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AVANT-PROPOS

Volume 14 of the Journal of Civil Law Studies is published one year behind schedule, proving the fragility and the resilience of the operation. Fragility, as it was hit by a series of events, such as the COVID pandemic that paralyzed many human ventures all over the world. Fragility, because human causes impacted the personal life of its major actors, such as the Editor-in-Chief’s unexpected long-time leave and the Managing-Editors moving to other places. Resilience, because editing continued thanks to devoted LL.M. graduates who answered the call and joined the Center of Civil Law Studies as Research Associates. Resilience, because the team did not give up and the venture is too successful to fail. Volume 14 of 2021 comes out as Volume 14 of 2021-2022. After Volume 15 of 2022-2023, the Journal will try to come back to two annual issues matching the calendar year.

The Journal mourns the loss of the two Honorary Members of its Advisory Board. Jacques Vanderlinden passed away on January 22, 2021. He started his academic career with a major study of codification, to then clarify the concepts of custom and sources of the law. He was a great support, contributing four articles1 and a book review2 to the Journal. His scholarship and teaching embraced several continents, namely, Africa, Europe, and America, connecting legal history, comparative law, and legal anthropology. Rodolfo Sacco died on March 21, 2022. A long-time professor at the University of Turin, he authored major civil law and comparative law treatises, renewed the theory of sources of the law, and changed Italy into a powerful comparative law incubator. No comparative law professor had as many followers, including the author of this note.

Sacco and Vanderlinden—who were friends, within and beyond academic life—will remain a fertile source of inspiration. Their last day and year on this earth is a salute to the Journal, each combining 21 and 22. Each of them visited Louisiana State University. They were mentors and friends of the Editor-in-Chief who used to have them speak as a duet in Lyon each April, before migrating to Louisiana. While my assistant used to code the event “Sacco and Vanzetti,” I named it the printemps des comparatistes and participants remember these sessions as an invigorating Rite of Spring. Sacco and Vanderlinden both spoke in Baton Rouge in spring 2008, when the Journées Capitant celebrated the Bicentennial of the Louisiana Digest of 1808. This bouquet final must receive an echo when the Center of Civil Law Studies and Journal of Civil Law Studies will celebrate the Bicentennial of the Civil Code of Louisiana in 2025.

Two more Members of the Advisory Board passed away during this period. Attila Harmathy, a longtime professor at the Eötvös University of Budapest who also served as a Justice of the Hungarian Constitutional Court (1998-2007), was one of the finest civil law and comparative law professors in Europe. His name comes first when listing great jurists from Eastern Europe. He was the kindest of men, a friend and mentor to many. He visited and taught at LSU in the spring of 2007, and visited again in November 2018 to deliver the 41st Tucker Lecture.

Harvard Law School graduate Paul R. Baier embraced the civil law tradition when he started his long teaching career at LSU. A scholar and a playwright, he brought the dramatis personae to life in the classroom, bringing objects, sound and image. A constitutional law scholar, he was a great supporter of the LSU civil law program. His reflection on the constitution as code reversing the  

more traditional perspective of code as constitution was saluted by Justice Nicholas Kasirer, an invitation to pursue the combination of both ideas in the years to come.

In the meantime, may this volume honor the memory of these great scholars, with a plurality of voices and a wealth of material. By its content and authorship, Volume 14 embraces over twelve jurisdictions including Argentina, Azerbaijan, Canada, Chile, France, Germany, Italy, Jersey, Louisiana, New Zealand, North Korea, Poland, Québec, and South Africa. Articles visit contract law and penalty rules, supreme court dissents in a civil law jurisdiction, civil liability of corporate officers, and legal education in micro jurisdictions. While the full translation into Spanish of Book 2 of the Louisiana Civil Code is published in bilingual format, the Civil Law Translations series opens to a rarely visited jurisdiction, publishing the Civil Code of North Korea in bilingual format, with an introduction by the translator. Civil Law in the World visits Azerbaijan, Chile, and South Africa. Professor Palmer’s research on the Lost Translators of the Digest of 1808 is reviewed, as well as a linguistic analysis of the doctrine of consideration, often compared to cause. A rediscovered Letter by Colonel Tucker reviews the sources of the early civil codes of Louisiana. Three student-written case notes conclude the volume, discussing recent decisions by Louisiana courts.

Patience has its rewards and readers, authors, contributors, and editors deserve our thanks. Everyone should consider the present Volume as a token of gratitude and appreciation for the hard work and for the interest the Journal of Civil Law Studies has sparkled since its foundation fifteen years ago, in Louisiana and beyond.

Olivier Moréteau

Penalty Default Rules in Quebec Contract Law

Zackary Goldford*

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Abstract

Few would deny that contract law is filled with default rules, but there has been a great deal of scholarly debate about their purposes and functions. Some American scholars have argued that there are default rules that do not align with most parties’ expectations; indeed, they impose a burden on one or both parties if they are not departed from. Departing from these default rules typically requires one or both parties to share information that they might have otherwise kept to themselves. These have been called “penalty default rules.” While there is a significant amount of scholarship on penalty default rules in the United States, mostly by law and economics scholars, civilian scholars have not paid much attention to this concept. In this paper, I bring the concept of penalty default rules out

* B.A. (York University), B.C.L., J.D. (McGill University). I am grateful to Fabien Gélinas, Olivier Moréteau, and the anonymous peer reviewer for their helpful comments.
of the United States, the common law tradition and the law and economics scholarship. I demonstrate that there are many penalty default rules in Quebec contract law. I continue by arguing that these penalty default rules serve two valuable functions. First, they enhance the parties’ freedom of contract by equipping them with information. I focus on how this enables them to reach a fair allocation of risks. Second, they complement the duty of good faith by supplementing the limited duty of disclosure and by altering what sort of conduct is reasonable and therefore not abusive.

Keywords: penalty default rules, obligations, contracts, information sharing.

I. INTRODUCTION

It would be hard to imagine a world in which people enjoy the freedom to form contracts without a legal system that has at least some default rules in place. What would happen if parties render their contract nonsensical or inoperative by overlooking a key detail? Default rules plug these gaps without inhibiting freedom of contract since the parties remain free to depart from them. Thus, by many accounts, default rules ought to resemble what parties hypothetically would have agreed to. ¹

But some have argued that default rules often do more than simply fill gaps. Ian Ayres and Robert Gertner coined the term “penalty default rule” to describe default rules that do not align with the parties’ expectations, or at least create an undesirable outcome if they are not departed from. This gives the parties an incentive to depart from them. ² Ayres and Gertner also argued that penalty default rules are desirable because they, among other things,

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“encourage the parties to reveal information to each other or to third parties (especially the courts)” since information sharing is necessary to depart from them. However, in response, Eric Posner argued that there are no penalty default rules in American contract law, and Eric Maskin argued that there ought not to be penalty default rules. Ayres responded with a blunt “ya-huh” and argued again that there are and ought to be penalty default rules in contract law.

In this paper, I contribute a new perspective to this debate, one that comes from both a different country and a different legal tradition. I argue that there are penalty default rules in Quebec contract law and that they serve valuable functions. I do so by analyzing four aspects of contract law—contract formation, the content and interpretation of contracts, changed circumstances and remedies for breach—to reveal an assortment of penalty default rules. Then, I argue that penalty default rules enhance parties’ freedom of contract by facilitating the sharing of information between them. This enables parties to make informed decisions and to better protect their own interests. I focus on how this facilitates the pursuit of a fair allocation of risks. Moreover, penalty default rules complement the duty of good faith in two ways. One way is by encouraging information sharing in a wider range of circumstances than what is required by the duty of disclosure that is part of the duty of good faith. Another is by informing what sort of conduct is reasonable and therefore not abusive. Overall, I show that the concept of penalty default rules that Ayres and Gertner outlined need not be confined

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to the United States\textsuperscript{7} or to the common law tradition, or even to law and economics scholarship. Rather, it offers a useful lens through which we can learn more about the nature and functions of contract law in a wide range of legal systems, including in Quebec’s civilian system.

The term “default rule” might, at first blush, seem to be confined to the common law tradition. After all, most civilians would prefer to use the term “suppletive rules” to describe rules that the parties can depart from if they choose to. Suppletive rules, if understood narrowly, are only those rules that clearly invite the parties to depart from them. However, some of the penalty default rules that I identify are not suppletive rules in this narrow sense; as I will note, they are mandatory or imperative rules that can behave like default or suppletive rules in some situations. I consider these rules to be default rules. Much like Ayres, “if something quacks like a duck and walks like a duck,”\textsuperscript{8} I consider it to be duck. With this in mind, I suggest that the concept of “penalty default rules” is best understood as a “meta concept” that does not call any legal tradition home.\textsuperscript{9} Instead, it can be used to describe concepts from different legal traditions, including some default rules in the common law tradition, suppletive rules in the civil law tradition and other rules that might not readily seem like default or suppletive rules at all. Any rule that parties can depart from, directly or indirectly, that imposes a burden on one or both parties if they fail to depart from it could be called a penalty default rule.

\textsuperscript{7} There is a limited amount of Canadian scholarship that engages with the concept of penalty default rules. For an example of an article that engages with the concept in the context of corporate law, see Mohamed F. Khimji & Jon Viner, \textit{Oppression-Reducing Canadian Corporate Law to a Muddy Default}, 47 OTTAWA L. REV. 123 (2016). In the context of family law, see Robert Leckey, \textit{Cohabitants, Choice, and the Public Interest, in PHILOSOPHICAL FOUNDATIONS OF CHILDREN’S AND FAMILY LAW} 115 (Elizabeth Brake & Lucinda Ferguson eds., Oxford U. Press 2018).

\textsuperscript{8} Ayres, \textit{supra} note 6, at 593.

I should emphasize that this paper stretches the concept of penalty default rules into a domain that Ayres and Gertner might not have anticipated, not only because I bring it to a different jurisdiction that operates within a different legal tradition. This paper does not offer an economic analysis. I do not focus, at least not directly, on how penalty default rules may or may not enhance efficiency. Rather, I borrow a concept that, while initially born out of scholarship from the law and economics movement, provides a useful lens to analyse the notions of freedom of contract and good faith in Quebec. That said, for the sake of completeness and for the convenience of readers who are not familiar with the existing scholarship on penalty default rules, I begin by briefly outlining the debate on penalty default rules and their ability (or lack thereof) to enhance economic efficiency.

II. SHORT (AND PARTIAL) SUMMARY OF THE AMERICAN DEBATE

In their first article on this subject, Ayres and Gertner described penalty default rules as default rules that are unappealing to at least one party if they are not departed from. This gives the parties an incentive to depart from them, and in so doing it forces them to reveal information to the other party. Ayres and Gertner went on to argue that penalty default rules enhance efficiency.

This idea eventually came under attack from two fronts at a symposium that led to papers in the Florida State University Law Review: one empirical and one normative. Posner analyzed the examples of penalty default rules that Ayres and Gertner offered, including the rule that is sometimes seen to have emerged in Hadley v. Baxendale. In Hadley, an English court held that victims of

10. Ayres & Gertner, supra note 2, at 91.
11. Id. at 93–95.
12. See Posner, supra note 4; see also Hadley v. Baxendale (1854) 156 Eng. Rep. 145 (Eng.). However, it should be noted that this rule has deep civilian roots, and that it emerged in common law jurisdictions prior to Hadley. See e.g. Robert Joseph Poitier, Traite des obligations, selon les regles tant du for de la conscience, que du for exterier 177 (Paris: Debure l’aîné 1764); Blanchard v Ely, 21 Wend 342 (NY Sup Ct, 1839); Joseph M Perillo, “Robert J. Poitier’s Influence on the Common Law of Contract” (2005) 11:2 Tex. Wesleyan
breaches cannot recover damages for injury that was not reasonably foreseeable or foreseen. Of course, injury could become foreseeable if the party that might suffer the injury communicates this possibility to the other party prior to the formation of the contract. But the default rule is that such loss will not be compensable if the adverse party is not told that it might occur, unless the parties allocate the risks of unforeseeable harm. According to Ayres and Gertner, this rule is unappealing to a party that might suffer injury that is not reasonably foreseeable or foreseen by the other party, which is understandable because it would leave them without full compensation. Therefore, it gives them an incentive to make the other party aware of this possibility, which means that the rule serves as a “purposeful inducement” that facilitates the sharing of information. Without summarizing Posner’s entire argument, it suffices to say that he challenged the idea that Hadley is a penalty default rule by arguing that it often aligns with the parties’ expectations. Posner wrote that “the usual reason for thinking that the Hadley rule is not a majoritarian rule is that it is counter to the notion of efficient breach.” Since “the efficient breach theory says that contract damages should equal actual loss” but “the Hadley rule excludes the unforeseeable portion of any loss, [therefore] it is not majoritarian.” However, Posner argued that “this view…oversimplifies the analysis of optimal damages rules.” Expectation damages – the typical remedy for breach of contract in the common law tradition – “force the breacher to provide insurance to the victim against whatever event causes the breach.” The breaching party, who would have to pay expectation damages to compensate for all injury caused by the breach, is not always “the cheaper insurer” against any and all potential risks.


13. Id.

14. See Ayres & Gertner, supra note 2, at 101.

15. Posner, supra note 4, at 574.
Posner argued that “if this is right, then most parties would want liability limited to foreseeable loss,” which means that the Hadley rule aligns with most parties’ expectations.

In reply, Ayres wrote that “[i]f we go far enough back behind the veil of ignorance, all information-forcing rules are majoritarian.” With this apparent reference to John Rawls’ work, Ayres suggested that the Hadley default could align with a majority of parties’ expectations when it leads to “fully compensatory damages” or when “a majority of contracting parties would prefer the rule that deters the strategic withholding of information by an unrepresentative minority.” But for Ayres, Hadley is nevertheless a penalty default rule because “its efficiency stems from its inducing some contractors to contract around the default, rather than from enabling parties to save on the costs of contracting around it.” While Ayres conceded that “the Hadley example is not the cleanest example of a penalty default” since it does not “[induce] a majority of contractors to contract around” it, it is nerveless an illustration of how penalty default rules work because it shows “the informational impact of contracting around was an important consideration in choosing among competing defaults.”

Maskin argued that Ayres and Gertner’s claim with respect to the efficiency of penalty default rules is “logically in error.” In short, Maskin argued that parties could reach a more efficient contract by adhering to the Hadley default rather than contracting around it. Ayres replied that Maskin’s “counterexample merely displaces one type of contracting cost with another,” therefore “it is hardly a serious challenge to the possibility that penalty defaults can be

16. Id. at 575.
17. Id. at 574–575.
18. Ayres, supra note 6, at 612.
20. Ayres, supra note 6, at 612.
21. Id.
22. Id. at 613.
23. Maskin, supra note 5, at 557.
24. Id. at 561–562.
But regardless of whether it was Maskin or Ayres that arrived at the most economically efficient calculation, both arguments overlook other potential benefits that flow from information sharing that penalty default rules encourage. Therefore, I push beyond this debate to identify some of these other benefits in Quebec contract law.

III. PENALTY DEFAULT RULES IN QUEBEC CONTRACT LAW

A. Contract Formation

The Civil Code of Quebec contains two penalty default rules that apply to how contracts are formed, and more specifically to the power of an offeror to revoke an offer. Parties, particularly sophisticated parties, probably expect that offers can be revoked by offerors at any time prior to acceptance, as is the case in every other Canadian province and in the United States. Commercial expectations are often drawn from how the law is generally seen to operate. For example, this is why the Supreme Court of Canada in Bhasin v. Hrynew recognized good faith as an organizing principle of contract law in common law provinces, explaining that part of its reason for doing so was to align Canadian common law with commercial expectations that are influenced by American and Quebec law. Thus, the fact that Quebec is physically surrounded by, and has deep commercial ties with, jurisdictions that allow offers to be revoked at any time prior to acceptance suggests that parties, particularly those that do some or even most of their business outside of Quebec, would expect that this would hold true in Quebec as well. It could also be argued that this expectation is intuitive or even commonsensical; if I offer to sell you something, we did not yet form an

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25. Ayres, supra note 6, at 617.
27. See e.g., RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS §42 (1981).
agreement, and in fact I probably did not even promise to sell it to you. But the Civil Code of Quebec contains two default rules that are inconsistent with this expectation.

First, unlike in other Canadian provinces and in the United States, offers that are made with “terms,” which are best understood as timelines for acceptance, cannot be revoked unilaterally by the offeror. These offers are almost like options contracts that are used in common law systems; in both cases, the offeror is required to keep the offer open. When one reads the articles in the Civil Code of Quebec that set out this rule, it appears to be a mandatory rather than a default rule. Seemingly mandatory language, like “[w]here a term is attached, the offer may not be revoked before the term expires,” leads to this perception. But this rule behaves like a default rule because an offeror can avoid it by simply not attaching a term to their offer, or they could probably avoid it by indicating that the timeline that they propose is not a binding term but instead a suggested timeline. Moreover, this rule behaves like a penalty default rule because it imposes a burden on the offeror—presumably the party with more information available to them at the time that the offer is made—by holding them to the timelines that they propose unless they take deliberate action, which must involve communicating with the offeree, to depart from it.

Second, when an offer does not include a term, the offeror is nevertheless bound to keep it open for a reasonable amount of time if the offeree indicates that they are interested in considering the offer. Again, this has the effect of creating what is almost an options contract because it causes the offeror to lose their power of revocation. And again, while the Civil Code of Quebec establishes this rule using what seems like mandatory language, it behaves like a default

29. C.C.Q. art. 1390 ¶2.
30. Id.
31. Even if a proposed timeline is more advantageous to the offeror than what might otherwise be reasonable (i.e., what they might be held to if their offer becomes the subject of a promise to contract, discussed below), requiring the offeror to keep the offer open for the duration of that timeline is still a burden on them if they want the flexibility to revoke their offer whenever wish.
32. C.C.Q. art. 1396.
rule because the offeror could exempt themselves from it by altering their communication to change its status from an offer to what could be called an ‘invitation to treat.’ For example, instead of saying “I will sell you my diamond ring for $10,000,” which would likely be an offer, one could say “I might be interested in selling you my diamond ring for $10,000; contact me if you want to discuss this further.” In the second scenario, the formal offer would likely only come from the apparent offeree, and probably only after the parties have communicated further to establish mutual interest in the transaction. Thus, by using carefully chosen language to depart from what is effectively a default rule, the offeror can avoid being bound to keep their offer open simply because the other party expressed noncommittal interest. This is a penalty default rule because it subjects the offeror to a burden—that of having to keep their offer open for a reasonable amount of time, which might not be desirable for them—if they fail to depart from it.

Taken together, these two penalty default rules force the offeror to either disclose the extent to which they are serious about the offer being accepted or risk experiencing a burden that extends protections to the offeree. If someone makes an offer knowing that the offeree is not in a position to accept it yet—something that happens frequently in large transactions where the offeree might, for example, need to secure financing before being in a position to seriously consider whether they should accept the offer—they have an incentive to say so and to take steps to depart from these penalty default rules.

B. Content and Interpretation of Contracts

Parties generally expect that clauses in their contracts will be given legal effect, which is the general rule in Quebec. But in consumer contracts and contracts of adhesion, the Civil Code of

33. C.C.Q art. 1384.
34. C.C.Q art. 1379.
Quebec sets out two exceptions that are penalty default rules. First, art. 1435(2) provides that external clauses in consumer and adhesion contracts are null unless the party that prepared the contract brought them to the attention of the consumer or adhering party prior to the formation of the contract or if they can prove that the consumer or adhering party knew of them when the contract was formed. Second, art. 1436 provides that illegible or incomprehensible clauses are null if they cause injury to a consumer or adhering party unless the party that prepared the contract explained “the nature and scope of the clause . . . to the consumer or adhering party.” Both of these rules function as penalty default rules because they put a burden on the party that prepared the contract (i.e., rendering these clauses null) if they fail to take steps to communicate information about these clauses to the consumer or adhering party in advance.

Arts. 1435 and 1436 are perhaps more effective than other penalty default rules that exist in other jurisdictions. J. H. Verkerke argued that, while many American penalty default rules do encourage information sharing between the parties, they do not often lead sophisticated parties to clearly or effectively communicate information to less sophisticated parties because this information sharing often takes the form of “boilerplate language in largely unread contract documents.” By contrast, arts. 1435 and 1436 ensure that boilerplate language is unhidden, legible, and comprehensible. Thus, there is at least a minimum amount of comprehensible communication between the parties in consumer and adhesion contracts, even if it is true that most consumers and adhering parties will not bother to make themselves aware of what has been communicated to them. In these situations, the consumer or adhering party has at least been provided with an opportunity to be fully informed of the content of the contract. This perhaps does not go nearly as far as “requiring an oral recitation of all or part of the contract, quizzing

35. C.C.Q. art. 1435.
36. C.C.Q. art. 1436.
parties about their understanding of key contract terms, or perhaps mandating the participation of an attorney in certain transactions, but it at least gives most consumers and adhering parties a chance to be properly informed. In reality, many consumers and adhering parties will not take advantage of this opportunity—whether we admit it or not, most of us have not taken the time to read all clauses in every consumer or adhesion contract that we have ever entered into with care—but if parties have a fair opportunity to read and understand those clauses, there is a possibility that this penalty default rule will have an impact on the parties’ behavior.

One might argue that arts. 1435 and 1436 are aligned with rather than opposed to parties’ expectations and therefore they cannot be seen as penalty default rules. By this view, parties would expect that their consent only extends so far as to cover clauses that they were aware of or could have reasonably been aware of, and that they would therefore not expect their consent to cover unknown external clauses or unexplained illegible or incompressible clauses. But it is common for people to be presented with lengthy consumer and adhesion contracts that they might not bother to read from top to bottom. This often happens online when people sign up for digital accounts or purchase goods. Usually, a lengthy set of clauses will appear, and the adhering party will have the opportunity to accept them within seconds through a click of their mouse or a tap of their finger. Thus, it would be difficult for one to argue that parties have a reasonable expectation that all clauses in contracts will be brought explicitly to their attention since they regularly scroll past and click to accept contracts the content of which they do not fully know. One day, this might change. Indeed, there is (at least arguably) some indication that consumer and adhesion contracts in Canadian common

38. Id. at 907.
39. Indeed, in a recent paper, Aditi Bagchi went so far as to argue that boilerplate or adhesion contracts should be regarded as the norm. See Aditi Bagchi, *Risk-Averse Contract Interpretation*, 82 LAW & CONTEMP. PROBS. 1 (2019).
law provinces will need to be made shorter and more legible,\textsuperscript{40} which might cause parties’ expectations to shift. But at the moment it is likely that parties do not expect that there are default rules like arts. 1435 and 1436 that penalize the party that prepared a contract if they fail to protect the consumer or adhering party by sharing certain information.

Another penalty default rule—one that has been identified in the American literature\textsuperscript{41}—is \textit{contra proferentem} interpretation of contracts. According to this canon of interpretation, ambiguous contracts are interpreted in a manner that disfavors their drafters. Courts rarely turn to \textit{contra proferentem} interpretation because, so long as “the words of the contract are clear, the court’s role is limited to applying them to the facts before it.”\textsuperscript{42} If the words are ambiguous, courts must look contextually for the common intention of the parties consistent with a holistic reading of the contract.\textsuperscript{43} However, art. 1432 provides that if this exercise still leaves courts with doubts, they must resolve these doubts in a manner that favors the debtor in a contract that was open to negotiation, or “[i]n all cases . . . in favor of the adhering party or the consumer.”\textsuperscript{44} This means that \textit{contra proferentem} interpretation is available for at least some ambiguous consumer and adhesion contracts. While this might look like a mandatory rule because it does not openly invite parties to depart from it, it is best understood as a default rule because it can be ignored if the contents of contracts are made clear, particularly through clear drafting.\textsuperscript{45}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{40} See Uber Technologies Inc. v. Heller, [2020] S.C.R. 16, 71 (Can.) (in which the majority wrote that an inequality of bargaining power, which is one part of the test used to determine whether contracts can be set aside for unconscionability, can arise because one party could not understand the content of an adhesion contract due to, for example, “dense or difficult to understand terms”).
\item \textsuperscript{41} See e.g., Ayres, \textit{supra} note 6, at 596.
\item \textsuperscript{42} Uniprix inc. v. Gestion Gosselin et Bérubé inc., [2017] SCC 43, para. 36
\item \textsuperscript{43} See C.C.Q. arts. 1425–1431.
\item \textsuperscript{44} C.C.Q. art. 1432. See also Didier Lluelles, \textit{Les règles de lecture forcée « contra proferentem » et « contra stipulatorem » : du rêve à la réalité}, 37 R. J. T. 235 (2003).
\item \textsuperscript{45} Ayres, in defending the position that \textit{contra proferentem} can be seen as a default rule, argued that “resolving the ambiguity [in the contract] through an act of interpretation is analogous to filling the obligational gap with a default.
\end{itemize}
\end{footnotesize}
because it gives parties that prepare contracts, especially consumer and adhesion contracts, a strong incentive to draft clearly. If they fail to do so, they could find themselves in a burdensome situation in which their ambiguous clauses are at best not given full legal effect or at worst given an effect that will harm them. Thus, it is difficult for these parties to hide their true intentions behind ambiguous terms in contracts; art. 1432 forces them to share enough information through clear drafting so that the court can discern a common intention of the parties in order to avoid contra proferentem interpretation.

C. Changed Circumstances

Parties generally expect that contractual obligations will be performed, or at least that damages will be paid. However, many endeavors that contracts facilitate run the risk of being upended by changed circumstances. The Civil Code of Quebec contains some recognition of this reality. Although parties have a broad duty to fulfill their contractual obligations, arts. 1470 and 1693 provide that they can be excused from liability for non-performance if the injury caused by their failure to perform results from a “superior force.” A superior force must be both “unforeseeable” and “irresistible;” this means that it could not have been foreseen by a reasonable person in the position of the parties when the contract was formed and that there is nothing that could have been done to stop it. Although

Where that act of interpretation is carried out according to a predictable rule, parties will contract around it just as they would a pure statutory default.” See Ayres, supra note 6, at 596.

46. As Ayres put it, “[t]he contra in contra proferentem rightly suggests a penalty; the interpretative presumption is not chosen because we think that the most negative interpretation is what the drafter or even the draftee normally wants, but rather because the rule of construction is a stick to force drafters to educate nondrafters.” See Ayres, supra note 6, at 596.
47. C.C.Q. art. 1590.
48. C.C.Q. art. 1470.
49. See SEBASTIEN GRAMMOND, ANNE-FRANÇOISE DEBRUCHE & YAN CAMPAGNOLO, QUEBEC CONTRACT LAW ¶363–644 (2d ed., Wilson Lafleur 2016);
there are some inconsistencies in the jurisprudence,\textsuperscript{50} few risks are considered to be truly unforeseeable.\textsuperscript{51} Even fewer risks are considered to be truly irresistible. As Vincent Karim notes, “any resistance by the debtor to the event must be ineffective, useless and futile...such that it is absolutely and permanently impossible for them to perform the obligation.”\textsuperscript{52} Thus, arts. 1470 and 1693 are of little help to parties that fail to allocate the risks associated with many, if not most, unforeseen circumstances.

If they are far enough behind the veil of ignorance—that is, if they do not yet know whether they might benefit from or suffer because of a change in circumstances—parties will likely expect that the law will require that, at minimum, contractual obligations be revised or renegotiated in the event that they are harmed. But there is no provision in the \textit{Civil Code of Quebec} that grants relief to parties in circumstances that do not meet the high bar of superior force. Thus, in order to give legal effect to their expectations, parties need to reach an agreement on how the risks of circumstances changing will be allocated. If they fail to do so, they run the risk of being left without recourse if a major change in circumstances that is not quite a superior force comes along in the future and harms them.

While it is common for parties to be far behind the veil of ignorance in the sense that neither expects that a major change in

\textsuperscript{50} See e.g., Gestion Initiative Développement GID Ltée v. Québec New York 2001, 2004 CanLII 647 ¶11 (Can. Qc. S.C.). In this case, the parties agreed that “\textit{les attentats terroristes du 11 septembre 2001, à deux pas du site de l’exposition, constituaient une force majeure}” [the terrorist attacks of September 11, 2001, close to the exhibition site, was a superior force]. Faced with different facts, the Superior Court held that “\textit{les tragiques incidents survenus le 11 septembre 2001 ne constituent pas un événement de force majeure pour Bombardier puisqu’ils n’en ont pas le caractère suffisant au terme du contrat intervenu entre les parties et qu’ils ne rencontrent pas plus les critères définis par la loi}” [the tragic incidents that occurred on September 11, 2001 do not constitute a superior force for Bombardier because they do not have the required character based on the contract between the parties and they do not meet the criteria established by law]. \textit{See} Caisse Desjardins de St-Paulin v. Bombardier Inc., [2008] QCCS 3725 (Can.)


\textsuperscript{52} \textit{KARIM, supra} note 49, para. 3779 [translation by author].
circumstances will occur, it is not difficult to imagine situations in which one of the parties knows more about how circumstances might change than the other. But even in these situations, the party with more information might still find themselves behind the veil of ignorance to the extent that they do not know whether or not they will benefit from a change in circumstances. For example, a manufacturer of hand sanitizer could conceivably benefit from a pandemic due to increased demand or they might be harmed because they will be stuck selling their product for a fixed price when they could have sold it to other customers that are suddenly willing to pay more. Thus, even parties that know more information will probably want to allocate the risks associated with at least some changes in circumstances. If they fail to discuss these risks with the other party and reach an agreement, they are penalized by being left without recourse unless there is a superior force. Arts. 1470 and 1693, taken together, can therefore be seen as a penalty default rule. It is a default rule because it can be departed from, and it penalizes the parties if they fail to initiate a discussion on the topic by depriving them of protections that they might want while they are still behind the veil of ignorance. Even if one party does not know more information than the other, arts. 1470 and 1693 still operate as a penalty default rule by denying both parties the opportunity to make themselves feel more comfortable with the amount of risk that they are taking on in the contract unless they have a discussion and agree on who will bear the risks of circumstances changing.

D. Remedies for Breach

Without rehashing the debate, which was briefly discussed earlier, about whether Hadley is a penalty default rule, I should note that the Hadley rule has deep civilian roots. It is thus unsurprising

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53. See e.g., Robert Joseph Pothier, supra note 12, at 177. See also Blanchard v Ely, 21 Wend 342 (NY Sup Ct, 1839) at 348–350; Joseph M Perillo, Robert J. Pothier’s Influence on the Common Law of Contract, 11:2 Tex. Wesleyan L. Rev. 267 (2005); Robert M Lloyd & Nicholas J Chase, Recovery of
that the Civil Code of Quebec contains a provision that is similar to the Hadley rule. Art. 1613 provides that “the debtor is liable only for damages that were foreseen or foreseeable at the time the obligation was contracted” if the breach is not the result of “intentional or gross fault” on the part of the breacher. One easy way to render injury that might otherwise be too remote foreseen is for the party with knowledge of the potential for such injury to alert the other party. If they fail to do so, art. 1613 penalizes them in the event of a breach by denying them recovery for such injury.

IV. Value of Penalty Default Rules in Quebec

So far, I have revealed that there are a number of penalty default rules in the Civil Code of Quebec that facilitate the sharing of information. The party that knows less stands to benefit from the existence of penalty default rules either because they favor them if they are not departed from or because the other party will act on their incentive to share information. While the benefits that these rules provide to parties with less information if they are not departed from, such as protections against the revocation of an offer, might seem obvious, the benefits that these rules provide when they are departed from might be less apparent. Therefore, in what follows, I discuss two major benefits of information sharing that is facilitated by penalty default rules. First, it enhances the parties’ freedom of contract. Second, it complements the duty of good faith.

A. Enhancing Freedom of Contract

Information sharing that is facilitated by penalty default rules enhances parties’ freedom of contract by equipping them with information that can help them reach fair agreements. Although freedom of contract has been defined as the freedom for “autonomous and
self-interested parties” to form any contract, meaning “that the content of a contractual obligation is a matter for the parties, not the law,” the Supreme Court of Canada has recently recognized that “[a]t the heart of this theory is the belief that contracting parties are best-placed to judge and protect their interests in the bargaining process.” This relies on the assumption that there is at least a degree of equality between the parties. Of course, there is room for “economically rational actor[s] engaged in commercial negotiation[s] . . . to achieve the most advantageous financial bargain . . . at the expense of the other negotiating party,” which might be seen as part of the broad concept of freedom of contract. But this freedom is not absolute. As Justice Binnie wrote, “[f]reedom of contract, like any freedom, may be abused.” Although I have thus far referred to common law cases and materials, the idea that freedom of contract, like other rights, is not absolute is well entrenched in Quebec civil law. Therefore, it could be said that a proper understanding of freedom of contract in Quebec would include the assumption that, while parties have the freedom to agree to whatever they wish that is within the bounds of public order, both parties should have a shared understanding of at least some information so that they can interact on a somewhat level playing field. When penalty default rules facilitate the sharing of information, the party that would have had less information is better equipped to negotiate clauses that reflect the realities revealed by that information and to decide whether they want to enter into the contract at all. Penalty default rules therefore

57. Heller, supra note 40, at ¶56.
58. Id.
60. Tercon Contractors Ltd. v. British Columbia (Transportation and Highways), [2010] SCC 4 ¶118 (Can.).
61. See e.g., C.C.Q. art. 7.
63. Indeed, Pierre-Gabriel Jobin and Nathalie Vézina note that, while freedom of contract is an important tenet of contract law in Quebec, it has never been endorsed in its most extreme form. See Jobin & Vézina, supra note 51, at ¶84.
serve to enhance the parties’ freedom of contract by equipping the party with less information with the information that they need to negotiate.

When parties engage in pre-contractual negotiations, the penalty default rules that I identified which apply at this stage enhance the parties’ freedom of contract by shaping how the parties negotiate. As previously discussed, if an offeror makes an offer without disclosing how serious they are about the offer being accepted, the law will effectively presume that they are serious and it will therefore build in protections for the offeree against sudden revocation of that offer. These protections impose a burden on the offeror. For example, if A offers to sell B gold at the present day’s spot price but the spot price fluctuates upward a few days later, A stands to miss out on the opportunity to sell the gold for more money if B accepts the offer. A would probably want to revoke the offer before B could accept it, but unless they told B in advance that they might do so, this would probably not be allowed. B therefore enjoys either protection or disclosure in advance of the potential for sudden revocation. The benefits for B are obvious if the default rules are not departed from. Yet, if the default rules are departed from, both B and A stand to benefit from the information sharing that would be required to depart from them. If, for example, A tells B that the offer is only open for a short period of time, such as 24 hours, B cannot reasonably rely on the offer being open for longer than that. A would not need to worry about opportunistic acceptance of the offer beyond that set period of time. Alternatively, if A tells B that the offer could be revoked at any time, B will either be wary of devoting too much energy to pondering whether to accept the offer or at least do so having been forewarned that this endeavor could leave them empty-handed.

Ultimately, by A sharing information with B about the seriousness of the offer—otherwise put, whether there is a risk of sudden revocation—both A and B are better positioned to protect their own interests in the negotiation process. B could, for example, reject an offer that is not sufficiently serious on the spot, perhaps because it
will not leave them with enough time to consider it, which would enable both B and A to move on to other endeavors. Alternatively, B might tell A that, given only a small amount of time to consider the offer, they would only be in a position to consider it if the price is lower, which would prompt negotiations between A and B. A might agree to lower the price (thus putting a new offer on the table), or B might walk away. In the first scenario, the risk of revocation would be built into the final offer, and more likely into the price to be paid or some other clause that is important to the parties. Regardless, by A giving B an assessment ahead of time of the risk of revocation of the offer, A and B are both better positioned to allocate the risks of sudden revocation during their pre-contractual negotiations, or if they cannot manage to do so, to move on to other endeavours. This enhances their freedom of contract because it allows both of them to negotiate on more realistic terms and to ultimately end up with an offer that both are satisfied with or to part ways sooner than they otherwise would have if they cannot find an agreeable solution.

Likewise, the penalty default rules that apply to the content and interpretation of contracts facilitate information sharing that enhances the parties’ freedom of contract. Take, for example, arts. 1435 and 1436 which require that certain clauses in consumer contracts and contracts of adhesion be brought to the attention of the consumer or adhering party when the contract is formed. Of course, the consumer or adhering party will often stand to benefit from these penalty default rules when they apply by protecting them from disadvantageous clauses. But if the party that prepared the contract decides to depart from them, the consumer or adhering party is often better empowered to protect their own interests. If they, for example, are made aware of a clause that is seriously disadvantageous to them, they might decide not to enter into the contract at all or insist that the problematic clauses be modified. If, for example, the party that prepared the contract would have allocated a great deal of risk to the consumer or adhering party, the consumer or adhering party might refuse to enter into the contract unless the price is lowered.
Of course, in such a situation, the contract would no longer be an adhesion contract because the clauses of the contract would have been negotiated, but by that point arts. 1435 and 1436 would have already done their information-forcing work. Contra proferentem interpretation of contracts that is sometimes required by art. 1432 serves a similar function by ensuring that clauses, including those that might be disadvantageous for the drafting party, are either clear or interpreted in a manner that favors the non-drafting party. Additionally, if enough consumers and adhering parties choose “exit” over “voice,” this could cause systemic change by encouraging parties that prepare consumer or adhesion contracts to more fairly allocate risks between the parties so that fewer people refuse to enter into those contracts. In any event, consumers and adhering parties will enjoy enhanced freedom of contract because they will be empowered to take some steps to protect their own interests, or at least to be forewarned about potentially disadvantageous clauses even if they do not take any steps to protect their interests.

The penalty default rule that applies to changed circumstances also serves to equip parties to more fairly allocate risks. If one party knows that there is a risk of circumstances changing in a way that will harm them, they have a strong incentive to share this information with the other party in order to avoid being left without recourse if that risk materializes. If that party stands to benefit from those changed circumstances, perhaps they will not have the same incentive to share that information with the other party, but it could be argued that they would be required to do so as part of the duty of good faith. Parties must disclose information that they knew or ought to have known which is of decisive importance that the other party could not have discovered themselves, or if the other party reasonably relies on the other party to disclose it. If one party

64. Ultimately, stronger parties will sometimes have a direct incentive to stay away from consumer or adhesion contracts.
withholds information about a serious risk that circumstances might change that will benefit them, particularly at the expense of the other party, it might not be difficult to argue that this test could be met. In either case, the party with less information is likely going to be informed, which could spark negotiations about the allocation of risks. For example, if circumstances are somewhat likely to change in a manner that will harm the buyer, they might ask for a lower price in order to make it economically rational for them to move forward with the transaction. There is also the possibility, which is perhaps more common, that both parties will be equally far behind the veil of ignorance as to the risk of circumstances changing. In these situations, while there is no foreseeable risk that one party is incentivised to tell the other party about, the parties will nevertheless be incentivised to engage in negotiations as to who is best placed to bear the risk of changed circumstances because they will want to avoid the possibility that they find themselves in a seriously disadvantaged position and without recourse if circumstances change. The party that bears more risk than the other might ask to be compensated in some way, such as through a more favorable price. In both cases, the penalty default rules that apply to changed circumstances give the parties incentives to negotiate a fairer allocation of risks. This enhances their freedom of contract because it equips both of them with the tools to better protect their own interests by presumably either taking on less risk or being compensated for taking on more risk than the other party.

Finally, the penalty default rule that excludes unforeseeable or unforeseen injury from compensation is another tool that facilitates the fair allocation of risks. If one party knows that they will suffer injury that would not be reasonably foreseeable in the event of a breach, they have a strong incentive to tell the other party about it during pre-contractual negotiations so that they are not left without recourse for that injury. When this happens, the other party is essentially told that they are taking on additional risk, and this could prompt them to either ask for a more favorable price, to seek other
modifications or to not enter into the contract at all. This enhances their freedom of contract because it equips them to protect their own interests in the face of varying levels of risk. Likewise, it enhances the other party’s freedom of contract because it makes it feasible for them to enter into contracts that might otherwise be undesirable for them. If they know that they might suffer some sort of injury that is not reasonably foreseeable if the contract is breached but they also know that they cannot possibly have recourse for that injury if it occurs, they might not enter into the contract at all. Ultimately, by sharing information and thus departing from this penalty default rule, both parties have the opportunity to negotiate a fairer allocation of risks. While this is easiest to visualize when one party knows of the potential for unforeseeable injury to flow from a potential breach, it is also true when both parties are equally far behind the veil of ignorance as to whether unforeseeable injury might occur. In such circumstances, the harshness of the penalty default rule—that no unforeseeable injury is compensable—might give the parties incentive to allocate some or all the risks of unforeseeable injury in order to make the contract more desirable for them. One party might feel more comfortable or be better equipped to take on that risk, and in exchange they might ask for a more favorable price. It is also possible, considering Posner’s analysis, that the parties will accept this default rule as a desirable allocation of risks. But even if this happens, the parties may have discussed the nature of this rule (or at least recognized it themselves) and therefore they would have come to an agreement on how the risk of unforeseeable injury should be allocated. Overall, regardless of whether this penalty default rule is departed from, the parties will be equipped to negotiate a fair allocation of risks and to decide not to enter into the contract at all.

B. Complementing the Duty of Good Faith

Penalty default rules serve a second valuable function in Quebec by complementing the duty of good faith. Parties owe each other a duty of good faith at all times, which can manifest itself in many forms, such as a duty to disclose information or to not exercise rights abusively. In this section, I demonstrate that penalty default rules build on top of the duty of good faith. First, they often give parties with additional information incentives to disclose more information than what the duty of good faith requires. Second, they can alter what it means to act reasonably and therefore to not exercise rights abusively.

