any theoretically valid conclusion. One quickly enters the realm of what I call conjectures and hypotheses, which look more “serious” than fraud and cunning. But even within such limits the effort is worthwhile. As soon as the student gets a glimpse at it, comparison gives him the impression of enlarging his perspectives through times and spaces as to what law is far away from the canvas he often must painfully swallow during his first contacts with law.

14. Last but not least, a careful reading of Samuel reveals that he rarely takes a definite stand on the multiple elements which he brings to the attention of his reader; he is, in most cases, satisfied

30. *Id.* at 15.
31. *Id.* at 16.
32. *Id.*
33. See, e.g., *id.* at 6, 9, 17, 63, 78, 121, 129, 130, 147, 151, and 165.
34. *Id.* at 9.
with introducing—is it not precisely what the title of his book declares straightaway?—various methods and theories and the pros and cons concerning each of them without passing a “judgment” on them. Bigotry is evidently not his cup of tea, as it is for some imprecators against anything which is not their own conception of comparison in the field of law. In a sense, he definitively is a pluralist, as he himself emphasizes in the closing lines of his book. But does he realize that such commitment has its consequences? If he is what I would call a “traditional” pluralist, i.e. those who carry on setting pluralism within the State legal structure, there is not much problem. However, in the view of critical and radical pluralists like Rod Macdonald and me, he has to locate it within the infinite variety of individuals’ inner selves, permanently defining their own law, in which case he might find that comparison is practically impossible as no single mentality is comparable to another. This reinforces Legrand’s perspective and his suggested characterization of comparison as an intercultural dialogue replacing the traditional approach to comparison. But, if the author is fundamentally—at least so does he appear to me—a pluralist, he cannot discard contemptuously any other approach to the comparison of laws. This should enable him to prepare many editions of the present capital and most interesting work.
BOOK REVIEW

THE SCOPE AND STRUCTURE OF CIVIL CODES
(Julio César Rivera ed., Springer 2013)
Reviewed by Jimena Andino Dorato*

This book features a collection of essays originated in the Second Thematic Congress of the International Academy of Comparative Law, held in Taiwan in May 2012. As indicated in the Preface, the subject matter of the “Congress was ‘Codification’, and the subject of the panel regarding the civil codes was: ‘The scope and structure of civil codes. The inclusion of commercial law, family law, labor law, consumer law’.”¹ The book reviewed here is not only a compilation of some revised and reformulated National Reports presented in the panel but also a coherent and well-structured work on comparative codification.

The volume is divided in two Parts. Part I solely consists of a contribution by Professor Julio César Rivera, editor of the book, while Part II regroups, in alphabetical order, contributions from countries belonging to different legal families and representing both codified and uncodified models.

Professor Rivera’s opening paper is both a comprehensive introduction and an autonomous paper on comparative codification. Following his extensive work on codification, decodification and recodification,² the editor dedicates the first part of his essay to the codification method by describing the

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¹ Julio César Rivera, Preface to THE SCOPE AND STRUCTURE OF CIVIL CODES (Julio César Rivera ed., Springer 2013) [hereinafter CIVIL CODES].

codification era from Napoleonic times until the codes of the Twentieth Century. After outlining specific examples like the status of codes in federal states and uncodified models, he then discusses how the “overestimated” decodification era was followed by a renewed interest in recodification.

In the second part, with a general and comparative approach and specific references to national reports (whether or not included in the book), Professor Rivera focuses on codes’ contents. He also explains their links with other branches of law, as well as the role of the civil code in relation to other national or supranational sources of positive law.

The twenty contributions that make Part II of the book follow, with few exceptions and modifications, the structure of Chapter 1. Each chapter is a domestic analysis of a particular country or region, a comprehensive reference work that offers the comparatist invaluable tools to compare law, overcoming the inherent difficulties. The similar structure allows comparing apples with apples and oranges with oranges 3 through three main axis or comparative foundations on codification.

The first axis of comparison is codification, decodification and recodification. Contributions start with preliminary historical and political references on codification—or not—referring to the country’s preference on decodification or recodification.

The second axis explores the contents of the civil code and the links between other branches of law. After introducing the structure and contents of the of the country’s civil code, authors explain the link between the civil code and domestic commercial law, consumer law, family law, labor law and private international law.

The last comparative axis focuses on matters of hierarchy or the place of the civil code. Contributors then pay attention to the

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code’s relationship with the national Constitution and public international law.

From these three axes, infinite comparisons become possible. However, suggesting personal paths of analysis seems unfaithful to the spirit of the book. Therefore, contributions that made up the book are presented following the alphabetical order chosen by the editor, leaving comparison among them to the field of interest, needs and even imagination of the comparatist.

In Chapter 2, Professor Graciela Medina illustrates how Argentina, after three stages of fundamental reforms and a tendency toward decodification, moved back to recodification. In light of the interest in this recodification process, she chose to describe the structure of the 2012 Draft over the Code in force. Considering the actual passage of the new code after publication of the book under review, this contribution is probably one of the first comments in the international sphere on the Argentinean Civil Code now enacted.

