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From its inception, the ambition of the Journal of Civil Law Studies was nothing less than becoming a reference periodical for the civil law in English, promoting a comparative approach. As our website advertised right from the beginning,

The *Journal of Civil Law Studies* is a peer-reviewed, online and open-access periodical, published by the Center of Civil Law Studies. LSU Law students participate in the editorial process once papers have been accepted for publication. First published in 2008, it promotes a comparative and interdisciplinary approach to the civil law in Louisiana and in the world.¹

The Journal is now ten-years old, well past the startup age. Present volume 10 publishes a note on the history of the journal during these first ten years, signed by Agustín Parise, Executive Editor and co-founder, with Olivier Moréteau, Editor-in-Chief. Parise points to the fact that the hybrid nature of the Journal “is especially valuable, since it makes [it] both a forum for legal scholarship and a laboratory for the development of research and writing skills in future generations of civilians and comparatists.” Regarding content, he notes that the Journal “serves as a forum for civil law scholarship that derives from academic discussion and debate,” which explains why a number of issues have published conference and workshop papers. He adds that “a number of articles have dealt with foundational aspects of the law, such as legal culture, legal language, legal systems, and the transformation and interpretation of the law.” Volume 10 is no exception. Angelo Chianale revisits notarial acts as written evidence, questioning whether things are really so different in the common law. Carlo Vittorio Giabardo addresses the civil contempt of court doctrine in the common law, wondering why it has no equivalent in the civil law. Zhe Huang critically examines social obligations on Chinese collective-owned land. Asress Adimi Gikay and

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¹. *Journal of Civil Law Studies*, LSU LAW DIGITAL COMMONS, at https://perma.cc/QA77-9AHA.
Cătălin Gabriel Stănescu question the reluctance of civil law systems in adopting the Uniform Commercial Code Article 9 “without breach of the peace” standard when allowing the secured creditor to take possession of the collateral upon the debtor’s default. These articles offer food for thoughts in various areas of the law, in every case with a comparative analysis. The same can be said of the essay by Alina-Emilia Ciortea on the duty of physicians to disclose medical risks to their patients: comparative discussion leads to the proposal of a better standard.

Other features are present in the volume. Civil Law in Louisiana, inaugurated in volume 5, publishes case notes written by LSU law students under the supervision of a professor. Civil Law in the World, inaugurated in volume 6, publishes national reports on recent evolution in multiple civil law jurisdictions. This time, we feature France with a report on the French revision of contractual obligations by Mustapha Mekki. Over a few years, no less than thirteen jurisdictions were explored, two of them more than once. A list of eighteen national correspondents appears on the masthead, and it will expand in the years to come. There is also a book review on key actors of Louisiana law during the period that follows the Civil War.

All this is the fruit of hard work and dedication. With the help of authors and advisors from all continents, the input of committed student editors, and the skills of multilingual staff, the journal is now well established to start a second decade of existence. Whether it lives up to the founders’ vision and meets the readers’ expectation remains to be seen. All involved in authoring, peer-review, editing, and producing will value the readers’ feedback. Do send your tenth anniversary wishes and comments to the editors, emailing at moreteau@lsu.edu. Happy reading.

The Editors
LOUIS VICTOR DE LA VERGNE
(1938-2017)

“Well, hello my friend!” That was the way Louis V. de la Vergne would answer a phone call or react when meeting an acquaintance. Indeed, Louis had many friends, and their common passion was the legal history of the Bayou State. Louis may be deemed the guardian of the Digest of the Civil Laws now in force in the territory of Orleans (Digest of 1808), since he owned and protected the de la Vergne copy of that text. Ancestry and the Digest of 1808 were eternal sources of research for Louis.

The Guardian of the Digest was born on September 21, 1938, in his beloved New Orleans, and died in that same city on September 15, 2017. Mr. de la Vergne graduated from New Orleans Academy and received an undergraduate degree from Tulane University. Louis was a graduate of the 1965 Class of Tulane University School of Law, and was a member of the Louisiana State Bar Association.1 Louis was an advocate for Louisiana legal history and helped build bridges with other civil law jurisdictions from across the globe.

Ancestry was a constant source of fascination for Louis. His ancestors included prominent figures of eighteenth- and nineteenth-century Louisiana; and it is possible to mention, amongst others, Hugues Lavergne, Gustavus Schmidt, and Jacques Villeré.2 Each of these Louisiana actors offered an opportunity for Louis to engage in academic projects. He was well known for seeding interest in scholars, offering the first stepping stones towards the realization of multiple projects. Scholars from Argentina, France, Mexico, Russia, Scotland, Spain, Sweden, and naturally, the US, to name a few jurisdictions, were enchanted by Louis and his passion.

2. Id.
Louis was indeed the Guardian of the Digest of 1808. That 1808 text did not include an exposé des motifs explaining its sources. Nevertheless, an uncertain number of copies contain interleaves with manuscript notes dictated by Louis Moreau-Lislet, or in some cases, even written by him. One of these manuscripts, the de la Vergne copy, includes references to Roman and Spanish materials linked to titles and articles. The manuscript also includes references to French texts of Roman grounding, such as the works of Robert J. Pothier and Jean Domat. The content of that copy triggered an academic debate between Rodolfo Batiza and Robert A. Pascal during the 1970s. That debate reflected that whether French, Spanish, or Roman, the laws were mainly taken from the continental European system, and that the Digest of 1808 was not a mere copy of the Code Napoléon or of a single text.

Louis was close to the LSU Law Center, mainly due to his lifelong friendship with Robert A. Pascal. Louis also found a friend in Alain A. Levasseur, and their interest in the life and work of Moreau-Lislet joined their paths during decades. Further, the Center of Civil Law Studies (CCLS) at the LSU Law Center, especially during the term of Olivier Moréteau, also built a strong bond with Louis. The CCLS developed the Digest Online, which made the text and manuscript notes of the de la Vergne copy—due to the generosity of Louis—freely available to readers across the globe.

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Louis will be missed; yet he is now an important actor within the legal history of the state he very much loved.

Agustín Parise
NOTARIAL ACTS AS WRITTEN EVIDENCE: TOWARDS A CONVERGENCE BETWEEN CIVIL LAW AND COMMON LAW SYSTEMS

Angelo Chianale∗

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ABSTRACT

This article studies the contrast between civil and common law systems regarding the significance of the notarial act. According to conventional scholarship, in the former, civil procedure requires written evidence and the notarial act is the strongest kind of evidence. In the latter, however, civil procedure requires oral evidence and the notarial act has no specific relevance. This article examines the extent of these two main principles: a) in civil law systems the notarial act is full evidence of the extrinsic and a document can be challenged only with an action for falsity; and b) in common law

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systems the notarial act has no specific evidentiary effect. Examination of the operational rules of both systems shows a marked weakening of the traditional theoretical opposition due to an increasingly pragmatic approach in solving problems linked to notarial acts, which are nowadays the same everywhere. This change marks an inexorable abandon of the crystallization of the classical schemes and theories, which, over the past centuries, have considered common law solutions a separate world from the civil law legal tradition.

Keywords: notarial act, public document, act under seal, deed, vestimentum, ius commune, contrelettres, témoins passent lettres, extrinsic, intrinsic

I. INTRODUCTION

Some of the strongest and most common oppositions in comparative law are centered on the notarial act. The notary is a public official in civil law systems who produces public or authentic documents with a high evidentiary value in the civil process, where written proof prevails. In contrast, common law systems have neither this type of notary, nor these public documents, and the proof provided in courts is predominately oral.

Often, the easiest and most successful oppositions, clear and linear in their approach, do not correspond with the facts. In the English system, there have been two new events, over the last few decades, that have modified the usual representation of these arguments.

First, judges of European common law systems are now called to accept any authentic document (notarial acts and court decisions) that originates from another European Union member state. In the English system, the relevant rules can be found in parts 74A and

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74B of the Civil Procedure Rules (CPR). Second, English judges have the capacity to receive a notarial act “in evidence without further proof.”

It is thus an opportune time to revisit the nature of the notarial act in the civil law systems and its peculiar strength as proof, comparing it with its counterpart under common law. This approach requires us to ascertain the typical evidentiary value of the notarial act among the various types of written evidence admitted in the civil procedure.

II. NOTARIAL ACTS AND DEEDS: AN HISTORICAL OVERVIEW

In Romano-Germanic civil procedure, written proof is found primarily in public documents and private agreements. The public document is characterised by the intervention of a public official such as a notary during drafting.

Pothier’s definition of a public document is still used: “Authentic acts are those which are received by a public officer, with the requisite solemnities.” This definition appears in article 1317 of the French Civil Code: “An authentic act is one that has been received by public legal officers who have the authority to draw up such acts at the place where the act was written and with the requisite formalities.”

Through the French Civil Code, Pothier’s definition reached Belgium (article 1317 of the Code Civil, identical to the French),

6. The relevant French text (and English translation) can be found on the Legifrance website: “L’acte authentique est celui qui a été reçu par officiers publics ayant le droit d’instrumenter dans le lieu où l’acte a été rédigé, et avec les solemnités requises,” https://perma.cc/FLA4-U6GT.
Québec (article 2813 of the Civil Code of Quebec: “An authentic act is one that has been received or attested by a competent public officer in accordance with the laws of Québec or of Canada, with the formalities required by law.”), Italy (article 1315 and article 2699 of the Codice civile from 1865), and Louisiana (article 2234 of the Louisiana Civil Code of 1870: “The authentic act, as relates to contracts, is that which has been executed before a notary public or other officer authorised to execute such functions . . . .”).

The German Code of Civil Procedure (Zivilprozeßordnung or ZPO) is similar. Under §415, public documents (öffentlicher Urkunden) are defined as: “Documents that have been prepared, in accordance with the requirements as to form, by a public authority within the scope of its official responsibilities, or by a person vested with public trust within the sphere of business assigned to him.”

A document similar to the acte notarié of continental systems also exists in English law. In England, legislation regarding public notaries indeed cites “notarial acts,” but it does not define them, specifying only that the tasks of public notaries, among others, are to “perform or certify any notarial act.” A famous scholar defined the notarial act as “any written instrument, act, or ceremony, under the signature and seal of a notary, authenticating or certifying some document, deed, writing, occurrence or fact.”

However, the most solemn document in the English system, substantively equivalent to the continental public document, is not the notarial act, but rather, the simple act under seal (deed). The deed, until a few years ago, was defined as a solemn document, written,

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8. The historical layering of works from English notaries appears in the definition contained in the Legal Services Act 2007, schedule 2: “Notarial activities’ means activities which … were customarily carried on by virtue of enrolment as a notary in accordance with section 1 of the Public Notaries Act 1801 (c. 79).”
9. Public Notaries Act 1833, s. 3-4.
sealed, and delivered by the author. 11 The requirement of the seal had been long substituted with a circular mark, pre-printed on the sheet, containing the letters L.S. (locus sigilli). 12 The Law of Property Act definitively abolished this requirement. 13 On the other hand, this law provided that it must be “clear on its face that it is intended to be a deed,” 14 that the deed must be undersigned in the presence of a witness, 15 and that it must be delivered by the author or the professional who oversaw its preparation. 16

The formality of the deed constitutes the most solemn form of documentation known under the English legal system. Indeed, it is not only necessary for the transfer of legal estates on land, but also for the assumption of obligations without consideration. 17 The function of vestimentum for the transfer of a right or the assumption of an obligation without consideration is carried out in a deed. Put differently, the presence of a consideration or the formality of the deed are the legal requirements necessary in common law to justify the transfer of a right or the enforceability of a promise: if a consideration is lacking, the deed supports the transfer or the promise. It has the same effect as a continental notarial act. In common law systems, a notarial act, which does not require the conditions imposed by a deed, cannot transfer a legal estate, nor can it compensate for the absence of consideration.

It is thus misleading to compare, at the level of substantive law, the public document of the Romano-Germanic systems with the English notarial act. For this reason, international private law scholars usually equate the continental public document with the deed in

12. This practice was already accepted in First National Securities Ltd v. Jones [1978] Ch. 109.
14. Id. s. 1(2)(s).
15. Id. s. 1(3)(a).
16. Id. s. 1(3)(b) and 1(5).
17. See H. de Page, L’obligation abstraite en droit interne et comparé 137 et seq. (Bruylant 1957).
common law countries. When the law in a continental system imposes the solemn form of the public document, such a request is satisfied if the document, created in the common law system, has been executed as a deed.  

III. THE DOCUMENTARY PROOF IN THE CIVIL PROCEDURE: A COMPARATIVE EXCURSUS

In the systems under review, a wealth of comments have been made on the evidentiary value of the written document and, in particular, the notarial act. In common law systems, a general principle exists which vests the judge (at times flanked by a jury) with freedom of verdict in the evaluation of the evidentiary material presented during the trial.

In Romano-Germanic systems, however, written documents prevail in civil procedure: the main method of proof is the written document. Written proof is said to be civilized, and testimonial proof to be barbarian. The types of written evidence are varied, but the most important are public documents, which allow “legal certainty” to be determined. Indeed, in the realm of written procedure, the presentation of a notarial act in court deprives the judge of his power to evaluate the proof. Judges cannot evaluate the document: they may only look at the result of the evidence and deduce the effect as established by the law.

In Germany, the notion of full proof can be found in § 415, 1 of the ZPO: public acts “shall establish full proof, provided they have been executed regarding a declaration made before the public authority or the public official issuing the deed.” They are assisted by the “presumption of truth” (Vermutung der Echtheit). The same rule is repeated in § 417 and § 418 of the ZPO respectively, relative to documents derived from public administration. The fact that the document is written and signed by a notary is by itself sufficient to grant to the act full evidence, in particular regarding these elements: the place and date of their creation, the identity of notary and parties, and the actions made by the parties and by the notary (this is called the extrinsic). However, the full evidence given by notarial acts must be interpreted narrowly because it is an exception to the judge’s power to evaluate the evidence received during the trial. A clear example of this rule can be found in a case decided by the German Supreme Court in 2016: a house was sold; the notarial act stated its area amounted to 640 square meters; the buyer later measured the area and found it was only 540 square meters. The court explained that the full evidence was given to the fact that the seller

21. § 437 ZPO.
24. BGH, Jun. 10, 2016, V ZR 295/14, https://perma.cc/3CYM-X3QU. On the same ground in a criminal case for falsity, the German Supreme Court decided that a notary is not guilty if a party of the act declares that he or she knows the German language, but this is not true: the content of the declaration is not covered by full proof. See BGH, May 25, 2001, StR 88/01.
declared the (wrong) surface, but that the actual surface could be proved by any kind of evidence.

A similar rule exists in the Netherlands' Code of Civil Procedure. In France and Italy, the day-to-day evidentiary value of the public document reflects the history of the action for falsity of documents that took place during Napoleonic codification. In Roman ius commune, as explained by Dumoulin, the public document provides full proof of the facts contained within for whomever it represents: “Quoad veritatem et probationem, plenam fidem facit quoad omnes; . . . acta vel quaecumque scripta publica probant se ipsa, id est rei taliter gestae fidem factunt inter quoscumque.” Differing from proof, the effect of the negotiation, as contained in the public document, is relevant only to the parties, their heirs, and successors. The Roman ius commune solution is still applied in Scotland, where the authentic document “is held to prove the verity of the legal actus expressed in it as the genuine actus of its author.” Pothier intended to follow traditional teachings. He wrote:

An original authentic act has in itself full credit as to what is contained in it . . . . The signature of the officer who has received the act, carries full credit of everything which the act contains, and of the signature of the parties who have subscribed it . . . . Authentic acts are entitled to credit, principally against the persons who were parties to them, their heirs, and those deriving title under them. They have full credit against such persons as to all the operative part of the act, that is to say, of every thing which the parties had in

26. C. Dumoulin, Commentaires sur la Coutume de Paris nn. 8, 10 (1539; revised ed. 1665), reprinted in C.B.M. Toullier, 3 Le Droit Civil Francais 278 (1847).
27. Id.
28. See also D.M. Walker, Principles of Scottish Private Law 94 (Oxford U. Press 1982); a similar formula to Dumoulin’s can be read in A. McDouall, 2 An Institute of the Laws of Scotland in Civil Rights 502 (1752): notarial acts “are probative by themselves, unless unproven.”
29. Pothier, Obligations or Contracts, supra note 5, at 517; Pothier, Traité des obligations, supra note 5, at 368.
view, and which constitutes the object of the act . . . . 30 The act proves against a third person, rem ipsam, that is to say, that the transaction which it includes has intervened. 31

In his explanation, Pothier links the evidence given by the public document, between the parties and their heirs and successors, to the content of it and not only to the historical facts documented by the act. 32

The French Notarial Law of 1803 stated that notarial acts shall have full credit in court (“feront foi en justice”). 33 The Napoleonic Code recognizes for the most part the teachings of Pothier and states: “An authentic act is absolute proof of the agreement it contains between the contracting parties and their heirs or assignees.” 34 The law, on one hand, seems to attribute probative value only between the parties and their heirs and successors, while on the other hand, it seems to extend such probative power to the negotiating power of that document.

The French model has been replicated in Louisiana, where article 2236 of the Louisiana Civil Code of 1870 states: “The authentic
act is full proof of the agreement contained in it, against the contracting parties and their heirs or assigns, unless it be declared and proved to be a forgery.”

The same rule appeared in the 1866 Civil Code of Lower Canada. In Italy, article 1317 of the Civil Code of 1865 upheld the French model, but distinguished between the intrinsic and extrinsic: the notarial act gives full proof of the facts that the notary declares have occurred in his presence.

IV. INTRINSIC AND EXTRINSIC: A GAZE ON THE DIFFUSION OF THE FRENCH AND ITALIAN SOLUTIONS ON THE “FULL PROOF ACT” DEBATE

French and Italian scholars have immediately corrected what is provided for under article 1319 of the Code Napoleon and article 1317 of the Italian Civil Code of 1865. The rule is thus—the public document is full proof of the date, identity of the public official, and signatories, as well as the actual occurrence of declarations and facts as attested in the act (the extrinsic), but not of the truth of the declarations issued by the parties or the judgments issued by the notary (the intrinsic). This teaching is further addressed in article 2700 of the Italian Civil Code of 1942.

35. See the classical treatise of Saul Litvinoff, 6 Obligations 202 (West 1969).

36. Article 1310 of the Civil Code of Lower Canada, 1866, mirroring that of the French Code states the following:

L’acte authentique fait preuve complète entre les parties, leurs héritiers et représentants légaux:

1. De l’obligation qui y est exprimée;
2. De tout ce qui y est exprimé en termes énonciatifs, pourvu que l’énonciation ait un rapport direct à telle obligation ou à l’objet qu’avaient en vue les parties en passant l’acte . . .

Also, article 1311 provides for an action against falsity in a notarial act, regulated by the Code of Civil Procedure, as per the French model. See H. Kéléada, Notions et techniques de preuve civile 35 et seq., 53 (Wilson & Lafleur 1986); M. A. Tancelin, Des obligations : contrat et responsabilité 120 et seq. (Wilson & Lafleur 1986).

37. In theory, for example, the mental health of the testator, ascertained by the notary and mentioned in the public will, is not considered covered by the full proof of the act and can be fought with simple evidence to the contrary: see Toullier, supra note 26; See also A. Duranton, 7 cours de droit français 273 (3d ed. 1834); Larombière, supra note 19, at 518; G. Baudry-Lacantinerie & L. Barde, III traité théorique et pratique de droit civil :
The same rule is now adopted in the new Quebec Civil Code: “The recital, in an authentic act, of the facts which the public officer had the task of observing or recording makes proof against all persons.” Thus, we find that the same rule has been applied both in German law and the French legal tradition.

French and Italian scholars thought that Pothier did not have clear ideas on this subject so they superimposed *intrinsic* and *extrinsic* notions on legislative texts. In reality, Pothier knew perfectly well what he was writing and French legislators intended to follow his teachings. Successive French authors placed a new significance upon simulation.

In the French *ius commune*, contracting parties (and thus their heirs and successors), were unable to oppose the evidentiary effect of a public document, even in regards to the content of the negotiations. Only matrimony was subject to the appeal of a counter declaration (*les contrelettres*) which, however, could not be enforced against third parties.

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DES OBLIGATIONS 420 (2d ed. 1905); T. HUC, 3 COMMENTAIRE THÉORIQUE & PRATIQUE DU CODE CIVIL 281 (Pichon 1895); M. PLANIOL & G. RIPERT, VII TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 886 (2d ed 1954); For Belgium, see H. DE PAGE, III TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL BELGE: LES OBLIGATIONS (2d ed., E. Bruylant 1950), which refers to following code formula “ne doit pas être prise à la lettre.” In the case law, see C.A. Fort-de-France, Nov. 23, 2012, n. Rg 117 00072 and C.A. Paris, Oct. 18, 2011, 10/02929 (in these cases judges allowed any means to contest the content of the declaration made by the parties); see also C.A. Paris, Jun. 24, 2016, 14/19810 (in this case there was an error in the description of the immovable sold); For Italy, see E. PACIFICI-MAZZONI, I TRATTATO DELLA VENDITA 152 (3d ed.1901); G. GIORGI, I TEORIA DELLE OBBLIGAZIONI NEL DIRITTO MODERNO ITALIANO 378 (3d ed. 1890); and for case law, see Cass. Turin, Apr. 19, 1866, Giur. it., 1866, 187; Cass. Florence, Jan. 27, 1870. Legge 1870, I, 281; Cass. Rome, Nov. 22, 1876. Legge 1877, I, 59; Cass. Naples, Feb. 9, 1883. Legge 1883, I, 585; Cass. Palermo, Apr. 22, 1894. Legge 1894, II, 332. As it has already been seen, in Quebec only the French legal model was initially adopted. However, the doctrine was quickly brought into line with the French: KÉLADA, supra note 36, at 53, speaking of “inexactitude de rédaction,” and J.-C. ROYER, LA PREUVE CIVILE 101 (1987), admitting that “nos codificateurs ont commis la même erreur rédactionnelle que ceux du Code Napoléon . . . La doctrine francaise et québécoise a corrigé cette erreur.” Eventually, the new Civil Code adopted the rule approved by scholars.

38. Art. 2818, Civil Code of Quebec.
French legislators, following the teachings of Domat, extended this particular rule to any contract, but always under the law of evidence, and not as a rule on the effects of contracts.\textsuperscript{39} This springs from the old article 1321 of the Code Napoleon: “Counterletters can have effect only between the contracting parties; they cannot have effect against third parties.” It is worth noting that the new articles 1200-1202 of the \textit{Code civil français} (French Civil Code) enacted after the recent reform of contract law in 2016, maintain the same content. The rule thus allows a declaration that seeks to paralyze the preceding document and only affects the law of evidence. In practice, this means that the parties to a contract may invoke the second document with the aim of minimizing the evidentiary effect of the first.

Scholars began to bring the problems of the \textit{contrelettres} under the frame of natural law. This likens a contract to the pure will of the parties and consequently treats falsity as a divergence between will and declaration. Scholars no longer consider this question a problem of proof. Counter-declarations thus assume relevance as an indication of the difference between will and declaration at the moment of the creation of the false document.

In conclusion, current German, Italian, and Quebec legal rules, as well as French doctrinal rule, establish that the notarial act is conclusive evidence only of the occurrence of the described event (the extrinsic).\textsuperscript{40} The same conclusion is reached in Scotland.\textsuperscript{41}

\begin{itemize}
\item \textsuperscript{39} See J. Domat, \textit{Les loix civiles dans leur ordre naturel} 213 (1777).
\item \textsuperscript{40} See G. Chiovenda, \textit{Principi di diritto processuale civile: le azioni il processo di cognizione} 845 (Jovene 1965). V. Andrioli, \textit{Il commentario al codice di procedura civile, del processo di cognizione} 154 (1956); O. Jauering, \textit{Zivilprozessrecht} 200 (21st ed. 1985); Ahrens, \textit{supra} note 22; Berger, \textit{supra} note 22.
\item \textsuperscript{41} See J. Erskine, \textit{The Principles of the Law of Scotland} 483 (1827): “Notarial instruments . . . bear full evidence that the solemnities therein set forth were used . . . do not prove any other extrinsic fact.” See also G. J. Bell, \textit{Principles of the Law of Scotland} 826 (10th ed. 1899): “Notarial instruments . . . are good evidence of the act which it is the province of a notary to perform, but not of extraneous facts recited in the instrumentum;” 17 \textit{The Laws of Scotland} 477 \textit{et seq.} (1989).
\end{itemize}
V. DOCUMENTARY EVIDENCE IN COMMON LAW ORAL PROCEEDINGS: SOME ENLIGHTENING CASES

Contrary to the alleged prevalence of written proof in the civil procedure of Romano-Germanic systems, it is commonly said that English law developed a procedural system that places a greater emphasis on oral evidence. Indeed, witnesses are considered “the principle items of judicial evidence,”42 while documentary evidence is relegated to second place, in one of the last chapters of the law books, as a subject of the lowest importance.

An explanation is required. Documents are obviously allowed in court. If a private document is produced, including in the form of a deed, it does not provide conclusive proof of the date, origin, and content unless supported by testimonial evidence.43

42. See C. Tapper, Cross & Tapper on Evidence 37 (12th ed., Oxford U. Press 2010); Walter H. Rechberger, The Principles of Oral and Written Presentation, in Dimensions of Evidence in European Civil Procedure, supra note 4, at 71 (underlining that the evidentiary effect of any document is linked to the legal provisions that requires the oral or the written form of proceedings). For many years, after the Norman conquest, written proof and in particular, the deed, prevailed in court over oral testimony: for historical reconstruction and references taken from Bracton, Glanville, and the Year Books, see J. Salmond, The Superiority of Written Evidence, 6 Law Q. Rev. 75, 81 (1890). It must however be observed that the prevalence of written documents reduced with the gradual transformation of the jury: a group of individuals informed of the facts of the case that become a collegiate judge and who, as a group, are informed of the evidence through the process. Such evidence is primarily presented orally.

The close connection between the structure of the common law process, which on the one hand sees juries and non-bureaucratic judges come together, and oral characteristics on the other, bringing with it a concentration of the case in one public moment and a refusal of written evidence, to be produced along a prolonged evidentiary phase, is underlined by Damaska, supra note 20, which highlights that in common law systems the pre-trial phase is assuming increasing importance and in some places of the United States, it is possible to waive the hearing of the case. See also D. Bolzanas & E. Tamošiūnienė, Witness Testimony, in Dimensions of Evidence in European Civil Procedure, supra note 4 at 161.

43. Tapper, supra note 42, at 610. Only after the witness to the document provides testimony that the document is proof, the concerned party is considered to have provided prima facie evidence, that is, “to mean prima facie proof of an issue, the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the prima facie proof becomes conclusive proof and the party giving it discharges his onus.” See Ex parte The Minister of Justice: In re Rex v. Jacobson & Levy [1931] AD 466 at 478.

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Thus, witnesses to a document’s signing must acknowledge the signing of the document in question. The unfit nature of a document to provide standalone evidence in court without a compliant witness also applied to documents authenticated by public notaries. Notarial authentication on documents “renders them evidence in foreign courts, though certainly not in our Courts of Common Law.” This rule is extremely old. In 1603, it had already been decided that a witness was required for the signing, sealing, and delivery of a deed. It was insufficient to provide a copy of the document, even if drafted by a notary.

More recently, that precedent was restated in *Chesmer v. Noyes* in 1815: a notarial protest against a foreign check, made by a notary from Bristol, was produced in court. Lord Ellenborough decided that proof of a missing payment had not been provided as “the presentment of a foreign bill in England must be proved in the same manner as if it were an inland bill,” thus calling the notary as a witness.

In 1870, the Privy Council in *Nye v. Macdonald* decided on a distinct matter: the plaintiff was based in Lower Canada (presently Quebec) a civil law jurisdiction. To claim land he produced evidence of his right which, among other things, included a power of

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44. The importance of testimonial proof is thus understood; relative to a deed, the recent Law of Property Act 1989 holds this importance at its foundations, as it required the presence of witnesses at the drafting phase. On this subject, see M. Cappelletti, *Procédure orale et procédure écrite* 18 (Giuffré 1971). Cappelletti observes that the preference for oral proof in English law finds justification not only in history: this preference is founded also on the essential principles of the process, which require the author of the documents to appear in court to testify and be cross-examined by the litigants, and on the acceptance of the hearsay rule, which leads to the inadmissibility of a document, which in itself expresses the thoughts and beliefs of its author, absent from the trial.

45. As stated by Lord Tenterden in King v. Scriveners’ Co, supra note 10.

46. See Sir G. Cary, *Reports or Causes of Chancery* 44 (William Lambert ed., Sweet 1820) and 21 E.R. 17, which reports the decision of the court: “therefore non allowance to be given of a deed, without producing the deed, or proving the execution thereof; and here appeareth what want we have of notaries and their deputies.”

47. Chesmer v. Noyes (1815) 4 Camp. 129; 171 E.R. 42.

attorney, received in the presence of a witness by a notary public of Upper Canada (presently Ontario), a common law jurisdiction. Here the question of identity was raised, even if ascertained by a notary. The plaintiff presented a declaration issued by the government of Upper Canada, certifying the appointment and powers of the notary and affirming that the notarial act was considered proof of the identity of those who signed the act. The Canadian court of second instance did not consider the notarial act to be proof. The Privy Council approved the decision, stating that the notary public of Upper Canada could not be equated with a French notary; that the court, even if in territory governed by French law, could not attribute the same probative effect to an act of a notary public as is granted to public French acts; and that the application of the English rule was correct, requiring the testimony of the notary. Therefore, “according to the law of England, the mere production of a certificate of a notary public stating that a deed had been executed before him would not in any way dispense with the proper evidence of the execution of the deed.”

The rule described above is subject to an exception: where it is not possible to call the notary to witness in court. This applies to two situations. The first situation relates to acts by notaries who have died before the case. A leading case is Sutton v. Gregory from 1797, wherein a check issued in Boston was presented for payment in London, on the request of an endorsee of the check. The check was rejected (with notification of the rejection). The clerk died before the case. The rejection was produced in court and was proved by witness that a clerk of the notary, with the mandate to follow the

49. Id. at 58; the Privy Council did not apply the lex fori (the civil law of Lower Canada) to the issue of evidence, but rather, the English law in force in the place of the pre-establishment of the proof: “A Notary public in the province of Upper Canada, a province regulated by English Law, has no power, by English law, to certify to the execution of a deed in such a way as to make his certificate evidence, without more, that the deed was executed . . . .”

case, presented the check and recorded the act in the protest register. The proof was allowed because the clerk in question was deceased.

This rule was approved in Poole v. Dicas in 1835.51 A notary received a check; he sent one of his clerks to the debtor and the clerk took note of the protest in the appropriate register. The employee died during the case. The protest register and the signature of the register by the clerk were produced as proof. The Court held that this counted as sufficient proof, deciding that in the case of the death of the author of said signature, the production of the notarial act constitutes sufficient proof.

The second situation relates to notarial acts created overseas. In the 1802 Hutcheon v. Mannington,52 the court discussed an act received from a notary public of the Prince of Wales Island in the East Indies, held by the Indies Company. Again, a foreign bill protest from a foreign notary was held to provide full proof, as was held by Lord Ellenborough in Chesmer v. Noyes.53

It is interesting to note that this second situation is justified in the English system by an international public law rule. English courts give a foreign document the same evidentiary proof attributed to it in the law of the place where it was formed. The court does not apply the rule given by the lex fori: “a Notary Public by the Law of Nations has credit everywhere: the Court therefore will give credit to him.”54 The idea, according to which the common law judge must recognize the same evidentiary effect that is in place in the legal system where it was drafted, is very old in English law. Written in Law French, the 1624 report at the end of Hurd v. Foy clearly stated

51. Poole v. Dicas (1835) 1 Bing N.C. 649; 131 E.R. 1267. A similar precedent, concerning an act involving a deceased lawyer, may be found in Doe d. Patteshall v. Turford (1832), 3 B. & Ad. 890; 110 E.R. 327.
53. Chesmer v. Noyes (1815) 4 Camp. 129; 171 E.R. 42: “the protest may be sufficient to prove a presentment which took place in a foreign country.”
the following: “sur trial de chose beyond sea, le testimony d’un publick notary la est bon proof & Ley Chief Justice dit; que tiel proof que ils beyond sea voilont allow nous allowomus.”

Returning to general documentary proof, there are two circumstances in which the document on its own is sufficient proof. In the first circumstance, official documents, issued by the public administration (not by a common law notary), are considered. The acquisition of a conforming copy of a document, drafted by a public authority, is sufficient proof of the date, the origin, and the content of the document. The public document provides prima facie evidence for the decision of the case, which can be overcome with evidence to the contrary.

Additionally, private agreements, even twenty years after drafting, are preserved by various simple assumptions as long as they have been conserved correctly. Testimonial evidence could become impossible for the corroboration of the writing. Consequently, in the leading case of Wynne v. Tyrwhitt, it was stated that the documents “coming from the proper custody are admissible in evidence, without proving the hand-writing” of their authors. Therefore, it is presumed that the date of the document is as stated, that the alterations to a deed inter vivos have been made prior to formalisation, and that the deed has been sealed in a valid mode (since 1989).

Finally, today English judges can receive a notarial act “in evidence without further proof.” This rule can be rightly considered an example of the impact of European continental solutions of civil

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55. Hurd v. Foy (1624) 2 Rolle 346; E.R. 843.
56. See TAPPER, supra note 42, at 607; this reminds us that the various fragmented legislative provisions of acts of the public administration, combined with the Evidence Act of 1845, s. 1 and the Evidence Act of 1851, s. 14, propose the presumption that a copy of an act of the public administration conforms with the original, on the basis of a declaration of the authority in question.
57. The twenty-year term is a result of the Evidence Act of 1938, s. 4; the common law precedent imposed thirty years. See TAPPER, supra note 42, at 614.
59. CPR 2005, 32.20.
procedural law. These last two rules are very important because they weaken the conflict between common law and civil law models on the evidentiary effect of written acts.

IV. COMPARING TWO MODELS ON CHALLENGING THE WRITTEN EVIDENCE

In all of the legal systems examined, when a solemn document is produced in court—public document, deed, or notarial act—the evidentiary effect of such a document can be challenged.

Two models can be identified to this end. The first model returns to the discussion of the evidentiary effect of a solemn document during the evidentiary phase of court proceedings. The affected party can thus demonstrate the falsity of the alleged document, both when involuntarily and voluntarily caused by the author. The classical example is when the notary describes in his act a fact that did not happen, or declares a date or a place different from the true date or place. The evidentiary effect of the document and the contrary elements thus contribute to judicial discretion.

This model is welcomed in English law, in which every evidentiary element is presented in court, including those documents, which aim to challenge the documents produced by the other party.

60. In general, on the Europeanization of English procedural law, see Sladic & Uzelac, supra note 20, at 110.

61. This research does not consider the different case of forgery, when a document is materially created as a false document.

62. Numerous sentences deal with the problem of falsity of written evidence and acts under seal, that have been verified by witness testimony, especially in criminal proceedings; see The King v. Sponsorsby (1784) 1 Leach 333, 168 E.R. 269; Leach v. Buchanan (1802) 4 Esp. 226, 170 E.R. 700; Rex v. Baekler (1831) 5 Car & P. 118; 172 E.R. 902; Rex v. King (1832) 5 Car & P. 123; 172 E.R. 905; Rex v. Hurley (1843) 2; M & Rob. 473; 174 E.R. 179 (in all cases, it is affirmed that the falsification of a signature on a cheque can be proven by witness and presumptions); Boursot v. Savage [1866] L.R. 2 Eq. 134 (falsity of a deed for the concession of a leasehold); Cooper v. Vesey [1881] L.R. 20 C.A. 611 (falsity of deed containing a warranty on property); Barton v. North Staffordshire Rail. Company [1888] L.R. 38 Ch. 458 (falsity of a document pertaining to the transfer of shares). In re De Leeuw [1922] L.R. 2 ch. 540 (falsity of a deed for the concession of a warranty on a property, proven with witnesses); Fung Kai Sun v. Chan Fui Hing [1951] L.R. A.C. 489 (similar to the previous case).
The recently enacted rule on the evidence of the notarial acts follows this solution: “A notarial act or instrument may be received in evidence without further proof . . . unless the contrary is proved.”

This model can also be found in § 415 Abs. 2 ZPO, which allows evidence to the contrary to contest a notarial act in courts: “Evidence proving that the transaction has been improperly recorded is admissible.” In Germany, as stated in § 445 ZPO, evidence to the contrary can be reached through the usual methods of proof, with the sole exception of interrogation of the parties.

Likewise, in Scottish law, it is possible to demonstrate the falsity of an authentic document according to the usual rules. It must be emphasised that this model is perfectly compatible with the stated privileged evidentiary effect recognised to notarial acts. In Germany, § 415 ZPO provides the public act with the power of full proof, relative to the provision of documental facts by its author (extrinsic). However, a specific court procedure has not been imposed.

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63. CPR 2005, 32.20.
64. Berger, supra note 22, at 780 et seq.; Ahrens, supra note 22, at 649 et seq.; Schreiber, supra note 23, at 208. For relevant cases, see RG, Dec. 12, 1912, in RGZ, 81, 95 et seq. (a public will, endowed with evidentiary effect, as per § 415 ZPO, was drafted on 27 September 1909. The will erroneously bore the incorrect date of September 25, 1909, but from other elements of the document and from the inspection of the repertoire of the attesting notary, it was possible to deduce the correct date, which was subsequently accepted by the courts. See also RGZ, Dec. 16, 1910, supra note 22, for a similar difference between the dates displayed a public will (Mar. 24, 1904) and the actual date (Mar. 24, 1905); RG, Jun. 7, 1905 in RGZ, 61, 95, in which it was proved by witness that a Auflassung (the document for the transfer of real property, to be carried out in front of a notary or at the court of the land registers, as per § 925 BGB) was drafted and read to the parties by an aide to the competent officer of the land registers office, who assisted with the relative operations and signed the document (the court confirmed the validity of the document); RG Feb. 5, 1931 in RGZ, 131, 284 et seq., which allows for the proving of an error in the date of the annotation of the land register, witnessed by the force of full proof under § 418 ZPO, and determined as sufficient proof the testimony of an employee of the office of land registers.
65. See WALKER, supra note 28, at 94, which places a rather heavy burden on the provision of evidence to the contrary drawn from a “probative document”: on the proof of forgery, see J. DALRYMPLE, VISCOUNT STAIR, THE INSTITUTIONS OF THE LAW OF SCOTLAND 990 (2d ed. 1693); McDouall, supra note 28, at 94; Erskine, supra note 41.
for disputing its precision. It is like this that Scottish authentic documents constitute full proof, save for demonstrations of falsity, without particular procedural burden.

The second model provides for the separation of the case in which the document is produced and a special procedure to contest the accuracy of the document. This model is utilised in France, Quebec, Belgium, and Italy, where the alleged falsity is received and the evidence derived from the public document maintains the nature of legal proof unless the false nature of the document is proved by special procedure.

The difference between the two models is found first in the structure of the civil process. In this example, an independent procedure is established to deal with the issue of falsity. Alongside this first characteristic there is a deeper difference, relative to the quality of the contrary evidence, requested to challenge the evidentiary effect of a public document. The establishment of a special procedure does not actually say anything about the difficulty in providing evidence to the contrary. The examination of the French model must thus take into account both the structure of the false incidental procedures and the type of proof that is requested.

VII. THE ACTION FOR FALSITY OF A NOTARIAL ACT

From the d’Aguesseau Grand Ordinance of 1737 and onwards, the French procedure to challenge the evidentiary effect of notarial acts has maintained its fundamental characteristics.

The action for falsity is a standalone declaratory action which initiates an autonomous process with the aim of ascertaining the true nature (real or false) of the declarations issued by the notary and, if falsity is found, to eliminate the contested document, indirectly excluding it as proof in the case. The action can be presented in both criminal and civil proceedings.66

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66. The French rule on the action for falsity in contemporary civil procedure is clearly illustrated by G. COUCHEZ & X. LAGARDE, PROCÉDURE CIVILE 357 (17th ed., Sirey 2014). For the application in the rule for the Belgian law, see M.
Originally, the procedure established with the action could require the judge to give at least three different decisions, unless there were other incidents in the proceedings to which the judge objected. The timeframe was divided into several stages. In the first stage, the plaintiff proposed the lawsuit and the court decided whether to admit or reject it. The second the lawsuit was accepted, the process began in the court to verify the disputed document and later in the hearing, to decide upon the admission of the evidence. Finally, in the third stage, the evidence was considered and a judgement handed down on its basis.

The Italian Code of Civil Procedure and the French *Nouveau Code de Procédure Civile* have in part simplified the procedure for an action for falsity, streamlining the various steps. The intent is that the action leads to a typical evidentiary proceeding. The only difference between it and the normal examination of evidence is that the judge performs no specific formalities or conditions.

This model, requiring an autonomous procedure to challenge the evidentiary effect of the document, obviously presents the problem of the relationship between the procedure on falsity and the principal case. The civil procedure rules can leave the two actions (the one based on the notarial act and the other claiming its falsity) proceed independently or suspend the principal case (the one based on the

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67. In this particularly solemn introductory phase, the plaintiff must determine if the other party is requesting to use the challenged document; the requesting party, in person or with power of attorney, must respond, and if they intend to use the document, the plaintiff must declare to cancel the proposal for the action; the defendant must then present the document; the sentence that accepts the action nominates the presiding judge.

68. On legal suits that are underway, see *Pothier, Obligations or Contracts*, supra note 5, at 372; and for French Law, which follows the pre-coded phase as illustrated by Pothier, see E. Garsonnet, *Trattato teorico e pratico di procedura civile*, 2 GIUR. IT. 760 (1912); at the time, the Italian Code of Civil Procedure of 1865 was tending towards the French model. See the extensive comments of L. Borsari, 4 IL CODICE ITALIANO DI PROCEDURA CIVILE 5 et seq. (2d ed. 1888); F.-S. Gargiulo, 2 IL CODICE DI PROCEDURA CIVILE DEL REGNO D’ITALIA 381 et seq. (2d ed., Marghieri 1887).
notarial act) until a judgment is given on the falsity of the document itself.

In the past, the solution to the problem was understood to be the prioritisation of the full faith in the notarial act. The original text of article 13 of French Notarial Law repeated the rules of *ius commune*, as accepted by Pothier, which acknowledged the full effect of the act until a judgment definitively declares the falsity of the document: “les actes des notaires publics seront exécutoires dans tout le royaume, nonobstant l’inscription de faux, jusqu’à jugement définitif.” 69

Later, article 1319 of the Code Napoleon stated that the judge could suspend the enforcement of the act during the procedure on falsity. 70 After the recent reform of contract law in France, the new article 1371 of the Civil Code provides that in case of falsity action, the court may suspend the performance of the act: “En cas d’inscription de faux, le juge peut suspendre l’exécution de l’acte.” 71 The same solution appears in article 1317(2) of the Italian Civil Code. Incidentally, the falsity action in Italy and France after the 1975 re-

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69. See Pothier, *Traité des obligations*, supra note 5, at 368; to protect the creditor who is relying on a public document, he shares the solution that “jusqu’à ce que l’accusation de faux ait été jugés tels, ils font foi par provision; et le Juge doit ordonner l’exécution provisoire de ce qu’ils renferment.”

70. On the effect of the public document during the process of the action for forgery, see Toullier, *supra* note 26, at 248; Duranton, *supra* note 37, at 274; Baudry-Lacantinerie & Barde, *supra* note 37, at 433; De Page, *supra* note 37, at 754.


L’article 1371 reformule en le clarifiant l’actuel article 1319 : les énonciations relatives à des faits que l’officier public a constatés par lui-même et dont il a pu vérifier l’exactitude, font foi jusqu’à inscription de faux. A contrario, celles relatives à des faits qu’il n’a pas constatés par lui-même, et non évoquées par le texte, ne font par conséquent foi que jusqu’à preuve contraire. L’alinéa 2 propose un texte adapté aux évolutions de la procédure d’inscription de faux (qui lorsqu’elle est engagée à titre principal, n’exige plus une saisine préalable du juge pénal) et laisse le juge apprécier l’opportunité de suspendre l’exécution de l’acte authentique.
form gave life to a procedure that suspends the treatment of the principle case, as the document in question is considered indispensable, but consents to the referral to the judge for the combined decision on the falsity and the principle case. The complete division of the two models illustrated is thus not absolute.

Indeed, French and Italian judges have always been able to determine the falsity of a notarial act, avoiding to open a case on it where the falsity is detected *ictu oculi*. In France this solution was already adopted by the *Cour de Cassation* before the codes were enacted. Following this, the rule was written in article 214 of the old French Code of Civil Procedure, in force from 1807 to 2007, which allowed the judge to adopt the action “*s’il y échet*,” allowing the judge to exert discretion in the allowance or rejection of a document as false. Similar rule is now given by article 307 of the new Code of Civil Procedure.

Additionally, it is understood that the judge has the power to eliminate the difference between two conflicting documents, both constituting legal proof, when the falsity of one of them is readily ascertainable. The same model also applies in Quebec.

VIII. THE BURDEN OF PROOF IN CASES OF FALSITY

French and Italian scholars underline the extreme difficulty in bringing forth an action for falsity. For example, De Page, from Belgium, identifies the action for falsity: “*est la seule preuve contraire*”

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73. The solution was adopted in Cass., Aug. 18, 1813, S. Jur., IV.1.432 and followed, among others, by Cass., Jan. 12, 1833, S. Jur., 18734.1.798; Cass., Mar. 25, 1835, S. Jur., 1835.1.510; Cass., Aug. 23, 1836, S. Jur., 36.1.740; See also Garsonnet, supra note 68, at 758; DURANTON, supra note 37, at 279; LAROMBIÈRE, supra note 19, at 279; BAUDRY-LACANTINIERE & BARDE, supra note 37, at 430; DE PAGE, supra note 37, at 753. The solution is also adopted in article 308 of the French Civil Code of Procedure, which states the following: “*Il appartient au juge d’admettre ou rejeter l’acte litigieux au vu des éléments dont il dispose.*”

admise contre les mentions protégés par l'authenticité.” Thus, it could be assumed that the necessary proof for demonstrating the falsity of a notarial act is particularly rigorous, and that the law precisely determines the means of evidence that are admissible. Various legislative provisions appear to be very strict: the plaintiff, when depositing the complaint to the courts, must specifically indicate “the motives” for the action and the clear proofs of the falsity.

In reality, the much-proclaimed difficulty vanishes quickly, as the contestation of the truthfulness of the notarial act can be sustained with the usual methods of proof, also in systems that allow for the action for falsity. Thus, in each of the legal systems analysed, the obligation to overcome the evidentiary effect of a notarial act is substantially identical. Reading the relevant decisions confirms this.

Single pieces of evidence should thus be considered. The inspection of the document in question is obviously the first piece of evidence that should be referred to. It is, as already shown, sufficient in cases where the falsity is discovered by a judge *ictu oculi*.

Testimonial evidence, in systems where the complaint of forgery exists, is easily permitted, without limit on the value, debating over

75. DE PAGE, *supra* note 37, at 753; BAUDRY-LACANTINERIE & BARDE, *supra* note 37, at 430 (advising the reader of how complicated and dangerous a complaint is).


77. As per G. De Stefano, *Falso (incidente di)*, in XVI ENCICLOPEDIA DEL DIRITTO (1967) and C.A. Catania, Jun. 22, 1957, Rep. Foro it., 1958, Falso Civile, n. 3. This solution is prevalent in systems based on the French model: for France and Belgium, see DE PAGE, *supra* note 37, at 745; for Québec, see ROYER, *supra* note 37; KELADA, *supra* note 36, at 55; Houle c. Lussier (1976) C.S. 7, which allowed for the witness.

78. It is also doubtful whether is it necessary to bring forth an action for falsity, in the event of a discrepancy in the relative documentation, when the issue is a simple material writing error; in Italy, see Cass., Jan. 30, 1968, n. 294, Rep. Foro it., Falso civile, n. 11; Cass., Nov. 25, 1982, n. 6375, Rep. Foro it., Falso civile, n. 4. More recently, see Cass. Civ., sez. II, May 28, 2007, n. 12399.
the verification of the facts.\textsuperscript{79} Thus, the almost indisputable evidentiary effect of the notarial act begins to crumble. A problem which has long worried older French and Italian scholars, for which a positive solution has been found, concerns the admissibility of the evidence of so-called instrumental witnesses, who were present in the drafting of the notarial act.\textsuperscript{80} The notary himself may be heard as witness in the falsity claim.\textsuperscript{81}

Technical expertise constitutes another important proof in the action for falsity.\textsuperscript{82} Documents of comparison can also be considered documents not recognised by the parties, notwithstanding the limits set for the process of verification of private documents.\textsuperscript{83}

Presumptions are likewise held to be valid methods of proof, which can be offered by the plaintiff in the action for falsity.\textsuperscript{84}

\textsuperscript{79} Pothier, Obligations or Contracts, supra note 5, at 378: “on fait entendre tous les témoins qui peuvent avoir connaissance de la fabrication, altération, et en général, de toute la fausseté des pièces accusées de faux, ou des faits qui peuvent servir à en établir la preuve.” See also Garsonnet, supra note 68, at 774; Baudry-Lacantinerie & Barde, supra note 37, at 431; Larombière, supra note 19. For Italy, see Gargiulo, supra note 68, at 381 et seq.; M. Zanzucchi, 2 Diritto processuale civile, Del processo di cognizione (5th ed., Giuffrè 1962). For cases, see Cass. Turin, Apr. 6, 1872, Giur. it., 1872, 277 (Public will: witnesses were called upon to testify that the testator was unable to express himself and had not made his intentions clear to the notary. The Court overturned the decision of the appeal, which refused this evidence); and Cass. Turin, Feb. 13, 1883, Giur. it., 1883, 353, 356 (forged holographic will based on expertise and presumptions).

\textsuperscript{80} The positive solution was found in the French Cass., Mar. 12, 1838, S. Jur. 1838.1.296; it can also be found in Garsonnet, supra note 68, at 774 note 4; Borsari, supra note 68, at 412 et seq.; Gargiulo, supra note 68, at 429.

\textsuperscript{81} Garsonnet, supra note 68, at 774 note 4; Cass. Turin, Apr. 10, 1885, Giur. it., 1885, 396.

\textsuperscript{82} Pothier, Obligations or Contracts, supra note 5, at 378; Garsonnet, supra note 68, at 774; Baudry-Lacantinerie & Barde, supra note 37, at 431; Larombière, supra note 19; Gargiulo, supra note 68, at 433 et seq.; Borsari, supra note 68, at 414 et seq.; Couchez & Lagarde, supra note 66, at 358. However, the French Cour de cassation recently decided that the technical expertise cannot be used outside the special procedure for falsity. See Cass., Jun. 11, 2003, D. 2003, 1808. Therefore, the judge cannot, during the trial, accept the expertise and set aside the notarial act, and the parties must initiate the procedure for falsity.


\textsuperscript{84} See Larombière, supra note 19, at 534; Baudry-Lacantinerie & Barde, supra note 37, at 432; For Italy, see De Stefano, supra note 77, at 713; F.
It is thus clear that the favourable aspect of the evidentiary effect bestowed upon a notarial act almost disappears in reality with the use of contrary presumptions. The only remarkable feature of this model is found in the autonomy of the proceedings for falsity.

IX. CONCLUSIONS

The notarial act has its origins in France and is strictly connected to the evidentiary requirements established by the Roman-Canonical civil procedure introduced with the reforms of Louis IX. Notaries were established in 1254 for creating written proof (i.e., the notarial act) for contracting parties. At the early stages of the French civil procedure, their function was to offer a qualified witness to the judge on the information (promises, facts, transfer of rights) that was held in the notarial act. Following this, as the civil procedure developed, the production of a notarial document became sufficient.

This original important feature still appears in Germany. For example, § 437 Abs. 2, ZPO provides that “[s]hould the court have doubts as to the authenticity of a record or document, it may also demand ex officio that the public authority or the person alleged to have executed the record or document make a statement regarding its authenticity.” Whenever there is doubt surrounding the evidentiary effect relative to the so-called extrinsic nature of a public document, the judge may allow the notary to testify.\textsuperscript{85}

As mentioned in the previous pages, historical evolution suggests that the public document and the Latin notary represent two parts of a strong legal institution. In reality, however, the apparent stability of the notary profession hides a serious decline: the first

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85. See Berger, \textit{supra} note 22, at 843 \textit{et seq.}, which emphasises that the notary may be heard by the judge; Ahrens, \textit{supra} note 22, at 756 \textit{et seq.}
centuries of notarial practice contributed to the creation of institutions and contractual forms that were destined for greatness. Following this, notarial activities were concentrated on the drafting of wills and property contracts. That said, since real estate wealth has lost the central and dominant role in favour of movables and financial instruments, the notary has remained largely detached from the most innovative areas of the law.

In this evolutionary process, the usefulness of the notarial act can be seen initially at the procedural level. The presentation in court of a notarial act avoids time wasting and the risk of an unfavorable outcome, which can originate from the disregard of a private document.

Thus, the differences between the two models can be reconstructed and verified. The first model, mainly adopted in common law systems, is characterised by oral evidence, to which the notions of the absence of legal proof and a subject are correlated, charged with the production of procedurally privileged documents. In these systems the notarial function is adopted normally to produce documents, destined for use in other systems.

86. See M. WEBER, ECONOMY AND SOCIETY (UC Press 1978). Such is the thesis of Max Weber in “Economy and Society,” which merits mention: the notaries were the only remaining group in Italy by whom the traditions of a developed commercial law could be perpetuated and transformed. They were, for a long time, the specific and dominant class of legal experts . . . . the notaries were one of the most decisive strata in the development of the law in general, and until the emergence of the class of legally trained judges in Italy . . . . Their own traditions, their long-lasting connection with the imperial courts, the necessity of quickly having on hand a rational law to meet the needs of the rapidly growing requirements of trade, and the social power of the great universities caused the Italian notaries to receive Roman law as the very law of commerce, especially since, in contrast to England, no corporate or fee interests were standing in the way.

The Weberian position is confirmed by M. RHEINSTEIN, EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG 171 (2d ed., Tübingen 1987). Among the innovations brought forth through notarial practice exists the notable clause of saisine-dissaisine inserted in sales, of particular importance in French common law: see H. COING, 1 EUROPÄISCHES PRIVATRECHT: ÄLTERES GEMEINES RECHT (1500 BIS 1800) 451 (Beck 1985).

87. The structural connection between the written procedure, legal proof, public document and notary is hinted at in CAPPELLETTI, supra note 44, at 18-19.
The second model, found in systems that have received the written Roman-Canonical procedure, is characterised by the existence of documents equipped with evidentiary effect. A person qualified to do so prepares this type of document: for historical reasons, normally this is a Latin notary, but it could also be considered the task of a public notary, such as in Baden Württemberg, or a lawyer acting as notary, as in other German law countries and in Scotland.

Through this brief comparative analysis, it is now clear that the distinction between the common law and civil law is increasingly disappearing on the significance of notarial acts. The evidentiary value of notarial acts is an interesting case for the convergence of these legal systems.\textsuperscript{88}

If it is true that, on one side, the attributed evidentiary effect in English law is bestowed upon the writings held in proper custody; on the other side, in Latin systems, it is possible to contest the evidentiary effect of the notarial document by any means, including an action for falsity (when deemed necessary). These two methods lead to a marked weakening concerning the difference between the two models.

Many civil procedure scholars think that future evolution will show an increasing orality in the proceedings in European continental systems. Therefore, a decrease in the evidentiary strength of the notarial act and a progressive disappearance of the traditional opposition of the evidentiary rules between civil law and common law systems is conceivable.

\textsuperscript{88} See T. Keresteš & J. Caramelo Gomes, \textit{Common Core After All?}, in \textit{Dimensions of Evidence in European Civil Procedure}, supra note 4, at 324.
DISOBEYING COURTS’ ORDERS—
A COMPARATIVE ANALYSIS OF THE CIVIL CONTEMPT
OF COURT DOCTRINE AND OF THE IMAGE OF THE
COMMON LAW JUDGE

CarloVittorio Giabardo

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ABSTRACT

The aim of this article is to briefly tackle, from a comparative viewpoint, an academically quite overlooked topic: techniques of enforcement of lawful judgments. Despite a gradual convergence in many fields of law, common and civil law jurisdictions still maintain a striking diversity in the ways in which they react to non-compliance with court judgments. Whilst in common law tradition, failure to comply with a judicial order is considered civil contempt of court, in civil law countries this legal institution is simply unknown. Furthermore, it is only in civil law systems that failure to comply with a
court judgment cannot be punished by imprisonment. My key question is: what are, if any, the “cultural” reasons that could explain this divergence of approach? First, discussing Mauro Cappelletti’s comparative methodology, I explore whether, and to what extent, civil contempt of court and its civilian counterparts are comparable. Then, focusing my attention on the common law model, I argue that many contemporary features of civil contempt can only be fully understood by looking at the particular image and unique social perception of the judge within the common law legal tradition.

Keywords: enforcement of rights, contempt of court, comparative law methodology, comparative civil procedure, common law, civil law

“... ne pas regarder comme semblables des cas réellement différents; et ne pas regarder manquer les différences de ceux qui paraissent semblables.”1 –Montesquieu

I. INTRODUCTION

Over the past few decades, the comparative study of civil procedure and, more specifically, that of the techniques of enforcement of legal judgments—a topic almost completely neglected in legal academia—has become of increasing importance.2 The reason underpinning this turn lies in the fact that legal scholars have become

more and more aware of the importance that all legal systems governed by the rule of law must provide some effective remedy to enforce the rights that are provided by the substantive law itself.