1. Disclosure of Information

As part of the duty of good faith, parties are sometimes required to disclose information to each other. The Supreme Court of Canada outlined a test to gauge whether disclosure is necessary in Bank of Montreal v. Bail Ltée. One has a duty to disclose information if they have “actual or presumed” knowledge of it, if that information is “of decisive importance” and if it was either impossible for the other party to find that information out themselves or if they legitimately relied on the first party to disclose it. Penalty default rules might therefore seem, at first blush, to have a redundant function since information sharing is sometimes required (not merely incentivized). But this duty of disclosure is limited. In some situations, penalty default rules incentivize the sharing of information that does not need to be disclosed in order to comply with the duty of good faith.

Take, for example, the penalty default rules that give parties an incentive to share information about the seriousness of their offers.

68. See C.C.Q. art. 1375.
69. See e.g., Bail, supra note 66.
70. See e.g., Houle v. Canadian National Bank, [1990] 3 S.C.R. 122 (Can.).
71. Bail, supra note 66.
72. Id. at 586–587.
While it might not be hard to argue that an offeror has actual knowledge of the seriousness of their own offer and that the other party would often have no way to discover that information themselves, it is not always the case that this information is of decisive importance to the offeree. In some cases, an offeree might only be prepared to consider accepting an offer that was made very seriously. But it is not hard to imagine situations in which an offeree is prepared to rely on an offer regardless of whether it was made very seriously. A start-up might, enamored by the prospect of taking their business to the next level, make internal arrangements to eventually form a lucrative contract with a multinational corporation if that corporation makes them an offer. Of course, this reliance might be based on an assumption that the offer was made seriously, but it would not be hard to argue in at least some cases that the start-up would rely just as heavily on an offer made less seriously. A prospective contract can sometimes be so alluring that it is rational to make arrangements to enter into it even if it is not certain or even likely that it will be eventually formed. Think of distributors who invest considerable efforts to get their products into big box stores, or start-ups that create products with the sole intention of trying to convince large companies to acquire them. In these situations, it would therefore be challenging to demonstrate that the offeror would be required to disclose the seriousness of their offer to the offeree under the duty of good faith. But penalty default rules incentivize the sharing of this information. In this example, the offeror would need to disclose the seriousness (or lack thereof) of their offer in order to depart from the default rules that would extend protections to the offeree. Once equipped with this information, the offeree becomes better placed to decide whether it is worthwhile for them to rely on the offer being open for acceptance.

The same could be said about the penalty default rules that incentivize the sharing of information about the content and interpretation of contracts. In consumer contracts and contracts of adhesion, the presence of certain clauses might not be of decisive importance to the consumer or adhering party. It is common for consumers and
adhering parties to sign pre-prepared written agreements without the presence or absence of certain clauses being of decisive importance for them. David Heller, the representative plaintiff in Uber Technologies v. Heller, relied on his contract with Uber to earn a living, and it is therefore not a stretch to say that he would have entered into the contract even if the arbitration clause that was later impugned had been written in plain language and printed in bold red ink. He might not have liked the clause—in fact, we know that at least in retrospect he did not like it—but it would be hard to claim that the presence or absence of the clause was of decisive importance for Mr. Heller because his livelihood depended on that contract. But even though this information might not rise to the level of decisive importance—and is therefore not subject to a duty to disclose required by the duty of good faith—the penalty default rules on the content and interpretation of contracts would give the party that prepared the contract a strong incentive to disclose it or at least make it available in legible and easily accessible text.

It is also not hard to imagine situations in which the risk of circumstances changing would not be of decisive importance. While I noted earlier that there could be situations in which the duty of good faith would require the disclosure of such information, this is not always the case. Take, for example a publicly held corporation that, after a few quarters of poor performance, is eager to boost its stock price. If it can enter into a contract that will boost its stock price quickly, it might want to do so even if there is a possibility that circumstances will change to its detriment. This might seem improbable because corporate directors and officers owe the corporation a duty of care and a fiduciary duty, which includes a duty to protect its long-term interests, but so long as the directors and officers can show that their decision was reasonable, courts will defer to their

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73. Heller, supra note 40.
74. See e.g. Canada Business Corporations Act, RSC 1985, c C-44, §122(1).
business judgement. It could be seen as sound, or at least reasonable, business judgement to enter into a contract that would temporarily boost a corporation’s stock price with the hope that this will inspire confidence in the corporation that will lead to more growth in the future. In these circumstances, a duty to disclose would not arise because the information about the potential that circumstances will change would not be of decisive importance. But the penalty default rule that applies to changed circumstances would give the parties an incentive to disclose information that they know about the potential for circumstances to change, at least when they either stand to be harmed by those changed circumstances or when they are sufficiently far behind the veil of ignorance that they cannot know whether they will be harmed or will benefit. Of course, the penalty default rule does not do a perfect job of incentivizing the sharing of information in all cases. If the party that knows about the potential for changed circumstances stands to benefit from those changes and no duty to disclose is triggered, they will probably opt not to share that information with the other party. That said, the penalty default rule and the duty of disclosure work together to force or incentivize the sharing of information about the potential for changed circumstances in many, if not most, situations.

Likewise, the risk of unforeseeable injury in the event of a breach might not be of decisive importance for parties that rely heavily on contracts, such as for their livelihoods, particularly if they do not expect that there will be a breach. But parties might still be incentivized to disclose information about unforeseeable injury by art. 1613 if they either know that they could suffer this injury upon breach or if they are sufficiently far behind the veil of ignorance that it is rational for them to act as if they might be harmed. Unlike with changed circumstances where it is conceivable that one could benefit from unforeseen events, it is hard to imagine that anyone would benefit from injury to themselves. Therefore, this penalty default

76. BCE, S.C.R 69 at 75; Peoples, S.C.R 68 at 75.
rule encourages even more information sharing than the penalty default rule that applies to changed circumstances.

2. Reasonable Conduct and Abuse of Right

By incentivizing information sharing, penalty default rules complement the duty of good faith in another way: by changing what it means to act reasonably (including in the exercise of legal rights) in some circumstances. One concept that fits under the broad umbrella of good faith is “the civil law framework of abuse of rights.” Under this framework, “it is no answer to say that, because a right is unfettered on its face, it is insulated from review as to the manner in which it was exercised.” Rather, parties must act reasonably in the exercise of their rights, meaning that they must not intentionally harm others or act in an objectively unreasonable manner. Put another way, they must not act “imprudently or negligently, in an intemperate manner or with an intention to harm.” Courts can objectively assess whether conduct is reasonable “by reference to the conduct of a prudent and diligent individual.” While this standard is objective, it takes context into account; courts consider how a reasonable person would have acted in the circumstances. If a party knows additional information due to the circumstances, so will the reasonable person. Therefore, if the circumstances surrounding the contractual dealings between parties—including penalty default rules—result in more information being shared, this could alter what would count as reasonable conduct in the circumstances.

77. C.M. Callow Inc. v. Zollinger, 2020 SCC 45, para. 68.
78. See C.C.Q. art. 7; see also Houle, supra note 70.
79. Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District, 2021 SCC 7, para. 109
80. Houle, supra note 70, at 164. See also Méthot c. Banque de développement du Canada, 2006 QCCA 649.
82. See e.g., Labelle v. Gatineau (Ville), [1960] BR 201 (Can.).
For example, what is reasonable and therefore not abusive can be influenced by the parties’ shared understanding that circumstances might change. This can come about because of the penalty default rule that applies to changed circumstances, which incentivizes the parties to disclose known risks and to allocate unknown risks. Consider, for example, the facts in *Houle v. Canadian National Bank*. Canadian National Bank suddenly recalled a corporation’s loan and gave only three hours for it to be repaid while negotiations were underway for its shares to be sold. This led to the shares being sold for significantly less than they would have otherwise been sold for. Under the contract, Canadian National Bank had the right to recall the loan whenever it wanted to. But the Supreme Court of Canada held that Canadian National Bank abused this right by acting unreasonably. While it was considered to be unreasonable to suddenly recall the loan in these circumstances, this might have been different if the parties had shared information about or allocated the risks of potential changes in circumstances when the contract was formed. Imagine that the Canadian National Bank told the debtor corporation’s directors that, if there is a serious risk that the shares will be sold to third parties, they could feel less comfortable with the loan, perhaps because they prefer to lend money to corporations whose directors they know and trust. New majority shareholders in a closely held corporation will probably mean new directors, and the bank would therefore no longer trust the corporation. If that had happened, it would be more difficult to argue that recalling the loan would be abusive because the debtors were forewarned that this might happen. Even the three-hour delay might not have been abusive if, for example, the bank only found out about the pending sale on short notice. Ultimately, the same action—suddenly demanding payment—which is abusive in some situations might not be abusive in other situations, which could be influenced by how much information the parties share with each other when the contract is formed.

83. *Houle*, *supra* note 70.
84. *Id.* at 130–133.
85. *Id.* at 167–176.
V. CONCLUSION

As I have shown, there are many penalty default rules in Quebec contract law that serve valuable functions. Although the concept emerged in the American law and economics literature, it is a useful tool to understand default rules in other jurisdictions and even other legal traditions. Penalty default or suppletive rules should not be seen as simply gap-fillers; rather, as I have shown, they can play a much greater role by enhancing the parties’ freedom of contract and by complementing the duty of good faith. With this in mind, my hope is that this paper will serve as an invitation to think more about the role of default rules—particularly penalty default rules—in Quebec and in other civilian jurisdictions.
PERFORMATIVES IN ARGENTINE SUPREME COURT DISSENTS: A JURILINGUISTIC PROPOSAL FOR CIVILIAN CHANGE BASED ON THE AMERICAN COMMON LAW

Mariano Vitetta*

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ABSTRACT

This article explores a linguistic defect in how Argentine Supreme Court dissents are written. The reader of these dissents has a hard time distinguishing between a majority opinion and a dissenting opinion, because dissents are written “as if” they were deciding the case. The confusion results from the use of performative language in dissents when adherence to reality and a plain-language approach require modal verbs reflecting the language of suggestion. This is actually the way dissents are expressed in the United States, the jurisdiction from which the Argentine Supreme Court copied its constitutional design. To make the case against the use of alleed performative language in Argentine Supreme Court dissents, the article explores the differences in how the civil law and the

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common law have traditionally treated dissents, introduces the basic elements of British philosopher J. L. Austin’s speech act theory, applies Austin’s concept of performatives to dissents, shows examples from the supreme courts of both Argentina and the United States, and finally makes the plain-language case as another compelling argument for clarity in dissents to propose the abandonment of a practice that is not truthful to reality and seriously limits the understanding of the Argentine Supreme Court decisions. The whole discussion is presented as a jurilinguistic exercise, combining law and language analysis.

Keywords: dissents, performatives, speech-act theory, judicial discourse, law and language, jurilinguistics, plain language, genre analysis, Supreme Court, Argentina

I. INTRODUCTION

Argentina is a civil-law country, but it has imported a considerable part of its constitutional design and some of its constitutional doctrines from the United States.¹ This influence has been so significant that Argentina has been described as a “civil law nation with a common law touch.”² One aspect in which Argentina sets itself apart from its civil-law counterparts is Supreme Court opinions. While decisions issued by the highest courts in other civil-law countries usually do not state the names and the specific opinions of each justice,³ Argentina has chosen to follow the American common-law

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¹ See, e.g., MANUEL JOSÉ GARCÍA MANSILLA & RICARDO RAMÍREZ CALVO, LAS FUENTES DE LA CONSTITUCIÓN NACIONAL. LOS PRINCIPIOS FUNDAMENTALES DEL DERECHO ARGENTINO (LexisNexis 2006); and MANUEL JOSÉ GARCÍA MANSILLA & RICARDO RAMÍREZ CALVO, LA CONSTITUCIÓN NACIONAL Y LA OBSESIÓN ANTINORTEAMERICANA (Virtudes 2009).


[T]he tendency is for the decisions of higher courts in civil law jurisdictions to be strongly collegial in nature. They are announced as the
model, in which the names and opinions of individual justices are known. The judgments issued by the Argentine Supreme Court indicate the name of the justices and their individual opinions, if any. Justices may join the majority or plurality, may concur, or may dissent. One of the consequences of this system is that justices may express their disagreement from the majority by writing a dissent, which in Argentina takes the form of an alternative disposition of the case. Dissents are unheard of in many other civil-law countries, such as France or Italy, though dissent writing is a widespread practice in other civilian jurisdictions, such as Spain, Colombia, Brazil, or Chile.

While Argentina has imported from the American common law the tradition of publishing dissents, if any, together with majority opinions (or plurality opinions, for that matter) in cases decided by the Supreme Court, it has copied the tradition with a defect. Dissents issued by Argentine Supreme Court justices use performative language as if they were actually deciding a case, and that is simply not true. As such, Argentine Supreme Court dissenting justices are liars, in linguistic terms. In the end, a dissent is nothing but an alternative view of how a case should have been decided. Conversely, in the United States dissenting judges express their opposition to the main opinion with the language of suggestion, using modal verbs such as “would” or “should.”

This remark may seem trivial at first sight, but considering that citizens at large are usually interested in the Supreme Court decisions given the transcendental role of the highest judicial body in the
decision of the court, without enumeration of votes pro and con among the judges. In most jurisdictions separate concurring opinions and dissenting opinions are not written or published, nor are dissenting votes noted. The tendency is to look at the court as a faceless unit.

4. See David Pollard, Sourcebook on French Law xxvii (Cavendish Pub’g 1998).
5. See Jeffrey S. Lena & Ugo Mattei, Introduction to Italian Law 111 (Kluwer 2002).
6. Martin Shapiro, Judges As Liars, 17 Harv. J. L. & Pub. Policy 155 (1994) (the epithet is actually used here for the reluctance of judges to recognize that they actually create the law and not that they merely apply it).
nation, justices should do away with this tradition and be clearer in how they express themselves. Also, being clearer in dissenting also favors experts who read Supreme Court opinions on a daily basis as part of their work. Writing dissents using performative language as if they were actually the law only infuses confusion in the reader. This article will analyze the concept of dissents and their place in the civil law and the common law, will explain what performatives are in the theory of British philosopher J. L. Austin and how this linguistic concept is relevant to the notion of dissents, will include examples of parts of American and Argentine dissents for comparative linguistic analysis, and will finally make a proposal for change that is in line with the linguistic theory underlying performatives and modern plain-language approaches.

II. DISSENTS IN COMMON-LAW AND CIVIL-LAW SYSTEMS

As dissents are typically described as a distinctive feature of common-law opinion writing, we need to bring the common law into the conversation and compare its approach with that of the civil law. The focus, however, will be mainly on the American common law. One of the many differences of the approach to the law between the common law and the civil law is the treatment of published dissents. To put it simply, published dissents are commonplace in the common law, but a rarity in the civil law, at least theoretically. This sharp distinction is not so clear-cut in every single case, as some higher courts in civil-law systems regularly publish dissents, such as the case of the Argentine Supreme Court being analyzed here.7

Michael Kirby provides a good account of the features of dissents in the common law or, in other words, the reasons why dissents

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7. For another example of a civilian jurisdiction whose highest court publishes dissents, see Stanisław Goźdz-Roszkowski, Communicating Dissent in Judicial Opinions: A Comparative, Genre-Based Analysis, 33 INT. J. SEMIOT. LAW 381 (2020) (discussing the differences and similarities in how dissents are expressed in the United States Supreme Court and the Poland Constitutional Tribunal).
are commonplace in common-law court decisions.\(^8\) The first of these reasons is the oral tradition.\(^9\) Common-law judges usually heard cases in the courtroom and decided on the spot. Such exposure to public criticism led judges to express their views before their audience, and that view could be the majority view or a dissenting opinion. The second reason is the judges’ background.\(^10\) In the common law, judges are appointed (and, in the United States, sometimes elected) after having been distinguished practitioners for several years. Thus, a judge tends to consider the judiciary as a continuation of his or her legal career. And that career consists in exercising independent judgment to solve legal conflicts. The idea is that judges come to the bench with, and because of, their intellectual individuality. Common-law judges rarely see themselves as part of the government bureaucracy tasked with solving conflicts. The third reason is the notion of what the role of courts is.\(^11\) Due to their training as lawyers, common-law judges have a knack for providing sound arguments; at times they might even improve the arguments of the parties. As their opinions are authoritative beyond the case at hand, they strive to make the best arguments possible so that their reasoning may endure. Also, stating their arguments in the most persuasive way is what they did when they practiced the profession.

Another feature that factors in is the model of courts in terms of judicial review. In the United States, as the courts are entitled to quash laws on grounds of their inconsistency with the constitution, judges are expected to be prudent in their exercise of such a broad power. The provision of convincing reasons, based on the law, has proven to be essential to exercise this power. These courts require the exposition of all views, even when they might differ and occasionally clash. Yet another feature for Kirby is that common-law judges are expected to render dissenting opinions, when they deem

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9. Id. at 384.
10. Id. at 387.
11. Id. at 388.
it appropriate, as one further step in the process of governmental
transparency.12 When it started hearing and deciding cases and for
the first decade of its existence, the United States Supreme Court
announced its decisions following the practice of the King’s Bench,
like, through seriatim opinions of its members.13 Afterward, Justice
Marshall, who was concerned about the Court speaking with one
voice to strengthen the constitutional structure of the nation, adopted
the practice of announcing the decision of the Court in a single opin-
ton to which the majority assented.14 The United States Supreme
Court was established in 1789 and published its first dissent in
1806.15 After this date, the publication of dissents became standard
practice in the United States Supreme Court.

Common-law judges, according to Kirby,16 are also prone to dis-
senting when they deem it appropriate because they expect that dis-
sents may cast light on a certain issue which will be decided properly
in the future. It is not uncommon that the view reflected in a dissent
is ultimately reflected in a statute or in a subsequent majority opin-
ion. Courts also have an important pedagogical function in the com-
mon law: law professors teach based on cases. Judges are aware of
this reality and many dissents result from the feeling of a judge who
believed that law students (and the academic community at large)
should pay attention to a given issue from a different perspective.17

12. Id. at 392 (drawing a comparison with the civil law: “The assertive, seem-
ingly dogmatic, style of judicial reasoning in the traditional civil law countries is
rather unsatisfying, even dismaying, to those brought up in the more transparent
and discursive approach of the reasoning of common law courts.”).
13. Karl M. ZoBell, Division of Opinion in the Supreme Court: A History of
Judicial Disintegration, 44 CORNELL L.Q. 186 (1958-1959) (containing a detailed
analysis of the evolution of the practice of opinion writing in the United States
Supreme Court). Seriatim opinions are individual opinions by the judges deciding
the same matter, instead of a single opinion for the whole court.
14. Id. at 193.
15. See Simms & Wise v. Slacum, 3 Cranch 300, 2 L.Ed. 446 (1806). See
also ZoBell, supra note 12, at 195.
17. Justice Antonin Scalia, a renowned dissenter, was famous for saying that
he wrote his dissents for law students. See ANTONIN SCALIA, SCALIA SPEAKS:
REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED 271 (Christopher J. Scalia
Other authors have said that dissents have an important and long-lasting influence after the case has been decided, “in shaping and sometimes in altering the course of the law,”18 that they are “an appeal to the intellect of tomorrow,”19 and that they show “that the case was well considered.”20 As a matter of fact, dissents may subsequently become binding after an overruling.21 In the common law, dissents serve the very important function of subjecting established rules to the process of evolution.22 As common law is, in essence, judge-made law, how a judge dissents in a case may be a good basis for a majority decision in the future and a draft dissent may even be useful in reaching consensus in a court.23 Multi-judge courts with an odd number of members are a sign that judges are expected to disagree.24 While some negative views have been expressed,25 dissents are a reality in legal practice.


The act of overruling can transform the statements written in a dissenting opinion into an authoritative source. . . . By quoting from the dissent, the Court incorporates the dissent’s language into the majority opinion. The very act of writing these words, in the proper context with the proper authority, transforms such words into an authoritative source on which future judges can rely.

22. Simmons, supra note 19, at 498.
23. See Ruth Bader Ginsburg, The Role of Dissenting Opinions, 95 MINN. L. REV. 1 (2010) (discussing the practice of Justice Brandeis, who used to write dissents and bury them “if the majority made ameliorating alterations or, even when he gained no accommodations, if he thought the Court’s opinion was of limited application and unlikely to cause real harm in future cases.”). A book was even published with all the dissents Justice Brandeis decided not to publish; see Alexander M. Bickel, Unpublished Opinions of Mr. Justice Brandeis: The Supreme Court at Work (Harvard U. Press 1957).

25. See William A. Bowen, quoted in Sanders, supra note 24 (“the Dissenting Opinion is of all judicial mistakes the most injurious”). See also article 19, Canons of Judicial Ethics, American Bar Association (“Except in case of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of last resort.”). Speech given by Judge Learned Hand at Harvard Law School on Feb. 6, 1958, quoted in Michael A. Musmanno, The Value of
Europe shows a surprising approach toward dissents. While the European Court of Justice does not permit dissents,\(^{26}\) the European Court of Human Rights allows for that possibility. Judges appointed to the European Court of Human Rights have a tendency to show their independence and integrity, and oftentimes their opinions are contrary to their countries of nationality.\(^{27}\) At the same time, in the different individual countries that are part of the European Union, two models of opinion-writing coexist: France\(^{28}\) and Italy\(^{29}\) follow the traditional civil-law model, and do not publish any dissents, while countries such as Germany and Spain have built on the American model and do publish individual votes and dissents. These different approaches to opinion-writing are also reflected on other features of the opinions: French and Italian decisions are relatively short and declare the law, while German and Spanish decisions are longer, more wide-ranging, and even have a literary taste.\(^{30}\)

Dissents have been traditionally considered a rarity in the civil law, especially in light of French judicial practices, which were in force before the codification movement.\(^{31}\) In many civil-law

\^\textit{Dissenting Opinions} 29 PA. BAR ASSOC. Q. 268 (1958) (a dissent “cancels the monolithic solidarity on which the authority of a bench of judges so largely depends.”).

\(^{26}\) See Statute of the Court of Justice of the European Union, OJC 115, 9.5.2008, p. 210–229, tit. III, art. 35 (“The deliberations of the Court shall be and shall remain secret.”) and art. 36 (“Judgments shall state the reasons on which they are based. They shall contain the names of the Judges who took part in the deliberations.”).

\(^{27}\) Kirby, supra note 8, at 33.

\(^{28}\) POLLARD, supra note 4 (“In France, the decision is that of the court, rather than a collective decision of individual judges. The court is a collegiate body and there is no place for dissenting judgments.”).

\(^{29}\) LENA & MATTEI, supra note 5 (“[C]ontrary to the practice in common law countries, separate opinions — whether dissenting or concurring — are not announced. In other words, appellate decisions appear as unanimous and anonymous decisions of the Court.”).


\(^{31}\) ANDREW WEST ET AL., THE FRENCH LEGAL SYSTEM 59 (Butterworths 1998):

Despite the fact that in all higher courts there is a plurality of judges, there is only one judgment, and no dissenting opinions are expressed. This results from the theory of unity; on the basis that the written law is one (\textit{la loi est une}) a judgment made in application of the law can only
jurisdictions, the decisions of higher courts are published without specifying how each individual judge voted. There is a deeper sense, it is alleged, of collegiality, and the aim is trying to send the message that what is important is the final decision of the court as a whole, regardless of the particularities of individual judges. As Merryman put it, “the tendency is to think of the court as a faceless unit.”

Some have even said that dissents are incompatible with the continental European legal tradition, that they are tantamount to adopting foreign law, and that they may result in an academic exercise without any legal consequences.

Anyway, whether one is for or against dissents, the reality is that the Argentine Supreme Court has departed from the general civil-law convention and it is not unusual at all that decisions on important matters where one or more judges disagree contain something else than a collegial, majority decision. The Argentine Supreme Court issues (a) unanimous opinions; (b) majority opinions; (c) plurality opinions; (d) concurring opinions; and (e) dissenting opinions. This article only discusses and criticizes the way dissents are written at the highest court in Argentina.

III. DOING THINGS WITH WORDS: PERFORMATIVE USE OF LANGUAGE

The whole point of this article is based on a simple idea: Argentine Supreme Court dissents should not be written with performative

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be expressed in the form of a single majority decision. The practice originated in the Ancien Régime, in which the written law was one, as being the expression of the king as sole legislator; the judgments of the Parlements were therefore expressed in the same form.

32. MERRYMAN, supra note 3, at 38.


34. The Argentine Supreme Court started hearing cases in 1863 and the first published dissent in the Argentine Supreme Court dates back to 1877, written by Justice Saturnino M. Laspiur in the case XL “D. Lino de la Torre sobre recurso de habeas corpus,” Fallos 10:231 (1877).

35. For an explanation of how cases are distributed for decision among justices in the Argentine Supreme Court, see Genaro R. Carrió, Don Quijote en el Palacio de Justicia (La Corte Suprema y sus problemas), LA LEY 1131 (1989).
language. To get there, we first need to revisit the concept of “performative utterances” or “performatives.” British philosopher J. L. Austin is to be given credit for coining these terms and describing what lies underneath them.\(^{36}\) He was convinced that the phenomenon described was widespread and obvious, and yet not much attention had been paid to it. This theoretical framework to understand how language is used came to be known as “speech-act theory.”\(^{37}\)

Philosophers had assumed that statements could only describe a state of affairs or state some fact, and any such statement could be true or false. But, Austin said, there are utterances which are not verifiable and are, instead, part of doing an action.\(^{38}\) For example, saying “I name this ship Queen Elizabeth,” while smashing a bottle against the hull of a ship, or saying “I bet you 10 dollars the LSU Tigers will win the game.” None of these utterances is true or false, nor do they describe anything; these utterances do what they predicate. As they perform an action, Austin proposed the term “performatives.”\(^{39}\)

But uttering words that spark a change in the reality is not an act of magic. It is always necessary that the circumstances surrounding the words uttered be appropriate. It is necessary that the speaker or somebody else also perform other actions or even utter other words. In the example given above, the person naming the ship must have adequate authority to do so. If, let us suppose, the board of directors of the company owning the ship had decided that the person who would throw the bottle at the ship to name her will be the president of the company, it is not possible for the chief financial officer to


\(^{37}\) For an explanation of the theory as applied to judicial opinions, overrulings in particular, see Dunn, supra note 21.

\(^{38}\) Austin, supra note 36, at 6.

\(^{39}\) Id. at 7. Austin justified the choice of this term as being the most overarching term for all utterances that qualify as performatives. He even mentioned that H. L. A. Hart told him that lawyers use the term “operative” for the clauses of an instrument that serve to effect the transaction; that is the main object of the instrument, while the rest “recites” the context in which the transaction takes place.
As we will see below, this consideration is of the utmost importance in the law. As for the substance of this study, while a dissenting judge has the authority to issue a dissent and express his or her judicial opinion on how the case should be resolved, the single opinion of that judge will have no performative value unless he or she has the support of the required number of fellow judges (and in that case, it follows, we would not be talking about a dissent anymore).

In Austin’s terms, a dissent using performative language would be an example of an unhappy performative utterance. Let us see why. Austin has described the requirements for a performative utterance to function smoothly or happily. In other words, what is required for a purposed performative to be an actual performative? The answer to this question in the context of judicial dissents, as we shall see, is the crux of this article.

Austin establishes six rules that must be met for a performative utterance to be such:

- A(1) There must be an accepted conventional procedure having a certain effect, which should include the uttering of certain words by certain persons in certain circumstances; and
- A(2) the particular persons and circumstances must be the appropriate ones to invoke the relevant procedure.
- B(1) The procedure must be executed by all participants both correctly and
- B(2) completely.
- C(1) If the procedure is designed for use by persons having certain thoughts or feelings, or to cause a certain conduct by any participant, then the person participating in and so invoking the procedure must in fact have those thoughts or feelings, and the participants must intend to so conduct themselves, and also
- C(2) must actually so conduct themselves subsequently.41

40. Unless, of course, there is an authorization from the president to delegate his or her powers to the chief financial officer but let us assume that such is not the case in this example.
41. Id. at 14–15.
Failure to satisfy any of the six rules renders the utterance *unhappy*. In A and B, if the requirements are not met, there is no per-formative utterance at all. In the ship-naming example, if the one crashing the bottle on the ship hull is not the president of the company but a sailor without any authorization, his or her act, even after having pronounced the correct words, produces no effect. Austin calls this infelicity effect a *misfire*. In the cases of C, the effects of not complying with requirements 1 and 2 do not result in the voidance of the performatie utterance. Instead, the act is achieved, but in insincere circumstances which render the act an abuse of the procedure. A good example of C is a false promise. For instance, Peter promises to convey a tract of land to Laura in exchange for $50,000, but Peter knows he will sell it for $75,000 to Covey. Peter has no intention to stand by his promise; he made a promise, but it is a false promise. This type of infelicity is an *abuse*, in Austin’s terms. The consequence of a misfire is that the act produced is void and of no effect; the consequence of an abuse is that the act is “hollow” or not consummated. This article does not discuss abuse; instead, we will focus on misfiring.

In both A.1 and A.2, Austin identifies the infelicity of *misinvo-
cation* of a procedure, because (a) there is no proceeding or (b) the proceeding cannot be made to apply in the way attempted. When the procedure exists, but cannot be applied as purported, Austin uses the term *misapplication*. The claim in this article is that a judge writing a dissent using performative utterances falls within the infelicity described by Austin as a misinvocation. The performative utterances in a dissent are of no operative value—they do not produce any changes in the reality. This does not mean that the dissent does nothing; it surely has

42. *Id.* at 15.
43. *Id.* at 16.
44. *Id.*
45. *Id.* at 17.
46. *Id.*
argumentative or pedagogical value, but it does not produce the act of adjudicating a case.

An example adapted to the ship-naming situation will help clarify this concept. If a person is walking by the harbor and sees the ship that the president is supposed to christen, but instead of waiting for the president takes the task upon himself and smashes the bottle against the hull of the ship pronouncing the words “I hereby name this ship the Mr. Oliver Cromwell,” we can all agree that the ship has not been named via that act. How so? Well, even if that person pronounced the words that are typically expected to be used when naming a ship, he had no authority to utter the performative which would change the reality in that very specific context and circumstances, i.e., giving a name to the ship.

This is very similar to what happens when a dissenting opinion uses performative language. A judge writing a dissent with performative language acts like the person walking by the harbor who took it upon himself to christen the ship in the example above. To go deeper into this consideration, we first need to explore the nature of the work of courts and judges in general.

Judges have jurisdiction, i.e., the power or authority to say or declare the law (from the Latin *juris dictio*). When a judge pronounces a sentence against a defendant, whether in writing or orally, the pronunciation or the writing on paper of the sentencing words is the act of sentencing. These words do not describe a previous act that took place earlier; instead, they modify the reality creating a new state of things. A free man sentenced to imprisonment changes his status right after the sentence is pronounced. Jurisdiction, however, is not without limits. A court cannot hear any case; typically,

47. Example adapted from *id.* at 23.
49. Saying or writing “I pronounce the defendant guilty” is a type of performative termed “verdictive statement” by Austin. See Austin, *supra* note 36, at 42–43; see also Dunn, *supra* note 21, at 502.
a court will be constrained by jurisdiction over the persons and over the subject matter, and venue, among other considerations.

In collegiate courts, the draft opinion that gets the greatest number of votes is the one that decides the case. If a case has been decided by an absolute majority, the resulting opinion is a majority opinion. For example, if a case pending before the Supreme Court of the United States results in a division of justices on two sides and five justices vote one way, and the other four do not agree, the prevailing view will be that of the majority opinion, that is, the opinion written by the five justices. If an opinion, however, has the support of four justices, and two others issue concurring opinion in a given sense, and the remaining three issue another concurring opinion, the prevailing opinion is that voted on by the four initial justices. Although that plurality opinion will decide the case, the force of the decision is somehow reduced, because it did not have the support of the court’s absolute majority. Whether an opinion has the support of a majority or a plurality, that decision will control the case being decided. Concurring opinions join the majority or plurality, but with different arguments. We can say that in all of these cases, the language of the judges is performative. When a majority says “the judgment by the lower court is reversed,” for example, by that very utterance the decision of the court below is quashed.

The language of dissents, however, is different. A dissent does not decide the case. As a dissent is not backed by the required

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50. Another peculiar case is what happens with “exhortative judgments.” In the first years of the 20th century, the Argentine Supreme Court has been including exhortations to the other branches of government so that they take measures to realize what the Constitution, as interpreted by the Court itself, requires. These appeals to act are a relative innovation in the Argentine Supreme Court practice, to the extent that the Court had traditionally limited its role to decide a case at hand. These exhortations may be perceived as an overreach in the power to adjudicate cases. Their efficacy as speech acts is completed by the exhortation itself, but their legal efficacy depends on the actual reaction of the branches of power exhorted—they may ignore or observe the exhortation. See Martín Böhmer, Una aproximación retórica a las sentencias exhortativas, II JURISPRUDENCIA ARGENTINA 285 (2012) (discussing the ruling in F., A. L. s/medida autosatisfactiva, in which the Court “exhorted” the Executive to implement and enforce medical protocols for legally-authorized abortions and the Judiciary to refrain from hearing
number of judges, it has no authority to decide a case. A judge writing a dissent can only express his or her opinion on how the case should or could be decided, including his or her arguments. By definition, the language of a dissent cannot be performative. As we shall see below, dissents attached to opinions of the Supreme Court of the United States make it clear that they do not dispose of the case, but that is not what happens with the opinions issued by the Argentine Supreme Court.

IV. PRACTICAL APPLICATION

We should now bring all the concepts discussed in this article down to earth and see examples of the way dissents are written in the courts of last resort in Argentina and the United States. For this purpose, I will only focus on the dispositive part of opinions, without delving into the facts or issues involved in the cases cited.

This is the disposition of a case decided by the Argentine Supreme Court in 2018:

Therefore, after the Attorney General of Argentina has issued the pertaining opinion, it is appropriate to grant certiorari, admit the extraordinary appeal filed and, based on the grounds already explained, affirm the decision appealed against. Be this communicated and be these proceedings sent back to be added to the main case file. Carlos Fernando Rosenkrantz (dissenting). Elena I. Highton de Nolasco. Juan Carlos Maqueda (separate opinion). Ricardo Luis Lorenzetti (separate opinion). Horacio Rosatti (emphasis added).

51. See also Néstor P. Sagüés, Las sentencias constitucionales exhortativas ("apelativas" o "con aviso"), y su recepción en Argentina, LA LEY 1461 (2005) (discussing a thorough classification of the types of opinions issued by the courts).
And this is a dissent issued by Justice Rosenkrantz in that very same case:

Therefore, after hearing the Attorney General of Argentina, certiorari is granted, the extraordinary appeal is admitted, and articles 10, 2, and 3 of Law No. 27362 are held to be unconstitutional, and the judgment appealed against is hereby reversed. Be this communicated and remanded, so that the relevant court renders a new judgment consistent with this opinion.52

A reader who is unfamiliar with the procedure of the Argentine Supreme Court would be baffled after reading this set of contradicting dispositions. How is it possible that the same opinion affirms the lower’s court judgment and, at the same time, reverses it?

Let us now take a look at how the Supreme Court of the United States deals with the same situation. This is the heading and disposition of the majority opinion in a 1991 case:

Scalia, J., delivered the opinion of the Court, in which Rehnquist, C.J., and White, Marshall, Blackmun, O’Connor, Kennedy, and Souter, JJ., joined. Stevens, J., filed a dissenting opinion, post, p. 500. . . .

The judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion. It is so ordered.53

Original text in Spanish:
Por ello, habiendo dictaminado la Procuración General de la Nación, corresponde hacer lugar a la queja, declarar admisible el recurso extraordinario interpuesto y, por los fundamentos expuestos, confirmar la decisión recurrida. Hágase saber y remítase a los fines de su agregación a los autos principales. Carlos Fernando Rosenkrantz (en disidencia). Elena I. Highton de Nolasco. Juan Carlos Maqueda (según su voto). Ricardo Luis Lorenzetti (según su voto). Horacio Rosatti. (translated into English by the author)

52. Id. Original text in Spanish:
Por ello, y oída la señora Procuradora General de la Nación, se hace lugar a la queja y al recurso extraordinario, se declara la inconstitucionalidad de los artículos 10, 2° y 3° de la ley 27362 y se revoca la sentencia apelada. Notifíquese y remítase a fin de que, por intermedio de quien corresponda, se dicte un nuevo fallo con arreglo al presente. (emphasis added) (translated into English by the author)

And this is the Justice Stevens’s dissent, in its pertinent part:
“Justice Stevens, dissenting. . . . Thus, the priority question in this case was correctly decided by the Court of Appeals and its judgment should be affirmed. . . . I would therefore affirm the judgment of the Court of Appeals.”

The U.S. dissent is much clearer. Even the nonlawyer can easily understand that something has been decided with a majority vote, and that is the disposition of the case, and something else was said in the dissent. That dissent, whatever its content, does not adjudicate the case. The U.S. dissent does not use performative language, but language of suggestion. Modal verbs “would” and “should” convey the idea that whoever is writing is expressing a wish as to how things should be. Other typical ways of concluding dissents in the U.S. Supreme Court are simply “I dissent,”


A judge writing a dissenting opinion has no authority to decide the case on his or her own. In courts with several members, as already explained, decisions are made by a majority or a plurality. The opinion of judges in collegiate bodies is only authoritative if it is backed by the sufficient number of colleagues. A dissent, therefore, has no authority to cause any changes in the reality. Dissents are the province of argumentation and are there to serve purposes of different natures, as discussed in section II of this article.

Writing a dissent with performative language leads to confusion, especially for students, who have to read piles of cases for their legal training. When reading a lengthy opinion—and important decisions rendered by the Argentine Supreme Court are usually lengthy—one can easily forget what has been said ten pages above. After reading several pages of a decision, one could be at a loss knowing if what is being read is the majority opinion, a concurrent opinion, or a
dissent. Getting to the end of a dissent issued by a justice of the Argentine Supreme Court only makes things worse, as one could read the dispositive part of a dissent as if it were the majority opinion, and one could understand the case the other way around! A rewritten version of the Argentine Supreme Court example would read like this: “Therefore, after hearing the Attorney General of Argentina, certiorari should be granted, the extraordinary appeal \textit{should} be admitted, and articles 10, 2, and 3 of Law No. 27362 \textit{should} be held unconstitutional, and the judgment appealed against \textit{should} be reversed (emphasis added).”

Dissents are always written using performative language in the decisions of the Argentine Supreme Court. This choice is not about a personal style of judges—all justices have traditionally been writing dissents with performative language. This reality leads to think that we are faced with one of those traditions whose only reason for existence is continued and unreasoned practice.\textsuperscript{58} Some authors have suggested that the problem with dissents goes deeper than the linguistic level. The way dissents are written actually reveals that there is no real dialog among the justices or, if there is dialog, it is below the desirable levels, as published opinions do not account for that interaction. When there is a dissent, the majority does not mention it, and the dissent does not mention the reasons in the majority. This problem has been labeled an “exchange of the deaf.”\textsuperscript{59}

\textsuperscript{58} Argentine Supreme Court decisions have also sparked criticism for an unnecessary proliferation of individual votes when there is a fractured majority. See Santiago Legarre, \textit{Mayoría fracturada y precedente horizontal}, LA LEY. SUP. PENAL (2020) (discussing the complex web of concurring and dissenting opinions in \textit{Ramos v. Louisiana} and comparing that approach with the way the Argentine Supreme Court deals with similar situations. The American model is praised for highlighting the differences, while the Argentine approach is portrayed as causing reader confusion. Argentine justices rewrite the majority opinion almost verbatim, only changing the sections they disagree with. The whole process leads to extremely lengthy opinions whose disentangling requires highly intensive attention).

\textsuperscript{59} Alberto F. Garay, \textit{La Corte Suprema debe sentirse obligada a fallar conforme sus propios precedentes. Aspectos elementales del objeto y de la justificación de una decisión de la Corte Suprema y su relación con el caso “Montalvo,”} II JURISPRUDENCIA ARGENTINA 870–892, 879:
V. The Plain-Language Case for Clarity in Dissents

Another argument to advocate that dissents not be written with performative language is plain language. According to the Plain Language Federation, “A communication is in plain language if its wording, structure, and design are so clear that the intended readers can easily find what they need, understand what they find, and use that information.” A court opinion needs to be considered a type of “communication” in the wide sense of the word for these purposes. While in a court opinion there is no bilateral communication, as the court merely conveys its decision of how the case is decided, it is communication in the sense that the opinion conveys the decision to the parties.

After reading many Supreme Court decisions where there was no unanimity, one oftentimes realizes that neither the majority nor the dissent reciprocally refute their arguments. Some take a certain position and the remaining a different one, but none of them tries to prove how mistaken, inappropriate, or lacking in arguments the other position is. Both opinions may be read in isolation, as if they were independent acts, when both are actually part of the same decision. These cases, which are not few, are the archetype of what I understand is not rational debate... When one side ignores what the other side said, the final product ends up looking more like what we would call an “exchange of the deaf” rather than a rational debate about the interpretation of the Argentine Constitution (translated by the author).


61. This federation was founded in 2007 and is the result of the joint efforts of three preexisting organizations: Center for Plain Language (United States), Clarity International (United Kingdom), and the Plain Language Association International (Canada). Given the prestige of the entities which form the Federation and the professionals behind them, this definition has been widely accepted as authoritative in plain language studies.