Professors Heirbaut and Matthias E. Storme explain in Chapter 3 how Belgium, “more faithful the French Civil Code than France itself,” failed in several efforts to replace the Code. This doesn’t mean its updating was neglected in several aspects over the years. They then revisit the sources of civil law today, analyzing constitutional rules and regional law. After that, they focus on how commercial law has always been separate but never really autonomous, and on the domestic and regional debate on an autonomous consumer law.

Four jurists—Augusto Teixeira Garcia, Dan Wei, Paula Nunes Correia and Tong Io Cheng—emphasize and describe, in Chapter

7. *Id.* at 67.
4, the unique situation of Macau which “just like Hong Kong, is a Special Administrative Region (SAR) of People’s Republic of China (PRC).” While the Civil Code encapsulates general law, the particular situation of Macau has consequences on various branches of law: for instance, family law is structured both as part of the Code, Macau Basic Law and other codified and non-codified legislation. This particular situation also has some important influence on the relationship between the Code and Macau Basic Law, described as consisting of a “mini-constitution” and treaties.

Chapter 5 is another example of complete recodification. In this case, an historical and political background underlies a complete turning point from an extensive socialist codification to the adoption of a Civil Code. Professors David Alischer, Ondřej Frinta and Monika Pauknerová explain how new laws in the Czech Republic are “built upon clear ideological foundations and leading ideas corresponding to Central European traditions.” They outline that there is still much incertitude on the future interpretation of this novelty, only in effect since 2014. In a very detailed manner, and always referring to the historical context, the authors visit all three axes presented above. Thus, they describe the Code’s structure and contents, its relationship with the Constitution, treaties and private international law, as well as with business law, consumer law and family law.

The following contribution, in Chapter 6, is another case of recodification in a former socialist country. As Professor Irene Kull outlines, the process of codification in Estonia “was basically

8. Augusto Teixeira Garcia, Dan Wei, Paula Nunes Correia & Tong Io Cheng, Codification in China: The Special Case of Macau in CIVIL CODES, supra note 1, at 83-104.
9. Id. at 84 (emphasis by author).
10. David Elischer, Ondřej Frinta & Monika Pauknerová, Recodification of Private Law in the Czech Republic in CIVIL CODES, supra note 1, at 105-32.
11. Id. at 106.
12. Irene Kull, Codification of Private Law in Estonia in CIVIL CODES, supra note 1, at 133-54.
initiated with a blank slate”\textsuperscript{13} and court interpretation plays a significant role. Estonian codification has the particularity of a code composed of five separate laws (General Part, Property, Obligations, Succession and Family, and International Private Law). Then it is this “Civil Code” that is presented vis-à-vis labour law, consumer law and the Constitution and treaties.

In Chapter 7, Professor Teemu Juutilainen introduces a non-codified civil law jurisdiction: Finland.\textsuperscript{14} This Nordic country, despite a few attempts at codification, remained locally skeptical about this methodology throughout its participation in discussions about a European Civil Code. Following a short historical explanation of the absence of a code, the author presents the three main acts that constitute the core of Finnish Patrimonial Law Legislation and the links and structure of commercial, consumer, labor and family law. He then outlines the case of the autonomous status of the Region of Åland that, though limited, has some examples of regional private law. Finally, in the sense of the third axis approached in all papers, he points out the relationship between private law, the Constitution, and public international law.

We then arrive in France, with its undeniable leading role in the history of codification. In Chapter 8,\textsuperscript{15} Professor Jean-Sébastien Borghetti focuses on the uniqueness of the French Civil Code that, though reformed in matters as personal status and family law, was never the subject of serious consideration for global reform or recodification. Despite its actual political and symbolical importance, Professor Borghetti outlines how the Code does not reign supreme anymore in the field of civil law due to Constitutional reforms. In this sense, the French Constitution of 1958 asserts both the importance of the Constitution in the French

\textsuperscript{13} Id. at 150.
\textsuperscript{15} Jean-Sébastien Borghetti, \textit{French Law} in \textit{CIVIL CODES}, \textit{supra} note 1, at 181-200.
legal order and the precedence of international rules over national ones.

In Chapter 9, Professor Christina Deliyanni-Dimitrakou presents how in Greece the Civil Code faced both decodification and recodification.¹⁶ Before entering a very detailed analysis of the matter, the author explains the historical context of an eclectic Code, only adopted in 1940. Through her presentation on codification and recodification shifts, she establishes the relationship of the Code with other branches of law.

Israel, presented by Professor Eyal Zamir in Chapter 10,¹⁷ is the first example of a mixed jurisdiction in the book. Besides its pioneering role in legislative harmonization between civil and common law, the case of Israel is an interesting example of codification by installments. Even with a project to codify in a Civil Code some of the existing legislation, traditional contents of civil codes like contracts or obligations and some aspects of family law (whether religiously or secularly considered) are kept separate from codification.