“Treaties are nothing but scraps of paper!”3 Indeed, the same could well be said for judicial decisions. Except for the cases in which judge’s statements have—as analytical philosophers would say—a “performative” effect,4 in the sense that they directly create or change a legal relationship (e.g., determining personal status, such as a divorce decree or annulment of marriage), judgments creating obligations always demand acts of compliance. Self-evidently, this compliance is not always spontaneous. If it is not, the legal system must find a way to win the not-surprising judgment debtor’s reluctance to comply with the pronouncement of the court, and to realize, therefore, what the famous Italian civil procedure scholar Giuseppe Chiovenda used to call “la volontà concreta della legge” (“the concrete will of the law”).6 From a more philosophical viewpoint, it is a common claim that coercion is central to the very idea of law, and that coercive enforcement inevitably accompanies the concept of rule of law.7

Technically speaking, while judgments requiring the defendant to pay a sum of money to the claimant simply involve the first being

3. This anecdotal phrase is said to have been exclaimed by German chancellor T. Von Bethmann Hollweg, in relation to the Treaty of London, shortly before the World War I.

4. JOHN AUSTIN, HOW TO DO THINGS WITH WORDS (Harv. U. Press 1962). More recently, see MARIANNE CONSTABLE, OUR WORLD IS OUR BOND: HOW LEGAL SPEECH ACTS (Stanford U. Press, 2014) and specifically chapter 1: How to Do Things with Law.

5. These types of judgments are defined “transformational” by FLEMING JAMES JR., GEOFFREY C. HAZARD & JOHN LEUBSDORF, CIVIL PROCEDURE 30 (5th ed., Foundation Press 2001), or “self-effectuating” by ADRIAN ZUCKERMAN, ZUCKERMAN ON CIVIL PROCEDURE: PRINCIPLES OF PRACTICE, 1096 (Oxford U. Press 2011), in the sense that they do not require enforcement proceedings (in Italian, sentenze costitutive; in French, jugement constitutif; in German, Gestaltungsurteile).

6. GIUSEPPE CHIOVENDA, ISTITUZIONI DI DIRITTO PROCESSUALE CIVILE 249 (Jovene 1960).

forcibly stripped of his assets to pay his debt, things get more complicated in the case of non-monetary judgments, i.e., those judicial decisions that order the defendant to do, or to abstain from doing, a specific act ("orders of specific performance" and "prohibitory" or "mandatory injunctions"). In those cases, without an adequate apparatus of coercive tools able to force human conduct, jurisdictional power—as it has been wryly noted—"would be an empty illusion."\(^8\)

Before proceeding further, let me first define what I mean, broadly speaking, by "coercive tools" in civil proceedings. It is well-known that the jurisprudential definition of a legal institution can take two forms: that of the function and that of the structure.\(^9\) From the former perspective, coercive sanctions are procedural tools that aim to oblige the judgment debtor (i.e., the party who has to give performance) without the intervention of the enforcement machinery of the State with the judicial order. From the perspective of the structure, they act by inflicting monetary or even personal penalties (incarceration) on the claimant. In short, the rationale of coercive means is to make non-compliance with the judicial order less convenient than compliance.

What I want to draw attention to in this article is that common and civil law jurisdictions—despite their undeniable gradual convergence in many legal aspects\(^10\)—still radically differ in the ways in which they react to non-compliance with court judgments. While in common law failure to comply with a binding legal decision or order is considered civil contempt of court, in civil law countries this concept is totally unknown. In the common law world, willful disobedience of court orders represents a sort of offence (as the word

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8. JOHN F. DOBBYN, INJUNCTIONS IN A NUTSHELL 216 (West 1974).
9. This dichotomy to define legal institutions is owed to the great Italian legal philosopher NORBERTO BOBBIO, DALLA STRUTTURA ALLA FUNZIONE. NUOVI STUDI DI TEORIA GENERALE DEL DIRITTO (Laterza 2014) (1977).
“contempt” literally indicates) against the court itself or the public administration and proper functioning of justice, and as such it has to be, in a certain sense, “punished.” This becomes clear especially if we look at the United States, where the line of demarcation between civil and criminal contempt is not so sharply drown. Conversely, in the civil law legal family, non-compliance is a matter of significance for the enforcing party only. Breach of civil orders is not considered a question of “public policy.” As it has been correctly pointed out, “to the non-common lawyer the contempt power is a legal technique which is not only unnecessary to a working legal system, but also violates basic philosophical approaches to the relations between government bodies and people.”

Undoubtedly, also civil law systems have some forms of sanction or threat to compel compliance with judges’ orders—the astreintes in France, the Geldstrafen in Germany, the “coercive measure” introduced for the first time in 2009 in the Italian Code of Civil Procedure, and so forth—but they are never regarded as ways

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12. Astreintes are notoriously court orders for the payment of a fine for each day the debtor delays compliance with the judgment. They are for the benefit of the creditor. This model has been transplanted—in Europe—in Luxemburg, Belgium, and the Netherlands. For the French model, see ANNE LEBORGNE, *VOIES D’EXÉCUTION ET PROCÉDURES DE DISTRIBUTION* 288 (Daloz 2009); Astreinte, Vocabulaire juridique (Gérard Cornu ed., Press Univ. France 2005). In Belgium, see JACQUES VAN COMPERNOLLE & GEORGES DE LEVAL, L’ASTREINTE (Larcier 2007).
13. Zivilprozessordnung [ZPO] (Code of Civil Procedure) § 888, 890 (Ger.). The sum of money, unlike in the French model, is to be paid to the State (and not to the plaintiff). For an examination of this model, see, in German, OSCAR REMIEN, RECHTSVERWIRKLICHUNG DURCH ZWANGSGELD: VERGLEICH — VEREINHEITLICHUNG — KOLLISIONSRECHT (Mohr 1992).
to “vindicate” the court’s authority or its dignity. Rather, as the historical evolution shows, these kinds of coercive tools are simply designed to overcome the Roman-Latin maxim “nemo precise ad factum cogi potest” (“nobody can be forced to do a specific act”). Thus, in contractual matters, they guarantee the continental principle of the supremacy of specific performance over the obligation to pay damages.

Furthermore, in the continental legal tradition (France, Italy and Spain, for instance), it is not possible to commit the unwilling debtor to prison. In this respect, the German model is quite problematic as it had followed a slightly different trajectory. While refusing a “personalized” and non-bureaucratic concept of judge—as it is, on the contrary, in the common law tradition (see section V.)—in Germany, imprisonment as a way of enforcement is theoretically still possible, although in very few and strictly limited cases, and only when the obligation is infongible or strictly personal (i.e., when it can be performed only by the debtor in person unvertretbare Handlung). The reason of this enduring possibility has been discussed by historians of civil procedure. It probably represents a residual institution from the Middle Ages, and, in particular, from the fact that

15. This rule was embedded, for instance, in former article 1142 of the French Civil Code (before the 2016 reform of contractual obligations) (“toute obligations de faire ou de ne pas faire se résout en dommages et intérêts en cas d’inexécution de la part du débiteur,” i.e., every obligation to do or not to do is converted in the obligation of paying damages in case of nonperformance). However, both in common and civil law tradition it is not possible to coerce the defendant into complying with orders that involve personal activities (like contracts of employment), such as “contracts of personal service.” See generally J. Lewis Parks, Equitable Relief in Contract Involving Personal Service, U. of Pa. L. REV., 251 (1918) or, in the French legal system, “obligations à caractère personnel,” see Antoine Lebois, Les obligations de faire à caractère personnel, JCP 2008, 210.

the contumacy, in its broader sense, was then considered as an offence to the authority of the king (Verletzung des Königs\textsuperscript{17}).

As the German model represents, in this hypothesis, an exception to the general rule adopted by civil law systems, it will not be taken into consideration here. Rather, what I want to stress, from a very general standpoint, is the fact that in civil law jurisdictions (with, indeed, the small exception of Germany, in some cases), courts lack the power to act in personam at all. Conversely, in common law countries, the imprisonment of the person found guilty of civil contempt seems to be a common practice, especially in the United States. The famous case of Beatty Chadwick is, to this extent, emblematic: here, an American lawyer was jailed for fourteen years in the county prison of Delaware only because he refused to disclose to the court his assets in a matrimonial proceeding, and it is surprising to note that he would have done less time in prison if he had simply stolen the money.\textsuperscript{18}

My key questions are: what are the reasons of this contrast? What are the cultural factors, if any, that are able to explain and justify this discrepancy of approaches?

My article will unfold as follows. In the following part, I will outline the methodological framework of my research, recalling the

\textsuperscript{17} In German language, J. KOHLER, Ungehorsam und Vollstreckung im Zivilprozess, ARCH. CIV. PRAX. 80, 141 (1893). For the historical analysis of this point, see the discussion occurred between the Italian procedural law scholars SERGIO CHIARLONI, MISURE COERCITIVE E TUTELA DEI DIRITTI 68, 72 (Giuffré 1980) and Vittorio Colesanti, Misure coercitive e tutela dei diritti, RIVISTA DI DIRITTO PROCESSUALE 601 (1980).

\textsuperscript{18} Chadwick v. Janecka, 312 F.3d 597 (3d Cir. 2002). This case is discussed in detail by Mitchell J. Frank, Modern Odysseus of Classic Fraud—Fourteen Years in Prison for Civil Contempt Without a Jury Trial, Judicial Power Without Limitations, and an Examination of the Failure of Due Process, 66 U. MIAMI L. REV. 599 (2012). See also, on this case, WENDY McELROY, THE ART OF BEING FREE: POLITICS VERSUS EVERYMAN AND WOMAN 95 (LaIssez Faire Books 2012). On a wider perspective, see Doug Rendleman, Disobedience and Coercive Contempt Confinement: The Terminally Stubborn Contemnor, 48 WASH. & LEE L. REV. 185 (1991). To avoid these situations, now, in England, committal by a Superior court may only be for a maximum of two years, and only one month if the order comes from an inferior court—Contempt of Court Act 1981, s.14(1). The superior court power to fine is, however, unlimited.
approach suggested by the Italian-American comparative law scholar Mauro Cappelletti (Part II). I will then explore what is the common function, or common need, which makes the comparison between the civil contempt of court and its civilian counterparts possible (Part III). Then, while focusing my attention upon the Anglo-American model of civil contempt of court, I will illustrate its most distinctive features, contrasting them with the “continental” view (Part VI). Finally, I will argue that those differences can be fully explained only by looking at the different images and roles played by judges and courts in each legal tradition (Part V). As I see it, it is not possible to even partially understand the long-lasting presence and enduring importance of a legal institution such as the (civil) contempt of court without taking into account the particular conception of the judiciary and the particular “symbolic image” and “social perception” of the judge in the common law systems and, I would say, within the Anglo-American society at large.

II. THE “COMPARABILITY” OF LEGAL INSTITUTIONS

Before addressing the problem shortly outlined above, I think it would be useful to premise some short methodological remarks in relation to the comparative law enterprise.

In my view, one of the biggest problems—if not the biggest—for comparative law scholars is to determine what can be usefully compared.19 By and large, comparative law is, in a certain sense, caught in middle of this paradox. On the one hand, it is necessary to respect differences existing between legal systems—without alterity, the comparative law endeavor itself makes no sense.20


20. “Comment, d’ailleurs, le comparatiste lui-même pourrait-il exister sans l’autre?” wonders PIERRE LEGRAND, LE DROIT COMPARÉ 96 (4th ed., Presses Uni-
On the other hand, we unavoidably need a “contact point”—or, to use Pierre Legrand’s evocative expression, an “interface séman-
tique”21—for legal cultures to communicate with each other: “[l’]absolument autre ne pourrait être qu’indéciffrable, c’est-
à-dire muet.”22 To make a dialogue, we must speak the same language. In short—as Catherine Valcke has summarized—comparative law, to be possible, requires unity and plurality at once.23

But how is it possible to combine respect for alterity and the need for communication? How is it possible to reconcile both those fundamental and to a certain extent, at odds requirements?

Although the literature relating to comparative law methodology is surprisingly huge (comparative law scholars seem to be somehow obsessed with methodological discussions24), I would like to employ and discuss here the methodological framework suggested by Mauro Cappelletti—one of the most prominent and internationally-renowned voices of the last century, both in the field of comparative law and civil procedure—as outlined in his book about civil justice systems in comparative perspective.25 I think his method represents one of the best attempts to fruitfully handle this “tension” between similarity and difference.

21. LEGRAND, supra note 20, at 77.
22. Id. at 73.
To put it roughly, according to his view, two or more legal institutions can be said “comparable” (and the comparative law endeavor can be, thus, meaningful) not when the final legal solutions adopted by each country are similar, but when the problem or social need the normative intervention intended to address is the same. It is quite evident here the reference to the functional method, the main assumption of which—as Zweigert and Kötz famously wrote—is that “in law the only things which are comparable are those which fulfill the same function.”

Attempting to bring unity to comparative law research, Mauro Cappelletti’s first assumption is that before comparing, we first need to find out what is the shared social problem or need legal institutions aim to respond. Secondly, in his desire to insist on differences, he explicitly states how a purely technical description of a legal state of affairs between two or more foreign countries does not mean comparative law. Comparative law in its most authentic sense always involves an in-depth research of historical, sociological, ethical, ideological (in one word: cultural) reasons that can somehow explain the divergence of legal solutions, and everyone sees how these reasons can only be found outside the strict legal domain.

Admittedly, this kind of methodology also has a weak part. Indeed, the final stage of the comparative research is said to consist in an assessment of the different legal solutions in terms of efficiency.


Since this claim can no longer be accepted—as it has been proven wrong by the most recent comparative law scholarship, and by the notion of “incommensurability” of legal traditions—my goal in this article is not to say which model of coercive sanction (the civil law or the common law one) is the best. I think that both have their advantages and drawbacks. For one thing, continental models are too “soft,” and could in fact lead to the “monetization” of all entitlements. On the contrary, the common law system could repress various kinds of legitimate revendications in order to preserve the legal status quo—as it happened in those cases in which the English and American judiciary, through the threat of contempt of court, prevented or stopped picketing and striking by trade unions in industrial disputes. Rather, I want to simply analyze and give value to the existing enriching cultural distance between common and civil law traditions in this academically quite overlooked legal field.

III. IN SEARCH OF THE COMMON NEED: THE PRINCIPLE OF EFFECTIVE JUDICIAL PROTECTION AND ITS SIGNIFICANCE

In the case of coercive sanctions in civil proceedings, it is not difficult to see what their core function is. Basically, it is to convert judges’ words into facts. By preventing that court decisions will not be followed by actions, coercive sanctions enforce the “rule of law,” generally understood as the supremacy of the law (in the case here at stake, as embodied in a binding legal judgment) over the personal will of people.

In a more detailed way, the task of all coercive tools is to enhance the so called principle of “effective judicial protection.” This principle is not only provided now, in Europe, by art. 6(1) of the European Convention on Human Rights—which generally protects the right of a fair trial—but it is also a general rule which is part of the very foundation of any system ruled by law.\textsuperscript{31} In the narrow sense and for my current purposes, this principle means, amid many other things, that every legal order \textit{must} provide effective means to enforcing its judgments (especially non-pecuniary ones) and that the remedies that courts deliver must be \textit{effective}. All this has been clearly stated by the European Court of Human Rights for the first time in its path-breaking decision \textit{Hornsby v. Greece}.\textsuperscript{32} In this case, Greek authorities refused to give the permission to two British citizens to open up an English language school because they did not have Greek nationality. The Greek Supreme Administrative Court held that this refusal was contrary to the European Law, which prevents nationality-based discriminations, and finally ordered to grant the “specific remedy” (i.e., the permission to open up the school). However, Greek administrative officials did not comply with this order, and the British citizens were then only awarded damages, i.e. a sum of money for their actual loss. The European Court of Human

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Rights then condemned Greece on the basis that Article 6 of the Convention requires final judgments to be exactly enforced. The Court persuasively argued that the right of access to court “would be illusory if a Contracting State’s domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party” and more importantly that the “action for damages” provided by Greek statutory legislation “cannot be deemed sufficient to remedy the applicants’ complaints” as “compensation for non-pecuniary damage . . . would not have been an alternative solution.” Here, the mere monetary compensation was found to be a qualitatively inadequate remedy compared to the specific relief.

I think it is quite clear that, especially after this judicial decision, all coercive procedural devices are expected to play a crucial and unique role in every contemporary legal system. They are, in some ways, necessary. Without them, as Calabresi and Melamed stressed in their influential study, “property rules” granted by law would be converted into mere “liability rules” if the defendant can only be forced to pay a “substituted” sum of money for having failed to comply with his/her primary duty. If things were so, we could say that the right to disobey a non-monetary judgment is obtainable by the mere payment of a monetary penalty. It is worth noting, incidentally, that this is what always happened in Italy before the ultimate introduction of the general coercive tool in 2009 in the Code of Civil Procedure, especially in the case of judgments ordering the abstention from doing something or ordering an activity that could be done only by the defendant in person (i.e., infongible).

34. Id. at para. 37.
36. “The right to disobey the law is not obtainable by the payment of a penalty . . .” Francome v. Mirror Group Newspapers Ltd. [1984] 2 All ER 408 at 412 (UK).
After having tackled the problem of the comparability between civil contempt of court and the continental coercive tools, I would like now to stress the divergences existing between the two, and try to explain them.

Coherently with the approach initially adopted and focusing on the Anglo-American model, I will leave apart the most technical aspects as well as the examination of procedural requirements or of operating rules of civil contempt of court, and I will explore its essential characteristics, its fundamental principles, and its most “ideological” or “political” features. Indeed, contempt of court has to be essentially seen, at least in my opinion, as an ideologically loaded notion.

To begin, it is well-known that the purpose of civil contempt of court (or contempt in procedure, or contempt by disobedience) is to provide a sanction for non-compliance of theoretically any court order (interlocutory or provisional as well final, for the discovery or production of documents, as well on the merit of the case), not only by means of monetary penalties (i.e., sequestration of assets and fines), but even through the incarceration of the contemnor. This possibility derives from the fact that all equity instruments (and in particular orders of specific performance, and mandatory and prohibitory injunctions, that in ancient times only the Lord Chancellor

could grant), do not act in rem (i.e., against assets), but in personam (i.e., directly against the debtor’s person).

“A court without contempt power is not a court.”38 I think this short phrase perfectly captures the main feature of the English civil sanction, a feature that does not exist in civil law jurisdictions at all. It expresses the very idea that the contempt power (both in its civil and criminal form) is so innate in the concept of jurisdictional authority that a court that could not secure compliance with its own judgments and orders is a contradiction in terms, an “oxymoron.” Contempt power is something regarded as intrinsic to the notion of court; even obvious, I would say. In the common lawyer’s eye, the power of contempt “is inherent in courts, and automatically exists by its very nature.”39

The legal origins of the contempt of court are well rooted in history.40 In R. v. Almon, judge Wilmot wrote: “I have examined very carefully to see if I could find out any vestiges or traces of its introduction, but can find none. It is as ancient as any other part of the common law, there is no priority or posteriority to be discovered about it.”41 Of course, such a statement must be understood as part of that broad, now debunked, “narrative” aiming to affirm that common law has always existed, and that the English judge do not invent, but rather find out and declare pre-existing laws (that is the so called “declaratory theory”). Nevertheless, in this case there is some truth. Yet in the very first essay on common law, the Tractatus de legibus et consuetudinibus regni Angliae (the famous Tractatus of Glanville), there is a reference to the contemptus curiae, i.e., the disregard of the party who failed to appear before the King’s court, or his justices (Curia Regis).42

42. Eady & Smith, supra note 37, at 1.
Historically speaking, and in more detail, the contempt power can be further explained by the development and stabilization of the notion of “inherent jurisdiction” of English Superior Courts, a concept completely extraneous to the habits of thought of civil lawyers, academically educated in the shadow of the dogma of the strict separation of powers. By inherent jurisdiction I mean that “reserve or fund of powers,” without statutory foundation, “which the court may draw upon as necessary whenever it is just or equitable to do so” in order to preserve their own authoritativeness. It follows that to affirm that civil contempt of court is mainly serving the plaintiff interest means to profoundly misunderstand the real nature of this institution. The main value here protected remains that of the “due administration” of justice: “civil contempt cannot be considered therefore merely as a means by which individuals litigants can enforce orders in their favour.”

Common law judges often use the concept of “public policy” to indicate this strong public interest toward the punishment of non-compliance with their orders. As Lord Diplock clearly wrote in his decision Attorney-General v. Times Newspapers Ltd., there is always “an element of public policy in punishing civil contempt, since the administration of justice would be undermined if the order of any court could be disregarded with impunity.”

In the common lawyer’s legal mentality, the presence of civil contempt of court is then fundamental to the maintenance of social order and its hypothetical elimination is often depicted in rather apocalyptical (and often irrational) ways:

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44. EADY & SMITH, supra note 37, at 893.

To allow court orders to be disobeyed—a Canadian judge argued—would be to tread the road towards anarchy. If the orders of Courts can be treated with disrespect, the whole administration of justice is brought into scorn . . . . Loss of respect for the Courts will quickly result in the destruction of our society.46

As a result, throughout all the common law world, the distinction itself between civil and criminal contempt is much hazier than civil lawyers may think.47 In Jennison v. Backer,48 Judge Solomon stated that the purpose of vindicating the right of the claimant and the purpose of vindicating the court authority are “inextricably intermixed” and that the divide between the two forms of contempt is “unhelpful and almost meaningless.” For Lord Donaldson, in Attorney-General v. Newspaper Publishing Ltd.,49 that distinction even “tends to mislead rather to assist.” Furthermore, as one of the most authoritative American books on injunctions says: “contempt are neither wholly civil nor altogether criminal.”50

That means that the nature of civil contempt of court is always twofold. It has both a coercive and punitive function at once.51

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46. O’Leary J., Canada Metal Co. Ltd vs. Canadian Broadcasting Corporation, [1975] 48 D.L.R. 3d 649, 669. (quoted in Chesterman, supra note 2, at 521). See also Sherry v. Gunning, supra note 30: “The orders of the court must be complied with. The alternative is anarchy in which the strong will triumph over the weak.”


In other words, one could say that the purpose of civil contempt of court, in most cases, is both backward-looking (used to punish past acts of disobedience) and forward-looking (used to compel obedience). It always has a “punitive” flavour. For these reasons civil contempt is often said to be a “quasi-criminal” wrong, and to “partake of a criminal nature.” It coherently follows, for example, that the standard of proof is the criminal one of “beyond any reasonable doubt” and not the civil one of “balance of probabilities.”

What it should be emphasized here is that such affirmations would be simply unthinkable in a civil law jurisdiction, where private and criminal (public) law are understood as two legal fields well separated and never overlapping and that is why, for instance, civil law courts cannot award punitive damages. In the civil law legal culture, unlike in the common law one, the distinction between what counts as (private) tort and what counts as (public) crime has always been quite sharply drawn.

Yet from these brief observations it is therefore possible to unveil the profound difference between civil contempt of court and its civilian counterparts. Indeed, the idea that non-compliance with court orders represents, in some ways, a public offence toward the court is simply foreign to civil law scholar’s eye. As Alexander Pekelis (an Italian-American civil procedural scholar of the last century) remarked:

This very concept of contempt simply does not belong to the world of ideas of a Latin lawyer. It just does not occur to him

that the refusal of the defendant to deliver to the plaintiff a painting sold to the latter . . . may, as soon as judicial order is issued, become a matter to a certain extent personal to the court, and that the court may feel hurt, insulted, “contemned,” because its order has been neglected or willfully disobeyed.55

Now, no doubt that in contemporary times, Anglo-American judges do not feel personally “offended” or “insulted” by the debtor’s non-compliance with its orders. But nonetheless it is true that only in civil law countries, what happens after the final judgment is conceived as a mere chose des parties (i.e., a private matter between the parties) and do not involve the judicial authority in its essence.

V. EXPLAINING THE DIFFERENCES: TWO REMARKS ABOUT THE IMAGE OF THE COMMON LAW JUDGE

My claim is that it is possible to fully understand the nature and character of civil contempt of court only by looking at the high social prestige of the judiciary in the common law jurisdictions, vis-à-vis civil law jurisdictions.56 In the words of Konstantinos Kerameus—one of the few procedural legal scholars that has dealt with the enforcement proceedings in comparative perspective—the regime of civil contempt “transcends the field of the enforcement by … exalting the function of courts within society at large.”57

I believe, in other words, that there is a sort of correspondence, a connection, or at least an influence, between the, so to say, “zero tolerance” for disobedience with judicial orders (well expressed by the civil contempt of court doctrine) and the symbolic image, or the “social perception,” of common law judges. Basically, while in common law jurisdictions judges are characterized by a high social

55. Pekelis, supra note 2, at 668; Chesterman, supra note 2, at 541.
56. This idea is not totally new; see, e.g., GILLES CUNIBERTI, Grands systèmes de droit contemporains 124 (2d ed., L.G.D.J. 2011): “[L]a stature du juge anglais n’est peut-être pas étrangère au développement d’une institution propre aux droits de Common law sanctionnant la désobéissance aux ordres judiciaires.”
57. Kerameus, supra note 2, at 117.
prestige, and the judiciary function is strongly “personalized,”\textsuperscript{58} on the contrary, in continental legal culture, judges are essentially seen as de-personalized, anonymous, bureaucratic figures that completely lack that “paternal authority” that characterizes their common law counterparts.

Although this point merits a deeper reflection, which goes beyond the scope of this article, I think that at least two kinds of historical justification can be advanced. The first is, I would say, “institutional.” It deals with the fact that, in England, the authority of the judiciary is historically derived from the Sovereign’s powers. I am aware that this is, in some ways, true also in relation to the civil law jurisdictions, at least at the beginning of their evolution. But whilst the recent developments of the continental legal culture are marked by a complete rupture with the previous legal order, due especially to the French Revolution and its strongly “anti-judicial” ideology, in England there is no a real, commonly-recognized boundary between the Middle Ages and modern times—it is well-known that the gradual development of common law is better described by the idea of “continuity” than that of “separation.”\textsuperscript{59}

In late Anglo-Saxon times, the King was described as the \textit{fountain of all justice}. According to the famous Blackstone’s metaphor,

\textsuperscript{58} This feature is well exemplified, for instance, by the fact that, in common law legal culture, the style in which legal decisions are written (their “aesthetic”) is rich and strongly “recognizable” (think emblematically of Lord Denning’s opening lines, like the famous one in Hinz v. Berry [1970] 2 Q.B. 40 at 42: “It happened on April 19, 1964. It was bluebell time in Kent,” and in many other judgments). Besides, each common law judge in the decision-making process expresses themselves in the first person, and is entitled to write their dissenting or concurring opinion—to clearly stress how the reasoning is to be intended as the product of their own mind and nothing else. In contrast, a French sentence is short, written in a highly technical and “impersonal” jargon that completely lacks any rhetorical force or literal beauty. Here the message implicitly conveyed is that it is neither a person nor a group of people speaking, but just the invisible will of the law, which has no face. On this topic, see Mitchel Lasser, \textit{Judicial (Self-)Portraits: Judicial Discourse in the French Legal System}, 104 \textit{Yale L.J.} 1326 (1995); for a more general discourse, see MITCHEL LASER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF TRANSPARENCY AND LEGITIMACY (Oxford U. Press 2004).

\textsuperscript{59} NICOLA PICARDI, \textit{LA GIURISDIZIONE ALL’ALBA DEL TERZO MILLENNIO} 53, 61 (Giuffré 2007).
jurisdiction was lake water: “[t]he course of justice flows from the King in large streams. As those streams run through his courts, justice is subdivided into smaller channels . . . till the whole and every part of the kingdom were plentifully watered and refreshed.”

 Sovereigns themselves could take part personally in their own courts. In this picture, the King delegated his power to carry out justice to judge, that they were nothing but the “impersonification” of the Sovereign in the realm. Although only in a symbolic way, all this can be seen still today. The High Court is Her Majesty’s High Court. The Law Courts, i.e., the London building that houses the High Court and the Court of Appeal, is called the Royal Courts of Justice. The judges are Her Majesty’s judges. In the United Kingdom, all jurisdiction still formally derives from the Crown, and justice is carried out in its name. In such a legal context, it was quite clear that disregard towards judges meant disregard toward the King himself, and to disobey equity orders issued by the Lord Chancellor (who was dubbed as the “keeper of the King’s conscience”) meant nothing but an indirect disobedience to the Monarch.

On the contrary, in civil law countries, coercive measures have developed only as means of guaranteeing the specific performance (exécution en nature in French, Naturalherstellung in German, esecuzione in natura in Italian) of every obligation—a principle that descends from the “natural law” and moral maxim “pacta sunt

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60. These words are quoted by Paul D. Halliday, Blackstone’s King, in RE-INTERPRETING BLACKSTONE’S COMMENTARIES: A SEMINAL TEXT ON NATIONAL AND INTERNATIONAL CONTEXTS 175 (Wilfred Prest ed., Oxford U. Press 2014).


62. The official website of the Royal Family still mentions this; see https://perma.cc/K5RS-XZHV.

63. Goldfarb, supra note 11, at 8 (“[t]he courts of early England acted for the king through the realm. And their exercise of contempt powers derived from a presumed contempt of king’s authority”). This point is highlighted also by John H. Beale, Contempt of Court, Criminal and Civil, 21 HARV. L. REV. 161, 162 (1908); remembering that, during the case of the committal of Prince Henry for contempt, the Chief Justice Gascoyn said, “I keep here the place of the king, your sovereign lord and father, to whom ye owe double obedience.”
servanda” (literally translated: promises must be kept) and that traditionally do not belong to the common law legal tradition, at least in the field of contract law.64

The second observation, in terms of “political theology,” has to do with the religious derivation of all legal professions and of the community of jurists as an élite in the common law world. Indeed, at least until late in the Middle Ages, the King of England was named as the “earthly living image of Christ” or “Vicar of God.”65 It is no surprise, therefore, if those features were transferred from the Sovereign to judges, who still remain today—in the mode of thought of the common law lawyer—the “priests” of justice (common law scholars often think of judges in theological terms).66 The implied syllogism was this: if the Monarch represents the image of God on earth, and judges represent the King, then people have to obey judges as they somehow represent God.67 Moreover, until the 16th century, the Lord Chancellor, who exercised jurisdiction in civil

64. “The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else” is the famous phrase owed to Oliver W. Holmes Jr., The Path of the Law, 10 HARV. L. REV. 457, 472 (1897).

65. In the Italian legal scholarship, this topic has been thoroughly explored by CRISTINA COSTANTINI, LA LEGGE E IL TEMPIO. STORIA COMPARATA DELLA GIUSTIZIA INGLESE (Carocci 2007). The appellation of “Vicar of God” of early Norman kings, as well its influence of the discipline of contempt are underlined by Goldfarb, supra note 11, at 7.


67. For this line of reasoning, see David Marrani, Confronting the Symbolic Position of the Judge in Western European Legal Traditions: A Comparative Essay, 3 EUR. J. LEGAL STUD. 45 (2010).
matter, had always been a high ecclesiastic dignitary, and his proce-
dural devices and techniques were those used in ecclesiastical
courts.

On the contrary, in civil law jurisdictions, judges are no longer
seen as “cultural heroes or parental figures” as “their image is that
of a civil servant who performs important but essentially uncreative
functions.”

In relation to the civil contempt of cou rt, all that has been said
can be perceived from the highly revelatory point of view of the lan-
guage. Words such as “disobedience,” “purging” (i.e., that sort of
confession of guiltiness, where the wrongdoer must admit before the
court his misconduct, acknowledge the breach of the order, express
his regret and show a “suitable remorse”\[69\]), “debarment” (i.e., the
formal exclusion of the contemnor from the legal proceeding), all
evoke concepts such as “sin” and “redemption,” that seem more
strongly to belong to the religious sphere (or to that of the “father-
son” relationship), than to the field of the administration of justice.\[70\]

To this extent, John Merryman, one of the most foremost Amer-
ican comparative law scholars, and learned expert of civil law sys-
tems, in specifically assessing the absence of the civil contempt of
court in the continental systems, lucidly wrote that the parties, in the
common law legal proceedings, play out their role before the
“father-judge,” and that the whole procedure is “permeated by a

\[68\] John H. Merryman & Rogelio Pérez-Perdomo, The Civil Law
Tradition: An Introduction to the Legal Systems of Western Europe

\[69\] Catherine O’Regan, Contempt of Court and the Enforcement of the Labor
Injunctions, 54 Mod. L. Rev. 385, 397 (1991). For the need of a “suitable re-
more” of the contemnor, see Enfield London Borough Council v. Mahoney

\[70\] Pekelis, supra note 2, at 669, describing the common law “judicial think-
ing”: he just disobeyed—a term that for a Latin lawyer’s ear is likely to suggest
a parent-child relation, rather than a court-party relation—he has diso-
beyed the court, he has been a bad boy, and he has to stand in the corner
until he changes his mind. Nothing mysterious about it!
moralistic flavour”—and of course the Protestant ethic may have played a great role in this.\footnote{Merryman & Pérez-Perdomo, supra note 68, at 124. See also, speaking of the common law as a system influenced by Protestantism in this field, Sergio Chiarloni, \textit{Ars distinguendi e tecniche di attuazione dei diritti}, RIVISTA DI DIRITTO PROCESSUALE 768 (1988).}

On the contrary, in the civil law legal tradition, given that the judge merely is “an important public servant, but he lacks anything like measure of authority and paternal character possessed by the common law judge,” parties and witnesses “can disobey his orders with less fear of serious reprisal.” This is because the civil law legal culture is “thoroughly secularized, less moralistic, and more immune to the ethic of the time and place.”\footnote{Merryman & Pérez-Perdomo, supra note 68, at 124.}

IV. CONCLUSIONS

In conclusion, my article aimed at demonstrating how civil contempt of court is an institution that cannot exist but in the common law legal tradition, and that its presence in common law jurisdictions, and conversely its absence in civil law countries, is totally understandable. Civil contempt is to be understood as a by-product, historically determined, of a particular and unique fashion to conceive and consider the function of the judge and its position within the legal system. In common law legal orders, the judge has always been at the center of the legal experience, and there is no surprise that his judgments and orders are so intensely protected. While in the civil law culture the judge is merely conceived as an impersonal institution applying pre-existing laws, in the common law tradition he has been the creator of legal rules, conceived therefore as a real person, whose pronouncements and orders prompted the advancement and development of the law. The disobedience of his words was therefore a disobedience, and thus a contempt, directed to his persona:
Dans l’imaginaire de common law, la justice est le fait d’une personne plutôt que d’une institution. C’est pourquoi la personnalisation de la fonction judiciaire semble infiniment plus importante que sur le continent, où la justice se conçoit plutôt comme une administration. L’unité de référence n’est pas la même : un individu dans un cas, une institution, dans l’autre […] La théorie positiviste, révolutionnaire et antijudiciaire conçoit le juge comme un automate; elle lui refuse toute contribution personnelle à la création du droit […] Pour la common law, la justice procède d’une décision rendue par un homme.  

This excerpt, in my opinion, perfectly sums up why in the common law legal tradition failure to comply with judicial decisions is a quasi-criminal wrong, sanctioned even by imprisonment.

Overall, on a more general scale, my short analysis aimed at drawing attention to the fact that, in comparative endeavors, we have to focus not only on the points of convergence between legal institutions but, most importantly, on those of divergence, especially in the field of civil procedure and dispute resolution mechanisms, where legal tools are—more than anywhere else—deeply influenced by historical and cultural conditions. Cultural distance is, indeed, something that should be praised, not eliminated. Cultural distance is an enriching component of comparative research that empowers our mutual understanding of law and legal institutions, and as such it should be emphasized, rather than underestimated or avoided, and explained, rather than taken for granted. This is, I think, the true mission of comparative scholars: “valoriser la singularité juridique . . . travailler avec acharnement à l’entendement du singulier,” and, at the same time, “refuser . . . la comparaison musarde, mécaniste, calculatrice, affairiste,” always bearing in mind that “la comparaison des droits sera culturelle ou ne sera pas.”

73. ANTOINE GARAPON & IOANNIS PAPADOPOULOS, JUSER EN AMÉRIQUE ET EN FRANCE : CULTURE JURIDIQUE FRANÇAIS ET COMMON LAW 159 (Odile Jacob 2003).
74. These beautiful words are those of LEGRAND, supra note 20, at 125.
SOCIAL OBLIGATIONS OF LAND RIGHTS ON CHINESE
COLLECTIVE-OWNED LAND

Zhe Huang*

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ABSTRACT

This article critically examines social obligations on Chinese collective-owned land. Current social responsibilities on Chinese collective-owned land are inadequate, ineffective, and distorted. Rural property right holders do not owe sufficient social burdens to society. As rural land regulators, rural collectives should have the authority to regulate and manage agricultural land use. Because of the vague and weak identity of rural collectives, collectives have limited authority and resources in restricting and regulating rural land use rights. As rural landowners, collectives violate their social responsibilities by misusing agricultural land and harming society. This article argues that for agricultural land, where physical characteristics of the land are better used in farming, the use restriction serves as a social obligation that conforms to the physical characteristics of the land. Thus, it is justifiable for collectives or the state to impose restrictions upon the land use rights of agricultural land, especially basic agricultural land—land that is most suitable for farming. The restrictions, however, must be imposed according to physical characteristics of the land, not according to the identity of landowners.

Keyword: social obligations of property rights in China, collective-owned land, social obligations

I. INTRODUCTION

Traditional libertarians argue that private property’s social function is to shield it from the power of the public, and to promote personal autonomy, liberty, security, and economic efficiency.¹ A social norm of private property, as an alternative, views property as a social institution, which can and should contribute to society.² It

contrasts with the notion that private property ordinarily triggers individual rights, not social obligations.\(^3\)

A social norm of private property does not come from a particular theory. It can be found in many property ideas that do not necessarily promote social norms. For example, even the strictest libertarians acknowledge that property should not be used in a way that harms neighbors or community.\(^4\) From the classical liberal view, social responsibility plays a necessary role in property rights. However, this role often only comes into play if something bad happens. The law and economics version of this obligation, for example, views owners as having responsibilities to their community to solve or cure problems like market failures, free riders, and holdouts.\(^5\) A negative social responsibility of libertarians is demonstrated in Anglo-American common law to avoid committing a nuisance.\(^6\) Anti-nuisance doctrine asks the owner not to commit a noxious use on his property, and the state could abate such use without paying compensation.\(^7\) Libertarians also acknowledged there might be “certain intrinsic constraints operating within property rights as a result of the limitations on permissible appropriation from the commons.”\(^8\) John Locke, for example, believed that the law of nature entails both negative obligations and affirmative obligations, which include leaving available resource to others, and making surplus resources available for others subsistence when they cannot provide for themselves.\(^9\)

What are the social obligations of land rights on collective-owned land in China? What roles do Chinese agricultural collectives play in regulating and enforcing social obligations of property rights on collective-owned land? Do these social obligations counter

\(^3\) Id.
\(^4\) Id.
\(^5\) GREGORY S. ALEXANDER & EDUARDO PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY 114 (2012).
\(^6\) Alexander, supra note 2.
\(^8\) ALEXANDER & PEÑALVER, supra note 5.
\(^9\) Id. at 39.
What prevents rural collectives to exercise their regulatory authority? What are the problems associated with the social obligations of Chinese property rights in the countryside?

As rural landowners, Chinese agricultural collectives have authority in regulating land use rights on rural land, such as cultivated land preservation, supervising farmers for reasonable use and protection of the property, and monitoring farmers’ rights to transfer their land use rights. However, social obligations imposed upon collective-owned land are inadequate and distorted. Historically, few social obligations were imposed on collective-owned land. The collective system created boundless property rights, eliminating property users’ basic negative social responsibilities, i.e., that they should not use their property in a way that harms their neighbors or community. Social duties imposed on collective-owned land were distorted. For example, mandatory quotas and fees demonstrated that Chinese rural property rights mainly served the state’s interests. Land use restrictions imposed on collective-owned land by the state turns on the question of who owns the land regardless of the physical characteristics, nature of the property, and public welfare.

Although rural collectives play an essential role in regulating agricultural land use, their regulatory authorities are abrogated by the state. As land regulators, collectives do not adequately exercise their regulatory responsibilities on collective-owned land. As landowners, collectives violate their social responsibilities when they use agricultural land for non-agricultural purposes. The state violates its social obligations by abandoning its regulatory responsibilities as higher land regulators in China. The state also violates social responsibilities on collective-owned land by initiating, transferring, or contracting agricultural land for non-agricultural purposes. In the context of China, this article argues that it is justifiable for collectives to regulate the agricultural land use and impose social obligations on farmers to avoid negative externalities. The state, as a
higher entity of landowner and regulator, is justifiable to restrict agricultural land for agricultural use.

II. HISTORICAL SOCIAL OBLIGATIONS ON COLLECTIVE-OWNED LAND

A. Social Obligations on Collective-Owned Land from the 1950s to 1980s

When the People’s Republic of China was founded in 1949, the new government confiscated landlords’ lands and houses and allocated them to individual peasants. 10 During the brief period of private ownership from 1950 to 1952 in rural areas, peasants began to exercise independent decision-making about production and sales. 11 In many regions, farmers sold their surpluses not to the state but to private parties, who usually would pay up to 40% higher than the state. 12 This situation occurred out of the expectancy of the Chinese Communist Party (or the CCP). 13 From that time on, the state authorities started to impose mandatory quotas on the farmers and fixed the purchase prices. 14

Before long, agricultural resources were pooled to support the state economic development. In 1953, the CCP decided to start the collectivization of rural land. 15 Under the flag of the “Proletarian Socialist Revolution,” three movements were launched. They were Mutual Aid Teams, Elementary Agricultural Producers’ Cooperatives, and Advanced Agricultural Producers’ Cooperatives.

11. Id.
12. Id.
13. Id.
14. Id.
15. Id. at 12.
The movements gradually eliminated peasants’ private rural land ownership. The movement that formed “Socialist Advanced People’s Cooperatives” finally completed the collectivization of rural land ownership.

At the same time, the first Five-Year Plan was designed for economic development for the period of 1953 to 1957. Industry and heavy industry were paramount to the plan. Peasants had to produce a surplus to enable the creation of an industry base “while consumption was to take [the] last place.” For example, under the “Socialist Advanced People’s Cooperatives” system, mandatory quotas were imposed. The income of Cooperatives came from mandatory sales to the “public procurement and supply organization.” Until the early 1980s, the state still “imposed near state monopoly over the purchase and marketing of grain, cotton, and other main agricultural products and permitted a quasi-segregation system between urban and rural residents.”

The collectivization of rural landownership served the dual purpose of both producing revenue for urban economic development and national socialist development, at the expense of “sacrificing rural development and exploiting the peasantry.” Agriculture became the primary source of capital when China lacked funds for industry construction. Agricultural products were exported to exchange for construction equipment.

17. PATRICK A. RANDOLPH JR. & LOU JIANBO, CHINESE REAL ESTATE LAW 78 (2000).
19. Id.
20. RANDOLPH & JIANBO, supra note 17.
22. Id. at 66.
23. CONTEMPORARY CHINA, supra note 18.
After the success of the first Five Year Plan, in 1957, Mao advocated a more aggressive mobilization of masses, and “greater, faster, better, and more economic results.” The plan was supposed to instill “a sense of communal thinking and value rather than an individualistic one.” The government promoted an even greater scale of agricultural production to make up for the shortage of capital so that the limited funds could be used for industries, such as state defense industry and nuclear capability development. This developmental policy generated three movements, also termed “Three Red Banners.” They were the “General Line of Socialist Construction,” the “Great Leap Forward,” and the “Establishment of People’s Communes.”

During these processes, rural collectives became more and more centralized under state control. They became production tools for the state. Although collectives had formal rural land ownership, they had no right to use it according to their wills. The state determined how collectives should use the agricultural land, what and how much the collectives should produce. The state claimed all farm

24. Domes, supra note 10, at 22.
25. Adrian Chan, Chinese Marxism 161 (2003). The policy was counter-productive and ran afoot of the reality. Peasants were already living a hard-working and thrifty life; most of them worked 12 to 16 hours per day in the field, but still had low living standards. For example, the working conditions were inhumane; because of retardation of the textiles industry, many communes lacked winter cloth. Peasants started to resist communes. They despised the common welfare of the communes as work units in the villages, and they divided harvested grain among them. Domes, supra note 10, at 18. June Teufel Dreyer, China’s Political System, Modernization and Tradition 102 (7th ed. 2010). Lin, supra note 21, at 70.
26. Chan, supra note 25, at 152. This policy demonstrated that a historical theme of conflicts between China and the world community dominated Mao and his close associates’ agenda, as the conflicts between peasants and landlords had been eliminated in the early 1950s.
27. Domes, supra note 10, at 24.
28. Id.
29. Id.
30. Within the People’s Communes system, collectives became production tools for the state. In the beginning, the “production guarantees” were determined before harvest. When communes found it impossible to deliver the quantity from the surplus, they had to limit the supply of their members to reach the guaranteed quota. Margo Rosato-Stevens, Peasant Land Tenure Security in China’s Transitional Economy, 26 B.U. INTL. L.J. 97, 105 (2008). Domes, supra note 10, at 18.
surpluses, “squeezing residual harvest out of villages through the state monopoly for purchasing and marketing agricultural products, planned low purchase prices, encouraging ‘over quota sales,’ and so on.”

Besides serving the state’s interests, rural collectives played little role in land management and regulating rural land use. Few social obligations were imposed on collective-owned land. The system focused on the totality of production, but ignored the means and individuality. This resulted in the total exhaustion of public property and the elimination of millions of peasants’ property. For example, on the eve of land collectivization, many incidents of wasting agricultural land occurred. There was a rush of building residential houses on collective-owned land, even on scarce and good agricultural land.

The extreme public ownership resulted in severe negative externalities, creating boundless property rights, diminishing society members’ basic negative duty not to interfere with others and causing calamities to public goods. Without property boundaries, nobody owed any duty to the neighbors, communities, or society. This system was a great contradiction to the socialist ideology, whose aim was to promote a greater good of the community. As scholar Adrian Chan pointed out:

[The] Great Leap Forward shows the innate weakness of [Mao Zedong Thought] and Chinese Marxism, and proves that it was simplistic and utopian to place extreme faith in

31. Xiaolin Pei, Collective Landownership and Its Role in Rural Industrialization, in DEVELOPMENTAL DILEMMAS: LAND REFORM AND INSTITUTIONAL CHANGE IN CHINA 237 (Peter Ho ed. 2005) [hereinafter DEVELOPMENTAL DILEMMAS].

32. The “tragedy of the commons” destroyed both promises and expectations. Peasants did not have any incentive or energy to respect collective-owned property. They were exhausted and still longing for private land ownership. Collectives did not have any extra energy to enforce social obligations.

33. WANG, supra note 16, at 68. Under the People’s Commune regime, almost all personal property became collectivized. Peasants only retained clothes, a few domestic animals, and some household utensils. DOMES, supra note 10, at 34.

34. DOMES, supra note 10.

35. ALEXANDER & PEÑALVER, supra note 5, at 32.
the powers of human consciousness to effect social and economic changes without scientific or realistic bases, and that the CCP leaders were Marxist in rhetoric only.36

B. Analysis of the Peasants’ Social Obligations

Historically, massive social burdens imposed on peasants were not directly related to their property rights on collective-owned land. Peasants had to sell a quota of their output to the state, pay a share of agricultural taxes to the state, and meet their monetary obligations to villages’ public accumulation and welfare funds.37 Peasants owed financial obligations to various levels of governments, from rural villages to state governments.38 The term tiliu referred to the peasants’ financial burdens towards village governments.39 In addition to official tiliu, other social charges, including labor corvées, were also added to the peasants’ burdens.40 Under many circumstances, peasants would gain nothing from sales of quotas; they may even be in debt when sales of quota were not enough to pay the whole contracted sum.41

These burdens imposed on peasants were derived from their memberships in the collectives.42 In most rural areas of China, whether or not peasants fulfilled these burdens decided whether or not they were still members in the collectives, and memberships in

36. CHAN, supra note 25, at 138. The years from 1959 to 1961 was known as “Three Lean Years.” Official figures estimated that around 8 million people died during the famine after the Great Leap Forward. DREYER, supra note 25, at 103. DOMES, supra note 10, at 18.
37. Pei, supra note 31.
38. Id.
39. Xiande Li, Rethinking the Peasant Burden: Evidence from a Chinese Village, in RURAL DEVELOPMENT IN TRANSITIONAL CHINA: THE NEW AGRICULTURE 47 (2d ed., Jacob Eyferth, Peter Ho & Eduard B. Vermeer eds. 2004). In the village level, the farmers pay three tiliu; in the township level, the farmers pay “five tongchou.” Three tiliu and five tongchou cannot exceed 5% of a farmer’s net income. In fact, the required payments are larger than 5%.
40. Id. at 53.
41. Id. at 59.
turn determined whether they were entitled to obtain any property rights. Most of these burdens had an indirect relationship with peasants’ property rights on collective-owned land and most of these obligations served the government’s needs. Although agricultural tax might be related to property, the weight of the tax was hefty and it had little to do with peasants’ actual farming income. All other burdens, including water and electricity fees, public accumulation funds, and other social charges such as insurance costs, fines in family planning, administrative expenses, and education fees, were not related to peasants’ property rights on collective-owned land.

The shortage of funding sources significantly restricted rural government’s ability to regulate any property-related activities. Towns and villages were responsible for providing public services, social welfare, and necessary infrastructure for rural economic development. The three tiliu collected by village committees were assigned to local institutions for public accumulation funds, public welfare funds, and administrative fees. However, due to weak financial statuses, rural governments could not accomplish these roles. The overstaffing problem among all three levels of governments drained financial resources. Ultimately, the burdens fell on farmers to pay salaries of these staffs.

On the other hand, state governments did not take responsibility for their role in developing the rural economy, but further drained


44. Eventually, the agricultural tax was repealed in 2006. HAN GAO, JI TIAN CHUANQUAN XIA DE ZHONG GUO NONG DI ZHENG SHOU WEN TI YAN JIU [STUDIES ON CHINESE FARMLAND EXPROPRIATION UNDER THE COLLECTIVE PROPERTY RIGHTS] 55 (2009).

45. Li, supra note 39, at 64.

46. Id. at 52.

47. Id.
rural financial resources. More critically, the redistribution of resources and wealth was moving backward; the regime imposed intentional and unfair redistributions of wealth from poor peasants and collectives to city dwellers and state governments. Although traditional law and economics oppose redistribution of wealth for the sake of equality of welfare, a more progressive regime expands property owners’ social obligations concerning contributing to an equal social welfare. Chinese state governments, as the highest landowners, were profiting at the expense of agricultural collectives by taking rural land and transferring it to third parties for much higher prices. The profits extracted from agricultural collectives were not used in rural areas to develop rural economies, but instead, were used to fund state government’s operations that primarily benefited urban cores. This further exacerbated the dire financial situations in rural areas and the gap between rural and urban areas since rural resources were constantly taken away without any return.

III. CURRENT SOCIAL OBLIGATIONS ON RURAL COLLECTIVES

A. The Identity of Rural Collectives Determines Their Limited Regulatory Roles

After the failure of the Great Leap Forward and the tragic “Three Year Natural Disasters,” the central leadership started to rebuild rural collectives. Considering that China could not regress back to the farmers’ private landownership, Mao and the center administration drafted the “Sixty Rules” and decentralized collectives to three levels: People’s Commune, Production Brigade, and Production Team. Production teams were the most important collectives and

48. Id.
49. Id.
50. ALEXANDER & PEÑALVER, supra note 5.
52. Id. at 38.
53. Jacob Eyferth, Peter Ho & Eduard B. Vermeer, The Opening-Up of China’s Countryside, in RURAL DEVELOPMENT IN TRANSITIONAL CHINA: THE
were the principal owners and managers of accounting units of agricultural land.54

Although the “Sixty Rules” decentralized rural collectives, the state and the party still firmly controlled agricultural collectives and enforced the state and the party’s policies. For example, state governments appointed team leaders of production teams who made decisions regarding farm operations.55 Every production brigade was stationed an administrative office and a communist party branch, representing “the state in executing government policies such as grain procurement.”56 Under the “Sixty Rules,” although the central leadership did grant some freedom to farmers, allowing them to own and manage some small parcels of “household plots,” and “home-steads,” state governments still controlled the transfer of land rights and made decisions regarding crop cultivation and their prices.

The “Sixty Rules” almost governed for two decades. Agricultural collectives in modern China are the remnant of People’s Communes, which were established in 1958 and disbanded in the mid-1980s.57 After further de-collectivization, people’s communes became townships or towns, and production brigades were changed

54. RANDOLPH & JIANBO, supra note 17, at 76. Rosato-Stevens, supra note 30.
55. For example, team leaders of “production team[s]” made decisions about farm production and state governments appointed rural community members. Xiaobo Zhan et al., Local Governance and Public Goods Provision in Rural China (International Food Policy Research Institute, EPTD Discussion Paper No. 93, 2002).
56. Id.
into administrative villages, and production teams turned into natural villages or villagers’ groups.58

Article 10 of the Land Administration Law provides the following:

Land owned by peasant collectives that belong lawfully to peasant collectives of a village shall be operated and managed by collective economic organizations of the village or by villagers’ committees. Land already owned by different peasant collectives that belong to two or more different collective economic organizations in the village shall be operated and managed by the rural collective economic organizations in the village or by villagers’ groups. Land already owned by a peasant collective of a township (town) shall be operated and managed by the rural collective economic organization of the township (town).59

However, it is unclear if these entities that manage and administer collective-owned land are equal to collectives that own land. In 2007, article 60 of the Property Rights Law further provided that these entities that manage and administer collective-owned land should exercise the ownership on behalf of collectives.

58. Id.
The diagrams of collectives and entities that represent collectives are as follows:

**Table 1.**

<table>
<thead>
<tr>
<th>Land owned by</th>
<th>Shall be operated and managed by</th>
</tr>
</thead>
<tbody>
<tr>
<td>Farmers’ collective of a village <em>(Former production team)</em></td>
<td><em>LAL,</em>(^{\text{60}}) Art. 10</td>
</tr>
<tr>
<td></td>
<td>exercise ownership on its behalf</td>
</tr>
<tr>
<td></td>
<td>2007 Real Property Law, Art. 60</td>
</tr>
<tr>
<td>Collective economic organizations of the village or by villagers committees</td>
<td></td>
</tr>
</tbody>
</table>

**Table 2.**

<table>
<thead>
<tr>
<th>Land owned by</th>
<th>Shall be operated and managed by</th>
</tr>
</thead>
<tbody>
<tr>
<td>Two or more different collective economic organizations in the village <em>(Former production brigades)</em></td>
<td><em>LAL,</em>(^{\text{Art. 10}})</td>
</tr>
<tr>
<td></td>
<td>exercise ownership on its behalf</td>
</tr>
<tr>
<td></td>
<td>2007 Real Property Law, Art. 60</td>
</tr>
<tr>
<td>The rural collective economic organizations in the village or by villagers’ groups</td>
<td></td>
</tr>
</tbody>
</table>

**Table 3.**

<table>
<thead>
<tr>
<th>Land owned by</th>
<th>Shall be operated and managed by</th>
</tr>
</thead>
<tbody>
<tr>
<td>A peasant collective of a township (town) <em>(Former communes)</em></td>
<td><em>LAL,</em>(^{\text{Art. 10}})</td>
</tr>
<tr>
<td></td>
<td>exercise ownership on its behalf</td>
</tr>
<tr>
<td></td>
<td>2007 Real Property Law, Art. 60</td>
</tr>
<tr>
<td>The rural collective economic organization of the township (town)</td>
<td></td>
</tr>
</tbody>
</table>

\(^{60}\) In this article, LAL is the abbreviation of the Land Administration Law.
Although rural collectives are important institutions in Chinese society, the vagueness of rural collectives has resulted in their limited role in regulating rural land use and problematic boundaries of rural land use rights. Collectives can mean old production teams, which are essentially natural villages, or old brigades, which are administrative villages, or old people's communes, which are townships. Even local officials are often unclear as to which level collectives are the right owners.

The results of this ambiguity are at least two-fold: one, because of this deliberate ambiguity, collectives can hardly establish or exercise their authority to regulate or manage the agricultural land as owners and regulators. Two, no valid legal entity can represent the interests of collectives. Collectives cannot adequately defend their ownership when the state expropriates collective-owned land. This result is what the state has intended, which further demonstrates that the state is the highest owner and arbiter of the land.

For example, in a small town named Nanhai, neither the county government nor the town government was ready to take the responsibilities to regulate and manage a small rural river within its area. Although the county-level government agencies had authority to monitor and administer the use of the river, they did not take their responsibilities. The town government, as a grassroots bureaucracy of the local government, did not have the resources to manage the river. In fact, nine rivers within the town over an area of 171.3 square kilometers were left unmanaged and unregulated.

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62. Id.

63. Id.

Rural collectives have been weak and submissive to the state and the party. In Maoist China, the state and the party firmly controlled the personnel of rural collectives; they appointed a party branch and team leaders for every collective. For example, in the past, production teams were the most influential collectives. However, they were too weak of an institution to represent their members’ interests.

Although they had formal land ownership, they lacked real power over land, and they frequently lost their rights against local governments and higher collectives.