63. See, e.g., Robert Eagleson, Judicial decisions: acts of communication, 71 CLARITY 11 (2014) (“In giving a decision we are communicating the law. ... [J]udging down a decision is not just an application of the law to a particular situation but also an act of communication to win acceptance from others . . . .”). See also Francis Bennion, Judicial Decisions: a riposte and a retort, 71 CLARITY 14 (2014) (opposing the communicative purpose of judicial decisions: “The purpose is to resolve a dispute by applying the law to it.”). See, finally, Robert
A comprehensive plain-language approach to opinion writing in general and dissent writing in particular requires adopting a position on who the addressees or intended readers of court opinions are. Identifying the addressees in this case, in turn, requires resorting to the concept of discursive genre in the law. The communicative situation is not the same in all legal texts—for these purposes, a statute, a legal memorandum, and a court opinion are very different, to name just a few examples. Each of these discursive genres is inserted in a specific communicative situation. The predominant view for lawyers is that the addressees of judgments are other legal professionals. Legal translation scholar Susan Šarčević has suggested that a difference should be made between direct addressees (law enforcement officers and other judges) and indirect addressees (the parties) of court opinions. She emphasizes that the focus on other judges as primary addressees has to do with precedents that are binding on the same or lower courts. Other authors have used the term “double voice” for the multiple addressees of judicial opinions and have put the parties at the forefront. In any case, as to judicial opinions, the

Eagleson, Judicial Decisions: A Retort, 71 CLARITY 15 (2014) (“Because the resolution is in terms of the law, and not on any other basis, judgments set out the law. Judges . . . do not simply declare the finding, but also add their reasons, and they see it as essential that the finding emerge from the reasons.”).

64. See, e.g., RICARDO LORENZETTI, EL ARTE DE HACER JUSTICIA 40 (Sudamericana 2014) (“[E]n la Corte plantearnos que las decisiones son un producto profesional, redactado en un lenguaje judicial y dirigidas a abogados” [At the Court, we discussed that opinions are a professional product, written in judicial language and addressed to lawyers] (translated by the author)). Justice Ricardo Lorenzetti sits on the Argentine Supreme Court and was its chief justice for eleven years.

65. SUSAN ŠARČEVIĆ, NEW APPROACH TO LEGAL TRANSLATION 60 (Kluwer Law Int’l 1997).

66. Id.


An opinion’s double voice often addresses itself to double or multiple hearers. An opinion speaks immediately to those interested in the resolution of the case at bar: parties, their lawyers, and lower court judges who may be called on to preside over further proceedings. At the same time, the judge speaks to those who will use the opinion to ascertain and understand the law: lawyers whose clients face legal problems arguably governed by precedent, and more broadly students, expounders and critics of the law. Usually, judicial opinions make no explicit reference to
plain-language approach focuses on the parties or citizens at large as the main and ultimate addressees of these legal instruments. The focus on nonlawyers as the main intended readers shapes the strategies to be used so that the message gets across.

In the common-law world, plain language has usually been considered a must for courts to the extent that pro se representation is allowed. But even beyond this consideration, it is possible to posit that for the plain-language approach, court decisions need to be stated in clear terms because the ultimate readers are citizens at large, especially the parties bringing the case before the court.

Based on the definition of plain language above and assuming that it is beneficial that court decisions be written in plain terms so that even nonlawyers may understand, one may ask whether or not the readers of an Argentine Supreme Court opinion can easily find the dispositive part of the majority opinion and separate it from the dissent, understand the dissent, and adequately use that information. It is possible to assume that readers, especially nonexperts, have a hard time trying to get the meaning of an Argentine Supreme Court dissent right the first time. Only after getting acquainted with the tradition that dissents by the highest court in Argentina are written “as if” they were deciding the case can they actually realize the nature and scope of the dissent. As Peter Tiersma said, “comprehension can be impaired by linguistic features that are not specifically

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these audiences, adopting somewhat the tone of a voice from the heavens, as opposed to a human speaking to humans. Occasionally, however, a judge will address more directly the bar, the scholarly community, or the general public.

68. See, e.g., CHRISTINE MOWAT, A PLAIN-LANGUAGE HANDBOOK FOR LEGAL WRITERS 28 (2d ed., Carswell 2015): Much legal writing is produced with only lawyers or the courts in mind. One result is that the parties to the document become almost irrelevant, ignored as outsiders or tourists. With plain-language writing, a new focus on audience enables clients, consumers, or the public to read documents as active and knowledgeable participants—or at least to have an option to do so.

69. See, e.g., Sean McLernon, Why Courts Need to Embrace Plain Language, 24 GEO. J. Pov. L. & Policy 381 (mainly discussing the relevance of plain English in court forms for pro se litigants).
The defect in how Argentine Supreme Court dissents are written identified in this article is precisely a linguistic feature which impairs comprehension and which is not legal in nature.

VI. CONCLUSION AND PROPOSAL

The linguistic defect studied in this article may be the reflection of a deeper, substantive problem: dissents’ failure to interact with the majority opinion may reveal lack of dialog or an insufficient level of dialog among justices. It is very difficult to know if Argentine Supreme Court dissents are being written with performative language merely because of tradition or because there is lack of dialog. Justices writing dissents should be able to express their disagreement with the majority and this expression should make the other justices revisit their own arguments. If no consensus can be reached, the dissent will only serve to express the opinion of the dissenter, but it may well otherwise be a tool to improve the Court’s arguments. In any case, the published dissent must accurately and truthfully account for what it really does—providing an alternative, yet nonbinding, solution to the case. Performative language has no room in dissents.

Emulating good practices from other legal traditions is not a sin. The Argentine Supreme Court has been structured after the American model, a notorious exception to which is the writing of dissents. In a way, this article proposes a return to basics, to the roots of the constitutional and judicial model Argentina decided to follow. The Argentine Supreme Court needs to follow its American model on dissent writing and get rid of performatives in dissents.

Changing the way dissents are written is in the hands of the justices themselves. Using performative language in dissent has no basis in logic, linguistics, or the law. A single judge may decide to change the style of his or her decisions and a trend may follow suit.

Discarding performatives in dissents will better reflect what judges do and will better convey to all parties interested in reading the decisions of the Court what judges do and do not do with their words.
AN ESSAY ON IDEOLOGY AND LEGAL EDUCATION
IN MICRO JURISDICTIONS: THE EXAMPLE OF JERSEY

David Marrani*

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ABSTRACT

This article explores the question of legal education in micro jurisdictions using the case of Jersey, a British Crown Dependency, positioned geographically, historically and culturally between two larger jurisdictions, France and the UK. It analyses how Jersey’s legal training is pulled towards those large “big neighbours,” rather than focusing on what makes its specificity and attraction. It questions how legal education in micro-jurisdiction is actually linked to ideology. The article starts with the following question: are we taking micro jurisdictions seriously? It then considers the routes to legal qualification in micro jurisdictions, before focusing specifically on the case of Jersey and analysing how ideology imposes asymmetrical views on micro jurisdictions, views that ultimately may erase the legal specificity of that micro jurisdiction.

Keywords: Jersey, Micro-jurisdictions; legal education in small states; mixed-jurisdiction; contamination; ideology; comparative legal education.
It can be said that legal education has been oscillating between two modes of education; being a part of liberal education and being treated as professional education.¹ As part of liberal education, legal education is considered to develop specific capacities as described by Andrew Delbanco:

1. A skeptical discontent with the present, informed by a sense of the past.
2. The ability to make connections among seemingly disparate phenomena.
3. Appreciation of the natural world, enhanced by knowledge of science and the arts.
4. A willingness to imagine experience from perspectives other than one’s own.
5. A sense of ethical responsibility.²

When treated as professional education,

legal education equips law students for filling different roles in society, and discharging various law jobs, the range and scope of which are always expanding in modern democratic society, e.g., as policy-makers, administrators,

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Some consider that legal education is not specifically a professional education but a “science to be studied in its own right, without reference to other areas of thought,” although it still departs from liberal education.

This “oscillation” has been present since the beginning of legal education, as seen in the history of legal education in common law countries, where it evolved from “innovation and experimentation” to “a narrow, vocational teaching of law” by the late 1800s. The “tension” between the two modes of education in legal education has recently been once more at the core of debates in England; for instance, through the Legal Education and Training Review (LETR), which resulted in the solicitor training becoming more liberal.

What we can consider is that legal education is currently composed of two parts, an initial academic general training, characterised by the need for a university degree, in law or not in law, primary or advanced, followed by practical or vocational training.

There is a particular issue regarding law and legal education. They both have a specific ideological function in a society. Althusser’s work interests the law, and particularly its comparison. First, it questions the core of the discipline itself. Indeed, Althusser’s writing on psychoanalysis used a very logical demonstration to show that psychoanalysis is a science. This demonstration may simply be applied to comparative law, for instance, to produce the

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5. *Id.* at 53.
6. See for discussion Jessica Guth & Chris Ashford, *The Legal Education and Training Review: Regulating Socio-Legal and Liberal Legal Education?*, 48 THE LAW TEACHER 5-19 (2014). See also the new SQE for qualify as solicitor lifting the necessity for a Qualifying law degree (QLD) as prerequisite.
same outcome. Then, there is Althusser’s reading of Marx. Althusser considered Marxism as a discourse with a proper structure with an “erased” subject, a subject that is “always-already” and therefore should (in a way) vanish. What this could mean for law and its comparison, is that it has to deal with legal places without subjects (of law), but at the same time without totally forgetting the subjects. It also means that we are immersed in language as a structure that compels us to do “things” unconsciously, without leaving us the capacity to escape. Which is, for Althusser, the origin of ideology:

We experience ideology as if it emanates freely and spontaneously from within us, as if we were its free subjects, “working by ourselves.” Actually, we are spoken by and spoken for, in the ideological discourses which await us even at our birth, into which we are born and find our place.

Ideology works as a mechanism that masks reality, misrepresents reality, and ultimately creates a fantasy world to allow the continuation of a system. Along its various incarnations, the discourse of a society is manifested, through ideology, then relayed by the law, also as ideology, which forms the “common sense” of a period and thus appears natural, normal, and right. It contributes to dividing mankind and challenges humanity. For Althusser, ideology is based on the existence of assumptions, imaginary products of personal stories that are mere reflections of actual conditions of individual existence. He analysed the state into separate state apparatuses, dividing the repressive one and ideological ones. Law appeared in both categories, while education was considered to be the main “Ideological State” apparatus. Althusser ideas have obvious implications

on the law and on lawyers, academics or practitioners, and particularly legal education.

[School] takes children from every class at infant-school age, and then for years, the years in which the child is most ‘vulnerable’, squeezed between the Family State Apparatus and the Educational State Apparatus, it drums into them, whether it uses new or old methods, a certain amount of ‘know-how’ wrapped in the ruling ideology (French, arithmetic, natural history, the sciences, literature) or simply the ruling ideology in its pure state (ethics, civic instruction, philosophy). Somewhere around the age of sixteen, a huge mass of children is ejected ‘into production’: these are the workers or small peasants. Another portion of scholastically adapted youth carries on: and, for better or worse, it goes somewhat further, until it falls by the wayside and fills the posts of small and middle technicians, white-collar workers, small and middle executives, petty bourgeois of all kinds. A last portion reaches the summit, either to fall into intellectual semi-employment, or to provide, as well as the ‘intellectuals of the collective labourer’, the agents of exploitation (capitalists, managers), the agents of repression (soldiers, policemen, politicians, administrators, etc.) and the professional ideologists (priests of all sorts, most of whom are convinced ‘laymen’).11

If we transpose these words into the specific area of legal education, we can start thinking of law schools and how they create specific workers (“the lawyers”). Legal education would then be a certain “know-how” wrapped into the ruling ideology or simply the pure state of the ruling ideology. This is particularly true about law, itself an ideological state apparatus. Legal education in micro jurisdiction is not exempted from this movement but suffers even more deeply of its impacts.

As we know, “Even when geographically isolated, the small populations—both general and legal—of micro-jurisdictions and small states typically require them to reach beyond, often far beyond, their

shores.” Jersey’s position is a true illustration of this statement. Jersey is the largest of the Channel Islands, 12 miles from continental Normandy. It was separated from Normandy in 1204 but retained Norman law, customs, and language. But Jersey administration was carried out for the King of England. Jersey is truly squeezed geographically and legally between the representatives of the two main western legal traditions, what Legrand described as “discursive formations of sufficient homogeneity.” The island is struggling to maintain its legal identity. Indeed, the “big neighbours” of Jersey that are France and Great Britain are, as Legrand put it, “autonomous discursivities.” They are sources of tensions that impacts on Jersey lawyers who are then facing the dilemma of ideology. As Fairgrieve stated,

Situated geographically and culturally mid-Channel, between the tectonic plates of civil law and common law, this jurisdiction is illustrative of an open-minded and diverse approach to sources of law. With its hybrid interaction of such different legal systems within a micro-jurisdiction, this jurisdiction is in many ways the Galapagos Islands for comparatists!

Remember that ideology focuses on the existence of imaginary assumptions, on imaginary, not on reality. They are a reflection of reality. Therefore, how the Jersey population understand itself is not based simply on the geography of where Jersey is, although it somehow plays a part in the perception of what Jersey and its population

15. Id.
16. LOUIS ALTHUSSER, ESSAYS ON IDEOLOGY 41 (Verso 1984).
17. DUNCAN FAIRGRIEVE, COMPARATIVE LAW IN PRACTICE: CONTRACT LAW IN A MID-CHANNEL JURISDICTION ch. 8 (Hart Publishing 2016).
are. It affects the perception Jersey lawyers have of themselves as well. It is easy to understand that some Jersey lawyers may be pushed to assume and imagine how they relate to the great Duchy of Normandy, while others may see the link to the Crown as a sort of romantic interpretation of the real position of Jersey between France and Great Britain. Due to the size of the micro jurisdiction that is Jersey and the massive influence that brings ideology here, it is obvious that these imaginary assumptions have consequences on Jersey lawyers as they have become an *essential* mystification that we could qualify as *essential*, intertwined with the society itself.\(^\text{18}\) As we know, the law is also an Ideological State Apparatus (ISA), which intensifies the ideological structure. This ISA is clearly dominated by where the lawyers have been trained (initial training and to some respect the final one), the core of the imaginary assumptions, augmented in Jersey by the increased use of English as a main language of communication (although French remains one of the official languages). As such, the law that is known by the lawyers of Jersey conditions their perception of the law. It conditions not only the law in Jersey but also the perception of the law of the “other,” the foreign law, creating value and hierarchy, simply through the classification in the structure of the law of the other law as foreign law. Legal education in Jersey has been influenced by these factors. As most Jersey lawyers are now trained in England, as I will explain in this paper, they therefore must study a foreign legal culture that is in fact alien to the jurisdiction and makes the law of Jersey the foreign law. This could be for instance a result of lack of higher education institutions on the Island, or simply the need of law firms to have lawyers trained in English law, or even the preference given to UK education over continental one. These factors taken separately or together are actually part of what Althusser considers to be constitutive of ideology. The result is the rather illogical but obliged

\(^{18}\) \text{WILLIAM C. DOWLING, JAMESON, ALTHUSSER, MARX, AN INTRODUCTION TO THE POLITICAL UNCONSCIOUS} 83 (Cornell U. Press 1984).
prerequisite that is the study of English law. The law of this micro jurisdiction is often becoming the foreign law itself.

What is at stake in micro jurisdictions legal training is quite simple and can be articulated around the ambivalence between the necessity of retaining a specific knowledge and expertise of the law of a particular micro jurisdiction, Jersey, what we may name the “legal identity” of Jersey, and the centrifugal attraction of the large jurisdictions, which defines in fact “two modes of understanding reality (reflecting the two foundational mythologies).”

Squeezed between two modes of understanding reality, Jersey legal training is pulled towards these large foundational mythology, rather than focusing on what makes its (legal) attraction. I start this paper by a simple question: are we taking micro jurisdictions seriously? Indeed, when one micro jurisdiction tries to retain its legal identity, are we considering this attempt as something that is worthy or not? I then consider the routes to legal qualification in micro jurisdictions, attempting to propose various families of legal training, before focusing specifically on the case of Jersey. I then analyse the impacts of ideology on legal education in micro jurisdiction and how ideology imposes alien views on micro jurisdictions, views that may contradict in fact the attraction of the jurisdiction, by removing or erasing its legal identity.

I. ARE WE TAKING MICRO JURISDICTIONS SERIOUSLY?

The first section of this paper is an attempt to answer the following question: Are we taking micro jurisdictions seriously? And as a sub-question, and consequence, can we take (legal education in) micro jurisdictions seriously?

We found many references in the academic literature to small or microstates. The issue of their definition itself is so complex that some scholars, such as Baldacchino, are trying to avoid dealing with

19. Legrand, supra note 14, at 240.
it: “the easiest way to ‘deal with the problem’ of how to define the small state is to ignore or avoid the issue.”

That said, a study of small states, even if we do not define what they are, contributes to the understanding of general concepts, as unique opportunity of a specific study. That is somehow what I am doing here. Even if we had a clear definition of small or microstates, we would still be far from having a foundation for the study of micro jurisdictions. Indeed, many jurisdictions are not states as such, for instance, sub-national divisions like islands. Vlcek, for example, explained the following:

Many states possess sub-national jurisdictions which may engage in commercial activity extending beyond their national borders. Some of these jurisdictions physically exist beyond those national borders and as a result effectively extend the national border in that location.

It seems that mainstream scholarship has neglected these very small world’s legal spaces. I am conscious that when writing about micro jurisdictions I should start with a definition of micro jurisdiction. I suppose that it has to do with how small a jurisdiction should be to fit in the category, while still being a jurisdiction. Vlcek in his attempt to define what is a jurisdiction explains that: “[it] includes the designation of the space or territory (with permanent population, government, etc.) over which a specific legal regime operates and is enforced. It also reflects the word’s usage regarding the law, its practice and the range or extent of legal enforcement.”

We could well consider that we have a jurisdiction on a territory over a population, if we have: (i) a specific body of law applying uniquely to that territory or population; (ii) a legislative institution

21. PETRA BUTLER, CAROLINE MORRIS, SMALL STATES IN A LEGAL WORLD vi (Springer 2017).
23. Id. at 170.
with capacity to make primary legislation; (iii) a distinct hierarchy of courts, judges, and public prosecutors; and (iv) a body of legal professionals recognised by the state or at least through self-regulation. What makes the size of a jurisdiction micro? Baldacchino adopts a more relaxed posture on the issue. He states that:

 attempts at fixed and absolutist definitions of smallness are not very productive. What, then, is the alternative? One can argue that smallness is inherently a relative concept. Poland, for instance, has been described as a small state compared to one of its neighbours (Russia); but a large state when compared to a different neighbour (Lithuania) . . . \textsuperscript{24}

The relativity of the definition would work here for Jersey and its position between its “big neighbours.” A micro jurisdiction would be on a territory smaller than the “big neighbours” over a population that is also smaller than the “big neighbours,” if we have: (i) a specific body of law applying uniquely to that territory or population; (ii) a legislative institution with capacity to make primary legislation; (iii) a distinct hierarchy of courts, judges and public prosecutors; and (iv) a body of legal professionals recognised by the state or at least through self-regulation.

Micro jurisdictions can be found in all corners of the world, as common law, civil law and mixed or hybrid jurisdictions. According to some authors: “Contemporary small jurisdictions are quite heterogeneous.”\textsuperscript{25} Some are independent micro-states that have some level of connections with “big neighbours” (geographically, historically, legally, financially); others are legal places within territories dependent on larger entities. Most of them share similar economic development as international finance centres, and the majority have similar issues concerning legal education.

\textsuperscript{24} Baldacchino, \textit{supra} note 20, at 7.  
\textsuperscript{25} Sebastian Wolf, Peter Bussjäger & Patricia Schiess Rütimann, \textit{Law, Small State Theory and the Case of Liechtenstein}, \textit{1 SMALL STATES \& TERRITORIES} 183, at 184-196 (2018).
In my opinion the most important point is the place of those jurisdictions in a global context rather than a geographical, historical, legal, or financial context. Through their quirky little rules, most of them survived from medieval time, these jurisdictions have developed as major players in our global economy. At the same time, questions are raised about the preservation of their legal heritage against the normalisation and the homogenisation, or even the fusion in larger legal spaces. Wolf et al. propose three assumptions regarding law in small states: assumption 1. a small jurisdiction extensively adopts foreign legal norms; assumption 2. a small jurisdiction features remarkable or unusual constitutional characteristics; assumption 3. a small jurisdiction is dependent on external resources to maintain its judicial and legal institutions. If a micro jurisdiction has its own constitutional characteristics, it has a specific constitutional identity, different from the surrounding neighbours. This offers the difference needed to qualify the jurisdiction in a way. I would quite rely on that assumption solely to define a micro jurisdiction, therefore assumption 2 would become the fundamental norm for the micro jurisdiction to exist as separate legal entity. Assumption 1 and 3 are different. If the jurisdiction adopts foreign legal norms or relies on external resources to maintain its judicial and legal institutions, it may be assumed that it may damage what makes it “a jurisdiction” and therefore affect its legal identity. But those assumptions are here to remind us about how the question of legal identity of micro jurisdictions is connected to relation between the centrifugal global movement towards “big neighbours” and the local roots of the micro jurisdictions. As a result, we have a “glocal” dimension of how the lawyers are trained. Legal education in micro jurisdictions is deeply affected by those assumptions, as seen in the various models for routes to lawyer’s qualification.

26. Id. at 184-185.
II. MODELS FOR ROUTES TO QUALIFICATION IN MICRO JURISDICTIONS

Legal education, as I summarised in the introduction, is evolving between liberal and professional (or science). In addition, legal education in the context of globalisation has been defined by Flood as falling into four main categories:

1. Importing foreign students to home law schools for LLM and research degrees.
2. Exporting domestic law schools’ programmes to foreign countries, sometimes in conjunction with a host institution.
3. Creating global law schools that attempt to appeal transnationally.
4. Online law schools that could transcend borders but tend towards the local.27

In addition, legal education has become global. Flood again stated that local education is becoming international, transnational, and global.28 In that context, it is evidently complicated for micro jurisdiction to affirm their legal identity through their own legal education. However, it could be argued that micro jurisdiction, because of their specific position have a crucial part to play in these phenomena: “international, transnational and global.” Nothing precludes micro jurisdictions to recruit international students, to export their programme, to appear transnational, or to have online provision. Therefore, micro jurisdiction can truly be a place of legal education for future lawyers.

It could be argued that there are some “models” or archetype of legal education in these micro jurisdictions that allow us to classify

them in families. They would evolve around the two parts: logically, between the academic part and the vocational part.

First, we may assume that micro jurisdictions rarely rely on 100% local legal education. This is particularly true of the academic stage for practitioners, the university phase of education. The reason could be as simple as the absence of a local university in the micro jurisdiction, or just because there is no faith from the micro jurisdiction (i.e., its population and/or its political elite) in a possible local education or because again, people or firms want/need students educated outside the micro jurisdiction. This point has dramatic consequences of course, as it obliges the initial legal training of future local lawyers of micro jurisdictions to be done abroad through foreign law schools. That said, this is less true of the initial vocational training. For this stage, there seems to be a (near) 100% local initial training on local laws that exists. We therefore have different families that are as follows:

i) University phase and initial vocational training abroad: Reliance on professional qualifications from another jurisdiction (like currently Gibraltar); most rely on the academic stage in another jurisdiction, although this may be changing;

ii) University phase abroad/initial vocational training local (without a local law school): Legal education without law schools (e.g., Isle of Man);

iii) University phase abroad (sometimes offering also local university stage)/initial vocational training local (with a local law school): this has been the case of some micro jurisdictions that set up micro law school (e.g., Andorra, Jersey, and to some extend Guernsey);

iv) University phase and initial vocational training local (e.g., San Marino).

For more than 7 years, I have been involved with the running of the micro law school providing legal education in Jersey, I would like to discuss further the case of Jersey.
III. THE CASE OF JERSEY

Jersey shares related histories and legal histories to the other Channel Islands, especially of Guernsey. These have broadly common histories and legal traditions but differ in some respects and are largely governed by separate local institutions. Jersey is very close geographically to France and its legal history closely relates to continental Normandy. Originally included in the Duchy of Normandy, Jersey remained attached to the English crown after the loss of Normandy. Jersey is a Crown Dependency, meaning that the island is neither part of the UK nor the EU. It is autonomous with its own parliament, the States of Jersey, and its own ordinary courts. English and French are the official languages.

The relationship between the Channel Islands and the United Kingdom results from historical and legal events. As one of the Channel Islands, Jersey, unlike the British Overseas Territories, is not a British colony. The Channel Islands (i) are not treated as part of the metropolitan territory under the British constitution and (ii) do not enjoy central democratic representation. They show a number of analogies with the British colonies and have a relationship with the United Kingdom that could be considered as “quasi-colonial.” It means that there could be some variable geometry in the way the UK Parliament may or may not act in the domestic affairs of Jersey and on how far the UK may be able to speak for and bind Jersey on international affairs.29

During the 20th century, the working language of the law shifted decisively from French to English: legislation enacted after the 1930s is normally in English, judgments of the Royal Court from the 1950s adopted both English language and “common law style,” and English legislation had a great influence over the content and style of Jersey enactments. Note that Jersey has always enjoyed a

specific status in relation the EU and Council of Europe. Jersey law has different layers. As stated by Southwell,

Much help can be found in the Reports of the Commissioners appointed to enquire into the criminal law of Jersey (1847) (“the Criminal Report”) and the civil, municipal and ecclesiastical laws of Jersey (1861) (“the Civil Report”). These Commissioners had the tasks of carrying out a thorough investigation of the laws and courts of Jersey, and not surprisingly they started with the sources of Jersey law, considering these under the two heads of common or customary law, and legislation.30

Common or customary law can be found compiled in the Ancienne coutume of 1204, the Grande coutume of 1539 and the Coutume reformée of 1585, considered at length by the Privy council as evidence of customary law of Jersey before the separation, as commented by Le Geyt, Poingdestre, Terrien, Basnage, and Pothier, etc. Legislation comprises the Royal Charters, the laws passed by the States of Jersey, “triennial regulations,” and some Acts of the British Parliament concerning Jersey. In addition, we find the influence of French and English laws. According to Southwell, “French law as such is not authoritative in Jersey” while “it is inevitable that English doctrines have played a large part in the great development of Jersey law during the last 50 years.”31 From these words, we already have the flavour of the asymmetrical situation Jersey law is in. This had ripple effects on legal education in Jersey.

The question of legal education in Jersey has always oscillated between the “big neighbours.” Indeed,

Jersey’s approach to legal education and training reflects these influences, as well as the fact that the jurisdiction has never had a local university or formal Faculty of Law. In the nineteenth century, Jersey law students studied in France. Increasingly in the twentieth century, students

31. Id.
typically studied at British, especially English, universities.

As explained by Jean-Marie Renouf, the current Jersey system of legal education is based on The Advocates and Solicitors (Jersey) Law 1997 (“the Law”)\(^\text{33}\) that governs “the right to practise as an advocate or solicitor.” It includes setting out the requirements for admission as an advocate or solicitor. In addition, we have The Advocates and Solicitors (Qualifying Examination) (Jersey) Rules 1997 (“the Rules”),\(^\text{34}\) which set out the structure of the Jersey qualifying examination.\(^\text{35}\)

Let us briefly describe the different stages of the legal training of a Jersey lawyer.

Initial training: Before 1997, Jersey lawyers could have a law degree of a British, French, or Irish university and Jersey advocate could have passed either the examinations set by the Council of Legal Education for call to the Bar by any one of the Inns of Court in England; or a licence of a French university.\(^\text{36}\)

After 1997, under the 1997 Rules it was decided a candidate applying to sit the qualifying examination of advocate or solicitor (the local legal practitioners) should have what the rules describe as a legal or a general qualification, that we will analyse first.\(^\text{37}\) They

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32. Donlan, Marrani, Twomey & Zammit, supra note 12, at 201.
36. Before 1997, the Jersey Law 17/1971 Solicitors (Jersey) Law, 1971 mentioned ‘he has a law degree of a British, French or Irish university’ and for the advocate, Jersey Law 15/1968 Advocates (Jersey) Law, 1968 ‘he has passed the examinations set by the Council of Legal Education for call to the Bar by any one of the Inns of Court in England; or (ii) he has a diploma of licentiate in law of a French university’.
37. The 1997 Rules supra note 34.
may then do their training in Jersey law, what the rules refers to as the final examination, as we will see.

Under the 1997 Advocates and Solicitors (Jersey) Law (Rules), Rule 1(2) mentions that a legal qualification should be either a law degree of a British University although leaving discretion to the Board to approve one from another university and various training in England, Scotland, and Northern Ireland.

For the purposes of these Rules, a person has a legal qualification if the person has:
(a) a law degree of a British University or of such other university or institution as the Board approves which conforms to the requirements in Rule 2;
(b) passed the examinations and assessments included in any course validated by the Common Professional Examination Board in England and Wales;
(c) passed the examinations and assessments included in any course –
   (i) validated by the Law Society of England and Wales for admission as a solicitor of the Supreme Court of England and Wales (or the examinations formerly set by the Law Society of England and Wales for that purpose), or
   (ii) accredited by the Law Society of Scotland for admission to the Roll of Solicitors in Scotland; or
(d) passed the examinations and assessments included in any course –
   (i) validated by the Bar Council for call to the Bar of England and Wales by any one of the Inns of Court in England (or the examinations formerly set by the Council of Legal Education for that purpose), or
   (ii) validated by the Faculty of Advocates in Scotland for admission as a member of the Faculty of Advocates in Scotland; or
(e) passed the examinations and assessments leading to the award of a Certificate of Professional Legal Studies by the Institute of Professional Legal Studies of the Queen’s University of Belfast or met such equivalent requirements as may be recognized for the time being by –
   (i) the Law Society of Northern Ireland, or
the Executive Council of the Honorable Society of the Inn of Court of Northern Ireland. 38

A law degree should contain the following subjects according to Rule 2 (1):

(a) the law of contract;
(b) the law of tort;
(c) criminal law;
(d) equity and the law of trusts;
(e) constitutional and administrative law; and
(f) the law of the European Union. 39

Anyone familiar with the English legal training will recognise the similarity with what is found in English legal training. Indeed, one may want to compare these to the subjects included in the Joint Statement issued in 1999 by the Law Society and the General Council of the Bar on the completion of the initial or academic stage of training by obtaining an undergraduate degree.

The Foundations of Legal Knowledge are:

a. The key elements and general principles of the following areas of legal study:
   i. Public Law, including Constitutional Law, Administrative Law and Human Rights;
   ii. Law of the European Union;
   iii. Criminal Law;
   iv. Obligations including Contract, Restitution and Tort;
   v. Property Law; and
   vi. Equity and the Law of Trusts. 40

It seems obvious that the 1997 Rules have been more or less mirroring the requirements for English practitioners. What was therefore referred to as legal qualification in the Jersey 1997 Rules highlights the domination of (English) common law in the initial training, by mirroring the English regulatory bodies “joint statement.”

38. Id. at r. 1 (2).
39. Id. at r. 2(1).
General qualification under the 1997 Rules: What was referred to as general education in the 1997 rules was a non-law degree (anything but a law degree). Someone with a general qualification would need to sit exams (“preliminary examination”) that specifically refers to English law. The Rules describe the content of the examination for non-law degree holders.

The preliminary examination consists of 6 papers on the following subjects:
(a) the English law of contract;
(b) the English law of tort;
(c) principles of English criminal law and the law of evidence;
(d) principles of English constitutional and administrative law;
(e) principles of English equity and the law of trusts; and
(f) the law of the European Union.  

It is left to the board of examiners (i.e., Jersey lawyers teaching and examining candidates, specialised in Jersey law) to assess candidates’ knowledge of English law. The board is defined under the “principal law,” article 9 of the 1997 Law.

**Board of examiners**

1. A board of examiners shall be responsible for the conduct of the qualifying examination.
2. The Board is to consist of –
   (a) the Deputy Bailiff, as the President of the Board;
   (b) the Attorney General;
   (c) the Solicitor General;
   (d) such advocates and solicitors of the Royal Court as are for the time being appointed for the purpose by the advocates and solicitors of the Royal Court generally; and
   (e) any persons co-opted under paragraph (5)(b).

In S. 9 (3) and (4) of the 1997 Law, we can see that the board is the body that would assess candidates. In a way, this seems both coherent and quite illogical. It is coherent if one wants to move to a

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41. The 1997 Rules *supra* note 34, at Rule 3(3).
42. The 1997 Law *supra* note 33, at art. 9(2).
mainstream English common law education but quite illogical for the micro jurisdiction to see its most important lawyers assessing students on English law.

The following table sums up the requirement for the foundation of common law under the 1997 Rules and the 1999 Joint Statement for clarity:

<table>
<thead>
<tr>
<th>1997 Rules § 2 (1) (Legal Qualification)</th>
<th>1997 Rules § 3 (3) (General Qualification with Preliminary Examination)</th>
<th>1999 Joint Statement</th>
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<td>- the English law of contract;</td>
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<td>- the law of tort;</td>
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<td>- criminal law;</td>
<td>- principles of English criminal law and the law of evidence;</td>
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<td>- equity and the law of trusts;</td>
<td>- principles of English constitutional and administrative law;</td>
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</tr>
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<td>- constitutional and administrative</td>
<td>- principles of English equity and the law of trusts; and</td>
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Both qualifications, legal and general (together with the preliminary examination) in the 1997 Rules are in fact truly a prerequisite for Jersey future lawyers to study English common law. We have therefore here a full picture and illustration of the clash between legal identity of Jersey and the influence of (one of) the “big neighbours.” This was spotted by the legal profession as seen in Renouf:

At a time when much concern is expressed by members of the profession that the increasing influence of English law and practice upon Jersey’s lawyers is eroding our identity and legal roots, the system of education we implement is surely of paramount importance and worthy of substantial debate.\footnote{44}{Renouf, supra note 35, at § 3.}

The idea was to revise the initial stage to push further the development of a proposer training in Jersey law. Indeed, Renouf noted that:

A major concern expressed frequently by the profession as a whole . . . is that Jersey is succumbing to a tide of English legal influence, largely resulting from the predominance of the English language and the English academic and professional training received by most Jersey lawyers. The result is that lawyers are often unwilling or unable to apply the traditional Norman French texts and instead rely too heavily upon English legal doctrines.\footnote{45}{Id. at § 54.}

When that initial stage is completed, candidates should then study Jersey law.

Training in Jersey law: During the 1980s and before 1997, provision was made for candidates to take some certification in French and Normand legal studies at the University of Caen in place of a Jersey option subject, a route taken in fact by a small number of candidates that has fallen into disuse.\footnote{46}{Note that if the candidate for admission has passed by the Bar Professional Training Course to become a barrister in England or the Legal Practice Course in England to become an English solicitor, that period of Jersey work experience is two years; otherwise, it is three years. Almost all candidates work full-time in a law office while studying part-time for the Jersey Law Course. Call to}
training in Jersey law was minute but examination in Jersey require
candidates to be assessed without proper training for their examine-
tion. Prior to the Institute, candidates would more or less study on
their own. Renouf’s report highlights that:

even more striking than the significant failure rates were
the threads of resentment towards the process running
through many candidates’ comments, and the reported ef-
fects that the ordeal of learning the totality of prescribed
material had on the health of some. The experience was de-
scribed as ‘miserable’, and ‘a physical and mental ordeal
that I have not experienced in any other situation’ whilst
the exams themselves were ‘inconsistent, capricious and
amateur in comparison [with the English equivalent ex-
ams]’. Experiences such as those recounted, reflected an
unnecessarily arduous process which can only raise ques-
tions as to the purpose and legitimacy of the Jersey legal
examination process.47

The Institute of Law, the law school of Jersey, was set up then,
under the leadership of one of the senior leading legal experts in
Jersey, the former Bailiff Sir Philip Bailhache. As the local law
school, the Institute aimed to make the process of training both
smoother and more robust. Renouf added in his report that:

The notion of a law school in Jersey has, however, recently
gained greater momentum under the auspices of the Bailiff
who in November, [sic] 2007 announced the impending in-
corporation of a Jersey Institute of Law.48

He added, that “[t]he great benefit of a law school would be the
improvement in students’ understanding of Jersey law and in partic-
ular the promotion of the island’s Norman texts and customs.”49

Currently, admission to the legal profession requires enrolment on

the Jersey bar and admissions as solicitors take place at special sittings of the
Royal Court. By convention, new advocates make ‘courtesy calls’ on other advoca-
tes, a practice made more onerous with the rapid growth of the legal profession.

See also Renouf, supra note 35, at § 7.
47. Renouf, supra note 35, at § 16.
48. Id. at § 51.
49. Id. at § 55.
the Jersey Law Course (JLC) leading to the Jersey law examinations and two or three years of work experience with a Jersey law firm. The Institute became the approved provider of the JLC, with teaching done during intensive study weekends by visiting academics and local practitioners.

Rule 3(4) of the 1997 Rules, under the title qualifying examination, stated what the subject would be for the final examinations:

The final examination consists of –
(a) 6 papers on the following subjects in Jersey law –
   (i) Paper 1: the Jersey legal system (including the history of Jersey law, its sources, customary law, the writers on Jersey law and the relevance of Norman customary law, English common law and the law of other legal systems) and constitutional law;
   (ii) Paper 2: the law of contract;
   (iii) Paper 3: the law of testate and intestate succession;
   (iv) Paper 4: the law of immovable property;
   (v) Paper 5: civil procedure and criminal procedure, including legal professional ethics;
   (vi) Paper 6: the law of security over movable property and bankruptcy; and
(b) subject to paragraph (5), one paper on a subject chosen by the candidate from the following options –
   (i) company law,
   (ii) trust law, and
   (iii) family law.

Again, very similar to what is considered to be the foundation of English common law by the 1999 Joint Statement, the 1997 Rules proposed six compulsory subjects in Jersey law and three options. Interestingly, the 1997 Law offered the possibility for a student under Rule 3(5) to be exempted from being examined for the three options (company law, family law, or trusts law) if the candidate obtained either the University of Caen Certificat d’études juridiques françaises et normandes, or the Certificat d’études de droit français et normand. This section proposed a very important point by bringing back I believe an archaic attachment to medieval Normandy and a more local and relevant aspect of legal education. But it is only a choice given to exempt candidates from studying some important
parts of Jersey law. In addition, it does not really eliminate the initial training in English law and the influence of the common law on the training of Jersey lawyers. It rather opens the possibility to be influenced by the other big neighbour. As Renouf noted, “in practice this is really the case.”

If it is sure that Jersey with its micro law school has now entered a route for a more local training for its lawyers, the “glocal legal” community does not work very coherently due to the mounting influence of English law on that legal training. The way the “glocal legal” community in Jersey has been influenced, between the “big neighbours,” is the result of the impact of ideology on legal education.

IV. IMPACTS OF IDEOLOGY ON LEGAL EDUCATION IN MICRO JURISDICTIONS

It is evident that legal education in Jersey is at the forefront of globalisation for many reasons. First, as mentioned previously, Jersey is an offshore international financial centre that is involved in many complex worldwide transactions and has many interactions with larger economies and large multinationals. In its study on offshore jurisdictions, Vlcek detailed what is an offshore archipelago: “The geographic imaginary of an offshore financial archipelago is intended to situate the multitude of jurisdictions labelled, by themselves or by others, as locations for offshore finance within the more extensive geography of global finance.”

He added that like Jersey, “[a] non-sovereign territory becomes part of this global capital transportation network by exercising its capability to legislate for the territory and craft legislation conducive for the operation of a financial centre.” He explained that the offshore archipelago of offshore financial centers was characterized as

50. Id. at § 7.
51. Vlcek, supra note 22, at 174.
52. Id. At 175.
providing “conduits and sinks” for capital in support of a global corporate ownership network, with Jersey as one of the largest capital “sinks.” 53 The expression “global legal” that I have been using was precisely to highlight the attraction of the laws of Jersey, a mixed legal framework that has their roots in archaic time but used (and useful) in the contemporary global world because of the necessary pragmatism of the financial industry. For instance, one can obviously see the link between Jersey and the UK economy while not so much between Jersey and the French economy: one is more attractive. According to the think tank Jersey Finance, 42% of origin of wealth of investors and 49% of the destination of investment were from the UK. 54 In addition, “Jersey supports an estimated 250,000 British jobs, of which 190,000 from foreign investment alone, and adds £14 billion to the United Kingdom economy.” 55

Connections with larger jurisdictions, what I called the “big neighbours,” have their importance here. But those connections go further than just financial connections: they can be physical and historical connections too. There is therefore a specific context of the micro jurisdiction, like the slice of ham stuck between two slices of bread in a jambon beurre sandwich. We should go further here and consider how Jersey has been to some degree, not simply influenced, but contaminated by the “big neighbours,” even if only by evident necessity. According to Moréteau,

Contamination . . . is not a clean and comfortable word like hybrid, transplant, reception, or circulation. It has troubling, unhealthy overtones. . . . Contamination means ‘to enter in contact with’ . . . . Contact among human beings generates changes in identity and behavior and the same applies to human groups and societies. There is always a risk of being altered by the contact of another. Alter means otherness but leads to alteration, with its ambivalent

53. Id.
55. Id. At 5.
connotation. The same can be said of contamination. The identity of a group may be altered at the contact of another. Groups, societies, and individuals have fluctuating identities, and they change when influenced by other groups, societies, and individuals. The same applies to legal systems that grow organically in symbiosis with the group generating them and react to the contact with other social groups and legal systems. . . . Contamination refers to the less visible. Its effects, good or bad, may appear later on. A transplant may take place with all its visible effects, yet generating some invisible or less visible changes in the system of the recipient. This is where contamination takes place. It is important to identify contamination and be aware of it. When contamination has a negative effect, remedies or ways to lessen that effect may be found and implemented.56

As one of the numerous consequences of this remark, we understand there exists an apparent ambivalence between the necessity of retaining a specific knowledge and expertise of the laws of Jersey, that we may name its “legal identity” and the centrifugal attraction of the large jurisdictions. The possible consequence here is the risk that the training of lawyers in Jersey introduces a contamination that ultimately will have the effect of departing from the legal identity of that jurisdiction.