In Chapter 11 we find Italy as a Code originated in model combinations.¹⁸ With decodification prevailing over recodification, Professor Rodolfo Sacco shows how the code lost its monopoly over the years through the adoption of various intense domestic legislation and European rules.

Staying in the scope of codes stemming from comparative law influenced both by German and French models, Professor Hiroyasu Ishikawa presents how Japan resisted direct decodification of its Civil Code.¹⁹ Contrary to the Commercial

¹⁸. Rodolfo Sacco, A Civil Code Originated During the War (The Italian Codice Civile) in CIVIL CODES, supra note 1, at 249-66.
Code that was largely decodified, the Civil Code maintains its role as general law in the field of private law, with a few separate legislations for consumer law, which is also submitted to the superior status of the Constitution and treaties. The author also outlines the existence of a recodification spirit subject to the bureaucratic characteristics of law-making in Japan.

In Chapter 13 we can find another case of global reforms. From 1970 onwards, the Netherland’s Code, originally inspired by the Napoleonic Code, was (and is) gradually recodified. Professor Anna Berlee graphically presents the actual contents of the Civil Code and its relationship with the Commercial Code (which will be completely incorporated to the Civil one) and consumer, family and labor law that are for the most part already included in the new Code. Professor Berlee also outlines the influence of European legislation in the Dutch recodification process as well as its particularities as a monist country.

Portugal, in Chapter 14, is another example of global reform in the second half of the 20th Century although it suffered from decodification afterwards. Notwithstanding the decodification process, Professor Dário Moura Vicente outlines how the Civil Code still stands as the cornerstone of private law, divided into separate branches of commercial and consumer law. This role is limited by the Constitution and international treaties duly ratified or approved and published in Portugal.

In Chapter 15, Professor Muñiz Argüelles from Puerto Rico provides a complete paper exclusively focused on the first axis of comparison: codification, decodification and recodification. Not limited to his country, the author provides his ideas on the matter,


22. Luis Muñiz Argüelles, Some Personal Observations on Codification in Puerto Rico in CIVIL CODES, supra note 1, at 331-42.
comparing examples of success and failure from other countries and regions.

Next, Professor Elspeth Reid takes us back to another example of mixed jurisdiction, in this case, one that is not codified: Scotland. The author introduces the sources of law in specific areas (property law, succession law, contract law, consumer law, delict, commercial law and family law) and she then outlines how domestic jurists discourage codification though actively participating in European codification ideas.

In Chapter 17, Professor Gabriel García Cantero from Spain allows us to revisit another traditional code inspired by the French system, subject to both decodification and recodification. The Spanish Civil Code is also an example of a code that lost its original “constitutional value” in favor of the Constitution as the supreme law and, with some particularities, communitarian law. Another particularity that Professor García Cantero points out is the existence of many autonomous territories in Spain and their link with the Code.

Turkey, seeking secularization, is another case of modern codification through voluntary legal transplants. The Civil Code of 1926, that with some alterations was a translation of the Swiss Civil Code, and the Code of Obligations were replaced by a new code in 2001. The contents of the Code in force are the same as the old one. Commercial and consumer law are kept as separated branches and, as Professor Ergun Özsunay indicates, Turkey, when once focused on westernization, these days uses European rules as inspiration in recent reforms.

23. Elspeth Reid, Mixed but Not Codified: The Case of Scotland in CIVIL CODES, supra note 1, at 343-68.
25. Ergun Özsunay, The Scope and Structure of Civil Codes: The Turkish Experience in CIVIL CODES, supra note 1, at 387-408.
The United States of America made up the book in two different chapters. In Chapter 19, Professor James R. Maxeiner presents a general analysis on codification on a country level.26 With historical contextualization, the U.S. as a common law jurisdiction allows the author to expound on the cost of not codifying and the U.S. alternatives to codes. He then introduces the contents of civil code counterparts such as national “General Laws” and the Uniform Commercial Codes.

Due to its particularities, in Chapter 20, Professor Agustín Parise presents the case of Louisiana’s mixed jurisdiction.27 The author emphasizes the importance of the context of this unique code in the U.S., its history, and evolution. He presents its structure and contents and the relationship with other branches including the supremacy of the U.S. Constitution.

The last contribution is for codification in Venezuela.28 Professors Eugenio Hernández-Bretón and Claudia Madrid Martínez explain how after a first long codification process during the 19th Century, after three main amendments, we see a tendency to decodification due to the proliferation of special civil legislation outside the codes (for instance in family law and private international law, as well as consumer law, which was never regulated in the Code). Despite this tendency, as well as the supremacy of the Constitution, the author outlines the importance of the Civil Code as “the glue that keeps the unity of the system of Venezuela Private Law legislation.”29

Altogether, the book is remarkable and most informative on comparative codification, describing a large spectrum of different systems. The good structure and similar organization of the twenty

29. Id. at 464.
national contributions allow comparatists to access reliable research on codification matters. The authors, all renowned professors and researchers, are undeniably experts in private law, which ensures the quality of the papers. The possibility of comparing *comparables* will most certainly enrich research and inspire future comparative works.