After decollectivization, the situation is the same. Natural villages are not independent and are subordinate to state governments. Their ownership rests in higher administrative levels such as administrative villages, towns, or county governments and above. For example, a 1997 survey of the Central Policy Research Office revealed that administrative villages through villagers’ committees and villagers’ delegates (rather than natural villages) leased 60.5% of the land.

No strong institutions represent the interests of villagers or farmers. The villagers committee, as the legal representative for a farmers’ collective of a village exercising collective landownership and manage collective-owned land, has become “an extension of state governance.” This reality is no surprise because local governments and party authorities control these village committees and their leaders, although they are supposed to be elected by villagers or farmers.

Township or town governments, as a grassroots bureaucracy,

66. Ho, supra note 61, at 17.
68. Id.
69. YAN ZHANG, GOVERNING THE COMMONS IN CHINA (2017).
primarily function as an extension of local governments. Township officials are primarily state cadres.\textsuperscript{71}

**B. Current Social Obligations on Rural Collectives Are Subordinate to the State Government’s Authority**

1. **Registration**

Chinese laws require rural collectives to register their land ownership within county governments.\textsuperscript{72} Registration is a prerogative power of state governments because it creates land ownership as well as land use rights.\textsuperscript{73} In reality, however, state governments do not properly implement registration.\textsuperscript{74}

Registration power clearly demonstrates the instrumentality of rural property rights in China: serving the state’s interests. State governments can choose not to register some property rights and refuse to issue certificates. For example, the law does not protect the “small property room,” which occurs when farmers or collectives build commercial residential houses on the collective-owned land and sell to nonmembers of collectives.\textsuperscript{75}


\textsuperscript{73} Land Administration Law, *supra* note 59.


\textsuperscript{75} According to the Ministry of Housing and Urban Development, “small property room” (or Xiao Chan Quan Fang refers) to commodity housing that is built upon collective-owned land. The small property room does not have housing certificate that is issued by the state government; rather, township or town government issues the certificate. Wang, *infra* note 76.
Central state governments employ many mechanisms to abolish this phenomenon, including refusing to register land rights or refusing to issue land rights certificate.76 In 2008, the central government issued a directive irritating the policy prohibiting urban residents from buying houses built on collective-owned land.77 Although townships (or towns) issue ownership certificate for small property room, the state government does not issue ownership certificate on small property room.78 Because the “small property room” potentially violates the nature of agricultural land and leads to misuse, it is reasonable for central governments to prohibit such use. However, serious doubts arise because the use restriction is imposed when collectives own the land and such restriction is not imposed when the state becomes the landowner. This phenomenon apparently protects the state’s monopoly over rural land, keeping the value of rural residential land cheap and enjoying the profits of non-agricultural land uses.79

2. Dispute Resolution

The Land Administration Law provides that towns or townships have authority in resolving disputes.80 However, this law hardly

76. The small property room does not have any housing certificate issued by the state government. Rather, the township or the town government issues the certificate. The law does not protect registration by town or village governments. It is very crucial for farmers or collectives to register their land rights in the state governments. Qi Wang, zhujianbu: xiao chan quan fang bu keneng hefahua zhili jiang yuelaiyue yanli [The Ministry of Housing and Urban Development: Small Property Room Cannot Be Legalized—It Should Be Treated Harsher], SHANGHAI SECURITY NEWSPAPER, May 24, 2010, https://perma.cc/AP2Z-BQEB.


78. Wang, supra note 76.


80. “Disputes between individuals or between individuals and units shall be handled by people’s governments at [all levels, including] the township level or at or above the county level.” Land Administration Law, supra note 59, Art. 16.
grants any actual authority to rural collectives. In the first place, town (or township level) government officials are mainly state cadres. Besides, the authority of the town is mostly advisory; according to the law, state governments are the final entities in resolving disputes between parties.81

3. Land Regulations

Compared to regulating collective land ownership, agricultural collectives have more authority in land use rights on collective-owned land. However, most of the authorities are subordinate to or abrogated by state governments.

a) Land Use Planning

Land use planning is a power and tool that belongs to state governments. In more developed rural areas, different local state governments compete to control the rural village’s planning process to expand their territories.82 According to the Land Administration Law, local governments shall make both comprehensive and annual land use plans.83 Lower-level government land use plans must be reviewed and approved by higher-level governments.84

81. Land Administration Law, supra note 59, Art. 16: “Disputes over ownership of land or the right to the use of land shall be solved through consultation between the parties. If such consultation fails, the disputes shall be handled by the people’s government.”
82. Smith, supra note 70.
83. RANDOLPH & JIANBO, supra note 17, at 328. Land Administration Law, supra note 59. The annual land use plan is the method “through which decisions are made as to the release of land for land use rights in the next following year.” Article 17 of Land Administration Law provides that people’s governments at all levels shall manage to compile comprehensive plans for land uses following “the national economic and social development program, requirements of national land consolidation and resources and environmental protection, land supply capacity and the requirements of various construction projects.” The State Council shall determine the validity term of the comprehensive plans for land use. The implementation rules set the duration of the comprehensive plan for 15 years. Tudi Guanli Fa Shishi Tiaoli Art. 13 (土地管理法实施条例) [The Implementation Rules of Land Administration Law] (amended by the State Council, Dec. 27, 1998, effective Jan. 1, 1999).
84. Land Administration Law, supra note 59, Art. 21.
The Land Administration Law regulates three different types of land: agricultural land, construction land, and unused land. Agricultural land protection is the primary purpose of making general land use plans. According to article 6 of the 1998 Basic Farmland Protection Regulations, state governments bear the responsibility of protecting agricultural land. The State Council and its agricultural administrative department shall be responsible for the management and protection of basic farmland throughout the country. According to the provisions of this regulation, local governments at or above the county level and agricultural administrative departments shall be responsible for the protection of basic farmland management work in their respective administrative areas. However, when state governments are burdened with the responsibility of protecting farmland, they have more leeway not to enforce it.

The regulations describe the authorities of agricultural collectives in very few articles, and all of these few powers are granted to town or township governments—the grass-root level governments whose fundamental duty is to serve state governments.
b) Granting Contractual Land Use Rights on Agricultural Land

In present-day China, most agricultural collective-owned land is used under the Agricultural Contract Responsibility System. According to article 12 of the 2009 Rural Land Contract Law, collectives have the right to grant contractual land use rights for agricultural purposes. Farmers who are members of the collectives have the right to undertake rural land contracts with their collectives. While agricultural collectives still hold the ownership of the land, farmers have a land use right for thirty years under the contract. State governments exercise their supervisory power upon transfer of land use rights on agricultural land through their registration authority. Although the contractual land use right becomes effective since the signing date of a contract, when farmers do not register the contract, the land use right to agricultural land does not become effective to third parties with good faith.

89. Rural Land Contract Law, supra note 43, Art. 12. The entities of collectives that exercise the right to grant contractual land use rights follow the Land Administration Law.

90. Id., Art. 5; see also Art. 19. The contractual process is like this: members of collectives must elect a group in charge of the contract work. The group, then, must publish the projected contract by laws and regulations. Then, village members pass the contract project through discussion. Two-thirds or more of the members of the collective must approve the contract plan. Then, the contract is concluded and publicly implemented. Stein, supra note 51, at 46. See also Gregory M. Stein, Commercial Leasing in China: An Overview, 8 CORNELL REAL EST. REV. 26 (2010);

91. RANDOLPH & JIANBO, supra note 17, at 117.

92. Rural Land Contract Law, supra note 43, Art. 23. Thus, when farmers transfer land use rights to farmland, they shall apply to county level governments for registration.

c) Supervisory Authority of Collectives under the Agricultural Contract

Agricultural agreements regulate farm uses and serve as a rudimentary form of zoning. The Rural Land Contract Law obligates the contract holder to use the contracted land for agricultural or other similarly prescribed purposes and not to commit waste. Farmers under agricultural contract must bear three burdens: first, they must sustain the agricultural use of the contracted land and not use the land for nonagricultural purposes without approval; second, they must use the land rationally and protect the land, and not cause permanent damage to the land; third, they must conform to other laws and regulations. These restrictions are crucial upon the scope of collective land ownership, as well as farmers’ rights in the land when they enter into agricultural contracts.

Collectives serve a limited supervisory role to ensure that farmers use the land for agricultural purposes. According to the law, collectives should exercise supervision over the reasonable use and protection of the land by the farmers. Collectives have the authority to supervise and ensure that the agricultural land is used for farming and cultivating purposes. The law requires collectives to:

- [provide] the contractor services in respect of production, technology, and information, etc. as agreed upon in the contract;
- [and carry] out the overall plan for land use worked out by the people’s government of the county or township (town) and [make] arrangements for the construction of agricultural infrastructure within its own collective economic

94. Rural Land Contract Law, supra note 43, Arts. 8, 17, 60.
95. Id., Art. 18.
96. Korff, supra note 53, at 416.
Collectives are empowered to stop “the contractor from damaging the contracted land and agricultural resources.” Collectives can terminate the contract and take back the land if the contractor leaves the cultivated land lay waste for two years. Collectives have limited authority to supervise a farmer’s right to circulate his or her land use right. When a farmer transfers his or her rights to a third party, he or she must get approval from the collective.

Even under the agricultural lease system, rural collectives are under the control of the state. Administrative villages are the lessors of the majority of the agricultural land under the supervision of the township or town. The law reserves administrative villages (or villagers’ committees) and villagers’ delegates the rights to redistribute land according to changes in household size, but state governments control these institutions.

Although both collectives and state governments have the power to stop illegal land use, collectives do not have robust measures to impose particular punishments upon contractors who harm the farmland. Only state governments have the authority to punish illegal actions. Collectives have the right to compensation when the contract undertaking party permanently damages the land. Collectives do not have an independent right to reclaim their agricultural

100. Id. Arts. 13, 60.
103. Id. Arts. 13, 60.
104. Id.
105. Rural Land Contract Law, supra note 43, Art. 37: “Where a transfer is adopted for circulation, the matter shall be subject to consent by the party giving out the contract; and where subcontract, lease, exchange or other means is adopted for circulation, the matter shall be reported to the party giving out the contract for the record.”
103. Id.
104. Id.
105. Id.
106. Id.
land when the state condemns the land for non-agricultural construction projects and the land is left unused or wasted.107

For example, article 37 of the Land Administration Law provides that state governments are empowered to revoke land use rights when the construction unit fails to start construction for two successive years. When the land used to belong to peasant collectives, state governments should return the land to the original rural collectives for re-cultivation.108 However, the article does not mandatorily require the state to reclaim the appropriated rural land, and it does not grant petition rights to farmers. For example, in Zhejiang Province, the local government condemned a piece of agricultural land and granted land use rights to a local company. The company wasted the land. Three years passed and no construction work was completed. The local government did not take any action to stop such wasteful action. A group of farmers sued the government, requesting the wasted agricultural land be returned to them. The government argued these farmers did not have any right to sue them because they were no longer the right-holder of the land; only the original rural collectives had such right. The local intermediate court took the case. However, it held that farmers did not have the right to sue.109

The Rural Land Contract Law removes many of the collectives’ restriction powers regarding the circulation of land. The law gives much freedom to farmers’ right to dispose of the land.110 The law requires only notification to collectives when farmers subcontract,

108. Id.
110. Rural Land Contract Law, supra note 43, Art. 34: “The contractor shall have the right to make his own decision, according to law, on whether to circulate the right to land contractual management and on the means by which to circulate the right.”
lease, or exchange land whereas it requires the agreement of collectives when farmers transfer land.\textsuperscript{111} This policy creates loopholes because farmers can simply subcontract, lease, or exchange land use right whereas they keep the land use right.\textsuperscript{112}

During the term of a contract, the adjustment of rural contract by collectives is very limited. Collectives may not take back the contracted land during the term of a contract.\textsuperscript{113} They have the authority to adjust the management of agricultural contract, but their authority is limited and subject to the approval of the township governments and county governments. When a farmer’s family moves and settles down in a small town, the farmer can reserve his or her land use right or circulate the right.\textsuperscript{114} Collectives can legally adjust the management of a contract in particular circumstances such as natural disasters and when farmers move to an urban area and become city residents. The readjustment matter must be approved by no less than two-thirds of the collectives’ members, and villagers’ representative must report to relevant administrative agencies of town governments and county governments for approval.\textsuperscript{115}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{111} Rural Land Contract Law, \textit{supra} note 43, Art. 37.
\item \textsuperscript{112} According to the National People’s Congress Standing Committee, the Land Administration Law was revised because (1) it reiterates the policy that “guarantees a land lease of 30 years no change;” and (2) “it curtails the power of the villagers’ committee through the stipulation that leased land can be redistributed only if the approval of two-thirds of the villagers’ congress or delegates has been obtained.” Daniel W. Bromley, \textit{Property Rights and Land in Ex-Socialist States: Lessons of Transition for China}, in \textit{DEVELOPMENTAL DILEMMAS, supra} note 31, at 41.
\item \textsuperscript{113} Rural Land Contract Law, \textit{supra} note 43, Art. 26.
\item \textsuperscript{114} \textit{Id.}
\item \textsuperscript{115} \textit{Id.}, Art. 27:

When during the term of contract, such special circumstances as natural calamities that seriously damaged the contracted land make it necessary to properly readjust the arable land or grasslands contracted by individual peasant households, the matter shall be subject to consent by not less than two-thirds of the members of the villagers assembly of the collective economic organization concerned or of the villagers’ representatives and shall be reported for approval to the competent administrative departments for agriculture, etc. under the relevant township (town) people’s government and the people’s government at the county level . . . .

\end{enumerate}
\end{footnotesize}

However, collectives should have more authority to adjust rural land contract during the term of a contract. From the collectives’ perspective, farmland adjustment is another aspect of regulating rural land use rights. Reasonable land adjustments allow collectives to either rearrange land that is returned willingly by farmers under the contract or reclaim back land when farmers cannot do the farming. Under either circumstance, collectives can allocate land to other farmers who are able to manage farms more efficiently.

Land adjustment due to the migration of rural labors has been a practical issue in China. Because the agricultural reforms have freed a substantial portion of rural labor from farmland, millions of farmers have left their allocated agricultural land and look for non-agricultural employment opportunities. A 1997 survey revealed that about 9.7% of 214 million active rural households were employed entirely outside the agricultural sector. In 2001, 220,000 people left their farmlands in Jianli County, Hubei Province, which

116. Rural Land Contract Law, supra note 43, Art. 26:
If during the term of the contract, the whole family of the contractor moves into a city divided into districts and his rural residence registration is changed to non-rural residence registration, he shall turn his contracted arable land or grassland back to the party giving out the contract. If the contractor fails to turn it back, the party giving out the contract may take back the contracted arable land or grassland.

Although the Land Administration Law provides that collectives can take back contracted farmland that is wasted by contractors, they must wait for two years. Land Administration Law, supra note 59, Art. 37.

117. Id.

118. Even fewer younger farmers are willing to continue farming. Because the profit of agriculture is low, many younger farmers have abandoned farming—their older generations employment—and look for a better life in urban areas. Roughly 7.3% of farmers’ children born in the 1980s are willing to farm, whereas only 3.8% of farmers’ children born in the 1990s are ready to plant. In this situation, coupled with a premature and incomplete rural land rental market, insufficiency has emerged, as these households cannot adjust such changes between land and labor. Zhang Xiaoge, Zhengdi Chaqiang Boji Quanguo Baifenzi Shilu Jiating, [16% of Chinese Households are Involved in Condemnation and Demolition], RADIO FREE ASIA (Oct. 28, 2013), https://perma.cc/AFV2-VMTB. Scott Rozelle, Loren Brandt, Li Guo & Jikun Huang, Land Tenure in China: Facts, Fictions and Issues, in DEVELOPMENTAL DILEMMAS, supra note 31, at 134.


120. Id.
accounted 49% of the total rural force.\textsuperscript{121} They vacated around a third of the county’s total arable land.\textsuperscript{122} However, these farmers did not give away their land use rights; instead, they kept the land “as security in case of unemployment, disability, or retirement,” or sublease to other farmers.\textsuperscript{123} The current law permits farmers to retain their contractual land use right if they move to a small town.\textsuperscript{124} On the one hand, this reality might cause a higher scale of agricultural use of the land “when the subcontracted land is leased to fewer farmers and the promotion of agricultural efficiency.”\textsuperscript{125} On the other hand, it has an adverse impact because it is common that these farmers would rather let the land go wasted or unpopulated than give it back to the collectives.\textsuperscript{126} It is evident that this will harm society as a whole, in which case both the state and the collectives should impose a certain amount of social responsibility on the farmers. Under these circumstances, collectives should readjust the land to other farmers who would efficiently farm the land.

Because rural China has a long-term egalitarian culture, collectives face intense social pressure from the rural community to promote an equal allocation of land, which causes frequent readjustments of cropland.\textsuperscript{127} Collective ownership with periodic reallocations of land ensures relatively equitable household access to land resources.\textsuperscript{128} In reality, adjustments have been found most frequently and comprehensively in those regions where land is rela-
tively scarce, and off-farm work opportunities are limited, thus confirming the role of social insurance. Research based on Sichuan Province showed that regions with high population pressure demand an equal distribution of resources, stringent land regulations, and a stronger commitment to shared interests. Despite the central authorities and the liberal economist belief that land tenure security is critical to China’s economic growth, it is unexpected that the majority of farmers supported redistributions of cropland because of changes in family size. In a 1997 survey conducted on 271 villagers, about 80% of them had been readjusted since the introduction of the lease system, within which 66% had been readjusted twice. The survey revealed that 62.8% of the sample villages still supported redistribution of farmland. Another study of 800 households showed that 62% of the participants were in favor of a policy that reassigned land among families “in response to changes in the composition of their families.”

The real force behind decisions of readjustment of land use rights comes from the state. While most decisions are rooted in villages, townships or higher-level state governments are the final decision makers. More significantly, because of the hierarchical nature of the governmental system in China, collectives are subordinate and under the control of state governments. As the state appoints most leaders of collectives, these leaders number one concern is to satisfy their higher-level officials because this affects their “prospect for promotion.” The primary responsibilities of village leaders include: first, “collecting taxes and levying fees;” second,

129. Id. The reality in the China rural area is that over 70% of registered rural residents represent a hidden unemployment in the countryside. Eyferth, Ho & Vermeer, supra note 53, at 14. Banks, supra note 31, at 264.
130. Id. supra note 57, at 10.
131. Id.
132. Id.
133. Id.
134. Id.
“implementing family planning;” and third, “fulfilling grain procurement quotas.”\textsuperscript{136} The state or the party “has the power to remove cadres who do not succeed in fulfilling the state’s interest, and may be able to prevent fired officials from taking advantage of the perks and privileges that otherwise accrue to past and present village leadership.”\textsuperscript{137}

d) Social Obligations of Rural Homestead Housing Rights

Rural homestead housing rights are “generally allocated [to farmers] without payment to households by village collectives.”\textsuperscript{138} This is an exception to the default rule that collective-owned land must be used for agricultural use.\textsuperscript{139} Thus, although the use of the land is for non-agricultural use, the land still belongs to agricultural collectives.\textsuperscript{140} These rights have no time limitation.\textsuperscript{141} The farmers can occupy and use their homestead without fees as long as they wish.\textsuperscript{142} This right is also inheritable.\textsuperscript{143} Rural homestead housing rights are of a social welfare character. Only members of economic collectives are entitled to apply to have such rights.\textsuperscript{144} As early as 1963, the Central Committee of the CCP issued “A Supplement Notice about Members Homestead Problems,” which provided that: “[A homestead belonging to members of the people’s communes] belongs to production teams collectively, and the homestead is prohibited from being transferred. It shall be used by members for a

\begin{itemize}
\item \textsuperscript{136} Id.
\item \textsuperscript{137} Rozelle, Brandt, Guo & Huang, supra note 118, at 133.
\item \textsuperscript{138} Weiguo Wang, Land Use Rights: Legal Perspectives and Pitfalls for Land Reform, in DEVELOPMENTAL DILEMMAS, supra note 31, at 68.
\item \textsuperscript{139} Land Administration Law, supra note 59, Art. 43.
\item \textsuperscript{140} Jialin Zhang, China’s Slow-motion Land Reform, HOOVER INSTITUTION (Feb. 1, 2010), https://perma.cc/9XH6-8XDT.
\item \textsuperscript{141} RANDOLPH & JIANBO, supra note 17, at 118.
\item \textsuperscript{142} Id.
\item \textsuperscript{143} Id. at 119.
\item \textsuperscript{144} LAWS AND REGULATIONS ON LAND AND HOUSE EXPROPRIATION 8 (Law Press 2012) [hereinafter LAND AND HOUSE EXPROPRIATION]. Land Administration Law, supra note 72, Art. 62.
\end{itemize}
long term and unchanged. Production team should protect members’
land use rights.”145

The Land Administration Law provides that the land used for
rural residents’ homesteads must be planned for construction pur-
poses under the general town or village land use plans.146 Rural res-
dents must apply to agricultural collectives and get approval from
both villages or town and county or city governments.147 The state
also is strict about the “one household, one homestead” policy. Ad-
ditionally, total homestead sizes applied should not exceed stand-
ards set by provinces, or cities.148

According to the language of the law, the social obligations of
this land use right have two dimensions. First, the transferability of
the right is limited: like any other collective-owned land, farmers
cannot sell or lease the collective-owned land.149 If they rent or sell
their house on the land, they cannot apply for a new homestead af-
afterward.150 The purpose of this rule is to restrict farmers’ speculation
of homestead.151 In addition, “[residents] must make good use of the
original homestead or empty land” and must use the land for housing
purposes.152 Section 52 of the “1995 Provisions on Land Ownership
and Land Use rights” provided that “if the family abandons the
house for two successive years or fails to restore the house within

145. WANG, supra note 16 at 100.
146. Id.
147. Land Administration Law, supra note 59, Arts. 44, 62. Guotu Ziyuanbu
Guanyu Jiaqiang Nongcun Zhaijidi Guanli De Yijian (国土资
源部关于加强农村宅基地管理的意见) [Land Resource Bureau’s Suggestions about Strengthening Management of Rural Homestead] (promulgated by the Ministry of Land Re-
sources, Nov. 2, 2004) [hereinafter Management of Rural Homestead]. If they
want to use farmland for housing construction, they must also follow the proce-
dure of farmland conversion.
148. Management of Rural Homestead, supra note 147. For violations of plan-
ing law or not through proper applications, the buildings must be demolished
and the land will be restored. When homesteads exceed maximum space require-
ments, village collectives can make use of the extra housing. If more than one
homestead is built, village collectives can confiscate the homesteads.
149. RANDOLPH & JIANBO, supra note 17, at 118.
150. Land Administration Law, supra note 59, Art. 62.
151. LAND AND HOUSE EXPROPRIATION, supra note 144, at 8.
152. RANDOLPH & JIANBO, supra note 17, at 117.
two years after its destruction, agricultural collectives may reclaim the property.\textsuperscript{153}

As a practical matter, many farmers have migrated to towns and cities and abandoned and deserted their housing land.\textsuperscript{154} On the one hand, this housing land remains unproductive. On the other hand, other villages or collectives are in urgent demand for additional land for housing due to rapid population growth.\textsuperscript{155} The next problem is that many homestead constructions violate both zoning laws and regulations and maximum space requirements. These buildings either occupy farmland that should be used for farming, or they exceed the maximum space requirements. Although central governments have realized this issue, it is hard to solve. For example, about 172,974 acres of cultivated land have been used to build houses since 1986, and the number is increasing rapidly.\textsuperscript{156} In addition, it is common for farmers who have built houses on their homestead to sell them to urban dwellers, who cannot afford the urban homes during the housing boom but want to own real property.\textsuperscript{157}

\textbf{C. Social Obligations Imposed Upon Collective Land Ownership Are Distorted}

Collectives are legally restrained owners, and all of these restrictions come from the party and state governments. Collectives can only hold their landownership for agricultural purposes. Collectives cannot transfer, lease, or mortgage their land for non-agricultural uses.\textsuperscript{158} With limited exceptions, collectives cannot

\begin{itemize}
\item \textsuperscript{153} \textit{Id.} at 119. However, the Land Administration Law does not have similar articles.
\item \textsuperscript{154} \textit{Wang, supra} note 138, at 69.
\item \textsuperscript{155} \textit{Id.}
\item \textsuperscript{156} \textit{Id.} \textit{Zhang, supra} note 140. More than 1,800 million mu (296 million acres) of arable land of China have been used as the rural homestead.
\item \textsuperscript{157} \textit{Id.}
\item \textsuperscript{158} \textit{Land Administration Law, supra} note 59, Art. 63. The article prohibits the transfer of land use right of collective land for non-agricultural purposes, with the exception that the transfer of such interests in the context of bankruptcy proceedings, merger situations.
\end{itemize}
change agricultural use unless they surrender their landownership to the state.\textsuperscript{159}

This land use restriction impinges entirely upon the question of who owns or who uses the land, regardless of the physical characteristics and nature of the land.\textsuperscript{160} For instance, if farmers want to alter the utilization of collective-owned land, the change of use has to be approved by at least two-thirds of members of the agricultural economic group and then approved by county governments.\textsuperscript{161} However, when state governments want to change agricultural land for non-agricultural purposes and eventually condemn the land, there is no such restriction.

Collective ownership has frequently been transferred into state ownership, almost at the will of the state. State governments do not regulate and impose social obligations on collective-owned land. On the contrary, the state initiates agricultural land conversion that enables the state to use agricultural land for any other purposes, as long as state governments condemn collective-owned land and then transfer collective ownership to the state.\textsuperscript{162} This situation is far-reaching in the circumstance of governmental takings. This situation often happens when a suburban neighboring city has sprawled, creating a need or desire for rural land. Due to rapid urban expansion, local governments have expropriated many former collective-owned lands for public non-agricultural purposes and then sold the land use rights to third parties for a much higher price. The weakness of collectives is the central reason that they cannot fight against the state governmental takings. There are some legal restrictions to the condemnation procedures, but as a practical matter, these processes

\textsuperscript{159.} Id. Art. 45.
\textsuperscript{160.} Id.
\textsuperscript{161.} Rural Land Contract Law, supra note 43, Art. 27.
will not prevent condemnation nor affect the legality of condemnation itself. These legal restrictions themselves clearly prove that collectives have no say when state governments decide to condemn their land.163

The three exceptions that do not need transferring of collective ownership to the state are: (1) using agricultural land for township and village enterprises, or using agricultural land use right as stock share with individuals or units to set up businesses or joint ventures,164 (2) using agricultural land for public facilities and public welfare services,165 (3) using the land for building houses for rural household.166 Even under these limited exceptions, collectives still have to apply to local governments for approval.167 This approval process is a significant barrier to rural economic development such as township and village enterprises.168 The state has held hostility towards rural collectives for a long-time. China’s top planners wanted to protect state-owned enterprises at the sacrifice of development of township and village enterprises.169 The state thought that

163. Vince Wong, Land Policy Reform in China: Dealing with Forced Expropriation and the Dual Land Tenure System (Center for Comparative and Public Law, University of Hong Kong, Occasional Paper No. 25, May 2014), https://perma.cc/7LX-JBK V. GREGORY M. STEIN, MODERN CHINESE REAL ESTATE LAW: PROPERTY DEVELOPMENT IN AN EVOLVING LEGAL SYSTEM 3 (2013). The disagreements of collectives about the terms of compensation do not interfere with the process of acquisition. Even when dispute about compensation arises, the state government that approves the land condemnation resolving the issue, which is hardly partial because state government is the party that condemns the land. Implementation of the rules of the Land Administration Law, supra note 59, Arts. 25, 47. RANDOLPH & JIANBO, supra note 17, at 84.

164. Land Administration Law, supra note 59, Art. 60.

165. Id. Art 60: “Whereas the occupation of agricultural land is involved, the examination and approval procedures provided for in Article 44 of this law are required.” See also Art. 44; article 44 refers to the process of the conversion of agricultural land into land for construction purposes, or the procedure of conversion of collective land ownership to state land ownership.

166. Id. Art 62.

167. Id. Art. 65.

168. Pei, supra note 31.

169. Id. at 237. The state used to have the policy of restricting rural industry development: “it was illegal for rural collectives industry to buy raw materials and energy controlled by the planned system.” Deng once admitted the upsurge of township and village enterprises were completely unexpected and called them “a new force suddenly coming to the fore.”
only state industries could efficiently use the limited resources in China, not township and village enterprises.\textsuperscript{170}

However, township and village enterprises offer substantial financial resources to villages and towns. They take advantage of the abundance of cheap labor in the countryside, make more affordable products, and significantly decrease the burdens of farmers. With the support of township and village enterprises, villages and towns can operate more efficiently; they can provide more public services and general welfare to farmers.\textsuperscript{171} The statuses of villages and townships would be strengthened because they would have more money and incentive to protect themselves against the state governments.\textsuperscript{172} In reality, however, because of the lack of financial resources, almost all the financial burdens fall upon the farmers, which makes poor rural areas poorer, causing social unrest and a disincentive to farming.\textsuperscript{173}

IV. SOCIAL OBLIGATIONS SHOULD BE IMPOSED ON COLLECTIVE-OWNED LAND

As land regulators, rural collectives should have the authority to regulate and manage agricultural land use. Collectives should impose restrictions to curb or counter the negative social impact of property. It is justified for collectives or the state to impose restrictions upon the land use rights of farmland, especially basic agricultural land—the land that is most suitable for farming. The use restrictions must be imposed according to the physical characteristics of the land, not according to the owner of the land.

For example, in some less developed areas, village or township authorities frequently surcharge farmers when agricultural land use rights are transferred, and this has provoked substantial controversy.

\textsuperscript{170} Id.
\textsuperscript{171} Id.
\textsuperscript{172} Id.
\textsuperscript{173} Id. The major responsibility of town officials was to collect taxes and fees from villagers, which created excessive burdens over villagers and sparked intense protests across rural China. Yeh, O’Brien & Ye, \textit{supra} note 135.
Yet if the fees are used to counter the negative impact of transferring land use rights, it is justifiable. The imposed fees are legitimate under two circumstances: first, when the purchase price would be too low or unreasonable between private parties; second, when land use rights are transferred to outsiders without any knowledge of or ability to farm, or if a farmer transfers land use rights without cultivating the land. The fees is reasonable as a fine to deter current farmers from randomly transferring their land use rights.

In reality, however, the inadequacy of both social obligations and their enforcement create severe concerns for rural development, in particular for the environment. Farmers and collectives violate their social responsibility by not using land according to its nature and by putting the environment at risk. In reality, it is common for farmers to use the agricultural land irrationally. The land use restrictions are blurred, and no restrictions exist at the local level to control agricultural production.174 Neither collectives nor local governments have the incentive, time, or resources to enforce legal restrictions on the agricultural activities of farmers. On the contrary, they want farmers to produce as many products as possible, as this will increase revenue.175 As a result, farmers with livestock are allowed to overgraze, which significantly diminishes the quality of land in rural areas.176 Significant amounts of chemical fertilizers are used, and water is polluted.177 Farmers are given no immediate directions about how to greenly and efficiently use their land and not pollute the environment.178

Collectives violate their social obligations in rural areas and waste agricultural land. Since the entity of collective is vague or vacant, cadres of collectives often replace members of collectives and

175. Id.
176. Id.
177. Id.
178. Id.
make contract decisions. Cadres, who are also members of collectives, would either conveniently sign agricultural contracts with collectives or would forcibly occupy or buy land contracts from current farmers. As the value of farmland use is low, both the cadres and contracting farmers have incentives not to use agricultural land for agricultural purposes.

For example, in the Shuangfeng village of Guangdong province, cadres of the village illegally and secretly converted more than 3,292 acres of collective-owned forestlands, including other villagers’ contracted agricultural lands, into luxury cemeteries. Trees were cut down, and lands were cleared and cut into squares according to different bosses. Disguised as a buyer, a journalist interviewed one “boss.” When told by the manager that each square meter cost 100 yuan and that the journalist could buy as many square meters as desired, the reporter asked, “Will the government examine this [illegal land use of collective-owned land]?” The boss replied, “You don't need to worry about this. There is no problem with it. The village [cadre] has solutions.” The journalist then asked how the bosses got the land, and the manager told him that the community collective contracted the land to them. Every year, these managers paid fees to the village and then they sold these properties as cemeteries. Then, the journalist interviewed the cadre of the community, but the cadre denied all allegations, saying the collective did not sell land to people to build cemeteries. When the journalist asked why there were so many cemeteries found, the cadres said: “the forest is too far away from the village and is hard to walk from

179. Pei, supra note 31, at 237.
181. Id.
182. Id.
183. Id.
184. Id.
185. Id.
here, and it is very hard to manage.” 186 The journalist also interviewed the city department of civil affairs, but the staff told the reporter that they did not know about this. 187 He told the reporter that a few individual villagers might have built these so-called cemeteries. 188 The reporter questioned him about his brother who managed one of the cemeteries (as tipped off by one villager). 189 The cadre replied that his brother was not managing the cemeteries, just one temple. 190 However, during the journalist’s interview, there was no visible temple found. 191

In another example, in Tongzhou City, Yongshun town, Jiaowang village, a cadre illegally occupied agricultural land for residential purposes. 192 He also was breeding Tibetan Mastiff dogs for commercial purposes. 193 The cadre received the lease of the land from one villager and paid over 1 million yuan. 194 The agricultural land belonged to the village collective and should have been used for apple planting. 195 After the cadre had started construction, villagers made complaints to the town government. 196 The town government planned to have a tractor demolish the construction, but it stopped after only destroying part of the building. 197 Then, the cadre resumed construction. 198

186. Id.
187. Id.
188. Id.
189. Id.
190. Id.
191. Id.
193. Id.
194. Id.
195. Id.
196. Id.
197. Id.
198. Id.
V. CONCLUSION

Chinese rural collectives as both landowners and land regulators should bear certain social obligations. In reality, however, Chinese rural land rights are devoid of social obligations. Current social obligations on collective-owned land are inadequate, ineffective, and distorted. The collective system creates boundless property rights, eliminating property users’ minimum negative social responsibilities that they should not use their property in a way that harms neighbors or community. The vague and weak status of rural collectives explains their limited roles in regulating rural property rights on the collective-owned land. The land use restrictions on collective-owned land impinge entirely upon the question of who owns the land rather than physical characteristics of the land.

As higher-level regulators, the state should impose restrictions on rural right-holders to use the agricultural land properly and reasonably to accommodate agricultural land’s physical characteristics, such as its nature and location and to serve social welfare. As regulators, the state does not fulfill its regulatory responsibilities in enforcing social obligations on collective-owned land. As higher-level landowners, the state violates its social responsibilities by harming agricultural land. Lack of boundaries of the state powers causes the state to be extremely flexible in encroaching upon rural property rights whenever it wants to.

This article argues that for agricultural land, where physical characteristics of the land are better used for farming, the use restriction serves as a social obligation that conforms to physical characteristics of the land. It is justifiable for collectives or state governments to impose social obligations on rural land because collective-owned land is predominately suitable for agricultural use. The restrictions, however, must be imposed according to physical characteristics of the land, not according to the identity of owners of the land.
THE RELUCTANCE OF CIVIL LAW SYSTEMS IN ADOPTING THE UCC ARTICLE 9 “WITHOUT BREACH OF PEACE” STANDARD—EVIDENCE FROM NATIONAL AND INTERNATIONAL LEGAL INSTRUMENTS GOVERNING SECURED TRANSACTIONS

Asress Adimi Gikay* and Cătălin Gabriel Stănescu†

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ABSTRACT

One of the defining features of the Uniform Commercial Code Article 9 is the secured creditor’s ability to take possession of the collateral upon the debtor’s default “without breach of peace.” This standard is meant to protect the debtor from abusive secured creditors, the meaning of which has been shaped by courts on a case-by-case basis.

In reforming their secured transactions laws to enhance access to credit, continental legal systems have shown great reception to Article 9 by adopting the unitary concept and functional approach to security interests, introducing private enforcement mechanisms, including various forms of self-help repossession. However, the “without breach of peace” standard seems to be rejected by most national laws and international legal instruments acceded to by civil law countries, to accommodate the supposedly alien idea of self-help repossession with civil law tradition.

Based on comparative analysis of secured transactions laws of the US, the UK, Romania, and Hungary (representing national laws), and the Cape Town Convention on International Interests in Mobile Equipment
along with the Aircraft Protocol and the Draft Common Frame of Reference (representing international legal instruments), this article demonstrates that continental European legal systems are generally apprehensive with the “without breach of peace” standard. Thus, they are reluctant to transplant it to their legislation and try to either modify it or replace it with different legal requirements.

This article concludes that the alternatives of the “without breach of peace” standard prevailing in continental legal systems undermine the privilege of the secured creditor, pose enforcement problems (such as uncertainty of creditors’ rights and possible abuses against consumer-debtors), and restrain out-of-court enforcement.

Keywords: enforcement of security right, self-help repossession, without breach of peace, judicial repossession, UCC Article 9, Louisiana, access to credit, secured creditor, consumer-debtor, civil law

I. INTRODUCTION

Recent years have witnessed a wave of secured transactions law reforms in many countries including Central and Eastern European (CEE) countries such as Croatia, Hungary, Poland, and Romania. International organizations such as the European Bank for Reconstruction and Development (EBRD) and the United Nations Commission on International Trade Law (UNCITRAL) supplied


countries looking to reform their secured transactions laws with model laws. The International Institute for the Unification of Private Law (UNIDROIT) administers international conventions and protocols governing secured transactions. The conventional wisdom has been that Article 9 of the Uniform Commercial Code (hereinafter Article 9), originating in a common law country with advanced economic and legal systems—the U.S.—is incompatible

6. See UNCITRAL, UNICITRAL Legislative Guide on Secured Transactions (New York, 2010), https://perma.cc/8NG8-K73X. This document contains core provisions that UNCITRAL believes any secured transactions should contain. States that opt to use the document can make use of it as it is or add to the provisions of the document. The European Bank for Reconstruction and Development also published a model law on secured transactions back in 1994. Since it was first published, the model law has been widely circulated and has served as a catalyst for defining the essential requirements of a collateral law in a modern market economy. It is not intended as detailed legislation for direct incorporation into local legal systems, but it has been widely used by the Bank and other institutions to support reform projects. For text, see Simpson et al., supra note 5.


8. First published in 1952, the Uniform Commercial Code (UCC) is one of the longest and most detailed uniform acts and has been adopted by all 50 states in the United States in the form of statutes. Prepared by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI), the UCC in the beginning represented a recommendation of the laws that should be adopted by the states. The Permanent Editorial Board was later established to continue adapting the UCC to future changes. Although its substantive content in all states is substantially similar, some states have made structural modifications to conform to local practices. (In Louisiana, for example, the UCC is referred to as a “Louisiana Civil Code.”) UCC Article 9 was significantly revised in 2001, and these substantive revisions have been adopted in every state and govern virtually all transactions within the UCC’s scope. They have simplified the use of personal property as collateral by providing for an almost uniform set of rules nationwide. The UCC does not, however, apply to real estate transactions. For a brief summary of UCC Article 9’s creation of a personal security interest, see Philip L. Kunkel et al., Security Interests in Personal Property, FARM
with civil legal tradition. Recent national secured transactions law reforms defy this wisdom. Moreover, international legal instruments and model laws that represent major rapprochement of civil law and common law traditions in the field of secured transactions law have emerged.

The purpose of this article is to explain the reception of Article 9 in different civilian legal systems and the underlying reasons for that reception in legal instruments inheriting some aspects of Article 9. Most importantly, this article analyses the place of self-help repossession in the continental countries and the seemingly inevitable “without breach of peace” standard, which they replace with different legal requirements. It argues that the approach taken toward self-help repossession in European systems does not only have the effect of causing unpredictability in enforcement of security rights and of discouraging private enforcement mechanisms, but may also have adverse consequences on access to credit.

Two features make this article unique compared to any other predecessor. First, while previous works address whether self-help repossession is available under and/or compatible with civilian legal systems,9 this article contends that self-help repossession is already a part of many civilian legal systems. Instead, it focuses on why the “breach of peace standard,” which is an inherent part of the device under U.S. law, tends to be disregarded by continental systems. Second, in previous works, the civilian perspective on self-help repossession was based solely on the experience of the state of Louisiana while continental European jurisdictions have been widely ignored.10 However, since continental European countries have now

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10. Id.
showed what can be considered a paradigm shift in the field of secured transactions law, by reforming their laws in line with Article 9, this article analyses the topic by emphasizing recent developments and provides a broader perspective on civil law jurisdictions, supported by concrete evidence.

II. THE RECEPTION OF ARTICLE 9 AS MODEL LAW IN NATIONAL AND INTERNATIONAL LEGAL INSTRUMENTS

Secured transactions laws across the globe can be classified into two main categories: the unitary model and the non-unitary (fragmented model). The unitary model is represented by Article 9, the secured transactions laws of Australia, New Zealand, common law provinces of Canada, and the new comers Malawi, Sierra Leone, and Liberia. These countries where “all secured transactions on personal property and fixtures are brought under the same roof, if a transaction ‘in substance secures payment and performance of an obligation . . . regardless its form or who has title to the collateral,’” are referred to as the “Unitary Systems.” However, the unitary


With the entry into force of the Australian Personal Property Securities Act 2009 (Cth) (‘APPSA’) in 2012, the Unitary Model of secured transactions law on personal property became part of the legal system of another major economy of the world. The quintessential feature and innovation of this model is the so-called unitary concept of security interest, bringing all secured transactions on personal property and fixtures under the same roof if a transaction ‘in substance secures payment and performance of an obligation . . . regardless of its form or who has title to the collateral.’ Although there are meaningful differences among the jurisdictions that have taken over this model with adaptations to local conditions and expectations, the building blocks and crucial features—in particular the unitary concept of security interests—remain the same. Hence, it makes sense to refer to these jurisdictions as ‘Unitary Systems.’
model and the functional approach are not only adopted by the aforementioned common law countries, but also by civil law countries such as Hungary and Romania, or by soft laws such as the Draft Common Frame of Reference (DCFR) and international legal instruments such as the Cape Town Convention on International Interests in Mobile Equipment.

The key characteristics of the non-unitary model are the existence of numerous legal devices that in reality secure performance of obligations, but are not considered security devices, or even if they are considered security devices, different sets of rules apply to their creation, public notice (if at all required), as well as to their enforcement. The implications of this model are threefold. First, there is no single statute (or code) that provides for a comprehensive concept

The group includes, besides Australia, the United States (the birthplace of the model), the Canadian provinces and New Zealand. One should also add to this list Book IX of the sui generis soft law instrument named the ‘Draft Common Frame of Reference’ (‘DCFR’) because it represents that farthest reaching project made in the direction of the Unitary Model in Europe.


15. The Draft Common Frame of Reference came out of a European-level project aimed at finding the common core of European private law. It is a soft law of the common principles of the laws of European countries. The outline edition of the text of the 648-page document, entitled “Principles, Definitions and Model Rules of European Private Law,” referred to in a shorthand manner as the Draft Common Frame of Reference (“DCFR”). The law of security interests as enshrined in the DCFR organized security interests following the unitary system. All modern security devices that are intended to be included are contained in one document. Thus, Book IX, section 1:101 of the DCFR states that:

(1) This Book applies to the following rights in movable property based upon contracts for proprietary security: (a) security rights; and (b) ownership retained under retention of ownership devices. (2) The rules of this Book on security rights apply with appropriate adaptations to: (a) rights under a trust for security purposes; (b) security rights in movable assets created by unilateral juridical acts; and (c) security rights in movable assets implied by patrimonial law, if and in so far as this is compatible with the purpose of the law.

STUDY GROUP, supra note 14, at 447.
of security interests rather security devices are scattered in various statutes. Second, different statutes provide different sets of rules for creation, filing (if at all required), and enforcement. Lastly, certain devices are not considered security devices and thus are not covered by secured transactions law. The consequence of such a fragmented approach to security interests is a lack of consistent and uniform rules of creation, registration, and enforcement of security rights. This leads to the inefficiency of the secured transactions legal regime.

The non-unitary model has been the dominant model in continental legal systems such as France, Italy, Germany, and others that have not recently reformed their secured transactions law. The UK, although being a common-law country, also falls into this category. Nevertheless, recent reforms in Hungary and Romania led to the departure of some civilian systems from the non-unitary model, thus breaking with their former traditions and moving toward the unitary model.

Finally, in the unitary systems, despite slight variations, the fundamental building blocks and features remain close, if not the same. For instance, Hungarian secured transactions law, following a functional approach brings retention of title to the realm of secured transactions, but does not re-characterize financial leasing as secured transactions, dedicating separate provisions for the latter. Similar patterns can be noticed showing variations in the degree to which the functional approach is adopted. However, the idea that transactions that purport to secure performance of obligations should be brought under the realm of secured transactions law is

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17. Tajti asserts that “[a]lthough there are meaningful differences among the jurisdictions that have taken over this model with adaptations to local conditions and expectations, the building blocks and crucial features—in particular the unitary concept of security interests—remain the same.” Tajti, supra note 14, at 150.
18. Polgári Törvénykönyv (Civil Code), Book VI, Chapter LIX, Sections 6:409 et seq. are dedicated to financial leasing agreements.
echoed across the jurisdictions that can be categorized under the uni-
tary model.

With the above background on the reception of Article 9 in other jurisdic-
tions, it ought to be inquired why Article 9 is being accepted as a model for secured transactions law. The reason is simple. Article 9 creates a very simple and efficient system. Under Article 9, the fact that the same rules of creation, perfection, and enforcement apply to all transactions purporting to secure performance of obligation comes with efficiency benefits. In other words, Article 9 is based on the idea that the cost of transaction for creation, filing, and enforcement of security interests must be low.

Due to the functional approach to security interests adopted by Article 9, the formal label of the transaction becomes irrelevant and only the economic reality behind the transaction determines whether Article 9 applies to it. This reduces the cost of transaction that would be incurred in attempting to define its precise nature or the cost incurred when an agreed upon transaction is ruled invalid based on mere formality.19 Hence, for instance, whether the transaction is la-

declared as “title financing” or “consignment,” the creditor is not de-

prived of its secured creditor status. This means that if the consignor files the transaction under Article 9, he or she is a secured creditor without regard to the fact that the transaction is not labeled as “se-

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The form of the transaction or the label the parties put on the transaction is irrelevant for the purpose of determining whether Article 9 applies. Rather, the determination of whether Article 9 applies is based on the economic reality of the transactions. For example, transactions may be characterized as a sale or lease of goods but if in economic reality security interest is being created, Article 9 will nevertheless apply . . . it is also not required that the parties refer in their agreement to a ‘security interest’ being created under a ‘security agreement.’ Even if parties use terms such as ‘assignment,’ ‘hypothecation,’ ‘conditional sales,’ ‘trust deed,’ the like, Article 9 still applies whenever security interest in personal property is being created. Similarly, it is irrelevant for the purpose of Article 9, whether title to the collateral is in the name of the debtor or the secured party.
curity agreement.” The filing requirement that is imposed universally on the great majority of transactions ensures that third parties do not have to incur the cost of inquiring the status of the potential debtor’s property other than checking at the filing office or searching electronically where applicable. Once the third parties discover the existence of the security interest on the debtor’s asset from the relevant public record, they have to inquire about the specific details from the debtor. The secured creditor has an obligation to endorse any information provided by the debtor to ensure that the third party has accurate information.20 If the debtor refuses to provide the information or the secured creditor refuses to endorse the information provided by the debtor, it is sufficient warning for the third party of the risk of dealing with the debtor.

Article 9’s filing system along with other methods of perfection tackle the ostensible ownership problem where publicly known transactions lead third parties to believe that the property is unencumbered or belongs to the debtor. Ostensible ownership is a serious problem in Germany, for instance, regarding retention of title transactions that are not subject to registration despite the rule protecting a good faith third party acquiring rights in the encumbered asset of the debtor.21 Hence, whether the property in the possession of the

20. U.C.C. Section 9-210(b) states the following:
Subject to subsections (c), (d), (e), and (f), a secured party, other than a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor, shall comply with a request within 14 days after receipt: (1) in the case of a request for an accounting, by authenticating and sending to the debtor an accounting; and (2) in the case of a request regarding a list of collateral or a request regarding a statement of account, by authenticating and sending to the debtor an approval or correction.
U.C.C. § 9-210(b) (AM. LAW INST. & UNIF. LAW COMM’N 2010).

21. Jens Hausmann, The Value of Public-Notice Filing Under Uniform Commercial Code Article 9: A Comparison with the German Legal System of Securities in Personal Property, 25 GA. J. INT’L & COMP. L. 427, 474 (1996). In Germany, there are limitations on the protection afforded to a good-faith third party. These limitations are that the subsequent acquirer in good faith must have been deceived by ostensible ownership, that the subsequent acquirer must have secured actual possession permanently—temporary transfer of possession does not suffice—and that the subsequent acquirer must demonstrate that his or her lack of knowledge of an existing right is not the result of his or her negligence.
debtor actually belongs to the debtor is a matter of guesswork. This entails significant transaction costs, a concern to which Article 9 inspired laws respond through a comprehensive perfection method, mainly with filing.

Lastly, the enforcement regime favors private enforcement methods through private disposition of the collateral unlike a court administered sale, the former being faster, cheaper, and commercially sensible.\textsuperscript{22} Self-help repossession, which allows the creditor to repossess the collateral without assistance of the court, subject to the “without breach of peace standard,” plays a significant role in making the enforcement of security rights quicker and cheaper, therefore more efficient.\textsuperscript{23} Hence, without further ado, on the question why developing countries belonging to the civil law system are receptive to Article 9, one must conclude that it is because it incorporates efficiency at its heart, eases access to credit, which in its turn fosters economic development.

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These are limitations to the priority right of a good-faith third party make osten-
sible ownership a serious problem in Germany because the subsequent third party
can invoke his or her good faith only in such limited circumstances. \textit{See id. at 470-72}.
\end{flushright}

\textsuperscript{22} Laurence M. Smith explains that “[a] secured party sale under Article 9 of the U.C.C. is a means by which a secured lender can realize on the debtor’s collateral, without the need to institute litigation or bankruptcy proceedings. It is expeditious, cost-effective and free of the adverse publicity that frequently accom-

\textsuperscript{23} \textsc{Cătălin Gabriel Stănescu}, \textsc{Self-Help, Private Debt Collection and the Concomitant Risks: A Comparative Law Analysis} 1 (2015):

\begin{quote}
It is then relevant to bring forth into discussion the effectiveness of the traditional judicial methods of debt recovery as compared to alternative means, which are arguably better, cheaper and faster when considering the creditors’ needs, as well as the efficiency of consumer-debtor protection mechanisms in place in the chosen jurisdictions, when considering the debtor’s needs.
\end{quote}
III. SELF-HELP REPOSSESSION AND THE “WITHOUT BREACH OF PEACE” STANDARD UNDER ARTICLE 9

The secured creditor can take possession of the collateral according to UCC Section 9-609 either judicially or non-judicially. When the creditor pursues non-judicial self-help repossession, it is under the duty to repossess “without breach of peace.” The “without breach of peace” standard is undefined by Article 9 and is left to ex post facto determination by the courts. The “without breach of peace” standard is intended to safeguard the debtor from abuses that can occur during self-help repossession.

Determining the existence of a breach of peace is difficult in most circumstances. This difficulty seems to be the underlining reason for which continental systems are reluctant to embrace it in their secured transactions laws. Therefore, the following brief overview of the various circumstances under which courts faced this issue serves as a stepping-stone for the rest of this article.

There are circumstances where the determination of breach of peace is easier and clear cut, such as in cases involving physical assault by the reposessor. The task becomes challenging in cases resulting in infliction of emotional distress on the debtor or when the self-help repossession took place through tactics such as the help of

24. There are primarily two channels of judicial repossession. These are an action for replevin and an action for writ of possession. Depending on the state law in question, the secured creditor has an option to resort to one of them. In either case, a state official, i.e., a sheriff or a Marshal executes the repossession on behalf of the secured creditor. See William D. Warren & Steven D. Walt, Secured Transactions in Personal Property 277 (2007).

25. U.C.C. Section 9-609(a)-(b) states the following:
(a) After default, the secured party: (1) may take possession of the collateral; and (2) without removal, may render equipment unusable and dispose of collateral on a debtor’s premises under Section 9-610. (b) A secured party may proceed under subsection (a): (1) pursuant to judicial process; or (2) without judicial process, if it proceeds without breach of the peace.

U.C.C. § 9-609(a)-(b) (AM. LAW INST. & UNIF. LAW COMM’N 2010).

26. Id.

a law enforcement officer or when the repossession has emotional impact on third parties, such as children of the debtor.\footnote{28}

In the US, court decisions have been inconsistent with regard to determining the occurrence of breach of peace across states.\footnote{29} The typical instance where courts agree that breach of peace occurred is the use of physical assault during the repossession.\footnote{30} Court decisions in borderline cases such as those involving: trespass, the mere presence of a law enforcement officer, emotional harm inflicted on third parties, and verbal objection by the debtor during the repossession have been inconsistent.\footnote{31} The inconsistency in court decisions on breach of peace in the US leads to unpredictability for creditors involved in interstate trade.\footnote{32} Thus, McRoberts argues that leaving Article 9’s “without breach of peace” standard undefined defeats the very purpose of the UCC.\footnote{33}

\footnote{28. \textit{Id.} at 570-71. McRobert asks several questions showing a number of scenarios in which the determination of breach of peace can be a daunting task: For example, if a repossession agent asks the police to provide him with protection as he repossesses a vehicle, is this a breach of the peace that makes the self-help repossession unlawful? Does a breach of the peace occur when a homeowner assaults someone trespassing on his property in an effort to repossess lawn furniture? Imagine that the same homeowner does not notice his property being repossessed, but the creditor has to cut a lock and bypass a gate to repossess the property. Does this breach the peace even if there is no confrontation? What if the debtor experiences emotional distress or something happens to a neutral third party?}

\footnote{29. \textit{Id.} at 578-94.}

\footnote{30. For example, the Arkansas Supreme Court has held that violence is breach of the peace. \textit{See} Ford Motor Credit Co. v. Herring, 589 S.W.2d 584, 586 (Ark. 1979). Similarly, the Tennessee Court of Appeals has held that breach of the peace must involve violence. \textit{See} McCall v. Owens, 820 S.W.2d 748, 751 (Tenn. Ct. App. 1991).}

\footnote{31. McRobert, \textit{supra} note 27, at 582-91. \textit{See} Chapa v. Traciers & Assocs., 267 S.W.3d 386 (Tex. Ct. App. 2008). In this case, the repossession agent repossessed a vehicle without knowing that the debtor’s two young children were in the back seats. The repossession agent returned the children after a while. The Texas Court of Appeals held that even though the children were diagnosed with post-traumatic stress, the repossession was not in breach of the peace irrespective of the harm to the third party. The Court disregarded what happened after repossession and focused on the nature of the repossession.}

\footnote{32. McRobert, \textit{supra} note 27, at 587.}

\footnote{33. \textit{Id.}: The courts should have a legal framework that allows them to consistently apply the law. Debtors and creditors should be able to understand
However, the practical problems faced in attempting to apply the “without breach of peace” call for reform, not for abandoning the standard altogether. In response to the inconsistency of court decisions defining the breach of peace and the ensuing unpredictability, McRoberts recommends the amendment of Article 9 to include a two-stage determination of the breach of peace. In his opinion, the first stage should include a list of three per se violation factors while the second stage contains a set of two factors to be determined on a case by case basis, although the feasibility of such a proposal is debatable.

A last point worth mentioning is that under Article 9, violation of the “breach of peace standard” has serious repercussions. These are criminal liability (in cases of grave breach, such as physical assault), compensatory damages, statutory and punitive damages as well as loss of the right to deficiency claim (payment).
IV. TERMINOLOGICAL CAVEAT

Self-help repossession is a designation used by Article 9 and secured transactions laws influenced by it. Terminological variations across jurisdictions are inevitable, given the fact that the legal systems that transplanted it did not retain all of its original features. Under the Hungarian secured transactions law and the DCFR, for instance, due to the substantial peculiarities of the private enforcement mechanism they enshrined, it is difficult to refer to “self-help repossession.” It is rather an out-of-court (non-judicial or extra-judicial) enforcement of a security right. Hence, self-help repossession, as one form of non-judicial enforcement procedure, is used strictly to mean the right of the secured creditor to take possession of the collateral without the involvement of a state agent.

There are two contexts in which the terms out-of-court, extra-judicial, or non-judicial enforcement are used interchangeably. The first is when different types of private enforcement mechanisms that do not involve state authority are being referred to. These include self-help repossession, strict foreclosure, and private sale of collateral. The second context is when the procedure being addressed does not qualify as self-help repossession in the strict sense.

V. THE ABHORRENCE OF SELF-HELP REPOSSESSION IN CIVIL LAW SYSTEMS—THE STATE OF LOUISIANA: WHERE IT ALL STARTED

The intricate relationship of civil law systems with self-help repossession begins in the U.S., in the state of Louisiana36 where self-help repossession faced challenges based on two major grounds. The first challenge came from the 14th Amendment due process clause.37

36. For detailed insight into Louisiana’s legal tradition, see A.N. Yiannopoulos, *The Civil Codes of Louisiana*, 1 CIV. L. COMMENT. 1, 1 (2008), at https://perma.cc/2UU2-JRLA.