Future Jersey lawyers have studied a foreign legal culture that is alien to their jurisdiction before starting to study the laws of Jersey. That has to do with an effect of the dominant legal culture that contaminates Jersey and needs to be known as a prerequisite. In short, most of the future Jersey lawyers must study for a LL.B. in English law before undertaking the Jersey law training. And we end up with a typical example of what Althusser meant by ideology here:

Law is an art of the asymmetry controlled. This asymmetry is the result of a hierarchy, a dogmatic appreciation of what is here, what the ‘local’ ideology voices as normal, against what is over there, that is not ‘as good as’, that is abnormal. . . . What we have is an acknowledgement of the

functioning of state apparatus, not the repressive state apparatus (RSA), but the ideological state apparatus (ISA), not the one functioning predominantly by violence, but the one functioning by ideology (predominantly so as Althusser stated). If in RSA, the state acts violently by laws and decrees, in ISA ruling ideology ‘voices’ what is ‘the best.’

Ideology shows that through—what Althusser called asymmetry—one law (the law of one jurisdiction) is going to be better than another one (the law of another jurisdiction): a hierarchy, a dogmatic appreciation of what is there. The asymmetry in the sphere of law of the micro jurisdiction is the fatal attraction towards one of the “big neighbours.” In addition, that law appears the good one versus the bad one. Jersey law becomes the victim of this asymmetry, which in turn proves to be a contamination of Jersey law. Of course, we first need to be clear about what “is” Jersey law. We have briefly defined the specific position it has above and as it was anticipated, there is a clear asymmetry. Insidiously, there is an assumption that one law is normal or good and that therefore, as a consequence, the other one is abnormal or bad. The law of England would be normal and good, as a result, while Jersey law would be abnormal and bad. Because of the mechanism of ISA, this interpretation will be coming “freely” from the “victims” who will believe freely and follow. The contamination is masked by ideology. To be more concrete with the case of our micro jurisdiction, a lawyer in Jersey, will par défaut believe that English law (the contamination) is normal or good and that the local Jersey law is abnormal or bad. This fact does not have to be a conscious one. Again, because of how ISA works, the ideology produces an effect on the minds that would make it “normal” to think that way. The contamination is hiding behind the ruling ideology.

58. To be more specific here, we will restrict the ‘messengers’ of the ideology to the ‘educated’ lawyers. But we could have added the political elite of the Island, the administration, the academic of the Institute although for those, like
is often the case, can only embrace the belief that this legal culture is the normal or good one, mainly because he or she would not be able to critically analyse whether this statement is valid. Then again, we may safely assume that a lawyer educated in English law will probably always favour the concepts of English common law, not because he or she “truly” believes this is the best law but because ideology makes him believe this is the best law.

To explain further my point on ideology, contamination, and legal education, I would like to give an illustration based on the law of contract in Jersey. This area of law has sustained a massive attack in Jersey as I will describe now. It has been complex for lawyers in Jersey to work with Jersey contract law for a while. Duncan Fairgrieve was the first academic involved in the teaching of Jersey contract law at the Institute of Law. He not only taught the future local lawyers but also designed the current study guide where he was trying to eliminate the illogical impracticality of the subject. John Kelleher wrote the following in a short article in the *Jersey and Guernsey Law Review*: “Long-time readers of this Review will have observed its commitment to promoting the development of the Jersey law of contract into something more accessible and coherent, with proper regard to the historical roots of our law. It has been a long process, but progress has been made.”\(^{59}\) He added in the second section that “[s]ince the seminal case of *Selby v Romeril*, the evolution of our contract law has had a decidedly French hue, recognising as it does our Norman roots and the Norman law reliance on the French common law (*ius commune*) for its law of obligations.”\(^{60}\)

Fairgrieve was adamant to find the “real” roots of Jersey contract law. To do so, he has been working on how Jersey contract law has

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60. *Id.* at 78.
drawn from the civil law tradition of France and the common law of England and what are the various elements that have now merged with the current Jersey contract law.\textsuperscript{61}

Meanwhile, the work of the law commissioners in Jersey has been slightly different. In two documents, they considered the law of contract in Jersey. The position of the Law Commission has been summarised in the consultation paper on contract law (2002),\textsuperscript{62} the final Topic Report on Contract Law (2004)\textsuperscript{63} and the Comments of Proposal for Reform of the Jersey Law of Contract (2019).\textsuperscript{64} The commissioners in 2002 wrote the following:

It is interesting to note that prior to the time that English influence became particularly marked in Jersey law, local lawyers trained in France. Today, the majority of Jersey lawyers study law in England and obtain a professional qualification in that jurisdiction prior to training locally. The influence of English law today is therefore explicable on the same basis as the influence of French law referred to by the Commissioners of 1861 (supra).\textsuperscript{65}

This statement certainly contradicted Kelleher’s statement on Fairgrieve’s work. But in my opinion, this is the way ideology works. Jersey lawyers have been trained in common law countries that do share English common law but with the particularism of their places. As put by Kelleher in the book review made on the book of Fairgrieve:

The practitioner instructed to advise on an aspect of contract law was in great difficulty. Many, unsurprisingly, turned to the law in which they had almost always received

\textsuperscript{61} FAIRGRIEVE, supra note 17.
\textsuperscript{65} Id.
their legal education and recourse was had to *Chitty on Contract Law* and the like on English common law.66

In the commission’s 2002 consultation paper, the Jersey Royal Court cases on Jersey contract law was quoted:

Perhaps the most notorious cases which referred to the Code Civil are *Kwanza Hotels v Sogeo Co. Ltd* and *Selby v Romeril*. At first instance in *Kwanza v Sogeo* the court stated as follows:

Although the “Code Civil” represents the law of modern France and not the “Ancienne Coutume” of Normandy from which the law of Jersey is drawn, I feel that, on a question such as the one I now have to decide, he [sic] and the other authorities quoted are a surer guide to the discovery of the Law of Jersey than is the Law of England, where, as here, the Laws relating to real property have diverged to a real extent.67

In the reported case, the Jersey judge was guided to make his decision and he decided not to replace the law of Jersey by French law or English law. That said, the law commissioners considered in their report that this was in fact a way of leaning toward French law. Therefore, the Jersey judge gave us a perfect illustration of what the “glocal legal” is about. Jersey contract law is Jersey contract law and nothing else. But the guidance towards the judicial decision seemed to be criticised by the law commissioners. Indeed, Sir Philip then Bailiff of Jersey, in *Selby v Romeril* made clear that the root of Jersey contract law are in French contract law. This is simply because Pothier who commented customary law was also a major influence on the draftsmen of the *Code civil* and, therefore, in his opinion, the current cases relating to the then art. 1108 of the Code that lays down the conditions for a convention to be valid should be regarded as

guiding Jersey contract law. But even though that point could be viewed as valid, the commissioners concluded their consultation paper by a rather peculiar statement:

[W]e presently favour the incorporation of English law by statute on the basis of the relative speed by which it could be carried out, its lack of a negative effect in terms of the Island’s suitability for doing business and the fact that it probably reflects the impression, albeit mistaken, that the majority of islanders have of the basis of the Jersey law of contract.

The commission’s 2002 consultation paper was then not an exercise of clarification of Jersey law but more of its eradication. In fact, the law commissioners did recommend the disappearance of Jersey law here. This was developed further in the commission’s 2004 report. The report took into consideration various variables, meaning the commissioners were less abrupt than in the consultation paper, due to comments they got. Even though the commission softened its approach, it considered that Jersey should adopt what was described as the Indian way, by recommending that “a statutory framework be adopted for the Jersey law of contract and the Indian Contract Act of 1872 be used as a model.”

The main point made here was that Indian contract law was based “heavily on the English common law of contract as it stood in 1872,” that the law would be familiar to “both local practitioners and residents alike” as the courts in Jersey were adopting “more and more of the elements of the English law of contract.”

68. See the 1804 version of French Civil Code, Art. 1108: Quatre conditions sont essentielles pour la validité d’une convention:
Le consentement de la partie qui s’oblige;
Sa capacité de contracter;
Un objet certain qui forme la matière de l’engagement;
Une cause licite dans l’obligation.
70. 2004 Report supra note 63, at 7.
71. Id.
the 2002 consultation paper, also recommended the eradication of Jersey law.

It is quasi evident that for most lawyers, it makes sense, and it is certainly more efficient to adopt once and for all mechanisms, concepts, legal institutions of a legal culture they know best. Legal education and the language used by lawyers impacts on their understanding of legal mechanisms. This is not surprising in ideology. In fact, “[l]anguage and behaviour are the media, so to speak, of the material registration of ideology, this modality of functioning.” 72 The behaviour of the lawyers and their language have to do with the way the good law in the asymmetry will eradicate the bad law. It is not surprising that one of the proposals of the commission was actually “a direct incorporation of the English common law of contract” although, according to the report, the Indian way felt more suitable. 73 It felt more suitable, as reaffirmed in the 2019 comments, simply because the commission advocated this time an “Anglo-Saxon” model.

[The Commission] would urge legislative reform based on an Anglo-Saxon model. Such a legislative reform would provide a modern framework for contract law, allowing Jersey businesses and individuals alike to go about their daily lives making and enforcing agreements in a way that they would expect. 74

Here, the dominant legal domain (English common law), of one of the “big neighbours” was to be the one crushing the local law of the micro jurisdiction Jersey. I am trying not to make any judgement of value here. There are arguments for and against in this illustration. But the point I would like to make is that the Jersey law commissioners were almost all English solicitors, and those who were already qualified Jersey lawyers had to be trained in English common law anyway. Althusser demonstrated the following:

72. Hall, supra note 9, at 99.
73. 2004 Report supra note 63, at 5.
74. 2019 Comments supra note 64, at 3.
Knowledge, whether ideological or scientific, is the production of a practice. It is not the reflection of the real in discourse, in language. Social relations have to be ‘represented in speech and language’ to acquire meaning. Meaning is produced as a result of ideological or theoretical work. It is not simply a result of an empiricist epistemology.75

We understand here how legal education, product of a specific practice, is the legal knowledge. I do not wish to criticise or be too negative here, but simply to highlight the logic of the frame of mind, and its result. As legal education has been more professional than liberal, the scope for any critical analysis has been very slim. It has somehow become monopolistic and, as a result, we may be able to affirm that the knowledge of the “educated” lawyers is geographically conditioned: Where you are trained conditions what you know. This point modifies the perception (the meaning) of what should be right in the two-fold legal education. The “foreign law” experience (training in English law) that is consciously or unconsciously imposed (voluntarily or not) seems to take a major space. It even gives a more or less insidious belief to the trained students as it provides one global legal discourse, simply by mirroring what had been done in the dominant country. Ultimately, it is imposing hegemonic alien views on micro jurisdictions.

V. HOW IDEOLOGY IMPOSES ALIEN VIEWS ON MICRO JURISDICTIONS?

More than any other places, micro jurisdictions suffer the “traditional positivist national approach to law.”76 This is a typical consequence of the monopolistic vision of the law carried by a national discourse of “big neighbours” that overspills. It overspills because of the requirement that the ab initio legal training be done

75. Hall, supra note 9, at 98.
somewhere else. Jersey lawyers are positioned within an ideological structure, dominated by the law of the “big neighbours,” and the language, in their ideology. Indeed, as Hall explained, “some of the basic positionings of individuals in language, as well as certain primary positions in the ideological field, are constituted through unconscious processes in the psychoanalytic sense, at the early stages of formation.”77

I gave the example of Jersey contract law particularly because it shows the tension, the conflicts between the dominant laws of the countries around Jersey and Jersey law: French law, English law, pulling apart Jersey law. The influence of the “big neighbours” conditions a certain perception of the law and a specific meaning of their law, the one of the other, creating unbalance, hierarchy, judgement of values between one law and the other law, between a good law and a bad law. This asymmetry defined by Althusser is produced and reproduced unconsciously. Legal education becomes an instrument of a domination of a place over another one, transpiring through gaps by the means of history and particularly language, as “[o]ne of the main challenges lying before law education . . . is related to law and language relationship.”78

The relationship “law and country,” as an ideological relationship, expands to a masked contamination of the legal identity of Jersey.79 And we clearly witness a reproduction of a specific vision, a specific domination, contaminations that go beyond the “law and country,” as it colonises spaces that are not supposed to be.

One could consider that it is a “good” thing to be educated in several legal cultures. It has for instance been argued that “[i]n legal education . . ., lawyers tend to analyse the law and to solve problems rather isolated from [the context of written law],” the “whole (social,
economic, historical, ideological . . . ) context of written law” that represent the legal culture. Then, having access to knowledge of English law (or French law for argument’s sake), as a pre-requisite to the access of micro jurisdictions law should be seen as a chance for critical learning rather than a challenge as I mentioned previously.

It is indeed a chance for micro jurisdictions to create an “in between” and contradict the strength of the “big neighbours” ideology, by critically looking at the law of the “big neighbours.” It also should help lawyers or candidate lawyers to compare and develop a critical mind on the one hand and, on the other hand, to raise awareness of what else is there. But the issue is the size of the jurisdictions involved and the question raised by Althusser about asymmetry. If Jersey lawyers would be trained in both French law and English law for instance, there would be scope to acknowledge that there is something “in between” that could guarantee an equilibrium and remove asymmetry. This is not currently the case. This “in between” is where the micro jurisdiction finds itself. In an ideal world, identity, and particularly legal identity should not disappear but be taken into account in a global world, as an added value, that is an adequate logical little addition, an addition of quality rather than quantity, an addition that is believed to be of importance.

We may well have French law and English law influence on the law of Jersey, but what is important here, is the rest, the “in between,” the important “nothing” as the psychoanalyst would say, that is Jersey law, the local extension of Normand customary law developed locally, that gives all its flavour to the legal culture of Jersey and gives its legal identity, its “glocal legal” dimension. However, that this is not that simple. Jersey faces internal influences that are repeatedly trying to undermine the “glocal legal” character of the island. We may illustrate this point once more by referring to

80. DAVID SHIFF & RICHARD NOBLES, LAW, SOCIETY AND COMMUNITY: SOCIO-LEGAL ESSAYS IN HONOUR OF ROGER COTTERRELL 273 (Ashgate 2014).
the Jersey law commission 2002 consultation paper. In section 12, the commissioners presented us the *Summary of present difficulties in ascertaining the law of contract*. The commission listed those difficulties: Accessibility of Norman texts, Language, The Difficulty of Applying Ancient Concepts, Uncertainty; A legal system for the modern world of commerce? As a preliminary remark, I would like to point out that what the commissioners listed would not be considered as such by comparative lawyers. Indeed, academics have ability to find texts. Legal historian can work on these. In addition, customary law is not strictly speaking a written type of law and using Norman text to describe it is quite untrue. Indeed, according to Ruiter:

> The conceptual framework may be helpful in analysing written law, that is, legal conditions whose validity rests on the successful performance of legal acts. It remains to be seen, however, whether this framework can also be used to analyse legal conditions whose validity does not rest on the successful performance of legal acts, that is, unwritten law. Unwritten law can roughly be divided into two categories. The first is the category of legal principles. The second is the category of customary law. ⁸¹

This is confirmed by Murphy who wrote that “custom . . . is unwritten law.”⁸² In the same logic, academics do not have many issues with applying concepts. And practitioners should not either. But I would like simply to conclude by considering further the comments made under the difficulties labelled language and efficient legal system.

**Language**

Apart from the translations to which we have referred in the preceding paragraph, works on Norman customary law and on more modern French law are almost exclusively written in the French

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language. Despite the island’s proximity to the coast of France, very few islanders are fluent in French and in the twenty-first century it may be difficult to justify a legal system where the laws are written in a language that is alien to the majority of the population. In addition, the educational system on the island is English-based, both in terms of language and content.

**A Legal System for the Modern World of Commerce?**

On an island predominantly inhabited by British nationals, it begs the question as to why contract law continues to lean towards French law and, on occasions, modern French law. Both statements relate. They are also both quite untrue. Jersey’s population is quite diverse. About half of its population is “really” from Jersey. When the report of the commission was published it was exactly 53% (it is 50% now), whereas the rest were from elsewhere. Of course, around 30% of the population is from an English-speaking part of the world. Then again, the island is constitutionally bilingual. That kind of arguments would not stand the analogy for example of Canada. Canada is bilingual, most of Canada communicates predominantly in English and some part predominantly in French. The presence of a large English-speaking community does not oblige the people of Quebec to adopt common law contract, although it is not forbidden to do so, and vice versa.

If we can assume that higher legal education has moved to some extent to an internationalisation, within globalisation, then legal education of students in micro jurisdiction is at the essence. But the whole area of knowledge, again, is bathing in ideology from the large legal entities that are surrounding these micro spaces. Ideally, lawyers in Jersey must develop a critical mind and first acknowledge that law of the “big neighbours” only reflects one law, another foreign law. In ideology, with the point of asymmetry and hierarchy,

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with the question of contamination surrounding the qualitative appreciation of the law, we observe the conflict of one law (or law of one) versus foreign law (or law of the other), the good versus the bad. That said, I am pretty sure that most future lawyers see only one thing that was well spotted by the commissioners: to study a legal system for the modern world of commerce. We can assume that this is one of the most important reasons here for the use of the English language, the new lingua franca, and the use of the English common law. The difficulty for an international financial centre like Jersey is to appear to have a legal system (rather than a legal culture) that is modern and sophisticated as the think tank Jersey Finance put it. Unfortunately, these ideas contribute to an ambiance that advocates for the reduction of the legal identity of Jersey and therefore also opens the way to less attractivity.

One may assume this is the result of the structural perception of what is hegemonic in the law. Because of this perception, most law students in Jersey expect to study the law of the English “big neighbour” even though their true *fonds de commerce* (goodwill) is in fact as I said above, “the rest”; that is their legal identity will appear only if Jersey legal culture was taught or if the legal cultures of both “big neighbours” would be critically taught, helping the fostering of the “in between.” It is a perception from the “globalisation” trend, but also, and maybe this is a related matter, because of the pressure of peer practitioners. The pair “law-country,” this monolithic, monopolistic approach of the law, created by a specific discourse, a national discourse is exacerbated in micro jurisdictions. In fact, by analogy, we might consider that it equates the violence described by Derrida on the way language was imposed in many societies. This vehicle has many considerations and assumptions that are wrong.

(like the divide private/public for example), fostered voluntarily or not by the hegemonic dominance of the “big neighbours” law.

As law may be considered as a specific discourse of a vast discourse,\(^85\) as the language carries the “always ready,” which is the impossibility to get out of the ideology, micro jurisdictions find themselves in the middle of a competition between hegemonic discourses. Jersey’s position amplifies this position because the micro jurisdiction itself competes with one competitor that does not have the same weight as the other and becomes the dominant legal culture, making Jersey law the foreign one. As a last illustration, I would like to add what the commissioners mentioned in their 2019 comments:

> We therefore advocate legislation to establish a statutory model for Jersey’s contract law. In designing a statutory model, we recommend that the statute should not be based on principles of French law. It is not good policy to base a statute on alien concepts which are introduced deliberately for cultural, romantic or sentimental reasons to be different. Laws should serve the people and, so far, as is possible, meet their expectations and avoid unfamiliar concepts.\(^86\)

Jersey’s contract law should be Jersey’s, without any epistemological reference to French law, understanding that what they had in mind with a common law approach.

**VI. Conclusion**

To conclude, there are ambivalent aspects of legal training in Jersey (identity and the “big neighbours” dilemmas). It highlights the drama and the trauma of the 21st century legal education in the micro jurisdictions.\(^87\) We are all aware that, to a certain extent, and I would not like to generalise too much here, the teaching of law has

\(^{85}\) Ernesto Laclau & Chantal Mouffe, Hegemony and Socialist Strategy 96 (Verso 1985).

\(^{86}\) 2019 Comments supra note 64, at 3.

\(^{87}\) I would even attempt to generalise here by saying that this might be the drama and trauma of most micro jurisdictions.
become mechanistic. This seems to be a result of the necessity to develop “good” lawyers, “ready to go” lawyers, some sort of good new blue-collar workers for the structure. It also has become too restricted and too narrow, to fit nicely within the pair “law and country.” This has to do with efficiency. These remarks may not be a major shock in the legal profession and therefore in legal education in a large country. But these remarks need to be addressed and analysed carefully in micro jurisdictions. Jersey legal education is mostly based on ab initio training in English law prior to a local training in Jersey law. The entire training is mostly done in English if we exclude some teaching in French due to conveyancing documents still being written in French in Jersey. The domination of one “big neighbour” over the other is creating an imbalance that preclude Jersey from truly determining its “in between.” As a result, one legal identity is contaminating drastically Jersey’s legal identity. This identity is being erased by a contamination from English common law. Thanks to Althusser, we know that ideology masks reality, misrepresents reality, creating a fantasy world to allow the continuation of a system. The contamination is masked under the veil of efficiency and contemporaneity of English common law. English trained future lawyers in Jersey are not immune to this asymmetry and this operation. They are unconscious victims within this mechanism. To be complete, it should also be noted that at the time of the publication of this article, the local law school has somehow turned even more towards the English side, leaving almost completely the French side, and drastically diminishing its Jersey specificity.

Along its various incarnations, the discourse of a society is manifested, through ideology, relayed by the law, also as ideology “which forms the ‘common sense’ of a period and thus appears natural, normal, right.”\(^88\) The trouble is that what appears natural,

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normal, right for those studying English law, clashes with the legal identity of Jersey, which is in fact as I mentioned, the real fonds de commerce of Jersey lawyers. Zizek would say that this sounds really like “shooting oneself in the foot”; this is indeed sacrificing what is most precious, doing the impossible.\textsuperscript{89} I think this is self-explanatory.

THE DOCTRINE OF VEIL-PIERCING LIABILITY
IN POLAND AND SELECTED COUNTRIES:
A COMPARATIVE LAW STUDY

Mariusz Fras*

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ABSTRACT

The separation of a company from its members, based on legal personality, is recognized as one of the fundamental principles of corporate law. It expresses the legal distinction between the two entities. A consequence of the separateness principle is that members are not liable for the debts of their companies, and companies cannot be held liable for the debts of their members. However, such consequences of the principle of mutual autonomy of companies and their members are in sharp contrast with commercial reality, in which intertwined corporate groups operate as a single economic entity. In market transactions, a subsidiary often becomes a tool in the hands of its controlling partner—the parent company—trading on its own behalf but in the interest of the parent enterprise or the entire corporate group. Consequently, the subsidiary rather than the

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controlling company is liable to third parties when harm is caused to them. In such situations, the application of the principle of corporate separateness gives rise to an unjustified privilege to the parent company—the member of the subsidiary—while parties contracting with the subsidiary are at risk. Many legal systems react by mitigating the separateness principle, using devices such as as “piercing (lifting) the corporate veil,” “disregarding (avoiding) corporate identity,” “intrusion beyond the barrier” (Durchgriff) or “de facto management” (gestion de fait). The purpose of this study is to present the terms and preconditions of different veil-piercing liability mechanisms in selected jurisdictions such as Poland, Germany, Switzerland, Austria, Italy, and the United States. The need to analyse the construction of veil-piercing liability in the Italian and Polish legal systems is a consequence of discussion on the methods of protection available to creditors of a limited liability company.

Keywords: Poland, Austria, Germany, Switzerland, United States, piercing (lifting) the corporate veil, disregarding (avoiding) corporate identity, intrusion beyond the barrier, capital companies, subsidiary, parent company, protection of company creditors, commercial law

I. INTRODUCTION

The separation of a company from its members based on legal personality is recognized as one of the fundamental principles of corporate law. It is expressed in terms of the legal distinctiveness between the two and extends to include corporate group operations in which a parent company is the controlling member of a subsidiary. The parent/dependence relationship in this regard does not serve to lift the principle of separation. While not expressly stated in Polish law, the principle is inferred from the construction of the legal personality of group members.

In the present paper, it is argued that discussions on reforming the capital structure of the limited liability company have exposed

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deficiencies in protecting the creditors of such companies. These shortcomings may be removed by strengthening the protection of creditors and including the company’s shareholders in the group of entities that are liable towards the creditors. This does not preclude the development of other protective instruments such as the motion of liability of management-board members. In the context of the above, the present research utilizes as its basic method the comparative method of analysis.

The purpose of this study is to present the terms and preconditions of different veil-piercing liability mechanisms in selected jurisdictions, that is in Polish, German, Swiss, Austrian, Italian, and American laws. The American system is the departure point and the adopted benchmark. The choice of the United States stems from the fact that it was the first jurisdiction to identify and address the abuse of corporate identity. Currently, the notion of veil-piercing liability seems to most widespread in the US where most of the judgements regarding this matter are issued. German legislation and doctrine provide the most comprehensive conceptualization of veil-piercing liability. Austrian and Swiss legislations, benefitting from the legacy of German literature, introduce certain distinctions in the understanding of veil-piercing liability. As to Italy, it is one of the few European countries where substantive law provides for a special mechanism of the dominating company’s private law liability towards the creditors of the daughter companies. The need to analyse the doctrine of veil-piercing liability in the Polish legal system is a consequence of a discussion of the means of protection available to the creditors of a limited liability company. German law having introduced and developed the notion of veil-piercing liability in the context of a civil-law jurisdiction, it may also be adopted in Polish law, another continental legal system.


4. Judgments of the Supreme Court, September 18, 2014, III PK 136/13, OSNP 2016, no. 2, item 17; March 17, 2015, I PK 179/14, OSNP 2016, no. 11, item 140; Court of Appeal, February 7, 2007, I ACa 1033/06.
The objective of the current paper is thus to discuss the notion of veil piercing liability in selected countries in order to analyze the existing legal solutions. This will allow for assessment of the effects of adopting particular legal solutions and the advantages, as well as difficulties that selected jurisdictions face when tackling the difficult issue of veil-piercing liability.

In broad terms, the essence of separating the two entities is that members are not liable for the debts of their companies, and companies cannot be held liable for the debts of their members. A company’s assets are to satisfy the claims of its creditors, who may not seek redress from the company’s members, regardless of the impact they may have on the company’s operation.

However, the aforementioned consequence of the principle of mutual autonomy of companies and their members is in sharp contrast with commercial reality, in which corporate groups operate as a single economic entity, regardless of the existence of parent and daughter companies. In market transactions, a subsidiary often becomes a tool in the hands of its controlling partner—the parent company—acting in commercial reality on its own behalf but in the economic interest of the parent enterprise or the entire corporate group. The consequence of such acts is the emergence of the subsidiary’s liability to third parties when harm is caused to them. In such situations—as it is claimed—the application of the principle of corporate separateness gives rise to an unjustified privilege to the benefit of the parent company—the member of the subsidiary—while placing those who contract with the subsidiary in a risky position. Incidents of a parent company’s control over a subsidiary company that lead to harm being caused to the subsidiary and its creditors are not uncommon. Typically, this results from managerial and/or financial restrictions imposed by the parent company which, in a worst-case scenario, can bring the subsidiary to a position where it can no

6. Frąckowiak, supra note 2.
7. A. Szumański, Spór wokół roli interesu grupy spółek i jego relacji w szczególności do interesu własnego spółki uczestniczącej w grupie, PRZEGŁAD PRAWA HANDLOWEGO 9 (2010).
longer satisfy its debts. This raises the following question: when this occurs, why not shifting the liability of the subsidiary to the parent company? It should be liable for the damage sustained by the subsidiary or directly liable towards parties injured by the acts of the subsidiary for which the parent company was ultimately responsible.

Many legal systems are making such a move, primarily in the jurisprudence of their courts, by mitigating the separateness principle with various legal constructions referred to, in most general terms, as “piercing (lifting) the corporate veil,” “disregarding (avoiding) corporate identity,” “intrusion beyond the barrier” (Durchgriff) or “de facto management” (gestion de fait).

The theory of separateness of companies from their members is recognized in German legislation. § 13(2) of the Limited Liability Companies Act (GmbHG) introduces the principle of corporate separateness, which means that members are not liable for the company’s debts (Trennungsprinzip). As in the Polish legal system, corporations are independent entities and constitute legal subjects separate from their members. The separateness of a company from its members is the case not only in corporate relationships but also in non-corporate relationships, in which members act with the company as equal parties to civil law relationships, entering into contracts with the company.

In the face of incompatibility of the corporate separateness theory with the economic reality in which commercial companies operate, German, Austrian and Swiss legal systems permit its mitigation by adopting the theory of veil-piercing liability (Durchgriffshaftung) and, in consequence, exclusion of the principle of members’ limited responsibility for the company’s liabilities. Although in German doctrine there is no independent and homogenous legal construction of veil-piercing liability, such liability must be identified with the liability of a member of a company under specific legal

9. A. Szumański, Regulacja prawną holdingu w polskim i europejskim prawie spółek (zagadnienia pojęciowe), 8 PRZEGŁAD PRAWA HANDLOWEGO (1996).
10. Gesetz betreffend die Gesellschaften mit beschränkter Haftung, April 20, 1892 (BGB1. I S. 2586).
provisions or in a situation of a member’s accession to debt. The purpose of the liability is to set aside or mitigate the principle of separateness. Italian law also provides for restrictions on the principle of legal separateness by affording legal protection to parties contracting with subsidiary companies. Finally, veil-piercing liability is also associated with the English concept of piercing (lifting) the corporate veil, drawn from the terminology adopted in American law.

In contrast, Polish legislation does not envisage any construction allowing to limit or mitigate the principle of corporate separateness. Despite the heterogeneity of the concept and vague boundaries of piercing liability, there have been many attempts to define the notion in Polish academic literature. Certain authors indicate that it is an exception to the principle under which company members incur no personal liability for the company’s debts, implying “either suppression of the separation principle or, possibly, only of the limited liability principle.” Other scholars define it as avoidance or mitigation of the legal separateness of corporations, leading to an attribution of certain legal norms, contractual provisions or liability to another entity, or more broadly, as a legal instrument intended to afford protection to the company’s creditors or creditors of a subsidiary. This protection may serve as a basis to disregard the legal personality of a given company, to avoid the separateness of several companies with capital connections and treat them as a single economic entity, or even to question specific transactions or contracts concluded between a member and the company. It is also indicated in the literature that the theory involves the direct accountability of

15. T. TARGOSZ, NADUŻYCIE OSOBOWOŚCI PRAWNEJ 138 (Kraków Zakamycze 2004).
members for the company’s debts by avoiding two principles: legal separateness of a company from its members and liability of members for the company’s debts.\textsuperscript{18}

II. PRINCIPLE OF LEGAL CORPORATE SEPARATENESS

Under the Polish legal system, both partnerships and companies are characterized by legal separateness from their members. Partnerships were given legal subjectivity by the legislator, which means the capacity to be a subject of rights and obligations and, consequently, the capacity to incur such rights and obligations (Art. 8 of the Code of Commercial Partnerships and Companies (CCPC)). In the same way, beside natural and legal persons, the legislator introduced a third category of subjects,\textsuperscript{19} the so-called imperfect legal persons, statutory subjects or non-personal subjects.\textsuperscript{20} As a result, partnerships have no legal personality as such and enjoy legal subjectivity only insofar as legal provisions afford them legal capacity. Thus, affording legal personality to partnerships implies their organizational and legal separation from the members who formed them.\textsuperscript{21}

As opposed to partnerships, companies were afforded legal personality, which means that they obtained the most extensive attributes of personality.\textsuperscript{22} A company acts through its governing bodies, its members are not liable for its debts (subject to Art. 13 § 2 CCPC), and benefits transferred from the company’s assets to its members require a legal basis in the form of a statutory provision or company action. In addition, there exists a special corporate relationship between the company and its members.\textsuperscript{23}


\textsuperscript{19} See W.J. Katner, Podwójna czy potrójna podmiotowość w prawie cywilnym?, in Rozprawy Prawnicze. Księga Pamiątkowa Profesora Maksymiliana Pazdan 1031 (Kraków Zakamycze 2005).


\textsuperscript{21} See IV CK 13/03 Supreme Court, July 8, 2003, Legalis no. 61171.

\textsuperscript{22} Opalski, supra note 16, at 10.

\textsuperscript{23} Id.
Corporate separateness (*Trennungsprinzip*) performs an important function in the German legal system. The legal personality of joint-stock companies stems from the provision of the first sentence of § 1(1) AktG, and in the case of limited liability companies, it is defined in the provision of § 13(1) GmbHG, under which a company so incorporated independently exercises its own rights and obligations. This refers both to corporate and non-corporate relationships, in which members act with the company as equal contracting parties. The legal personality granted, also means that the claims of creditors can only satisfied from the company’s assets.

As in German law, Austrian legislation grants legal personality to limited liability companies and joint-stock companies which, in turn, allows to adopt the legal principle of separateness of a company from its members (§ 61(2) öGmbHG in the case of limited liability companies and § 8 öAktG in that of joint-stock companies). In the United States and in the Italian Republic, the attribution of legal personality to companies gave rise to development of the concept of veil-piercing liability.

In Poland, under the principle of non-liability of members for their company’s debts (Art. 151 § 4 CCPC and Art. 301 § 5 CCPC), which accompanies the principle of corporate separateness, companies are independently liable for their own debts, and their creditors may not seek satisfaction from the personal assets of their

26. See LUTTER & HOMMELHOFF, supra note 11 at 142.
27. The German legislator excluded the possibility to assert claims for a company’s debts directly against its shareholders (§ 13(2) GmbHG), which also refers to stockholders of joint stock companies (sentence 2 of § 1(1) AktG).
28. § 61(1) öGmbHG.
29. § 1 öAktG.
33. See also P. Moskała, *Konstrukcja odpowiedzialności cywilnoprawnej we włoskim prawie grup spółek*, in 1 STUDIA PRAWA PRYWATNEGO 32 (2016).
Authors are divided as to whether the exclusion of personal liability of company members for its debts constitutes a characteristic of corporations or whether it is a natural consequence of such entities being vested with legal personality. The majority view is that the first opinion should prevail, i.e. that it represents a corporate characteristic.

The principle of legal separateness seems a natural solution that best suits the interests of companies. By contrast, in German law, the general rule is that corporate members incur personal and unlimited liability, and its mitigation or exclusion constitutes an exception to that rule. As a result, only the combination of the principle of separateness and the liability incurred by members of a company permits the conclusion that in civil law the general rule is personal liability of members, or their solidary liability, even though such persons are not parties to legal relationships.

The assumption of full separation between the actions and assets of a company and its members serves as basis for the legislative regimes in Swiss law (Trennung zwischen dem Rechtsträger und seine Mitgliedern), American law and Italian law.

The arguments for excluding corporate members from liability include: encouraging initiative, promoting creativity and achieving greater objectivity in decision making processes; all attributes that lead to optimizing an undertaking’s economic growth. Conversely, not just the economic growth but also the efficiency of an undertaking can suffer when the actions and decisions of members

34. See VI ACa 1561/14, Legalis No. 1392962, Court of Appeal of Warsaw, October 23, 2015; I ACa 854/14, Court of Appeal of Białystok, March 5, 2015; V CK 411/02, Supreme Court, October 23, 2003, MONITOR PRAWNICZY no. 9, 2004, at 417.
39. FLETCHER, supra note 32, at 334.
40. See also Moskała supra note 33, at 32.
41. Raiser, supra note 37, at 649.
are influenced solely by the potential risk to their personal assets should the business fail.\textsuperscript{42} Notwithstanding, it has to be acknowledged that corporate separateness effectively shifts the liability and risk of a company’s insolvency to its creditors.

However, the concept of veil-piercing liability must not be regarded as depriving members of a company of the privilege of exclusion of their liability or even as a rule. Such liability is just one of the aspects involved in the subject of “piercing.”

III. VEIL-PIERCING LIABILITY

A. Characteristics of Veil-Piercing Liability

1. Germany

In German law, the term “veil-piercing liability” has no legal definition. Sharing the opinion expressed in legal doctrine, the concept may refer to situations in which members incur personal, unlimited, solidary liability for the company’s debts towards its creditors.\textsuperscript{43} Following the broadest of the definitions proposed in the literature, it should be indicated that, in such situations, the liability regime under § 13(2) GmbHG is stricken out, resulting in the external liability of members towards the company’s creditors or materialization of the obligation to reimburse to the company, as a part of the internal relationship, all losses suffered by the latter. The point is to afford to the company’s creditors a possibility of indirect satisfaction of their claims.\textsuperscript{44} The cited definition is valuable inasmuch as it accounts for both external and internal liability of company members. However, its drawbacks also need to be recognized. It does not account for the legal nature of veil-piercing liability and

\textsuperscript{42} TARGOSZ, supra note 15, at 72 et seq., M. WIÓREK, OCHRONA WIERZYCELI SPÓŁKI Z O.O. POPRZECZ OSOBISTĄ ODPOWIEDZIALNOŚĆ JEJ WSPÓLNIKÓW. KONCEPCJA ODPOWIEDZIALNOŚCI PRZEBIJAJĄCEJ I NADUŻYCIA FORMY PRAWNEJ SPÓŁKI W PRAWIE POLSKIM I NIEMIECKIM 272 (Wrocław 2016).

\textsuperscript{43} See K. HEIDER, MÜNCHENER KOMMENTAR ZUM AKTIENGESETZ: AKTG, commentary to § 1 AktG, nb. 63 (M. Habersack & W. Goette eds., C.H. Beck 2015).

does not specify the legal basis for the company’s claims against its members. Finally, it does not take into consideration other situations that might arise.

In German law, veil-piercing liability does not cover situations in which members are liable towards the company’s creditors for delicts of their own making or when the source of their obligations were legal acts in which they pledged to assume liability for the company’s debts (unechte Durchgriffshaftung). At the same time, German authors assume the existence of so-called reverse veil-piercing liability (Umgekehrter Haftungsdurchgriff), which excludes the possibility of personal creditors of a company’s members to be satisfied from the company’s assets.45

In seeking to provide a wider characterization of veil piercing, it needs to be understood that in German doctrine there is no independent legal construction of veil-piercing liability. Due to the various ways in which it is possible to impose liability on company members for the company’s debt, systematization and comparison was set forth to address the multitude of situations presented.

In German academic literature, one can distinguish between liability piercing (namely, Durchgriffshaftung, Haftungsdurchgriff) and attributive piercing (Zurechnungsdurchgriff). The latter consists in the application and interpretation of legal provisions or contractual clauses so that, by disregarding the separateness of entities, the consequences of certain events are attributed to a specific entity.46 Attribution may proceed in two directions, meaning attribution of the company’s actions to a member and the other way round. Along these lines, authors distinguish various types of “piercing,” namely the type where the member is charged, the other type with the company being charged and two other types: to the benefit of the member or to the benefit of the company.47

Shortcomings of the proposed definition have been identified in the literature on the subject. Authors distinguish between proper (echte Durchgriffslehren) and improper veil-piercing liability. The first of the two relates to the principle of separateness and gives rise to the external liability of members of a limited liability company

45. HEIDER, supra note 43 at commentary to § 1 AktG, no. 63.
46. TARGOZ, supra note 15, at 138.
for the company’s debts, which is effective directly to the company’s creditors and based on company law. In the same way, such theories question the legal independence of companies, and their attribution with the feature of legal personality. It is assumed that such liability is legitimate only in situations involving violation of obligations which are intended to afford protection both to the company or its members and to the company’s creditors. Among theories of proper piercing liabilities, one should point to the subjective (subjektive Mißbrauchslehre) and objective theory of abuse, as well as the institutional theory and theory of the norm’s purpose (classical norm’s purpose theory).

On the other hand, improper veil-piercing liability (improper piercing of liability, unechter Haftungsdurchgriff) is the case when the liability of members of a limited liability company towards its creditors, is based on the general regime of liability envisaged in civil law, thus outside company law, and principally moulded as external liability. Other authors indicate that improper veil-piercing liability also covers situations of internal liability towards the company and those in which member liability is grounded in company law.

In German literature, veil-piercing liability is substantiated by the following theories: abuse theory (Mißbrauchslehren), institutional theories (institutionelle Lehren) and norm application theories (Normanwendungslehren).

According to the abuse theory, veil-piercing liability may apply in situations of abuse of the corporate form (subjective theory). This concept is based on the assumption that the exploitation of corporate separateness by a member in any way that is contrary to its purpose and use, may result in such member being held liable for the company’s debts, regardless of whether or not he acted with intent to injure creditors or circumvent the law. Since proponents of

48. Raiser, supra note 44 at § 13, no. 54.
49. Id.
50. Id., § 13, no. 90.
52. SCHMIDT, supra note 47, at 221.
53. TARGOSZ, supra note 15, at 122.
this concept invoke the construction and function of a company as a corporation, an independent legal subject, objective abuse of the corporate form is also referred to as the “institutional theory.”

On the other hand, the alternative concept focuses on the purpose and role of provisions which, by restricting a member’s liability for company debts, affords that member a liability privilege (Haftungsprivileg). The analysis of purpose of such norm, considering the circumstances of a specific matter, allows establishing if the given norm is applicable or if it should be disregarded. This theory had an important influence on the shape of the contemporary so-called teleological reduction of legal provisions setting out limited liability of the members for their company’s debts. This notion is based on the presumption that the limitation of members’ liability is not a characteristic of a corporate body but rather a consequence of a legislative choice. Therefore, only fulfillment of the appropriate preconditions and minimum conditions allows for the exclusion of members’ liability for the company’s debts and, where such conditions are not complied with, a member will incur personal and unlimited liability.