37. The Fourteenth Amendment’s Due Process Clause states: “nor shall any state deprive any person of life, liberty, or property, without due process of law….” U.S. CONST. amend. XIV, § 1.
While the second one stemmed from public policy based on “Louisiana’s traditional civil law hostility to self-help” that self-help repossession is considered to violate.38

Even before the implementation of the UCC, it was projected that Article 9 self-help repossession might face constitutional challenges in Louisiana where self-help repossession in the creditor-debtor relationship has been regarded as incompatible with the legal system in place, on the grounds of an alleged violation of due process.39 This challenge was ultimately rejected by the Supreme Court of Louisiana, which held that self-help repossession was constitutional.40 The challenge contended that the 14th Amendment of the U.S. Constitution prohibits deprivation of property by the state without due process of law.41 The court held that because the 14th Amendment requires only state action to comply with due process


   In Louisiana, the incorporation may never occur. In the short run the utility of such an enactment is dubious since it would likely prove to be the catalyst for rounds of litigation. Assuming that the Federal Constitution is interpreted so as to uphold 9-503 and 9-504, difficulties would remain under article I, section 2 of the Louisiana Constitution. Unshackled by the state action limitation and as ‘a flexible provision which gives the courts significant leeway in developing standards of reasonableness,’ article I, section 2 may be viewed as an articulation of the civilian ideas of protection of private property. If a Louisiana creditor, acting under the authority of the U.C.C. in a manner historically associated with the government, engages in self-help, such conduct should be deemed to be violative of the tenets of civilian due process.

41. Section 1 of the Fourteenth Amendment to the United States Constitution provides that:

   All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1 (emphasis added).
and self-help repossession was a private action, it did not violate the due process clause.\footnote{See Price v. U-Haul Co. of Louisiana, 745 So. 2d 593 (La. 1999). In the Price case, it is stated by way of background discussion that: An essential requirement in any due process challenge is that the claimant must show that some property or liberty interest has been adversely affected by state action. Delta Bank & Trust Co. v. Lassiter, 383 So.2d 330 (La.1980); Lee Hargrave, The Louisiana State Constitution: A Reference Guide 23 (1991) (state due process guarantee protects against governmental, as opposed to private, action). Here, it is disputed plaintiff was deprived of rights that are protected by the due process guarantees of the federal and state constitutions against state action. The disputed issue, decisive of the constitutional challenge, is whether defendants’ invoking the Act's provisions to conduct a private seizure and sale of plaintiff’s property constituted state action. Defendants contend that their action involved purely private seizure and private sale of property, authorized by statute and by contract between the parties, and therefore was not state action that would implicate constitutional due process principles. Id. at 594 (emphasis in original).} The Supreme Court of Louisiana also rejected the argument that by enacting a statute allowing the exercise of deprivation of property by private entities (which amounted to a delegation of state powers and constituted a veritable privatization of enforcement), self-help repossession should also be subject to due process requirements.\footnote{Id.}

Another long-standing challenge to self-help repossession, which defined self-help repossession as it appears today in Louisiana, emanated from the incompatibility of self-help repossession with the Louisianan policy of keeping public peace.\footnote{Ory, supra note 38, at 1225.} On multiple occasions, courts in Louisiana refused to affirm self-help repossession on the grounds that it is against public peace or order.\footnote{In Liner v. Louisiana Land & Exploration Co., for instance, Justice Tate indicated that “[t]his [possessionary protection in cases of eviction by force or fraud] is done in the interest of preservation of peace in society and as a deterrent against self-help.” 319 So. 2d 766, 781 (La. 1975) (Tate, J., concurring in denial of rehearing). See also Guidry v. Rubin, 425 So. 2d 366, 371 (La. Ct. App. 1982) and Grandeson v. International Harvester Credit Corp., 66 So. 2d 317 (La. 1953).}

Pursuant to the above, Louisiana generally banned self-help repossession except when the debtor has abandoned the collateral, sur-
rendered it, or has given his or her consent either before or after default.\footnote{46} Hence, in Louisiana, the general rule is that the creditor has no right to repossess the collateral without court involvement.\footnote{47} As an exception, in Louisiana, self-help repossession is allowed with respect to automobiles. Under the revised Additional Defaults Remedies Act, a secured creditor can repossess a vehicle collateral (1) by sending notice to the debtor after default,\footnote{48} (2) by clearly stating in the notice that “Louisiana law permits repossession of motor vehicles upon default without further notice or judicial process,” and (3) without breaching peace.\footnote{49}

Besides limiting self-help repossession to vehicle collaterals, Louisiana also took further steps. Mainly, unlike under Article 9 that leaves the determination of breach of peace to the courts in all circumstances, the revised Additional Defaults Remedies Act illustratively lists the conditions under which breach of peace occurs. Accordingly, for instance, there is breach of peace in case of unauthorized entry into the debtor’s premise (locked or unlocked) to conduct the repossession or where the repossession takes place despite the debtor’s verbal objection.\footnote{50}

\footnote{46} Louisiana Revised Statutes Title 10, Section 9-609(a) provides that: After default, a secured party may take possession of the collateral only: (1) after the debtor’s abandonment, or the debtor’s surrender to the secured party, of the collateral; (2) with the debtor’s consent given after or in contemplation of default; (3) pursuant to judicial process; or (4) in those cases expressly provided by law other than this Chapter. LA. STAT. ANN. § 10:9-609(a) (2001).

\footnote{47} Id.

\footnote{48} See LA. STAT. ANN. § 6:966 (2015). Section 6:966(A)(2) states that: Prior to the use of the procedures set forth in this Chapter, a secured party shall send notice to all debtors in writing at the last known address of the debtors, of the right of the secured party to take possession of the collateral without further notice upon default as defined in R.S. 6:965(C). Such notice shall include the debtor’s name, last known address, and description of the collateral and the following in at least twelve-point type . . . .


\footnote{50} LA. STAT. ANN. § 6:966(A)(2),(B) (2015). Section 6:965(C) provides as follows: As used in this Chapter, the following terms have the following meanings:
It should be noted that under Article 9, court decisions on whether a breach of peace occurred in cases of verbal objection by the debtor during the repossession have been inconsistent. Some courts have ruled that verbal objection does not amount to breach of peace. By listing the grounds for breach of peace, Louisiana has attempted to either avoid or reduce the possibility of the occurrence of breach of peace due to ambiguity of the law, in line with its high concern for maintaining public peace. While the list may prove to be a valuable aid to courts and a possible solution to the uncertainties caused by differences of interpretation, serving notice prior to the actual repossession of the collateral may undermine the very essence of the self-help remedy. These two possibilities should be considered seriously by weighing the competing interests involved: subject self-help repossession to less burdensome conditions or impose stricter rules in order to protect the prevailing public policy. Louisiana has chosen the latter path. Despite this, self-help repossession and enforcement of security rights seem to function efficiently in Louisiana.

(1) “Breach of peace” shall include but not be limited to the following:
(a) Unauthorized entry by a repossessor into a closed dwelling, whether locked or unlocked.
(b) Oral protest by a debtor to the repossessor against repossession prior to the repossessor seizing control of the collateral shall constitute a breach of the peace by the repossessor.


51. See, e.g., Chrysler Credit Corp. v. Koontz, 661 N.E.2d 1171, 1173–74 (Ill. Ct. App. 1996). In this case, the debtor protested to repossession by rushing out of his house in his underwear and yelled “Don’t take it!” The Appellate Court of Illinois found as follows:

We note that to rule otherwise would be to invite the ridiculous situation whereby a debtor could avoid a deficiency judgment by merely stepping out of his house and yelling once at a nonresponsive repossessor. Such a narrow definition of the conduct necessary to breach the peace would, we think, render the self-help repossession statute useless. Therefore, we reject Koontz’s invitation to define ‘an unequivocal oral protest,’ without more, as a breach of the peace.

See also Williams v. Ford Motor Credit Co., 674 F.2d 717, 720 (8th Cir. 1982).
VI. EUROPEAN PERSPECTIVE: EVIDENCE OF STEPS FORWARD

In civilian legal systems, outside of the US, the perception of self-help repossession has been negative. Regarding this, Warren and Walt wrote “the Europeans tend to see it as another example of American Barbarism: ‘You mean that the creditor can just go out and steal the property back?’”\textsuperscript{52} The criminalization of self-help repossession in Germany reflects this perception,\textsuperscript{53} and so does the failure to regulate it in other civil law countries. One possible reason self-help repossession has been unknown in the civilian systems is that the efficiency of judicial enforcement or the availability of an alternative judicial remedy, i.e., judicial repossession renders self-help repossession unnecessary. However, as shown later, evidence does not support this argument. Similarly to the civil law state of Louisiana, another reason advanced for rejecting self-help repossession is its incompatibility with due process of law and public peace and order. Even so, the judicial confirmation of self-help repossession as well as the existence of other covert self-help remedies in civilian law\textsuperscript{54} refute the argument of incompatibility of self-help repossession and civilian systems.\textsuperscript{55}

A. Perception and Reality

Despite the longstanding perception that self-help repossession is incompatible with civil law tradition, there are also counter-examples manifesting that developing civil law countries, either knowingly or unknowingly, have embodied a type of self-help repossession.

\textsuperscript{52} W\textsc{arren} & W\textsc{alt}, supra note 24, at 269.
\textsuperscript{53} T\textsc{ibor Taji}, Systemic and Topical Mapping of the Relationship of the Draft Common Frame of Reference and Arbitration 134 (2013).
\textsuperscript{54} For details on covert self-help remedies still present in civil law countries, see S\textsc{tănescu}, supra note 23, at 51-95.
\textsuperscript{55} For details on constitutional challenges to self-help repossession in Central and Eastern Europe, see Alexandra Horváthová et al., Is Self-Help Repossession Possible in Central Europe? The Case of Hungary, Romania and Slovakia, 4 J. EURASIAN L. 83 (2011).
sion into their legal systems. For instance, in some civil law countries, the lessor can take possession of the leased good by giving notice to the lessee upon the lessee’s default. No additional safeguard is in place to protect the interests of the lessee who might have paid a significant amount of the value of the property.  

Compared to self-help repossession under Article 9 (subject to ex post facto judicial control), the form of self-help repossession, hardly noticed in the civil law countries, can have far-reaching consequences on the debtor. One must then reach the conclusion that there is a discrepancy between the perception and the reality of self-help repossession in civil law countries. The permissibility of self-help repossession in financial leasing is not paid attention to merely due to the dogmatic thinking and approach in civil law countries that financial leasing is not a secured transaction. However, under certain conditions, financial leasing for all purposes create a security

56. For instance, Ethiopia’s (civil law country) Capital Goods Leasing Business Proclamation states the following:
   1) Where the lessee defaults in the payment of the rent, or commits another fault which may breach the agreement, the lessor shall grant him a period of 30 days for remedying the default so far as the default may be remedied.
   2) Where the lessee does not remedy the default within the period specified in sub-Article (1) of this Article, the lessor may rescind the agreement, repossess the leased capital goods and claim related damages.
   Capital Goods Leasing Business Proclamation No. 103/1998, Part Two, Article (6), Negarit Gazeta 710. Hence, the lessor has a statutory right to repossess the collateral if thirty days’ notice was served upon the debtor. The possibility that the debtor might have paid ninety percent of the value of the leased good is irrelevant. This makes the device harsh for debtors under the financial leasing law. The International Institute for the Unification of Private Law (UNIDROIT) also administers an international financial leasing law that allows the lessor to take possession of the collateral up on the lessee’s default. See UNIDROIT Convention on International Financial Leasing art. 13, opened for signature May 28, 1988, 2321 U.N.T.S. 415. This convention is effective in civil law countries such as Hungary, Italy, and France. For the status of the convention, see Status—UNIDROIT Convention on International Financial Leasing (Ottawa, 1988), https://perma.cc/2DK2-BZQE (last updated June 28, 2017).

57. Under the U.C.C., a leasing is a secured transaction if it meets the following noncumulative criteria:
   (a) it is not subject to termination by the lessee and (b) at least one of four listed situations is present. These are (i) that the original term of the lease equals or exceeds the remaining economic life of the asset, (ii) that
right in favor of the lessor on the lease, as a result of which it is recharacterized as secured transactions in countries that adopted the functional approach to security interest. Consequently, the permissibility of self-help repossession in financial leasing implies that self-help repossession has been part of civil law tradition in a field, which is essentially similar to secured transactions.

**B. The United Kingdom: Is the “Breach of Peace Standard” Used to Vanquish Self-Help Repossession?**

The presence of the United Kingdom in an analysis dedicated to the “without breach of peace” standard in continental systems might be surprising and somehow unfit, given the fact that all of the countries in this analysis belong to the civil law tradition. However, although England and Wales are obviously common-law jurisdictions, they have been in constant contact with civilian systems due to the United Kingdom’s EU membership and adhesion to the *acquis communautaire*. Since it is also the only European jurisdiction (besides Romania), where the “without breach of peace standard” is

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the lessee is bound to renew for the remaining economic life or to become the owner of the asset, (iii) that the lessee may renew for the remaining economic life for no or nominal additional payment, and (iv) that the lessee may become the owner at the end of the lease term for no or nominal additional payment.


At the same time, in a recent case in Romania involving a five-year-long financial leasing contract, the court of first instance of Bucharest’s First District held that the provisions of Law 99/1999 governing Romanian secured transactions, are inapplicable with respect to leasing. The ruling is in complete contradiction to the provisions of Article 2 of the Law, which clearly state that financial leasing contracts concluded for a period longer than a year are governed by Law 99/1999. Moreover, despite obvious errors made by the court of first instance in the understanding and interpretation of the law, the Bucharest Tribunal dismissed the appeal and upheld the decision. See Decisions no. 24877/17.12.2015 and 4064/22.11.2016 rendered in case no. 66094/299/2014, unpublished, at https://perma.cc/PQA6-GFPV and https://perma.cc/E58K-PUYW.

58. See Kronke, supra note 57, at 29.

59. Although we refer to the United Kingdom as one jurisdiction, the ensuing analysis focuses mostly on the law of England and Wales.
(still) upheld, the authors deemed the inclusion of English law to be beneficial for the purposes of this article.

It must be stated at the outset that the position of British commentators, such as Roy Goode, does not differ much from that of their U.S. peers, even though the UK does not have a secured transaction law that resembles the unitary model advocated by Article 9. However, Goode underlines that a creditor who exercises his or her right to repossession “must take the greatest care not to commit any of the numerous offences that lie in store for him,” and “where the exercise to self-help involves the use of violence against the person or property of another, it ceases to operate.”

This is pretty much where the certainty regarding self-help repossession and the “without breach of peace” standard ends. Bridge states that “the law has been somewhat equivocal about whether individuals may exercise self-help as a remedy instead of pursuing their grievances in court,” especially with respect to personal property where “the law on self-help falls significantly short of standards of clarity and consistency.” Like all other jurisdictions, Britain also lacks a definition of the standard, which leaves the task to the courts that will decide on a case-by-case basis. The explanation for this trait of common law systems might reside in their court system. Unlike civil law courts, which are bound to interpret and apply the existing law, common law courts are also creators of law. Thus, common law courts enjoy more freedom and flexibility in applying the rules on a case-by-case basis, while their civilian counterparts require clear(er) guidelines.

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Self-help repossession is known in the UK under the term “re-caption,”62 a right which is “constrained by the limitation that reasonable means be employed.”63 In Michael Bridge’s reading, these reasonable means require the creditor to serve a notice to the wrongful possessor of the collateral of his or her intention to recover it.

Additional attention should be given to the notice requirement in the UK, for its presence here might be surprising. In the UK, the Consumer Credit Act (CCA) 1974 introduced a series of rules designed to protect consumers who became indebted under regulated agreements, but since most of them proved inefficient, the CCA 2006 had to come up with extra provisions designed to make sure that all consumers in arrears receive default notices, in order to understand their position.64 In 2014, as the Financial Conduct Authority (FCA) took over consumer credit regulation, the CCA was doubled by secondary legislation, the Consumer Credit Sourcebook (CONC), meant to strengthen the protection of consumer debtors from unfair debt collection practices.65

These provisions served to delay the creditor from enforcing his or her rights until certain formalities are complied with.66 Creditors must provide debtors with notices before they can terminate an agreement, recover possession of any good, or enforce any security.67 In those cases where there has been a breach of contract by the debtor, under the 2006 amendments, it must be provided with 14

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63. BRIDGE, supra note 61, at 121.
64. MACLEOD, supra note 62, at 813. See also COMMERCIAL AND CONSUMER LAW 527 (Michael Furmston & Jason Chuah eds. 2010) and HUGH BEALE ET AL., THE LAW OF SECURITY AND TITLE-BASED FINANCING 918 (2d ed. 2012).
65. See FINANCIAL CONDUCT AUTHORITY, CONSUMER CREDIT SOURCEBOOK, ch. 7 (2017).
66. GEOFF HARDING, CONSUMER CREDIT AND CONSUMER HIRE LAW: A PRACTICAL GUIDE 111 (1995). See also COMMERCIAL AND CONSUMER LAW, supra note 64, at 527.
67. HARDING, supra note 66, at 112. See also FINANCIAL CONDUCT AUTHORITY, supra note 65, at arts 7.17 et seq.
days (under CCA 1974, there were only 7) to cure the breach.\textsuperscript{68} Three extra arrears notices are provided for the benefit of debtors who have made at least two installment payments,\textsuperscript{69} to be served at the expense of the creditor. Default notices are not required when the creditor is simply looking for recovery of arrears of instalments, but only when it claims damages for breach, enforcement of the agreement or repossession.\textsuperscript{70} Similarly, no notice is required in the case of non-commercial, unsecured agreements.\textsuperscript{71}

The purpose of the default notices is to assist the debtor in resolving his or her difficulties. In the case of supply of goods, a default notice also suspends the right of the creditor to immediately take possession of the goods.\textsuperscript{72} In other words, the possession of the debtor over the collateral is still legitimate since the right of the creditor to repossess is on hold. Obviously, these notices established by the CCA 2006 may have the perverse effect of prolonging non-payment, but failure to provide them in the prescribed form deprives the creditor of his or her right to enforce and ask for interest on the amounts due or the default sum.\textsuperscript{73} Although the consequences seem harsh, they are a reaction to the failure of the CCA 1974 to provide efficient redress to aggrieved debtors for not receiving notice, thus forcing them to seek action in common law for conversion or wrongful taking of possession.\textsuperscript{74}

\textsuperscript{68} Iain Ramsay, Consumer Law and Policy: Text and Materials on Regulating Consumer Markets 474 (3d ed., Hart Publ’g 2012). The fourteen-day term is maintained by the Consumer Credit sourcebook. See Financial Conduct Authority, supra note 65, at art. 7.17.4.

\textsuperscript{69} The protection afforded to debtors who have made payments is similar in purpose to the sixty-percent rule available under the U.C.C. Given that United Kingdom consumers must prove payment of only two installments, however, the protection available to them is much broader than that available to United States consumers.

\textsuperscript{70} A.G. Guest et al., Encyclopedia of Consumer Credit Law 2086 § 1 (Thomson Reuters 2009).

\textsuperscript{71} Id. See, e.g., Consumer Credit Act 1974, c. 39, §§ 86C(7), 86E(8) (UK).

\textsuperscript{72} MacLeod, supra note 62, at 815.

\textsuperscript{73} Id. at 814. Commercial and Consumer Law, supra note 64, at 527.

\textsuperscript{74} Ramsay, supra note 68, at 474.
Upon receiving the notice, the debtor has two options, to either comply or not. If he or she complies in full before the established date for that purpose, then the breach is cured and treated as if it never occurred. In the case that the debtor does not comply within the given term, the suspension of the creditor’s rights ends and he or she may now resort to the termination of the agreement, repossession of the goods, and levy of a default charge. In fact, although being a common-law jurisdiction (generally favorable to self-help remedies), the UK has the most detailed regulation of default notices compared to the rest of the jurisdictions analyzed. Therefore, the CCA appears as a very paternalistic and over-protective regime for consumer debtors in the after default and pre-repossession period.

When analyzing the requirement of prior notice, Michael Bridge concludes that in the absence of clear statutory standards and given the uncertainty of the repossession’s aftermath, “the continuing obscurity of the right may therefore be seen as providing evidence of a desire not to encourage reception,” while the requirement of prior notice renders quick and effective recovery of collateral almost impossible. Thus, the UK seems to have picked the worst of both worlds, for it overemphasizes the importance of prior-notice, which characterizes civilian jurisdictions, and suffers from the lack of clear standards, giving rise to the same criticism heard in the U.S.

C. Self-Help Repossession in Civilian Jurisdictions Today

Recent development in secured transactions law reform shows further steps in civil law countries where self-help repossession started being introduced. However, the “without breach of peace standard,” which is the center of this article, is either removed or

75. Partial compliance is insufficient. See Price v. Romilly [1960] 1 WLR 1360 (QB) (Eng.).
76. BRIDGE, supra note 61, at 122.
modified. The question that follows is whether the fact that self-help repossession, as designed under Article 9, is stripped of its major features when incorporated into a civil law system turned it into a different legal device.

The question is worth addressing before moving into the analysis of the two selected civilian jurisdictions. Self-help repossession as a non-judicial enforcement mechanism developed in United States case law and was statutorily recognized under UCC Article 9. Its essential components under Article 9 are: (a) default, (b) taking of the property by the secured creditor without the assistance of a state official and without notice to the debtor and (c) observance of the “without breach of peace standard.”

The authors argue that in general, the defining element of self-help repossession is the absence of a state official in the enforcement (police, bailiff of the judiciary) and the secured creditor’s right to take possession of the collateral.77 Therefore, the fact that in Romania, the secured creditor serves notice to the debtor before repossession as opposed to the approach in the US, does not mean that the device is less of a self-help mechanism. Rather, the notice requirement entails a consequence on the efficiency of the device.

Hungary presents a unique experience as discussed later where not only should the creditor provide notice, but also must request the debtor to release possession of the collateral. The creditor must quit the procedure if the debtor refuses to surrender the collateral voluntarily. With this background, the coming sections analyze in detail how self-help repossession is enshrined in the laws of Hungary and Romania.

77. See Douglas Ivor Brandon et al., Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society, 37 VAND. L. REV. 845, 850 (1984). See also STĂNESCU, supra note 23, at 8. “Self-help is therefore a legally recognized extrajudicial alternative to traditional judicial remedies.” (emphasis in original) Id.
1. Hungary: Self-Help Repossession or Merely an Out of Court Enforcement Procedure?

The Hungarian Civil Code of 2013 (HUCC) generally bans self-help remedies though allowing exceptions which must be expressly provided for by law: “Unless otherwise provided for by law, the rights afforded in this Act may be enforced by way of judicial process.” The prohibition of private justice in Hungary is affirmed by the criminal code, which criminalizes, among others, the use of force to enforce lawful or allegedly lawful pecuniary demands, except when the use or threat of use of force constitutes an authorized means of enforcement of claim. It is within this context that whether self-help repossession is permitted under Hungarian law and under what conditions should be examined.

In Hungary, self-help repossession occurred in practice sometime before the enactment of the HUCC despite the absence of regulation. The HUCC, which represents a major step forward in the evolution of the Hungarian secured transactions law, introduced an out-of-court enforcement procedure. Whether the new out-of-court procedure amounts to self-help repossession and whether it is as efficient are debatable issues.

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79. 2012. évi C. törvény a Büntető Törvénykönyvről (Act C of 2012 on the Criminal Code). Section 368 of the Hungarian Criminal Code, which is captioned “Private Justice,” provides as follows:

   (1) A person who, by force or by threat of force, with the purpose of enforcing his lawful or allegedly lawful pecuniary demand, compels another person to do, not to do, or to endure something, is guilty of a felony punishable by imprisonment between one to five years. (2) The penalty shall be imprisonment between two to eight years if private justice is committed: a) by displaying a deadly weapon; b) by carrying a deadly weapon; c) in a gang; d) against a person incapable of self-defense. (3) Where the use of force or threat of force constitutes an authorized means of enforcement of a claim, it shall not be construed as private justice.

Btk., ch. XXXV, § 368.
80. Horváthová et al., supra note 55, at 3.
81. Id. at 3.
The relevant Hungarian version of out-of-court enforcement of security right has four essential defining features. These are: (a) default of the debtor (b) the creditor’s right to request release of possession of the collateral for the purpose of disposition (c) notice (ten days for movable collateral and twenty days for immovable collateral) and (d) the debtor’s duty to surrender the collateral and refrain from conduct that prevents the secured creditor from selling the collateral. These four essential features of the HUCC private enforcement of security interest raise several concerns regarding the possibility to conduct private enforcement successfully.

First, the procedure does not seem to be self-help repossession at all because it does not entitle the secured creditor to take possession of the collateral. It merely entitles the secured creditor to request the release of the possession of the collateral by the debtor, which was possible even in the absence of a specific provision to that effect. One may wonder what happens if the debtor refuses to comply with the request. Since Hungarian law prohibits the use of force or the threat to use force in view of enforcement, it seems reasonable to conclude that if the debtor refuses to surrender the collateral, the creditor has no other option than judicial enforcement. This

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82. PTK., bk. V, ch. XXVII, § 5:132(1)-(3):
[Right of possession of the pledged property]
(1) Following the effective date of the right to satisfaction, the lien holder shall have the right to take possession of the pledged property for the purpose of sale, and, to this end, to call the lienor to release the pledged property into his possession by the time limit specified.
(2) For compliance with the request of possession a time limit justified by the circumstances shall be given, of at least ten days in the case of movable properties and at least twenty days for real estate properties. A residential property shall be surrendered fully vacated within a time limit of at least three months.
(3) Following the effective date of the right to satisfaction, upon the lien holder’s request the lienor shall release the pledged property in his possession to the lien holder within the prescribed time limit for the purpose of sale, to permit the lien holder to take possession of the pledged property, and shall refrain from any conduct aimed at preventing the lien holder from carrying out the sale.
does not fit the definition of self-help repossession where the creditor is at least allowed to take the collateral without the consent of the debtor as long as it is done in a peaceful manner.

The second point is that the secured creditor has the right to request the release of the collateral for disposition. Considering that the enforcement right presupposes disposition, the fact that the relevant HUCC provision explicitly refers to “disposition” as the reason for which the creditor can request the release of the collateral implies that if the creditor is not able to dispose of the collateral immediately, there is no right to take the possession of the collateral. The problem with this approach is that it is practically infeasible to make the request for taking the possession of the collateral conditional to the immediate sale of the collateral. The practical inconvenience of this provision stems from the fact that the market demand for the collateral might not be readily available and the creditor may not be certain as to whether he or she can dispose of the collateral. Hence, either the creditor has to market the collateral while it is in the debtor’s possession and request the release of possession after locating a buyer or not exercise his or her right at all.

The third and overarching point regarding the HUCC private enforcement provision is whether the provision can be used to carry out extra-judicial enforcement and whether it is efficient. The HUCC imposes the duty on the creditor, to serve notice to the debtor before the repossession takes place. The notice is supposed to inform the debtor of the potential enforcement through repossession and give the debtor the chance to rectify the default, an approach similar to UK law. If the debtor does not rectify the default under the HUCC, the creditor can request the surrender of possession, which the debtor can either reject or comply with. Hence, whether the extra-judicial repossession is possible depends on the voluntary

83. See Tibor Tajti (Thaythy), Security Rights & European Insolvency Regulation, Report for Central and Eastern Europe: Focus on Hungary, Lithuania and Poland 48 (2016), https://perma.cc/P2ZT-S7FH.
84. Id.
surrender by the debtor of the collateral. Nevertheless, the assumption that a defaulting debtor would voluntarily surrender the collateral seems naïve. Even if the debtor is willing to do so, the creditor can repossess the collateral only if he or she is in the position, thus putting another hurdle on the possibility of repossessing the collateral.

Based on the preceding analysis it can be concluded that the HUCC extra-judicial enforcement is not self-help repossession. It is rather an out-of-court enforcement process that gives the creditor and the debtor the chance to avoid court proceedings, but denies the creditor any chance of conducting non-consensual repossession. Therefore, the “without breach of peace standard” that is supposed to tackle abusive practices is irrelevant to the HUCC provision governing out-of-court enforcement due to the way the procedure is defined. The authors argue that the HUCC makes self-help device impotent and compels the secured creditor to resort to judicial enforcement. Consequently, it is legitimate to conclude that the provision governing private enforcement of security interests in Hungary does not serve its intended purpose.

2. Romania: A Toned-Down Type of Self-Help Repossession?

When Romania decided to reform its secured transaction law in 1999, the proposed text was almost an identical translation of UCC Article 9. Upon the debtor’s default, the secured party was entitled to “take possession of the collateral or its proceeds by peaceful means,” with “no notice . . . to the debtor before taking possession.” However, the secured creditor had an obligation “not [to] breach the peace, use physical force or intimidation, or resort to any

86. Id. at art. 36, para. 1.
other method designed to coerce the debtor at the time the secured party takes possession.”87 Thus, one could notice several limits imposed on the creditor: a) limits related to public order, b) limits related to violence (whether physical or verbal), c) limits related to intimidation, and d) limits related to any other means of coercion. Together combined they represented a big difference from the American model, where the sole limit imposed by the law is the “without breach of peace.” It is inferred that by doing so, the Romanian legislator attempted “to classify, even if not clarify,”88 the experience of the vast US case law, although, in the authors’ opinion, this contention has little support.

Following the approach of Article 9, the proposed law did not define “breach of peace,” although one may argue that the insertion of limits, like in Louisiana, had the purpose to ease somehow the task of practitioners. The drafters’ commentary, although emphasizing the importance of repossession in reducing time and costs of defaulted credit recovery, also left untackled the issue of “breach of peace.” It merely mentions that the legal provisions “aim at preserving a clear distinction between the peaceful means agreed to between creditor and debtor and the use of force requiring intervention of the state to ensure lawful application of force,”89 an explanation hardly sufficient to clarify the practical issues posed by the novel remedy of self-help repossession in a civilian country. Moreover, if in the US, the lack of definition may be substituted by the ability of American courts to create law, whereas Romanian courts can only interpret it.90

87. Id. at art. 36, paras. 1-2.
89. For commentary on art. 36 of the proposed law, see Nuria de la Peña & Heywood Fleisig, Romania: Draft Law on Security Interests in Personal Property and Commentaries (Ctr. for the Economic Analysis of Law, 1999), https://perma.cc/NH2C-NFHB.
90. STĂNESCU, supra note 23, at 114 nn. 79-80.
Additional problems stemmed out of the translation of the proposed law. The legislators translated “breach of peace” as “tulburarea ordinii publice” which means “disturbance of public order.”\(^9\)

As the literature emphasized:

[T]he peaceful character of repossession is closely related to non-disturbance of public order. In other words, the right of the creditor to repossess the collateral is strongly bound by the right of each citizen to live in a climate of social peace. The public interest prevails over the private one, for Romanian law protects mere possession, even in the absence of a title. Thus, the maintenance of the status quo regarding possession was more important when it came to preserving the public order.\(^9\)

The conclusion is that in Romania, the analysis of repossession cases was not to be regarded as “a conflict between two private interests (the creditor’s v. the debtor’s) but between a private interest versus a public one which means that the law was not defending a debtor’s right, but only social peace.”\(^9\)

However, leaving the concept of “breach of peace” undefined by the legislator was not the only problem. The peculiar translation adopted by the Romanian law also posed a great deal of practical issues since aiding standards or directions existed not as much in its civil law, but in its criminal law.\(^4\) One thing is certain, due to the translation and the division of limits adopted by Law 99/1999, when Romanians and Americans discuss “breach of peace” they do not mean the same thing.\(^5\)

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\(^9\) For the implementation of the proposed article 36, see art. 63(2) of Law 99/1999.

\(^4\) RIZOIU, supra note 88, at 593.

\(^5\) Id.


\(^5\) “[N]u putem sa confundam breach of peace cu încălcarea linistii publice.” RIZOIU, supra note 88, at 597.
Because criminal law deals with mandatory rules of behavior, any crime or misdemeanor occurring during self-help repossession would remove its peaceful character. In Romanian criminal law, the “disturbance of public order” has a double meaning: either producing a public scandal, or damaging moral standards. As a rule, public scandal means a serious breach of public peace. In the area of self-help repossession this would imply: a public scandal caused by the repossession of the collateral despite protests of third parties (such as neighbors or relatives of the debtors, or simply members of the community), acts which could not be circumscribed to violence or intimidation against the debtor himself, and which would never be sanctioned under the American definition of breach of peace. However, this result will affect the peaceful character of repossession only at the time of repossession and not afterwards. Thus, for example, in the case where the creditor peacefully reposessed a collateral consisting of a vehicle and afterwards, while driving the vehicle, committed a misdemeanor related to driving on public roads, the respective misdemeanor will not affect the peaceful character of the repossession.96

Unfortunately, not even by referring to criminal law standards does the issue of defining “disturbance of public order” become easier. Rizoiu showed that the concept differs from one normative act to the other97 and generally has a very wide coverage. Thus, he attempted to adapt these concepts to the needs of secured transactions law, by stating that “disturbance of public order” is nothing more than an intentional tortious act and that any act that causes a disturbance of the public order must have a close tie to the collateral.98 Either way, the tortious act must be sanctioned not only by compensating the loss of the debtor, but also by sanctioning the creditor in order to deter similar acts from being committed in the future or by

96. Rizoiu, supra note 94, at 8.
97. For a thorough analysis of the concept throughout Romanian law, see RIZOIU, supra note 88, at 597-601.
98. Id. at 602-04.
other persons. This would explain the choice of the Romanian legislator to include, for the first time in history, severe civil penalties payable to the debtor.99

A question which could be raised is the one concerning *abuse of rights*. Although the law gave the right to the secured party (and its agents) to take possession of the collateral upon the debtor’s default, it is obvious that the said right may not be exercised outside its boundaries. The legal interdiction to “disturb the public order” was to set precisely the internal boundaries for self-help repossession. Thus, a secured creditor who resorts to self-help repossession must take all necessary precautions to avoid the “disturbance of public order.”100 According to the Romanian criminal law definition, the “disturbance of public order” is different from the “without breach of peace standard” as defined by American courts. Therefore, the Romanian court’s task of finding a balance between the right of the secured creditor to take back the collateral (as fast and as cheap as possible), the rights of the society to public order, and the rights of non-parties to the security agreements to not be affected by any repossession attempts is seriously impaired.

By referring to “disturbance of public order” as a criminal law concept, it appears that under Romanian law the rights of the secured creditor stretched only until they conflicted with rights of third parties. This is a very different result than the approach of the U.S. courts where it was held in numerous cases that only directly affecting the debtor may be considered in order to impair self-help repossession.101 In the absence of relevant Romanian court cases, it is difficult to say whether the aforementioned theoretical conclusion is confirmed by practice, however, such absence cannot constitute proof to the contrary either.

100. RIZOIU, supra note 88, at 594.
In 2011, Romania changed its Civil Code and, together with it, its secured transactions law. Law 99/1999 was repealed and most of its provisions were included in the New Civil Code (NCC). The provisions of articles 2429 to 2441 of NCC now govern self-help repossession. Concerning breach of peace, the NCC specifically mentions that the creditor is banned from disturbing public order and peace, and from resorting to any direct or indirect means of coercion, even if his or her acts would not qualify as criminal offenses.\(^\text{102}\) It was inferred that despite changes in the wording, the effects of the new law are entirely similar to the previous one.\(^\text{103}\)

However, a major change did occur. Unlike the Law 99/1999, the NCC imposed a requirement for the creditor to serve a prior notice, through a bailiff, of his or her intention to repossess to the debtor.\(^\text{104}\) Although being in trend with most of the European reformed systems\(^\text{105}\) or the suggestions of the DCFR,\(^\text{106}\) the notice requirement undermines one of the main advantages of self-help repossession by removing the element of surprise.

Thus, Romanian law moved away from American law, which does not require any notice to the debtor regarding self-help repossession\(^\text{107}\) and took a serious step back towards the over-protectionism of the debtor witnessed in the UK. According to American literature, the debtor was not to be informed of the creditor’s actions and intentions regarding the collateral, after the debtor’s default. The simple logic behind it was to enable the creditor to repossess the collateral fast and with avoidance of any physical deterioration or loss of market value. At the same time, the debtor was precluded from hiding or displacing the collateral, once informed of the upcoming repossession.

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102. Art. 2440 (2), C. Civ.
103. RIZOIU, supra note 88, at 623.
104. Art. 2440 (1), C. Civ.
106. See infra section VIII. B.
By introducing the requirement of prior notice, the Romanian legislator now gives the debtor the upper hand, for he or she is empowered to paralyze any repossession attempts through private means. In other words, it appears that the Romanian legislator did its best to limit to a maximum extent (even if not by specifically saying so) the usage of a self-help remedy. Given the code’s silence with respect to the nature and content of the notice, the creditor may be able to serve it on the very same day of the repossession,\textsuperscript{108} but it is undeniable that a resort to self-help repossession is currently seriously impaired in Romania. Despite this, Romania remains one of the few civilian systems that introduced and maintained the requirement of “without breach of peace” standard in relation to self-help repossession.

### VII. SELF-HELP REPOSSESSION UNDER INTERNATIONAL LEGAL INSTRUMENTS

International legal instruments governing secured financing represent the attempt to accommodate common law and civil law traditions for the sake of promoting efficiency, predictability, and security in cross-border transactions, leading to the convergence of the two legal traditions. The negotiation of an international legal instrument governing cross-border commerce typically leads to an acceptable compromise between both legal traditions. The negotiation of an international legal instrument governing cross-border commerce typically leads to an acceptable compromise between both legal traditions. The Cape Town Convention (CTC) and the Draft Common Frame of Reference (DCFR) will be reviewed in this section. While the CTC is an international worldwide legal instrument, the DCFR is a European one, intended to pave the way to a European Civil Code.

\textsuperscript{108} STĂNESCU, \textit{supra} note 23, at 127.
A. Replacing the “Breach of Peace Standard” by Contractual Clause for Sui Generis Industry: The Cape Town Convention

The central objective of the CTC is to facilitate financing of high value mobile equipment by providing the legal framework for creation, registration, and enforcement of international interests recognized by signatory parties.\(^{109}\) As of 2017, the CTC has 73 contracting parties from both civil law and common law countries.\(^{110}\) In the light of the multi-jurisdictional legal and political efforts put into designing the convention,\(^{111}\) and the diversity of the membership to the convention, it is fair to say that it represents a major rapprochement of the civil and common law legal traditions.

The enforcement regime of the CTC is characterized by wide room for party autonomy.\(^{112}\) Unless the member state in question has opted out, the secured creditor (chargee) can take possession of


\[\text{THE STATES PARTIES TO THIS CONVENTION, Aware of the need to acquire and use mobile equipment of high value or particular economic significance and to facilitate the financing of the acquisition and use of such equipment in an efficient manner, Recognising the advantages of asset-based financing and leasing for this purpose and desiring to facilitate these types of transaction by establishing clear rules to govern them, Mindful of the need to ensure that interests in such equipment are recognised and protected universally, Desiring to provide broad and mutual economic benefits for all interested parties, Believing that such rules must reflect the principles underlying asset-based financing and leasing and promote the autonomy of the parties necessary in these transactions, Conscious of the need to establish a legal framework for international interests in such equipment and for that purpose to create an international registration system for their protection, Taking into consideration the objectives and principles enunciated in existing Conventions relating to such equipment, Have agreed upon the following provisions . . . .}\]

\[\text{(110) Id., Chart of signatures, ratifications and accessions, UNIDROIT, available at https://perma.cc/DRY3-4ZT4.}\]

\[\text{(111) Legal Advisory Panel to the Aviation Working Group, Self-Instructional Materials: For Use by the Cape Town Convention Academic Project (2014), https://perma.cc/XF4C-GM0E. In particular, see Introduction.}\]

the collateral upon the debtor’s default. The remedy for the seller with retention of title or the lessor is slightly different unless those are recharacterized as security interests in the relevant domestic secured transactions law. As this article does not dwell upon the analysis of the slight differences in the remedies available to the chargee, and conditional seller (or lessor), it focuses solely on the self-help remedy, where it is available, and the conditions under which it is exercised.

Self-help repossession is possible under the convention and the Aircraft Protocol subject to the consent of the debtor. No specific formality is required to secure the consent of the debtor. The debtor’s consent can be secured before or after default. However, the “without breach of peace” standard has not been imported by the CTC regime. Neither does it subject self-help repossession to prior notice. This is rather a unique approach to self-help repossession compared to Article 9 or the approach prevailing in civil law countries. It is different from Article 9 due to the lack of “without breach of peace” standard. It is different from the typical civil law approach, for instance, Louisiana and Romania because it does not require notice to be served to the debtor. The requirement of consent of the

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113. Id. at 7. Article 8(1)(a) of the Cape Town Convention states the following:
   
   (1) In the event of default as provided in Article 11, the chargee may, to the extent that the chargor has at any time so agreed and subject to any declaration that may be made by a Contracting State under Article 54, exercise any one or more of the following remedies: (a) take possession or control of any object charged to it . . . .


114. Article 10 deals with remedies available to conditional sellers and lessors. For further discussion, see ROY GOODE, CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND PROTOCOL THERETO ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT: OFFICIAL COMMENTARY 58-59 (3d ed., Int’l Inst. for the Unification of Private Law (UNIDROIT) 2013).


116. GOODE, supra note 114, at 59.

117. Id.
debtor potentially undermines the efficiency, especially when the consent has not been secured before default.

Given that the convention along with the protocols target an industry of professionals with comparable bargaining position (e.g., airlines companies), the CTC’s version of self-help repossession is easy to apply and probably sound from a policy perspective. While promoting its foundational policy (i.e., efficient enforcement of security rights), it also strikes the balance between the rights of the creditor, on the one hand, and the debtor’s, on other hand, by subjecting repossession to prior consent of the debtor. The midway solution between Article 9 and the civil law approach adopted by the CTC and its protocol appears to be reasonable in its own context. To a large extent, this convention governs *sui generis* industries such as airlines and big technology companies. In these fields, it can safely be assumed that the parties have comparable bargaining powers and the likelihood of imposition of a standard contract clause subjecting one party to an abusive term is low. Hence, once the parties have agreed to self-help repossession in the security agreement or subsequently, the convention assumes that *ex post facto* judicial control is not necessary.

This solution is not fit for domestic secured transactions law because the dynamics involved are different. Domestic secured transactions law must address the risk of potential abuse on consumer-debtor. This is not to suggest that a business to business relationship is immune from the risk of abuse, but the concern is higher in business to consumer transactions. Moreover, in the industries targeted by the convention, for instance airlines, one can reasonably expect the parties to deal with enforcement issues in light of protecting their reputation. Hence, the possibility of self-help repossession to occur in practice is likely to be low. Domestic secured transactions enforcement, comparatively speaking, presumes frequent repossession in situations where, due to the diversity of the creditors and the debtors, an aggressive enforcement mechanism is inevitable, and the concomitant risks are higher. But the convention is another good
example of the reluctance in adopting the “breach of peace standard.”

The authors are aware that with the coming into force of the protocol governing security interests in high value agricultural, mining, and construction equipment, the same policy is likely to be maintained. With respect to smallholder agricultural financing, it is possible to make the argument that the farmers deserve better protection in cases of enforcement. Either way, the UNIDROIT self-help re-possession mechanisms appear to be reasonable in its limited context.

B. The Draft Common Frame of Reference

Drafted and prepared by the elite of the European legal scholars and professionals, the DCFR was meant to be a model for a future European Civil Code, a project no longer on the political agenda. However, the importance and the magnitude of this document should not be underrated, for it provides a glimpse into the possible future of self-help repossession in Europe. The issue of default and enforcement of secured transactions in movable assets is addressed in Chapter 7 of Book IX, where the drafters stated from the outset that “in many European countries there is an increasing movement seeking an alternative to traditional methods of enforcing security rights because of its delays, costs and often disappointing results,” a statement which remained bold and revolutionary, but may not be supported by the legal provisions that followed.

The DCFR places the entire burden on the creditor, overlooking not only his or her secured status, but also the fact that once default


119. On the failure of the DCFR to change the general European approach to self-help remedies, see STĂNESCU, supra note 23, at 42-47.
has occurred, he or she is also strategically the weaker party in relation to a defaulting debtor. First, the DCFR requires the creditor to serve a minimum 10 days prior notice to consumers whenever it intends to repossess the collateral,\(^{120}\) which basically strips repossession of both the element of surprise and the leverage factor, since the debtor is granted enough time to preclude the creditor from reaching the collateral. Interestingly, the commentary addresses the issue of debtor’s remedies against secured creditors who fail to send notice, but does not consider any remedy for the secured creditor who, because of proper notice, finds him or herself in the position of not being able to recover the collateral. The DCFR obviously fails to provide a balance between the interest of the creditors’ expectation of fast and cheap recovery and those of the debtors’ expectation for adequate consumer protection against abuse, a balance which lies at the core of UCC Article 9 when it comes to self-help repossession.

In fact, the DCFR bans self-help repossession in its entirety even though it does not state it openly.\(^{121}\) This unfortunate result is indirectly achieved by the provision which requires the secured creditor to obtain the consent of the debtor, \textit{at the time} of repossession. Failure to obtain such a voluntary relinquishment of the collateral forces the secured creditor to stop any attempts and switch to the judicial remedies available. Thus, as if the notification requirement was not enough, under the provisions of the DCFR, the creditor does not benefit from the possibility given to U.S. creditors to avoid the lack

\(^{120}\) \textit{STUDY GROUP 2010, supra} note 118, at 4701, bk. IX, ch. 7, § 1, art. IX.–7:107 (“Enforcement notice to consumer”).

\(^{121}\) The commentary to article IX.–7:201 states as follows:

The dilemma for the secured creditor arises if, as happens frequently, the security provider who is in possession of the encumbered assets and who may need them urgently for the continuation of its production or sales or other commercial activity, refuses or attempts to delay the transfer of possession. This Article is designed to solve this dilemma. \textit{Without saying so expressly, self-help by the secured creditor is clearly excluded} (emphasis added).

\textit{STUDY GROUP 2010, supra} note 118, at 4707, bk. IX, ch. 7, § 2, subsec. 1, art. IX.–7:201 (“Creditor’s right to possession of corporeal asset”) cmt. C.
of debtor’s consent by repossessing the collateral from public places or by avoiding the debtor’s presence. In other words, if the debtor does not expressly consent to repossession, the creditor must always resort to judicial enforcement. This is an obvious contradiction of the aforementioned premise according to which, the DCFR recognized the need to provide secured creditors with speedy and efficient private enforcement alternatives.

The DCFR does not mention anywhere the requirement that the secured creditor must act in full compliance with the “without breaching the peace standard.” However, a comment mentions the fact that “the rules of the Article\textsuperscript{122} proceed on the basis that the secured creditor may proceed against the holder of the encumbered assets only in a peaceful way. Therefore, the latter’s present or a past consent is necessary.”\textsuperscript{123} The drafters understanding that repossession by peaceful means equals consent is extremely limitative, especially by comparison with the U.S. model, or even Romanian law, whose approach to what breach of peace means is broader than the one in the U.S. Like in the case of the UK or Hungary, the only answer to the DCFR’s position was the desire of the drafters to limit to the largest extent possible the usage of self-help repossession and force the creditor to shift immediately to courts, where all enforcement procedures could be supervised by the judge.

VIII. JUDICIAL REPOSSESSION

The central idea behind addressing judicial repossession here is to determine whether there are efficient alternatives to self-help repossession to justify its mutations in the continental systems. Therefore, the following subsections investigate whether it is possible to judicially repossess the collateral in a swift and less costly manner and if so, what are the implications on the way self-help repossession is regulated?

\textsuperscript{122} STUDY GROUP 2010, supra note 118, at 4706, art. IX.–7:201.

\textsuperscript{123} Id. at 5632.
A. Judicial Repossession in the U.S. in General

In the U.S., when the secured party cannot, or does not, want to pursue self-help repossession, as an alternative, he or she can resort to repossession by judicial action. Generally, Article 9 gives the secured creditor the right to take possession immediately upon default. Since the law protects the secured status of the creditor, he or she is entitled to take possession of the collateral without involvement of state or court agents, provided there is no breach of peace. This would generally save the secured creditor time, effort, and money. However, when the debtor resists self-help repossession or when the creditor does not want to pursue it, the latter must resort to judicial measures and obtain a court order for the possession. The sheriff then enforces the order. Most states authorize the sheriff to use force to take possession, a right the secured creditor making use of his or her self-help remedy does not have. The most common way of obtaining an order is by filing an action for replevin.

The mechanism might be familiar to civilian systems as well. The secured creditor files a civil action against the debtor and, immediately upon filing, he or she then moves for an order granting immediate temporary possession pending the outcome of the case. Typically, this does not take more than 10 to 20 days. In some U.S. states, the procedure is ex parte which means the debtor may not even be informed and the case is solved in a matter of hours. In

125. The creditor might be reluctant in resorting to self-help repossession and may thereby wish to avoid the risks of being held liable for potential violations of the “without breach of peace” standard.
127. “By far the most common users of replevin today are secured creditors entitled to possession of collateral pursuant to UCC Section 9-609.” Id. at 41.
128. See Del’s Big Saver Foods, Inc. v. Carpenter Cook, Inc., 603 F. Supp. 1071 (W.D. Wis. 1985), in which the secured creditor successfully filed an action for replevin without notice to the debtor and obtained a writ of replevin on the same day. Later that day, the secured creditor presented the writ to the debtor and demanded possession of the collateral under threat that it would return with the sheriff for enforcement. The debtor complied and surrendered possession of the
order to obtain the writ of replevin, all the creditor needs to establish at the hearing is the likeliness that the action will prevail on the merits.\textsuperscript{129} Usually, the writ is conditioned by the posting of a bond in order to protect the debtor in case the creditor’s case will be rejected. In theory, the debtor can regain possession of the collateral by posting a similar bond in favor of the creditor, but where the default is due to the debtor’s inability to pay the likeliness that the debtor will be able to post such bond is low.

The distinguishing feature of this procedure is its swiftness. Once the writ is issued and the collateral is in the creditor’s possession, the debtor has no reason to defend the action of replevin and judgment is entered by default.\textsuperscript{130} As a result, a secured creditor obtains possession of collateral (provided it is a tangible good) through judicial procedure within two or three weeks, after which the creditor can foreclose the collateral by selling it in a commercially reasonable manner as per Article 9. What follows is that over-careful secured creditors can choose to resort directly to judicial repossession, for the procedure is not much lengthier than the self-help remedy and, provided the debtor’s default is real, it poses fewer risks.\textsuperscript{131}

It might explain, for instance, why self-help repossession maintains a limited attraction in Louisiana (being mostly used for repossession of vehicles): judicial repossessions are just as fast.

The main difference between judicial repossession and self-help repossession is the involvement of the judiciary, i.e., the court and collateral. The federal case brought by the debtor alleging violation of the constitutional right to due process was dismissed. Nevertheless, states where no notice is required are the exception, not the rule, which means that generally the procedure will not be as fast as the one described here.

\textsuperscript{129} LOPUCKI & WARREN, supra note 126, at 41.

\textsuperscript{130} Id.

\textsuperscript{131} Courts generally hold that the duty to refrain from breach of the peace during repossession is nondelegable, which means that secured creditors who resort to professional repossession cannot escape liability in case the latter engage in abusive practices. In other words, secured creditors cannot insulate themselves from the consequences of unlawful repossession by simply externalizing the service to a third party. \textit{Id.} at 43.
the sheriff, which makes the procedure relatively longer and, potentially, more expensive. Judicial repossession is safer for the creditor because he or she avoids the likelihood of being sanctioned for violating the “without breach of peace” standard. Nonetheless, compared to ordinary judicial enforcement procedure, judicial repossession is cheaper and quicker and hence more efficient. Therefore, it is an attractive remedy for the secured creditor.

B. Judicial Repossession in Louisiana

In Louisiana, the secured creditor can judicially repossess the collateral. In other states in the U.S., judicial repossession is exercised mostly through an action for replevin. In Louisiana, it is exercised through executory process under the Code of Civil Procedure: “Executory process begins with the filing of a special kind of lawsuit where there is no citation and no service of process on the debtor.”\footnote{Michael H. Rubin & Jamie D. Seymour, \textit{Deficiency Judgements: A Louisiana Overview}, 69 LA. L. REV. 783, 794 (2009). Article 2631 of the Louisiana Code of Civil Procedure states that executory proceedings are “those which are used to affect the seizure and sale of property, without previous citation and judgment, to enforce a mortgage or privilege thereon evidenced by an authentic act importing a confession of judgment, and in other cases allowed by law.” LA. CODE CIV. PROC. ANN. art. 2631.} Similarly to replevin, after the hearing of petition for executory process, the court can order the seizure and sale by the sheriff of the collateral.\footnote{Article 2638 of the Louisiana Code of Civil Procedure provides that “[i]f the plaintiff is entitled thereto, the court shall order the issuance of a writ of seizure and sale commanding the sheriff to seize and sell the property affected by the mortgage or privilege, as prayed for and according to law.” LA. CODE CIV. PROC. ANN. art. 2638.}

Executory process is faster compared to the ordinary process because under the former, the collateral after being repossessed by the sheriff can be sold without judicial appraisal provided that waiver of judicial appraisal has been agreed upon in the security agreement\footnote{Article 2723 of the Louisiana Code of Civil Procedure states that: Prior to the sale, the property seized must be appraised in accordance with law, unless appraisal has been waived in the act evidencing the mortgage, the security agreement, or the document creating the privilege and plaintiff has prayed that the property be sold without appraisal, and}
and the secured creditor loses its right to deficiency judgement. In order to prove his or her right to the executory process, the creditor must submit the petition along with statutorily required documents, including, an authentic evidence of the security agreement, and a judgement confession. Because the virtue of executory process lies in the fact that it is fast and less expensive, the Civil Procedure Code of Louisiana gives the debtor limited defenses, giving the secured creditor the benefit of enforcing its claim without delay, “[t]hree days, exclusive of holidays, after having served the notice of seizure, the sheriff may proceed to have the property appraised and advertisements of the sale published.”

The current form of enforcement of security rights in Louisiana is the result of deliberate and cautious process of weighing various

the order directing the issuance of the writ of seizure and sale has directed that the property be sold as prayed for. There is no requirement that seized property subject to a security interest under Chapter 9 of the Louisiana Commercial Laws (R.S. 10:9–101, et seq.), be appraised prior to the judicial sale thereof.

L.A. CODE CIV. PROC. ANN. art. 2723.

135. Rubin & Seymour, supra note 132, at 796-97.
136. See L.A. CODE CIV. PROC. ANN. art. 2635(A), which states the following: In order for a plaintiff to prove his right to use executory process to enforce the mortgage, security agreement, or privilege, it is necessary only for the plaintiff to submit with his petition authentic evidence of: (1) The note, bond, or other instrument evidencing the obligation secured by the mortgage, security agreement, or privilege. (2) The authentic act of mortgage or privilege on immovable property importing a confession of judgment. (3) The act of mortgage or privilege on movable property importing a confession of judgment whether by authentic act or by private signature duly acknowledged.
137. John Pierre & M.R. Franks, The Consequence of Default to the Debtor Under Part 5, Chapter 9 of the Louisiana Commercial Laws: A Primer on Debtor’s Rights, 18 S.U. L. REV. 21 (1991). See also L.A. CODE CIV. PROC. ANN. art. 2632: “An act evidencing a mortgage or privilege imports a confession of judgment when the obligor therein acknowledges the obligation secured thereby, whether then existing or to arise thereafter, and confesses judgment thereon if the obligation is not paid at maturity.”
138. Louisiana Code of Civil Procedure article 2642 limits the defenses available to the debtor to (1) an injunction against the seizure and sale and (2) a suspensive appeal of the order of seizure and sale. L.A. CODE CIV. PROC. ANN. art. 2642. Louisiana Code of Civil Procedure article 2751 further limits the grounds for granting an injunction to claims that (1) the debt is extinguished, (2) the debt is unenforceable, or (3) the incorrect procedure was followed. L.A. CODE CIV. PROC. ANN. art. 2751.
interests. To ensure efficient enforcement of security rights and despite the availability of judicial repossession under the executory process, Louisiana permitted self-help repossession while delimiting its contours substantially to accommodate it within its civil law tradition. Furthermore, despite the narrow scope of self-help repossession, Louisiana still subjects self-help repossession to the “breach of peace standard” partially defined by statute and subject to further ex post facto judicial control. This shows that self-help repossession and judicial repossession cannot replace one another, but rather complement each other. The presence of efficient judicial repossession cannot imply that the regulation of self-help repossession should be disregarded or that some of its essential elements should be taken lightly.

Is this procedure utilized in continental jurisdictions? If so, does that have an implication on the way self-help repossession is regulated? While the presence of an efficient judicial enforcement procedure, alternative to self-help repossession, can make the latter less indispensable, it is not clear to what extent it affects the conditions under which self-help repossession can be exercised.

C. United Kingdom: Return Orders, Transfer Orders, and Writs of Delivery

Generally in English law, in case of default, the secured creditor is entitled to seizure of collateral by resorting to self-help remedies (reclamation).\textsuperscript{140} Self-help remedies are favored, where available, for they are fast, they avoid legal costs, and can bypass procedural and substantive law obstacles to a judicial remedy. Matters are somewhat complicated in English law due to the distinction between legal and equitable security interests. Yet once the right to take possession due to the debtor’s default was expressly reserved in the security

\textsuperscript{140} ROY GOODE, GOODE ON COMMERCIAL LAW 121 (5th ed., Ewan McKendrick ed. 2016).
instrument, it can be exercised regardless of the nature of the security interest. A secured creditor can seize goods without an order of the court, provided there is no breach of peace and there are no statutory restrictions. For instance, there can be no repossession of a good covered by a regulated agreement within the CCA meaning, without a fourteen-day notice to the debtor, and court orders are required in case the creditor must enter the premises of a debtor to repossess goods from the consumer-debtor.