The criterion for another division of the piercing theory is either reference to the principle of corporate separateness or development of veil-piercing liability in isolation from that principle. Theories invoking the principle of separateness render veil-piercing liability as opposing that principle and put emphasis on independence and separateness of members and their assets from the company. From this point of view, theories involving the principle of separateness include both abuse theories and institutional theories.


55. See also T. Fock, commentary to § 1 AktG, in AKTIENGESETZ no. 45 (G. Spindler & E. Stilz eds., Munich 2015).


57. WIOREK, supra note 42, at 112.

58. Bitter, supra note 51 at § 13, no. 117.
2. Switzerland and Austria

In the Swiss and Austrian legal systems, the concept of veil-piercing liability has not been so amply and comprehensively developed as in German law. Swiss legislation considers that the corporate form may be abused by members of legal persons, and therefore provides legal solutions offering more protection to creditors.\(^{59}\)

Austrian law provides mechanisms protecting the assets of a company’s creditors against disloyal behaviour of its members.\(^{60}\) However, in fear of insufficient creditor protection, jurisprudence allows, in exceptional cases, to derogate from the principle of separateness.\(^{61}\) Because of the judiciary’s significant role in the development of the concept of veil-piercing liability, such jurisprudence lacks homogeneity and covers not only members’ liability for the company’s debts but also their delictual liability for acts that harm its creditors.\(^{62}\)

In a 1983 decision, the Austrian Supreme Court held that the concept of veil-piercing liability may not be compatible with the Austrian legal system.\(^{63}\) At a later time, the concept was admitted although its practical application remained insignificant.\(^{64}\) In 1986, the Austrian Supreme Court defined the scope of liability regarding a member managing the company’s operations vis-à-vis the company’s creditors. This decision was delivered in a case where the controlling member, a bank, exerted considerable influence on matters handled by a daughter company. The daughter company, with its managers acting under the member’s instructions and guidelines, subsequently became insolvent and filed for bankruptcy. The Supreme Court, when examining claims submitted by the creditors of the bankrupt company against the controlling member, held that due to the influence of the member on the controlled entity, the shareholder had a special duty of care in the exercise of its corporate

\(^{59}\) Binder, Geiser & Roberto, supra note 38 at 15.

\(^{60}\) F. WUNSCHER, DIE DURCHGRIFFSHAFTUNG WEGEN SPHÄRENVERMISCHUNG IM DEUTSCHEN UND ÖSTERREICHISCHEN GMBH-RECHT 4 (U. Graz 2014).


\(^{62}\) OGH April 12, 2001, 8 ObA 98/00 w, SZ 74/65.

\(^{63}\) OGH June 16, 1983, supra note 61.

rights and exertion of influence on the management of the controlled company. In consequence and without any direct reference to veil-piercing liability, it was concluded that the member of the bankrupt company was liable for negligently driving the company towards insolvency as per § 159 öStGB. In the cited ruling, the risk relating to participation in the company was found to exceed the value of capital invested by the member, which accounts for and points to the ruling’s affinity with veil-piercing liability theory.

In this regard, Austrian law shows many similarities with German legislation. Just as the German legal system, it permits the use of the interpretation method of legal norms and contractual provisions which recognizes that they relate not only to a member but also to the company (piercing by attribution, Zurechnungsdurchgriff). The jurisprudence of the Austrian Supreme Court offers many examples for relativization of the legal separateness of the company and its members through piercing by attribution, including consideration of the member’s state of awareness while evaluating if the company acted in good faith or charging the company with the consequences of breach of a contractual prohibition of competition (namely, vertragliches Wettbewerbsverbot) binding on the member controlling the company. Moreover, the corporate separateness of an entity from its members may be avoided by way of mutual attribution of their features. As a result, an error as to the characteristics of a company’s controlling member may serve as a basis for the avoidance of consequences of a legal agreement with the company. Finally, as in the German legal system, the construction of piercing by attribution works in both directions as, on the one hand, it allows to burden the company with circumstances relating to a member and, on the other to shift to members some liability that would otherwise be on the company.

3. United States


66. OGH April 12, 2001, supra note 65. See also P. Mazur, Odpowiedzialność przebijająca w prawie niemieckim, austriackim i szwajcarskim, IWS 49 (2017).
Under American law, the mechanism of veil-piercing liability is intended to prevent crime and promote equity in some specific factual situations. However, though there is a multitude of cases, state and federal courts have not yet developed a uniform understanding and a consistent case law on veil-piercing liability.

In American law, the concept applies to both tort and contract liability claims. However, a mere breach of contractual provisions is insufficient to establish a basis for the application of veil-piercing liability mechanisms.

Despite the absence of a uniform definition of veil-piercing liability in American law, the judiciary has developed many theories substantiating the concept under which, in certain circumstances, members are liable towards their company’s creditors and, consequently, may be held accountable against such creditors for the company’s debts. Among the classical theories of veil-piercing liability, one can distinguish the doctrine of instrumental treatment of a company (instrumentality doctrine), the alter ego doctrine and the identity doctrine.

In academic literature and judicial practice, the most widespread theory allowing bypassing the corporate identity of a company is the instrumentality doctrine, admissible in situations where a company is a mere instrument in the hands of another entity. Once approved by the courts in the State of New York, this doctrine became widely used. The theory assumes the existence of three factors: entity exercising such control over a subsidiary that the subsidiary becomes a tool in the hands of the controlling entity (mere instrumentality); cases of fraud, injustice, unlawful behaviour or any other act

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prohibited by law; and a causal link between the act and the resulting damage.\textsuperscript{72}

The *alter ego* doctrine applies in situations where the convergence of interests between a member and the company is such that the latter may be considered an “alter ego” of the member. On analysis, one cannot help but agree with the opinion that instrumentality doctrine and *alter ego* doctrine amount to one and the same thing.\textsuperscript{73} Nevertheless, contrary views can also be found.\textsuperscript{74}

Among the theories of veil-piercing liability, one should also mention single factor theories (single factor piercing). This includes the use of sham or shell corporations, use of the corporate form for fraudulent, unjust or unlawful purposes, situations involving matters regulated by federal law and the practice of presenting a group of companies as a single business enterprise. These are referred to as equitable theories because American courts apply them when the collected evidence allows proving one of the factors indicated in the classical compensatory liability theories. However, the case must involve a gross violation of the corporate form.\textsuperscript{75}

These solutions differ from the regime of veil-piercing liability as introduced in Italian law. The Italian Republic is a country where, since 2004, legal provisions expressly set out the liability of a controlling company in relation to the creditors of its subsidiaries.\textsuperscript{76}

4. Italy

Under the Italian legislative framework, companies or entities which, in the course of management and coordination of other companies, act in their own interest or in the interest of a third party, in violation of the principles of sound corporate management and business operations in relation to the companies subject to management and coordination, incur direct liability to the members of such companies for damage arising from the lowering of the company’s

\textsuperscript{72}  P.I. Blumberg, K. A. Strasser, N.L. Georgakopoulos & E.J. Gouvin, Blumberg on Corporate Groups 11-3—11-4 (Wolters Kluwer, Supplement 2014-1).

\textsuperscript{73}  Id., 11-01 to 11-04.


\textsuperscript{75}  See also Zmysłowska, supra note 14 at 23 et seq.

profitability and the value of shares or stocks held by such members, and for the damage caused to creditors by compromising the company’s assets. However, liability does not arise when there is no actual damage in light of the totality of consequences of the management and coordination exercised, or when actual damage has been redressed by subsequent actions undertaken as a part of the management or coordination exercise. Other persons incurring solidary liability alongside those previously identified, are the person or persons who participated in the commission of a harmful act and, within the limits of the benefits obtained, the person or persons who knowingly reaped benefits from such act. Finally, members and creditors of the coordinated company may sue the managing and coordinating company or entity only as far as they have not been satisfied by the company under the management and coordination exercise. This legislative reform was to be based on two basic presumptions, namely: transparency of relationships within a group (trasparenza) and equilibrium of interests of the entities affected by the existence of a corporate group (contemperamento degli interessi coinvolti). However, it must be remembered that, since the beginning of the 1990s, the courts have not handled the problems of veil-piercing liability in Italian law.

5. Poland

In Polish doctrine, no uniform definition of veil-piercing liability has been developed. Moreover, Polish law, in light of the mandatory nature of Art. 151 § 4 CCPC and Art. 301 § 5 CCPC, does not offer an instrument of any description that would allow to exclude corporate separateness. In addition, no comprehensive regime has been introduced that, following along the lines of the German model, would govern the rights of corporate groups and provide a basis for expanding the liability of a controlling entity. Provisions

77. See Moskala, supra note 33, at 32.
78. See for more details V. Cariello, The ‘Compensation’ of Damages with Advantages Deriving from Management and Coordination Activity (Direzione e Coordinamento) of the Parent Company (Article 2497, paragraph 1, Italian Civil Code) – Italian Supreme Court 24 August 2004, no. 16707, 3 EUROPEAN COMPANY AND FINANCIAL LAW REVIEW 330 (2006).
79. See TARGOSZ, supra note 15 at 138; Wiórek, supra note 18 at 237.
of the Code of Commercial Partnerships and Companies merely contain rules defining the concepts of a controlling and subsidiary company, imposing disclosure obligations on companies in relation to the control relationship, and a number of provisions expanding the legal regime governing a given parent company to its subsidiaries. Nevertheless, in the conditions of everyday Polish market practice, there are attempts to formulate claims based on the doctrine of veil-piercing liability.

B. The Scope of Veil-Piercing Liability

To continue with the topic of the nature of veil-piercing liability, it must be reminded that one of the traditionally important roles in the structure of a limited liability company and joint-stock company is the part played by their nominal capital. Both in Polish law and legislations of other EU Member States, it is a foundation for the operation of corporations. Under the current legislative framework, the construction of nominal capital requirements may be characterized as being both dysfunctional and inadequate regarding the protection of creditors’ interests.

In response to the shortcomings of nominal capital, there are voices in Polish literature that propose legislative reform or, more radically, the abandonment of nominal capital and its replacement by an alternative system based on a so-called solvency test. In the German legal system, it was judicial practice that played an important role in the correction and supplementation of the construction of nominal capital, and existing jurisprudence was then taken into consideration by the legislator. The amendments introduced, which were a compromise, streamlined the operation of German


81. See also K. Oplustil & P. Wiórek, Aktualne tendencje w europejskim prawie spółek – orzecznictwo ETS i planowane działania prawodawcze, 5 PPH 4 (2004).

82. See also BGH “November”-Urteil BGH November 24, 2003, I ZR 171/01, BGHZ 157, 72-79; T. Drygala, M. Staake & P. Szalai, KAPITALGESELLSCHAFTSRECHT. MIT GRUNDZUGEN DES KONZERN- UND UMWANDLUNGSRECHTS 114 (Springer 2012).
limited liability companies and made them an attractive platform for conducting business activity.

However, criticism of the protective function of nominal capital questions its tenet and justifies the pursuit of alternative protection of creditors.\(^{83}\) Still, regardless of the drawbacks of the discussed construction, there are many situations in the laws of European countries where the provisions implementing the guarantee function of nominal capital do not apply.

Among such situations, one can mention the existence of undercapitalized companies,\(^{84}\) which lack the means to participate in business transactions, engage in the due management of funds or the preparation of long-term financial plans considering their business profile. Undercapitalization may be primary or subsequent, depending on whether from the outset the company had not been equipped with a capital base sufficient to meet the scope of its operation, or if the capital was subject to certain reduction in the course of the company’s business. Undercapitalization may also be divided into nominal (nominelle Unterkapitalisierung)\(^{85}\) and substantive (materielle Unterkapitalisierung).\(^{86}\) That said, in the case of undercapitalization, the legitimacy of asserting claims directly against members, although commonly supported in the doctrine, has not been accepted by German courts.\(^{87}\)

Another problem is to determine which of the assets are the property of a company and which are the property of a member; a dilemma posing a threat to the principle of separateness. A peculiar “confusion” of patrimonies arises when a member of a limited liability company conducts matters of the company as his own business, treating the company’s assets as part of his own patrimony, or keeps accounts in a non-transparent or unreliable manner.\(^{88}\)

\(^{83}\) Act of July 13, 2006 on the protection of employee claims in case of employer’s insolvency (Dz.U. 2006 no. 158 poz. 1121).

\(^{84}\) See also Opalski, supra note 16, at 17-18.

\(^{85}\) T. Eckhold, Materielle Unterkapitalisierung. Zur Gesellschafterverantwortlichkeit in der Gesellschaft mit beschränkter Haftung 8 (Heymanns 2002); Wiórek, supra note 42, at 53-54.

\(^{86}\) Id. at 9; Wiórek, supra note 42, at 54.

\(^{87}\) BGH April 28, 2008, II ZR 264/06, NJW 2008, 2437.

\(^{88}\) K. Wappler, Die Haftung von Gesellschaftern einer GmbH auf Grund von Einflussnahmen auf die Leitung der Gesellschaft. Vom qualifiziert faktischen Konzern über Durchgriffshaftung wegen
Undoubtedly, such behaviour may harm the creditors’ interests and this is why, both in doctrine and in jurisprudence, it creates an indisputable situation that renders the application of veil-piercing liability admissible. On such occasions, the legal basis is § 128 HGB. A similar situation is the failure to scrupulously maintain the company’s documentation, which repeatedly precludes identification and elimination of the negative influence exerted by a member regarding the financial situation and operations of a limited liability company. On the other hand, a company’s failure to keep proper accounts departs from the principle of nominal capital protection (§ 30 GmbHG).

The need to separate the patrimonies belonging to the company and to its members is accentuated in the judicial practice of the Federal Court of Justice. For example, in its judgement of November 12, 1984, it was held that clear and substantiated separation of the company’s assets from the assets of its stockholders, in accounting entries and financial documents, is one of the necessary conditions for affording company members the privilege of limiting their liability for the company’s debts. Similar conclusions can be reached upon analysis of the decision of the Federal Court of Justice of October 14, 2005, which allowed the concept of veil-piercing liability to be applied because the relevant company kept non-transparent accounts, thus precluding the review of compliance with the provisions on nominal capital. Actual coverage of the nominal capital was found necessary for the limitation of liability of the company’s members. At the same time, the Federal Court of Justice concluded that the liability of members is a derivative of their behaviour (Verhaltenshaftung) and not a consequence of a specific state of affairs (Zustandshaftung).

Among other situations posing a threat to a company’s creditors, one can point to the loss of financial liquidity, the deprivation of assets necessary to conduct business activity, the transfer of assets

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89. Id. at 276.
90. The Federal Court of Justice also emphasized that the provisions on the maintenance of capital, intended to protect the interests of corporate creditors, are based on a clear distinction between the company’s assets and personal assets of company members. See BGH November 12, 1984, II ZR 250/83, NJW 1985, 740.
91. BGH October 14, 2005, II ZR 178/03, NJW 2006, 1344.
contrary to trading principles, situations related to securing the members’ interests (their receivables) and engaging in high-risk transactions.

Another problem that recently aroused much controversy in the judicial practice of the Federal Court of Justice, was liability for the members’ actions leading to termination of the company (Existenzvernichtung). Such possibility was admitted for the first time in a judgement of 2001. However, this line of jurisprudence was abandoned by the Federal Court of Justice six years later. The relevant ruling excluded the possibility of veil-piercing liability where a member undertook actions that could lead to termination of a corporation. Indeed, the Court pointed to the possibility, open for the company and its creditors, to file claims in damages against the members who took such actions based on delictual or tort liability (§ 826 BGB).

The Austrian Supreme Court, in a judgement of 2004, making reference to German doctrine, ruled that it was generally possible to hold members liable for the company’s debts by means of teleological reduction of the provisions granting members the privilege of limited liability (§ 61(2) öGmbHG and § 48 öAktG). The Court found that the doctrine of veil-piercing liability may be applied in four situations. First, excluding the limitation of a member’s liability for the company’s debts would be possible if the company is an alter ego of the member. This is the case when the member exercises de facto management of the company’s operations, acting as a member of the management board. Second, as in the German legal system, imposition on a member of liability for the company’s debts was admitted in case of confusion of the patrimonies of the company and its members (Sphärenvermischung). Third, the corporate veil could be pierced in case of an abuse, on the part of a member, of the corporate form (missbrauch der Organisationsfreiheit). Fourth and finally, it was considered admissible to charge members with veil-

95. OGH April 29, 2004, 6 Ob 313/03 B, GeS 2005/1.
piercing liability for the company’s debts in case of substantive undercapitalization of the company (materielle Unterkapitalisierung).

The Italian legislator recognized the need for a special protection to be afforded to creditors of subsidiary companies participating in holding structures. However, this did not lead to the enactment of norms introducing direct personal liability of the controlling company for debts of its subsidiaries, which would be an exception to the principle of a member’s non-liability for corporate debts.

In Italian law, the burden of proof is with minority stockholders and creditors of the company, who should demonstrate that (1) a specific act of management violated the terms of proper management; (2) the controlling entity acted in its own interest or in the economic interest of third parties; (3) the company’s income or the value of its shares have decreased and, that as a consequence of the actions undertaken, damage was caused to their assets. The solutions introduced in Italian holding law are to protect the interests of creditors of subsidiary companies by affording them a claim against the controlling company for the recovery of damages. A circumstance found to justify the liability of the controlling entity towards creditors of subsidiary companies was the management of the subsidiary and coordination of the subsidiary’s activities by the controlling company. It follows that the limitation of autonomy of a subsidiary company by the controlling company should give rise to special liability of the controlling entity which makes decisions and gives instructions relating to the daughter company. However, such a solution also protects the position of the parent company, as its liability may only materialize when some specific conditions are met. Nonetheless, because of the mechanisms enabling the controlling company to be discharged of liability to the creditors of subsidiary companies, coupled with the lack of means to relax the burden


97. Art. 2359 (2) Italian Civ. Code; Pyzio, supra note 96 at s. 23-24.

of proof creditors are required to provide, this solution is understandably subject to criticism in Italian literature.⁹⁹

IV. CRITICISM OF THE CONCEPT OF VEIL-PIERCING LIABILITY

Although the literature reveals shortcomings in the protection of creditors due to the existence of gaps in legislative protection, voices can be heard questioning judicial developments trying to fill those gaps. Certain authors deploy methodological¹⁰⁰ or constitutional¹⁰¹ arguments. Others criticize the doctrine of veil-piercing liability on a dogmatic level, with two lines of arguments: first, a general dogmatic criticism that does not refer to the methodological legitimacy and the need for developing the piercing concept, and second, a general dogmatic criticism recognizing the need for judicial law-making albeit to the exclusion of veil-piercing liability.

As far as the methodological criticism of veil-piercing liability is concerned, its precursor was U. Ehricke.¹⁰² The author points to the chaos and uncertainty caused by the veil-piercing liability theory. Moving beyond dogmatic and factual levels, he shifted the discourse to the most important level, that of methodology.

First, one wonders whether, from a methodological perspective, the piercing concept is necessary. Second, upon determination of the methodological admissibility of legal veil-piercing liability, one may search to justify the obligation of company members to incur liability for their company’s debts. On the dogmatic level, one may consider a limitation to the exclusion of member liability for the company’s debts in case of malpractice and abuse of the corporate construction and the need to expand liability for the company’s debts to its members. Lastly, on the level of facts, one should consider specific situations which substantiate the use of the piercing construction.¹⁰³

⁹⁹. Truffi & Straneo, supra note 96 at s. 1; Daccò & Tatozzi, supra note 98 at s.3099; G. Alessi, supra note 98 at s. 392.
¹⁰³. Ehricke, supra note 100, at 262.
Other authors criticize the concept of veil-piercing liability from the methodological and constitutional perspective. W. Nassall, when criticizing a decision of the Federal Court of Justice, concluded that the Court supplemented, in an unjustified manner, the provision excluding liability of company members for their company’s debts.\footnote{Nassall, supra note 100, at 970.} In the opinion of the Court, this rule will not apply if members deprive the company of its assets or consent to an intervention or if the damage so inflicted to the company may not be entirely remedied or if the company, as a result of an intervention, has lost its capacity to pay debts. In Nassall’s opinion, in such situations, there is no need nor ground for any judicial development of the law. Indeed, such legal developments do require careful and constitutional justification and can only take place when overall, the law appears to be incomplete as initially planned or subsequently amended.\footnote{Id. at 971.} There are no sufficient arguments to conclude that there is a legislative gap to be filled since the system of nominal capital was intended to, and to some extent does, afford sufficient protection to creditors.

To go further, veil-piercing liability places emphasis on insolvency law rather than company law because it refers to the loss by a company of its capacity to pay debts. If so, the remedies should be sought in the provisions of insolvency law. The protective mechanism in insolvency law is composed of two basic elements: liquidation and restructuring. The first obligates managers to file for bankruptcy within a specific deadline calculated from the date of emergence of the grounds for bankruptcy, i.e. insolvency or indebtedness. On the other hand, the restructuring aspect relates to the possibility of contesting the acts of the insolvent debtor and the managers’ obligation to return any payments from the company’s assets, which were made after the emergence of grounds for bankruptcy.

Further, criticism of the piercing concept on the dogmatic level is voiced by J. Wilhelm, who questions the grounds for distinguishing proper and improper theories of veil-piercing liability.\footnote{J. Wilhelm, Rechtsform und Haftung bei der juristischen Person 310-314 (Heymann 1981).} The author claims that veil-piercing liability has no precise boundaries or grounds backing up its support by judicial opinions. At the same
time, he recognized the risk of legally ungrounded and equitable resolutions being assigned the force of a legal principle based on completely arbitrary argumentation. Theories of abuse, institutional theories and theories involving a norm’s purpose, refer to objective criteria whose ascertainment is problematic even for proponents of such theories. In addition, conceptions of a norm’s purpose reach beyond the application of existing rules and move on to the level of legal policy or de lege ferenda comments. In Wilhelm’s opinion, those conceptions may indicate that the remedies intended to protect creditors are insufficient, however, they allow for actions that are not supported by legislative provisions.107

Others, recognizing the shortcomings of nominal capital, signal the need for judicial development of law by creating concepts other than veil-piercing liability, which could enhance the scope and effectiveness of creditor protection. One such possibility is to associate company members’ liability with the principle of dispositional freedom of such members and its boundaries. This is the case since the provisions on contributing and maintaining nominal capital specify situations in which members of a limited liability company are liable to the company. In particular, they incur compensatory liability for overstatement of the value of non-monetary contributions (§ 9 GmbHG, c.f. Art. 175 CCPC) and in the case of receipt of payments constituting the return of the entirety or part of their contribution, or payments from the company’s assets needed to fully cover the nominal capital (§ 30 et seq GmbHG, c.f. Art. 198 in conjunction with Art. 189 CCPC). As a consequence, provisions specifying the scope of members’ leeway in the management of the company and disposal of the company’s assets set the boundaries of their accountability for internal influence on the company (gesellschaftsinterne Einflussnahme der Gesellschafter). As long as company members do not overstep their discretion, they are not liable to the company.

107. **Id.** at 314.
The problems with seeking the liability of company members using the concept of veil-piercing liability—considering the solutions developed in several legal systems—should be assessed as heterogeneous and multithreaded. Even in German or American doctrine, even where the theories justifying such a liability have been extensively discussed and developed, there is no uniform and consistent concept of veil-piercing liability, both on the theoretical and methodological level.

On the other hand, the principle of corporate separateness, which has such rigid foundations from the axiological and normative perspective, may be limited to achieve greater creditor protection.

Nevertheless, the undertaken analyses allow the establishment of preconditions justifying the use of the discussed concept and the depiction of the basic theories that substantiate veil-piercing liability. These include the objective abuse theory (theory of institutional abuse) and the theory of teleological reduction, which was also based on objective criteria. However, developing veil-piercing liability based on objective criteria, as a mechanism intended to prevent gross abuses of the legal corporate form, gave it a character of absolute liability. In consequence, it is for the courts to assess the extent of abuse of the corporate entity, thus depriving members of the possibility to escape liability by proving that they had not been guilty of the abuse. Such views give rise to criticism of the construction of veil-piercing liability and to its mitigation by bringing it closer to compensatory liability.

At the same time, in the German, Austrian, and Swiss legal systems, one can identify tendencies to replace veil-piercing liability with mechanisms assuming that company members are liable for their own acts. Such a liability may be based on general terms or

consist in the imposition on the controlling company of specific duties stemming from the influence the parent entity may have on the decisions of a daughter company. At English law, where the discussed concept was not met with wide approval, it is admitted that in some cases, a controlling company may be held liable to the creditors of its subsidiary.

Criticism of the veil-piercing liability concept in German doctrine and jurisprudence is much more extensive and multifaceted when compared to the corresponding criticism of the concept and construction of abuse of the legal corporate form in the Polish legal system. Indeed, Polish doctrine has not developed a concept of abuse of the legal corporate form leading to consequences similar to the German Durchgriffshaftung, especially providing for the consequence of piercing.

More importantly, from a comparative law perspective, it would be impossible to conclude that the Polish legal system offers a wider and more comprehensive system of creditor protection, which justifies a rare application of the piercing concept or its exclusion. It must be remembered that the remedies envisaged in Art. 299 CCPC are known also in other legal systems, which does not preclude the application of veil-piercing liability or alternative grounds of company members’ liability.

109. Under art. 299 CCPC,

§ 1. If execution against the company proves ineffective, members of the management board shall be solidarily liable for the company’s liabilities.

§ 2. A member of the management board may be discharged from liability referred to in § 1 above if he proves that the petition in bankruptcy was timely filed or, at the same time, decision was delivered on the commencement of a restructuring procedure or approving a composition in a procedure for the approval of a composition, or that a failure to file the petition in bankruptcy occurred through no fault on his part, or that despite the failure to file the petition or non-delivery of a decision commencing a restructuring procedure or non-approval of a composition in a procedure for the approval of a composition, the creditor suffered no damage.

§ 3. The provisions of § 1 and 2 above shall not prejudice the provisions whereby further liability of members of the management board is envisaged.

§ 4. The persons specified in § 1 shall not be liable for a failure to file the petition for bankruptcy in the course of execution by administrative receivership or through sale of an enterprise, under the provisions of the Code of Civil Procedure, if the obligation to file the petition for bankruptcy arose during the execution.
From this, it must be concluded that an acceptable and legitimate solution for creditors of a subsidiary company would be to seek compensatory liability against the controlling company based on the general law. In its judgement of 24 November 2009, the Polish Supreme Court expressed the opinion that there are no grounds for exclusion of direct and personal liability of a member of a limited liability company for damages caused to third parties. However, in the opinion of the Court, the company member always holds personal liability for his own culpable behaviours causing damage to third parties but is not personally liable for the company’s debts.

In the relationship between a company and its member (the controlling corporation), the compensatory liability of the latter may materialize as a consequence of such member’s violation of the loyalty obligation. Such a duty is generated by the obligational relationship it has with the company. Its violation may give rise to contractual liability (Art. 471 et seq. of the Civil Code). However, the only currently available legislative basis for claims by creditors of a subsidiary against the controlling company—as a member of the subsidiary—is the regime of delictual liability. If the controlling member acts to the detriment of creditors of the subsidiary, this may allow these creditors to sue the controlling member in compensatory damages. On such occasions, the damage may be a detriment suffered by the subsidiary’s creditor in consequence of non-performance of the subsidiary’s obligations. Of course, all conditions of delictual liability must be met.

When considering the Skanska judgment of the Court of Justice of the European Union (CJEU), it is a justifiable conclusion that the court accepted veil-piercing liability within the private law realm of competition law, because it was allowed to direct claims against

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110. Supreme Court, November 24, 2009, V CSK 169/09, LEX 627248.
112. S. WŁODZYKA, PRAWO KONCERNOWE 176 (Zakamycze 2003).
114. T. Targosz, Odpowiedzialność wspólnika wobec wierzycieli spółki, 4 PRZEGLĄD PRAWA HANDLOWEGO 27 (2003), WŁODZYKA, supra note 112, at 1572.
115. WŁODZYKA, supra note 112, at 1573.
entities who, according to national laws, are separate persons, independent of the entity that caused damage. It seems, however, that another explanation is also admissible, namely that the CJEU, by accepting the liability of an enterprise, did not refer to the notion of veil-piercing liability, but rather concentrated on the concept of the enterprise and concluded that the liable party is one enterprise, which is composed of various entities.
The CCLS is now offering a full translation into Spanish of Book II of the Louisiana Civil Code. In Volume 13, Number 2, of the Journal of Civil Law Studies, we published the Spanish translation of Titles IV-X of Book I and a trilingual version in English, French, and Spanish of Book IV. In Volume 13, Number 1, we published an introduction to the Louisiana Civil Code Spanish Translation Project together with the first articles (Titles I-III) translated into Spanish. The progress reached so far means that Books I, II, and IV are fully translated into Spanish and published in the Journal and on the Louisiana Civil Code Online web page. More titles of Book III in Spanish will follow in upcoming issues of the Journal.

This translation into Spanish was done by Mariano Vitetta, under the supervision of Olivier Moréteau. María Natalia Rezzonico contributed as an assistant translator and reviser. The Validation Committee is made up by Jimena Andino Dorato (Montreal, Canada), Francisco Alterini (Buenos Aires, Argentina), Ignacio Alterini (Buenos Aires, Argentina), Ricardo Chiesa (Buenos Aires, Argentina), Alejandro Garro (New York, United States of America), Aniceto Masferrer (Valencia, Spain), Luis Muñiz Argüelles (San Juan, Puerto Rico), Agustín Parise (Maastricht, The Netherlands), Julio César Rivera (Buenos Aires, Argentina), Andrés Sánchez

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The Center of Civil Law Studies looks forward to any comments on the translation that readers may have. We welcome corrections, as well as proposals, to improve the Spanish text.
ART. 448. Things are divided into common, public, and private; corporeals and incorporeals; and movables and immovables.

Art. 449. Common things may not be owned by anyone. They are such as the air and the high seas that may be freely used by everyone conformably with the use for which nature has intended them.

Art. 450. Public things are owned by the state or its political subdivisions in their capacity as public persons. Public things that belong to the state are such as running waters, the waters and bottoms of natural navigable water bodies, the territorial sea, and the seashore.

Public things that may belong to political subdivisions of the state are such as streets and public squares.
Art. 451. Seashore is the space of land over which the waters of the sea spread in the highest tide during the winter season.

Art. 452. Public things and common things are subject to public use in accordance with applicable laws and regulations. Everyone has the right to fish in the rivers, ports, roadsteads, and harbors, and the right to land on the seashore, to fish, to shelter himself, to moor ships, to dry nets, and the like, provided that he does not cause injury to the property of adjoining owners.

The seashore within the limits of a municipality is subject to its police power, and the public use is governed by municipal ordinances and regulations.

Art. 453. Private things are owned by individuals, other private persons, and by the state or its political subdivisions in their capacity as private persons.

Art. 454. Owners of private things may freely dispose of them under modifications established by law.
Art. 455. Private things may be subject to public use in accordance with law or by dedication.

Art. 455. Las cosas privadas pueden estar sujetas a uso público en virtud de la ley o por su afectación.

Art. 456. The banks of navigable rivers or streams are private things that are subject to public use.

The bank of a navigable river or stream is the land lying between the ordinary low and the ordinary high stage of the water. Nevertheless, when there is a levee in proximity to the water, established according to law, the levee shall form the bank.

Art. 456. Las riberas de los ríos u otros cursos de agua navegables son cosas privadas afectadas al uso público.

La ribera de un río u otro curso de agua navegable consiste en la tierra que está entre el nivel del agua más bajo y el más alto habituales. No obstante, cuando haya un dique cerca del agua, establecido conforme a la ley, el dique será la ribera.

Art. 457. A road may be either public or private.

A public road is one that is subject to public use. The public may own the land on which the road is built or merely have the right to use it.

A private road is one that is not subject to public use.

Art. 457. Los caminos pueden ser públicos o privados.

Es público el camino afectado al uso público. La población puede ser dueña de la tierra sobre la que está construido el camino o simplemente tener derecho a usarla.

Es privado el camino que no está afectado al uso público.

Art. 458. Works built without lawful permit on public things, including the sea, the seashore, and the bottom of natural navigable waters, or on the banks of navigable rivers, that obstruct the public use may be removed at the expense of the persons who built or own them at the instance of the public authorities, or of any person residing in the state.

Art. 458. Las construcciones realizadas sin la habilitación debida sobre cosas públicas, incluidos el mar, la orilla del mar y el fondo de los cursos de agua naturales navegables, o sobre la ribera de ríos navegables, que obstruyan el uso público podrán ser retiradas a costa de las personas que las hayan construido o que sean sus dueños, a instancia de las autoridades públicas o de cualquier persona que resida en el estado.
The owner of the works may not prevent their removal by alleging prescription or possession.

Art. 459. A building that merely encroaches on a public way without preventing its use, and which cannot be removed without causing substantial damage to its owner, shall be permitted to remain. If it is demolished from any cause, the owner shall be bound to restore to the public the part of the way upon which the building stood.

Art. 460. Port commissions of the state, or in the absence of port commissions having jurisdiction, municipalities may, within the limits of their respective jurisdictions, construct and maintain on public places, in beds of natural navigable water bodies, and on their banks or shores, works necessary for public utility, including buildings, wharves, and other facilities for the mooring of vessels and the loading or discharging of cargo and passengers.

Art. 461. Corporeals are things that have a body, whether animate or inanimate, and can be felt or touched.
Incorporeals are things that have no body, but are comprehended by

El dueño de las construcciones no podrá evitar su remoción alegando prescripción o posesión.

Art. 459. Se permitirá la conservación de la edificación que apenas invada una vía pública sin obstruir su uso y que no pueda ser eliminada sin causar un daño sustancial al dueño. Si por alguna razón fuera demolido, el dueño deberá devolver al uso público la parte de la vía sobre la que se erigía la edificación.

Art. 460. Las comisiones portuarias del estado o, en ausencia de comisiones portuarias con competencia, las municipalidades podrán permitir, dentro de los límites de su respectiva jurisdicción, la construcción y el mantenimiento en lugares públicos, en los lechos de cuerpos de agua naturales navegables, y en sus riberas u orillas, de las obras que fueran necesarias con fines de utilidad pública, incluidas las edificaciones, puertos y otras instalaciones para el amarre de buques y para actividades de carga o descarga y para el embarque o desembarco de pasajeros.

Art. 461. Son cosas corporales aquellas que tienen cuerpo, ya sea animado o inanimado, y pueden sentirse o tocarse.
Son cosas incorporales aquellas que no tienen cuerpo, pero que
the understanding, such as the
inghts of inheritance, servitudes,
obligations, and right of
intellectual property.

SECTION 2. IMMOVABLES

Art. 462. Tracts of land, with
their component parts, are
immoveles.

Art. 463. Buildings, other
constructions permanently attached
to the ground, standing timber, and
unharvested crops or ungathered
fruits of trees, are component parts
of a tract of land when they belong
to the owner of the ground.

Art. 464. Buildings and standing
timber are separate immoveles
when they belong to a person other
than the owner of the ground.

Art. 465. Things incorporated
into a tract of land, a building, or
other construction, so as to become
an integral part of it, such as
building materials, are its
component parts.

Art. 466. Things that are
attached to a building and that,
according to prevailing usages,
serve to complete a building of the
same general type, without regard

pueden comprenderse por el
entendimiento, como los derechos
de herencia, las servidumbres, las
obligaciones y los derechos de
propiedad intelectual.

SECCIÓN 2. DE LOS
INMUEBLES

Art. 462. El fundo, con sus
partes integrantes, son inmuebles.

Art. 463. Las edificaciones, otras
construcciones unidas de manera
permanente al suelo, la madera en
pie y los cultivos no cosechados o
frutos no recolectados de los
árboles son partes integrantes del
fundo si pertenecen al dueño del
suelo.

Art. 464. Las edificaciones y la
madera en pie son inmuebles
independientes si su dueño no es el
dueño del suelo.

Art. 465. Las cosas
incorporadas a un fundo, una
edificación u otro tipo de
construcción de manera tal que
pasan a ser parte inescindible
suya, como los materiales de
construcción, son partes
integrantes de ese fundo,
edificación u otro tipo de
construcción.

Art. 466. Son partes integrantes
las cosas unidas a una edificación
y que, según la práctica habitual,
sirven para completar una
edificación del mismo tipo general,
to its specific use, are its component parts. Component parts of this kind may include doors, shutters, gutters, and cabinetry, as well as plumbing, heating, cooling, electrical, and similar systems.

Things that are attached to a construction other than a building and that serve its principal use are its component parts.

Other things are component parts of a building or other construction if they are attached to such a degree that they cannot be removed without substantial damage to themselves or to the building or other construction.


Art. 467. The owner of an immovable may declare that machinery, appliances, and equipment owned by him and placed on the immovable, other than his private residence, for its service and improvement are deemed to be its component parts. The declaration shall be filed for registry in the conveyance records of the parish in which the immovable is located.

Art. 468. Component parts of an immovable so damaged or deteriorated that they can no longer independently de su uso especifico. Son partes integrantes de este tipo las puertas, las persianas, los desagües y la ebanistería, así como los sistemas de plomería, calefacción, refrigeración, electricidad y otros similares.

Las cosas unidas a una construcción que no sean edificaciones y que sirvan a su uso principal son sus partes integrantes.

Son también partes integrantes de una edificación u otra construcción las cosas unidas de tal modo que no pueden quitarse sin causar un daño sustancial a esas cosas o a la edificación u otra construcción. [Sección 1, ley n.º 301 de 2005, vigente desde el 29 de junio de 2005; sección 1, ley n.º 765 de 2006; sección 1, ley n.º 632 de 2008, vigente desde el 1 de julio de 2008].
The owner may deimmobilize the component parts of an immovable by an act translative of ownership and delivery to acquirers in good faith.
In the absence of rights of third persons, the owner may deimmobilize things by detachment or removal. [Amended by Acts 1979, No. 180, §2.]

Art. 469. The transfer or encumbrance of an immovable includes its component parts. [Amended by Acts 1979, No. 180, §2.]

Art. 470. Rights and actions that apply to immovable things are incorporeal immovables. Immovables of this kind are such as personal servitudes established on immovables, predial servitudes, mineral rights, and petitory or possessory actions.

SECTION 3. MOVABLES

Art. 471. Corporeal movables are things, whether animate or inanimate, that normally move or can be moved from one place to another.
Art. 472. Materials gathered for the erection of a new building or
other construction, even though deriving from the demolition of an old one, are movables until their incorporation into the new building or after construction.

Materials separated from a building or other construction for the purpose of repair, addition, or alteration to it, with the intention of putting them back, remain immovables.

Art. 473. Rights, obligations, and actions that apply to a movable thing are incorporeal movables. Movables of this kind are such as bonds, annuities, and interests or shares in entities possessing juridical personality.

Interests or shares in a juridical person that owns immovables are considered as movables as long as the entity exists; upon its dissolution, the right of each individual to a share in the immovables is an immovable.

Art. 474. Unharvested crops and ungathered fruits of trees are movables by anticipation when they belong to a person other than the landowner. When encumbered with security rights of third persons, they are movables by anticipation insofar as the creditor is concerned.
The landowner may, by act translative of ownership or by pledge, mobilize by anticipation unharvested crops and ungathered fruits of trees that belong to him.

Art. 475. All things, corporeal or incorporeal, that the law does not consider as immovables, are movables.

CHAPTER 2. RIGHTS IN THINGS

Art. 476. One may have various rights in things:
1. Ownership;
2. Personal and predial servitudes; and
3. Such other real rights as the law allows.

TITLE II. OWNERSHIP
CHAPTER 1. GENERAL PRINCIPLES

[Acts 1979, No. 180, §1.]

Art. 477. A. Ownership is the right that confers on a person direct, immediate, and exclusive authority over a thing. The owner of a thing may use, enjoy, and dispose of it within the limits and under the conditions established by law.

B. A buyer and occupant of a residence under a bond for deed contract is the owner of the thing for purposes of the homestead.

Art. 478. The right of ownership may be subject to a resolutory condition, and it may be burdened with a real right in favor of another person as allowed by law. The ownership of a thing burdened with a usufruct is designated as naked ownership.

Art. 479. The right of ownership may exist only in favor of a natural person or a juridical person.

Art. 480. Two or more persons may own the same thing in indivision, each having an undivided share.

Art. 481. The ownership and the possession of a thing are distinct.

Ownership exists independently of any exercise of it and may not be lost by nonuse. Ownership is lost when acquisitive prescription accrues in favor of an adverse possessor.
Art. 482. The ownership of a thing includes by accession the ownership of everything that it produces or is united with it, either naturally or artificially, in accordance with the following provisions.

CHAPTER 2. RIGHT OF ACCESSION

SECTION 1. OWNERSHIP OF FRUITS

Art. 483. In the absence of rights of other persons, the owner of a thing acquires the ownership of its natural and civil fruits.

Art. 484. The young of animals belong to the owner of the mother of them.

Art. 485. When fruits that belong to the owner of a thing by accession are produced by the work of another person, or from seeds sown by him, the owner may retain them on reimbursing such person his expenses.

Art. 486. A possessor in good faith acquires the ownership of fruits he has gathered. If he is evicted by the owner, he is entitled to reimbursement of expenses for fruits he was unable to gather.

A possessor in bad faith is bound to restore to the owner the

Art. 482. La propiedad de la cosa incluye por accesión la propiedad de todo aquello que la cosa produce o que está unido a ella, de manera natural o artificial, de acuerdo con las siguientes disposiciones.