Judicial repossession can occur by order of the court, either directly for possession or for the appointment of a receiver, who will have the power to take possession. Furthermore, the CCA provides that, in an action brought by the creditor to recover possession of goods to which the agreement relates, the court may either make an order (a return order) for the return to the creditor of goods to which the agreement relates, or make an order (a transfer order) for the transfer to the debtor of the creditor’s title to certain goods to which the agreement relates (the transferred goods), and return to the creditor of the remained of the goods (a return order).

Return or transfer orders have limited power, for they do not allow recovery agents to enter the premises of the debtor to recover possession of collateral, and do not entitle the holder to seek the assistance of police officers in the process. This is problematic because the law states that if the debtor fails to comply with the return or transfer order, the goods to which the order relates but were not returned, the creditor must submit another application to the court. As a result of this subsequent judicial action, the court may revoke the part of the order that referred to the non-returned goods and order

141. Id. at 707-08.
142. BEALE ET AL., supra note 64, at 623.
the debtor to pay the creditor the unpaid portion of so much of the total price as is referable to those goods.\textsuperscript{146}

The possible effect is staggering, for the (quasi-)secured creditor faces the risk to return to the initial situation, where the default of the debtor deprived him of both the payments and the collateral. This possibility undermines the very idea of secured status. Later on, the CCA states that refusal to deliver the goods at the request of the creditor may be deemed to be adverse to the creditor and entitles the secured creditor to bring a claim for damages in conversion. However, this does not solve the main issue of non-payment, delays, or even impossibility to recover the collateral, for it does not empower the creditor or his/her agents to enter the premises of the debtor to take possession.\textsuperscript{147}

Hence, when the goods whereabouts are known and the debtor did not comply with the return order, the creditor is entitled to apply for a writ of delivery. The procedure requires the creditor to pay an additional fee, but once obtained, the writ of delivery allows the creditor’s agent to access (on sight of goods) any lock-up, land, or garage (provided it is not attached to a dwelling house) and may use reasonable force in order to seize the goods.\textsuperscript{148} At the same time, a writ of delivery also entitles the holder to ask for the assistance of police officers in the process. They will ensure there is no breach of the peace whilst the goods are recovered. The writ takes about 10 days to obtain and is valid for a year after, which emphasizes the risk that within the 10 days period the debtor can move the goods to another location and hinder repossession efforts.\textsuperscript{149}

Unlike the U.S. where judicial repossession is almost as fast as the self-help remedy, in the UK, judicial action poses an entire series

\textsuperscript{146} Id. at § 133(7).
\textsuperscript{147} On the issue of delays and hardships faced by creditors as well as on the alternatives available to them, see Insights: Return of Goods Orders - Understanding Your Enforcement Options, OPTIMA LEGAL, June 2015, https://perma.cc/VZQ8-979V (last visited June 16, 2017).
\textsuperscript{148} Id.
\textsuperscript{149} Id.
of risks to the secured creditor, requires significant amount of time, additional costs and does not appear to be a viable alternative to self-help remedies (where they exist).

D. Hungary: Judicial Enforcement Only

In Hungary, the secured creditor has the option to enforce its security right through judicial or non-judicial means. However, the HUCC does not contain any special rules regarding judicial repossession. Judicial enforcement in general is governed by various statutes the most important ones being the Civil Procedure Code and the Act LIII 1994 (Judicial Enforcement Act). The closer examination of the application of judicial enforcement rules in Hungary does not suggest that secured creditors have efficient enforcement mechanism alternatives to self-help repossession that can render the latter inessential. When non-judicial enforcement under the HUCC fails, the secured creditor switches to ordinary judicial enforcement process, which is lengthy and costly.

According to a report prepared by a practitioner in the year 2017, judicial enforcement of a security right takes between several months to a year from petitioning for trial to final distribution of proceeds of sale depending on the complexity of the case and various defenses pleaded by the debtor. In a nutshell, in Hungary,

150. Section 5:126(3) of the Hungarian Civil Code of 2013 states that “The lien holder shall have the option to exercise his right to satisfaction either by way of judicial enforcement or by means other than by judicial enforcement.” PTK., bk. V, tit. VII, ch. XXVII, § 5:126(3).
153. See EULER HERMES, Collection Profile: Hungary 5 (2016), available at https://perma.cc/Z53N-RP6T. This report states: Commencing ordinary legal action in Hungary is not advisable and amicable settlement opportunities should always be considered as a major alternative to court proceedings. Indeed, the Hungarian judiciary system is overall excessively formal and costly, whilst the courts have difficulties coping with the caseload because they are often ill-equipped and there is a lack of trained staff.
154. Id.
there is no judicial repossession procedure comparable to replevin or executory process. Consequently, secured creditors in Hungary do not reap the privilege offered by security interest, i.e., cheaper and speedier enforcement of their claim against the collateral. Due to the vigorous conditions under which private enforcement must be exercised that effectively forces the secured creditor to resort to ordinary judicial process, the advantageous position of the secured creditor is undermined by the system, which potentially leads to an increase in the cost of credit.

E. Judicial Repossession in Romania

The Romanian secured transactions law also establishes the right of the creditor to take possession of collateral by private means or with the aid of a bailiff. Like the U.S. creditor, the Romanian one enjoys the right to choose any of the options and he or she is not obliged to resort to self-help before employing judicial repossession. The judicial repossession is simple, for there is no court involvement. In fact, the secured creditor can address the bailiff directly. The only requirement is to attach to the enforcement request a copy of the security agreement, a description of the collateral, and where the case may be, a certified copy of the filing with the electronic archive. At the request of the bailiff, police officers must provide assistance in recovery of the collateral. Within 48 hours of the creditor’s request, the bailiff must go to the location of the collateral, take possession, and hand it over immediately to the

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158. Art. 2442(2)-(3), C. Civ.
159. This article presumes that the location of the collateral is known to the enforcement officer, for the obligation to identify it is his or hers and not the creditor’s. In cases where the location is not yet known, the 48-hour term is calculated from the moment when the enforcement officer has knowledge of the collateral’s location.
creditor. An enforcement minute must be drawn up immediately in
two original copies, one for the bailiff’s file and one to be commu-
nicated to the debtor. All expenses generated by the repossession
effort, as well as transportation, deposit risks, and costs are ad-
vanced by the creditor. In cases where the use of force is required
for taking possession of the collateral, the bailiff is obliged to return
on the same day with police officers in order to perform the repos-
session. No court order or any other administrative act is required
thereof. However, like self-help repossession, judicial repos-
session may trigger the liability of the secured creditor in case of a
breach of provisions concerning repossession.

The aforementioned provisions seem to indicate that the bailiff
is not entitled to resort to the use of public force immediately, but
must try first to obtain possession peacefully and without police as-
sistance. Only where the use of force is necessary, he or she is re-
quired to return during the same day with police officers to take pos-
session of collateral. Based on the above, it is safe to conclude that
like in the U.S., judicial repossession constitutes a viable alternative
to self-help repossession, although we lack hard evidence to sub-
stantiate this theoretical assessment. On paper, it is a fast, ex parte
procedure, which does not require any court involvement. The only
potential issues are the expenses which must be advanced by the
creditor and the lack of knowledge concerning the collateral’s loca-
tion, which may result in prolongation of the procedure. Finally,
whereas U.S. creditors who wish to avoid any potential liability aris-
ing from the repossession choose judicial repossession, in Romania,

160. Communication is done in accordance to the provisions of the NCCP. See COLECTIV, NOUL COD CIVIL. COMENTARIII, DOCTRINĂ ŞI JURISPRUDENȚĂ § 3, 855 (2012).
161. The creditor will recover the expenses generated by judicial repossession from the debtor by using the general provisions of the NCCP.
162. According to article 2474 of the NCC, failure to return on the same day may result in liability for the secured creditor for any damages caused. See COLECTIV, supra note 160, at 856.
163. Art. 2443, C. Civ.
164. Arts. 2474, C. Civ. et seq.
creditors who resort to judicial repossession do not insulate the secured creditor from the dire consequences of wrongful repossession.

IX. CONCLUSION

This article shows that self-help repossession in civilian systems is tainted by internal self-contradictions, with serious implications on the success of out-of-court enforcement of security rights. This has negative consequences on the possibility of an aggrieved secured creditor to benefit from a swift and least costly recovery of his or her claim, thus affecting the very rationale behind security interests and secured transactions law reform.

One of the essential elements of self-help repossession under Article 9 is the “breach of peace standard,” which is intended to protect debtors from abuses that can occur during self-help repossession. Despite its utility, the standard is difficult to determine in many circumstances, which appears to be the reason continental countries are reluctant to embrace it in their secured transactions laws. Instead of improving the standard, national laws, including in the UK, and international instruments are prone to amend the self-help remedy, by creating their own “mutated” forms, or remove it altogether.

This article argues that serving prior notice contradicts the very essence of self-help repossession, thus putting the entire out-of-court enforcement system under a question mark. Removing or impeding out-of-court enforcement by curtailing its features that are distinctively necessary for efficient and speedy recovery of the secured creditor’s claims increases the cost of enforcement, which ultimately increases the cost of credit and undermines the underlying reasons of secured transactions law reforms.

Implementing self-help repossession requires weighing various competing interests. The guiding principles in this regard should be striking the balance between efficient enforcement of security rights and protecting vulnerable debtors from concomitant risks. Article 9 offers efficient enforcement of security rights both through its self-
help repossession provision and judicial repossession that is exercised under common law. Louisiana accepted Article 9 with substantial modifications because it had a swift and efficient judicial repossession in place. Romania carved self-help repossession probably because it implemented an effective judicial repossession as well, while the UK and Hungary desperately need a self-help device because their judicial enforcement procedures are long, complex, and costly.

The authors contend that those legal systems that took the initiative to implement a secured transactions regime based on Article 9 should maintain out-of-court enforcement, in general, and self-help repossession, in particular, but also parallel them with tailor-made protective measures for debtors against any sort of abuse that may be inflicted upon consumer-debtors. Thus, instead of fearing the unknown—the “without breach of peace” standard—these states should learn from the experience of the U.S. and reform the standard to increase its practicability and predictability as well as provide the courts with clear standards of assessment.

While the anxiety in bringing the relatively new concept of self-help repossession is understandable, it is not reasonable to implement a legal institution that wishes to introduce the benefits of an efficient enforcement system, which at the same time negates its purpose by placing unnecessary conditions on its practical implementation. We argue that the Hungarian secured transactions law represents a good example of a legal regime that fails to address the dilemma, while the experience of Romania shows a cautious approach to balancing various interests.

Agustín Parise*

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Keywords: academic legal writing, circulation of ideas, law reviews, legal education, legal transplantation

I. INTRODUCTION

The Journal of Civil Law Studies1 (JCLS) may be deemed a bridge between Louisiana and the civil law world, while at the same time it welcomes the circulation of legal ideas and knowledge.2 It is now a decade since the JCLS first appeared, and a diverse collection of contributions has been published throughout its pages. The JCLS is a peer-reviewed journal that also includes student editors who are engaged in the production process. This hybrid feature is especially

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valuable, since it makes the Journal both a forum for legal scholarship and a laboratory for the development of research and writing skills in future generations of civilians and comparatists.

This note is divided into three parts. In the first part, the note introduces readers to the origins and structure of the JCLS. In the second part, the note addresses the forum offered by the Journal and the variety of its contributions. The variety of authors, jurisdictions, and topics addressed are highlighted in this second part. In the third part, the note likewise highlights the role of the JCLS as a research and writing laboratory for law students. Sections of the Journal are mentioned as laboratories where law students can elaborate on the civil law, mainly of Louisiana. This note aims to celebrate the first decade of the JCLS and show how this journal acted as a bridge for civil law knowledge to circulate and develop between Louisiana and the rest of the civil law world.

II. ORIGINS AND STRUCTURE

The JCLS is an open-access and peer-reviewed journal that is published by the Center of Civil Law Studies (CCLS) of the Louisiana State University (LSU) Law Center. Olivier Moréteau has been director of the CCLS since 2005, and upon his arrival to Baton Rouge, he envisioned a journal for the Center, the working title being the Journal of Bijural Studies. The name of the journal-to-be was soon changed to its current form in order to highlight the interrelation with the CCLS and the comprehensive scope of the civil law. In the words of Moréteau, 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 . . . .” The first volume of the JCLS was published in December 2008 and included

4. Id. at 1.
the papers of a civil law workshop in honor of Robert A. Pascal that revisited the distinction between persons and things. Volumes have been published yearly since 2008, some being spread throughout two issues.

The JCLS can be deemed a hybrid journal because it is both edited by peers and encourages the participation of law students. On the one hand, decisions are made by the Editor-in-Chief. In that capacity, Morétau takes the final decision on the content of the different issues, after the peer-review process is completed by the members of the Advisory Board and/or other expert scholars. The Advisory Board is composed of comparatists from across the globe, many of them having undertaken academic visits at the CCLS. At the time of writing, the JCLS also has an Executive Editor from Argentina; two Managing Editors, one from Canada and another from the United States; a Book Review Editor from the United States; and a Special Advising Editor from Romania. It should be noted that Jennifer Lane acted for eight years first as Executive Editor and then as Managing Editor and left her mark in the gestational years of the Journal. The team pursues quality in the contributions that are placed in the pages of the JCLS and reconfirms the comparative law nature of the Journal. On the other hand, LSU law students are likewise involved in the activities of the Journal, participating in the editorial process of contributions that have been accepted for publication by the Editor-in-Chief. Students are appointed Graduate Editors, and the first volume benefited from the work of LL.M. students from across the globe who pursued their degrees at the LSU Law Center. Later, in the volumes that followed, J.D. students from the LSU Law Center were also invited to join as Graduate Editors. This characteristic relates to the legal education efforts of the CCLS, and


6. On hybrid journals, see generally Agustín Parise, Las revistas jurídicas en el ámbito universitario: foros de expresión y laboratorios de escritura, 15 ACADEMIA: REV. SOBRE ENSEÑANZA DEL DERECHO 123 (2010).
some students may act in that capacity for more than one volume. Students who participate in more than one volume are Senior Graduate Editors, while students who serve only once are Junior Graduate Editors. The JCLS is based in Louisiana, though its content emerges from across the globe. The Journal is, therefore, of special interest for law students who want to start to develop research and writing skills, since students are able to engage with the legal narrative beyond the United States, being exposed to the ideas and experiences that tie Louisiana with its civil law sister jurisdictions. The role of Graduate Editors may ignite in students an interest in the civil law both from Louisiana and abroad. Law journals, after all, play a fundamental role in the formation of practitioners and scholars and promote the development of law as a science.7

The JCLS welcomes distinct types of contributions that aim to showcase different aspects of the civil law, again, both from Louisiana and beyond. A volume of the JCLS typically includes contributions by scholars and by students. Articles, notes, and book reviews are the fora where scholars present their contributions. Articles address substantive legal scholarship and fall within different areas of private law; while notes generally study recent developments that might take place in doctrine, jurisprudence, or legislation. Book reviews offer readers critical analyses on legal literature from across the civil law world. Essays are one of the fora where students present their contributions and offer an early opportunity to develop academic writing skills in substantive areas of private law. The JCLS has innovated legal scholarship by means of four sections: (i) Civil Law in the World includes reports from different civil law jurisdictions, where scholars relate relevant events or changes in the law of their home jurisdictions. (ii) Civil Law in Louisiana invites students to critically comment on developments in the decisions of Louisiana courts. Students write their contributions under the supervision of LSU faculty members; and, again, the educational aspect of the

7. Id.
JCLS is reinforced with this practice. Volumes may also include (iii) *Translations*, such as that of the Louisiana Civil Code into French undertaken by the CCLS, as well as (iv) *Rediscovered Treasures of Louisiana Law*, in which reprints of seminal Louisiana works are published with introductions by scholars. Finally, some volumes include the proceedings of workshops and conferences. All these sections secure a space for the discussion and dissemination of the civil law narrative in the English language.

III. ENRICHING HABITAT

As a hybrid journal, the JCLS offers both a forum for legal scholarship and a laboratory to develop academic research and writing skills. Three types of law journals exist in the United States: peer reviewed, student edited, and hybrid. The first two types of journals are the most popular in the United States. First, the peer-reviewed journals, that are valued by students, scholars, and practitioners alike, publish only work that has been reviewed by experts. Scholars administer these journals and select their content. Second, the student-edited journals, that are also valued by all members of the legal discourse and are the most abundant in the United States, publish scholarship without utilizing the peer-review process. Law students administer these journals and select their content. Third, the hybrid journals offer a combination of the first two types. This third type is characterized by the interaction of scholars and students. The JCLS submits scholarly contributions to a double, blind-peer-review process that is led by its Editor-in-Chief. In addition, the Journal encourages law students to bring forward suggestions on both the substance and form of the potential contributions with which they are involved, while it also invites law students to submit essays. Those submissions—many times written in consultation with faculty members—are subject to peer review. Hybrid journals may, therefore,
offer solutions to some of the criticism made to student-edited journals\(^8\) and seem to provide the best of both worlds.

\(A.\) Forum

The JCLS is a forum that aims to showcase civil law scholarship from Louisiana and beyond: an approach that has been defended since the very first volume. The paragraphs that follow are not intended to serve as an exhaustive index of the JCLS; they aim only to place scholarly contributions within clusters.

Articles attest to the broad spectrum of the Journal. The JCLS offers a venue to a number of articles that are the results of the proceedings of academic meetings. Edited by Moréteau and John Randall Trahan, volume 1 (2008) presented the contributions to the first series of the CCLS Civil Law Workshop, which was held in 2006-2007 and addressed the fundamental distinction between persons and things.\(^9\) Volume 3 (2010) included the contributions presented during the second series of the Civil Law Workshop, which was named in honor of the late Saúl 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 together with Ronald J. Scalise, Jr., and discussed the cross influences, contamination, and permeability between those two systems.\(^10\) Volume 4 (2011) presented articles that focused on the legal and normative traditions of the Mediterranean and that

\(\)\(^8\) See the criticism raised by Richard A. Posner against student-edited journals. That author suggests the implementation of hybrid journals, though he does not refer to these fora with that term. See Richard A. Posner, Against the Law Reviews, LEGAL AFFAIRS, Nov.-Dec. 2004, available at https://perma.cc/2ATL-3GDP.


were presented in Malta in 2010 as the fruit of the efforts of the interdisciplinary group *Juris Diversitas*.\(^{11}\) Volume 8 (2015) shared with readers the output of a conference which took place in Nantes in 2013 and considered international approaches to recognized unions.\(^ {12}\) Finally, volume 9 (2016) included articles presented at the time of completing the Louisiana Civil Code Translation Project, which took place at the CCLS in 2014.\(^ {13}\) The JCLS, therefore, clearly serves as a forum for civil law scholarship that derives from academic discussion and debate.

Articles naturally extend beyond conference proceedings, and these contributions can be placed within different topical groups. For example, a number of articles have dealt with foundational aspects of law, such as legal culture,\(^ {14}\) legal language,\(^ {15}\) legal systems,\(^ {16}\) and the transformation\(^ {17}\) and interpretation of the law.\(^ {18}\) Core aspects of private law have likewise been examined in the


JCLS (i.e., the principle of good faith;19 the law of persons,20 property,21 and torts;22 and the role of notaries23). Other articles have focused on the law of Louisiana either exclusively or vis-à-vis the law of other civil law jurisdictions.24 Contributions have addressed two seminal topics when dealing with Louisiana: legal history25 and codification.26 Studies on the mixed character of jurisdictions have likewise been included in the pages of the JCLS.27 The JCLS also welcomes comparative law scholarship, as it is one of the tenets of the mission of the CCLS. For example, United States law has been

24. See, for example, Andrea Borroni & Charles Tabor, Caveat Emptor’s Current Role in Louisiana and Islamic Law: Worlds Apart yet Surprisingly Close, 2 J. CIV. L. STUD. 61 (2009).
compared with the law of France,\textsuperscript{28} South Africa,\textsuperscript{29} and Argentina.\textsuperscript{30} Latin America, an important cradle for civil law developments, was explored in the pages of the JCLS with studies discussing the law of Brazil.\textsuperscript{31} Other foreign perspectives have also been present, i.e., those of China,\textsuperscript{32} Spain,\textsuperscript{33} and Tunisia.\textsuperscript{34}

Notes offer a diversity of legal perspectives. Thus, foundational aspects of law\textsuperscript{35} and legal history\textsuperscript{36} are tackled in the pages of the JCLS, while the accessibility of civil law sources in Louisiana\textsuperscript{37} is explored as well. After all, Louisiana needs bridges with other civil

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law jurisdictions. In prior volumes, notes have examined two fundamental pillars of the civil law: property\textsuperscript{38} and obligations\textsuperscript{39}.

Reports on the developments that take place in a number of civil law jurisdictions have been part of the content of the JCLS since volume 6 (2013). Accordingly, \textit{Civil Law in the World} has devoted attention to notable changes in the law of Argentina,\textsuperscript{40} Brazil,\textsuperscript{41} Chile,\textsuperscript{42} China,\textsuperscript{43} France,\textsuperscript{44} Italy,\textsuperscript{45} the Netherlands,\textsuperscript{46} Poland,\textsuperscript{47} Québec,\textsuperscript{48} Russia,\textsuperscript{49} South Africa,\textsuperscript{50} Spain,\textsuperscript{51} and Switzerland.\textsuperscript{52} These reports may be deemed useful, since they assist in placing Louisiana within the context of other civil law jurisdictions, hence providing a better understanding of the challenges and changes that

\textsuperscript{41} Lucas Abreu Barroso et al., \textit{Brazil: The Difficult Path Toward Democratization of Civil Law}, 9 J. CIV. L. STUD. 471 (2017).
\textsuperscript{44} Olivier Moreteau, \textit{French Tort Law in the Light of European Harmonization}, 6 J. CIV. L. STUD. 759 (2013).
other legal systems might encounter. Moreover, these reports serve as bridges between Louisiana and civil and common law jurisdictions.

The translation efforts of the CCLS increase the exchange of civilian knowledge. The Louisiana Civil Code has been translated into French53 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.54 This effort helps promote and make accessible the civil law of the Southern state to French-speaking civil law jurisdictions. The project was presented in volume 5 (2012),55 and parts of the translation were reproduced in installments in subsequent volumes: Preliminary Title;56 Book II;57 and Book III, titles 3, 4, 5,58 6,59 7, 8,60 15, and 16.61 The segmented reproduction aimed to share the translators’ work with the legal community, thereby disseminating the output of the team in a timely manner. The complete translation is currently available in open access62 and was recently published as a book.63

55. Moréteau, supra note 53.
56. Louisiana Civil Code - Code civil de Louisiane Preliminary Title; Book III, Titles 3, 4 and 5, 5 J. CIV. L. STUD. 105 (2012).
58. Louisiana Civil Code, supra note 56.
60. Louisiana Civil Code - Code civil de Louisiane Book III, Titles 7 and 8, 7 J. CIV. L. STUD. 195 (2014).
Book reviews point readers to civil law literature both from Louisiana and beyond. Louisiana literature merits attention, since it is one of the main bridges for transferring knowledge on the law of the state. Legal historical works have been reviewed, while civil law dictionaries and treatises were likewise noted. Mixed-jurisdiction literature has also been reviewed, thus helping to contextualize better the legal culture of Louisiana. Literature on codification, a characteristic of Louisiana law, was also reviewed in the pages of the JCLS. Finally, it is worth mentioning that methodological and substantive aspects of comparative law find a place in the reviews section of the JCLS, since comparative law literature is another important link between Louisiana and the civil law world.

Louisiana has a rich legal history that is a product of its social history. The unique heritage of Louisiana resulted in the development of unique legal literature within the United States. The JCLS devotes pages to enhance awareness of that uniqueness. Consequently, the section Rediscovered Treasures of Louisiana Law reproduced a history of the laws of Louisiana and of the civil law by Thomas J. Semmes, depicting the understanding of the civil law in

[References]


the Southern state during the second half of the nineteenth century.  
Further, the JCLS has served as a forum to generate awareness of a translation of the Spanish *Siete Partidas* undertaken in Louisiana by Louis Moreau-Lislet and Henry Carleton during the first half of that same century. The translation is of value because it serves as a way to preserve the civil law in the Bayou State.

B. Laboratory

The JCLS, being part of 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.” For this reason, LSU law students are involved in the activities of the JCLS and in their capacity as Graduate Editors undertake both substantive and formal contributions, thereby developing their research and academic writing skills. Again, as in the previous section, the paragraphs that follow are not intended to serve as an exhaustive index of the JCLS.

Law students make substantive contributions by means of essays and submissions to the *Civil Law in Louisiana* section. Essays offer an opportunity for students to take their first steps in academic legal writing. Usually under the supervision of an LSU faculty member, students elaborate on different topics of the civil law. All but one author has written from a Louisiana perspective, typically comparing their home jurisdiction with other civil law jurisdictions or with


other states of the Union. Essays have dealt with the law of tort,73 civil rights,74 the interplay of code and constitution,75 and marriage.76 The sole non-Louisiana-centric essay dealt with European Union law and the labor law applicable to same-sex partnerships.77 That essay aimed to bring awareness to the approach to non-discrimination practices in the European Union. The JCLS, therefore, aims to be a laboratory where future scholars can acquire necessary skills for legal research, analysis, and writing.

Contributions to the Civil Law in Louisiana section critically comment on developments in the decisions of Louisiana courts. These communications deal with a number of core civil law issues. The law of persons is an important pillar of the civil law, and this section accordingly has addressed a number of decisions that have shaped that pillar. Law students have contributed their voices to an array of matters: paternity,78 intrafamily adoption and same-sex

marriage,79 child custody,80 relocation of the minor child,81 interim spousal support,82 and partition of community property.83 Another important pillar is the law of obligations, and naturally it occupies a paramount place within this section. Contract law has been addressed in this section with contributions on consent,84 lesion,85 contract of sale,86 and mineral leases.87 Donations likewise finds a place in Civil Law in Louisiana.88 The law of tort in broad terms89 has

been explored in multiple submissions, often in relation to other areas of law. Yet another important pillar of the civil law is grounded in the law of property, and law students there have focused on trespass to chattels,\textsuperscript{90} the public records doctrine,\textsuperscript{91} confusion in predial servitudes,\textsuperscript{92} and acquisitive prescription and possession of immovables.\textsuperscript{93} This section is instrumental in offering readers information on the most salient decisions that impact the civil law of the State of Louisiana.

Law students make formal contributions by means of participating in the editorial process of submissions that have been accepted for publication by the Editor-in-Chief after the peer-review process is completed. Graduate Editors assist with the technical aspects of contributions, as is the case in student-edited journals: review of the text’s format and footnotes and revision of style and language. Furthermore, Graduate Editors also check the accuracy of citations both in form and substance. Since many contributions refer to foreign primary and secondary sources, Graduate Editors gain skills in the narrative and legal terminology of other civil law jurisdictions, a training few United States law students acquire during their legal studies. Louisiana scholars indeed need to be trained in that “language” if local law aims to preserve a dialogue with the rest of the civil law world.


IV. CLOSING REMARKS

The JCLS has offered for already a decade both a forum for legal scholarship and a laboratory to develop research and academic writing skills. These two characteristics make the journal one of the few hybrid experiences in the United States legal community. This experience tends to quality of output and at the same time formation of necessary skills in future civilians and comparatists. This note first introduced readers to the origins and structure of the JCLS. The note then addressed the forum offered by the Journal and the diversity of its scholarly contributions that result from peer review. Finally, the note highlighted the role of the JCLS as a research and writing laboratory for law students.

The JCLS devotes efforts to act as a bridge for civil law knowledge to circulate between and develop in Louisiana and the rest of the civil law world. Isolation would be detrimental to the development of the civil law in Louisiana by producing intellectual inbreeding and thus threatening the survival of Louisiana’s civil law. Engaging in a dialogue with other civil law jurisdictions will secure the survival of the civil law in the Bayou State. Moreover, scholars both of civil law and of common law systems may look to Louisiana for civil law terminology in English and for experiences in a civil law island that is partially surrounded by a sea of common law.94 It must be acknowledged that Louisiana civil law scholars have important expertise, and the more-than-two-hundred-year-old tradition of English-language civil law codification in Louisiana should be valued.95 As a corollary, building bridges may be a means to secure


a prosperous development of the civil law in Louisiana and beyond. That is the mission of the Journal of Civil Law Studies.

WHAT MEDICAL RISKS SHOULD PHYSICIANS DISCLOSE TO THEIR PATIENTS? TOWARDS A BETTER STANDARD IN AMERICAN AND FRENCH MEDICAL MALPRACTICE LAW

Alina-Emilia Ciortea*

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ABSTRACT

This essay discusses the historical and evolutionary background of the doctrine of informed consent in medical malpractice cases in order to provide the reader with a detailed and a unique comparative perspective of the law in the United States and in France, along with some cross-references to other legal systems across the globe.

In order to achieve the desired goal, this paper conducts the analysis based on a hypothetical situation. Starting from these facts, the paper shows how and if the American and the French standards addressing the scope of the physician’s duty to disclose the risks intrinsic to the procedure draw a proper balance between the two conflicting interests (i.e., the patient and the physician).

Keeping in mind that the principles of medical ethics and human rights should guide the legal development of the doctrine of informed consent, it is proposed, in a non-exhaustive manner, that the addition of two alternative legal standards of disclosure: a “mixed standard” that should embrace into tort law the notion of error, as vice of consent, and the shared-medical decision-making, which involves engaging both the physician and the patient in the process of deciding on the medical treatment or procedure. These innovative solutions protect the patient’s ability to obtain the information necessary for an intelligent decision and, at the same time, provide the physician with a clear understanding of what necessary information should be disclosed in order to avoid liability based on the doctrine of informed consent.

Keywords: medical malpractice, doctrine of informed consent, comparative law, information disclosure, American law, French law, shared medical decision-making, new standards of disclosure
“Had I known about the risks, I would have made another choice, but nobody told me. How could I have guessed?” As frequent as this situation might be, it is undeniable that it can be a painful experience when connected to a medical choice.

Think of the following scenario: while cleaning his home on Saturday, Paul fell down and injured his right wrist. Though he is in pain, he is reluctant to run to the emergency room during the weekend. On Monday morning, he seeks medical assistance at the Municipal Hospital, where his arm is x-rayed. Dr. Medicus, the orthopedist, tells Paul that his wrist is broken. “You have two options,” he says. “We can put this hand on a splint or you can have surgery. If you choose not to have surgery, you must rest this hand in a horizontal position for at least four weeks.” Dr. Medicus explains that if Paul chooses surgery, the hand will cure faster, though it might be more painful. Paul does not worry about pain (there are painkillers) but cares about mobility. He decides to have the surgery. Dr. Medicus performs the surgery, apparently successfully, but Paul does not recover completely, even with physiotherapy, he keeps some stiffness in one finger. He goes back to Dr. Medicus, who admits that this is a rare outcome of the procedure but not a usual risk. “Still, you could have told me of the risk,” says Paul. “Well, this is such an unusual development. If I told my patients of all these unusual risks, they would grow such anxiety that they would not survive the anesthesia. I am afraid you will have to live with this finger stiffness, which should not bother you too much unless you are a pianist . . . .”

Dr. Medicus lost his good humor hearing Paul tell him that his second job was to play the piano in the local orchestra.

Should Dr. Medicus be held liable for failure to disclose the unusual risk? Should he have guessed that his patient might have been a pianist on the sole account of him having fine hands? As
part of the conversation, did the parties have an opportunity to properly discuss what was at stake, including lifestyle?

All western legal systems are facing these questions, whether they are civil law or common law jurisdictions. Some systems may have it as an issue of tort law; others may consider it under contract law. All of the above will be embraced in this paper.

The standard of disclosure will be explored in two leading common law and civil law jurisdictions: The United States (part I) and France (part II) in order to provide a broad understanding of the doctrine of informed consent¹ in a comparative manner.² One may wonder why the United States and France?

Firstly, in the United States, one of the leading jurisdictions of the common law world, several standards of disclosure have been identified. Some states³ give physicians large discretion in choosing the medical procedure, and as a result the patient’s autonomy is severely diminished. In other states, even if the patient has a certain voice, his right of self-determination is not well-protected as it is generally assumed that all patients in similar circumstances assess identically the risks and benefits of a medical procedure. Whether the actual standards of disclosure respond to the needs of the contemporary American society is a dilemma that has its roots in a variety of frameworks, including the ethical and juridical underpinnings of the doctrine of informed consent.

Secondly, in France, a jurisdiction all too famous for its seminal Civil Code, the doctrine of informed consent has evolved gradually and consistently, though not by a Civil Code reform.

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1. A definition of the doctrine of informed consent explains it as “a negligent concept predicated on the duty of the physician to disclose to a patient information that will enable him to ‘evaluate knowledgeable the options available and the risks attendant upon each’ before subjecting the patient to a course of treatment.” See Perna v. Pirozzi, 457 A.2d 431, 438 (1983).

2. The following part will focus mainly on the development of the physician’s duty to inform the patient in these two jurisdictions, but some references to other countries will be made as well in order to enhance the comparative approach.

3. For example, Arizona, Arkansas, Colorado, Florida, Indiana, Maine, Nevada, New York.
Courts had to step in: the *Cour de cassation* ruled, in 1998, that the physician must inform the patient about the serious risks of a medical procedure and the treatment proposed and that this duty exists even if the serious risks occur only in exceptional cases. What did lawmakers mean by “serious risks” in 1998? What is to be understood by that phrase nowadays? What are the differences and similarities between the French standard and the standards applied in the United States?

It is known that the duty to disclose, implicitly its scope, that rests upon the physician has developed gradually in the United States, as well as in France, in order to meet the evolution of society. This paper discusses the historical and evolutionary background in order to provide the reader with a detailed and unique comparative perspective of the doctrine of informed consent by highlighting that the current standards of disclosure might not be sufficiently evolved to meet the needs of contemporary society.

To achieve the desired goal, based on the hypothetical situation above-mentioned, this paper will show that as society has changed over the last few years in the United States, as well as in France, the patient’s autonomy has become a valuable health care resource. Therefore, the choice of treatment must be the result of a compromise between the patient’s autonomy and the physician’s obligation to act with beneficence toward the patient. The outcome consists of a communication in which the patient and the physician are directly and personally engaged. Hence, part III will focus mainly on discussing two alternative and innovative solutions in order to adequately protect the patient’s ability to obtain the information necessary for an intelligent decision and, at the same time, provide the physician with a clear understanding of what necessary infor-

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mation should be disclosed in order to avoid liability based on the doctrine of informed consent.\(^5\)

Though we are aware that the patient may also bring criminal or disciplinary actions against the physician, the paper will focus on civil liability. It will not address the issue of whether the hospital has a (non) duty to obtain the patient’s consent. The focus will be on the duty that the physician has to the patient involved in a medical procedure. This paper will only refer to the informed consent of legally competent patients, in normal circumstances of clinical care and not in emergency situations.

I. THE STANDARD OF DISCLOSURE IN THE UNITED STATES

A. Origins of the Doctrine of Informed Consent

In the United States, two major legal adjustments have been made to meet the needs of an evolving medical system. In the past, a patient who had been the victim of injury by physicians could file a civil battery lawsuit.\(^6\) Battery is defined as “an intentional tort that protects a person’s interest in being free from physical contact

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5. We are not of the opinion that the physician should have indefinite discretion in making a choice for the patient’s treatment (as it was considered under the traditional paternalistic approach. For instance, for a presentation of this approach in the Israeli legal system, see Yehiel S. Kaplan, The right of a Minor in Israel to Participate in the Decision-Making Process Concerning His or Her Medical Treatment, 25 FORDHAM INT’L L.J. 1085, 1086-87 (2002). Therefore, it is mandatory to impose a standard, whether a judicial or a legislative one, in order to consolidate the “partnership” between the physician and the patient. See Leonard J. Nelson III, in 5 MEDICAL MALPRACTICE § 22.04 (David W. Louisell & Harold Williams eds. 2016). The traditional paternalistic approach can be seen in Romanian law as well: see Emese Florian, Discuții în legătură cu răspunderea civilă a personalului medical pentru neîndeplinirea obligației privitoare la consimțământul informat al pacientului, 8 DREPTUL 30, 31 (2008) (Ro.).

6. See Mohr v. Williams, 104 N.W. 12, 14-16 (Minn. 1905). In this case, the patient consented to an operation on her right ear. During the surgery, the physician considered that the left ear should be the one operated because it was in a more serious condition and proceeded with the operation on the left ear only. The patient sued the surgeon for the tort of assault and battery based on the theory of lack of consent. The court awarded damages to the patient because she gave no consent to the surgery on the left ear, thus the operation was unlawful.
Historically, this course of action was taken due to the fact that the physician failed to obtain the patient’s consent to an invasive course of treatment, because it was contended that “[t]he physician’s need to obtain the consent of the patient to surgery derived from the patient’s right to reject a nonconsensual touching.” Therefore, battery was the proper and the efficient cause of action for the protection of the patient’s interest in being free from unconsented touching. The real focus in these early cases was on the right to bodily integrity, rather than on self-determination.

To conclude, the common law world faced with practical situations in which the physician failed to inform the patient about the risks of a certain medical procedure, had to find an equitable solution for the innocent victim. Wisely using the juridical tools that were available at a certain point in the past, and with the awareness that the law evolves empirically in the United States, the courts decided that, for the time, battery was the appropriate cause of action.

Judge Cardozo’s opinion in Schloendorff v. Society of New York Hospitals adopted a slightly different view and stated that: “[e]very human being of adult years and sound mind has the right to determine what shall be done with his own body.” Thus, the accent was not placed so much on the unwanted touching (meaning

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7. Frank L. Maraist et al., Tort Law: The American and Louisiana Perspectives 25 (2d ed. 2015). The United States maintains the old boundary between intentional torts and negligence. See also id. at 15. Battery, assault, false imprisonment, intentional infliction of emotional distress, trespass to land, trespass to chattel etc. are, in a common law jurisdiction, included in the category of intentional torts, viewed as a tort theory of recovery for the innocent plaintiff against the intentional tortfeasor.
9. Id. at 460.
10. Id.
12. Mattheis, 733 A.2d at 460.
the lack of consent), which is the very essence of the battery, but rather on the violation of the bodily integrity. Courts noticed that equity requires imposing liability upon physicians, and because the doctrine of informed consent was not yet adopted, the cause of action of battery was a practical alternative. Moreover, generally, physicians did not have the requisite intention to harm patients; rather they failed to provide the necessary information “in the relatively good faith for the benefit of the patient.” Being so, a shift from battery to negligence standard was definitely needed.

Later, under the theory of negligence, the doctrine of informed consent may hold the physician liable “regardless of whether the injuries were the consequence of negligence or otherwise.” Negligence is defined as follows: “a 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 of an interest of others.”

The doctrine of informed consent requires that, in the absence of an emergency, the physician must inform the patient about: “(1)
the diagnosis; (2) the general nature of the contemplated procedure; (3) the risks involved; (4) the prospects of success; (5) the prognosis if the procedure is not performed; and (6) alternative medical treatments."^{19}

These broad requirements do not offer a clear and certain standard as to what type of risks the duty to disclose extends. In the interest of finding out the sphere of coverage of this duty and accordingly the correlative interest of the patient to be informed, we will have to use the adjustable legal microscope and examine the "plate" consisting of case law and legislation from different states in the United States.

B. Contemporary Development: The Standard of Disclosure

Most states have generally adopted the negligence theory of the doctrine of informed consent.\(^{20}\) Thus, the patient has a distinct cause of action\(^{21}\) under the doctrine of informed consent.\(^{22}\) Still, there are also states in which the action for lack of consent is treated as an action based on battery.\(^{23}\)

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20. For details, see Nelson, supra note 5, at §22.11.
21. Swiss law is another example in which the action for failure to obtain informed consent is a distinct cause of action. See Corrine Widmer Lüchinger, Medical Liability in Switzerland, in MEDICAL LIABILITY IN EUROPE: A COMPARISON OF SELECTED JURISDICTIONS 547, 579 (Bernhard A. Koch ed. 2011).
22. See, e.g., Willis v. Bender, 596 F.3d 1244, 1254 (10th Cir. Wyo. 2010) (quoting Roybal v. Bell, 778 P.2d 108, 111 n.4 (Wyo. 1989)): “While battery still ‘remains applicable where a treatment or procedure was completely unauthorized . . . negligence principles [now] apply to the more often encountered situation where the treatment or procedure was authorized but the consent was uninformed.’”
23. Pennsylvania is an example of such a jurisdiction. See Pomroy v. Hosp. of the Univ. of Pa., 105 A.3d 740 (Pa. Super. Ct. 2014). Courts decided that “[t]here is no cause of action in Pennsylvania for negligent failure to gain informed consent” by referring to Kelly v. Methodist Hospital, 664 A.2d 148, 150 (Pa. Super. 1995). It was also decided that “[l]ack of informed consent is the legal equivalent to no consent” (quoting Montgomery v. Bazaz-Sehgal, 798 A.2d 742, 748 (Pa. 2002)).
Without ignoring the states that treat lack of consent as a battery claim, the focus of this paper will be on the right of action for negligence. Hence, liability will be imposed if, before engaging into a medical procedure, the physician fails to provide sufficient relevant information in order to enable the patient to give his “intelligent consent.” In Salgo, a 55 year-old man consulted Dr. Gerbode, a specialist in the surgical treatment of arterial diseases, because he complained about severe cramping pains in his legs. Dr. Gerbode told the patient that his circulatory situation was quite serious, but he did not explain to the plaintiff all of the various possibilities of the proposed procedures. The physician performed an aortography procedure, which departed, at that time, from the standard of care. The surgery went well, but on the following day, both of his legs were in an irreversible paralyzed condition. The court in this case did not clarify the standard of care that should be imposed. After ruling, Judge Bray stated that “a physician violates his duty to the patient and subjects himself to liability if he withholds any facts which are necessary to form the basis of an intelligent consent by the patient to the proposed treatment;” and he granted discretion to the physicians regarding the necessary facts about which proper information must be given.

What are the elements of a prima facie case in the common law negligence theory? The plaintiff, i.e., the patient, is required to

24. The theory of battery applies nowadays to situations in which the medical procedure was performed without the consent of the patient. See Pizzalotto v. Wilson, 437 So. 2d 859, 863 (La. 1983): “Thus, an unauthorized operation that is skillfully performed still constitutes a battery.” See also Cobbs v. Grant, 502 P.2d 1, 8 (1972): “The battery theory should be reserved for those circumstances when a doctor performs an operation to which the patient has not consented.”
26. Id. at 173.
27. Id.
28. Id.
29. Id.
30. Id.
31. Id. at 181.
32. Id.
prove as part of the *prima facie* case: the existence of a duty, a breach of that duty, proximate cause or causation, and injury.\(^{33}\) Regarding causation, the patient has to prove that the physician’s failure to provide the requisite information was the proximate cause of the patient’s injuries\(^{34}\) and that the patient would have refused to undergo the medical procedure had the information been disclosed.\(^{35}\)

Without any intent of minimizing the importance of the other elements of a lawsuit based on lack of informed consent, this paper will focus on the criteria used to measure the physician’s duty to disclose information to the patient.

Generally, the standard of care requires physicians to “inform a patient of the dangers of, possible negative consequences of, and alternatives to a proposed treatment or procedure.”\(^{36}\) However, how is this abstract standard measured *in concreto*? 

In the United States, there are two major lines of cases addressing the scope of the physician’s duty to disclose the risks inherent in medical procedures.\(^{37}\)

The traditional negligence standard, known also as the “professional standard,”\(^{38}\) is mainly opened to the wisdom and the practical experience of the physicians. Hence, one may say that the patient’s autonomy is not well protected. Are there valid arguments to contradict or sustain this statement? How did doctrinal criticism contribute to the development of the doctrine of informed consent?

In recent years, many states have alternatively adopted a new standard, known as the “prudent patient standard.”\(^{39}\) Does the new standard adequately protect the patient’s interests? What are the predictions for the evolution of this saga? Does this new standard

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33. 70 C.J.S. PHYSICIANS AND SURGEONS § 122, 1 (2015). See also RESTATEMENT, supra note 18, at § 281-282.
34. King & Moulton, supra note 11, at 440.
35. Id. at 441.
36. King & Moulton, supra note 11, at 440.
37. Id. at 439-45.
38. Nelson, supra note 5, at §22.05.
39. Id.
indicate the end of the old controversy or the beginning of a new paradigm?

1. The Professional Standard

The professional standard\(^\text{40}\) states that the physician’s duty is determined by the prevailing practice in the community. The question is as follows: what would a reasonable physician disclose to a patient under similar circumstances?\(^\text{41}\)

This standard, also known as the “professional theory,”\(^\text{42}\) has been adopted in many states whether judicially (see for example: Arizona,\(^\text{43}\) Arkansas,\(^\text{44}\) Colorado,\(^\text{45}\) Indiana,\(^\text{46}\) Maine,\(^\text{47}\) Nevada,\(^\text{48}\) North Carolina,\(^\text{49}\) Texas,\(^\text{50}\) Virginia,\(^\text{51}\) Wyoming\(^\text{52}\)) or by statute\(^\text{53}\) (see for instance: Florida,\(^\text{54}\) Nebraska,\(^\text{55}\) New York,\(^\text{56}\) and Vermont\(^\text{57}\)).

When a patient files a lawsuit for breach of informed consent, as part of the \textit{prima facie} case, the plaintiff has to establish the existence of a duty on the part of the physician. This can be achieved

\(^{40}\) Justice Schroeder expressed a rationale for this approach. See Natanson v. Kline, 350 P.2d. 1093, 1106 (Kan. 1960).
\(^{41}\) Nelson, \textit{supra} note 5, at §22.05.
\(^{46}\) Spar v. Cha, 907 N.E.2d 974 (Ind. 2009).
\(^{47}\) Ouellette v. Mehalic, 534 A.2d 1331 (Me. 1988).
\(^{49}\) Starnes v. Taylor, 158 S.E.2d 339 (1968).
\(^{50}\) Sherrill v. McBride, 603 S.W.2d 365 (Tex. App. 1980).
\(^{52}\) Roybal v. Bell, 778 P.2d 108 (Wyo. 1989); Willis v. Bender, 596 F.3d 1244, 1255 (10th Cir. 2010).
\(^{53}\) There are jurisdictions in which the legal requirements of the doctrine of informed consent have been developed in case law as well as in statute. See, \textit{e.g.}, for Swedish law, Lüchinger, \textit{supra} note 21, at 547, 579.
\(^{54}\) FLA. STAT. ANN. § 766.103 (West 2012).
\(^{55}\) NEB. REV. STAT. ANN. § 44-2816 (2014).
by proof that a “reasonable prudent practitioner” acting in the physician’s position, would have provided additional information. As the physician failed to disclose sufficient relevant information to the patient, he breached his duty.

How the physician discharges his obligation to inform the patient is “primarily a question of medical judgment.”\(^5^8\) Therefore, the courts held that the patient has to prove that a professional custom exists (hence, the defendant’s departure from that standard) by relying on medical expert testimony.\(^5^9\) The rationale for this approach: establishing that a physician breached his duty is rarely “sufficiently obvious as to lie within common knowledge.”\(^6^0\)

The professional standard is said to have two main justifications.\(^6^1\) Firstly, because disclosure of the risks is regarded as a professional judgment, it is contended that the physician is in the best position to estimate the effects of the disclosure of certain risks on the patient.\(^6^2\) Secondly, the physician cannot afford to waste time in order to inform the patient about every possible risk to protect himself from liability.\(^6^3\)

Courts have criticized the professional standard because it provides unlimited discretion to the physician.\(^6^4\) Furthermore, some object that the standard “undercuts the value of autonomy”\(^6^5\) of the patient, which stands as one of the foundations of the doctrine of informed consent.\(^6^6\)

What would be the result if the professional standard was applied to the hypothetical case presented above? If the physician

\(^{59}\) See, e.g., Copenhaver v. Miller, 537 So.2d 198, 200 (Fla. Dist. Ct. App. 2d Dist. 1989) (citing Public Health Trust of Dade County v. Valcin, 507 So.2d 596 (Fla. 1987)).
\(^{60}\) Woolley v. Henderson, 418 A.2d 1123, 1130 (Me. 1980) (citing Cox v. Dela Cruz, 406 A.2d 620, 622 (Me. 1979)).
\(^{61}\) Nelson, supra note 5, at §22.04.
\(^{62}\) Id.
\(^{63}\) Id.
\(^{64}\) See Cobbs, 502 P.2d 1, 10.
\(^{65}\) Nelson, supra note 5, at §22.04.
\(^{66}\) Id.
does not have knowledge of the patient’s preferences and lifestyle, then it is more probable than not, taking into consideration the cases discussed in this section, that the custom in the medical field would have dictated that the physician, Dr. Medicus, did not have the duty to disclose the risk of nerve damage. This is because it represented a minor risk to the medical community and it was too remote in regard to the medical procedure performed. For example, there are many serious risks associated with a medical invasive procedure that are required, by the medical custom, to be disclosed: infections, bleeding, side effects to anesthesia, etc. Disclosing every single risk of the procedure, regardless of how remote and unlikely it is to occur, would likely result in constant refusal of treatment. Such behavior of the patients is not desirable in a modern and developed society. However, in case the patient communicates his preferences and lifestyle, then the physician might be under customary obligation to disclose even the unusual risks associated with the information provided by the patient. Taking into account that Paul, due to anxiety and stress, might not have communicated efficiently his preferences, it is difficult to say whether Dr. Medicus would have disclosed the risk of stiffness of one finger. Whereas this standard protects the physician from liability, it does not provide an adequate tool for the respect of the patient’s autonomy. However, even if Paul informed Dr. Medicus about his second job as a pianist, it would be very hard for the plaintiff to prove the existence of a professional custom (admitting that such custom exists), which would impose on the physician the disclosure of such risks. Should society, i.e., the policy makers and the judges, allow such unfairness? Perhaps this was one of the reasons that the law evolved over time and a new standard was developed.
2. The Prudent Patient Standard

Under the prudent patient standard, the physician’s duty to disclose is determined by the information needs of a prudent patient in similar circumstances. The patient’s needs are “the information material to his decision” to undergo a proposed therapy.

The plaintiff is not required to present expert testimony in order to establish a professional standard (under the duty element), as part of the prima facie case. Consequently, the patient must show that “the probability of the type of harm is a risk which a reasonable person would consider in deciding on treatment” or the jury must determine, based on the “credibility of the plaintiff’s testimony” whether he would have refused the treatment, had he been informed about the risks of the medical procedure. Correspondingly, the determination of materiality is a question for the trier of fact and does not require expert testimony.

In order to determine whether particular information is material to the decision of the patient, the courts have utilized two standards: the objective or the subjective patient-based standard.

a. The Objective Patient-Based Standard

In 1972, the courts of the United States elaborated a new standard—the prudent patient objective standard—in two landmark cases.

67. Nelson, supra note 5, at §22.05.
69. For the need of the elimination of expert testimony with respect to the standard of care, see Canterbury, 464 F.2d at 783.
70. Nelson, supra note 5, at §22.04.
73. Id.
74. Marsingill v. O'Malley, 128 P.3d 151, 158 (Alaska 2006). However, we have to stress that there is still a need for expert medical testimony with regard to the “existence and nature of the risk as well as the likelihood of its occurrence.” See Nelson, supra note 5, at §22.04.
75. Id. at §22.05.
This approach was firstly adopted in *Canterbury v. Spence.*\(^76\) The facts presented a nineteen-year old boy who had experienced severe pain between his shoulder blades.\(^77\) The patient underwent surgery.\(^78\) A day after the operation, the lower half of his body was paralyzed and he had to be operated.\(^79\) However, he remained paralyzed in the bowel region and had urinal incontinence.\(^80\) The plaintiff contended that the physician had failed to perform his duty to inform him about any risk of paralysis from the procedure.\(^81\) He brought a negligence suit, claiming that the physician failed to disclose the risks necessary to allow the patient to make an informed consent relating to the medical procedure.\(^82\) Judge Robinson questioned the feasibility of the professional standard, and reached the conclusion that it had to be replaced with another standard that will give patients a larger role in determining whether to undergo a certain medical procedure.\(^83\)

According to the objective patient-based standard, the scope of the standard is “not subjective as to either the physician or the patient.”\(^84\) The test whether a particular risk must be disclosed to the patient is “its materiality to the patient’s decision,”\(^85\) meaning that all risks that might influence the decision must be revealed.\(^86\) The materiality of the standard is defined as what “a reasonable person, in what physician knows or should know to be the patient’s position, would be likely to attach significance to the risk or cluster the risks in deciding whether or not to forego the proposed therapy.”\(^87\)

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76. Canterbury, 464 F.2d at 772.
77. *Id.* at 776.
78. *Id.* at 777.
79. *Id.*
80. *Id.*
81. *Id.* at 778.
82. *Id.*
83. *Id.* at 786.
84. *Id.* at 787.
85. *Id.* at 786.
86. King & Moulton, *supra* note 11, at 442.
The court in Canterbury expressed the need for a change with respect to the standard of disclosure. Firstly, it held that “the patient’s right of self-decision shapes the boundaries of the duty to reveal.”

Secondly, the court finds “formidable obstacles” to accept that the duty to disclose is limited by the custom in the medical practice. To sustain this statement, Judge Robinson contended that “a professional consensus on communication of option and risk information to patients is open to serious doubt.” Moreover, the court acknowledged the deficiency of the professional standard that “physicians may or may not impose upon themselves.” In conclusion, the court calls for a “standard set by law rather than one which physicians may or may not impose upon themselves” in order to respect the patient’s right of self-determination.

Then, Canterbury v. Spence was followed by Cobbs v. Grant. The facts in this case suggest that a patient had his spleen removed after it had been injured in a previous surgery that was performed because of the plaintiff’s duodenal ulcer. The plaintiff filed a suit claiming that the physician failed to disclose the inherent risk of the initial surgery, which led the patient to give a “vitiated consent” to the procedure. The court held that “an objective test is preferable: i.e., what would a prudent person in the patient’s position have decided if adequately informed of all significant perils.”

88. Id. at 786.
89. Id. at 783.
90. Id.
91. Id.
92. Id. at 784.
93. Id.
94. Id.
95. Cobbs v. Grant, 8 Cal. 3d 229 (1972).
96. Id. at 234.
97. Id. at 235.
98. Id. at 245.
This standard was aimed at protecting the patient’s autonomy\(^9\) and, at the same time, at assuring that physicians are not exposed to “the whims and idiosyncrasies of individual patients.”\(^{100}\) However, the objective patient-based standard assumes that all patients assess the risks and benefits of a medical procedure similarly,\(^{101}\) which is obviously far from true.\(^{102}\)

Moreover, in *Canterbury*, Judge Robinson distinguishes between “the special and general standard aspects of the physician-patient relationship”\(^{103}\) for the purpose of the duty to disclose. On the one hand, when a physician has to make a medical judgment (in which case the special standard controls), the court in *Canterbury* gives “great deference to the physicians’ decisions.”\(^{104}\) On the other hand, the court does not give further indication on how medical judgment is defined or what criteria should be used in order to distinguish between medical and non-medical judgments.\(^{105}\) Then, we ask ourselves: did the law really get to the point where the self-determination of the patient is well protected and the physician is given rigorous standards to rely on in order to avoid medical liability? Maybe some more steps need to be taken.

Applying the objective patient-based standard to the hypothetical, the plaintiff will not be required to prove, by medical experts, the existence of a standard of care. However, even if the burden of proof seems to be lighter, a reasonable person would be unlikely to

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99. However, there is also an opposite opinion expressed in the doctrine. See, e.g., Katz, supra note 14, at 76.
100. See King & Moulton, supra note 11, at 443, 458. Although the physician might seem to be protected if the objective patient-based standard is applied, such a conclusion might be deceitful. There are some difficulties on the part of the physician to know *a priori* what does a reasonable patient expect to be informed about before he gives his consent to a medical procedure. Thus, “the idea that all physicians and patients drew the same bright lines distinguishing those ‘material’ risks from ‘immaterial’ risks is misleading.”
101. Id. at 443.
102. See Katz, supra note 14, at 76: “The belief that there is one ‘reasonable’ or ‘prudent’ response to every situation inviting medical intervention is nonsense, from the point of view of both the physician and the patient.”
103. Canterbury, 464 F.2d at 785.
104. King & Moulton, supra note 11, at 443.
105. Id.
attach so much significance to the minor loss of the finger’s mobility. For Paul, the patient who plays in the local orchestra, the unwanted outcome of the procedure affects his life, thus the risk of loss of mobility would have been, for him, a relevant one, that should have been disclosed by the physician prior to the procedure. Under these facts, if the patient would file a suit, it is likely that he would not receive compensation because the physician did not breach the standard of care established on the basis of a reasonable patient. A reasonable patient might have placed more importance on the element of fast recovery, rather than on the particular risk that was not disclosed. Hence, this example shows that there are no black or white risks, but in lieu that the “risks exist only in shades of grey.”

b. The Subjective Patient-Based Standard

In 1979, in Scott v. Bradford, Justice Doolin of the Oklahoma Supreme Court established a subjective patient-based standard, which was aimed at enhancing the patient’s autonomy, as “the law does not permit a physician to substitute his judgment for that of the patient by any form of artifice.”