CAPÍTULO 2. DEL DERECHO DE ACCESIÓN

SECCIÓN 1. DE LA PROPIEDAD DE LOS FRUTOS

Art. 483. A falta de derechos de terceros, el dueño de la cosa adquiere la propiedad de sus frutos naturales y civiles.

Art. 484. Las crías de los animales pertenecen al dueño de la madre.

Art. 485. Cuando los frutos que pertenecen por accesión al dueño de una cosa son producidos por el trabajo de un tercero o a partir de semillas sembradas por un tercero, el dueño podrá conservarlos después de reintegrarle a ese tercero los gastos que haya efectuado.

Art. 486. El poseedor de buena fe adquiere la propiedad sobre los frutos que haya recolectado. Si es despojado por el dueño, tiene derecho al reintegro de los gastos por los frutos que no haya podido recoger.

El poseedor de mala fe está obligado a reintegrar al dueño...
fruits he has gathered, or their value, subject to his claim for reimbursement of expenses.

Art. 487. For purposes of accession, a possessor is in good faith when he possesses by virtue of an act translative of ownership and does not know of any defects in his ownership. He ceases to be in good faith when these defects are made known to him or an action is instituted against him by the owner for the recovery of the thing.

Art. 488. Products derived from a thing as a result of diminution of its substance belong to the owner of that thing. When they are reclaimed by the owner, a possessor in good faith has the right to reimbursement of his expenses. A possessor in bad faith does not have this right.

Art. 489. In the absence of other provisions, one who is entitled to the fruits of a thing from a certain time or up to a certain time acquires the ownership of natural fruits gathered during the existence of his right, and a part of the civil fruits proportionate to the duration of his right.
SECTION 2. ACCESSION IN RELATION TO IMMOVABLES

Art. 490. Unless otherwise provided by law, the ownership of a tract of land carries with it the ownership of everything that is directly above or under it.

The owner may make works on, above, or below the land as he pleases, and draw all the advantages that accrue from them, unless he is restrained by law or by rights of others.

Art. 491. Buildings, other constructions permanently attached to the ground, standing timber, and unharvested crops or ungathered fruits of trees may belong to a person other than the owner of the ground. Nevertheless, they are presumed to belong to the owner of the ground, unless separate ownership is evidenced by an instrument filed for registry in the conveyance records of the parish in which the immovable is located.

Art. 492. Separate ownership of a part of a building, such as a floor, an apartment, or a room, may be established only by a juridical act of the owner of the entire building when and in the manner expressly authorized by law.

Art. 493. Buildings, other constructions permanently attached to the ground, standing timber, and unharvested crops or ungathered fruits of trees may belong to a person other than the owner of the ground. Nevertheless, they are presumed to belong to the owner of the ground, unless separate ownership is evidenced by an instrument filed for registry in the conveyance records of the parish in which the immovable is located.

SECCIÓN 2. DE LA ACCESIÓN EN RELACIÓN CON LOS INMUEBLES

Art. 490. A menos que la ley indique otra cosa, la propiedad sobre un fundo implica la propiedad de lo que está debajo o arriba de ella.

El dueño puede hacer obras en la tierra, sobre ella o debajo de ella según lo desee, y obtener todas las ventajas derivadas de ello, a menos que esté limitado por la ley o por derechos de terceros.

Art. 491. Las edificaciones, otras construcciones unidas de manera permanente al suelo, la madera en pie y los cultivos no cosechados o frutos no recolectados de los árboles pueden pertenecer a una persona que no sea el dueño del suelo. No obstante, se presume que pertenecen al dueño del suelo, a menos que se demuestre lo contrario mediante instrumento presentado para su inscripción en el registro de transferencias inmobiliarias de la parroquia en que esté ubicado el inmueble.

Art. 492. La propiedad separada de una parte de una edificación, tal como un piso, un apartamento o una habitación solo puede establecerse mediante acto jurídico del dueño de toda la edificación en los supuestos y conforme a las formalidades exigidas por la ley.

Art. 493. Las edificaciones, otras construcciones unidas al suelo de
to the ground, and plantings made on the land of another with his consent belong to him who made them. They belong to the owner of the ground when they are made without his consent.

When the owner of buildings, other constructions permanently attached to the ground, or plantings no longer has the right to keep them on the land of another, he may remove them subject to his obligation to restore the property to its former condition. If he does not remove them within ninety days after written demand, the owner of the land may, after the ninetieth day from the date of mailing the written demand, appropriate ownership of the improvements by providing an additional written notice by certified mail, and upon receipt of the certified mail by the owner of the improvements, the owner of the land obtains ownership of the improvements and owes nothing to the owner of the improvements. Until such time as the owner of the land appropriates the improvements, the improvements shall remain the property of he who made them and he shall be solely responsible for any harm caused by the improvements.

When buildings, other constructions permanently attached to the ground, or plantings are made on the separate property of a spouse with community assets or with separate assets of the other spouse, the improvements remain the property of the spouse. However, if the improvements are made in a manner that suggests ownership, the improvements are considered to belong to the owner who made them, and the other spouse is responsible for any harm caused by the improvements.
spouse and when such improvements are made on community property with the separate assets of a spouse, this Article does not apply. The rights of the spouses are governed by Articles 2366, 2367, and 2367.1. [Acts 1984, No. 933, §1; Acts 2003, No. 715, §1.]

Art. 493.1. Things incorporated in or attached to an immovable so as to become its component parts under Articles 465 and 466 belong to the owner of the immovable. [Acts 1984, No. 933, §1.]

Art. 493.2. One who has lost the ownership of a thing to the owner of an immovable may have a claim against him or against a third person in accordance with the following provisions. [Acts 1984, No. 933, §1.]

Art. 494. When the owner of an immovable makes on it constructions, plantings, or works with materials of another, he may retain them, regardless of his good or bad faith, on reimbursing the owner of the materials their current value and repairing the injury that he may have caused to him.

Art. 495. One who incorporates in, or attaches to, the immovable of another, with his consent, things that become component parts of the immovable under Articles 465

con bienes propios del otro cónyuge y cuando las mejoras se hacen sobre bienes conyugales con bienes propios de un cónyuge. Los derechos de los cónyuges se rigen por los artículos 2366, 2367 y 2367.1. [Sec. 1, ley n.º 933 de 1984; sección 1, ley n.º 715 de 2003].

Art. 493.1. Las cosas incorporadas a un inmueble o adheridas a él de modo que se hayan convertido en partes integrantes conforme a los artículos 465 y 466 pertenecen al dueño del inmueble. [Sec. 1, ley n.º 933 de 1984].

Art. 493.2. Quien pierde la propiedad de una cosa a favor del dueño de un inmueble puede reclamarle a él o a un tercero de acuerdo con las siguientes disposiciones. [Sec. 1, ley n.º 933 de 1984].

Art. 494. Cuando el dueño de un inmueble hace construcciones, plantaciones u otras obras con materiales de un tercero, puede conservarlas, con prescindencia de su buena o mala fe, después de reintegrar al dueño de los materiales su valor actualizado y reparar el daño que le hubiera causado.

Art. 495. Quien incorpora o une a un inmueble de un tercero, con consentimiento del tercero, cosas que se transformen en partes integrantes del inmueble en virtud
and 466, may, in the absence of other provisions of law or juridical acts, remove them subject to his obligation of restoring the property to its former condition.

If he does not remove them after demand, the owner of the immovable may have them removed at the expense of the person who made them or elect to keep them and pay, at his option, the current value of the materials and of the workmanship or the enhanced value of the immovable.

Art. 496. When constructions, plantings, or works are made by a possessor in good faith, the owner of the immovable may not demand their demolition and removal. He is bound to keep them and at his option to pay to the possessor either the cost of the materials and of the workmanship, or their current value, or the enhanced value of the immovable.

Art. 497. When constructions, plantings, or works are made by a bad faith possessor, the owner of the immovable may keep them or he may demand their demolition and removal at the expense of the possessor, and, in addition, damages for the injury that he may have sustained. If he does not demand demolition and removal, he is bound to pay at his option either the current value of the materials and of the workmanship of the separable improvements that

de los artículos 465 y 466, puede quitarlas, en ausencia de disposiciones legales o actos jurídicos en contrario, con sujeción a la obligación de restablecer el bien a su condición anterior. Si no las quita después del pedido de hacerlo, el dueño del inmueble puede quitarlas a costa de la persona que las hizo o conservarlas y pagar, a su elección, el valor actualizado de los materiales y la mano de obra o la mejora en el valor del inmueble.

Art. 496. Cuando las construcciones, plantaciones u obras son realizadas por un poseedor de buena fe, el dueño del inmueble no puede requerir su demolición y extracción. Está obligado a conservarlas y, a su elección, pagar al poseedor el costo de los materiales y la mano de obra, o su valor actualizado, o la mejora en el valor del inmueble.

Art. 497. Cuando las construcciones, plantaciones u obras son realizadas por un poseedor de mala fe, el dueño del inmueble puede conservarlas o exigir la demolición y extracción a costa del poseedor, y, además, una indemnización por los daños y perjuicios que haya sufrido. Si no exige la demolición y extracción, debe pagar a su elección el valor actualizado de los materiales y la mano de obra de las mejoras.
Art. 498. One who has lost the ownership of a thing to the owner of an immovable may assert against third persons his rights under Articles 493, 493.1, 494, 495, 496, or 497 when they are evidenced by an instrument filed for registry in the appropriate conveyance or mortgage records of the parish in which the immovable is located. [Acts 1984, No. 933, §1.]

Art. 499. Accretion formed successively and imperceptibly on the bank of a river or stream, whether navigable or not, is called alluvion. The alluvion belongs to the owner of the bank, who is bound to leave public that portion of the bank which is required for the public use.

The same rule applies to dereliction formed by water receding imperceptibly from a bank of a river or stream. The owner of the land situated at the edge of the bank left dry owns the dereliction.

Art. 500. There is no right to alluvion or dereliction on the shore of the sea or of lakes.

Art. 501. Alluvion formed in front of the property of several separables que conserve o la mejora en el valor del inmueble.

Art. 498. Quien pierde la propiedad de una cosa a favor del dueño de un inmueble puede oponer frente a terceros los derechos que le corresponden conforme a los artículos 493, 493.1, 494, 495, 496, o 497, cuando la existencia de esos derechos conste en un instrumento presentado para su inscripción en el registro de transferencias inmobiliarias o de hipotecas correspondiente de la parroquia en la que se sitúa el inmueble. [Sec. 1, ley n.º 933 de 1984].

Art. 499. Se denomina aluvión al acrecentamiento formado de manera continuada e imperceptible en la orilla de un río o arroyo, navegable o no. El aluvión corresponde al dueño de la orilla, quien está obligado a mantener pública la parte de la orilla que sea necesaria para su uso público.

La misma regla rige para los terrenos que queden descubiertos por el retiro imperceptible del agua de la orilla de un río o arroyo. El terreno descubierto pertenece al dueño de la tierra ubicada al borde de la orilla que ha quedado seca.

Art. 500. No hay derecho a aluvión ni a terrenos descubiertos en la orilla del mar o de los lagos.

Art. 501. El aluvión formado frente a inmuebles de varios
owners is divided equitably, taking into account the extent of the front of each property prior to the formation of the alluvion in issue. Each owner is entitled to a fair proportion of the area of the alluvion and a fair proportion of the new frontage on the river, depending on the relative values of the frontage and the acreage.

Art. 502. If a sudden action of the waters of a river or stream carries away an identifiable piece of ground and unites it with other lands on the same or on the opposite bank, the ownership of the piece of ground so carried away is not lost. The owner may claim it within a year, or even later, if the owner of the bank with which it is united has not taken possession.

Art. 503. When a river or stream, whether navigable or not, opens a new channel and surrounds riparian land making it an island, the ownership of that land is not affected.

Art. 504. When a navigable river or stream abandons its bed and opens a new one, the owners of the land on which the new bed is located shall take by way of indemnification the abandoned bed, each in proportion to the quantity of land that he lost. If the river returns to the old bed, each shall take his former land.

dueños se divide en partes iguales, teniendo en cuenta la extensión del frente de cada inmueble antes de la formación del aluvión en cuestión. Cada dueño tiene derecho a una proporción justa del área del aluvión y a una proporción justa del nuevo frente en el río, según los valores relativos del frente y la superficie.

Art. 502. Si la acción repentina del agua de un río o arroyo arrastra un pedazo de suelo identificable y lo une a otras tierras del mismo lado de la ribera o del contrario, la propiedad de ese pedazo de tierra arrastrado no se pierde. El dueño puede reclamarlo dentro del año o incluso después, si el dueño de la ribera con el que se haya unido no ha tomado posesión.

Art. 503. Cuando un río o arroyo, navegable o no, abre un nuevo canal y circunda tierra ribereña y la convierte en una isla, la propiedad de esa tierra no se ve afectada.

Art. 504. Cuando un río o arroyo navegable abandona su curso y abre uno nuevo, los dueños de la tierra por donde pasa el nuevo curso tomarán en concepto de reparación el lecho abandonado, cada uno en proporción a la cantidad de tierra perdida.
Art. 505. Islands, and sandbars that are not attached to a bank, formed in the beds of navigable rivers or streams, belong to the state.

Art. 506. In the absence of title or prescription, the beds of nonnavigable rivers or streams belong to the riparian owners along a line drawn in the middle of the bed.

SECTION 3. ACCESSION IN RELATION TO MOVABLES

Art. 507. In the absence of other provisions of law or contract, the consequences of accession as between movables are determined according to the following rules.

Art. 508. Things are divided into principal and accessory. For purposes of accession as between movables, an accessory is a corporeal movable that serves the use, ornament, or complement of the principal thing.

In the case of a principal thing consisting of a movable construction permanently attached to the ground, its accessories include things that would constitute its component parts under Article 466 if the construction were immovable.
Art. 509. In case of doubt as to which is a principal thing and which is an accessory, the most valuable, or the most bulky if value is nearly equal, shall be deemed to be principal.

Art. 510. When two corporeal movables are united to form a whole, and one of them is an accessory of the other, the whole belongs to the owner of the principal thing. The owner of the principal thing is bound to reimburse the owner of the accessory its value. The owner of the accessory may demand that it be separated and returned to him, although the separation may cause some injury to the principal thing, if the accessory is more valuable than the principal and has been used without his knowledge.

Art. 511. When one uses materials of another to make a new thing, the thing belongs to the owner of the materials, regardless of whether they may be given their earlier form. The owner is bound to reimburse the value of the workmanship.

Nevertheless, when the value of the workmanship substantially exceeds that of the materials, the thing belongs to him who made it. In this case, he is bound to
Art. 512. If the person who made the new thing was in bad faith, the court may award its ownership to the owner of the materials.

Art. 513. When one used partly his own materials and partly the materials of another to make a new thing, unless the materials can be conveniently separated, the thing belongs to the owners of the materials in indivision. The share of one is determined in proportion to the value of his materials and of the other in proportion to the value of his materials and workmanship.

Art. 514. When a new thing is formed by the mixture of materials of different owners, and none of them may be considered as principal, an owner who has not consented to the mixture may demand separation if it can be conveniently made.

If separation cannot be conveniently made, the thing resulting from the mixture belongs to the owners of the materials in indivision. The share of each is determined in proportion to the value of his materials.

One whose materials are far superior in value in comparison to the others may, if it cannot be conveniently separated, demand the property except to a just proportion of the materials of the others.

Art. 512. Si la persona que hizo la cosa nueva actúo de mala fe, el juez podrá asignar la propiedad al dueño de los materiales.

Art. 513. Cuando alguien usó en parte materiales propios y en parte materiales de un tercero para hacer una cosa nueva, a menos que los materiales puedan separarse adecuadamente, la cosa pertenece a los dueños de los materiales de manera indivisa. La parte de uno se determina en proporción al valor de sus materiales, y la del otro, en proporción al valor de sus materiales y de la mano de obra.

Art. 514. Cuando se forma una cosa nueva por la combinación de materiales de dueños diferentes y ninguno de ellos puede considerarse el principal, el dueño que no prestó su consentimiento respecto de la combinación puede exigir que se realice la separación si esta puede hacerse adecuadamente.

Si la separación no es posible de manera adecuada, la cosa resultante de la combinación pertenece a los dueños de los materiales de manera indivisa. La parte de cada uno se determina en proporción al valor de sus materiales.

Aquél cuyos materiales sean de un valor muy superior a los de
with those of any one of the others, may claim the thing resulting from the mixture. He is then bound to reimburse the others the value of their materials.

Art. 515. When an owner of materials that have been used without his knowledge for the making of a new thing acquires the ownership of that thing, he may demand that, in lieu of the ownership of the new thing, materials of the same species, quantity, weight, measure and quality or their value be delivered to him.

Art. 516. One who uses a movable of another, without his knowledge, for the making of a new thing may be liable for the payment of damages.

CHAPTER 3. TRANSFER OF OWNERSHIP BY AGREEMENT

Art. 517. The ownership of an immovable is voluntarily transferred by a contract between the owner and the transferee that purports to transfer the ownership of the immovable. The transfer of ownership takes place between the parties by the effect of the agreement and is not effective against third persons until the contract is filed for registry in the conveyance records of the parish in cualquiera de los demás podrá reclamar la cosa resultante de la combinación. Estará obligado a reintegrar a los demás el valor de sus materiales.

Art. 515. Cuando un dueño de materiales usados sin su conocimiento para hacer una cosa nueva adquiere la titularidad de esa cosa, puede exigir que, en lugar de la propiedad sobre la cosa nueva, se le entreguen materiales de la misma especie, cantidad, peso, medida y calidad o el valor equivalente.

Art. 516. Quien utiliza un mueble de un tercero sin su conocimiento para hacer una cosa nueva puede ser responsable por el pago de una indemnización en concepto de daños y perjuicios.

CAPÍTULO 3. DE LA TRANSMISIÓN DE LA PROPIEDAD POR CONTRATO

Art. 517. La propiedad sobre un inmueble se transmite voluntariamente mediante contrato entre el dueño y el adquirente por el que se pretende transmitir la propiedad del inmueble. La transferencia de la propiedad se produce entre las partes por efecto del contrato y no es oponible a terceros hasta que el contrato se presente para su inscripción en el registro de transmisiones
which the immovable is located. [Acts 2005, No. 169, §2, eff. July 1, 2006; Acts 2005, 1st Ex. Sess., No. 13, §1, eff. Nov. 29, 2005.]

Art. 518. The ownership of a movable is voluntarily transferred by a contract between the owner and the transferee that purports to transfer the ownership of the movable. Unless otherwise provided, the transfer of ownership takes place as between the parties by the effect of the agreement and against third persons when the possession of the movable is delivered to the transferee.

When possession has not been delivered, a subsequent transferee to whom possession is delivered acquires ownership provided he is in good faith. Creditors of the transferor may seize the movable while it is still in his possession. [Acts 1984, No. 331, §2, eff. Jan. 1, 1985.]

Art. 519. When a movable is in the possession of a third person, the assignment of the action for the recovery of that movable suffices for the transfer of its ownership.

Art. 520. [Repealed by Acts 1981, No. 125, §1.]

Art. 521. One who has possession of a lost or stolen thing may not transfer its ownership to

inmobiliarias de la parroquia en la que se sitúa el inmueble. [Sección 2, ley n.º 169 de 2005, vigente desde el 1 de julio de 2006; sección 1, ley n.º 13 de 2005, 1.ª Ses. Ex., vigente desde el 29 de noviembre de 2005.]

Art. 518. La propiedad sobre un bien mueble se transmite voluntariamente mediante contrato entre el dueño y el adquirente por el que se pretende transmitir la propiedad de tal bien. A menos que se disponga otra cosa, la transferencia de la propiedad se produce entre las partes por efecto del contrato, y frente a terceros, cuando se entrega la posesión del bien mueble al adquirente.

Cuando no se haya entregado la posesión, el adquirente posterior al que se le transmita la posesión adquiere la propiedad si actúa de buena fe. Los acreedores del enajenante podrán embargar el bien mueble mientras aún esté en su posesión. [Sec. 2, ley n.º 331 de 1984, vigente desde el 1 de enero de 1985.]

Art. 519. Cuando un bien mueble está en posesión de un tercero, la cesión de la acción de reivindicación de ese bien basta para transmitir la propiedad.

Art. 520. [Derogado por sección 1, ley n.º 125 de 1981.]

Art. 521. El que tiene la posesión de una cosa perdida o robada no puede transferir la
another. For purposes of this Chapter, a thing is stolen when one has taken possession of it without the consent of its owner. A thing is not stolen when the owner delivers it or transfers its ownership to another as a result of fraud.

Art. 522. A transferee of a corporeal movable in good faith and for fair value retains the ownership of the thing even though the title of the transferor is anulled on account of a vice of consent. [Acts 1979, No. 180, §1.]

Art. 523. An acquirer of a corporeal movable is in good faith for purposes of this Chapter unless he knows, or should have known, that the transferor was not the owner.

Art. 524. The owner of a lost or stolen movable may recover it from a possessor who bought it in good faith at a public auction or from a merchant customarily selling similar things on reimbursing the purchase price.

The former owner of a lost, stolen, or abandoned movable that has been sold by authority of law may not recover it from the purchaser.

Art. 525. The provisions of this Chapter do not apply to movables propiedad sobre ella a un tercero. A los efectos de este capítulo, se considera robada aquella cosa tomada sin el consentimiento de su dueño. La cosa no se considera robada cuando el dueño la entrega o transmite su propiedad a un tercero a consecuencia de un engaño.

Art. 522. El adquirente de buena fe y por el valor de mercado de un bien mueble corporal conserva la propiedad de la cosa aunque el título del enajenante sea anulado a raíz de un vicio del consentimiento.

Art. 523. El adquirente de un bien mueble corporal es de buena fe a los efectos de este capítulo a menos que sepa o haya debido saber que el enajenante no era el dueño.

Art. 524. El dueño de un bien mueble perdido o robado puede recuperarlo del poseedor que lo adquirió de buena fe en subasta pública o de un comerciante que habitualmente vende cosas similares si le reintegra el precio de compra.

El dueño anterior de un bien mueble perdido, robado o abandonado que fue vendido al amparo de una disposición legal no puede recuperarlo del adquirente.

Art. 525. Las disposiciones de este capítulo no se aplican a los
that are required by law to be registered in public records.

CHAPTER 4. PROTECTION OF OWNERSHIP

Art. 526. The owner of a thing is entitled to recover it from anyone who possesses or detains it without right and to obtain judgment recognizing his ownership and ordering delivery of the thing to him.

Art. 527. The evicted possessor, whether in good or in bad faith, is entitled to recover from the owner compensation for necessary expenses incurred for the preservation of the thing and for the discharge of private or public burdens. He is not entitled to recover expenses for ordinary maintenance or repairs.

Art. 528. An evicted possessor in good faith is entitled to recover from the owner his useful expenses to the extent that they have enhanced the value of the thing.

Art. 529. The possessor, whether in good or in bad faith, may retain possession of the thing until he is reimbursed for expenses and improvements which he is entitled to claim.

Art. 530. The possessor of a corporeal movable is presumed to

CAPÍTULO 4. DE LA PROTECCIÓN DE LA PROPIEDAD

Art. 526. El dueño de una cosa tiene derecho a recuperarla de cualquiera que la posea o la detente sin derecho y a obtener una sentencia en la que se reconozca su titularidad y se ordene la entrega de la cosa a su favor.

Art. 527. El poseedor, de buena o mala fe, que ha sido despojado tiene derecho a percibir del dueño una indemnización por los gastos necesarios en los que haya incurrido para la conservación de la cosa y para cumplir con las cargas públicas o privadas. No tiene derecho a recuperar los gastos por reparaciones o mantenimiento corrientes.

Art. 528. El poseedor de buena fe que ha sido despojado tiene derecho a recuperar del dueño los gastos útiles en tanto hayan mejorado el valor de la cosa.

Art. 529. El poseedor, independientemente de su buena o mala fe, puede conservar la posesión de la cosa hasta que se le reintegren los gastos y las mejoras que tenga derecho a reclamar.

Art. 530. Se presume dueño al poseedor de un bien mueble
be its owner. The previous possessor of a corporeal movable is presumed to have been its owner during the period of his possession.

These presumptions do not avail against a previous possessor who was dispossessed as a result of loss or theft.

Art. 531. One who claims the ownership of an immovable against another in possession must prove that he has acquired ownership from a previous owner or by acquisitive prescription. If neither party is in possession, he need only prove a better title.

Art. 532. When the titles of the parties are traced to a common author, he is presumed to be the previous owner.

TITLE III. PERSONAL SERVITUDES

CHAPTER 1. KINDS OF SERVITUDES

Art. 533. There are two kinds of servitudes: personal servitudes and predial servitudes.

Art. 534. A personal servitude is a charge on a thing for the benefit of a person. There are three sorts of personal servitudes: usufruct, habitation, and rights of use.

corporal. Se presume que el poseedor anterior de un bien mueble corporal fue el dueño durante su posesión.

Estas presunciones no rigen contra un poseedor anterior que fue desapoderado a consecuencia de una pérdida o hurto.

Art. 531. El que reclama la propiedad sobre un bien inmueble contra quien es poseedor debe probar que adquirió la propiedad de un dueño anterior o por prescripción adquisitiva. Si ninguna de las partes está en posesión, solo debe probar mejor título.

Art. 532. Cuando los títulos de las partes se remontan a un autor común, se presume que este es el dueño anterior.

TÍTULO III. DE LAS SERVIDUMBRES PERSONALES

CAPÍTULO I. DE LOS TIPOS DE SERVIDUMBRES

Art. 533. Las servidumbres son personales o reales.

Art. 534. La servidumbre personal grava la cosa en beneficio de una persona. Hay tres tipos de servidumbres personales: el usufructo, la habitación y los derechos de uso.
CHAPTER 2. USUFRUCT

SECTION 1. GENERAL PRINCIPLES

Art. 535.Usufruct is a real right of limited duration on the property of another. The features of the right vary with the nature of the things subject to it as consumables or nonconsumables.

Art. 536. Consumable things are those that cannot be used without being expended or consumed, or without their substance being changed, such as money, harvested agricultural products, stocks of merchandise, foodstuffs, and beverages.

Art. 537. Nonconsumable things are those that may be enjoyed without alteration of their substance, although their substance may be diminished or deteriorated naturally by time or by the use to which they are applied, such as lands, houses, shares of stock, animals, furniture, and vehicles.

Art. 538. If the things subject to the usufruct are consumables, the usufructuary becomes owner of them. He may consume, alienate, or encumber them as he sees fit. At the termination of the usufruct he is bound either to pay to the naked owner the value that the things had at the commencement of the

CAPÍTULO 2. DEL USUFRUCTO

SECCIÓN 1. PRINCIPIOS GENERALES

Art. 535. El usufructo es el derecho real de duración limitada sobre un bien de un tercero. Las características del derecho varían de acuerdo con la naturaleza de las cosas sujetas a él según sean consumibles o no consumibles.

Art. 536. Son consumibles las cosas que no pueden usarse sin gastarse o consumirse, o sin que se altere su sustancia, como el dinero, los productos agrícolas cosechados, las existencias de mercadería, los comestibles y las bebidas.

Art. 537. Son no consumibles las cosas que se pueden usar sin alterar su sustancia, aunque su sustancia pueda verse disminuida o deteriorada naturalmente por el paso del tiempo o por el uso al que se aplican, como es el caso de las fracciones de tierra, las casas, las acciones, los animales, el mobiliario y los vehículos.

Art. 538. Si las cosas sujetas al usufructo son consumibles, el usufructuario se transforma en su dueño. Puede consumirlas, enajenarlas o gravarlas según su criterio. Extinguido el usufructo, está obligado a pagar al nudo propietario el valor que las cosas tenían al inicio del usufructo o
usufruct or to deliver to him things of the same quantity and quality. [Acts 2010, No. 881, §1, eff. July 2, 2010.]

Art. 539. If the things subject to the usufruct are nonconsumables, the usufructuary has the right to possess them and to derive the utility, profits, and advantages that they may produce, under the obligation of preserving their substance.

He is bound to use them as a prudent administrator and to deliver them to the naked owner at the termination of the usufruct.

Art. 540. Usufruct is an incorporeal thing. It is movable or immovable according to the nature of the thing upon which the right exists.

Art. 541. Usufruct is susceptible to division, because its purpose is the enjoyment of advantages that are themselves divisible. It may be conferred on several persons in divided or undivided shares, and it may be partitioned among the usufructuaries.

Art. 542. The naked ownership may be partitioned subject to the rights of the usufructuary.

Art. 543. When property is held in indivision, a person having a share in full ownership may demand partition of the property in entregarle cosas en la misma cantidad y de la misma calidad. [Sección 1. ley n.° 881 de 2010, vigente desde el 2 de julio de 2010].

Art. 539. Si las cosas sujetas al usufructo son no consumibles, el usufructuario tiene derecho a poseerlas y a obtener la utilidad, las ganancias y las ventajas que produzca, con la obligación de conservar su sustancia.

Está obligado a usarlas como administrador prudente y entregarlas al nudo propietario a la extinción del usufructo.

Art. 540. El usufructo es un bien incorporeal. Es mueble o inmueble según la naturaleza de la cosa sobre la que recae el derecho.

Art. 541. El usufructo es susceptible de división, porque su fin es el goce de ventajas que son divisibles en sí mismas. Puede otorgarse a favor de varias personas por porciones divisas o indivisas, y puede dividirse entre los usufructuarios.

Art. 542. La nuda propiedad puede dividirse con sujeción a los derechos del usufructuario.

Art. 543. Cuando se posee un bien de manera indivisa, la persona que tiene una participación en la propiedad
kind or by licitation, even though there may be other shares in naked ownership and usufruct.

A person having a share in naked ownership only or in usufruct only does not have this right, unless a naked owner of an undivided share and a usufructuary of that share jointly demand partition in kind or by licitation, in which event their combined shares shall be deemed to constitute a share in full ownership. [Acts 1983, No. 535, §1.]

Art. 544. Usufruct may be established by a juridical act either inter vivos or mortis causa, or by operation of law. The usufruct created by juridical act is called conventional; the usufruct created by operation of law is called legal. Usufruct may be established on all kinds of things, movable or immovable, corporeal or incorporeal.

Art. 545.Usufruct may be established for a term or under a condition, and subject to any modification consistent with the nature of usufruct.

The rights and obligations of the usufructuary and of the naked owner may be modified by agreement unless modification is prohibited by law or by the grantor in the act establishing the usufruct.
Art. 546. Usufruct may be established in favor of successive usufructuaries.

Art. 547. When the usufruct is established in favor of several usufructuaries, the termination of the interest of one usufructuary inures to the benefit of those remaining, unless the grantor has expressly provided otherwise.

Art. 548. When the usufruct is established by an act inter vivos, the usufructuary must exist or be conceived at the time of the execution of the instrument. When the usufruct is established by an act mortis causa, the usufructuary must exist or be conceived at the time of the death of the testator.

Art. 549. Usufruct may be established in favor of a natural person or a juridical person. [Acts 2010, No. 881, §1, eff. July 2, 2010.]

SECTION 2. RIGHTS OF THE USUFRUCTUARIO

Art. 550. The usufructuary is entitled to the fruits of the thing subject to usufruct according to the following articles.

usufructo en el acto de constitución del usufructo.

Art. 546. El usufructo puede constituirse a favor de usufructuarios sucesivos.

Art. 547. Cuando el usufructo se creó a favor de varios usufructuarios, la extinción del derecho de uno de ellos beneficia a los demás, a menos que quien constituyó el usufructo haya dispuesto expresamente de otro modo.

Art. 548. Cuando se constituye un usufructo por acto entre vivos, el usufructuario debe existir o haber sido concebido al momento de la suscripción del instrumento. Cuando se constituye un usufructo por causa de muerte, el usufructuario debe existir o haber sido concebido al momento del fallecimiento del testador.

Art. 549. El usufructo puede constituirse a favor de una persona física o jurídica. [Sección 1, ley n.° 881 de 2010, vigente desde el 2 de julio de 2010].

SECCIÓN 2. DE LOS DERECHOS DEL USUFRUCTUARIO

Art. 550. El usufructuario tiene derecho a los frutos de la cosa sujeta a usufructo conforme a lo dispuesto en los siguientes artículos.
Art. 551. Fruits are things that are produced by or derived from another thing without diminution of its substance.

There are two kinds of fruits; natural fruits and civil fruits.

Natural fruits are products of the earth or of animals.

Civil fruits are revenues derived from a thing by operation of law or by reason of a juridical act, such as rentals, interest, and certain corporate distributions.

Art. 552. A cash dividend declared during the existence of the usufruct belongs to the usufructuary. A liquidation dividend or a stock redemption payment belongs to the naked owner subject to the usufruct.

Stock dividends and stock splits declared during the existence of the usufruct belong to the naked owner subject to the usufruct.

A stock warrant and a subscription right declared during the existence of the usufruct belong to the naked owner free of the usufruct.

Art. 553. The usufructuary has the right to vote shares of stock in corporations and to vote or exercise similar rights with respect to interests in other juridical
persons, unless otherwise provided. [Acts 2010, No. 881, §1, eff. July 2, 2010.]

Art. 554. The usufructuary’s right to fruits commences on the effective date of the usufruct.

Art. 555. The usufructuary acquires the ownership of natural fruits severed during the existence of the usufruct. Natural fruits not severed at the end of the usufruct belong to the naked owner.

Art. 556. The usufructuary acquires the ownership of civil fruits accruing during the existence of the usufruct.

Civil fruits accrue day by day and the usufructuary is entitled to them regardless of when they are received.

Art. 557. The usufructuary takes the things in the state in which they are at the commencement of the usufruct.

Art. 558. The usufructuary may make improvements and alterations on the property subject to the usufruct at his cost and with the written consent of the naked owner. If the naked owner fails or refuses to give his consent, the usufructuary may, after notice to the naked owner and with the participaciones en otras personas jurídicas, salvo disposición en contrario. [Sección 1, ley n.º 881 de 2010, vigente desde el 2 de julio de 2010].

Art. 554. El derecho del usufructuario a los frutos comienza con la constitución del usufructo.

Art. 555. El usufructuario adquiere la propiedad de los frutos naturales extraídos durante la existencia del usufructo. Los frutos naturales no extraídos al fin del usufructo corresponden al nudo propietario.

Art. 556. El usufructuario adquiere la propiedad de los frutos civiles devengados durante la existencia del usufructo. Los frutos civiles se devengan diariamente, y el usufructuario tiene derecho a ellos independientemente de cuándo se perciban.

Art. 557. El usufructuario toma las cosas en el estado en que se encuentren al inicio del usufructo.

Art. 558. El usufructuario puede hacer mejoras y modificaciones en el bien sujeto a usufructo a su propio costo y con el consentimiento por escrito del nudo propietario. Si el nudo propietario omite prestar su consentimiento o se niega a hacerlo, el usufructuario puede,
approval of the court, make at his cost those improvements and alterations that a prudent administrator would make. [Acts 2010, No. 881, §1, eff. July 2, 2010.]

Art. 559. The right of usufruct extends to the accessories of the thing at the commencement of the usufruct.

Art. 560. The usufructuary may cut trees growing on the land of which he has the usufruct and take stones, sand, and other materials from it, but only for his use or for the improvement or cultivation of the land.

Art. 561. The rights of the usufructuary and of the naked owner in mines and quarries are governed by the Mineral Code.

Art. 562. When the usufruct includes timberlands, the usufructuary is bound to manage them as a prudent administrator. The proceeds of timber operations that are derived from proper management of timberlands belong to the usufructuary.

Art. 563. The usufruct extends to the increase to the land caused by alluvion or dereliction.

después de notificar al nudo propietario y con la venia del juez, hacer a su propio costo las mejoras y modificaciones que haría un administrador prudente. [Sección 1, ley n.° 881 de 2010, vigente desde el 2 de julio de 2010].

Art. 559. El derecho de usufructo se extiende a los accesorios de la cosa al inicio del usufructo.

Art. 560. El usufructuario puede cortar los árboles que crezcan en la tierra sobre la que tiene el usufructo y puede tomar piedras, arena y otros materiales de ella, pero solo para su uso o para mejora o cultivar de la tierra.

Art. 561. Los derechos del usufructuario y del nudo propietario sobre las minas y canteras se rigen por el Código de Minería.

Art. 562. Si el usufructo incluye bosques maderables, el usufructuario está obligado a administrarlos como administrador prudente. Los fondos derivados de la actividad maderera que sean consecuencia de la correcta administración de los bosques maderables corresponden al usufructuario.

Art. 563. El usufructo se extiende al acrecentamiento de tierra causado por aluvión o terreno descubierto.
Art. 564. The usufructuary has no right to the enjoyment of a treasure found in the property of which he has the usufruct. If the usufructuary has found the treasure, he is entitled to keep one-half of it as finder.

Art. 565. The usufructuary has a right to the enjoyment of predial servitudes due to the estate of which he has the usufruct. When the estate is enclosed within other lands belonging to the grantor of the usufruct, the usufructuary is entitled to a gratuitous right of passage.

Art. 566. The usufructuary may institute against the naked owner or third persons all actions that are necessary to insure the possession, enjoyment, and preservation of his right.

Art. 567. The usufructuary may lease, alienate, or encumber his right. All such contracts cease of right at the end of the usufruct.

If the usufructuary leases, alienates, or encumbers his right, he is responsible to the naked owner for the abuse that the person with whom he has contracted makes of the property. [Acts 2010, No. 881, §1, eff. July 2, 2010.]

Art. 564. El usufructuario no tiene derecho al goce del tesoro encontrado en el inmueble sobre el que tiene usufructo. Si el usufructuario es quien encuentra el tesoro, tiene derecho a conservar la mitad en calidad de descubridor.

Art. 565. El usufructuario tiene derecho al goce de las servidumbres reales de las que se beneficia el inmueble sobre el que recae el usufructo. Cuando el inmueble está encerrado entre otros inmuebles pertenecientes al otorgante del usufructo, el usufructuario tiene derecho de paso gratuito.

Art. 566. El usufructuario puede iniciar todas las acciones que sean necesarias contra el nudo propietario o terceros para garantizar la posesión, el goce y la conservación de su derecho.

Art. 567. El usufructuario puede arrendar, enajenar o gravar su derecho. Los contratos celebrados a esos efectos quedan sin efecto de pleno derecho cuando se extingue el usufructo.

Si el usufructuario arrienda, enajena o grava su derecho, es responsable frente al nudo propietario por el abuso que haga sobre el bien la persona con la que contrató. [Sección 1, ley n.º 881 de 2010, vigente desde el 2 de julio de 2010].
Art. 568. The usufructuary may not dispose of nonconsumable things unless the right to do so has been expressly granted to him. Nevertheless, he may dispose of corporeal movables that are gradually and substantially impaired by use, wear, or decay, such as equipment, appliances, and vehicles, provided that he acts as a prudent administrator.

The right to dispose of a nonconsumable thing includes the rights to lease, alienate, and encumber the thing. It does not include the right to alienate by donation inter vivos, unless that right is expressly granted. [Acts 1986, No. 203, §1; Acts 2010, No. 881, §1, eff. July 2, 2010.]

Art. 568.1 If a thing subject to the usufruct is donated inter vivos by the usufructuary, he is obligated to pay to the naked owner at the termination of the usufruct the value of the thing as of the time of the donation. If a thing subject to the usufruct is otherwise alienated by the usufructuary, the usufruct attaches to any money or other property received by the usufructuary. The property received shall be classified as consumable or nonconsumable in accordance with the provisions of this Title, and the usufruct shall be governed by those provisions subject to the terms of the act establishing the original usufruct.
If, at the time of the alienation, the value of the property received by the usufructuary is less than the value of the thing alienated, the usufructuary is bound to pay the difference to the naked owner at the termination of the usufruct. [Acts 2010, No. 881, §1, eff. July 2, 2010.]

Art. 568.2 The right to dispose of a nonconsumable thing includes the right to lease the thing for a term that extends beyond the termination of the usufruct. If, at the termination of the usufruct, the thing remains subject to the lease, the usufructuary is accountable to the naked owner for any diminution in the value of the thing at that time attributable to the lease. [Acts 2010, No. 881, §1, eff. July 2, 2010.]

Art. 568.3 If, at the termination of the usufruct, the thing subject to the usufruct is burdened by an encumbrance established by the usufructuary to secure an obligation, the usufructuary is bound to remove the encumbrance. [Acts 2010, No. 881, §1, eff. July 2, 2010.]

Art. 569. If the usufructuary has not disposed of corporeal movables that are by their nature impaired by use, wear, or decay, he is bound to deliver them to the owner in the

Si, al momento de la enajenación, el valor de los bienes recibidos por el usufructuario fuera inferior al valor de la cosa enajenada, el usufructuario deberá pagar la diferencia al nudo propietario cuando finalice el usufructo. [Sec. 1, ley n.° 881 de 2010, vigente desde el 2 de julio de 2010].

Art. 568.2. El derecho a disponer de un bien no consumible incluye el derecho de arrendar la cosa por un plazo que exceda la extinción del usufructo. Si, a la extinción del usufructo, la cosa sigue sujeta a arrendamiento, el usufructuario será responsable frente al nudo propietario por cualquier disminución en el valor de la cosa en ese momento atribuible al arrendamiento. [Sec. 1, ley n.° 881 de 2010, vigente desde el 2 de julio de 2010].

Art. 568.3. Si, a la extinción del usufructo, la cosa objeto del usufructo está afectada por un gravamen creado por el usufructuario para garantizar una obligación, el usufructuario estará obligado a quitar el gravamen. [Sec. 1, ley n.° 881 de 2010, vigente desde el 2 de julio de 2010].

Art. 569. Si el usufructuario no dispuso de los bienes muebles corporales que por su propia naturaleza se ven afectados por el uso, el desgaste o el deterioro, deberá entregarlos al dueño en el
state in which they may be at the end of the usufruct.

The usufructuary is relieved of this obligation if the things are entirely worn out by normal use, wear, or decay. [Acts 2010, No. 881, §1, eff. July 2, 2010.]

SECTION 3. OBLIGATIONS OF THE USUFRUCTUARY

Art. 570. The usufructuary shall cause an inventory to be made of the property subject to the usufruct. In the absence of an inventory the naked owner may prevent the usufructuary’s entry into possession of the property.

The inventory shall be made in accordance with the rules established in Articles 3131 through 3137 of the Code of Civil Procedure.

Art. 571. The usufructuary shall give security that he will use the property subject to the usufruct as a prudent administrator and that he will faithfully fulfill all the obligations imposed on him by law or by the act that established the usufruct unless security is dispensed with. If security is required, the court may order that it be provided in accordance with law. [Acts 2004, No. 158, §1.]

Art. 570. El usufructuario debe procurar que se haga inventario de los bienes sujetos al usufructo. A falta de inventario, el nudo propietario podrá evitar que el usufructuario tome posesión del bien.

El inventario debe realizarse de acuerdo con las reglas de los artículos 3131 a 3137 del Código Procesal Civil.

Art. 571. A menos que se dispense la garantía, el usufructuario debe garantizar que utilizará los bienes objeto del usufructo como administrador prudente y que cumplirá fielmente todas las obligaciones que le imponga la ley o el acto por el que se constituyó el usufructo. Si se exige garantía, el juez puede ordenar que se preste conforme a la ley. [Sección 1, ley n.º 158 de 2004].
Art. 572. The security shall be in the amount of the total value of the property subject to the usufruct.

The court may increase or reduce the amount of the security, on proper showing, but the amount shall not be less than the value of the movables subject to the usufruct.

Art. 573. A. Security is dispensed with when any of the following occur:

1. A person has a legal usufruct under Civil Code Article 223 or 3252.

2. A surviving spouse has a legal usufruct under Civil Code Article 890 unless the naked owner is not a child of the usufructuary or if the naked owner is a child of the usufructuary and is also a forced heir of the decedent, the naked owner may obtain security but only to the extent of his legitime.

3. A parent has a legal usufruct under Civil Code Article 891 unless the naked owner is not a child of the usufructuary.

4. A surviving spouse has a legal usufruct under Civil Code Article 2434 unless the naked owner is a child of the decedent but not a child of the usufructuary.

B. A seller or donor of property under reservation of usufruct are not required to give security. [Acts

Art. 572. La garantía debe ser por el monto total del bien sujeto al usufructo.

El juez puede aumentar o reducir el monto de la garantía, siempre que el pedido respectivo esté debidamente fundado, pero el monto no podrá ser inferior al valor de los bienes muebles sujetos al usufructo.

Art. 573. A. Se dispensa la garantía si ocurre alguno de los siguientes supuestos:

1) una persona tiene el usufructo legal conforme al artículo 223 o 3252 del Código Civil;

2) el cónyuge superviviente tiene un usufructo legal conforme al artículo 890 del Código Civil, a menos que el nudo propietario no sea hijo del usufructuario o, si el nudo propietario es hijo del usufructuario y también es heredero forzoso del causante, el nudo propietario podrá obtener una garantía, pero solo en la medida de su legítima;

3) un progenitor tiene el usufructo legal conforme al artículo 891 del Código Civil, a menos que el nudo propietario no sea hijo del usufructuario;

4) el cónyuge sobreviviente tiene el usufructo legal conforme al artículo 2434 del Código Civil, a menos que el nudo propietario sea hijo del causante, pero no hijo del usufructuario.

B. No están obligados a prestar garantía el vendedor ni el donante de un bien con reserva de
Art. 574. A delay in giving security does not deprive the usufructuary of the fruits derived from the property since the commencement of the usufruct. [Acts 2010, No. 881, §1, eff. July 2, 2010.]

Art. 574. La demora en la prestación de la garantía no priva al usufructuario de los frutos derivados del bien desde el comienzo del usufructo. [Sección 1, ley n.º 881 de 2010, vigente desde el 2 de julio de 2010].

Art. 575. If the usufructuary does not give security, the court may order that the property be delivered to an administrator appointed in accordance with Articles 3111 through 3113 of the Code of Civil Procedure for administration on behalf of the usufructuary. The administration terminates if the usufructuary gives security. [Acts 2010, No. 881, §1, eff. July 2, 2010.]

Art. 575. Si el usufructuario no ofrece garantía, el juez puede ordenar que los bienes se entreguen a un administrador designado conforme a los artículos 3111 a 3113 del Código Procesal Civil para su administración en nombre del usufructuario. Cesa la administración si el usufructuario ofrece la garantía. [Sección 1, ley n.º 881 de 2010, vigente desde el 2 de julio de 2010].

Art. 576. The usufructuary is answerable for losses resulting from his fraud, default, or neglect.

Art. 576. El usufructuario responde por el deterioro derivado de su dolo, culpa o negligencia.

Art. 577. The usufructuary is responsible for ordinary maintenance and repairs for keeping the property subject to the usufruct in good order, whether the need for these repairs arises from accident or force majeure, the normal use of things, or his fault or neglect.

Art. 577. El usufructuario es responsable por el mantenimiento y las reparaciones ordinarias para mantener el bien objeto del usufructo en buenas condiciones, ya sea que la necesidad de las reparaciones surja de un accidente o por fuerza mayor, el uso normal de las cosas, o su culpa o negligencia.

The naked owner is responsible for extraordinary repairs, unless they have become necessary as a result of...
result of the usufructuary's fault or neglect in which case the usufructuary is bound to make them at his cost. [Amended by Acts 1979, No. 157, §1; Acts 2010, No. 881, §1, eff. July 2, 2010.]

Art. 578. Extraordinary repairs are those for the reconstruction of the whole or of a substantial part of the property subject to the usufruct. All others are ordinary repairs.

Art. 579. During the existence of the usufruct, the naked owner may compel the usufructuary to make the repairs for which the usufructuary is responsible.

The usufructuary may not compel the naked owner to make the extraordinary repairs for which the owner is responsible. If the naked owner refuses to make them, the usufructuary may do so, and he shall be reimbursed without interest by the naked owner at the end of the usufruct.

Art. 580. If, after the usufruct commences and before the usufructuary is put in possession, the naked owner incurs necessary expenses or makes repairs for which the usufructuary is responsible, the naked owner has the right to claim the cost from the usufructuary.

Art. 578. Son extraordinarias las reparaciones necesarias para la reconstrucción de la totalidad o de una parte sustancial del bien objeto del usufructo. Todas las demás son reparaciones ordinarias.

Art. 579. Durante la vigencia del usufructo, el nudo propietario puede exigir al usufructuario que haga las reparaciones que están a cargo del usufructuario.

El usufructuario no puede exigir al nudo propietario que haga las reparaciones extraordinarias que están a cargo del nudo propietario. Si el nudo propietario se niega a hacerlas, el usufructuario puede hacerlas, y el nudo propietario le deberá reintegrar la suma correspondiente sin intereses al finalizar el usufructo.

Art. 580. Si, después de iniciado el usufructo y antes de que el usufructuario esté en posesión, el nudo propietario incurre en gastos o hace reparaciones que están a cargo del usufructuario, el nudo propietario tiene derecho a reclamar el costo al usufructuario.
Art. 581. The usufructuary is answerable for all expenses that become necessary for the preservation and use of the property after the commencement of the usufruct. [Acts 2010, No. 881, §1, eff. July 2, 2010.]

Art. 581. El usufructuario es responsable por todos los gastos necesarios para la conservación y el uso del bien que surjan después del inicio del usufructo. [Sección 1, ley n.° 881 de 2010, vigente desde el 2 de julio de 2010].

Art. 582. The usufructuary may release himself from the obligation to make repairs by abandoning the usufruct or, with the approval of the court, a portion thereof, even if the owner has instituted suit to compel him to make repairs or bear the expenses of them, and even if the usufructuary has been cast in judgment.

He may not release himself from the charges of the enjoyment during the period of his possession, nor from accountability for the damages that he, or persons for whom he is responsible, may have caused.

Art. 582. El usufructuario puede liberarse de la obligación de hacer reparaciones abandonando el usufructo o, con la venia del juez, una parte de él, aun si el nudo propietario lo demandó para exigirle que haga las reparaciones o que cubra su costo, y aun si se condenó al usufructuario.

No puede liberarse de los cargos del goce durante su período de posesión, ni de la responsabilidad por los daños que hayan causado él o personas por las que él responde.

Art. 583. Neither the usufructuary nor the naked owner is bound to restore property that has been totally destroyed through accident, force majeure, or age.

If the naked owner elects to restore the property or to make extraordinary repairs, he shall do so within a reasonable time and in the manner least inconvenient and...
Art. 584. The usufructuary is bound to pay the periodic charges, such as property taxes, that may be imposed, during his enjoyment of the usufruct. [Acts 2010, No. 881, §1, eff. July 2, 2010.]

Art. 585. The usufructuary is bound to pay the extraordinary charges that may be imposed, during the existence of the usufruct, on the property subject to it. If these charges are of a nature to augment the value of the property subject to the usufruct, the naked owner shall reimburse the usufructuary at the end of the usufruct only for the capital expended.

Art. 586. When the usufruct is established inter vivos, the usufructuary is not liable for debts of the grantor, but if the debt is secured by an encumbrance of the thing subject to the usufruct, the thing may be sold for the payment of the debt. [Acts 2010, No. 881, §1, eff. July 2, 2010.]

Art. 587. When the usufruct is established mortis causa, the usufructuary is not liable for estate
debts, but the property subject to the usufruct may be sold for the payment of estate debts, in accordance with the rules provided for the payment of the debt of an estate in Book III of this Code. [Acts 2010, No. 881, §1, eff. July 2, 2010.]

Art. 588. When property subject to a usufruct established inter vivos is encumbered to secure a debt before the commencement of the usufruct, the usufructuary may advance the funds needed to discharge the indebtedness. If he does so, the naked owner shall reimburse the usufructuary, without interest, at the termination of the usufruct, for the principal of the debt the usufructuary has discharged, and for any interest the usufructuary has paid that had accrued on the debt before the commencement of the usufruct. [Acts 2010, No. 881, §1, eff. July 2, 2010.]

Art. 589. If the usufructuary of a usufruct established mortis causa advances funds to discharge an estate debt charged to the property subject to the usufruct, the naked owner shall reimburse the usufructuary, without interest, at the termination of the usufruct, but only to the extent of the principal of the debt he has discharged and for any interest he has paid that had accrued on the debt before the commencement of the usufruct. [Acts 2010, No. 881, §1, eff. July 2, 2010.]

por las deudas de la sucesión, pero el bien objeto del usufructo puede venderse para el pago de las deudas de la sucesión, de acuerdo con las reglas establecidas para el pago de las deudas sucesorias en el Libro III del presente Código. [Sección 1, ley n.º 881 de 2010, vigente desde el 2 de julio de 2010].

Art. 588. Cuando el bien objeto de un usufructo constituido entre vivos es gravado para garantizar una deuda antes del inicio del usufructo, el usufructuario puede adelantar los fondos necesarios para pagar la deuda. Si así lo hace, el nudo propietario debe reintegrar al usufructuario, sin intereses, a la finalización del usufructo, el capital de la deuda que saldó el usufructuario y el importe en concepto de intereses abonado por el usufructuario que se hubiera devengado sobre la deuda antes del inicio del usufructo. [Sección 1, ley n.º 881 de 2010, vigente desde el 2 de julio de 2010].

Art. 589. Si el usufructuario de un usufructo constituido por causa de muerte adelanta fondos para pagar una deuda de la sucesión que pesa sobre el bien objeto del usufructo, el nudo propietario debe reintegrar su importe al usufructuario, sin intereses, a la finalización del usufructo, pero solo en la medida del capital de la deuda que haya abonado y los intereses que haya pagado y que se
commencement of the usufruct. [Acts 2010, No. 881, §1, eff. July 2, 2010.]

Art. 590. If the usufructuary fails or refuses to advance the funds needed to discharge a debt secured by property subject to the usufruct, or an estate debt that is charged to the property subject to the usufruct, the naked owner may advance the funds needed. If he does so, the naked owner may demand that the usufructuary pay him interest during the period of the usufruct. If the naked owner does not advance the funds, he may demand that all or part of the property be sold as needed to discharge the debt. [Acts 2010, No. 881, §1, eff. July 2, 2010.]

Art. 591. If property subject to the usufruct is sold to pay an estate debt, or a debt of the grantor, the usufruct attaches to any proceeds of the sale of the property that remain after payment of the debt. [Acts 2010, No. 881, §1, eff. July 2, 2010.]

Art. 592. If there is more than one usufructuary of the same property, each contributes to the payment of estate debts that are charged to the property in

hayan devengado sobre la deuda antes del inicio del usufructo. [Sección 1, ley n.° 881 de 2010, vigente desde el 2 de julio de 2010].

Art. 590. Si el usufructuario omite o se niega a adelantar los fondos necesarios para pagar la deuda garantizada por el bien objeto del usufructo, o una deuda de la sucesión que pesa sobre el bien objeto del usufructo, el nudo propietario puede adelantar los fondos necesarios. Si lo hace, el nudo propietario puede exigir al usufructuario que le pague intereses durante el periodo del usufructo. Si el nudo propietario no adelanta los fondos, puede exigir que la totalidad o parte del bien se venda según sea necesario para pagar la deuda. [Sección 1, ley n.° 881 de 2010, vigente desde el 2 de julio de 2010].

Art. 591. Si los bienes objeto del usufructo se venden para pagar deudas de la sucesión o una deuda de quien constituyó el usufructo, el usufructo continúa sobre los fondos resultantes de la venta del bien que queden después de pago de la deuda. [Sección 1, ley n.° 881 de 2010, vigente desde el 2 de julio de 2010].

Art. 592. En caso de que haya más de un usufructuario del mismo bien, cada uno contribuye al pago de las deudas de la sucesión que pesen sobre el bien en proporción
proportion to his enjoyment of the property. If one or more of the usufructuaries fails to advance his share, those of them who advance the funds shall have the right to recover the funds they advance from those who do not advance their shares. [Acts 2010, No. 881, §1, eff. July 2, 2010.]

Art. 593. Unless there is a governing testamentary disposition, the legacy of an annuity that is chargeable to property subject to a usufruct is payable first from the fruits and products of the property subject to the usufruct and then from the property itself. [Acts 1990, No. 706, §1; Acts 2010, No. 881, §1, eff. July 2, 2010.]

Art. 594. Court costs in actions concerning the property subject to the usufruct are taxed in accordance with the rules of the Code of Civil Procedure. Expenses of litigation other than court costs are apportioned between usufructuaries and naked owners in accordance with the following Articles. [Acts 2010, No. 881, §1, eff. July 2, 2010.]

Art. 595. Parents who have a legal usufruct of the property of their children are bound for expenses of litigation concerning that property, in the same manner as if they were owners of it; but reimbursement may be ordered by the court at the termination of the

a su uso del bien. En caso de que uno o más usufructuarios no adelanten su parte, los que adelanten los fondos tendrán el derecho de recuperarlos de los que no hayan contribuido. [Sección 1, ley n.° 881 de 2010, vigente desde el 2 de julio de 2010.]

Art. 593. A menos que rija una disposición testamentaria, el legado de la renta vitalicia que afecta al bien objeto del usufructo se debe pagar primero con los frutos y productos del bien objeto del usufructo y luego con el bien mismo. [Sección 1, ley n.° 706 de 1990; sección 1, ley n.° 881 de 2010, vigente desde el 2 de julio de 2010.]

Art. 594. Las costas judiciales en los procesos vinculados con el bien objeto del usufructo se regulan de acuerdo con las reglas del Código Procesal Civil. Los gastos de litigación que no sean las costas judiciales se distribuyen entre usufructuarios y nudos propietarios conforme a los siguientes artículos. [Sección 1, ley n.° 881 de 2010, vigente desde el 2 de julio de 2010.]

Art. 595. Los padres que tienen el usufructo legal sobre los bienes de sus hijos están obligados por los gastos de litigación en relación con los bienes de la misma manera que si fueran dueños. Sin embargo, el juez puede ordenar que, finalizado el usufructo, se reintegren los
usufruct in cases in which inequity might otherwise result.

Art. 596. Conventional usufructuaries are bound for expenses of litigation with third persons concerning the enjoyment of the property. Expenses of litigation with third persons concerning both the enjoyment and the ownership are divided equitably between the usufructuary and the naked owner. Expenses of litigation between the usufructuary and the naked owner are borne by the person who has incurred them.

Art. 597. The usufructuary who loses a predial servitude by nonuse or who permits a servitude to be acquired on the property by prescription is responsible to the naked owner.

Art. 598. If, during the existence of the usufruct, a third person encroaches on the immovable property or violates in any other way the rights of the naked owner, the usufructuary must inform the naked owner. When he fails to do so, he shall be answerable for the damages that the naked owner may suffer.

Art. 599. When the usufruct includes a herd of animals, the usufructuary is bound to use it as a prudent administrator and, from the increase of the herd, replace animals that die. If the entire herd perishes without the fault of the
usufructuary, the loss is borne by the naked owner.

Art. 600. The usufructuary may dispose of individual animals of the herd, subject to the obligation to deliver to the naked owner at the end of the usufruct the value that the animals had at the time of disposition.

The usufructuary may also dispose of the herd or of a substantial part thereof, provided that he acts as a prudent administrator. In such a case, the proceeds are subject to the provisions of Article 618.

Art. 601. The usufructuary may remove all improvements he has made, subject to the obligation of restoring the property to its former condition. He may not claim reimbursement from the owner for improvements that he does not remove or that cannot be removed. [Acts 2010, No. 881, §1, eff. July 2, 2010.]

Art. 602. The usufructuary may set off against damages due to the owner for the destruction or deterioration of the property subject to the usufruct the value of improvements that cannot be removed, provided they were made in accordance with Article 558.

manada completa sin culpa del usufructuario, la pérdida es soportada por el nudo propietario.

Art. 600. El usufructuario puede disponer de animales determinados de la manada, con sujeción a la obligación de entregar al nudo propietario a la finalización del usufructo el valor que tenían los animales al momento de la disposición.

El usufructuario también puede disponer de la manada o de una parte sustancial de ella, siempre y cuando actúe como administrador prudente. En tal caso, el producido está sujeto a las disposiciones del artículo 618.

Art. 601. El usufructuario puede quitar todas las mejoras que haya hecho, con sujeción a la obligación de restituir el bien a su estado anterior. No puede reclamar al propietario el reintegro por las mejoras que no quite o que no puedan quitarse. [Sección 1, ley n.º 881 de 2010, vigente desde el 2 de julio de 2010].

Art. 602. El usufructuario puede compensar el valor de las mejoras que no puedan quitarse con la indemnización debida al propietario por la destrucción o el deterioro del bien objeto del usufructo, siempre que las mejoras hayan sido realizadas conforme al artículo 558.
SECTION 4. RIGHTS AND OBLIGATIONS OF THE NAKED OWNER

Art. 603. The naked owner may dispose of the naked ownership, but he cannot thereby affect the usufruct [Acts 2010, No. 881, §1, eff. July 2, 2010.]

Art. 604. The naked owner may establish real rights on the property subject to the usufruct, provided that they may be exercised without impairing the usufructuary’s rights. [Acts 2010, No. 881, §1, eff. July 2, 2010.]

Art. 605. The naked owner must not interfere with the rights of the usufructuary.

Art. 606. The naked owner may not make alterations or improvements on the property subject to the usufruct.

SECTION 5. TERMINATION OF USUFRUCT

Art. 607. The right of usufruct expires upon the death of the usufructuary.

Art. 608. A usufruct established in favor of a juridical person terminates if the juridical person is dissolved or liquidated, but not if the juridical person is converted, merged or consolidated into a
successor juridical person. In any event, a usufruct in favor of a juridical person shall terminate upon the lapse of thirty years from the date of the commencement of the usufruct. This Article shall not apply to a juridical person in its capacity as the trustee of a trust. [Acts 2010, No. 881, §1, eff. July 2, 2010.]

Art. 609. A legacy of revenues from specified property is a kind of usufruct and terminates upon death of the legatee unless a shorter period has been expressly stipulated.

Art. 610. A usufruct established for a term or subject to a condition terminates upon the expiration of the term or the happening of the condition.

Art. 611. When the usufructuary is charged to restore or transfer the usufruct to another person, his right terminates when the time for restitution or delivery arrives.

Art. 612. A usufruct granted until a third person reaches a certain age is a usufruct for a term. If the third person dies, the usufruct continues until the date the deceased would have reached the designated age.

Art. 613. The usufruct of nonconsumables terminates by the permanent and total loss, extinction, or destruction through accident.
accident, force majeure or decay of the property subject to the usufruct. [Acts 2010, No. 881, §1, eff. July 2, 2010.]

Art. 614. When any loss, extinction, or destruction of property subject to usufruct is attributable to the fault of a third person, the usufruct does not terminate but attaches to any claim for damages and the proceeds therefrom.

Art. 615. When property subject to usufruct changes form without an act of the usufructuary, the usufruct does not terminate even though the property may no longer serve the use for which it was originally destined.

When property subject to usufruct is converted into money or other property without an act of the usufructuary, as in a case of expropriation of an immovable or liquidation of a corporation, the usufruct terminates as to the property converted and attaches to the money or other property received by the usufructuary. [Acts 2010, No. 881, §1, eff. July 2, 2010.]

Art. 616. When property subject to usufruct is sold or exchanged, whether in an action for partition or by agreement between the usufructuary and the naked owner or by a usufructuary who has the power to dispose of nonconsumable property, the usufruct cesa.

Art. 614. Cuando la pérdida, extinción o destrucción del bien objeto del usufructo es atribuible a la culpa de un tercero, el usufructo no se extingue, sino que se incorpora al reclamo y se extiende a la indemnización por daños y perjuicios.

Art. 615. Cuando el bien objeto del usufructo cambia de forma sin acción del usufructuario, no se extingue el usufructo aunque el bien ya no sirva para el uso para el que fue destinado originalmente.

Art. 616. Cuando el bien objeto del usufructo se transforma en dinero u otro tipo de bien sin acción del usufructuario, como en el caso de la expropiación de un inmueble o la liquidación de una sociedad, el usufructo se extingue respecto del bien transformado y se extiende al dinero u otro bien recibido por el usufructuario. [Sec. 1, ley n.º 881 de 2010, vigente desde el 2 de julio de 2010].
usufruct terminates as to the nonconsumable property sold or exchanged, but as provided in Article 568.1, the usufruct attaches to the money or other property received by the usufructuary, unless the parties agree otherwise. Any tax or expense incurred as the result of the sale or exchange of property subject to usufruct shall be paid from the proceeds of the sale or exchange, and shall be deducted from the amount due by the usufructuary to the naked owner at the termination of the usufruct. [Acts 1983, No. 525, §1; Acts 2010, No. 881, §1, eff. July 2, 2010.]

Art. 617. When proceeds of insurance are due on account of loss, extinction, or destruction of property subject to usufruct, the usufruct attaches to the proceeds. If the usufructuary or the naked owner has separately insured his interest only, the proceeds belong to the insured party.

Art. 618. In cases governed by Articles 614, 615, 616, and the first sentence of Article 617, the naked owner may demand, within one year from receipt of the proceeds by the usufructuary that the usufructuary give security for the proceeds. If such a demand is made, and the parties cannot agree, the nature of the security shall be determined by the court. This Article does not apply to corporeal

Art. 617. Cuando existan ingresos derivados de seguros en razón de la pérdida, extinción o destrucción del bien objeto del usufructo, el usufructo se extiende a esos ingresos. Si el usufructuario o el nudo propietario aseguraron solo su propio derecho, los fondos corresponden al asegurado.

Art. 618. En los casos comprendidos en los artículos 614, 615, 616 y la primera oración del artículo 617, el nudo propietario puede exigir, dentro de un año desde la recepción de los fondos por el usufructuario, que este ofrezca una garantía por ellos. Si se hace tal pedido y las partes no pueden ponerse de acuerdo, el juez decidirá qué garantía debe ofrecerse. Este artículo no se
movables referred to in the second sentence of Article 568, or to property disposed of by the usufructuary pursuant to the power to dispose of nonconsumables if the grantor of the usufruct has dispensed with the security. [Acts 2010, No. 881, §1, eff. July 2, 2010.]

Art. 619. A usufruct by donation mortis causa is not considered revoked merely because the testator has made changes in the property after the date of his testament. The effect of the legacy is determined by application of the rules contained in the title: Of donations inter vivos and mortis causa. [Acts 2010, No. 881, §1, eff. July 2, 2010.]

Art. 620. Usufruct terminates by the enforcement of an encumbrance established upon the property prior to the creation of the usufruct to secure a debt. The usufructuary may have an action against the grantor of the usufruct or against the naked owner under the provisions established in Section 3 of this Chapter. The judicial sale of the usufruct by creditors of the usufructuary deprives the usufructuary of his

6. N. de T.: En el 2008 se modificó este título, pero no se actualizó la referencia en el artículo. La traducción en español incluye el título que corresponde en la actualidad.
Art. 621. A usufruct terminates by the prescription of nonuse if neither the usufructuary nor any other person acting in his name exercises the right during a period of ten years. This applies whether the usufruct has been constituted on an entire estate or on a divided or undivided part of an estate.

Art. 622. A usufruct terminates by confusion when the usufruct and the naked ownership are united in the same person. The usufruct does not terminate if the title by which the usufruct and the naked ownership were united is annulled for some previously existing defect or some vice inherent in the act.

Art. 623. The usufruct may be terminated by the naked owner if the usufructuary commits waste, alienates things without authority, neglects to make ordinary repairs, or abuses his enjoyment in any other manner. [Acts 2010, No. 881, §1, eff. July 2, 2010.]

Art. 624. In the cases covered by the preceding Article, the court may decree termination of the usufruct or decree that the property

Enjoyment of the property but does not terminate the usufruct. [Acts 2010, No. 881, §1, eff. July 2, 2010.]

Art. 621. El usufructo se extingue en razón de la falta de uso si ni el usufructuario ni ninguna otra persona que actúe en su nombre ejercen el derecho correspondiente durante un periodo de diez años, independientemente de que el usufructo se haya constituido sobre la totalidad de un fundo o sobre una parte divisa o indivisa de él.

Art. 622. El usufructo se extingue por confusión cuando el usufructo y la nuda propiedad recaen sobre la misma persona. No se extingue si el título por el que se unieron el usufructo y la nuda propiedad se anula por un defecto ya existente o por un vicio inherente al acto.

Art. 623. El nudo propietario puede ponerle fin al usufructo si el usufructuario genera un deterioro, enajena cosas sin autorización, omite hacer las reparaciones ordinarias o abusa de su derecho de uso y goce de algún otro modo. [Sec. 1, ley n.º 881 de 2010, vigente desde el 2 de julio de 2010].

Art. 624. En los supuestos cubiertos por el artículo anterior, el juez puede ordenar la extinción del usufructo o que el bien sea
be delivered to the naked owner on
the condition that he shall pay to
the usufructuary a reasonable
annuity until the end of the
usufruct. The amount of the
annuity shall be based on the value
of the usufruct.

The usufructuary may prevent
termination of the usufruct or
delivery of the property to the
naked owner by giving security to
insure that he will take appropriate
corrective measures within a
period fixed by the court. [Acts
2010, No. 881, §1, eff. July 2,
2010.]

Art. 625. A creditor of the
usufructuary may intervene and
may prevent termination of the
usufruct and delivery of the
property to the naked owner by offering to repair the damages
caused by the usufructuary and by
giving security for the future. [Acts
2010, No. 881, §1, eff. July 2,
2010.]

Art. 626. A usufruct terminates
by an express written renunciation.

A creditor of the usufructuary
may cause to be annulled a
renunciation made to his prejudice.

Art. 627. Upon termination of
the usufruct, the usufructuary or
his heirs have the right to retain
possession of the property until
reimbursed for all expenses and
advances for which they have
entregado al nudo propietario con
la condición de que pague al
usufructuario una renta por un
monto razonable hasta la
finalización del usufructo. El
monto de la renta se basa en el
valor del usufructo.

El usufructuario puede evitar la
extinción del usufructo o la entrega
de la propiedad al nudo
propietario ofreciendo garantía
para asegurar que tomará las
medidas correctivas correspondientes dentro del
período fijado por el juez. [Sec. 1,
ley n.º 881 de 2010, vigente desde el 2 de julio de 2010].

Art. 625. Los acreedores del
usufructuario pueden intervenir y
evitar la extinción del usufructo y
la entrega del bien al nudo
propietario ofreciendo reparar los
daños causados por el
usufructuario y prestando caución
para el futuro. [Sec. 1, ley n.º 881
de 2010, vigente desde el 2 de julio
de 2010].

Art. 626. El usufructo se
extingue por renuncia expresa por
escrito.

El acreedor del usufructuario
puede solicitar la anulación de la
renuncia realizada en su perjuicio.

Art. 627. Extinguido el
usufructo, el usufructuario o sus
herederos tienen el derecho de
conservar la posesión del bien
hasta que les reintegren todos los
gastos y adelantos que tengan
recourse against the owner or his heirs.

Art. 628. Upon termination of a usufruct of nonconsumables for a cause other than total and permanent destruction of the property, full ownership is restored. The usufructuary or his heirs are bound to deliver the property to the owner with its accessories and fruits produced since the termination of the usufruct.

If property has been lost or deteriorated through the fault of the usufructuary, the owner is entitled to the value the property otherwise would have had at the termination of the usufruct.

Art. 629. At the termination of a usufruct of consumables, the usufructuary is bound to deliver to the owner things of the same quantity and quality or the value they had at the commencement of the usufruct.

CHAPTER 3. HABITATION

Art. 630. Habitation is the nontransferable real right of a natural person to dwell in the house of another.

Art. 631. The right of habitation is established and extinguished in the same manner as the right of usufruct.
Art. 632. The right of habitation is regulated by the title that establishes it. If the title is silent as to the extent of habitation, the right is regulated in accordance with Articles 633 through 635.

Art. 633. A person having the right of habitation may reside in the house with his family, although not married at the time the right was granted to him.

Art. 634. A person having the right of habitation is entitled to the exclusive use of the house or of the part assigned to him, and, provided that he resides therein, he may receive friends, guests, and boarders.

Art. 635. A person having the right of habitation is bound to use the property as a prudent administrator and at the expiration of his right to deliver it to the owner in the condition in which he received it, ordinary wear and tear excepted.

Art. 636. When the person having the right of habitation occupies the entire house, he is liable for ordinary repairs, for the payment of taxes, and for other annual charges in the same manner as the usufructuary.

When the person having the right of habitation occupies only a part of the house, he is liable for ordinary repairs, the payment of taxes, and other annual charges in proportion to his use.
ordinary repairs to the part he occupies and for all other expenses and charges in proportion to his enjoyment.

Art. 637. The right of habitation is neither transferable nor heritable. It may not be alienated, let, or encumbered.

Art. 638. The right of habitation terminates at the death of the person having it unless a shorter period is stipulated.

CHAPTER 4. RIGHTS OF USE

Art. 639. The personal servitude of right of use confers in favor of a person a specified use of an estate less than full enjoyment.

Art. 640. The right of use may confer only an advantage that may be established by a predial servitude.

Art. 641. A right of use may be established in favor of a natural person or a legal entity.

Art. 642. A right of use includes the rights contemplated or necessary to enjoyment at the time of its creation as well as rights that may later become necessary, provided that a greater burden is
not imposed on the property unless otherwise stipulated in the title.

Art. 643. The right of use is transferable unless prohibited by law or contract.

Art. 644. A right of use is not extinguished at the death of the natural person or at the dissolution of any other entity having the right unless the contrary is provided by law or contract.

Art. 645. A right of use is regulated by application of the rules governing usufruct and predial servitudes to the extent that their application is compatible with the rules governing a right of use servitude.

TITLE IV. PREDIAL SERVITUDES

CHAPTER 1. GENERAL PRINCIPLES

[Acts 1977, No. 514, §1.]

Art. 646. A predial servitude is a charge on a servient estate for the benefit of a dominant estate.
The two estates must belong to different owners.

Art. 647. There must be a benefit to the dominant estate. The benefit need not exist at the time the servitude is created; a possible convenience or a future advantage suffices to support a servitude.
There is no predial servitude if the charge imposed cannot be reasonably expected to benefit the dominant estate.

Art. 648. Neither contiguity nor proximity of the two estates is necessary for the existence of a predial servitude. It suffices that the two estates be so located as to allow one to derive some benefit from the charge on the other.

Art. 649. A predial servitude is an incorporeal immovable.

Art. 650. A. A predial servitude is inseparable from the dominant estate and passes with it. The right of using the servitude cannot be alienated, leased, or encumbered separately from the dominant estate.


Art. 651. The owner of the servient estate is not required to do anything. His obligation is to abstain from doing something on his estate or to permit something to be done on it. He may be required by convention or by law to keep his estate in suitable condition for the exercise of the servitude due to the dominant estate. A servitude
may not impose upon the owner of the servient estate or his successors the obligation to pay a fee or other charge on the occasion of an alienation, lease, or encumbrance of the servient estate. [Acts 2010, No. 938, §2, eff. Jul. 2, 2010.]

Art. 652. A predial servitude is indivisible. An estate cannot have upon another estate part of a right of way, or of view, or of any other servitude, nor can an estate be charged with a part of a servitude.

The use of a servitude may be limited to certain days or hours; when limited, it is still an entire right. A servitude is due to the whole of the dominant estate and to all parts of it; if this estate is divided, every acquirer of a part has the right of using the servitude in its entirety.

Art. 653. The advantages resulting from a predial servitude may be divided, if they are susceptible of division.

Art. 654. Predial servitudes may be natural, legal, and voluntary or conventional. Natural servitudes arise from the natural situation of estates; legal servitudes are imposed by law; and voluntary or servidumbre no puede imponer al dueño del predio sirviente ni a sus sucesores la obligación de pagar cargo alguno en ocasión de la enajenación, el arrendamiento o el gravamen del predio sirviente. [Sec. 2, ley n.º 938 de 2010, vigente desde el 2 de julio de 2010].

Art. 652. La servidumbre real es indivisible. Un predio no puede tener sobre otro una parte de un derecho de paso o de vista ni de ningún otro tipo de servidumbre, así como tampoco puede estar gravado con una parte de una servidumbre.

El uso de una servidumbre puede estar limitado a ciertos días u horarios; cuando lo esté, conserva de todos modos su naturaleza de derecho completo. La servidumbre corresponde a la totalidad del predio dominante y a todas sus partes; si el predio estuviera dividido, cada uno de los adquirentes de una parte tendrá el derecho de usar la servidumbre en su totalidad.

Art. 653. Si son susceptibles de división, las ventajas resultantes de la servidumbre real pueden dividirse.

Art. 654. La servidumbre real puede ser natural, legal, y voluntaria o convencional. La servidumbre natural surge de la situación natural de los predios. La servidumbre legal es impuesta por...
conventional servitudes are established by juridical act, prescription, or destination of the owner.

CHAPTER 2. NATURAL SERVITUDES

Art. 655. An estate situated below is bound to receive the surface waters that flow naturally from an estate situated above unless an act of man has created the flow.

Art. 656. The owner of the servient estate may not do anything to prevent the flow of the water. The owner of the dominant estate may not do anything to render the servitude more burdensome.

Art. 657. The owner of an estate bordering on running water may use it as it runs for the purpose of watering his estate or for other purposes.

Art. 658. The owner of an estate through which water runs, whether it originates there or passes from lands above, may make use of it while it runs over his lands. He cannot stop it or give it another direction and is bound to return it to its ordinary channel where it leaves his estate.

la ley. La servidumbre voluntaria o convencional es aquella creada por acto jurídico, prescripción o destino que le dé el dueño.

CAPÍTULO 2. DE LAS SERVIDUMBRES NATURALES

Art. 655. El predio situado más abajo recibirá el agua superficial que fluya naturalmente del predio situado más arriba a menos que la acción del hombre haya originado su curso.

Art. 656. El dueño del predio sirviente no debe hacer nada que evite el flujo del agua. El dueño del predio dominante no debe hacer nada que haga que la servidumbre sea más gravosa.

Art. 657. El dueño de un predio que linda con un curso de agua puede usarla como fluye para regar su predio o para otros fines.

Art. 658. El dueño de un predio por el que corre agua, ya sea que se origine allí o que pase desde tierras más altas, puede usarla en sus tierras mientras pase por ellas. No puede detenerla ni darle otra dirección y está obligado a devolvérsela a su curso habitual cuando abandona su predio.
CHAPTER 3. LEGAL SERVITUDES

SECTION 1. LIMITATIONS ON OWNERSHIP

Art. 659. Legal servitudes are limitations on ownership established by law for the benefit of the general public or for the benefit of particular persons.

Art. 660. The owner is bound to keep his buildings in repair so that neither their fall nor that of any part of their materials may cause damage to a neighbor or to a passerby. However, he is answerable for damages only upon a showing that he knew or, in the exercise of reasonable care, should have known of the vice or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Nothing in this Article shall preclude the court from the application of the doctrine of res ipsa loquitur in an appropriate case. [Acts 1996, 1st Ex. Sess., No. 1, §1, eff. April 16, 1996.]

Art. 661. When a building or other construction is in danger of falling a neighbor has a right of action to compel the owner to have it properly supported or demolished. When the danger is imminent the court may authorize

CAPÍTULO 3. DE LA SERVIDUMBRE LEGAL

SECCIÓN 1. DE LAS LIMITACIONES A LA PROPIEDAD

Art. 659. La servidumbre legal es una limitación a la propiedad creada por la ley en beneficio del público en general o de personas en particular.

Art. 660. El dueño está obligado a mantener en buen estado su construcción de modo tal que ni su eventual caída ni la de ninguno de sus materiales pueda causar un daño a un vecino o a un transeúnte. Sin embargo, es responsable por los daños solo si se demuestra que sabía o que, ejerciendo un cuidado razonable, debería haber sabido del vicio o defecto que causó el daño, que el daño se podría haber evitado mediante el ejercicio de un cuidado razonable y que omitió ejercer tal cuidado razonable. Ninguna de las disposiciones de este artículo impide que el juez aplique la doctrina de res ipsa loquitur cuando corresponda. [Sec. 1, ley n.º 25 de 1996, 1.ª Sess. Ex., vigente desde el 16 de abril de 1996].

Art. 661. Cuando una edificación o cualquier otro tipo de construcción está en riesgo de desmoronarse, cualquier vecino puede accionar judicialmente para exigirle al dueño que la apuntale o la demuelan. Cuando el peligro es
the neighbor to do the necessary work for which he shall be reimbursed by the owner.

Art. 662. One who builds near a wall, whether common or not, is bound to take all necessary precautions to protect his neighbor against injury.

Art. 663. A landowner may not build projections beyond the boundary of his estate.

Art. 664. A landowner is bound to fix his roof so that rainwater does not fall on the ground of his neighbor.

Art. 665. Servitudes imposed for the public or common utility relate to the space which is to be left for the public use by the adjacent proprietors on the shores of navigable rivers and for the making and repairing of levees, roads, and other public or common works. Such servitudes also exist on property necessary for the building of levees and other water control structures on the alignment approved by the U.S. Army Corps of Engineers as provided by law, including the repairing of hurricane protection levees.

All that relates to this kind of servitude is determined by laws or

inminente, el juez puede autorizar al vecino a hacer las obras necesarias, con derecho a obtener reembolso del dueño.

Art. 662. Quien construye cerca de un muro, común o no, está obligado a tomar todas las medidas de precaución necesarias para proteger a su vecino de todo daño.

Art. 663. El propietario no puede construir salientes más allá de los límites de su predio.

Art. 664. El propietario debe mantener el techo de manera tal que el agua de lluvia no caiga sobre su vecino.

Art. 665. Las servidumbres impuestas a favor de la utilidad pública o común se relacionan con el espacio que se debe dejar para el uso público de propietarios adyacentes en las orillas de ríos navegables y para hacer y reparar diques, caminos y otras obras públicas o comunes. Tales servidumbres también existen sobre los inmuebles necesarios para la construcción de diques y otras estructuras de control del agua conforme a las directivas aprobadas por el Cuerpo de Ingenieros del Ejército de los Estados Unidos de América según lo dispuesto por la ley, lo que incluye la reparación de diques de protección contra huracanes.

Todo lo relativo a este tipo de servidumbre se rige por las leyes o
Art. 666. He who from his title as owner is bound to give a public road on the border of a river or stream, must furnish another without any compensation, if the first be destroyed or carried away.

And if the road be so injured or inundated by the water, without being carried away, that it becomes impassable, the owner is obliged to give the public a passage on his lands, as near as possible to the public road, without recompense therefor.

Art. 667. Although a proprietor may do with his estate whatever he pleases, still he cannot make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him. However, if the work he makes on his estate deprives his neighbor of enjoyment or causes damage to him, he is answerable for damages only upon a showing that he knew or, in the exercise of reasonable care, should have known that his works would cause damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Nothing in this Article shall

por normas particulares. [Sec. 1, ley n.º 776 de 2006].

Art. 666. Quien está obligado en razón de su calidad de propietario a proporcionar un camino público en la orilla de un río u otro curso de agua debe proporcionar otro camino sin derecho a compensación alguna en caso de que el primero sea destruido o arrastrado.