Under a subjective patient-based standard, the physicians could be held negligent for failing to obtain an informed consent if the plaintiff is able to prove that knowing the material risks would have made him refuse to undergo the medical procedure. Hence, the material risk is the one that would “be likely to affect a patient’s decision.”

106. Id. at 449 (citing August Piper, Jr., Truce on the Battlefield: A proposal for a Different Approach to Medical Informed Consent, 22 J.L. MED. & ETHICS 301, 303).
107. Scott v. Bradford, 606 P.2d 554, 556 (Okla. 1979). The facts of the case state that the plaintiff’s wife underwent surgery for removal of the uterine tumors that she had developed. The plaintiff contended that the physician did not disclose the risks involved or available alternatives to surgery.
108. Id.
109. King & Moulton, supra note 11, at 443.
110. Scott, 606 P.2d at 558.
The Oklahoma Supreme Court rejected the “reasonable patient standard” in favor of a subjective approach, in order to adequately protect the injured patient.111 The objective patient-based standard, although it was at that time the rule of the majority, has been criticized by commentators arguing that a particular patient, after being given a proper disclosure of the risks, would have declined the therapy proposed, and a reasonable person in similar circumstances would have consented, then the patient’s right of self-determination is “irrevocably lost.”112

The merit of the subjective patient-based standard stands for the fact that it focuses on the particular needs of each patient, requiring the physician to disclose the peculiar risks which that patient, in that position, in that moment would consider “material” for his decision to undergo the therapy.

However, the subjective patient-base standard was criticized because it eliminated the protection (if any)113 that the physicians were benefiting from with regard to the objective standard, as the latter required them to disclose “only what a ‘reasonable’ patient would want to know.”114 Furthermore, it was contended that the subjective standard might preclude recovery for lack of proper disclosure if the patient died after the medical procedure was done.115 Moreover, even if the subjective standard best reflects “the ethical and legal foundation”116 of the doctrine of informed consent, it fails because it lacks the certainty that physicians need to properly perform their tasks regarding the disclosure of the material risks.117

How could the physician predict the information that the patient would consider relevant? However, because the physician is rarely able to anticipate the values and the preferences of the particular

111. King & Moulton, supra note 11, at 443-44.
112. Scott, 606 P.2d at 559.
113. For details, see supra note 100 and accompanying text.
114. King & Moulton, supra note 11, at 443.
115. Id. at 444 (citing Ashe v. Radiation Oncology Assoes., 9 S.W.3d 119, 122 (Tenn. 1990)).
116. Id. at 445.
117. Id.
Does the subjective patient-based standard provide a better solution to the hypothetical case that was exposed previously? The risk of having the finger’s mobility reduced, for Paul, a piano player at the orchestra, is definitely a relevant one to be taken into consideration when consent is given. Thus, under this standard, the patient would recover under the doctrine of informed consent for the physician’s failure to disclose the risk. However, if the physician is new in town and does not know and has no reasons to know that Paul is a piano player (and therefore, the risk is deemed to be material for the patient), should the law impose an omniscient knowledge on Dr. Medicus in order to protect the patient’s autonomy? We hold the opinion that the policy behind every law (where two different interests are conflicting) is to draw a proper balance in order to achieve a feasible solution. Nevertheless, how should this be done?

II. THE STANDARD OF DISCLOSURE IN FRANCE

Based on the ideas expressed by Portalis in a famous speech, \(^{118}\) one may argue that changes in society, \(i.e.,\) practice of medicine, should have an echo in the legal evolution and this should apply to the doctrine of informed consent.

This part will focus on the country of good pastries and delicious wine in order to illustrate how the “codified law”\(^ {119}\) responds

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\(^{119}\) Even if Anglo-American private law shows some repugnance with respect to the concept of codification (see, \(e.g.,\) Robert A. Pascal, *A Summary Reflection on Legal Education*, 69 LA. L. REV. 125, 133 (2008)), Simon Taylor stresses that “[c]odification of the patient’s rights to information in France should have a symbolic role in promoting the position of the patient in his relationship with the medical professional.” See also Simon Taylor, *Cross-Border Patients and Informed Choices on Treatment in English and French Law and the Patient’s Rights Directive*, 19 EUROPEAN JOURNAL OF HEALTH LAW 467, 474 (2012). On the other hand, the author mentions that this “symbolic and didactic role for the patients” is much more difficult to see in English case law.
(or not) to the needs of the contemporary society, i.e., the special relationship between the physician and the patient with respect to the standard of disclosure present in the doctrine of informed consent.

One may feel the need to establish the type of liability that the physician is held to in case he fails to perform the duty to disclose the necessary information to the patient. Considering this issue, the French law had an interesting development.

To begin with, under French law, physicians were held liable under tort law (fault-based liability). Then, after the 1936 ruling of the Cour de Cassation in the famous case, Mercier, the medical malpractice liability, in the private sector, was viewed as a “matter of contract law.” Under this theory, the physician’s obligation was “not described as an obligation of result (obligation de résultat),” but as an obligation of means (obligation de moyens). Thus, the physician had to comply with the Mercier test, which provides that the doctor must act with “attentive and conscientious care and, subject to exceptional circumstances, consistent with established scientific knowledge.” The practical distinction between the obligations of result and the obligation of means

122. G’Sell-Macrez, supra note 120, at 1096.
123. Olivier Moretèau, France, in EUROPEAN TORT LAW 2010 175, 177 (Helmut Koziol & Barbara C. Steininger eds., de Gruyter 2010).
124. Id.
125. Id. This test was later enshrined in the Code de la Santé Publique [Public Health Code] (Fr.) arts. R 4127-32 by Decree no. 2004-802 of July 29, 2004.
126. An obligation of result exists “whenever the performance or object of the performance is so precisely determined as to amount to a definite result to be achieved.” ALAIN A. LEVASSEUR ET AL., LOUISIANA LAW OF OBLIGATIONS: A
is that, while in the first situation it suffices for the obligee (the patient) to prove that the result has not been attained, in the latter case, the patient has to show that the physician acted with negligence, which is a more difficult burden of proof.128

The analysis of the physician’s failure to inform the patient under contractual theory of liability is not unknown to United States law. However, the courts hold that it is unlikely that the physicians will guarantee a certain result of a medical procedure,129 thus enter into a contract with the patients. Even so, there are cases in which the court found that a contractual link was created by the physician-patient relationship.130 Hence, the breach of the physician’s duty was treated as a breach of contract.131

In 2010, the Cour de Cassation132 held the physician liable for failure to inform the patient based on article 16, 16-3 paragraph 2, and article 1382 of the Civil Code.133 Thus, it appears that the liability of the physician is based on tort law (article 1382, liability for fault), rather than on a contractual basis (which has been the rule since the Mercier case in 1936).134

The impact of the 2010 revirement de jurisprudence (or over-ruling) was thought not to have “a major practical consequence.”135 In supporting this argument, it was contended that, except for the prescription issues regarding bodily injury that have

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127. Id. An obligation of means or diligence can be defined as a situation “when an obligor is expected to use the best possible means available to him, or to act with outmost care and diligence in the performance of his obligation but without guaranteeing a definite result.”


131. Id.


134. Morèteau, supra note 123, at 177.

135. Id. at 178.
already been eliminated under the Law of March 4, 2002 (also known as the Patients’ Rights Law\(^{136}\)), the patient’s burden of proof did not change. Thus, the plaintiff still has to provide evidence of the negligence on the part of the physician,\(^{137}\) similar to the situation in which the patient has to prove that the physician did not execute his contractual obligation of means.\(^{138}\)

A. What is the Legal Basis for the Duty to Inform?

In France, the Civil Code “is phrased in the form of general rules”\(^{139}\) and special provisions can be found in other codes, such as the Public Health Code (Code de la santé publique) or statutes that cover specific areas of law. The “positive law,” meaning the law enacted by the legislature,\(^{140}\) should be seen in the view of jurisprudence.

\(^{136}\) Id. Loi 2002-303 du 4 mars 2002 relative aux droits des malades et à la qualité du système de santé [Law 2002-303 of March 4, 2002, on Patients’ Rights and the Quality of the Health System], [hereinafter the Patients’ Rights Law of March 4, 2002] which was incorporated into the Code de la Santé Publique [Public Health Code]. The law aimed at unifying the medical malpractice liability rules, regardless if one party belongs to the private or to the public sector.

\(^{137}\) The question of causation as an element of the \textit{prima facie} case of negligence can be posed differently in distinct civil law jurisdictions. For example, in Austria, the patient cannot recover if the defendant can prove that he would have undergone the medical procedure had he known all possible risks and complications thereof. See Lüchinger, supra note 21, at 1, 29, 547, 579. This element is also known as “the hypothetical consent” in Swiss law. However, in France, the difficulty in establishing the causational link has been reduced by the French courts’ adoption of the notion of “loss of chance.” Taylor, supra note 119, at 477-78. Actually, French courts have changed the notion of the injury in order to meet the standard of causation. Commentators of the French case, Cass. Civ. 1, 3 June 2010, supra note 132, seem to be uncertain of the need for the Supreme Court to award compensation for any failure to inform the patient (See, e.g., Patrice Jourdain, \textit{Le manquement au devoir d’information médicale cause un préjudice qui doit être réparé} (revirement de jurisprudence), RTDCiv 2010, 571, 573).

\(^{138}\) See supra note 126 for the definition of the obligation of result; see also supra note 127 for the definition of the obligation of means.


\(^{140}\) Id. at 276.
For the first time, the duty to inform was imposed on the physician by the *Cour de Cassation* in the Teyssier decision.\(^{141}\) The court stated that the physician has to, except for emergency cases, obtain an informed consent prior to the surgery.\(^{142}\) This duty is imposed in accordance with the respect given to the human being. If the physician violates the duty to disclose, he will be held liable.\(^{143}\)

In 2001, the *Cour de Cassation*\(^ {144}\) held that the duty to inform the patient has its fundament in the requirement to respect the constitutional principle of the human dignity.\(^ {145}\) Even though the French Constitution does not contain *expressis verbis* the physician’s duty to disclosure, the principle of human dignity derives its constitutional value from the preamble’s reference to the Declaration of the Rights of Man and the Citizen.\(^ {146}\)

Moreover, article 16 of the Civil Code,\(^ {147}\) states that the law interdicts the infringement of the person’s dignity and guarantees respect for the human being from the beginning of his life.\(^ {148}\)

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141. Cass. Civ. 1, 28 January 1942, D. 1942, 63. Teyssier, a professional driver, was injured in a car accident. At the hospital, he was diagnosed with a broken left hand. There were two surgical procedures to choose from: treatment by plaster cast and osteosynthesis. The latter operation was performed. The outcome was not favorable to the patient, as he developed high fever and other complications which imposed the amputation of the hand. There was no breach with respect to the standard of care for the performance of the surgery. However, the court held that the patient should have been informed about the consequences of the surgery in order for him to be able to give his consent. Thus, the physician was held liable for the failure to provide the information necessary to the patient.

142. Id.

143. Id.


147. This article did not exist at the time of Teyssier, as it was first enacted in 1994.

148. C. CIV. art. 16 (Fr.), available at *https://perma.cc/2BSW-2CXN* (last visited Mar. 6, 2016). Article 16 is found in Book I of Persons, Title I of Civil Rights, Chapter II of the Respect of the Human Body and states the following:
Additionally, article 16-3 of the Civil Code\textsuperscript{149} shows that the inviolability of the human body is not absolute. Thus, exceptions such as “in case of medical necessity for the person or exceptionally in the therapeutic interest of others” may be regarded as legitimate. However, because these are exceptions to the general rule presented in article 16, these situations have to be interpreted narrowly.

The presence of the people’s guarantees, both in the Constitution and in the Civil Code, shows the important role that the human being plays with respect to the legislation. Furthermore, it highlights that the physician cannot be confined to a technician role in which he just respects the rules of the medical field without any consideration regarding the patient.\textsuperscript{150}

\section*{B. The Patient’s Right to Information}

Even before the enactment of the Patients’ Rights Law, there was a \textit{jurisprudence constant},\textsuperscript{151} which imposed on physicians a heavy duty to inform the patient.\textsuperscript{152} In France, the patient’s right to information was given legislative value by the enactment of the

\footnotesize
\begin{quote}
“Legislation ensures the primacy of the person, prohibits any infringement of the latter's dignity and safeguards the respect of the human being from the outset of life.”
\end{quote}

\textsuperscript{149} C. Civ. art. 16-3 (Fr.), available at https://perma.cc/2BSW-2CXN (last visited Mar. 6, 2016). This article is found in Book I of Persons, Title I of Civil Rights, Chapter II of the Respect of the Human Body and states the following: There may be no invasion of the integrity of the human body except in case of medical necessity for the person or exceptionally in the therapeutic interest of others (Act no. 2004-800, Aug. 6, 2004). The consent of the person concerned must be obtained previously except when his state necessitates a therapeutic intervention to which he is not able to assent.

\textsuperscript{150} François Villa, \textit{Comparaison des jurisprudences rendues en matière de responsabilité pour défaut d’information}, \textit{MÉDECINE & DROIT} 57, 60 (2013) (Fr.).

\textsuperscript{151} For a comparison between the doctrine of \textit{stare decisis} and \textit{jurisprudence constante}, see Robert L. Henry, \textit{Jurisprudence Constante and Stare Decisis Contrasted}, 15 A.B.A.J. (1929).


Every person has the right to be informed of his state of health. This information relates to different investigations, treatment or preventive action which is proposed, its utility, possible urgency, the consequences, the frequent and serious risks that are normally foreseeable as well as other possible solutions and the foreseeable consequences in the event of refusal. Whenever new risks are identified, after the investigations, treatment or preventive actions have been carried out, the patient must be informed, except when it is impossible.153

The Patients’ Right Law was an important event in the French legal history. This law has unified the medical malpractice rules in a civil law system that can be “portrayed as a very positive and legicentric”154 one. To deeply understand the present law that is composed by multiple pieces that evolved over time, we have to take a careful look at the roots of the norms and the evolutionary background of the rules. One should not forget that the French tort law resides in the continual cooperation between scholars155 and the judiciary.156

How important was the promulgation of the Patients’ Right Law? Did the law bring a totally new approach to the issue of informed consent in France or just local remedies for the deficiencies that were noticed? Hereinafter, we will focus our attention on analyzing the law that was in force prior to March 4, 2002 and afterwards.

153. See the following for the text in French, available at https://perma.cc/6E6K-HJ5W (last visited Mar. 6, 2016).
155. Id., it is important to keep in mind that the French scholars are more pragmatic than dogmatic.
156. Id.
C. The Duty to Disclose Before the Patients’ Rights Law of March 4, 2002

With regard to the means of presenting the information to the patient, the Cour de Cassation\(^{157}\) held that the physicians must give “a loyal, clear and appropriate”\(^{158}\) disclosure of the serious risks, in order to allow the patient to decide if he wants to undergo the medical procedure\(^ {159}\).

In 1998, the Cour de Cassation\(^{160}\) defined the scope of the physician’s duty to disclose. In that case, the person had a vertebral fracture caused by a fall.\(^ {161}\) Because of the persistent pain, she underwent surgery, which should have been followed by another.\(^ {162}\) In the afternoon, after the first surgery, the left eye had definitively lost its functionality.\(^ {163}\) This risk was known to be very rare, so the physician did not inform the patient about it prior to surgery.\(^ {164}\) The patient filed a suit claiming, among other things, the failure of the physician to inform her about the rare risk of a definitive loss of an eye’s functionality.\(^ {165}\) The Appellate Court dismissed the suit holding that the physician only had to disclose the normally foreseeable risks, and because the risk that occurred in this case was a very rare risk, the physician did not breach his duty by failing to inform the patient.\(^ {166}\) However, the Cour de Cassation reversed this decision; it found that the physician did not meet his duty to disclose.\(^ {167}\) In order to reach this conclusion, the Cour de Cassation held that the physician must inform the patient about the seri-

\(^{158}\) Id., the French reads: “une information loyale, claire et appropriée.”
\(^{159}\) See also Cass. Civ. 1, 14 October 1997, JCP 1997, 2, 22942.
\(^{161}\) Id.
\(^{162}\) Id.
\(^{163}\) Id.
\(^{164}\) Id.
\(^{165}\) Id.
\(^{166}\) Id.
\(^{167}\) Patrice Jourdain, Obligation d'information du médecin: extension confirmée de l'obligation aux risques exceptionnels graves, RTDCiv 1999, 111.
ous risks of the investigations and the treatment proposed and that
this duty exists even if the serious risks occur only in exceptional
cases.\textsuperscript{168}

This leaves the question of what is the definition of a “serious
risk.” The \textit{Cour de Cassation}\textsuperscript{169} defined the serious risks\textsuperscript{170} as “the
risk that might cause death, invalidity or serious aesthetic conse-
quences, considering their impact with respect to the physiological
and social aspect of the patient’s life.”\textsuperscript{171} Moreover, if it is clear
that a minor and exceptional risk is not required to be disclosed by
the physician,\textsuperscript{172} one may wonder if there is a duty to disclose a
minor risk that is foreseeable?

Patrice Jourdain explains that, according to the \textit{Cour de Cassa-
tion}, one must distinguish the serious risks, which must be dis-
closed, from the simple “inconvenience” of a medical procedure,
which is not required to be disclosed.\textsuperscript{173} This is a fine line and Ad-
vocate General Sainte-Rose insisted that this theory of the excep-
tional risks must be reanalyzed.\textsuperscript{174} Thus, in 2002, the standard of
disclosure was (re)defined by the legislature and encompassed in
the Public Health Code.

\textbf{D. The Duty to Disclose After the Law of March 4, 2002}

The Patients’ Rights Law of March 4, 2002 relaxed the previ-
ous jurisprudential standard of disclosure\textsuperscript{175} in article L. 1111-2
paragraph 1, which does not require the physician to provide ex-

\begin{itemize}
\item \textsuperscript{168} Cass. Civ. 1, 7 October 1998, \textit{supra} note 4.
\item \textsuperscript{169} Cass. Civ. 1, 14 October 1997, \textit{supra} note 159.
\item \textsuperscript{170} In French it is “\textit{risques graves}.”
\item \textsuperscript{171} In French: “\textit{les risques de nature à avoir des conséquences mortelles, invalidantes, ou même esthétiques graves compte tenu de leurs répercussions psychologiques et sociales}.” Cass. Civ. 1, 14 October 1997, \textit{supra} note 159.
\item \textsuperscript{172} Jourdain, \textit{supra} note 167, at 111.
\item \textsuperscript{173} \textit{Id.}
\item \textsuperscript{174} \textit{Id.}
\item \textsuperscript{175} The rule stated that the physician must inform the patient of the “all inconvenience that arise” and all risks, even if they are exceptional. G’Sell-Macrez, \textit{supra} note 120, at 1101.
\end{itemize}
haustive information to the patient.\footnote{176. PHILIPPE LE TOURNÉAU, DROIT DE LA RESPONSABILITÉ ET DES CONTRATS 722 (9th ed. 2012).} Article L. 1111-2 paragraph 1 imposes on the physician the obligation to inform the patient about the “frequent risks or the serious but normally predictable risks.”\footnote{177. G’Sell-Macrez, \textit{supra} note 120, at 1101.}

With respect to the frequency of the risks, administrative courts in France held that even if a risk is not serious, if it can be regarded as frequent, then the physician has a duty to disclose it to the patient.\footnote{178. C.A.A. (Cour administrative d’appel; intermediate court of appeal for administrative law cases) Paris, 12 November 2012, 11PA02031.} Furthermore, there are cases that state that the physician’s duty to inform is not discharged if the risk is serious, even if it is not frequent.\footnote{179. See, e.g., C.A.A. Lyon, 7 April 2001, 09LY01837.}

One may note that there is no legislative definition of what actually constitutes “serious risks.”\footnote{180. Taylor, \textit{supra} note 119, at 475.} However, there are cases in which judges expressed their opinion on what constitutes a serious risk.\footnote{181. Cass. Civ. 1, 14 October 1997, \textit{supra} note 159.} A similar definition to the one adopted by the courts is given by the \textit{Haute Autorité de santé}\footnote{182. French National Authority for Health. For details about this entity, see \url{https://perma.cc/6T3S-2SE2} (last visited Mar. 6, 2016).} in its guide to physicians on what actually can be defined as serious risk\footnote{183. Taylor, \textit{supra} note 119, at 475.}—“a serious harm\footnote{184. It is just a way to refer to the same serious risk of causing harm.} is one which is ‘life-threatening or that alters a vital bodily function.’\footnote{185. Taylor, \textit{supra} note 119, at 475.}

The definitions that were attributed by the courts and governmental entities to the serious risks would indicate that, in France, the standard of disclosure is an objective one. Compared to United States’ law, French law does not provide any solid indication whether the “seriousness” of the risk is to be treated from the viewpoint of a reasonable physician, a reasonable patient, or a par-
ticular patient.\textsuperscript{186} It is thought that French lawyers feel more comfortable with the use of abstract principles than lawyers in common law.\textsuperscript{187} Thus, French society is less concerned to engage in a more detailed discussion about the type of standard of care that is imposed upon physicians.\textsuperscript{188}

In accordance with the legislative requirement that the risk has to be normally foreseeable, courts in France have ruled that a risk is “\textit{normalement prévisible},”\textsuperscript{189} even if it is exceptional, if it occurs in one case out of a thousand cases.\textsuperscript{190} Thus, statistical data plays an important role in the establishment of the foreseeability. Moreover, another factor that courts seemed to have taken into consideration is the health antecedent of the patient.\textsuperscript{191}

Going back to the hypothetical situation that was presented above, one may argue that the risk of loss of the finger’s mobility is not a serious risk from an objective point of view and, more probable than not, this risk is not frequent. However, if the physician had known about the pianistic activity of the patient (\textit{i.e.}, he had attended the local orchestra in the past or the patient himself had disclosed this information to the health care provider), then it is likely that the risk of stiffness of the finger would be regarded as serious. This risk affects “the social aspect of the patient’s life.”\textsuperscript{192} Thus, more probable than not, the physician would be found liable for the failure to disclose this serious risk to the patient, as he had knowledge of the patient’s lifestyle and preferences.

A common law scholar may point a finger at the lack the foreseeability on what type of risks are serious and/or frequent and normally foreseeable. He might also object that decisions of

\begin{footnotesize}
\textsuperscript{186} Id.
\textsuperscript{187} Id.
\textsuperscript{188} Id.
\textsuperscript{189} The English translation is “normally foreseeable.”
\textsuperscript{190} C.A.A. Lyon, 23 December 2010, 09LY01051. However, one may note that in Switzerland, “[i]n general, the statistical risk percentages are not used for determining the scope of the duty to inform,” Lüchinger, \textit{supra} note 21, at 580.
\textsuperscript{191} C.A.A. Nancy, 9 April 2009, 07NC01468.
\textsuperscript{192} For details, see Cass. Civ. 1, 14 October 1997, \textit{supra} note 159.
\end{footnotesize}
French courts use brief and cryptic language and it might be only after the work of a scholar that the entire decision is fully understood. Hence, the physician’s duty and the extent of the patient’s right to information may seem to him unclear and ambiguous.

III. SUGGESTED ALTERNATIVE STANDARDS

The legal standards in the United States and in France have undergone impressive improvements with respect to the patient’s right to self-determination in the sphere of the doctrine of informed consent. However, there are still areas in which the solutions provided by the law do not correspond to the need of the parties involved, i.e., the physician and the patient. For example, in most jurisdictions in the United States the standard of disclosure does not depend upon the lifestyle of the patient, though he is the one who has to consent to the medical procedure, unless the patient brings his preferences to the physician’s knowledge. However, generally, the reasonable prudent practitioner or the reasonable patient is taken into consideration to establish the physician’s duty to disclose.

A proper legal standard of informed consent should aim at protecting the patient’s ability to obtain the information necessary for making an intelligent decision, to either decide for him or to defer the decision-making to the physician. Moreover, the ideal legal standard should provide the physician with a clear understanding of what necessary information should be disclosed to the particular patient in order to avoid liability based on the doctrine of informed consent. One may ask whether the law in the common law as well as in the civil law arena could achieve such goals. This part of the paper will prove that this desideratum is not utopic.

The next part will propose, without aiming to achieve an exhaustive analysis, two possible alternative solutions: the modifi-
cution of the substantive patient-based standard developed by the courts in the United States and the implementation of a new standard of care, known as the shared medical decision-making.

A. Injecting Objectiveness into the Substantive Patient-Based Standard

In the United States, the subjective patient-based standard\(^{194}\) adopted by the court in *Scott v. Bradford*\(^{195}\) has been vigorously criticized because, among other objections, it was contended that it eliminated the protection given by the objective standard to the physician, as the latter standard required the physician to disclose the information deemed relevant to a “reasonable patient.”\(^{196}\) In order to overcome this criticism, one may ask whether, by fusing different legal concepts, the law might find a solution that will consist of the combination between the objective and the subjective standard. However, is it worth the effort? How many jurisdictions worldwide have implemented the subjective patient-based standard?

The United States subjective approach of the doctrine of informed consent can be identified, though under different names, in many other jurisdictions such as Belgium, Germany, or Switzerland.\(^{197}\)

In Belgium, the traditional standard of informed consent, which stated that the physician must inform the patient about the “normal

\(^{194}\) King & Moulton, *supra* note 11, at 443; under the subjective patient-based standard, the physician could be held negligent for failure to obtain an informed consent if the plaintiff proves that knowing the material risks would have made him refuse to undergo the medical procedure. Hence, the material risk is one that would “be likely to affect a patient’s decision.” *Scott v. Bradford*, 606 P.2d 554 (Okla. 1979).

\(^{195}\) *Scott*, 606 P.2d. at 558.

\(^{196}\) King & Moulton, *supra* note 11, at 443.

\(^{197}\) There might be other jurisdictions in which the subjective patient-based standard is adopted, but this paper will limit the analysis to these three European countries.
and foreseeable" has been criticized for being “too vague and too abstract.” The more modern standard, so-called the “relevant-risk” theory has been implicitly accepted by the Cour de Cassation of Belgium. Under this theory, the physician has to disclose to the patient the risks that are considered relevant for “the patient in a particular case.” Thus, in Belgium, the United States subjective patient-based standard has been implemented since 2009.

The law in Germany with respect to the standard of disclosure is based on the principle of full disclosure. German law emphasizes on the patient’s right to self-determination. Hence, it was stated that “the decisive element here is the view of the specific patient in the specific situation, not the view of a ‘reasonable patient.’” Therefore, it is evident that Germany has adopted the subjective patient-based standard without specifically naming it as such.

Switzerland is another example where in order for the patient to give his intelligent consent to a medical procedure, he should be provided with all the necessary information. With respect to the standard of disclosure, Swiss law emphasizes that the “individual patient’s information needs are decisive, not those of a ‘reasonable patient.’” Hence, Switzerland is an additional jurisdiction in which the subjective patient-based standard seems to be effective.

198. Herman Nys, Medical Liability in Belgium, in MEDICAL LIABILITY IN EUROPE: A COMPARISON OF SELECTED JURISDICTIONS, supra note 21, at 61, 80.
199. Id.
200. Id.
202. Herman Nys, Medical Liability in Belgium, in MEDICAL LIABILITY IN EUROPE: A COMPARISON OF SELECTED JURISDICTIONS, supra note 21, at 80.
204. Id. at 318.
205. Franz Michael Petry, Medical Liability in Germany, in MEDICAL LIABILITY IN EUROPE: A COMPARISON OF SELECTED JURISDICTIONS, supra note 21, at 233, 265.
206. Lüchinger, supra note 21, at 547, 580.
207. Id.
It was contended, in France, that the standard of disclosure is more likely treated as objective. However, even though there may be no clear guidelines as to whether the standard of disclosure is treated from the viewpoint of a reasonable physician, a reasonable patient, or a particular patient, it is important to notice that, in 1997, the Cour de Cassation showed great concern for the patient’s physiological and social aspects. Thus, from this point of view, the French standard of disclosure may be regarded as a fusion of the American objective and subjective standard. Therefore, important steps have been taken in order for the law to evolve accordingly to the changing needs of society. Are these steps enough? Does the law fully satisfy the evolutionary sociological aspects of life?

Taking into consideration the above-mentioned references to different jurisdictions that seem to have adopted the United States subjective patient-based standard and that major criticism that was brought to this standard (the elimination of the physician’s protection given by the objective standard), one may argue that injecting some objectiveness into the subjective standard might be a solution to the issue. Essentially, this means that the new “mixed” standard should require the physician to disclose the relevant information to the particular patient (not to a reasonable patient, as the objective standard requires), if the obligor of the duty to inform (i.e., the physician) knows or should have reasonably known that the special risk is important to the patient.

The structure of the “mixed” standard seems similar to the requirements of error, as a vice of consent. For a definition of error, article 1949 of the Louisiana Civil Code states the following: “Error vitiates consent only when it concerns a cause without

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208. Taylor, supra note 119, at 475.
209. For details, see Cass. Civ. 1, 14 October 1997, supra note 159.
210. For details, see LEVASSEUR ET. AL., supra note 126, at 186-87.
which the obligation would not have been incurred and that cause
was known or should have been known to the other party.”\textsuperscript{211}

In order to properly examine the issue of error, it is mandatory
to determine the notion and the legal effects of consent: “[c]onsent,
which is the concurrence of the declared will of parties to an
agreement, constitutes an essential element of contract in both the
civil and the common law.”\textsuperscript{212} Consent given in order to enter into
a contract can be vitiated by error, thus the contract is annul-
able.\textsuperscript{213} In the United States, as well as in France, the physician’s
liability for failure to disclose the relevant information to the pa-
tient is based on tort law. Thus, the notion of error, as a vice of
consent, is inapplicable. However, because we are discussing con-
sent, the provisions of error can be implemented by analogy in the
field of defining the duty to disclose in the doctrine of informed
consent.

The “mixed” standard is not totally unknown to United States
case law. For example, in 1980, a California court in \textit{Truman v.
Thomas}\textsuperscript{214} held that “if the physician knows or should know of a
patient's unique concerns or lack of familiarity with medical pro-
cedures, this may expand the scope of required disclosure.”\textsuperscript{215}
However, by using the word “may,”\textsuperscript{216} the court seemed to be re-
luctant to hold this as a mandatory requirement imposed upon the
duty to disclose, but it shows that the idea of injecting subjectivity
into the objective standard may be a practicable solution.\textsuperscript{217}

By adopting a “mixed” standard, both in the United States and
in France or in any other jurisdiction that implemented the subject-
ive patient-based standard, the goals of the doctrine of informed

\textsuperscript{211} LA. CIV. CODE art. 1949.
\textsuperscript{212} Herbert A. Holstein, \textit{Vices of Consent in the Law of Contracts}, 13 TUL.
L. REV. 362 (1938).
\textsuperscript{213} Id. at 364.
\textsuperscript{214} Truman v. Thomas, 611 P.2d 902 (Cal. 1980).
\textsuperscript{215} Id. at 906.
\textsuperscript{216} The use of the word “must,” for example, would have given a more au-
thoritative tone to the rationale.
\textsuperscript{217} However, this case was decided by applying the objective standard.
consent are better achieved by applying the actual objective or subjective patient-based standard. Thus, the right of self-determination of the patient is well protected because he is given the information regarding the risk that he, as an individual, deems important. Moreover, the physician is protected by the law as, in case he does not know or has no reasonable reasons to know that the risk is important to the patient, he will not be held liable for the failure to disclose such risk. This might imply, on the part of the patient, a duty to communicate his preferences and values so that the physician is under the legal obligation to disclose the risks associated with the patient’s lifestyle. However, no obligation to inform the physician should be imposed on the patient. It should be rather left at his discretion and if the patient chooses not to inform the physician about his preferences and values, then the consequence will be that the physician cannot be held liable under the doctrine of informed consent for the failure to disclose the peculiar risks associated with the medical procedure.

How does the “mixed” standard work in the hypothetical scenario previously mentioned? The discussion should start by analyzing whether the physician knew or had reasons to know the patient’s values and preferences (i.e., the fact that he plays the piano, hence his fingers’ mobility is very important aspect of his lifestyle). If Dr. Medicus knew because the patient told him about his piano passion or had reasons to know because, for example, Paul is famous in town for his piano performances, then the risk of nerve damage should have been disclosed to the patient. In the event that Dr. Medicus does not disclose the material risk and if the other elements of the action under the doctrine of informed consent are met, then the physician will be held liable. If, under the circumstances, the physician was unaware of the values and preferences of the patient, then the physician is not going to be held liable for the failure to disclose the risk of nerve damage.

In conclusion, even if implementing the “mixed” standard requires more profound research and analysis, from a general point
of view, it seems to be a feasible standard that achieves the goals of the doctrine of informed consent better than the actual standards. Apart from the “mixed” standard of disclosure, recently, in the legal and medical field, a new standard of care started to evolve, in which both the physician and the patient are protagonists.

B. Shared Medical Decision-Making

The current legal standards of disclosure in the United States and in France can be visually associated to a one-way road, in which the physician provides the patient with the information that a reasonable physician would disclose,218 or a reasonable patient would consider material,219 or the particular patient would deem important220 in making the decision to undergo a medical procedure. Nevertheless, one may ask why does the information go just one way? Why should the patient be deprived of the possibility to provide the physician with individual concerns or questions,221 or emotional preferences, if the patient desires to do so?222 The theory that pleads for a two-way “alley” of exchanged information is known as the shared medical decision-making.223

A possible definition of the shared medical decision-making is described as followed: “a process in which the physician shares with the patient all relevant risk and benefit information on all treatment alternatives and the patient shares with the physician all relevant personal information that might make one treatment or

218. Under the objective patient-based standard.
219. Id.
220. As expressed by the subjective patient-based standard.
221. King & Moulton, supra note 11, at 466.
222. Ministry of Employment and Solidarity & High Committee on Public Health, Health in France 306, February 2002 [hereinafter Health in France].
side effect more or less tolerable than others.”224 Thereafter, both parties use the information gathered from the interaction to come to a mutual medical decision.225

According to the definition of informed consent, one may view the process as consisting of three main steps.226 Firstly, the physician provides accurate and useful information regarding the option of treatment to the patient and then, the latter shares his preferences and values.227 Secondly, the physician and the patient engage in a process of shared medical decision-making.228 Thirdly, the two parties involved in the medical relationship will decide together the best option that fits the needs of the patient.229

To begin with, as people differ in their level of medical literacy, level of risk aversion, values, and preferences, etc.,230 they have to be assisted in clearly identifying whether they deem a specific risk important, so they want that risk to be disclosed by the physician.

Two different methods—decision aids and decision coaches—have been proposed to assist the patients through the decision process by providing them with the adequate information and helping them discover their preferences and values.232 Firstly, the purpose of a decision aid is to “analyze the latest clinical evidence regarding the risks and benefits of different treatment options and

225. Id.
227. Id.
228. King & Moulton, supra note 11, at 466.
229. Id.
231. Moulton & King, supra note 223, at 91; for example, the Dartmouth-Hitchcock Medical Center has created a Center for Shared Decision Making. The Dartmouth model includes: “(1) a video decision aid; (2) an online survey and written questionnaire; (3) optional additional resources to help in resolving decisional conflict; (4) shared decision-making communication process; and (5) post-treatment survey.”
232. King & Moulton, supra note 11, at 464.
then present the information in a manner patients understand.”

Thus, the patient will be given the information regarding the advantages and disadvantages of each medical option that is available to him in an unbiased manner. Secondly, the patient might be assisted in making the medical decisions by decision coaches. These individuals help the patient identify the values and the preferences in the medical treatment, so that the patient will be able to have a meaningful conversation with the physician, later in the process. Thus, this phase takes place before the patient’s meeting with the physician.

Not every medical institution has the financial means to resort to decision aids and decision coaches and that they are not available for every major medical decision. However, scholars have argued that, while preferable, decision aids are not essential to the implementation of shared medical decision-making, as there are other resources that provide physicians with the needed up-to-date information.

The physician and the patient should together “construct a care space.” Hence, the two actors should engage in a consultation, during which the patient’s treatment preferences together with the physician’s medical opinion will be mutually exchanged. This interaction can be described as a two-way street, where the information flows from both the physician and the patient. For example, in the Netherlands, the patient has the duty to communicate his preferences and values to the physician, as he “‘needs to do the best to his knowledge’ to inform the practitioner and cooperate

233. Id. at 463-64.
234. Id. at 464.
235. Id.
236. Id.
237. Moulton & King, supra note 223, at 91.
238. King & Moulton, supra note 11, at 465.
239. Id.
240. Health in France, supra note 222, at 308.
with him in as far as is reasonable needed for his treatment.” 241 However, one may highlight that no obligation to disclose should be imposed to the patient, as the requirement to provide personal information conflicts with his right to privacy. 242 Hence, the patient’s rights to keep silence with respect to his preferences and values should be respected. 243 Nonetheless, in case the patient’s desire is to communicate his particular situation to the physician, except for the fact that such possibility should be provided by the law, the patient should also be provided with aid 244 in order to properly identify his preferences and values.

Generally, there is mistrust on the part of physicians because they fear that patients might feel anxious after the information is provided. 245 Moreover, the literature contends that there is little in the physicians’ medical training and experience that could prepare them to “sense how patients will react to disclosures.” 246 Thus, the summary report that is done after the first step of the process helps the physician to identify the suitable level of disclosure with respect to the patient’s needs and his physical comfort. 247

There are four possible outcomes with respect to the possibility to reach an agreement between the physician and the patient regarding the medical procedure to be undertaken. First, the parties arrive at a mutual medical decision. 248 Second, the patient chooses to undergo a specific procedure, with which the physician disagrees, but he will provide nonetheless. 249 Third, no agreement is reached, so the patient seeks medical care elsewhere. 250 Fourth, the

242. KATZ, supra note 14, at 127.
243. Id.
244. See Siegal, Bonnie & Appelbaum, supra note 230.
245. Health in France, supra note 222, at 308.
246. KATZ, supra note 14, at 77.
247. Moulton & King, supra note 223, at 91.
248. Id. at 89.
249. Id.
250. Id.
patient can choose to differ the treatment choice to the physi-
cian.\textsuperscript{251} Whichever conclusion is going to be drawn, it is more like-
ly that the medical procedure chosen will be adequate for the pa-
tient’s individual values and preferences and the physician will not
be held liable for the failure to provide the relevant information in
order to allow the patient to make an intelligent decision.

At the end of the discussion, the physician will provide a con-
sent form for the patient to sign that acknowledges that the parties
successfully engaged in shared medical decision-making and, fi-
nally, reached a conclusion regarding the medical procedure.\textsuperscript{252}

The value of the consent form has been discussed in many ju-
risdictions. For example, in Italy, the jurisprudence held that the
duty to inform is not “a mere ‘bureaucratic step,’”\textsuperscript{253} as the pa-
tient’s consent has to be expressed based on comprehensible in-
formation.\textsuperscript{254} Moreover, in England, the British Medical Associa-
tion “tool kit” underlines the importance of the discussion with the
patient and emphasizes that the written consent form should be
seen as a supplement to rather than a substitute of the dialog.\textsuperscript{255}

Scholars have identified a set of benefits of shared medical de-
cision-making.\textsuperscript{256} Firstly, from the patient’s standpoint, shared
medical decision-making enhances his autonomy, as it satisfies the
need for adequate information and engagement in the medical dis-
cussion.\textsuperscript{257} Studies have shown that “the vast majority of patients
want to be informed and involved in medical decision-making.”\textsuperscript{258}
However, there is no evidence that the patient strongly desires to

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{251} Id.
\item \textsuperscript{252} King & Moulton, supra note 11, at 466.
\item \textsuperscript{253} Alessandro P. Scarso & Massimo Foglia, Medical Liability in Italy, in
\textit{MEDICAL LIABILITY IN EUROPE: A COMPARISON OF SELECTED JURISDICTIONS},
supra note 21, at 329, 346-47.
\item \textsuperscript{254} Id.
\item \textsuperscript{255} Taylor, supra note 119, at 473.
\item \textsuperscript{256} King & Moulton, supra note 11, at 468.
\item \textsuperscript{257} Id.
\item \textsuperscript{258} Moulton & King, supra note 223, at 89 (citing W. Levinson et al., \textit{Not
All Patients Want to Participate in Decision-Making: A National Study of Public
Preferences}, 20 J. GEN. INTERN. MED. 531, 335 (2005)).
\end{itemize}
\end{footnotesize}
remove annihilate the physician’s integral part of the medical decisions.259 Thus, after receiving the information that the patient wants, he has the possibility to determine whether he will defer the decision entirely to the physician or make a final determination with the collaboration of the physician.260 Moreover, various studies have shown that by increasing the patient’s involvement in the medical decision-making, he will reach psychological comfort, which will contribute to the patient’s well-being.261 Furthermore, some studies have shown that the involvement of the patients in medical decisions has improved the treatment outcomes.262

Secondly, from the physician’s point of view, shared medical decision-making will provide insights on what the patient’s preferences and values need to be taken into consideration when the disclosure is given.263 Thus, the law will give a clearer standard of disclosure. In addition, the physician’s medical liability should be heavily reduced because of the extensive communication with the patient and the better perception of goals.264 Moreover, the ample discussions in which the physician and the patient engage will tighten the bonds between them. Thus, less stress is placed on the medical professional when he performs the chosen procedure.265

Skeptics, who have spoken against the potential benefits of the shared medical decision-making, argue that the implementation of such standard raises important challenges.266

Firstly, the management of the physician’s time seems to be one of the major concerns.267 It has been contended that physicians

259. Id.
260. King & Moulton, supra note 11, at 468.
261. For more details, see id. at 469.
263. King & Moulton, supra note 11, at 471.
264. Id.
265. Id.
266. Moulton & King, supra note 223, at 90.
267. King & Moulton, supra note 11, at 473.
do not have the time to explain every detail to patients. These obstacles are not insurmountable. For example, by adopting decision aids, or other decision management tools, such as a decision coach, the physician will save a lot of time. Thus, the physician will not be required to gather and provide information to the patient, in order for the latter to be able to engage in a productive communication. Even if there is definitely an “initial time investment” designed to favor the training of physicians to properly take part in shared medical decision-making, this investment will profit in the long run by reducing the overall time needed for the delivery of information.

Secondly, it has been contended that even if physicians had the time to properly engage in shared medical decision-making, they are not paid for the time spent discussing the risks with patients. Moreover, implementing shared medical decision-making may result in “a reduction in medical services as many patients would forego care if they had all the facts.” Thus, physicians will be rewarded with less financial support because of fewer treatment requests. However, engaging in shared medical decision-making will potentially lower the number of malpractice claims, as it is more probable than not that this standard of disclosure will be a solution to the communication difficulties that physicians and patients face.

In conclusion, despite the criticism that might be brought to the idea of adopting shared medical decision-making as a standard of disclosure in the United States and France, there is definitely a

268. Id.
269. Id.
270. King & Moulton, supra note 11, at 473.
271. Id.
272. Id.
273. Moulton & King, supra note 223, at 90.
274. King & Moulton, supra note 11, at 474.
275. Id.
276. The communication defects in the relationship between the physician and the patient are said to be among the most common complaints from patients who sue physicians for malpractice. Id.
need to adapt the actual legal standards of disclosure, in both jurisdic-
tions, to meet society’s demands. The robust mechanism of this
innovative idea may be the best, if not perfect, compromise be-
tween the patient’s autonomy and the physician’s expertise and
beneficence.

Back to our leading hypothetical, under the shared medical de-
cision-making, the patient would have had the opportunity to dis-
cuss the medical procedure in depth with the physician and ask
questions relating to it during the first two steps of the process.
Hence, Paul would have had the possibility to identify and share
his values and preferences with Dr. Medicus (i.e., the fact that he
plays the piano, hence his finger’s mobility is very important to his
lifestyle). The risk of nerve damage would have ultimately been
disclosed to the patient. Therefore, Paul would have been able to
give a proper informed consent to the medical procedure (whether
he ultimately decides to undergo surgery or not). Although, Paul’s
preferences are unlikely to be shared by other patients, it is not im-
possible that some of them feel the same way. Dr. Medicus should
nevertheless express his opinion regarding the treatment that best
fits with the personal values of the patient. If, for instance, the phy-
sician has a strong preference for a certain procedure (the surgery,
for example), which is not consented by the patient, Dr. Medicus
has no authority to force Paul to undergo treatment. On the other
hand, if under the same scenario, Paul is aware of the possible risk
of nerve damage and consents to the surgery, he would give an in-
formed consent. He would be prepared psychologically for the un-
likely result that might occur and could not claim damages for the
physician’s failure to inform him about the risk.

277. Respecting the patient’s autonomy can be defined as recognizing their
“wishes regarding what information is relevant to their decision and how much
they want to participate” in the decision-making process. Moulton & King, su-
pra note 223, at 89.

278. The ethical obligation of the physician to act with beneficence was ex-
pressed as his duty to assist the “patients to select both a decision-making path-
way and a treatment option that best satisfies their personal and medical goals.”
Ibid.
To conclude, by implementing shared medical decision-making in the United States and France, the cases in which physicians would be held liable for failure to disclose risks to patients would be substantially reduced and the patient’s autonomy would be protected against any illegal intrusion.

**CONCLUSION**

It takes a global view to properly understand the duty to disclose imposed on the physician by the doctrine of informed consent. This paper covers a common law jurisdiction, the United States, and a civil law jurisdiction, France, while offering cross-references to other jurisdictions.

Firstly, in the United States, in case the patient gives his consent to the medical procedure, but he is not sufficiently informed beforehand, there are two lines of cases addressing the scope of the physician’s duty to disclose the risks intrinsic to the procedure: the professional standard and the prudent patient-based standard. The latter is divided into two sub standards: the objective and the subjective patient-based standard. The professional standard determines the physician’s duty by asking: what would a reasonable physician disclose to a patient under similar circumstances? The approach differs under the patient-based standard that establishes the duty to disclose by referring to the needs of a reasonable patient (under the objective approach), or by referring to the individual patient (as the subjective substandard requires).

Secondly, in France, the *Cour de cassation* held that the duty to inform the patient has its fundament in the requirement to respect the constitutional principle of human dignity. Moreover, the patient’s right to information was reinforced by the enactment of the Law of March 4, 2002. Thus, each individual has the right to be informed about “the frequent and serious risks”279 that are “nor-

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mally predictable.” 280 With respect to the definition given by courts and governmental entities to the serious risks would indicate that, in France, the standard of disclosure is an objective one, although there is no profound analysis on this matter. 281 It was contended that French lawyers are more at ease with the use of abstract principles than common law lawyers.

Criticisms have been brought to the actual standards of disclosure. Skeptics claim that under the professional standard, the physician is given discretion as the information process is regarded as a question of professional judgment. Moreover, it was contemplated that the objective patient-based standard assumes that all patients assess similarly the risks and benefits of a medical procedure, thus the right to self-determination is not protected. Furthermore, critique was brought to the subjective patient-based standard because it eliminates the protection given to physicians by the objective standard. Hence, the general inference is that the standard of disclosure, i.e., the duty to inform, does not respect the “modern medical practice” 282 and the “individual autonomy rights” 283 of patients.

Keeping in mind that the principles of medical ethics (autonomy, beneficence, non-malfeasance and justice) 284 and human rights (patient’s ability to exercise self-determination) should guide the legal development of the doctrine of informed consent, 285 this paper proposed, in a non-exhaustive manner, the addition of two alternative legal standards of disclosure.

Firstly, in order to overcome the criticism that the subjective patient-based standard does not adequately protect the physician from unwanted liability, embracing into tort law the content of the

280. G’Sell-Macrez, supra note 120, at 1101.
281. Taylor, supra note 119, at 475.
282. King & Moulton, supra note 11, at 480.
283. Id. at 490.
285. King & Moulton, supra note 11, at 434.
notion of error, as a vice of consent, might be a feasible solution. Thus, the new “mixed” standard should require the physician to disclose the relevant information to the particular patient (not to a reasonable patient, as the objective standard requires), if the obligor of the duty to inform, i.e., the physician, knows or should have reasonably known that the special risk is important to the patient. This standard has the advantage that the right of self-determination of the patient is respected, as he is given personalized information. Moreover, the law protects the physician: in case he does not know or has no reasonable reasons to know that the risk is important to the patient, he will not be held liable for the failure to disclose such risk.

Secondly, implementing a new standard, known as the shared medical decision-making, may be a key to achieve the goals of the doctrine of informed consent. The shared medical decision-making, by engaging both the physician and the patient in the process of deciding on the medical treatment or procedure, makes possible the communication of patient’s treatment preferences, on the one hand, and the physician’s medical opinion, on the other hand. Hence, from the patient’s standpoint, shared medical decision-making enhances his autonomy, satisfies his need of adequate information and engagement in the medical discussion. From the physician’s point of view, shared medical decision-making will provide an understanding on what are the values and the preferences of the patient. The physician will then be able to disclose the relevant information to the particular patient and avoid unlimited liability for the failure to disclose the material risks.

The deficiencies found in United States law and in French law may be solved by applying, as an incremental step towards reaching the goals of the doctrine of informed consent, the “mixed” standard of disclosure. Meanwhile, the legal and economic framework of the countries will be able to implement the medical and legal national infrastructure to adopt properly and successfully shared medical decision-making.
We hope that this analysis provides lawmakers the legal arena with useful insights. While being careful to not swing the pendulum too far in favor of either party (i.e., the patient or the physician), we believe that more in depth research ought to be undertaken in order for the proposed alternative standards of disclosure to be integrated into different legal systems across the world.
THE FRENCH REFORM OF CONTRACT LAW: THE ART OF REDOING WITHOUT UNDOING

Mustapha Mekki*

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Keywords: France, French reform, Code revision, French contract law, formation of contract, effects of contract

* Professor of Law, Université Paris-Nord (Paris XIII). This text was first published in French; see M. Mekki Le volet droit des contrats : l’art de refaire sans défaire, D. 2016, 494. It was translated into English by Camille Audebaud, Laura Potvain, and Yasmina Saadane under the supervision of Professor Olivier Moréteau. This is a user-friendly translation, with some additions and sometimes departures from the original, to make the text accessible to a larger, non-French public. The author also thanks William H. Patrick, Christabelle Lefebvre, and Camille Renard for the final revision and editing.
1 – From the Reform Project to the Ordinance. Many thought that the reform of the law of obligations would remain the Arlésienne\(^1\) of the law. The recent resignation of Christiane Taubira, the former Minister of Justice, casted doubts, till the last minute, as to the outcome of the reform project. However, this did not prevent Ordinance no. 2016-131 of February 10, 2016, reforming the law of contract and the general regime and proof of obligations, to be published in the official gazette (Journal officiel de la République française) on February 11, 2016.\(^2\) The reform was not adopted by way of ordinary legislation. In order to gain time on a busy parliamentary agenda, the French Parliament delegated the power to enact the reform to the executive, causing the reform to be adopted by way of an ordinance, without parliamentary debates. The Ordinance is packaged with a report to the President of the Republic meant to disclose the spirit of the law and its body of rules, in the absence of a record of parliamentary proceedings.\(^3\) A major rule of construction provided by the report immediately sets the tone: any rule not expressly made mandatory (public policy) is deemed a suppletive rule. Whether the courts will abide by this guideline with a weak normative power is left to be seen.

2 – A Dialogue Between the Sources of Law. The final Ordinance is the outcome of an evolution that will not be traced in this paper.\(^4\) However, we must point out that it appears as the fruit of a

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1. *L’Arlésienne* is a play by Alphonse Daudet in which the character known as “the Arlésienne” never appears on stage at any point. The expression is used about someone or something that one believes may not exist at all. *See L’Arlésienne, 2 HARRAP’S UNABRIDGED: DICTIONNAIRE FRANÇAIS-ANGLAIS (2007).*

2. With some exceptions, quotations are to the draft Louisiana translation of the Ordinance, by David W. Gruning, Alain A. Levasseur, and John R. Trahan, revised by Juriscrope, with the terminology expertise of Michel Séjean.


4. For a general presentation, *see* D. Mazeaud, Droit des contrats : réforme à l’horizon !, D. 2014, 291; J.-B. Seube, La réforme du droit des contrats vaut bien une ordonnance !, JOURN. SOCIÉTÉS Apr. 2014, 8; N. Molfessis, Droit des
dialogue between various sources of the law. Indeed, an open public
consultation on the draft Ordinance took place until the end of April
2015,\(^5\) triggering comments by academics and law professionals.
All criticisms, observations, comments, and proposals were not only
processed by the Civil Affairs team of the Ministry of Justice, under
the supervision of Guillaume Meunier, but most importantly, many
of them were included in the final draft.\(^6\) Even if all of the modifi-
cations or lack thereof will arouse criticisms or regrets, the result is
coherent as a whole and, for the most part, it is relevant. However,
in order to give time to users such as legal practitioners (judges, ad-
vocates, notaries, corporate lawyers), professors and ordinary citi-
zens, to get accustomed to the new provisions, the entry into force
of the Ordinance was delayed until October 1\(^{st}\), 2016 (article 9 of the
Ordinance). For the sake of legal certainty, the new provisions only
apply to contracts entered into after this date. A few exceptions may
be found in paragraphs 3 and 4 of article 1123 as well as in articles
1158 and 1183, which will apply to existing contracts upon entry
into force. These relate to the so-called “interrogatory actions” (ac-
tions interpellatoires ou interrogatoires), established to apply in the
context of pre-emption agreements, representation, and nullity.\(^7\)
Lastly, article 9 paragraph 4 could raise an issue of interpretation:
“When a legal proceeding has been introduced before the entry into

\(^5\) Projet d’ordonnance portant réforme du droit des contrats, du régime gé-
néral et de la preuve des obligations, https://perma.cc/TQX5-6YD4 [hereinafter
Draft Ordinance].

\(^6\) About three hundred contributions have been appraised by the working
group led by G. Meunier; see also G. Meunier, Droit des contrats : les enjeux
d’une réforme !, D. 2016, 416.

\(^7\) Report Presented to the President, supra note 3: “as a matter of fact they
are procedural mechanisms implemented to allow a party to end with a situation
of uncertainty that do not affect existing contracts and that can be used at the
discretion of the interested parties.”
force of this Ordinance, the action is pursued and judged in accordance with the former law. This law will also apply on appeal and cassation.” There are two possibilities: if this paragraph applies to all provisions, it would contradict paragraph 2 providing that existing contracts are governed by the former law. Conversely, if restricted to interrogatory actions, it would mean that legal proceedings introduced before October 1st, 2016 and still pending beyond this date would still be governed by the former law. The second interpretation is more fitting. It may have been wiser to place this provision in paragraph three rather than creating a separate paragraph 4, to eliminate any doubt regarding its connection with the provisions on interrogatory “action.”

3 – The Future of the Ordinance. As a rule, the Ordinance should have received parliamentary ratification within six months of its publication. Failing that, the Ordinance would no longer have force of law. However, if the bill is introduced during that time period, but has not been discussed yet, which is what happened,9 the Ordinance is automatically downgraded into regulation, losing the force of a legislative act and making it judicially reviewable as being ultra vires. If ratified in time, which did not happen, the Ordinance gains legislative force.10 However, there may be implied ratification in the event a subsequent legislative act refers to the Ordinance.11 Now, whether one agrees with the reform or not, efforts must be

8. The precision may seem redundant, but the purpose is to prevent from analyzing these exceptions with regard to civil procedural rules. Indeed, procedural rules are commonly of direct application in pending proceedings. To avoid any discussion, the legislator preferred to add this precision concerning the interrogatory actions, which are extrajudicial.


made to understand the meaning, value, and scope of its various provisions and think about the way actors may draft clauses, either complying with the new law or departing from it. However, though it is time to apply the new law, some of its provisions have been challenged in the last months of 2017, during a parliamentary ratification process that has not been concluded yet, and may end up with a reform of the reform. The present text has not been updated with the amendments discussed after the publication of the Ordinance.

4 – A Large Consensus. Those expecting to find revolutionary provisions in the Ordinance will be disappointed. Though the draft was improved in its final version, most of the original text was left unchanged. The report to the President of the Republic points to a consensus between the reform project and the final text. The report highlights that one of the purposes is to make the law more accessible and intelligible without adulterating the fine style of the Civil Code. A stated objective is also to fit in with a globalized world where legal systems compete. French law must be modernized to remain a model or offer itself as a model again. While resisting the idea of restating French law as an attractive model, reforming the law of obligations projects the image of a rejuvenated and modern law, connected with the surrounding world. Beyond these objectives, the Ordinance still relies on a set of values, most particularly legal certainty. Economic efficiency also permeates the whole Ordinance. Contractual justice feeds into numerous provisions. Certainty, efficiency, and equity are the motto of the new law of obligations.

5 – A Didactic Approach of the Reform. The author of this comment considered two possible ways of conducting the discussion. A first option consists in adopting a problem-based approach, or comparing the draft with the final text of the Ordinance, focusing first on consolidations and then on innovations. To be clear and

12. See, on the objectives and values, the Report Presented to the President, supra note 3.
learner friendly, the choice has been made to address the differences between the draft and the final version in a more technical way. This was preferred to a second option, which would have been to contrast provisions increasing judicial powers (e.g. article 1122) with those increasing the parties’ prerogatives. (e.g. article 1225 on the resolutorial clause). However, such an approach may prevent a rigorous and structured perception of changes carried out—at times limited to the change of a single word. For the sake of clarity, the choice was made to follow the logical order of the Ordinance and to address in a linear manner clarifications, precisions, suppressions, corrections, and additions brought by the final Ordinance, sometimes at the cost of some innovation. If the government conveniently accepted to review its original draft (under the French system, legislative bills can be introduced by the executive), it did not change the general economy of the text. The work is limited to redoing without undoing. This presentation will be limited to contract law: the preliminary provisions of chapter I, chapter II on formation and chapter IV on the effects of contracts.\footnote{In subsection 1, we will focus on contract only. Subsection 2 on extracontractual liability (C. CIV. arts. 1240 et seq.) uses the wording of the former Civil Code articles 1382 et seq. Few modifications were made in subsection 3 on the other sources related to quasi-contract (C. CIV. arts.1300 et seq.), except a correction to article 1303 modified from the former article 1303.}

I. Preliminary Provisions

6 – Introductory Articles. Compared to the draft Ordinance, title III on the sources of obligations breaks new ground with the enactment of article 1100, introducing the various “sources of obligations”: juridical acts, juridical facts and “the mere authority of legislation” (article 1100 Civil Code). Juridical acts and juridical facts are respectively defined in articles 1100-1 and 1100-2. These provisions may have been integrated hastily, without properly articulating
a general theory of juridical acts. Yet, was it necessary? Close attention should be paid to article 1100, paragraph 2, which provides that obligations: “may arise from the voluntary performance or the promise of performing of a duty of conscience toward another.” Though limited in scope, this acknowledgment of some forms of unilateral commitments is to be welcome. The Ordinance keeps the language of article 1, paragraph 2 of the draft reform of the Ministry of Justice (2009). The transformation of a natural obligation into a civil obligation may now be based on the new article 1100, paragraph 2. Without pondering over these hastily written preliminary provisions, their new contents must be analyzed. Echoing the draft Ordinance, article 1101 and the following articles aim to define or redefine the fundamental notions of contract law and reaffirm the underlying general principles, though this phrase is not used in the text.

A. Definitions

7 – Reorganization of Some Definitions. In the draft Ordinance, the definition of contract was innovative in the sense that it addressed its “legal effects.” It was reworded in the new article 1101 of the Civil Code, contract being now defined as “an agreement of wills between two or more persons whereby obligations are created,
modified, transferred, or extinguished.” It is unfortunate that the legislature made the choice to restore the link between contract and obligations.\textsuperscript{19} First, it is inconsistent with the rest of Ordinance that no longer refers to obligations to do, not to do, and to give. Then, it is inconsistent with the concept of juridical act, defined by its legal effects (Civil Code article 1100-1). Last but not least, this reflects a narrow perception of the contract, failing to recognize that contracts produce legal effects beyond the sole obligations.\textsuperscript{20} Such a definition does not encompass all the “new functions” of contract.\textsuperscript{21}

The Ordinance corrects and completes the definitions contained in the draft. Under article 1108, paragraph 2 (former article 1106 paragraph 2), the contract is aleatory “whenever the parties accept to have the effects of the contract, as regards both the benefits and the losses that will ensue, depend on an uncertain event.”\textsuperscript{22} The concept of “real contract” is also introduced in the preliminary provisions. Article 1109 paragraph 3 provides that “[a] contract is real when its formation is subject to the delivery of a thing.” Improvements regarding the definition of “contract of adhesion” call for special attention. The Ordinance adopts a broader definition of the contract of adhesion. Whereas the original draft referred to the absence of negotiation of essential terms (former article 1108 paragraph 2), article 1110 paragraph 2 now relates to contracts “whose general conditions, not subjected to negotiation, are determined in advance by one of the parties.” This modification, modelled after German

\textsuperscript{19} On the importance of the reasoning based on contractual clauses in the reform, see M. Mekki, \textit{La réforme du droit des contrats et le monde des affaires : une nouvelle version du principe comply or explain !}, GAZ. PAL. 5 Jan. 2016, 18.


\textsuperscript{21} M. Mekki, \textit{Les incidences du mouvement de contractualisation sur les fonctions du contrat}, in \textit{LA CONTRACTUALISATION DE LA PRODUCTION NORMATIVE, COLLECTION: THÈMES ET COMMENTAIRES} 323 et seq. (S. Chassagnard-Pinet & D. Hiez eds., Dalloz 2008). Functions expressed in institutions such as contrat-organisation, contrat-alliance, contrat-coopération, or contrat-relatio\-nnel.

\textsuperscript{22} F. Leduc, \textit{Le projet d’ordonnance portant réforme du droit des contrats et le caractère aléatoire du contrat d’assurance}, REVUE DES CONTRATS 2015, 895.
law,\textsuperscript{23} is all the more decisive, since article 1171 on abusive clauses is now limited to contracts of adhesion. However, considering that its function is primarily explanatory, the fact that the concept of contract of adhesion is consecrated as a category of its own may cause it to become an important source of dispute. The mere reference to “essential terms,” inspired from Quebec law,\textsuperscript{24} would have dramatically reduced its scope, as it excluded the so-called “peripheral” or accessory provisions that create the most difficulties in practice (exclusion clauses regarding warranties or liability, unilateral termination clauses . . .).\textsuperscript{25} Generally speaking, the Ordinance aims at removing concepts that could be a source of litigation,\textsuperscript{26} a point made clear by the abandonment of the term “essential.” Likewise, article 1111’s definition of framework contracts also removes any reference to “essential features,” as provided in the original draft of article 1109.

B. “General Principles”

8 – Enrichment of the General Principles\textsuperscript{27} of Contract. The Ordinance of February 10, 2016 both mitigates and enriches the “principles” of contract.\textsuperscript{28} These principles do not supersede the rules, but shall guide judicial interpretation. Although the principle

\begin{itemize}
\item \textsuperscript{23} Bürgerliches Gesetzbuch [BGB] [Civil Code], arts. 6, 305, para. 1, and 307, para. 1.

\item \textsuperscript{24} B. Moore, Le contrôle des clauses abusives dans les contrats de consommation et d’adhésion : perspectives de droit québécois, in L’AMORCE D’UN DROIT EUROPÉEN DU CONTRAT 109 et seq. (Société de législation comparée 2010).

\item \textsuperscript{25} On this point, see F. Chénédat, Le contrat d’adhésion dans le projet de réforme, D. 2015, 1226, no. 1. See also R. Boffa, Article 1108: le contrat d’adhésion, REVUE DES CONTRATS 2015, 736, no. 5.

\item \textsuperscript{26} The concept of “evident terms” is often replaced by “express reference.”

\item \textsuperscript{27} See Report Presented to the President, supra note 3; the report uses the term “fundamental principles.”

\item \textsuperscript{28} M. Mekki, Les principes généraux du droit des contrats au sein du projet d’ordonnance portant sur la réforme du droit des obligations, D. 2015, 816; See also M. Mekki, La réforme au milieu du gué. Les notions absentes ? Les principes généraux du droit des contrats - aspects substantiels, REVUE DES CONTRATS 2015, 651.
\end{itemize}
of freedom of contract remains unaffected (article 1102), the limits to its exercise are mitigated with the removal of any reference to control of proportionality or fundamental rights and freedoms. Such removal may sound surprising, considering its frequent use\(^{29}\) in positive law and regarding the Cour de cassation’s judicial policy, which promotes this type of control.\(^{30}\) The principles are enriched with a new element provided for in article 1104, “[c]ontracts must be negotiated, entered into and performed in good faith. This provision is of public order,” the latter words preventing any derogation by a contractual clause.\(^{31}\) Another principle, previously contained in the provisions themselves (former article 1134), must be added. The binding force of contract is now enshrined in article 1103: “Contracts legally entered into have the binding force of legislation for those who have made them.”

9 – General and Special Rules. Lastly, a provision omitted in the draft has been introduced in the preliminary provisions\(^{32}\): former article 1107 of the Civil Code connected the general law of contract with the law applicable to specific contract. It is reinserted in the new article 1105, with limited change in the wording. One may have wished for a more precise drafting regarding the possible conflict between private law norms, the new text only stating that “the general rules are applied subject to these particular rules.” Why not say that these particular rules only displace the general ones in those situations where they are inconsistent with them?\(^{33}\)

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30. B. Louvel, Réflexions à la Cour de cassation, D. 2015, 1326.
32. N. Balat, Réforme du droit des contrats : et les conflits entre droit commun et droit spécial ?, D. 2015, 699; See also N. Blanc, Contrats nommés et in-només, un article disparu ?, REVUE DES CONTRATS 2015, 810.
33. On this proposal, see Blanc, supra note 32, at no. 8.
II. FORMATION OF CONTRACT

10 – Chapter II on formation of contract is composed of four sections: conclusion,\textsuperscript{34} validity, form,\textsuperscript{35} and sanctions. This section will focus on conclusion, validity, and sanctions.

A. Conclusion

11 – Negotiations. Though the final text largely follows the draft, article 1112 brings something new to the Civil Code.\textsuperscript{36} Article 1112 states: “The initiative, process, and breach of precontractual negotiations are free. They must imperatively satisfy the requirements of good faith.” The adverb “imperatively” insists on the public order requirement. The rule is simplified since article 1112, paragraph 2 uses a concise formulation to characterize a wrongful breach: “In case of fault committed during the negotiations, reparation of the damage resulting from it cannot have for its object to compensate for the loss of the benefits anticipated from the contract not entered into.” Regarding the damage, the Ordinance consolidates existing jurisprudence.\textsuperscript{37}

12 – Duty to Inform. Regarding the duty to inform, changes are substantial. Previously dealt with under validity of contract, the duty

\textsuperscript{34} Concerning subsection 4 on contracts electronically concluded, there are few modifications. The reference to invitation to treat is removed in the new articles 1127-2 and article 1127-1, which states that French language must be part of the proposed languages. For a general overview, see P. Chauviré & A.-M. Gruel, Les dangers de la période de l’échange des consentements, JCP N. 2015, 1207.

\textsuperscript{35} C. CIV. art. 1172 concerns a clearer way of formulating the principle of mutual consent and its exceptions. The notion of solemn contract is clearer and the notion of real contract has to be added.

\textsuperscript{36} See, B. Haftel, La conclusion du contrat dans le projet d’ordonnance portant réforme du droit des obligations, GAZ. PAL. 30 Apr. 2015, 8.

to inform is now placed where it belongs, namely at the negotiation stage under subsection 1. The draft article 1129 is substantially re-written (article 1112-1). Some awkward turns have been corrected. “Party” is substituted to “party to a contract” (contractant), which is more consistent with a precontractual duty to inform, with one omission at the end of the first sentence where the word cocontractant remains. Article 1112-1 paragraph 4 clarifies the burden of proof: “It is up to the party who claims that an information was owed to her to prove that the other party owed her that information, contingent upon the rights of that other party to prove she had provided the information.” This paragraph reproduces verbatim article 33, paragraph 3 of the Terré draft reform. Paragraph 2 is also suitable as it avoids any discussion reconsidering the Baldus decision, as it adds that “[n]evertheless, this duty to inform is not owed with respect to the appraisal of the value of the performance.” The new article 1112-1, paragraph 1 limits the scope of the duty to known information, thereby excluding information that the party should have known. Therefore, the duty to make inquiries in order to inform no longer exists, at least in general contract law. Still, the reference to the other contracting party’s reliance could raise difficulties. Is it not the purpose of a contract to generate reliance? Paragraph 1 insists that the information must be of decisive importance, a point that is clarified in paragraph 3: “The information which has a direct and necessary link with the content of the contract or the quality of the parties has a determinative importance.” Lastly, paragraph 5 provides that “the parties may neither limit nor exclude this duty,”

which may be too broad. Does this mean that a clause could not protect some information, aside from non-disclosure clauses, dealt with in article 1112-2? Suppose that a seller asks a buyer to personally estimate the condition of the property, and the buyer accepts: is this reprehensible under article 1112-1, paragraph 4?

13 – Offer and Acceptance. The reform introduces in the Civil Code a doctrine of offer and acceptance, which was absent in the original text. Former article 1108 only referred to “the consent of the party who obligates himself.” The new article 1114 tends to complete the definition of offer: “The offer made to an identified or unidentified person, includes the essential elements of the contract which is contemplated and expresses its author’s will to be bound when it is accepted. In the absence thereof there is only an invitation to negotiate.” The expression “the author’s will to be bound” refers to a firm proposal that must not be potestative. Whereas the draft reform addressed the issue of revocability of the offer, the final articles 1115 and 1116 prefer the language of “withdrawal” (rétractation) of the offer. Offer (article 1115), acceptance, and any withdrawal thereof (article 1118) only produce effect when received by the other party (théorie de la réception). Article 1115 provides that the offer can be withdrawn as long as it has not reached the person to whom it was addressed, an improvement from the draft mysteriously referring to the offer “that was brought to the knowledge of” (former article 1115).

Regarding the general conditions, the rule defined by the jurisprudence, that “in case of inconsistency between general conditions and particular conditions, the latter prevails over the former,” is confirmed (article 1119, paragraph 3).

14 - Preparatory Contracts. Preparatory contract law is source of shillyshallying.40 Article 1124 paragraph 1 provides: “A unilateral promise is a contract whereby a party, the promisor, grants to

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the other, the beneficiary, the right to choose to conclude the contract the essential elements of which are specified, and for the formation of which only the beneficiary’s consent is lacking.” The draft’s reference to a “certain amount of time,” which could have been a source of dispute, has been abandoned. Now paragraph 2 provides that: “The withdrawal of the promise during the period of time granted to the beneficiary to make his choice does not prevent the formation of the contract as promised.” As implied in the report to the President of the Republic, any provision not expressly made mandatory is to be regarded as suppletive.

Article 1123 defines the pact of preference: “The pact of preference is a contract whereby a party binds himself to propose to his beneficiary to negotiate with the latter first in case the former should decide to enter into a contract.” Article 1123 restores a double requirement to obtain the nullity or the substitution of a pact of preference: proof of the knowledge by a third party of the existence of the pact of preference and proof of the beneficiary’s intention to take advantage of it. Why have such heavy requirements? However, several clarifications are welcome. The first one concerns the interrogatory action, which requires, when implemented by the third party, the determination of a reasonable time limit. Furthermore, the draft reference to the “presumption” of existence of the pact of preference is abandoned. The third party can implement it in any case. Article 1123 removes the reference to “apparent terms.” Last but not least, the reservation regarding a non-disclosure agreement, both controversial and counterproductive, has been wisely removed.

15 – Bilateral Promises to Sell: A Restored Coherence. The coherence between preparatory contracts was threatened by the well-established jurisprudence of the Cour de Cassation. Since 2010, it has ruled that in the event of a dispute between successive
buyers of a same right on an immovable, the first party to publish is preferred even though he would have acted in bad faith.41

This principle prevented the notary from refusing to draw up the second sale although he would have known of a first promise to sell considered as a sale.42 In other words, a unilateral promise was given a stronger binding force than a bilateral promise to sell which, as one says, vaut vente (is considered as a sale).43 The coherence is finally restored with new article 1198, paragraph 2:

When two successive acquirers of rights bearing on the same immovable hold their right from the same person, the one who was the first to register his title of acquisition, written in authentic form, in the land register is given preference even though his right be posterior in time, on the condition that he be in good faith.

The second purchaser, publishing first and in bad faith, can no longer take advantage of land registration rules.

B. Validity

The validity of contract, as provided for by the Ordinance, refers to consent, legal capacity and representation, and content of the contract.

16 – Consent. To make the rule more accessible, article 1129 recalls the principle contained in article 414-1 of the Civil Code: only a sane individual can validly consent to a contract. This unnec-

42. M. Mekki, La réforme du droit des contrats et la pratique notariale, JCP N. 2015, 1111.
43. See C. CIV. art. 1123, para. 3; the sole knowledge by a third party of the unilateral promise to sell is grounds for nullity of the contract.
necessary reminder makes the Code unwieldy. Several minor modifications or precisions are worth considering. For those who may still have doubts, nullity for vice of consent is a relative nullity (article 1131). Error of law remains within the scope of error on substantial qualities, which, besides the legal uncertainty that it could create,\(^44\) does not comply with the jurisprudence of the *Cour de cassation*.\(^45\)

Fraud is now dealt with in articles 1137 and following, with a few noticeable rectifications. The concept of intentional concealment, included in the draft (article 1136) is enlarged in article 1137, paragraph 2. The draft referred to the intentional concealment of information that a party had to provide to the other “according to the law.” This modifier has been removed from the final version. This change must be welcome, since the duty to inform may exist outside of legislative sources. Indeed, the Ordinance refers to information of which the contracting party “knows its decisive character for the other party.” However, the addition was not needed, since this is already included in article 1130, paragraphs 1 and 2. A more significant modification may prevent some delaying tactics. The draft requirement of a “benefit gained” by the contracting party in case of fraud by a third party (draft article 1137), which seemed to imply that nullity could only be pronounced on the proof of an unbalanced contractual relationship, is removed. Article 1138, paragraph 2, excludes such an interpretation: fraud is also established “when it originates from a third party in collusion.”

Of all vices of consent, economic violence is the most controversial, which explains a number of significant modifications in relation with the original draft. It remains a subset of violence rather than becoming an autonomous vice of consent. The draft requirement of a “state of necessity,” deemed too vague, is removed. The

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Ordinance also satisfies a unanimous doctrinal request, adding the requirement of a manifestly excessive advantage obtained by abuse of economic dependence. Article 1143 (former draft article 1142) now provides that:

There is also violence when one party, taking advantage of the state of dependence in which the co-contracting party happens to be, obtains from him a commitment the latter would not have agreed to in the absence of such a constraint and derives from it a manifestly excessive advantage.

In addition, the Ordinance rightly removed the twenty-year stopping period mentioned in the draft. Indeed, the draft article 1143, paragraph 2, provided that “an action in nullity cannot be brought beyond twenty years from the day the contract was entered into,” words that no longer appear in new article 1144. The constitutionality of this provision may have been challenged by way of the priority preliminary ruling (*question prioritaire de constitutionnalité*) for denial of access to justice or may have undergone a conventionality control under article 6, paragraph 1 of the European Convention of Human Rights, on fair trial. Indeed, the stopping period may deprive a person from the right to sue even before the conditions of action are met.46

**17. Capacity and Representation.** Provisions on legal capacity are enriched with a reference to juridical persons. The new article 1145, paragraph 2 thus provides: “the capacity of juridical persons is limited to acts useful for the achievement of their purpose as defined by their corporate documents and to acts which are accessory to them, in compliance with the rules applicable to each one of

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them.” The provisions on incapacity also make a few minor changes.47

Rules applicable to representation are clarified. Article 1158, paragraph 1, provides that:

A third person who is in doubt as to the extent of the authority of a conventional representative on the occasion of an act he is about to conclude can demand in writing that the person represented confirm, within a time period he sets and which must be reasonable, that the representative has the authority to conclude the act.

One may regret that both the draft and the final text did not make the “interrogatory action” provided for in this article contingent to situations of ostensible authority (creation of an appearance) as provided in new article 1156. The Ordinance improves the modalities of the interrogatory action. First of all, instead of requiring a response within a reasonable time (former draft article 1157) of the interrogated principal, the new article 1158, paragraph 1, imposes on the third party to fix a period of time that must be reasonable. The drafting is improved, even if reasonableness may give room to debate. The Ordinance also removes controversial wording (“apparent terms”). Under article 1158, paragraph 2, “[t]he writing mentions that for lack of an answer within this time period, the representative is considered to be authorized to conclude this act.” Ostensible authority is addressed in article 1156, which introduces the théorie de l’apparence in the Civil Code: “An act made by a representative without authority or beyond his authority is ineffective against the person represented, unless the third person with whom he contracts legitimately believed that the representative had authority, particularly on account of the behavior or statements of the represented.”

47. See C. civ. art. 1149, para. 2: “The mere fact that a minor has made a declaration of majority does not constitute an obstacle to nullification.” See also C. civ. art. 1152, 3°, this provision adds persons against whom prescription runs: “a person subject to an order empowering their family to act on their behalf.” A few other draft provisions relating to donations have been abandoned; see Draft Ordinance, supra note 5, at arts. 1151-1, 1151-2.
The addition of the adverb “particularly,” absent from draft article 1155, affords broader judicial discretion.

18. Content of the Contract: Object. The content of the contract is probably the most controversial part of the reform especially due to the removal of the concept of cause, upheld in the final text of the Ordinance. Subsection 3 is substantially rich and the modifications brought by the final Ordinance are material. Regarding the object, the terminology is improved. Rather than having a contract that cannot derogate from public order “by its content,” we end up with a contract that “cannot derogate from public order either by its stipulations or by its purpose, whether or not the latter was known by all the parties” (new article 1162). The Ordinance also explains what a determined act of performance is. A useful addition is made at the end of the draft article 1163, with paragraph 3 now providing that: “An act of performance is determinable where it can be deduced from the contract or by reference to usage or the prior dealings between the parties, without the need for further agreement.”

19. Price. Provisions Concerning Price are Modified in Depth. The question of the unilateral determination of the price no longer deals with successive performance contracts, but is now limited to framework contracts, governed by the new article 1164.

48. See, e.g., M. Fabre-Magnan, Critique de la notion de contenu du contrat, REVUE DES CONTRATS 2015, 639; E. Savaux, Le contenu du contrat, JCP 2015, 20 et seq. (no. 21).
50. Some articles were moved and now have a coherent place within the future Civil Code. This includes former article 1170 on the prohibition of the equivalence of “obligations” (now called “acts of performance” in the new text), which closed subsection 3 on content. It now appears within article 1168.
The language of the article matches its spirit: “In framework contracts it may be agreed that the price will be fixed unilaterally by one of the parties, provided that party be in a position to explain the reason for the amount in case of dispute.” The words “explain the reason” replace the stronger “justification,” which appeared in the draft. Similar wording is used in article 1165 on contracts for the supply of services. Still, article 1164 raises a series of questions. Must the unilateral determination of price necessarily be based on a contractual clause? Should the unilateral determination of price be limited to framework contracts, as implied in the report submitted to the President of the Republic? Lastly, the new text excludes the possibility of judicial revision. Under article 1164, paragraph 2: “In case of abuse in the fixing of the price, the court may be called upon by a party to grant damages and, where applicable, to decide on the dissolution of the contract.” This limitation of judicial power in a field narrowly limited to framework contracts may be regretted. One notes the removal of the controversial reference to “market prices,” a notion said to raise concerns in economic circles, which seems exaggerated in the author’s opinion. The draft article 1165 is totally rewritten and now follows the same regime as framework contracts. The new article 1165 provides that:

In contracts for the supply of services, in the absence of an agreement by the parties before performance, the price may be fixed by the obligee, provided he can explain the reason for the amount in case of a dispute. In the case of abuse in the fixing of the price, the court may hear a claim for damages.

The judicial power of revision is also removed from contracts for the supply of services. This limitation to the power to revise the contract is not in harmony with the creation of judicial revision powers in the case of imprévision (article 1195)!
20. Abusive Clauses.\textsuperscript{52} As predicted, in response to the doctrinal outcry triggered by the original draft,\textsuperscript{53} the Ordinance limits the scope of abusive clauses to adhesion contracts (former article 1169, now article 1171), as redefined more broadly in the preliminary provisions. This restriction will not have a large impact, as the provision primarily addresses “significant imbalance.” Article 1171 provides:

Any term of a contract of adhesion that creates a significant imbalance in the rights and obligations of the parties to the contract is deemed unwritten. The evaluation of the significant imbalance bears neither on the principal object of the contract nor on the adequacy of the price in relation to the performance.

Judges will now have to separate the “truly” negotiated contracts (contrats de gré à gré) from the “falsely” negotiated ones. Many will be tempted to fake a negotiation, for instance by the exchange of purely formal emails, in order to avoid having the deal characterized as a contract of adhesion, an issue that will no doubt become crucial. Former Civil Code article 1107 is reenacted in article 1105, offering a legal basis to conciliate article 1171 with special rules such as articles L.132-1 of the Consumer Code and L. 442-6, I, 2\textsuperscript{o} of the Commercial Code. However, a number of issues remain. General and special rules may not be incompatible, since they are based on different requirements and have distinct consequences. It is especially true of aforesaid article L.442-6, I, 2\textsuperscript{o}, which has stricter

\textsuperscript{52} See Draft Ordinance, \textit{supra} note 5, at art. 1168. Draft article 1168 becomes article 1170 and is not modified: “Any contract term which deprives an obligor’s essential obligation of its substance is deemed not written.” As already suggested, the interpretation should go beyond clauses limiting the liability of one party, so as to include reclamation clauses, divisibility clauses . . . . The report submitted to the President of Republic upholds this interpretation, noting that it will apply, “especially” to clauses limiting liability. Note that some authors suggest to limit the scope of the new article 1170, making it subsidiary to article 1171 on abusive clauses: L. Gatton, \textit{Les clauses abusives en droit commun des contrats}, D. 2016, 22.

conditions; behavior requirements are added to the significant imbalance, and a different remedy is provided, namely civil liability. Is it then possible, in one action, to obtain the eradication of the abusive clause under article 1171 and an award of damages under article L.442-6, I, 2° of the Commercial Code? In any case, regarding the procedure, one may primarily use article L.442-6, I, 2° and article 1171 as an alternative. Furthermore, the Ordinance eliminated this cumbersome notion of “removal” to retain a more traditional notion of “deemed unwritten.” Lastly, as there is no more reference to the “contracting party’s claim,” one may wonder whether others may bring an action (third parties: non-profit organizations, government entities?) and about judicial powers. This opening may warrant greater effectiveness.

C. Sanctions

21. Nullity. Though the provisions on sanctions did not generate many comments, they remain important. Some minor cleanup has been made to the draft. The interrogatory action has been kept: “One party can, in writing, ask the other party who could claim the protection of the nullity either to confirm the contract, or to bring an action in nullity within a six-month time under pain of foreclosure. The ground of nullity must have ceased” (article 1183). The combination with the stopping periods should now be settled by reference to new article 1105. Special rules supplant general rules. The interrogatory actions could be excluded when the causes of nullity come from public order provisions. Retroactivity in case of nullity, which had been removed in the draft, is reintroduced in the final version. Now article 1178, paragraph 2 provides that: “An annulled contract

54. G. Wicker & H. Boucard, Les sanctions relatives à la formation du contrat, JCP 2015 (no. 21, 32 et seq.).
55. See C. CIV. art. 1183; interrogatory action contained in article 1183 removes any reference made to “apparent terms” for a mere written notice that “set out expressly that unless the action for nullity is brought within a period of six months, the contract shall be deemed to have been confirmed.”
is deemed never to have existed.” One may regret the absence of a provision regarding opposabilité\(^{56}\) (effectiveness against third parties\(^{57}\)) and on conversion by reduction.\(^{58}\) Article 1179, paragraph 2, adds an important word to determine the scope of relative nullity: nullity is relative “when the rule violated has for its sole object the protection of a private interest.” The addition of “sole” responds to those who could have thought that the distinction between general interest and private interest was sometimes problematic especially where the harmed interest relates to a fundamental right. By using this term, article 1179, paragraph 2, seems to include within the category of absolute nullity cases where the rule infringed protects both a private interest and the general interest. Another rectification of terminology, which has significant practical consequences, is contained in article 1181, paragraph 1. Former article 1181 provided for relative nullity “claimed” by the one protected by the law. The new version provides that: “The relative nullity can be claimed only by the party the legislation intends to protect.” Unlike the term “invoked” used in the draft, the term “claimed” does not exclude the judicial power to raise ex officio a case of relative nullity. At present, only a party can ask for relative nullity. The judge can raise a case of relative nullity, in compliance with civil procedure rules (especially the subject matter of the dispute and the adversarial principle). Article 1184 (former draft article 1185) now includes a most welcome second paragraph: “The contract is upheld when legislation considers the clause unwritten or when the aims of the disregarded rule require that the contract be upheld.” The purpose is twofold. On the one hand, it points to the difference of regime between a clause deemed unwritten and the partial nullity of a clause. On the other hand, and more importantly, it sets aside the case where the decisive

\(^{56}\) L. Sautonie-Laguionie, Articles 1178 à 1187 : l’absence de l’inopposabilité aux côtés de la nullité et de la caducité, REVUE DES CONTRATS 2015, 767.  
\(^{58}\) Compare with Terré Draft Reform, supra note 38, at art. 87.

A very important notion was missing in the draft and now appears in the final version: the defense of nullity. Article 1185 provides that: “The exception of nullity does not prescribe if it concerns a contract that has not received any performance,” in compliance with the jurisprudence of the \textit{Cour de cassation}.

\textbf{22. Caducity}. Article 1186 has been modified by the final Ordinance, even if it remains within a section on sanctions that cannot be linked to the essence of that technique.\footnote{J.-B. Seube, \textit{L'article 1186 du projet : la caducité}, REVUE DES CONTRATS 2015, 769. Caducity is neither a sanction, nor an institution of the formation of contract.} First, the case where “an external element to the contract but necessary to its enforcement is missing” is no longer mentioned. This convoluted formula most likely referred to the case of the suspensive condition, but was not precise enough; its removal is fortunate. As to caducity in groups of contracts,\footnote{S. Bros, \textit{L'interdépendance contractuelle, la Cour de cassation et la réforme du droit des contrats}, D. 2016, 29.} article 1186, paragraph 2, provides that:

When the performance of several contracts is necessary to the achievement of the same overall operation and when one of them fails, the contracts the implementation of which is made impossible by this failure as well as those contracts for which the implementation of the failed contract was a determinative condition of the consent of a party lapse.

This formula is less restrictive than the former one, which provided for the impossibility to perform another contract from the group of contracts or the lack of interest in the performance of another contract from the group of contracts. The difficult notion of interest, fortunately, disappears. Then, the article deals with two
cases of cascading retroactive termination. The first one, objective, when the extinction of a contract from the group of contracts makes impossible the performance of another from that same group. A second one, subjective, when the lapsed contract was “a determinative condition of the consent of a party.” Indeed, caducity in groups of contracts does not only concern structurally interdependent contracts, but also interdependent contracts by the will of the parties. Then, the parties have the possibility to extend the notion of “interdependent” groups of contracts to cases defined by means of a contractual clause that must be clear, precise, and unambiguous. Article 1186, paragraph 2, suffered no modification: “however, caducity only operates where the contracting party against whom it is invoked knew of the existence of the general transaction at the time he gave his consent.” This wording may be problematic, especially regarding divisibility clauses. Indeed, if the contracts are “structurally interdependent” (the disappearance of a contract making it impossible to perform another) and if the third party knows of the general transaction (e.g. financial leases), cascading retroactive termination will occur even if a divisibility clause had been incorporated in the contract. Lastly, the text is silent on the retroactivity of caducity, allowing the court to assess the amount of restitutions on a case-by-case basis, as underlined in the report submitted to the President of Republic.

III. EFFECTS OF CONTRACT

23 – The Reform Deals with the Effects of the Contract Between the Parties and on Third-Parties.62 Chapter III dealing with interpretation of contract (articles 1188 to 1192-1) is not discussed here. Article 1190 includes an important provision: “In case of doubt, a mutual agreement is interpreted against the obligee and in

favor of the obligor, and the contract of adhesion is interpreted against the party who proposed it.” 63

A. Effects Between the Parties64

24 – Hardship: From Dissolution to Revision due to Unpredictability. French law was known for its strict adherence to pacta sunt servanda even in those cases where, due to an unforeseeable event, performance of the contract becomes excessively onerous for one of the parties. Except in those cases where outside circumstances made performance impossible (force majeure), parties remained bound by promised performance.65 The initial draft article 1196 made room for a duty to renegotiate the contract in such circumstances, to which the final text adds a possibility of termination in case of failure to renegotiate within a reasonable time. The new article 1195 of the Civil Code now reads:

Should a change in circumstances that was unforeseeable at the time the contract was concluded make its performance excessively onerous for a party who had not agreed to assume the risk, that party may ask the other party that the contract be re-negotiated. While the negotiations are ongoing the party continues to carry out its obligations.

In the event of a refusal or a failure to re-negotiate, the parties may agree that the contract will be dissolved on the date and under the conditions they lay down, or they may ask by common agreement that the court proceed with its adaptation.

If they fail to reach an agreement within a reasonable time, the court may, at the request of one party, revise the contract or put an end to it, at the time and under the conditions the

64. O. Deshayes, Les effets du contrat entre parties, JCP 2015 (no. 21, 43).
court will determine.

The process is made clear. If there is no renegotiation or in case of failure to renegotiate, the parties may terminate the contract as agreed or ask the court to proceed to its adaptation. In case of failure to reach an agreement to re-negotiate, terminate, or adapt the contract, the matter can be referred to the court.

The draft gave the court the power to “terminate” the contract. The Ordinance adds the power to revise. Finally, French law makes provision for revision of contracts in case of hardship. The door is now wide open.66 The scope of the revision remains to be determined, probably in accordance with the legitimate expectations of the parties, as contemplated in the Terré draft reform.67

B. Effects of Contracts on Third Parties

25 – Promise for Another and Stipulation for Third Parties.

For one thing, it is fortunate to have modified draft article 1204, which is now article 1203: “One may contract in one’s name only for one-self.”68 In this new version, the expression “in general,” no longer appears, and neither does the prohibition of stipulation for third parties; this makes no sense since article 1205 (former draft article 1206) stated the opposite: “One may stipulate for another.”69

Regarding third parties, the promise for another,70 and stipulation for a third party, no significant change has been made. Minor ambiguities and inconsistencies detected in the draft have been fixed.

66. R. Cabrillac, L'article 1196 : la porte entrouverte à l'admission de l'imprévision, REVUE DES CONTRATS 2015, 771.
67. See Terré Draft Reform, supra note 38, at art. 92: “the court can set about the contract considering the legitimate expectations of the parties.”
68. “In general” is removed; it was contradicted by the provisions that followed.
69. O. Deshayes, Article 1204 : la prohibition des contrats pour autrui, REVUE DES CONTRATS 2015, 775.
Regarding the promise for another (*promesse de porte-fort*), article 1204 provides:

One may promise a performance by a third party. The promisor is released of any obligation when the third party accomplishes the promised performance. He may otherwise be found liable in damages. When the promise has for object the ratification of an undertaking, there is retroactive validation from the date of the promise for another.

As for the stipulation for a third party, it has been aligned on the provisions concerning the formation of contract.

According to the draft article 1207, paragraph 2, the stipulation was irrevocable once the author or the promisor had knowledge of the beneficiary’s acceptance. To ensure consistency with the theory of reception enshrined in article 1121, it is provided in article 1206, paragraph 3, that: “The stipulation becomes irrevocable at the moment when the acceptance reaches the stipulator or the promisor.”

**C. Duration**

**26 – Duration of Contract.** Provisions on duration of contract needed to be completed\(^7\) and this has been achieved. Firstly, according to article 1210, “[p]erpetual commitments are prohibited.” Article 1210, paragraph 2, clarifies how they can be ended, a point on which the draft article 1211 was silent. The contract can be terminated under the same conditions as a contract of indefinite duration: “Either contracting party may terminate them under the conditions provided for contracts of indeterminate duration.”

As for contracts of indefinite duration, the draft article 1212 could be read as ruling out the possibility of a contractual notice. Article 1211 now unambiguously provides that: “[w]here a contract

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\(^7\) A. Etienney de Sainte Marie, *Article 1212 : la résiliation du contrat à durée indéterminée*, REVUE DES CONTRATS 2015, 777.
is concluded for an indeterminate duration, each party may terminate it at any time upon giving notice provided in the contract or, if the contract does not so provide upon giving reasonable notice.”

The question remains whether the contractual notice also has to be reasonable. In this sense, the wording “in its absence” is ill-formulated but should be inconsequential since the jurisprudence generally verifies that there is a sufficient notice. One should also note the abandonment of paragraph 2 of the draft article 1212 prohibiting abusive termination. One should not, however, conclude that breaking off a contract of indefinite duration became a discretionary right.

The doctrine of abuse can be applied without textual basis. In addition, the draft article 1212, paragraph 2, alluded to liability in case of abuse, a weak sanction compared to the re-instatement or continuation of the abusively terminated contract. Finally, one may question the very existence of article 1212 dealing with contracts of definite duration: “[w]here a contract is for a determinate duration, each party must perform it until its term arrives.” Too general and useless, reminiscent of the binding force of contract, this article may in the future turn into a strong argument against the efficiency of anticipatory breach clauses.

D. Assignment of Contract

27 – Assignment of Contract. Assignment of contract, initially part of the general regime of obligations, is moved to the section on effects of contract, between the paragraphs on duration and non-performance of contract. This was recommended by Professor Laurent Aynès, a member of the Terré taskforce, who is of opinion that assignment of contract is related neither to assignment of right nor

72. L. Aynès, La cession de contrat, DR. ET PATR. 2015, 249; R. Boffa, Les opérations translatives dans le projet d’ordonnance, GAZ. PAL. 4 June 2015, 8; see also C. Barrillon, La cession de contrat en voie de consécration, GAZ. PAL. 9 June 2015, 15.
assignment of debt. It relates to effects of contract, precisely between “duration of contract” and “nonperformance of contract.”

This formal disconnection between assignment of contract and assignment of right and debt strengthens the idea that the notion is fully autonomous, as asserted in the report to the President of the Republic. Once neglected in the draft Ordinance, assignment of contract is rightly defined as the assignment of the status of party to the contract (new article 1216). The final version clarifies its legal regime. Article 1216 provides that the consent of a contracting party may be:

Given in advance, notably in the contract between the future assignor and the assigned party, in which case assignment is effective against the assigned party when he is notified of the contract concluded between the assignor and the assignee or when he takes cognizance of it.

This anticipatory consent gives legislative force to earlier jurisprudence. Just like the assignment of right, the assignment of contract is null if it is not in writing (article 1216, paragraph 2). Articles 1216-1 to 1216-3 deal with the legal regime of assignment. If the person subject to assignment has not expressly consented to discharge the assignor, a discharge that would only be effective for the future (article 1216, paragraph 1), the assignor remains the “guarantor” of the assignee’s debts.

Such an equivocal term left room for interpretation. The new article 1216-1, paragraph 2 abandoned it: “In its absence, and except for a contrary stipulation, the assignor is solidarily bound for the performance of the contract.” According to article 1216-2, the assignee may use against the person, subject to assignment, the defenses inherent to the debt such as nullity or termination, yet without using defenses personal to the assignor.

Making a difference between defenses inherent to the debt and personal defenses, the implementation of which is controversial when applied to suretyship, could be an issue in the future. Consider the case of nullity, conceived by the text as a defense inherent to the
debt: does it remain a defense in case of nullity for fraud whereas, when applied to suretyship, it is considered an exception strictly personal to the debtor?73

As for the person subject to assignment, he can set up against the assignee, all the defenses, without distinction, which he could have set up against the assignor (article 1216-2, paragraph 2). Finally, if the assignor is not discharged by the person subject to assignment, existing securities remain in place. If the assignor is discharged, the securities only remain in place with the agreement of third-party guarantors. If the assignor is discharged, solidary co-debtors remain liable to the extent which remains after deduction of his share of the debt (article 1216-3). This new regime of contract assignment is welcome, as it may reduce the volume of litigation.

E. Nonperformance

28 – Contractual Nonperformance.74 Provisions dealing with “remedies” for nonperformance of contract form the last section of the chapter on contract. Changes were numerous, although for some of them it feels like they stopped midstream.75 For one thing, some terminological corrections should be highlighted. Whereas the draft used the word “remedies,” the Ordinance sticks to “sanction” (article 1217, paragraph 2). The word remedy obviously has a common

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74. The exception for nonperformance of articles 1219 and 1220 was not modified, except for the substitution of the word “performance” to “obligation,” which is less precise.

75. M. Mekki, Les remèdes à l’inexécution dans le projet d'ordonnance portant réforme du droit des obligations, GAZ. PAL. 30 Apr. 2015, 37.
law origin\textsuperscript{76} and, more importantly, it would not fit in with the content of section 5, which includes both remedies and actual sanctions.

The draft article 1217 featured a first scenario allowing a party to “suspend the performance of one’s own obligation.” The new text specifies that a party can “refuse to perform or suspend performance of his own obligation.” Terminological fine-tuning continues in article 1218 regarding force majeure, with language alluding to “temporary prevention” rather than “the non-performance (which) is not irreversible.”

Finally, in case of temporary prevention, the suspension does not apply to the contract but to the performance of the obligation. In substance, the suspension can be excluded in case of temporary prevention, if such a suspension could lead to a delay so important that it would justify termination by judgment. Otherwise, the draft and final Ordinance remain identical.

**29 – Specific Performance in Kind.** The principle that contractual obligations are to be performed in kind remains sacrosanct. However, the draft article 1221 included a limit when the cost of specific performance would be “manifestly unreasonable,” which triggered a doctrinal controversy.\textsuperscript{77} This obstacle to specific performance was not removed,\textsuperscript{78} but the wording was corrected and completed. The Ordinance requires a “manifest disproportion,” which is more in line with the concept of abuse of right, as acknowledged in the report submitted to the President of the Republic. In addition, this must be manifest disproportion “between its cost to the obligor and its interest of the obligee.”


\textsuperscript{78} About this criticism, see Y.-M. Laithier, *Le droit à l’exécution en nature: extension ou réduction?*, in RÉFORME DU DROIT DES CONTRATS ET PRATIQUE DES AFFAIRES 97 et seq. (P. Stoffel-Munck ed., Dalloz 2015); Mekki, *supra* note 75, at no. 10.
The author of the present report regards this as a dangerous limitation to the binding force of a contract, and is concerned by the reference made to the obligee’s interest when applying what will be a balance of interest approach. Assessing the cost for the obligor is the easy part of the test, but what do we mean by the “obligee’s interest?” Are courts to take into account positive and negative interests? Are they to take into account solely interests internal to the contract or must they add external interests too? Does this solely relate to the actual amount of the damage caused? Must it take into account the satisfaction caused by a monetary award? What about taking into account the project that the creditor wanted to achieve?

If the obligee’s interest is the key notion, should not the obligee be under the duty, in the future, to clearly stipulate what his relevant interest is in the contract? To what extent would the judge be bound by such provisions? Could the bad faith of the obligor and possibly of the obligee be taken into account when deciding for or against specific performance? Lastly, could parties exclude such an option and require in the contract that any default could lead to specific performance, regardless of the cost? The spirit of the revision, as expressed in the report submitted to the President of the Republic, is to treat all provision not made expressly imperative as suppletive. All this generates many questions.

Article 1222, as finalized in the Ordinance, marks a setback of unilateralism and the return of court adjudication. Once the obligor has been put in default, the obligee may contract in view of performance by another, though at a reasonable cost, as was provided in

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81. M. Faure-Abbad, Article 1222 : la faculté de remplacement, REVUE DES CONTRATS 2015, 784.
pre-revision articles 1143 and 1144 of the Civil Code. However, if there is a need to destroy what had been performed in violation of the obligation, such destruction must be previously authorized by the court. The report to the President of the Republic points to the “irreparable consequences of such a destruction” and to the need to “avoid abuse on the part of the obligee.”

30 – Price Reduction. This setback from unilateralism can also be observed regarding price reduction, governed by article 1223. In the event of defective performance, the obligee may accept such performance and request a price reduction, provided that the obligor has been put in default. The original draft allowed the obligee to act unilaterally.

Article 1223 is built on an alternative. If the obligee has not paid yet, he can give notice to the obligor of his intent to reduce the price. One understands that in such a case the court would only be called in case of disagreement on the reduced price. If the obligee has already paid, then he must “request” a price reduction from the other party. One may imply that failing the other party’s consent, the obligee will pray the court to force the contracting party to restore part of the price.

31 – Ways to Terminate the Contract. Article 1225 deals with dissolution clauses (clauses résolutoires). Such a clause must “specify” (rather than “designate,” the term used in the draft) the commitments whose nonperformance will result in the termination of the contract. The earlier wording was conducive of itemization and some worried that it may preclude the stipulation of “catch-all clauses,” though one is not sure the new wording will help. Under article 1225, paragraph 2, dissolution presupposes that the obligor has been put in default in vain, unless it was agreed that the contract would be dissolved by the mere effect of nonperformance. Express reference must be made to the dissolution clause when the obligor is put in default. One may regret some lack of coordination between
the dissolution clause and dissolution upon notice. Is the obligee given an option or must he necessarily abide by the terms and conditions of the termination clause?

Article 1226 makes provision on dissolution by notification. There is no need to put the obligor in default in case of emergency. One may regret that the exemption is not more general. One should for instance dispense the obligee from putting the obligor in default when it is clear that performance has become impossible. According to article 1226, paragraph 2, the formal default notice must “expressly mention” that if the obligor fails to perform the obligation, the obligee will have the right to dissolve.

Regarding judicial dissolution, article 1227 states that: “Dissolution may in any event be claimed in court proceedings.” The adverb “always” has been dropped from the draft. The new wording connects the various dissolution methods. Even if a dissolution clause exists and even if dissolution is possible with notice, the judicial dissolution remains a possible option. This provision does not prevent anticipatory waiver of judicial dissolution clause, as expressly stated in the report to the President of the Republic.

According to article 1228, the court can acknowledge or declare the full dissolution of the contract or order its performance, with the possibility of granting additional time to perform, or simply award damages. Article 1229 adds valuable details regarding the effects of dissolution and is more specific than the draft version. Paragraph 3 provides the following:

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82. See Report Presented to the President, supra note 3; termination out of court is “an autonomous option given to the oblige, victim of the nonperformance, who from now on will have the choice between two termination options, judicial, or unilateral, especially failing an express termination clause.” Does this mean that he will have the ability to choose termination by notification including when such a termination exists? We might think that.


84. See, e.g., LA. CIV. CODE art. 2016.
Where performances exchanged would only be of use upon the complete performance of the contract terminated, the parties must restore the whole of what has been received. Where the performances exchanged are of use as the reciprocal obligations are performed, restitution is not due for the period preceding the last performance that did not receive a counter-performance.

In this case, dissolution is no longer called résolution but résiliation. The word résolution is used where there is full restoration. Where there is no restoration for the time prior to the last act of performance, which did not receive something in return, it is a résiliation.85 This disconnects retroactivity and restoration. The latter is now governed by the Code.86

32 – Reparation of Damage. Subsection 5 deals with the reparation of damage resulting from nonperformance of a contract. Article 1231 of the Ordinance clarifies the former article 1146 of the Civil Code: “[u]nless nonperformance is final, damages are due only if the obligor has previously been put in default to perform his obligation within a reasonable time.” This has the effect of exempting the obligor of the obligation to pay moratory damages regarding this additional reasonable time.87 A same exemption is provided regarding the implementation of the penalty clause under article 1231-5, paragraph 5. Then, the Civil Code now enshrines, within the new article 1231-3, the equivalence of gross negligence and fraud: “[t]he obligor only owes damages that were foreseen or could have been foreseen when the contract was concluded, unless the nonperformance occurred through gross fault or fraud.”

33 – Conclusion: Prepare your Clauses. The new provisions introduced into the Civil Code by the Ordinance of February 10,

85. See C. CIV. art. 1230; it provides that dissolution does not impact clauses relating to dispute resolution or those meant to be effective even in case of dissolution, such as confidentiality clauses and non-competition clauses. The effect of dissolution on clauses excluding or limiting liability remains an issue.
86. See Report Presented to the President, supra note 3.
87. Compare with L.A. CIV. CODE art. 1989: “[d]amages for delay in the performance of an obligation are owed from the time the obligor is put in default....”
2016 will no doubt generate questions and sometimes disapproval. The ongoing parliamentary ratification process may bring changes here and there, but overall it is time to look ahead and comply with the new contract law, while figuring out possible adjustments, by way of contract clauses.
THE INTERACTION OF GOOD FAITH WITH CONTRACT PERFORMANCE, DISSOLUTION, AND DAMAGES IN THE LOUISIANA SUPREME COURT

Jumoke Joy Dara* and Olivier Moréteau†

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Keywords: good faith, contract law, contract performance, contract dissolution

It is a general rule, in civil law jurisdictions, that contracts must be performed in good faith. However, the fundamental nature of the good faith principle remains a matter for scholarly debate. The case of Lamar Contractors, Inc. v. Kacco, Inc. illustrates how the principle that all contracts must be performed in good faith interacts with contract dissolution and allocation of damages.

I. BACKGROUND

In this case, Lamar Contractors, Inc. was a general contractor on a construction project. Lamar hired a subcontractor named Kacco, Inc. The subcontractor was to provide metal framing and drywall

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1. Lamar Contractors, Inc. v. Kacco, Inc. 2015-1430 (La. 05/03/16), 189 So. 3d 394 (2016).
work for the construction project. The subcontractor contract included a “pay-if-paid” payment provision; it allowed Lamar ten days to give payment to the subcontractors after receipt of the payment from the owner.

Kacco began work on the project in October 2010, but had regular problems providing manpower and paying for supplies. On November 9, 2010, a Lamar representative sent a certified letter to Kacco expressing concerns regarding the timely completion of the project. Kacco responded by email and explained that the account had been put on hold. Additionally, Kacco was unable to pay a portion of the balance due to insufficient funds. It requested that Lamar issue a joint check to Kacco and the supplier. Lamar agreed, on the condition that Kacco pay a ten percent back charge for the cost of purchased materials. Kacco refused and during the waiting period was able to pay the debt down; it then continued to work through the months of November and December of that same year. An invoice was submitted for the forty-five percent of work completed, and Lamar made payment prior to receiving funds from the owner.

On January 13, 2011, Lamar sent notice addressing the same concerns regarding Kacco’s inability to perform the work required under the contract. Kacco asked Lamar to be allowed to finish the job. Kacco completed the metal framing and stud work; however, upon inspection of the work, Lamar found deficiencies.

Later, on January 31, 2011, Kacco notified Lamar that it was awaiting payment for the December invoice to pay the supplier and order the required materials to complete the work. Lamar had received payment from the owner on January 26, 2011, but was not required, under the contract with Kacco, to remit payment until ten business days later, on February 5, 2011.

Lamar sent notice on February 3, 2011, to Kacco stating that the subcontract would be terminated if Kacco did not provide sufficient manpower and materials within forty-eight hours. Kacco did not re-
spond or return to the job site. Two days later, by a letter dated February 5, 2011, Lamar declared the contract terminated, and subsequently hired another subcontractor to complete the work.

Lamar sued Kacco for failure to perform the contract. Kacco filed a reconventional demand against Lamar for failure to pay Kacco for the work performed under the contract, alleging that their failure to pay caused them to fail to perform the contract. The district court ruled that Kacco failed to perform the contract and was liable to Lamar, awarding damages in the amount of $24,116.67 plus interest and attorney’s fees. Additionally, the district court entered a judgment in the amount of $60,020 plus interest in favor of Kacco on the reconventional demand. The judgment notes that Kacco failed to provide sufficient materials to complete the work. However, Lamar negligently withheld payments for completed work by Kacco, which contributed to Kacco’s inability to perform. The ruling was based on Louisiana Civil Code article 2003. Lamar appealed the judgment, which was affirmed in its entirety. Upon Lamar’s application, certiorari was granted, thereby allowing the Louisiana Supreme Court to pronounce for the first time on article 2003 after the 1984 revision of the law of obligations.

II. DECISION OF THE COURT

The Supreme Court limited its ruling to answering the sole issue presented in the appeal: "whether the district court erred in reducing Lamar’s damages for breach of contract [sic] based on a finding that Lamar’s negligence contributed to Kacco’s breach of the contract.

An obligee may not recover damages when his own bad faith has caused the obligor’s failure to perform or when, at the time of the contract, he has concealed from the obligor facts that he knew or should have known would cause a failure.
If the obligee's negligence contributes to the obligor's failure to perform, the damages are reduced in proportion to that negligence.
As the judgment states, “our sole focus is on whether Lamar’s actions during the relevant time frame contributed to that breach for purposes of La. Civ. Code article 2003.” Indeed, looking into jurisprudence based on pre-revision article 1934, the predecessor to article 2003, the Court concludes that “an obligor cannot establish an obligee has contributed to the obligor’s failure to perform unless the obligor can prove the obligee itself failed to perform duties owed under the contract.”

The Court rightly restates the requirement in article 2003 paragraph 2 when saying that “Kacco must demonstrate that Lamar failed to perform its obligation under the contract, which in turn contributed to Kacco’s breach of the contract.” The Courts, then, reviews what it describes as the “undisputed facts”:

On January 31, 2011, Kacco notified Lamar that Kacco was waiting on the payment of its December invoice to pay the supplier and order the necessary supplies to complete the punch list. Lamar had received payment from the owner on January 26, 2011. However, pursuant to the terms of the contract, Lamar was not required to make payment to Kacco until February 9, 2011, ten business days later.

With respect, the Court should have noted February 5 if computing correctly, a detail that has its importance. The following paragraph also needs to be quoted for its full terms:

On February 3, 2011, during this ten-day period, Lamar advised Kacco that Kacco’s contract would be terminated if Kacco did not provide sufficient manpower and materials within forty-eight hours. Kacco did not respond to Lamar or return to the job site. Lamar officially terminated Kacco’s subcontract in a letter dated February 5, 2011. Thus, the contract was terminated on February 5, 2011, before Lamar’s

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4. Lamar, 89 So. 3d at 397. Note the confusing usage of the common law terminology “breach of contract” rather than the civil law “failure to perform.”
5. Id.
6. Id. at 398.
7. Id.
8. Id.
9. Id.
obligation to make payment to Kacco became due on February 9, 2011.\textsuperscript{10}

Based on the Court’s reading of the facts, assuming that the contract was validly terminated on February 5, given the fact that performance by the obligee was due on February 9, the Court could rightly conclude the following:

Under these circumstances, it is clear Lamar did not violate any obligation owed under the contract to make payment to Kacco and could not have negligently contributed to Kacco’s breach of its obligations under the contract. Accordingly, the district court erred in applying the provisions of La. Civ. Code art. 2003 to reduce Lamar’s award of damages.\textsuperscript{11}

Therefore, the judgment of the court of appeal was vacated and the case was remanded to the district court for the sole purpose of entering an amended judgment in favor of Lamar, for the full amount of damages and with no reduction for contributory negligence.

However, the problem is that based on the facts as they appear in the judgment, nothing (other than the unilateral declaration by Lamar) warrants that the contract had been officially terminated on February 5, and this date comes close to the precise moment when Lamar actually owed payment to Kacco. Though the Court seems, on the face of its reading of the facts, to have correctly applied the rule in article 2003 paragraph 2, a closer look shows the following:

- That there was valid termination of contract can be doubted, absence of termination supporting the challenged judgment;
- If the contract had been validly terminated, the proximity of the date of termination with the due date of performance by the obligee casts doubts as to the obligee’s good faith, though this may be mitigated by the silence and inaction of the obligor.

\textsuperscript{10} Id. (emphasis added).
\textsuperscript{11} Id.
This case offers a most interesting setting to revisit the interaction of good faith with contract performance and termination and its impact on court allocation of damages.

III. COMMENTARY

This commentary will first discuss the impact of the obligee’s good faith in contract performance and its impact on the allocation of damages, assuming that the Supreme Court was legally justified in concluding that the contract had been terminated. Revisiting the issue of contract dissolution warrants further analysis of the obligee’s duty of good faith.

A. The Duty of Good Faith in Contract Performance

Every contract imposes a duty for the contracting parties to act in good faith. Like most civil codes, the Louisiana Civil Code does not define good faith. Article 1759 states that, “[g]ood faith shall govern the conduct of the obligor and the obligee in whatever pertains to the obligation;” and article 1983 adds that “[c]ontracts must be performed in good faith.”

The Louisiana Supreme Court assumes that Lamar has been acting in good faith all along the performance of its contract with Kacco, its subcontractor. A “pay-if-paid” provision in the contract afforded Lamar ten days to remit payment to its subcontractor after receipt of payment from the owner of the building project. However, the record shows that Lamar paid Kacco ahead of time when Kacco had accomplished forty-five percent of the work, since it had been made aware that Kacco’s delay was due to Kacco’s inability to provide manpower and pay for supplies. This portrays Lamar as a cooperative obligee, acting in a way that favors contract performance by the obligor, yet without ever renouncing its contractual right to full performance.
The term good faith has more than one definition.\textsuperscript{12} Citing to French sources and to § 2.103(b) of the Uniform Commercial Code, the late Saúl Litvinoff noted that “it consists of honesty in a party’s contractual behavior, or loyalty to, or collaboration with, the other party.”\textsuperscript{13} He then observed:

The fact cannot be ignored, however, that as much difficulty may be encountered in defining honesty or loyalty as in defining good faith, which turns those definitional attempts into mere substitutions of words that fail to provide the clarity warrantedly expected from either a definition or an explanation.\textsuperscript{14}

Yet, in the context of contract performance, the law attaches significant consequences to the existence or absence of good faith. Lamar’s good faith as obligee is essential in its attempt to recover contract damages. Not that it needs to prove it (good faith is presumed throughout the civil law tradition),\textsuperscript{15} but because on a show of the obligee’s bad faith and by proving that this bad faith caused the obligor’s failure to perform, Kacco, the obligor, may not owe damages. The first paragraph of article 2003 offers an all-or-nothing solution, stemming from pre-revision article 1934(4). This is a much more radical solution than simply reducing the amount of damages in proportion of the obligee’s negligence, when it contributes to the obligor’s failure to perform, as stated in the post-revision article 2003 paragraph 2.\textsuperscript{16}

It, therefore, comes as no surprise that earlier jurisprudence based on the old article 1934(4) stated that bad faith in this context

\begin{itemize}
\item \textsuperscript{12} Saúl Litvinoff, \textit{Good Faith}, 71 TUL. L. REV. 1645 (1997).
\item \textsuperscript{13} \textit{Id.} at 1663.
\item \textsuperscript{14} \textit{Id.} at 1664.
\item \textsuperscript{15} Civil Code [Fr.], art. 2274 (formerly art. 2268, renumbered by Law no. 2008-561 of June 17, 2008, art. 2): “Good faith is always presumed, and he who alleges bad faith must prove it.”
\item \textsuperscript{16} Comment (b) invites to compare with article 2323, dealing with comparative negligence in the title dealing with extra-contractual (tort) liability.
\end{itemize}
had to amount to a breach of contract by the obligee, making performance of the contract much more difficult for the obligor.\textsuperscript{17} This interpretation fits the logic of reciprocity existing in synallagmatic contracts. However, it has the effect of stretching the meaning of bad faith to the extreme case of nonperformance of a contractual obligation.\textsuperscript{18}

Though noting that nonperformance by Kacco was caused by the non-payment by Lamar, the district court did not apply the all-or-nothing bad faith provision, but the post-revision option of reducing damages in proportion of the obligee’s negligence (article 2003 paragraph 2). Pointing out that the obligee’s performance was due past the date of dissolution of the contract was sufficient motive for reversal.

This leads to a fundamental question, central to the resolution of our case: was the contract properly dissolved before the term of payment by the obligee?

\textbf{B. The Duty of Good Faith in Contract Dissolution}

The Supreme Court takes it for granted that the contract was officially terminated by the note sent by Lamar on February 5, at the expiration of the forty-eight-hour notice they had sent and was met by silence and inaction by Kacco.\textsuperscript{19} This at least discards a common law reading of the case: whereas in common law the contract typically does not survive fundamental breach by one of the parties, in civil law the contract is a legal relationship that survives non-performance and can only be dissolved according to conditions set out by

\begin{itemize}
  \item \textsuperscript{17} The Supreme Court cites Board of Levee Commissioners of Orleans Levee District v. Hulse, 120 So. 589, 167 La. 896 (1929), also cited in LA. CIV. CODE art. 2003 (2017) comment (b), comment (a) indicating that this article does not change the law; \textit{Lamar}, 89 So. 3d at 398.
  \item \textsuperscript{18} Good faith has been defined as performance “in conformity with the intention of the parties and in the light of the purpose for which [agreements] have been formed.” \textit{Aubry & Rau, 4 DROIT CIVIL FRANÇAIS} § 346 (6th ed., A.N. Yianopoulos trans., West 1965).
  \item \textsuperscript{19} \textit{Lamar}, 89 So. 3d at 399.
\end{itemize}
the law. This is why it is so important to use the word “breach” sparingly, as it creates the mental picture of a destroyed and terminated contract.

According to the civil law tradition, dissolution of contract is typically judicial.20 There is no indication, in our case, of a petition by Lamar that the contract be judicially resolved. We may, therefore, be in a situation where the obligee has a right, “according to the circumstances, to regard the contract as dissolved.”21

The parties may have expressly agreed that the contract shall be dissolved for the failure to perform a particular obligation, as provided for in article 2017, which states that: “[i]n that case, the contract is deemed dissolved at the time it provides for or, in the absence of such a provision, at the time the obligee gives notice to the obligor that he avails himself of the dissolution clause.”22 The ruling of the Supreme Court is perfectly compatible with the existence of a dissolution clause that does not provide for a certain term and, therefore, leaves the obligor with a reasonable time for performance.23

In the absence of a dissolution clause, given the fact that there has been no judicial dissolution, we are left with two remaining possibilities: dissolution after notice to perform (article 2015) and dissolution without notice to perform (article 2016).

We understand from the facts of the case that Lamar lost patience and confidence in Kacco’s ability to offer satisfactory and timely performance, and did not want to make payment without having assurances that there would be due performance. Hence, their issuing a two-day ultimatum that can be analyzed as an article 2015 “notice to perform within a certain time, with a warning that, unless performance is rendered within that time, the contract shall be deemed dissolved.” This amounts to inserting unilaterally a term certain for performance together with an express dissolution clause,

20. LA. CIV. CODE art. 2013 (2017): “When the obligor fails to perform, the obligee has a right to the judicial resolution of the contract . . . .”
21. Id. at art. 2013 in fine (2017).
22. Id. at art. 2017 (2017).
23. Id. at art.1778 (2017).
whilst allowing additional time for performance in situations where there is obviously a delay.\textsuperscript{24} This convenient way out allows a frustrated obligee to terminate the contract without judicial action, in the absence of an express dissolution clause.

Article 2015, however, does not seem to make room for a harsh ultimatum. As provided by article 2015, “[t]he time allowed for that purpose must be reasonable according to the circumstances.” In the present case, Lamar granted a period of forty-eight hours. This may seem unreasonably short in a long-term contract taking weeks or months to perform. Had Lamar requested full performance in a period of two days, there is no way the additional time could be regarded as reasonable. However, Lamar did not call for full performance in two days. The obligee only wanted assurances that the contract could be performed, requesting Kacco, the obligor, to mobilize the work force needed for completion.

Given the tense situation and the threat of termination, it was very unwise for Kacco to remain passive and even more, totally silent. This brings us to the scenario envisioned in Civil Code article 2016, allowing for termination without notice, providing that “when it is evident that the obligor will not perform, the obligee may regard the contract as dissolved without any notice to the obligor.”

We reach the point of the discussion where the duty of good faith appears as a two-way street. Knowing of Kacco’s delays and cash-flow difficulties, Lamar had to give reasonable notice with sufficient time for performance. In a civil law jurisdiction, delay in performance does not \textit{per se} warrant contract dissolution. One may question whether or not Lamar acted in a loyal or collaborative manner. The forty-eight-hour grace period expiring just four days before Lamar’s contractual date of payment for the work that had been done looks like pushing for termination rather than giving a last chance

\textsuperscript{24} This parallels the grace period that may be granted by a court, in accordance with \textit{La. Civ. Code} art. 2013 para. 2 (2017): “[i]n an action involving judicial dissolution, the obligor who failed to perform may be granted, according to the circumstances, an additional time to perform.”
for performance; Lamar probably guessing that Kacco needed cash to secure full performance.

However, knowing that the situation was getting tense, total silence and passivity on the part of Kacco can be objectively understood, in a business sense, as an implied statement that they did not intend to complete performance. Had they prayed for an additional grace period of say, a few hours, just enough to secure payment, insisting on their willingness to perform, they may have deserved the generous award granted by the district court and upheld by the court of appeal. By its lack of response to the ultimatum and its subsequent lack of reliance on Civil Code dissolution rules when the case was argued before the Supreme Court, Kacco did not show good faith or bad faith, but simply lacked faith in its ability to save a bargain or avert a loss.
THE FOURTH CIRCUIT’S TREATMENT OF AN UNCONVENTIONAL OBLIGATION IN *WEGMANN V. TRAMONTIN*

Nathan W. Friedman*

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Keywords: obligations, contracts, civil code, statute of frauds, natural obligation, civil obligation, lesion beyond moiety, Louisiana law, civil law, common law

*Wegmann v. Tramontin,*¹ a case involving an oral contract, a prescribed debt, and a divorced couple who has been engaged in on-again, off-again litigation with one another in Louisiana courts for more than thirty years, represents a quality example of a court in a mixed jurisdiction seamlessly applying both civilian principles, namely the obligations articles of the Louisiana Civil Code, and relevant common law authority to solve a legal problem. It shows that the civilian tradition remains strong in Louisiana courts, but not to the exclusion of common law methodology, and that the two need not be thought of as, and indeed cannot practically be, mutually exclusive in a mixed jurisdiction like Louisiana.

* J.D. (May, 2017), Paul M. Hebert Law Center, Louisiana State University. The author would like to thank Professor Olivier Moréteau for his guidance and assistance throughout the writing of this case note.

¹ Wegmann v. Tramontin 2015-0561 (La. App. 4 Cir. 1/13/16), 186 So. 3d 236, *writ denied*, 2016-0276 (La. 4/4/16), 190 So. 3d 1209.
I. BACKGROUND

Cynthia Wegmann and Gregory Tramontin were married in 1981 and separated in 1985. During marriage, the couple had founded the USAgencies Insurance Company, and stock in that company was the primary asset of the community of acquits and gains existing between them at the time of their separation. Pursuant to a partition agreement reached in 1988, Ms. Wegmann received $25,000 from Mr. Tramontin in exchange for all rights to her USAgencies stock. However, in 1994, she sued to rescind the partition agreement based on lesion beyond moiety. She alleged that her shares of USAgencies stock were worth significantly more, and she had transferred her rights to the stock “based on erroneous information that [the company] had little or no value.” She succeeded on this claim at the trial court level, receiving a $1,758,571.64 damages award in the 19th Judicial District Court in 2004, but the Louisiana First Circuit Court of Appeal overturned the decision, holding that her original claim had prescribed.

The First Circuit’s 2005 decision in Tramontin v. Tramontin seemed to be the final word on the matter as far as Louisiana courts were concerned, but on April 18, 2010, the controversy was resurrected in the form of an alleged oral contract between Ms. Wegmann and Mr. Tramontin purportedly obligating Ms. Wegmann to “willingly support Mr. Tramontin in his pending divorce litigation in East

2. Readers in Louisiana and the Las Vegas area of Nevada may know Gregory Tramontin as “Greg, the GoAuto Guy,” a recurring character in television advertisements for the GoAuto Insurance Company, which Mr. Tramontin founded in 2009. See GoAuto Insurance, YOUTUBE, https://www.youtube.com/watch?v=nftho_3FUpI.
4. LA. CIV. CODE ANN. art. 2589 (2016).
5. Id. at 30-31. In fact, Mr. Tramontin had sold his USAgencies stock in 1988. In return, he had received twenty-five shares of Liberty Underwriters, a successor company, and a contract guaranteeing his employment with Liberty at $80,000 per year. However, Liberty proceeded soon thereafter to terminate his employment, resulting in litigation whereby Mr. Tramontin was awarded a $2.2 million judgment and the buyback of his Liberty stock for $200,000.
6. Tramontin, 928 So. 2d at 34.
Baton Rouge Parish with his then-wife,” in exchange for “$3,000,000 to $5,000,000 for her ownership in U.S. Agencies [sic] Insurance Co.”7 The contract allegedly promised further that, “The first portion of the $3,000,000 would be tendered to [Ms. Wegmann] after she sold the house she was living in,” the remainder to be provided on an “‘as-needed basis.’”8 Evidently, Ms. Wegmann held up her end of the bargain, selling her house and supporting Mr. Tramontin in his divorce action by attending court hearings and being “available to testify truthfully.”9 Mr. Tramontin refused to pay, and Ms. Wegmann sued him in the Civil District Court for the Parish of Orleans for “breach of contract and fraud.”10 Mr. Tramontin pled exceptions of prescription, res judicata, no cause of action, and vagueness in response.11 The trial court granted his exception of no cause of action, dismissing Ms. Wegmann’s claim with prejudice. Ms. Wegmann appealed.

II. DECISION OF THE COURT

On appeal to the Fourth Circuit Court of Appeal, Ms. Wegmann assigned the following errors: that the District Court’s signed judgment and oral reasons for judgment were inconsistent, that the District Court erred by not finding that she and Mr. Tramontin had perfected a valid and enforceable oral contract, and finally that the District Court should have dismissed her case without prejudice had it correctly decided that her petition did not state a cause of action.12 The Fourth Circuit affirmed the judgment of the District Court in full.13

Ms. Wegmann’s first assignment of error was held to be without merit as the court found no conflict between the trial court’s oral

7. Wegmann, 186 So. 3d at 238.
8. Id.
9. Id.
10. Id.
11. Id.
12. Id. at 239.
13. Id. at 238.
reasons for judgment and the written judgment. Had there been one, the conflict would have been disposed of by a jurisprudential rule that “where there is a conflict between the judgment and its written reasons, the judgment controls . . . [and] the same reasoning applies where there is a conflict between a written judgment and oral reasons for judgment.”

Mr. Tramontin’s exception of no cause of action was found to have been properly granted because an oral contract to pay a prescribed debt and a contract for an undeterminable sum are unenforceable under Louisiana Civil Code articles 1847 and 1973, and a contract to pay a fact witness for testimony is void as against public policy. The court’s treatment of this assignment of error will be discussed in further detail infra.

Finally, the Fourth Circuit held that Ms. Wegmann’s petition was properly dismissed with prejudice as amendment would have been futile under Louisiana Code of Civil Procedure article 934, which provides that when, “the grounds of the objection raised through the exception cannot be . . . removed . . . the action, claim, demand, issue, or theory shall be dismissed,” with prejudice.

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14. Id. at 239. The Fourth Circuit’s opinion relates that Ms. Wegmann had argued in the trial court that Mr. Tramontin had “contracted based on a ‘moral obligation to give her the money,’” to which the trial judge had remarked, “Well, if the contract is based upon a moral consideration on the defendant’s part, he’ll have to answer to a higher authority than me if he violates that. But for the purposes of the law of the State of Louisiana I have to grant the Exception. It’s prescribed. It’s res judicata.”

15. Id. See Arbourgh v. Sweet Basil Bistro, Inc., 98-2218, p. 14 (La. App. 4 Cir. 5/19/99); 740 So. 2d 186, 192, writ denied, 99-2942 (La. 12/17/99); 751 So. 2d 883; Slaughter v. Bd. Of Sup’rs of S. Univ. & Agr. & Mech. Coll., 2010-1049 p. 37 (La. App. 1 Cir. 8/2/11); 76 So. 3d 438, 459, writ denied, 2011-2110 (La. 1/13/12); 77 So. 3d 970; see also Hebert v. Hebert; 351 So. 2d 1199, 1200 (La. 1977).

16. Id. at 241.

17. Id. See Massiha v. Beahm, 2007-0137 (La. App. 4 Cir. 8/15/07); 966 So. 2d 87.
III. COMMENTARY

The Fourth Circuit declined to grant legal enforceability to the alleged contract under Louisiana Civil Code articles 1847 and 1973, as well as on public policy grounds.

A. Article 1847

Article 1847 reads in full, “Parol evidence is inadmissible to establish either a promise to pay the debt of a third person or a promise to pay a debt extinguished by prescription.”18 A brief and seemingly straightforward article, the Fourth Circuit explains that it stands for the proposition that, “an oral contract to pay a prescribed debt is unenforceable.”19 Thus, because Ms. Wegmann asserted in her initial pleading that the amount of money she bargained for under the purported contract represented what she believed she was owed by Mr. Tramontin for her shares of USAgencies stock under the 1988 partition agreement, and that debt was held prescribed by the First Circuit in Tramontin v. Tramontin,20 the article thus rendered the contract unenforceable and Ms. Wegmann with no cause of action.

As Revision Comment (e) explains, article 1847 was originally article 2278 when the Code was promulgated in 1870. Because it has no analog in the Code Napoléon, the article is “no doubt [reflective] of the influence of the common law Statute of Frauds” on post-bellum Louisiana.21 Here we have a Code article that reflects the creeping influence of the common law of Louisiana’s neighbors not only on its jurisprudence, but also on its positive law. Like the common law Statute of Frauds, the article creates not necessarily a rule of law, but instead an evidentiary rule; namely, that a court may not

18. LA. CIV. CODE ANN. art. 1847 (2016).
19. Wegmann, 186 So. 3d at 240.
20. Tramontin, 928 So. 2d at 33.
21. LA. CIV. CODE ANN. art. 1847, Revision Comment (e) (2016).
admit parol evidence to prove the existence of certain classes of contracts, and therefore courts may not imbue such contracts with legal enforceability when not evidenced by a writing.

There is an element of friction between the common law and the Civil Code at play in this controversy: the civilian concept of the natural or moral obligation to pay a prescribed debt, enumerated in Louisiana Civil Code articles 1760 and 1761, is significantly weakened by the incorporation of the Statute of Frauds into the Code. A natural obligation is typically understood as an obligation that is created by a moral duty to act, but one that nevertheless is not legally enforceable in the manner of a conventional or general obligation with civil effects (known as a “civil obligation”). The Code and Louisiana jurisprudence nevertheless grant enforceability to some promises to pay a debt, which represents a natural obligation, thus turning the natural obligation into a civil one. This process, created by the provision of article 1761 that states, “A contract made for the performance of a natural obligation is onerous,” takes place when a debtor’s promise to perform a natural obligation “binds him to the creditor by a civil obligation of which the natural one is the cause.” Even if Mr. Tramontin’s oral promise to pay a prescribed debt to Ms. Wegmann had been sufficient to convert a previously existing natural obligation into a judicially enforceable civil one, Louisiana’s incorporation of the Statute of Frauds into article 1847 would still operate to make such a civil obligation impossible.

22. “A natural obligation is not enfor cancable by judicial action. Nevertheless, whatever has been freely performed in compliance with a natural obligation may not be reclaimed. A contract made for the performance of a natural obligation is onerous.” LA. CIV. CODE ANN. art. 1761 (2016).
23. Id. at art. 1762. A debt extinguished by prescription is expressly defined as a natural obligation in Civil Code article 1762: “Examples of circumstances giving rise to a natural obligation are: (1) When a civil obligation has been extinguished by prescription . . . .”
24. “If the obligor makes a promise to perform his natural obligation, that promise, though informally made, gives the creditor an action to enforce it, but . . . in such a case the obligor through his promise turns the natural obligation into a civil one.” SÁUL LITVINOFF & RONALD J. SCALISE, JR., 5 LA. CIV. L. TREATISE, LAW OF OBLIGATIONS § 2.1 (2d. ed., West 2016).
25. Id. at § 2.23.
to enforce. Such a civil obligation would have been created by oral contract, and parol evidence would continue to be inadmissible to prove its existence in court.

Because of the unusual nature of the alleged debt in this case—an alleged lesionary conveyance in a partition agreement evidenced by an actually fairly unrelated damages award in an amount far exceeding the original value of the stock in controversy—it is hard to know exactly how it should have been treated. Indeed, whether the amount prayed for by Ms. Wegmann can even properly be called a “debt” at all. The First Circuit held in Tramontin v. Tramontin that Ms. Wegmann’s lesion claim had prescribed because she had not brought it within five years of the execution of the agreement under Civil Code article 1413, and refused to find an interruption of prescription for reason of contra non valentem agere nulla currit praescriptio (no prescription runs against a person unable to act).26 The court here disposed of this alleged debt easily by characterizing it as a prescribed debt which no debtor can create an enforceable oral contract to pay; but if Ms. Wegmann had been allowed to amend her pleading to state that the money bargained for under the purported oral contract was not in fact representative of the amount she alleged she was owed for her share of USAgencies stock, this would have been perhaps a much more difficult question. Surely one that could not have been disposed of by Mr. Tramontin’s exception of no cause of action in the trial court.27

Had Ms. Wegmann been allowed to amend her petition to remove the prescription problem, there would have simply existed an alleged oral contract for payment in exchange for certain acts. In such a case, the admissibility of parol evidence to prove the contract’s validity would be controlled not by article 1847, but instead by its sister article, article 1846—formerly article 2277 of the Code.

26. Tramontin, 928 So. 2d at 32.
27. Wegmann, 186 So. 3d at 240.
of 1870, and transferred into the current code keeping its spot directly before article 2278, now 1847—which states that a contract the object of which has a value over $500, “must be proved by at least one witness and other corroborating circumstances.”28 Indeed, the court tells us that Ms. Wegmann claimed that “witnesses could corroborate the details of the contract,” but, “such evidence would not be admissible.”29 However, if the alleged oral contract were not representative of a promise to pay a prescribed debt, it would necessarily fall under article 1846, and that article would expressly admit witness testimony related to the details of the alleged contract. The trial court disposed of this issue by granting Mr. Tramontin’s exception of no cause of action and dismissing Ms. Wegmann’s petition with prejudice, reasoning that because Ms. Wegmann had memorialized her understanding that the $3 to $5 million bargained for in the alleged contract represented her purported share of USAgencies, that fact was judicially admitted and could not be contradicted by an amended petition.30 Therefore, the trial court reasoned, and the Fourth Circuit affirmed, amendment of the petition to cure the defect that allowed Mr. Tramontin’s exception of no cause of action to be granted would be impossible and as such dismissal with prejudice was required under Louisiana Code of Civil Procedure article 934.

B. Article 1973

The court held that the purported oral contract is also without effect under Louisiana Civil Code article 1973, which states, in pertinent part, “The quantity of a contractual object may be undetermined, provided it is determinable.”31 The court writes that, “Where an obligation is ‘too indeterminate’ to meet the requirements of article 1973, the ‘obligation [is] unenforceable because it is without

29. Wegmann, 186 So. 3d at 240.
30. Id. at 241.
cause.’”32 The court concluded that because the purported contract was for an amount of money between $3 and $5 million to be tendered on the sale of Ms. Wegmann’s house, and the remainder to be paid on an “as-needed basis,”33 the purported contract failed as to cause due to an indeterminable object.

Cause is defined in the first paragraph of article 1967 as “the reason why a party obligates himself,” and is one of the crucial ingredients of an enforceable contract without which a valid contract cannot exist. Quite notable is that the second paragraph of that article is the Code’s definition of and express authorization for courts to apply the doctrine of detrimental reliance.34 Detrimental reliance is yet another common law principle that has been absorbed into the law of Louisiana and memorialized in the Code. Louisiana courts have held that “Louisiana law allows a party to recover under the doctrine of detrimental reliance even if no formal, valid, or enforceable contract existed.”35 Here, the court makes no mention of the doctrine of detrimental reliance, as it appears Ms. Wegmann did not raise the issue.36 This may have been a missed opportunity as it is undisputed that Ms. Wegmann did indeed sell her home in reliance upon the purported contract between her and Mr. Tramontin.

32. Id. (citing TAC Amusement Co. v. Henry, 238 So. 2d 393,400 (La. App. 4th Cir. 1970)).

33. Id.

34. LA. CIV. CODE. ANN. art. 1967, para. 2 (2016):
   A party may be obligated by a promise when he knew or should have known that the promise would induce the other party to rely on it to his detriment and the other party was reasonable in so relying. Recovery may be limited to the expenses incurred or the damages suffered as a result of the promisee’s reliance on the promise. Reliance on a gratuitous promise made without required formalities is not reasonable.

35. Babkow v. Morris Bart, P.L.C., 98-0256 (La. App. 4 Cir. 12/16/98), 726 So. 2d 423, 429; State v. Murphy Cormier Gen. Contractors, Inc., 2015-111 (La. App. 3 Cir. 6/3/15), 170 So. 3d 370, 380, writ denied, 2015-1297 (La. 9/25/15), 178 So. 3d 573 (“A formal, written, underlying contract is not necessary to prove the existence of a binding contractual agreement where the plaintiff can show a promise was made, he relied on the promise, the promise was broken, and as a result he suffered loss.”).

C. Void as Against Public Policy

Finally, the court upheld the trial court’s determination that the alleged oral contract was a contract to secure live testimony through remuneration in excess of an amount fixed by law, and therefore void as against public policy. This finding is notable, as it is *sui generis* in Louisiana jurisprudence, being the first recorded opinion to apply this particular public policy consideration, although it has been known to the common law for many years. The court’s ruling seems to have the effect of invalidating all contracts to secure live testimony in exchange for an amount of money greater than that set by law as against public policy within the jurisdiction of the Fourth Circuit. It is an open question, then, whether the remaining Louisiana Courts of Appeal will adopt the rule.


38. The court relies on three of the iconic volumes of common law doctrine to reach its determination: *Williston on Contracts*: “A bargain to pay one who is amenable to process a further sum for attending as a witness is generally invalid,” RICHARD A. LORD, 7 WILLISTON ON CONTRACTS § 15:6 (4th ed., Lawyers Cooperative Publ’g), *The Restatement (First) of Contracts*: “A bargain to pay one who is subject to legal process a sum for his attendance as a witness in addition to that fixed by law is illegal.” RESTATEMENT (FIRST) OF CONTRACTS § 552 (1932), and the *Corpus Juris Segundum*: “When a witness ‘is to be paid more than his or her legal fees, or other elements occur which tend to show that his or her evidence may be improperly influenced, the contract is against public policy.’” 17A C.J.S. CONTRACTS § 304).

39. In fact, the Fourth Circuit’s decision seems to go beyond what had previously been the law regarding payment to witnesses. See Dane S. Ciolino, *Can I make Any Payments to a Fact Witness?,* LOUISIANA LEGAL ETHICS Blog (Aug. 8, 2013) https://perma.cc/382K-SNSX; Dane S. Ciolino, a distinguished scholar of Louisiana Legal Ethics, has written that, at least regarding attorney discipline, “the Louisiana Rules of Professional Conduct, relevant statutory law, case law, and persuasive authority all indicate that a lawyer should not be subjected to discipline for paying a fact witness if: 1. the payment is not motivated by an improper purpose, such as to obtain “inside information,” to obtain false testimony or to influence the content of the witness’s testimony; 2. the amount paid merely compensates the witness for the reasonable value of the time and expenses actually incurred by the witness; and, 3. the amount of the payment is not contingent on the witness’s testimony.” After Wegmann v. Tramontin, however, agreements to remit such formerly permissible payments to witnesses in exchange for their availability to testify may be unenforceable within the jurisdiction of the Fourth Circuit.
HOOPER V. HERO LANDS COMPANY

Christopher B. Ortte*

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Keywords: boundary, cumulation, interruption, land, ownership, petitory action, possessory action, acquisitive prescription, property, real action

“And this is one of the major questions of our lives: how we keep boundaries, what permission we have to cross boundaries, and how we do so.”

— A.B. Yehoshua

INTRODUCTION

The boundary is a concept ancient to human civilization, applicable to both the tangible and intangible aspects of our lives. Internally we deliberate moral or spiritual boundaries, while externally we struggle amongst one another to establish geographical boundaries. Especially throughout the development of Western Civilization and democracy, in the least, boundaries have become an essential characteristic of the westerner’s individual freedoms. Albeit a doctrine of criminal law, take for example the Castle Doctrine,¹ which,

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¹ See Castle Doctrine, BLACK’S LAW DICTIONARY 261 (10th ed., West 2014); the Castle Doctrine is defined as, “[a]n exception to the retreat rule allowing the use of deadly force by a person who is protecting his or her home and its
in essence, represents the value we as a society appropriate to personal boundaries.

In the civil law, one may establish the boundary to his land through a boundary action. A boundary action is considered a real action. A person may bring a real action in order to assert rights specifically in, to, or upon immovable property. There are a number of real actions provided for in Title II of the Louisiana Civil Code, three of which were explored in the case presented herein, *Hooper v. Hero Lands Company* (Hooper II): possessory, possessor, and boundary actions. Each of the three actions considered in *Hooper II* are distinguishable, however, as we so often find, distinctions are not easily drawn.

*Hooper II* takes up these real actions, as well as a trespass action, which is not treated as a real action by the Louisiana Code of Civil Procedure, and considers some age-old disputes in Louisiana jurisprudence, much of which has assumedly been put to rest. However, there appears to have surfaced some slight disparity between circuits—particularly the First and Fourth—which are worth noting.

I. BACKGROUND

In 1860, following the long and controversial litigation over the estate of eccentric miser and real estate spectacular John McDonogh, a particular portion of his vast land-holdings was prepared for subdivision. The land, known as the Cazelard Plantation,
was inherited by the City of New Orleans from McDonogh and located generally in “down the bayou,” Louisiana, specifically encompassing lands within Jefferson, Orleans, and Plaquemines parishes. The land was subdivided into 44 lots, each notably one arpent in size, or approximately 192 feet wide, and was put up for public auction by New Orleans. As a result of the auction, Alphonse Camus purchased lots 17-26 and Pierre Cazelar, Jr., purchased lots 27-44. Legal description was made and good title was recorded upon these transactions, of which was eventually passed to the parties in the case before us.

Detailing the history of the property back nearly 160 years is not mere fluff to draw in the reader’s attention. The fact that the property was divided into arpents is not unsubstantial; indeed the issue in *Hooper II* was born of the lot measurements. Moreover, prior to the public auction in 1860, the City of New Orleans hired Louis Pilie, a surveyor, to comprise a plat of the property. Both plaintiffs and defendants in *Hooper II* relied on the Pilie plat for their property description.

The particular boundary in contention is between lots 26 and 27. In *Hooper I*, the plaintiffs, Patsy and James Hooper (the “Hoopers”), have owned lot 26 since 1992, while the Hero Lands Company

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6. “Down the bayou” is a vernacular phrase used liberally by Louisianans when describing a broad area of the state, generally south of Interstate 10 (e.g., when one hails from Houma, Louisiana, one might say, “He’s from down the bayou”).
8. See Arpent, BLACK’S LAW DICTIONARY, *supra* note 1; an arpent is 192 feet.
9. *Hooper II*, 216 So.3d at 969.
10. Id.
11. Id.
12. Id.
13. Id. at 973.
14. Hooper v. Hero Lands Co., 13-0576 (La. App. 4 Cir. 12/11/13); 128 So. 3d 691, 692 [hereinafter *Hooper I*]. Important to note for purposes of prescription, Hooper acquired lot 26 in 1992, in good faith and just title, from Burmaster Land & Development Co., who was also in good faith possession of lot 26 since 1974. *Hooper II*, 216 So.3d at 969.
(“Hero”), owns lots 27-35.\(^{15}\) The lots are situated laterally west to east, with lot 26 being the most westerly.\(^{16}\) Just as the Pilie plat described each lot to be the same width, according to the titles, each lot is 192 feet wide.\(^{17}\) Therefore, the total width of lots 26-35 would be 1,920 feet. However, it turns out the distance is 2,040.77 feet—a surplus of 120.77 feet.\(^{18}\) Therein lies the controversy. Additionally, on the eastern side of lot 26 there existed a fence, which was maintained and considered by the Hoopers to be the boundary line between lots 26 and 27.\(^{19}\)

In 2012, Hero authorized the local government to dig a thirty-five foot drainage canal on the western boundary of lot 27.\(^{20}\) When plotting the drainage canal, the government’s surveyor used the lot titles, which mathematically caused the canal to overlap across the boundary between lots 26 and 27. With the disparity unbeknownst to Hero and the government, preparations to dig the drainage canal commenced which resulted in a trespass onto the Hoopers’ property.\(^{21}\) As a result, the Hoopers filed suit claiming trespass and asserting a possessory and boundary action, along with a request for injunctive relief.\(^{22}\)

The trial court granted temporary injunctive relief to the Hoopers, enjoining the government from continuing to dig the canal.\(^{23}\) Nevertheless, the government adopted a resolution to expropriate the property and continue the project, allegedly without notice to the Hoopers.\(^{24}\) The resolution to expropriate the land introduces a fold in the case considered in \textit{Hooper I},\(^{25}\) but not in \textit{Hooper II}.

\begin{footnotes}
15. \textit{Hooper II}, 216 So.3d at 968.
16. \textit{Id.} at 969.
17. \textit{Id.}
18. \textit{Id.} at 968.
20. \textit{Hooper I}, 128 So.3d at 693.
21. \textit{Hooper II}, 216 So.3d at 968.
22. \textit{Id.}
23. \textit{Hooper I}, 128 So.3d at 693.
24. \textit{Id.}
25. \textit{Id.} at 692.
\end{footnotes}
Presented to the court were a number of arguments asserting the Hoopers’ rights to the entire surplus 120.77 feet, of which they claimed was encompassed within the fence line. Hooper asserted ownership of the surplus by “Possession Within Title,” arguing that the 120.77 foot strip of land “constituted the ‘more than one arpent’” as provided in the title description, “one arpent more or less.” Additionally, the Hooper’s provided evidence of corporeal possession. Furthermore, by tacking possession to their ancestors-in-title, the Hooper’s asserted ownership by acquisitive prescription of ten-years and thirty-years. Thus, the Hoopers asserted ownership by possession, title, and prescription. Finally, the Hooper’s prayed for the court to establish the boundary line.

II. DECISION OF THE COURT

The court in Hooper II addressed the following issues:

- Whether the Hoopers had improperly cumulated their possessory action with a petitory action;
- Whether the Hoopers had acquired ownership to the surplus 120.77 feet of property: (1) by title; (2) by ten-year acquisitive prescription; and (3) by thirty-year acquisitive prescription;
- Whether the trial court properly fixed the boundary.

27. Id.
28. Id. at 2-3.
29. The possession of the transferor is tacked to that of the transferee if there has been no interruption of possession. L.A. CIV. CODE art. 3442 (2017).
30. Hooper’s Third Amended Petition at 2, para 5.
31. Hooper II, 216 So.3d at 970.
32. Hooper’s Third Amended Petition at 21.
33. Hooper II, 216 So.3d at 970.
34. Id. at 971-72.
35. Id. at 972.
36. Id. at 972-73.
37. Id. at 973-74.
On the issue of the Hoopers’ improper cumulation of a petitory and possessory action, the court reversed the trial court, ruling the Hoopers improperly cumulated, “demonstrated by [the Hoopers’] assertions of ownership by title and by prescription, and their request to fix the boundary line.”38 Thus, according to the court, the Hoopers waived their possessory action. However, as discussed supra, the Hooper’s petition made no mention of the action being petitory, as well, cumulation of a boundary action with either a petitory or possessory should not be considered improper—article 3657 of the Louisiana Code of Civil Procedure overtly does not prohibit such cumulation.39

With regard to the Hoopers’ attempt to show ownership by title—a petitory action—the court found the addition of “more or less” to an arpent was not sufficient to show better title than Hero.40 Next, albeit the Hoopers had sufficient ten-year corporeal possession, the court found the description on the deed to their tract insufficient to show the just title necessary to achieve ten-year acquisitive prescription.41 Further, the court noted that because the Hooper’s immediate ancestor-in-title, Burmaster Land & Development Company (“Burmaster”), leased lot 26 for the years leading up to the Hoopers’ purchase, Burmaster was a precarious possessor.42 To acquire by thirty-year acquisitive prescription, one must have adverse corporeal possession; therefore, because Burmaster did not acquire ownership to lot 26 until December 31, 1989, adverse possession did not begin until January 1, 1990—not soon enough for the Hoopers to acquire via thirty-year prescription.43

Despite the Hoopers’ argument that apportionment “foreign” to Louisiana law, the court affirmed the trial court order, finding “as a matter of law, [utilizing] equal apportionment among the ten lots [to

38. Id. at 970.
40. Hooper II, 216 So.3d at 971.
41. Id.
42. Id. at 972.
43. Id.
fix the boundary] was the correct method to divide the disputed property.” Nonetheless, the court realized that neither judgment had provided for a particularized description of the property as required by Louisiana Civil Code of Procedure article 1919 and, therefore, remanded with instruction to provide an accurate legal property description.

III. COMMENTARY

Possession and ownership are separate things, which require separate legal actions to determine: petitory and possessory. Article 3657 of the Louisiana Code of Civil Procedure prohibits the cumulation or alternative pleading of petitory and possessory actions, the penalty of such cumulation being the abatement of the possessory action. The intent is to encourage the determination of the possession prior to institution of a petitory action. It follows common sense as a petitory action assumes the petitioner has only better title to and no possession of the property.

_Hooper II_ made holdings that it was improper to cumulate a petitory action and an acquisitive prescription action, as well a boundary action cannot be cumulated with a possessory action.

Primarily to note, Louisiana Civil Code of Procedure article 3657 expressly states, “[t]he plaintiff may not cumulate the petitory and the possessory action.” It makes no prohibition, nor even mention, of a cumulation of a boundary action with either a petitory or a possessory action, nor does it consider acquisitive prescription.

_Hooper II_ notes that a ruling on the Hoopers’ claim of ownership by acquisitive prescription, albeit consistent with a possessory action, would “necessarily be a determination of ownership.” As such, the court reasoned the Hoopers cumulated a petitory action

44. Id. at 973.
45. Id. at 973-974.
46. L.A. CODE OF CIV. PROC. art. 3657 (comment (a) (2017).
47. Id. at art. 3657 (2017).
48. Hooper II, 216 So.3d at 970.
with a possessory action, waiving their possessory action. However, as it turned out, the question was not so much whether the Hoopers were in possession, but to what extent did they possess; the boundary had to be determined.

Boundaries are not necessarily fixed judicially, but may also be fixed extrajudicially, through agreement by parties. In the instance judicial fixing is necessary, the boundary action must be brought by: an owner of the contiguous tract of land; one who is in possession as owner; or one who has a real right in the property (i.e., a usufruct or mineral lease).49

Notwithstanding the possibility that the Hoopers failed to even bring a petitory action (to which the court was seemingly aware50), it is disputable the court was correct to assert that the Hoopers improperly cumulated a petitory action by claiming ownership by title and requesting to fix the boundary line.51 Petitory and boundary actions may be cumulated because, inter alia, they both seek to establish ownership.52 However, to boot, the court claimed improper cumulation took place when the Hoopers asserted ownership by title and acquisitive prescription.53 Within the same paragraph the court contradicts itself, stating that a claim of acquisitive prescription “may suggest to a casual reader that [it] is consistent with a possessory action . . . but . . . would necessarily be a determination of ownership.”54

If a boundary action can be cumulated with a petitory action because they both assert ownership, and holding an action by acquisitive prescription is a determination of ownership, then why not may a petitory action and acquisitive prescription claim be cumulated? At any rate, the Hooper’s possession was more or less a non-issue;

49. LA. CIV. CODE art. 786 (2017).
50. Hooper II, 216 So.3d at 968 (“In addition to the trespass action, the Hoopers asserted a possessory action and a boundary action . . . .”).
51. Id. at 970.
53. Hooper II, 216 So.3d at 970.
54. Id.
whether they possessed within their title was not argued, but rather what their title encompassed. Thus, *Hooper II* made its inference that the Hoopers were bringing a petitory action.\(^{55}\) It would appear then, that one cannot claim ownership through acquisitive prescription without improperly cumulating a petitory action and possessory action, as establishing possession is necessary for acquisitive prescription, which is a determination of ownership. Presumably there has been a mischaracterization of what constitutes a petitory action and/or possessory action.

The First Circuit previously took up the same issues in *Kadair v. Hampton*,\(^{56}\) and perhaps made a bit more sense of the relationship between boundary, petitory, and possessory actions, and ownership by acquisitive prescription. First, *Hooper II’s* statement, “[b]ecause a judgment in a boundary action necessarily involves a preliminary determination of *ownership*, it arguably cannot be cumulated with a possessory action,”\(^{57}\) is arguably incorrect. Both the Civil Code and the Code of Civil Procedure provide that a boundary action may be used to determine ownership, as opposed to requiring a preliminary determination of ownership.\(^{58}\) *Hooper II* cites *Kadair* as authority holding that “proof of ownership is a necessary prerequisite to establishing [a] boundary.”\(^{59}\) However, this was taken from a narrow context in *Kadair*. Second, jurisprudence extensively supports that the type of possession necessary to establish ownership by acquisitive prescription is identical to the type of possession necessary to maintain a possessory action.\(^{60}\) Thus—in contrast to *Hooper II’s*

\(^{55}\) See *Hooper II* at 971: “Importantly, for our purposes, the Hoopers asserted that the surplus property had been conveyed to them by title, as evidence by the phrase ‘one arpent more or less’ . . . effectively claim[ing] *ownership* of the property by title.”

\(^{56}\) *Kadair v. Hampton*, 13-1171 (La. App. 1 Cir. 7/10/14); 146 So.3d 694, *writ denied*, 14-1709 (La. 11/7/14); 152 So.3d 177 (mem).

\(^{57}\) *Hooper II*, 216 So.3d at 970.

\(^{58}\) See LA. CIV. CODE arts. 792, 794 (2017); LA. CIV. CODE OF PROC. art. 3693 (2017).

\(^{59}\) *Hooper II*, 216 So.3d at 970.

\(^{60}\) *Kadair*, 146 So.3d at 703.
contention that asserting ownership by title and acquisitive prescription is an improper cumulation—
not only should a boundary action be “cumulatable” with a possessory action, in the case of acquisitive prescription, they are mutually inclusive.

Upon review of the Hoopers’ petition, they argued to have had “possession within title,” which on its face seems to create an improper cumulation, though as abovementioned, the Hoopers had not expressly asserted a petitory action. Perhaps, regardless of whether it is permissible to assert ownership by acquisitive prescription and by title, had the Hoopers claimed that they were owners of the one arpent by good title, but also owners, separately, of the surplus through acquisitive prescription; then they may have avoided issues of improper cumulation altogether. However, by arguing that their title—per the language “more or less” than one arpent—conveyed to them the surplus, but that nonetheless they had possessed the surplus for thirty-years through ancestors-in-title, the Hoopers did precisely what the Louisiana Code of Civil Procedure article 3657 prohibits—plead in the alternative—and subjected themselves to a court’s inferences.

CONCLUSION

“Hooper II” seemed to lose sight of the ultimate goal of the action—to fix a boundary—and provided debatable, largely unnecessary dicta on the relationships between petitory, possessory, boundary, and acquisitive prescription actions. However, despite difficulties navigating through the analysis of boundary, petitory, and possessory actions, “Hooper II” seemed to reach a result that more or less satisfies some principles of equity. Eventually, it was determined that the boundary be fixed according to principles of equal apportionment, despite there being a “dearth of guidance” within Louisiana’s jurisprudence on the matter, and remanded instructing the trial
court delineate a boundary with proper property description pursuant to Louisiana Code of Civil Procedure article 1919. Seeing the glass half-full, the Hoopers may have lost a potential bit of land, but it was nonetheless established they own more than one arpent, granting them a piece of the surplus pie.\footnote{Hooper II, 216 So.3d at 973.}
BOOK REVIEW

(Vandeplas Publ’g 2015)
Reviewed by Georgia Chadwick*

Keywords: Supreme Court of Louisiana, Slaughter House Cases, Suffrage, Citizenship, Civil War

Evelyn Wilson makes a useful and practical contribution to the history of the Louisiana Supreme Court with her book, The Justices of the Supreme Court of Louisiana 1865–1880. Wilson, the Horatio C. Thompson Endowed Professor at Southern University Law Center in Baton Rouge, examines in detail eighteen of the nineteen men who were appointed to the Court at the end of the Civil War through a few years after Reconstruction officially ended in Louisiana. Through the lens of great political upheaval, Professor Wilson examines the critical work of these justices and categorizes the Louisiana Supreme Court by its three periods in the Reconstruction Era.

Professor Wilson logically divides the work of the Court into three periods and describes the provisions of the particular constitution that created each Court and the political backgrounds of the governors who made the appointments. She gives detailed biographical information about the men who were appointed to each bench, along with highlighting and analyzing selected opinions that these justices wrote, thus reflecting the political events of the times.

Louisiana’s secession ordinance was passed on January 26, 1861, and by the end of April of 1862, United States Commodore David Farragut captured New Orleans intact after Confederate troops stationed at two forts along the Mississippi River failed to

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stop him. On May 1, 1862, Union General Benjamin Butler arrived, placing New Orleans and its surrounding areas under his command.

Professor Wilson explains that, in the face of the imminent capture of New Orleans, four of the five justices of the Louisiana Supreme Court met on February 24, 1862, and the Court’s minute book shows that the Supreme Court and the courts in the parish of Orleans adjourned until May 5, 1862. Some of the justices left New Orleans and followed Louisiana’s Confederate government, although there is no evidence that the Court rendered any opinions during this time. No judges were present on May 5 in New Orleans, when the Clerk of Court called the Court to order. Professor Wilson reports that the clerk returned the next day and, finding no justices in attendance, adjourned the Court \textit{sine die}.

During the first months of military occupation by United States forces, none of the established courts were open in New Orleans. Because the state court system had collapsed,\footnote{Joseph Gray Taylor, \textit{Louisiana Reconstructed 1863–1877} 4 (LSU Press 1974).} General Butler quickly established a Provost Court to handle civil and criminal trials. General Butler required all who held public office or wished to use the courts in civil or criminal cases to take a loyalty oath to the Union. By the summer of 1862, some of the district courts in New Orleans were reopened. In October of 1862, President Lincoln established the Provisional Court of Louisiana that was granted the most unusual power of federal and state jurisdiction. These special courts remained in operation until the organization of the judiciary under the Constitution of 1864.\footnote{Thomas Helis, \textit{Of Generals and Jurists, in A Law Unto Itself? Essays in the New Louisiana Legal History} 117–137 (Warren Billings & Mark Fernandez eds., LSU Press 2001).}

Others, such as Henry Plauché Dart, Ben Robertson Miller, Warren Billings, Judith Schafer, and Mark Fernandez, wrote about the history of Louisiana’s judiciary, but no one focused in depth on the particular time period Professor Wilson has chosen. Henry Plauché Dart, the premier Louisiana legal historian of his time, gave little
credit to most of the justices who served during the period that Professor Wilson covers. In Dart’s “The History of the Supreme Court of Louisiana,” published in 1913 as part of *The Celebration of the Centenary of the Supreme Court of Louisiana*, Dart does give some credit to the Ludeling Court:

> The Annuals from 1868–72 cover a great course of jurisprudence—not even at the beginning of that century were the questions so intricate or the matters at stake so important. This court was engaged, as had been the case with the first court, in rebuilding a government. It was called on to interpret and to enforce legislation which was intended to reverse the ancient and create a new order of things.³

Ben Robertson Miller, in *The Louisiana Judiciary*, indicates that the limited scope of his book did not permit him to examine the opinions that the Supreme Court of Louisiana issued during Reconstruction, and that “a study of the personalities of the bench would no doubt give an insight into certain of the decisions.”⁴

In order to expand on what had been written before, Professor Wilson saw a need to examine the work of the Louisiana Supreme Court by selecting cases she found to be unique. Her analysis of these cases demonstrates that the work of the justices was crucial in restoring order to the lives of people in Union-occupied Louisiana and in creating a necessary new way of life. She delves into the background of each justice and offers lively biographical sketches. Professor Wilson consulted genealogical sources, government reports, letters, books, and articles that yielded some previously unrevealed details. She also makes use of the Court’s minute books that are a rich source of details on the Court’s work. By highlighting selected cases, Professor Wilson shows that these justices focused on setting a steady course during a particularly turbulent political period for Louisiana. Her intention is not to describe all the intricacies

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of Reconstruction, but her clear writing style provides an understandable outline of the political landscape as it affected the justices and their work. The reader, however, should realize that during this time period, deadly violence often accompanied elections and the work of the government. Those in government were never completely assured of their right to carry out their duties.

During Reconstruction, Louisiana held a unique position in contrast with the rest of the South. James K. Hogue describes the difference, stating that Louisiana’s distinct population and geography set it apart from the rest of the Old South. He also mentions that Louisiana was one of three former Confederate states that counted an enslaved population outnumbering white people, as shown in the federal census of 1860. Enfranchisement was of momentous political consequence in Louisiana.5

Professor Wilson points out that the elected governors in Louisiana who appointed the members of the Louisiana Supreme Court were a changing cast of executives. James K. Hogue describes what the five governors who held office between 1865 and 1877 might face: threat of replacement, impeachment, assassination attempts, and death threats. Rival governments (due to contested elections) were expected, and the intervention of federal troops was necessary for governors to remain in office.6

The first period presented by Professor Wilson is called “War and Occupation,” and starts with justices appointed under the Constitution of 1864. President Lincoln remained hopeful that Union-occupied Louisiana would return to the Union as a state, and he urged General Banks to have a new constitution written. Banks called a constitutional convention that resulted in the adoption of Louisiana’s Constitution of 1864. Many of the delegates to the convention originally supported secession in 1861. The Constitution of 1864 abolished slavery, but because it did not grant suffrage to

6. Id. at 7–8.
blacks, it was never accepted by Congress; however, Professor Wilson states that it operated as the governing document in the Union-controlled portions of Louisiana.

The judiciary article of the Constitution of 1864 called for the Court to consist of one chief justice and four associate justices to be appointed by the governor to eight-year terms. The appointments were subject to the advice and consent of the senate. The Court first sat at on April 3, 1865. Chief Justice William B. Hyman and Associate Justices Zenon Labave, John H. Ilsley, and Robert B. Jones were present and took the following oath required by Title VII – General Provisions of the 1864 Louisiana Constitution:

I do solemnly swear that I will support the Constitution and laws of the United States and of this State, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as [Chief Justice or Associate Justice], according to the best of my abilities and understanding: so help me God!7

Rufus Howell, who had been elected and served as a district court judge in New Orleans in 1857, took his oath several days later. Interestingly, Howell, who opposed secession, took the oath required in order to keep his court open as government dynamics changed. He also served as a delegate to the 1864 Constitutional Convention. Howell, a Radical Republican and strong supporter of suffrage for black men, issued the call to reconvene the 1864 Constitutional Convention in order to address the suffrage issue. This action resulted in the bloody Mechanic’s Institute Riot of 1866, during which he narrowly escaped injury and death. Professor Wilson points out that Howell was the only justice to serve on the Louisiana Supreme Court for the duration of Reconstruction, serving longer than any of the other men who served with him.

Overall, Professor Wilson describes the members of Louisiana’s first Reconstruction Court as men who opposed secession and remained loyal to the Union. Some had owned slaves, had previously

7. LA. CONST. Art. 90 (1864).
held elective offices, or had practiced law before the war. Generally, the cases that came before them had to do with complications arising from the fact that slavery had been abolished and Confederate money was worthless. Professor Wilson, having studied a number of cases arising from these issues, finds that the members of the Court considered the use of Confederate currency a treasonable act and an illegal transaction. As the Louisiana Constitution required, the justices remained careful to refer specifically to the Louisiana law on which they based their decisions. From her analysis of the cases that the 1865 Court decided, Professor Wilson believes that they did not seek to change the law but rather to administer it justly, and for this reason their work on the bench was respected. She points out that the justices who served on this Court were not held in high regard by many of the pro-Confederate lawyers who appeared before them because the justices were loyal Unionists. The litigation they heard might be considered pedestrian, but the issues were necessary ones to settle so that citizens could get on with life and business after the upheaval caused by the Civil War.

The Constitution of 1868 cut short the eight-year terms of the justices who received an appointment in 1865. The second part of Professor Wilson’s book, entitled “Congressional Reconstruction,” concerns two justices from the 1865 Court whom Governor Warmoth reappointed: Justice Howell and Justice Taliaferro. Justice Taliaferro, who replaced Justice Robert Jones upon his death, served as president of Louisiana’s 1868 Constitutional Convention and also ran against Governor Warmoth in the 1868 gubernatorial election. Governor Warmoth completed the Court with the appointments of John T. Ludeling of Ouachita Parish as chief justice, and William Wirt Howe of New Orleans, and W. G. Wyly of Carroll Parish as associate justices.

Professor Wilson describes the relevant features of the 1868 Louisiana Constitution, including universal male suffrage, but highlights the oath the justices took in 1868 that clearly demonstrates a marked difference from the previous oath required under the 1864
Louisiana Constitution. The Court minute book on November 2, 1868, records the oath of Justice Taliaferro:

I, James G. Taliaferro, do solemnly swear (or affirm) that I accept the civil and political equality of all men and agree not to attempt to deprive any person or persons, on account of race, color, or previous condition of any political or civil right, privilege, or immunity enjoyed by any other class of men: that I will support the constitution and laws of the United States, and the constitution and laws of this state, and I will faithfully and impartially discharge and perform all the duties incumbent on me as Associate Justices of the Supreme Court of La. According to the best of my ability and understanding. So Help Me God.8

Professor Wilson states that these jurists strongly advocated for equal political rights for all blacks. Wilson says, while they did not agree on every issue, she found an amazing lack of discord from these men who came from diverse backgrounds. The most notable case from this court was the Slaughter-House Case.9 This case centered around an act enacted by the Louisiana Legislature in 1869 protect the public health of New Orleans from slaughterhouse waste polluting the Mississippi River, which supplied the city with its drinking water. The act created a corporation to control all slaughterhouse activities at a particular location. Butchers in the New Orleans area were required to rent space from this newly-formed corporation. A group of two hundred butchers formed a rival organization to compete with the one established under the 1869 law. Consequently, the state’s Attorney General filed suit to enjoin them from operating a slaughterhouse in violation of the state law.

The Court determined that the state’s police power authorized the legislature to close the upriver slaughterhouses in order to protect the public water system. Professor Wilson points out that one

8. 17 MINUTE BOOK 125–26 (1868).
justice dissented and one was absent. The case made its way to the United States Supreme Court, which affirmed the decision of the Louisiana Supreme Court.

Professor Wilson explains that, for the first time, the United States Supreme Court construed the Thirteenth and Fourteenth Amendments and found that they did not apply to butchers; rather, they applied only to privileges and immunities of United States citizenship. These amendments to the United States Constitution were written to protect newly emancipated blacks from state oppression and afforded the butchers no protection against laws the state was entitled to enact.

Although Professor Wilson analyzes interesting cases from this Court, which existed twice as long as the previous court, one opinion in particular should be mentioned because the Louisiana Supreme Court declared the *Dred Scott* decision of the United States Supreme Court inapplicable in a case that came before it. In 1857, the United States Supreme Court held that a black man had no rights under the U.S. Constitution and, consequently, could not sue for his freedom. The case before the Louisiana Supreme Court involved Charles Lalrande, a man born of free parents, who purchased land in 1844 and was in quiet possession of it until 1866. The Louisiana Land Office cancelled Lallande’s land title on the grounds that the *Dred Scott* decision stripped him of his United States citizenship. The Land Office sold the land to another man who then brought suit to evict Lallande. Chief Justice Ludeling’s opinion for the Louisiana Supreme Court held that the treaty by which Louisiana was made a territory ensured that free, colored inhabitants were admitted to citizenship of the United States.¹⁰

Professor Wilson writes that the 1868 Court performed under challenging and hostile conditions. She states, however, that there were very few issues, which divided the Court. What brought dissents were cases that concerned deciding who should bear the loss

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for emancipated slaves and cases determining if madams of prostitution houses should have to pay rent for their furniture. The eight-year terms of the justices ended in 1876. Embattled Governor William Pitt Kellogg reappointed Chief Justice Ludeling and Associate Justice Leonard to the Court, and appointed John Edward King to fill a third seat. The two remaining seats were left vacant to allow the newly elected governor to make appointments. Determining whom would be the next governor brought the end of the Reconstruction Era to Louisiana.

Louisiana found itself with a contested election in 1876 that resulted in two competing administrations with inaugurations held for each on January 8, 1877. The Democratic governor was Francis T. Nicholls and the Republican governor was Stephen B. Packard. Rival governors and legislatures were nothing new. During the tenure of Governor Kellogg, the Battle of Liberty Place was fought in New Orleans to remove him from his position due to his contested election. Although the rival administration of Governor John McEnery won the battle, the victory was brief. President Grant reinstated Governor Kellogg with the support of Federal troops. Instead of attacking his rival directly, Francis T. Nicholls employed an effective and carefully considered strategy.

Professor Wilson explains that Nicholls first appointed five attorneys to sit on the Court then used the civil and military officers of his government to take control of the state’s government without attacking the State House where Governor Packard was being guarded. On the morning of January 9, 1877, more than 3,000 armed men surrounded the Cabildo, filling the area around it. The justices previously appointed under Governor Kellogg, Ludeling, Leonard and newly appointed King, were inside the building ready to begin their session. It was reported that the justices held a short session and adjourned. When faced by the troops, the Metropolitan Police protecting the courthouse realized that it would be useless to try to defend the courthouse, resulting in them leaving the courthouse with the three justices.
The five justices that Governor Nicholls appointed were then escorted to the Cabildo and the court crier opened court for Chief Justice Thomas Manning and associate justices Robert Marr, Alcibades DeBlanc, William Egan, and William Spencer. No cases were heard that day, and Professor Wilson notes that the Court’s minute book makes no mention of the brief session of the Ludeling Court earlier that day.

The disputed presidential election of 1876 resulted in Rutherford B. Hayes, a Republican, becoming president after he agreed to recognize the Democratic governments in Louisiana, Florida, and South Carolina in exchange for receiving their electoral votes. On April 27, 1877, President Hayes ordered United States troops to withdraw from the statehouse and formally recognized Nicholls’s government, which marked the end of Reconstruction in Louisiana. Professor Wilson says the five appointments made by Governor Nicholls were respected lawyers who were loyal to the Confederacy. They bravely risked their reputations to accept appointment before they were certain that his government would prevail. These justices served only until 1880 when a new court was organized under the Louisiana Constitution of 1879.

Professor Wilson concludes her book with a chapter called “Judicial Legacy,” wherein she gives a balanced and nuanced overview of the eighteen men who served on three different courts during three different social and political periods. She writes that the 1865 Court, a timid court, served as a forum for dispute resolution and not as a catalyst for change. Then the 1868 Court gave voice to the state’s new constitution, but the justices did not always agree with one another. The practicing bar that argued before the 1868 Court mostly lacked respect for the justices for political reasons. Professor Wilson asserts that the 1877 Court was the most confident of the three courts and the justices actively embraced their role in restoring Democratic control to Louisiana. Professor Wilson concludes that the greatest combined contribution of the three courts centers on their operating with some level of success during a tumultuous time.
for Louisiana after the Civil War so that the rule of law was carried forward.11

Henry Plauché Dart, whom legal historian Warren Billings describes as having resolutely worked to undermine the Reconstruction government in New Orleans,12 offered a harsh and critical voice when describing the Louisiana Supreme Court justices in his 1913 history of the Court. In contrast, Professor Wilson offers a more calm and reflective voice in presenting these justices who attempted to navigate a different way of life under the newly-enacted laws of Louisiana following the Civil War. A minor quibble, however, is that the book could have benefited from an index, which would have provided better access to the fascinating people and events she describes in such interesting detail. Nonetheless, the book fills a gap in the history of the Louisiana Supreme Court after the Civil War, and should be essential reading for anyone wanting to know more about Reconstruction in Louisiana.