En caso de que el camino fuera dañado o inundado sin ser arrastrado de manera tal que sea imposible el paso, el propietario está obligado a permitir al público el paso por su predio, tan cerca como sea posible del camino público, sin derecho a obtener compensación alguna por ello.

Art. 667. Si bien el propietario puede hacer con su inmueble lo que desee, no puede hacer ninguna obra sobre él que prive a su vecino de la libertad de goce del propio inmueble o que pueda causarle un daño. Si las obras que hace en su inmueble privan al vecino del goce de su propio derecho o le causan un daño, será responsable por los daños solo cuando se demuestre que sabía o que, ejerciendo un cuidado razonable, debería haber sabido que sus obras causarían un daño, que el daño se podría haber evitado mediante el ejercicio de un cuidado razonable y que omitió ejercer tal cuidado razonable. Ninguna de las disposiciones de este artículo impedirá que el juez
Art. 668. Although one be not at liberty to make any work by which his neighbor's buildings may be damaged, yet every one has the liberty of doing on his own ground whatsoever he pleases, although it should occasion some inconvenience to his neighbor.

Thus he who is not subject to any servitude originating from a particular agreement in that respect, may raise his house as high as he pleases, although by such elevation he should darken the lights of his neighbors's [neighbor's.] house, because this act occasions only an inconvenience, but not a real damage.

Art. 669. If the works or materials for any manufactory or other operation, cause an inconvenience to those in the same or in the neighboring houses, by

 aplicue la doctrina de res ipsa loquitur cuando corresponda. No obstante, el propietario debe responder por los daños con prescindencia de su conocimiento o de su ejercicio de un cuidado razonable si el daño es causado por una actividad extraordinariamente peligrosa. A los efectos del presente artículo, son actividades extraordinariamente peligrosas exclusivamente el hincado de pilotes o la voladura con explosivos. [Sec. 1, ley n.° 25 de 1996, 1.° Ses. Ex., vigente desde el 16 de abril de 1996].

Art. 668. Si bien no se pueden hacer obras que causen un daño en la construcción del vecino, todos tienen la libertad de hacer en su propio predio lo que deseen, aunque cause alguna molestia al vecino.

Así, quien no está sujeto a una servidumbre creada por un acuerdo particular a tal fin puede elevar su casa tanto como desee, aunque tal elevación oscurezca la casa del vecino, porque este acto solo causa una molestia, pero no un daño real.

Art. 669. Si las obras o los materiales usados para una fábrica u otro tipo de operación causan molestias a quienes están en la misma casa o en las casas vecinas,
diffusing smoke or nauseous smell, and there be no servitude established by which they are regulated, their sufferance must be determined by the rules of the police, or the customs of the place.

Art. 670. When a landowner constructs in good faith a building that encroaches on an adjacent estate and the owner of that estate does not complain within a reasonable time after he knew or should have known of the encroachment, or in any event complains only after the construction is substantially completed the court may allow the building to remain. The owner of the building acquires a predial servitude on the land occupied by the building upon payment of compensation for the value of the servitude taken and for any other damage that the neighbor has suffered.

Art. 671. Governing bodies of parishes and municipalities are authorized to adopt regulations determining the mode of proceeding to prevent the spread of fire by the destruction of buildings.

When private property is so destroyed in order to combat a conflagration, the owner shall be indemnified by the political subdivision for his actual loss.

por la difusión de humo o de olor nauseabundo, y no hay una servidumbre por la que se rijan, la molestia se regirá por los reglamentos de policía o los usos del lugar.

Art. 670. Si un propietario construye de buena fe una edificación que invade un predio adyacente y el propietario de ese predio no se queja dentro de un período razonable después de enterarse o de haber debido enterarse de la invasión, o si se queja solo después de que la edificación está sustancialmente terminada, el juez puede permitir que se mantenga la edificación. El propietario de la edificación adquiere una servidumbre real sobre el predio ocupado por la edificación mediante el pago de una compensación por el valor de la servidumbre tomada y por cualquier otro daño que haya sufrido el vecino.

Art. 671. Los órganos de gobierno de las parroquías y municipalidades están autorizados a aprobar reglamentos por los que se determine el modo de proceder para evitar la difusión de un incendio mediante la destrucción de construcciones. Cuando se destruya propiedad privada de este modo para combatir un incendio, el dueño debe ser resarcido por la subdivisión política.
Art. 672. Other legal servitudes relate to common enclosures, such as common walls, fences and ditches, and to the right of passage for the benefit of enclosed estates.

SECTION 2. COMMON ENCLOSURES

Art. 673. A landowner who builds first may rest one-half of a partition wall on the land of his neighbor, provided that he uses solid masonry at least as high as the first story and that the width of the wall does not exceed eighteen inches, not including the plastering which may not be more than three inches in thickness.

Art. 674. The wall thus raised becomes common if the neighbor is willing to contribute one-half of its cost. If the neighbor refuses to contribute, he preserves the right to make the wall common in whole or in part, at any time, by paying to the owner one-half of the current value of the wall, or of the part that he wishes to make common.

Art. 675. A wall that separates adjoining buildings and is partly on one estate and partly on another is presumed to be common up to the highest part of the lower building unless there is proof to the contrary.

Art. 672. Las demás servidumbres legales se refieren a los cercos comunes, como los muros compartidos, las vallas y las zanjas, y al derecho de paso en beneficio de predios sin salida.

SECCIÓN 2. DE LOS CERCOS COMUNES

Art. 673. El propietario que construye primero puede apoyar la mitad de la medianera en el predio del vecino, siempre y cuando use materiales sólidos que alcancen al menos hasta el primer piso y el ancho del muro no supere las dieciocho pulgadas, excluido el enyesado, que no puede superar las tres pulgadas de espesor.

Art. 674. El muro construido de este modo se transforma en común si el vecino está dispuesto a aportar la mitad de su costo. Si el vecino se niega a aportar, conserva el derecho de hacer común el muro en su totalidad o en parte, en cualquier momento, pagando al dueño la mitad del valor actualizado del muro o de la parte que quiera que sea común.

Art. 675. El muro que separa construcciones contiguas y está en parte sobre un predio y en parte sobre otro se presume común hasta la parte más alta de la edificación más baja a menos que haya prueba en contrario.
Art. 676. When a solid masonry wall adjoins another estate, the neighbor has a right to make it a common wall, in whole or in part, by paying to its owner one-half of the current value of the wall, or of the part that he wishes to make common, and one-half of the value of the soil on which the wall is built.

Art. 677. In the absence of a written agreement or controlling local ordinance the rights and obligations of the co-owners of a common wall, fence, or ditch are determined in accordance with the following provisions.

Art. 678. Necessary repairs to a common wall, including partial rebuilding, are to be made at the expense of those who own it in proportion to their interests.

Art. 679. The co-owner of a common wall may be relieved of the obligation to contribute to the cost of repairs by abandoning in writing his right to use it, if no construction of his is actually supported by the common wall.

Art. 680. The co-owner of a common wall may use it as he sees fit, provided that he does not impair its structural integrity or

Art. 676. Cuando un muro de materiales sólidos colinda con otro inmueble, el vecino tiene derecho a hacerlo muro común en su totalidad o en parte, pagando al dueño la mitad del valor actualizado del muro o de la parte que quiera hacer común, y la mitad del valor del suelo sobre el que está construido el muro.

Art. 677. A falta de acuerdo por escrito o de una ordenanza local aplicable, los derechos y obligaciones de los copropietarios de un muro, cerca o zanja común se determinan conforme a las siguientes disposiciones.

Art. 678. Las reparaciones necesarias de un muro común, incluida la reconstrucción parcial, deben hacerse a costa de sus dueños en proporción a sus respectivos derechos de propiedad.

Art. 679. El copropietario de un muro común puede ser dispensado de la obligación de contribuir en el costo de las reparaciones mediante la renuncia por escrito a su derecho a usarlo, siempre que el muro común no soporte efectivamente una construcción suya.

Art. 680. El copropietario de un muro común puede darle el uso que considere adecuado, siempre y cuando no afecte su integridad.
infringe on the rights of his neighbor.

Art. 681. The co-owner of a common wall may not make any opening in the wall without the consent of his neighbor.

Art. 682. A co-owner may raise the height of a common wall at his expense provided the wall can support the additional weight. In such a case, he alone is responsible for the maintenance and repair of the raised part.

Art. 683. The neighbor who does not contribute to the raising of the common wall may at any time cause the raised part to become common by paying to its owner one-half of its current value.

Art. 684. A landowner has the right to enclose his land.

Art. 685. A fence on a boundary is presumed to be common unless there is proof to the contrary.

When adjoining lands are enclosed, a landowner may compel his neighbors to contribute to the expense of making and repairing common fences by which the respective lands are separated.

When adjoining lands are not enclosed, a landowner may compel his neighbors to contribute to the expense of making and repairing common fences only as prescribed by local ordinances.
Art. 686. A ditch between two estates is presumed to be common unless there be proof to the contrary. Adjoining owners are responsible for the maintenance of a common ditch.

Art. 687. Trees, bushes, and plants on the boundary are presumed to be common unless there be proof to the contrary. An adjoining owner has the right to demand the removal of trees, bushes, or plants on the boundary that interfere with the enjoyment of his estate, but he must bear the expense of removal.

Art. 688. A landowner has the right to demand that the branches or roots of a neighbor's trees, bushes, or plants, that extend over or into his property be trimmed at the expense of the neighbor. A landowner does not have this right if the roots or branches do not interfere with the enjoyment of his property.

SECTION 3. RIGHT OF PASSAGE
Art. 689. The owner of an estate that has no access to a public road or utility may claim a right of passage over neighboring property conforme a lo dispuesto por las ordenanzas locales.

Art. 686. La zanja entre dos predios se presume común a menos que haya prueba en contrario. Los propietarios de predios contiguos deben hacerse cargo del mantenimiento de la zanja común.

Art. 687. Los árboles, los arbustos y las plantas ubicados en el límite se presumen comunes a menos que haya prueba en contrario. Los propietarios contiguos tiene el derecho de exigir que se quiten los árboles, arbustos o plantas del límite que interfieran en el goce de su predio, pero deben hacerse cargo de los gastos de quitarlos.

Art. 688. El propietario tiene el derecho de exigir que las ramas o raíces de los árboles, arbustos o plantas de un vecino que se extiendan sobre su inmueble o dentro de él sean cortados a costa del vecino. El propietario no tiene este derecho si las raíces o ramas no interfieren en el goce de su inmueble.

Art. 689. El dueño de un inmueble que no tiene acceso a una calle pública o a un servicio público puede reclamar una
to the nearest public road or utility. He is bound to compensate his neighbor for the right of passage acquired and to indemnify his neighbor for the damage he may occasion.

New or additional maintenance burdens imposed upon the servient estate or intervening lands resulting from the utility servitude shall be the responsibility of the owner of the dominant estate. [Acts 2012, No. 739, §1, eff. Aug. 1, 2012.]

Art. 690. The right of passage for the benefit of an enclosed estate shall be suitable for the kind of traffic or utility that is reasonably necessary for the use of that estate. [Acts 2012, No. 739, §1, eff. Aug. 1, 2012.]

Art. 691. The owner of the enclosed estate may construct on the right-of-way the type of road, utility, or railroad reasonably necessary for the exercise of the servitude.

The utility crossing shall be constructed in compliance with all appropriate and applicable federal and state standards so as to mitigate all hazards posed by the passage and the particular conditions of the servient estate and intervening lands. [Acts 2012, No. 739, §1, eff. Aug. 1, 2012.]

servidumbre de paso al inmueble vecino hasta el camino público o el servicio público más cercanos. Debe compensar al vecino por la servidumbre de paso adquirida y debe mantenerlo indemne ante cualquier daño que ocasione.

Las cargas de mantenimiento nuevas o adicionales impuestas sobre el predio sirviente o sobre predios intermedios resultantes de la servidumbre de servicio público también están a cargo del propietario del predio dominante. [Sec. 1, ley n.º 739 de 2012, vigente desde el 1 de agosto de 2012].

Art. 690. La servidumbre de paso en beneficio de un predio cerrado debe ser adecuada al tipo de tráfico o servicio público que sea razonablemente necesario para el uso de ese predio. Sec. 1, ley n.º 739 de 2012, vigente desde el 1 de agosto de 2012.

Art. 691. El dueño de un predio cerrado puede construir sobre la servidumbre de paso el tipo de camino, servicio público o red ferroviaria que sea razonablemente necesario para el ejercicio de la servidumbre.

El cruce de servicio público debe construirse de acuerdo con todas las normas correspondientes y aplicables federales y estatales a fin de mitigar todos los peligros presentados por el paso y las condiciones particulares del predio sirviente y de los predios intermedios. [Sec. 1, ley n.º 739 de
Art. 692. The owner of the enclosed estate may not demand the right of passage or the right-of-way for the utility anywhere he chooses. The passage generally shall be taken along the shortest route from the enclosed estate to the public road or utility at the location least injurious to the intervening lands.

The location of the utility right-of-way shall coincide with the location of the servitude of passage unless an alternate location providing access to the nearest utility is least injurious to the servient estate and intervening lands.

The court shall evaluate and determine that the location of the servitude of passage or utility shall not affect the safety of the operations or significantly interfere with the operations of the owner of the servient estate or intervening lands prior to the granting of the servitude of passage or utility.

[Acts 2012, No. 739, §1, eff. Aug. 1, 2012.]

Art. 693. If an estate becomes enclosed as a result of a voluntary act or omission of its owner, the neighbors are not bound to furnish a passage to him or his successors.

[Acts 2012, vigente desde el 1 de agosto de 2012].

Art. 692. El dueño del predio encerrado no puede exigir la servidumbre de paso para el servicio público en cualquier lugar que desee. El paso generalmente se tomará en la ruta más corta desde el predio encerrado hasta el camino público o el servicio público en la ubicación que menos afecte los predios intermedios.

La ubicación de la servidumbre de paso por el servicio público coincidirá con la de la servidumbre de paso, a menos que fuera menos gravosa para el predio sirviente y los predios intermedios una ubicación alternativa que brinde acceso al servicio público más cercano.

Antes de que se conceda la servidumbre, el juez debe evaluar y determinar que su ubicación no afecte la seguridad de las operaciones ni interfiera significativamente con las operaciones del dueño del predio sirviente o los predios intermedios.

[Sec. 1, ley n° 739 de 2012, vigente desde el 1 de agosto de 2012].

Art. 693. Si el predio queda encerrado a consecuencia de un acto u omisión voluntarios del dueño, los vecinos no están obligados a concederle el paso ni a él ni a sus sucesores.
Art. 694. When in the case of partition, or a voluntary alienation of an estate or of a part thereof, property alienated or partitioned becomes enclosed, passage shall be furnished gratuitously by the owner of the land on which the passage was previously exercised, even if it is not the shortest route to the public road or utility, and even if the act of alienation or partition does not mention a servitude of passage. [Acts 2012; No. 739, §1, eff. Aug. 1, 2012.]

Art. 695. The owner of the enclosed estate has no right to the relocation of this servitude after it is fixed. The owner of the servient estate has the right to demand relocation of the servitude to a more convenient place at his own expense, provided that it affords the same facility to the owner of the enclosed estate.

Art. 696. The right for indemnity against the owner of the enclosed estate may be lost by prescription. The accrual of this prescription has no effect on the right of passage.

Art. 696.1. As used in this Section, a utility is a service such as electricity, water, sewer, gas, telephone, cable television, and other commonly used power and communication networks required for the operation of an ordinary

Art. 694. Cuando en el caso de una partición o de una enajenación voluntaria de un inmueble o de una parte de él, el inmueble enajenado o dividido queda encerrado, el paso debe ser concedido de manera gratuita al dueño del inmueble sobre el que se ejercía previamente el paso, aun si no es la ruta más corta para llegar al camino público o al servicio público, e incluso si el acto de enajenación o partición no menciona la servidumbre de paso. [Sec. 1, ley n.º 739 de 2012, vigente desde el 1 de agosto de 2012.]

Art. 695. El dueño del predio encerrado no tiene derecho a solicitar la reubicación de la servidumbre después de fijada. El dueño del predio sirviente tiene el derecho de exigir la reubicación de la servidumbre a un lugar más cómodo a su propio costo, siempre y cuando ofrezca la misma funcionalidad al dueño del predio encerrado.

Art. 696. El derecho de indemnidad contra el dueño del predio encerrado puede perderse por prescripción. Esta prescripción no afecta a la servidumbre de paso.

Art. 696.1. Conforme al uso dado en esta sección, se entienden comprendidos dentro de los servicios públicos aquellos tales como la electricidad, el agua, el alcantarillado, el gas, el teléfono, la televisión por cable y cualquier
household or business. [Acts 2012; No. 739, §1, eff. Aug. 1, 2012.]

CHAPTER 4. CONVENTIONAL OR VOLUNTARY SERVITUDES

SECTION 1. KINDS OF CONVENTIONAL SERVITUDES

Art. 697. Predial servitudes may be established by an owner on his estate or acquired for its benefit.

The use and extent of such servitudes are regulated by the title by which they are created, and, in the absence of such regulation, by the following rules.

Art. 698. Predial servitudes are established on, or for the benefit of, distinct corporeal immovables.

Art. 699. The following are examples of predial servitudes:

Rights of support, projection, drip, drain, or of preventing drain, those of view, of light, or of preventing view or light from being obstructed, of raising buildings or walls, or of preventing them from being raised, of passage,
of drawing water, of aqueduct, of watering animals, and of pasturage.

Art. 700. The servitude of support is the right by which buildings or other constructions of the dominant estate are permitted to rest on a wall of the servient estate.

Unless the title provides otherwise, the owner of the servient estate is bound to keep the wall fit for the exercise of the servitude, but he may be relieved of this charge by abandoning the wall.

Art. 701. The servitude of view is the right by which the owner of the dominant estate enjoys a view; this includes the right to prevent the raising of constructions on the servient estate that would obstruct the view.

Art. 702. The servitude of prohibition of view is the right of the owner of the dominant estate to prevent or limit openings of view on the servient estate.

Art. 703. The servitude of light is the right by which the owner of the dominant estate is entitled to make openings in a common wall for the admission of light; this includes the right to prevent the neighbor from making an obstruction.
Art. 704. The servitude of prohibition of light is the right of the owner of the dominant estate to prevent his neighbor from making an opening in his own wall for the admission of light or that limits him to certain lights only.

Art. 705. The servitude of passage is the right for the benefit of the dominant estate whereby persons, animals, utilities, or vehicles are permitted to pass through the servient estate. Unless the title provides otherwise, the extent of the right and the mode of its exercise shall be suitable for the kind of traffic or utility necessary for the reasonable use of the dominant estate. [Acts 2012, No. 739, §1, eff. Aug. 1, 2012.]

Art. 706. Predial servitudes are either affirmative or negative. Affirmative servitudes are those that give the right to the owner of the dominant estate to do a certain thing on the servient estate. Such are the servitudes of right of way, drain, and support.

Negative servitudes are those that impose on the owner of the servient estate the duty to abstain from doing something on his estate. Such are the servitudes of prohibition of building and of the use of an estate as a commercial or industrial establishment.

Art. 704. La servidumbre de prohibición de luz es el derecho del dueño del predio dominante de impedir que su vecino haga una abertura en su propio muro para permitir que pase la luz o para limitarlo a ciertos tipos de luz solamente.

Art. 705. La servidumbre de paso es el derecho en beneficio del predio dominante por el que tienen permitido pasar por un predio sirviente personas, animales, servicios públicos o vehículos. A menos que el título disponga de otro modo, el alcance del derecho y el modo de su ejercicio debe ser adecuado en relación con el tipo de tráfico o servicio público necesarios para el uso razonable del predio dominante. [Sec. 1, ley n.º 739 de 2012, vigente desde el 1 de agosto de 2012.]

Art. 706. Las servidumbres reales son afirmativas o negativas. Las servidumbres afirmativas son aquellas que dan al dueño del predio dominante el derecho de hacer algo en el predio sirviente. Tales son las servidumbres de paso, de drenado y de apoyo.

Son servidumbres negativas las que imponen al dueño del predio sirviente el deber de abstenerse de hacer algo en su predio. Tales son las servidumbres de prohibición de construcción y del uso del predio como establecimiento comercial o industrial.
Art. 707. Predial servitudes are either apparent or nonapparent. Apparent servitudes are those that are perceivable by exterior signs, works, or constructions; such as a roadway, a window in a common wall, or an aqueduct.

Nonapparent servitudes are those that have no exterior sign of their existence; such as the prohibition of building on an estate or of building above a particular height.

SECTION 2. ESTABLISHMENT OF PREDIAL SERVITUDES BY TITLE

Art. 708. The establishment of a predial servitude by title is an alienation of a part of the property to which the laws governing alienation of immovables apply.

Art. 709. A mandatary may establish a predial servitude if he has an express and special power to do so.

Art. 710. The naked owner may establish a predial servitude that does not infringe on the rights of the usufructuary or that is to take effect at the termination of the usufruct.

The consent of the usufructuary is required for the establishment of any other predial servitude.

Art. 707. Las servidumbres reales son aparentes o no aparentes. Son servidumbres aparentes las que se puedan percibir por los signos, trabajos o construcciones exteriores, tales como una calle, una ventana en un muro común o un acueducto.

Las servidumbres no aparentes son las que no tienen signos exteriores de su existencia, tales como la prohibición de construir en un predio o de hacerlo más allá de determinada altura.

SECCIÓN 2. DE LA CONSTITUCIÓN DE LAS SERVIDUMBRES REALES POR TÍTULO

Art. 708. La constitución de una servidumbre real por título es una enajenación de una parte del inmueble a la que se aplican las reglas de la enajenación de inmuebles.

Art. 709. El mandatario puede constituir una servidumbre real si tiene poder expreso y especial para hacerlo.

Art. 710. El nudo propietario puede constituir una servidumbre real que no afecte los derechos del usufructuario o que comience a regir cuando finalice el usufructo.

Se necesita el consentimiento del usufructuario para constituir cualquier otra servidumbre real.
Art. 711. The usufructuary may not establish on the estate of which he has the usufruct any charges in the nature of predial servitudes.

Art. 712. A person having ownership subject to a term or the happening of a condition may establish a predial servitude, but it ceases with his right.

Art. 713. A purchaser under a reserved right of redemption may establish a predial servitude on the property, but it ceases if the seller exercises his right of redemption.

Art. 714. A predial servitude on an estate owned in indivision may be established only with the consent of all the co-owners. When a co-owner purports to establish a servitude on the entire estate, the contract is not null; but, its execution is suspended until the consent of all co-owners is obtained.

Art. 715. A co-owner who has consented to the establishment of a predial servitude on the entire estate owned in indivision may not prevent its exercise on the ground that the consent of his co-owner has not been obtained.
If he becomes owner of the whole estate by any means which terminates the indivision, the predial servitude to which he has consented burdens his property.

Art. 716. When a co-owner has consented to the establishment of a predial servitude on his undivided part only, the consent of the other co-owners is not required, but the exercise of the servitude is suspended until his divided part is determined at the termination of the state of indivision.

Art. 717. If the estate owned in indivision is partitioned in kind, the servitude established by a co-owner on his undivided part burdens only the part allotted to him.

Art. 718. If the estate is partitioned by licitation and the co-owner who consented to the establishment of the predial servitude acquires the ownership of the whole, the servitude burdens the entire estate as if the co-owner had always been sole owner. If the entire estate is adjudicated to any other person the right granted by the co-owner is extinguished.

Art. 719. Except as provided in Article 718, the successor of the co-owner who has consented to the establishment of a predial servitude, whether on the entire estate owned in indivision or on his

Si se convierte en el dueño de todo el predio de tal modo que cesa la indivisión, la servidumbre real a la que haya consentido pesa sobre su predio.

Art. 716. Si un copropietario consiente la constitución de su porción indivisa solamente, no se necesita el consentimiento de los demás copropietarios, pero el ejercicio de la servidumbre queda suspendido hasta que se determine su porción indivisa a la finalización del estado de indivisión.

Art. 717. Si el predio indiviso se divide en especie, la servidumbre constituida por un copropietario sobre su porción indivisa solo afecta a la parte atribuida a él.

Art. 718. Si el predio se divide por licitación y el copropietario que consintió la constitución de la servidumbre real adquiere la propiedad de la totalidad, la servidumbre gravará todo el predio como si el copropietario siempre hubiera sido el único dueño. Si el predio entero se asigna a otra persona, se extingue el derecho otorgado por el copropietario.

Art. 719. Con excepción de lo dispuesto en el artículo 718, el sucesor del copropietario que haya consentido la constitución de la servidumbre real, ya sea en la totalidad del predio indiviso o solo
undivided part only, occupies the same position as his ancestor. If he becomes owner of a divided part of the estate the servitude burdens that part, and if he becomes owner of the whole the servitude burdens the entire estate.

Art. 720. The owner of the servient estate may establish thereon additional servitudes, provided they do not affect adversely the rights of the owner of the dominant estate.

Art. 721. A predial servitude may be established on mortgaged property. If the servitude diminishes the value of the estate to the substantial detriment of the mortgagee, he may demand immediate payment of the debt. If there is a sale for the enforcement of the mortgage the property is sold free of all servitudes established after the mortgage. In such a case, the acquirer of the servitude has an action for the restitution of its value against the owner who established it.

Art. 722. Predial servitudes are established by all acts by which immovables may be transferred. Delivery of the act of transfer or use of the right by the owner of the dominant estate constitutes tradition.

sobre su porción indivisa, ocupa el mismo lugar que su antecesor. Si se convierte en dueño de una parte divisa del predio, la servidumbre grava esa parte, y si se convierte en dueño de la totalidad, la servidumbre grava la totalidad del predio.

Art. 720. El dueño del predio sirviente puede constituir sobre el predio otras servidumbres, siempre y cuando no perjudiquen los derechos del dueño del predio dominante.

Art. 721. Puede constituirse una servidumbre real sobre un bien hipotecado. Si la servidumbre reduce el valor del predio en desmedro sustancial del acreedor hipotecario, este puede exigir el pago inmediato de la deuda. En caso de una venta para ejecutar la hipoteca, el bien se vende sin las servidumbres constituidas después de la hipoteca. En tal caso, el adquirente de la servidumbre puede accionar por la restitución de su valor contra el dueño que la haya constituido.

Art. 722. Las servidumbres reales pueden ser constituidas mediante todos los actos por los que se pueden transferir bienes inmuebles. El otorgamiento del acto de transferencia o el ejercicio del derecho por el dueño del predio dominante constituye tradición.
Art. 723. Predial servitudes may be established on public things, including property of the state, its agencies and political subdivisions.

Art. 723. Se pueden constituir servidumbres reales sobre cosas públicas, incluidos bienes del estado, sus organismos y subdivisiones políticas.

Art. 724. A predial servitude may be established on several estates for the benefit of one estate. One estate may be subjected to a servitude for the benefit of several estates.

Art. 724. La servidumbre real puede gravar varios predios en beneficio de uno solo. Un predio puede estar sujeto a una servidumbre en beneficio de varios predios.

Art. 725. The title that establishes a servitude for the benefit of the dominant estate may also establish a servitude on the dominant estate for the benefit of the servient estate.

Art. 725. El título por el que se establece una servidumbre en beneficio del predio dominante también puede crear una servidumbre sobre el predio dominante en beneficio del predio serviente.

Art. 726. Parties may agree to establish a predial servitude on, or for the benefit of, an estate of which one is not then the owner. If the ownership is acquired, the servitude is established.

Parties may agree that a building not yet built will be subjected to a servitude or that it will have the benefit of a servitude when it is built.

Art. 726. Las partes pueden acordar constituir una servidumbre real sobre un predio o en beneficio de un predio del que una de ellas no tiene la propiedad. Si se adquiere la propiedad, se constituye la servidumbre.

Pueden asimismo estipular que la edificación aún no construida estará sujeta a una servidumbre o que tendrá el beneficio de una servidumbre cuando se construya.

Art. 727. A predial servitude may be established on a certain part of an estate, if that part is sufficiently described.

Art. 727. Se puede constituir una servidumbre real sobre una parte determinada de un predio si esa parte está descrita de manera suficiente.

Art. 728. The use of a predial servitude may be limited to certain

Art. 728. El uso de la servidumbre real puede estar
times. Thus, the rights of drawing water and of passage may be confined to designated hours.

Art. 729. Legal and natural servitudes may be altered by agreement of the parties if the public interest is not affected adversely.

Art. 730. Doubt as to the existence, extent, or manner of exercise of a predial servitude shall be resolved in favor of the servient estate.

Art. 731. A charge established on an estate expressly for the benefit of another estate is a predial servitude although it is not so designated.

Art. 732. When the act does not declare expressly that the right granted is for the benefit of an estate or for the benefit of a particular person, the nature of the right is determined in accordance with the following rules.

Art. 733. When the right granted be of a nature to confer an advantage on an estate, it is presumed to be a predial servitude.

Art. 734. When the right granted is merely for the convenience of a person, it is not considered to be a predial servitude.
predial servitude, unless it is acquired by a person as owner of an estate for himself, his heirs and assigns.

SECTION 3. ACQUISITION OF CONVENTIONAL SERVITUDES FOR THE DOMINANT ESTATE

Art. 735. A predial servitude may be acquired for the benefit of the dominant estate by the owner of that estate or by any other person acting in his name or in his behalf.

Art. 736. An incompetent may acquire a predial servitude for the benefit of his estate without the assistance of the administrator of his patrimony or of his tutor or curator.

Art. 737. The owner of the dominant estate may renounce the contract by which a predial servitude was acquired for the benefit of his estate, if he finds the contract onerous, and if the contract was made without his authority or while he was incompetent.

Art. 738. The grantor may not revoke the servitude on the ground that the person who acquired it for the benefit of the dominant estate was not the owner, that he was incompetent, or that he lacked authority.
Art. 739. Nonapparent servitudes may be acquired by title only, including a declaration of destination under Article 741. [Amended by Acts 1978, No. 479, §1.]

Art. 740. Apparent servitudes may be acquired by title, by destination of the owner, or by acquisitive prescription.

Art. 741. Destination of the owner is a relationship established between two estates owned by the same owner that would be a predial servitude if the estates belonged to different owners.

When the two estates cease to belong to the same owner, unless there is express provision to the contrary, an apparent servitude comes into existence of right and a nonapparent servitude comes into existence if the owner has previously filed for registry in the conveyance records of the parish in which the immovable is located a formal declaration establishing the destination. [Amended by Acts 1978, No. 479, §1.]

Art. 742. The laws governing acquisitive prescription of immovable property apply to apparent servitudes. An apparent

Art. 739. La servidumbre no aparente solo puede adquirirse mediante título, incluida la declaración de destino conforme al artículo 741. [Modificado por sec. 1, ley n.º 479 de 1978].

Art. 740. La servidumbre aparente puede adquirirse por título, por destino dado por el dueño o por prescripción adquisitiva.

Art. 741. La servidumbre por el destino dado por el dueño es la relación que se establece entre dos predios pertenecientes al mismo dueño que sería una servidumbre real si los predios pertenecieran a dueños diferentes. Si los dos predios dejan de pertenecer al mismo dueño, a menos que haya disposición expresa en contrario, se crea de pleno derecho una servidumbre aparente; en cambio, surge una servidumbre no aparente si el dueño presentó previamente para su registro una declaración formal por la que se estableció el destino en el registro de transferencias de la parroquia en que se encuentra ubicado el inmueble. [Modificado por sec. 1, ley n.º 479 de 1978].

Art. 742. El régimen de la prescripción adquisitiva de inmuebles también se aplica a las servidumbres aparentes. La
servitude may be acquired by peaceable and uninterrupted possession of the right for ten years in good faith and by just title; it may also be acquired by uninterrupted possession for thirty years without title or good faith.

Art. 743. Rights that are necessary for the use of a servitude are acquired at the time the servitude is established. They are to be exercised in a way least inconvenient for the servient estate.

SECTION 4. RIGHTS OF THE OWNER OF THE DOMINANT ESTATE

Art. 744. The owner of the dominant estate has the right to make at his expense all the works that are necessary for the use and preservation of the servitude.

Art. 745. The owner of the dominant estate has the right to enter with his workmen and equipment into the part of the servient estate that is needed for the construction or repair of works required for the use and preservation of the servitude. He may deposit materials to be used for the works and the debris that may result, under the obligation of causing the least possible damage and of removing them as soon as possible.

Art. 746. If the act establishing the servitude binds the owner of

servidumbre aparente puede adquirirse mediante la posesión pacífica e ininterrumpida del derecho por diez años de buena fe y por justo título; también puede adquirirse por la posesión ininterrumpida durante treinta años sin título ni buena fe.

Art. 743. Los derechos necesarios para el uso de la servidumbre se adquieren cuando se constituye la servidumbre. Deben ejercerse de la manera que menos estorbe al predio sirviente.

SECCIÓN 4. DE LOS DERECHOS DEL DUEÑO DEL PREDIO DOMINANTE

Art. 744. El dueño del predio dominante tiene el derecho de hacer a su costo todas las obras que sean necesarias para usar y conservar la servidumbre.

Art. 745. El dueño del predio dominante tiene derecho a ingresar con sus trabajadores y equipos a la parte del predio sirviente que se necesite para realizar la construcción o los trabajos de reparación necesarios a fin de usar o conservar la servidumbre. Puede depositar los materiales necesarios para los trabajos y los escombros que se generen, con la obligación de causar el menor daño posible y de levantarlos lo más rápido posible.

Art. 746. Si el acto de creación de la servidumbre obliga al dueño
the servient estate to make the necessary works at his own expense, he may exonerate himself by abandoning the servient estate or the part of it on which the servitude is granted to the owner of the dominant estate.

Art. 747. If the dominant estate is divided, the servitude remains due to each part, provided that no additional burden is imposed on the servient estate. Thus, in case of a right of passage, all the owners are bound to exercise that right through the same place.

Art. 748. The owner of the servient estate may do nothing tending to diminish or make more inconvenient the use of the servitude.

If the original location has become more burdensome for the owner of the servient estate, or if it prevents him from making useful improvements on his estate, he may provide another equally convenient location for the exercise of the servitude which the owner of the dominant estate is bound to accept. All expenses of relocation are borne by the owner of the servient estate.

Art. 749. If the title is silent as to the extent and manner of use of the servitude, the intention of the parties is to be determined in the light of its purpose.

Art. 747. Si el predio dominante se divide, la servidumbre continúa beneficiando a ambas partes, siempre y cuando no se imponga una carga adicional sobre el predio sirviente. Así, en el caso de una servidumbre de paso, todos los dueños están obligados a ejercer ese derecho transitando por el mismo lugar.

Art. 748. El dueño del predio sirviente debe abstenerse de realizar actos dirigidos a disminuir o dificultar el uso de la servidumbre.

Si la ubicación original se volvió más gravosa para el dueño del predio sirviente o si no le permite hacer mejoras útiles en su predio, puede ofrecer otra ubicación igual de apropiada para el ejercicio de la servidumbre, que el dueño del predio dominante debe aceptar. Todos los gastos de la reubicación deben ser cubiertos por el dueño del predio sirviente.

Art. 749. Si el título no indica nada respecto de la extensión y el modo de uso de la servidumbre, la intención de las partes se
Art. 750. If the title does not specify the location of the servitude, the owner of the servient estate shall designate the location.

SECTION 5. EXTINCTION OF PREDIAL SERVITUDES

Art. 751. A predial servitude is extinguished by the permanent and total destruction of the dominant estate or of the part of the servient estate burdened with the servitude.

Art. 752. If the exercise of the servitude becomes impossible because the things necessary for its exercise have undergone such a change that the servitude can no longer be used, the servitude is not extinguished; it resumes its effect when things are reestablished so that they may again be used, unless prescription has accrued.

Art. 753. A predial servitude is extinguished by nonuse for ten years.

Art. 754. Prescription of nonuse begins to run for affirmative servitutes from the date of their last use, and for negative servitutes from the date of the occurrence of an event contrary to the servitude.
An event contrary to the servitude is such as the destruction of works necessary for its exercise or the construction of works that prevent its exercise.

Art. 755. If the owner of the dominant estate is prevented from using the servitude by an obstacle that he can neither prevent nor remove, the prescription of nonuse is suspended on that account for a period of up to ten years.

Art. 756. If the servitude cannot be exercised on account of the destruction of a building or other construction that belongs to the owner of the dominant estate, prescription is not suspended. If the building or other construction belongs to the owner of the servient estate, the preceding article applies.

Art. 757. A predial servitude is preserved by the use made of it by anyone, even a stranger, if it is used as appertaining to the dominant estate.

Art. 758. The prescription of nonuse does not run against natural servitudes.

Art. 759. A partial use of the servitude constitutes use of the whole.
Art. 760. A more extensive use of the servitude than that granted by the title does not result in the acquisition of additional rights for the dominant estate unless it be by acquisitive prescription.

Art. 761. The use of a right that is only accessory to the servitude is not use of the servitude.

Art. 762. If the dominant estate is owned in indivision, the use that a co-owner makes of the servitude prevents the running of prescription as to all.

If the dominant estate is partitioned, the use of the servitude by each owner preserves it for his estate only.

Art. 763. The prescription of nonuse is not suspended by the minority or other disability of the owner of the dominant estate.

Art. 764. When the prescription of nonuse is pleaded, the owner of the dominant estate has the burden of proving that he or some other person has made use of the servitude as appertaining to his estate during the period of time required for the accrual of the prescription.

Art. 765. A predial servitude is extinguished when the dominant

Art. 760. El uso de la servidumbre de un modo más amplio que el otorgado por el título no implica la adquisición de derechos adicionales a favor del predio dominante a menos que sea por prescripción adquisitiva.

Art. 761. El uso de un derecho que es solo accesorio a la servidumbre no es uso de la servidumbre.

Art. 762. Si la propiedad sobre el predio dominante es indivisa, el uso que un copropietario haga de la servidumbre evitará que transcurra la prescripción respecto de los demás.

Si se divide el predio dominante, el uso de la servidumbre por cada propietario conserva la servidumbre solo respecto del inmueble de cada uno.

Art. 763. La prescripción por falta de uso no se suspende por la minoría de edad u otro tipo de incapacidad del dueño del predio dominante.

Art. 764. Cuando se alega la prescripción por falta de uso, el dueño del predio dominante tiene la carga de probar que él u otra persona usó la servidumbre como propia de su inmueble durante el periodo necesario para el cómputo de la prescripción.

Art. 765. La servidumbre real se extingue cuando los predios
and the servient estates are acquired in their entirety by the same person.

Art. 766. When the union of the two estates is made under resolutory condition, or if it cease by legal eviction, the servitude is suspended and not extinguished.

Art. 767. Until a successor has formally or informally accepted a succession, confusion does not take place. If the successor renounces the succession, the servitudes continue to exist. [Acts 2001, No. 572, §1.]

Art. 768. Confusion does not take place between separate property and community property of the spouses. Thus, if the servient estate belongs to one of the spouses and the dominant estate is acquired as a community asset, the servitude continues to exist.

Art. 769. A servitude that has been extinguished by confusion may be reestablished only in the manner by which a servitude may be created.

Art. 770. A predial servitude is extinguished by the abandonment of the servient estate, or of the part on which the servitude is exercised. It must be evidenced by a written act. The owner of the dominant estate is bound to accept it and confusion takes place.
Art. 771. A predial servitude is extinguished by an express and written renunciation by the owner of the dominant estate.

Art. 772. A renunciation of a servitude by a co-owner of the dominant estate does not discharge the servient estate, but deprives him of the right to use the servitude.

Art. 773. A predial servitude established for a term or under a resolutory condition is extinguished upon the expiration of the term or the happening of the condition.

Art. 774. A predial servitude is extinguished by the dissolution of the right of the person who established it.

TITLE V. BUILDING RESTRICTIONS

[Acts 1977, No. 170, §1.]

Art. 775. Building restrictions are charges imposed by the owner of an immovable in pursuance of a general plan governing building standards, specified uses, and improvements. The plan must be feasible and capable of being preserved.

Art. 776. Building restrictions may be established only by juridical act executed by the owner of an immovable or by all the owners.

ART. 771. La servidumbre real se extingue por renuncia expresa y escrita por parte del dueño del predio dominante.

ART. 772. La renuncia de la servidumbre por parte de un copropietario del predio dominante no libera al predio sirviente, sino que priva a ese copropietario del derecho de usar la servidumbre.

ART. 773. La servidumbre real sujeta a plazo o a condición resolutoria finaliza con la extinción del plazo o el acaecimiento de la condición.

ART. 774. La servidumbre real se extingue por la disolución del derecho de la persona que la constituvió.

TÍTULO V. DE LAS RESTRICCIONES CONSTRUCTIVAS

[Sec. 1, ley n.° 170 de 1977].

Art. 775. Las restricciones de construcción son cargas impuestas por el dueño de un inmueble a fin de implementar un plan general que rija las normas constructivas, los usos especificados y las mejoras. El plan debe ser factible y tener posibilidades de sostenerse en el tiempo.

Art. 776. Las restricciones constructivas pueden establecerse solo por acto jurídico celebrado por el dueño del inmueble o por
owners of the affected immovables. Once established, building restrictions may be amended or terminated as provided in this Title. [Acts 1999, No. 309, §1, eff. June 16, 1999.]

Art. 777. Building restrictions are incorporeal immovables and real rights likened to predial servitudes.

They are regulated by application of the rules governing predial servitudes to the extent that their application is compatible with the nature of building restrictions.

Art. 778. Building restrictions may impose on owners of immovables affirmative duties that are reasonable and necessary for the maintenance of the general plan. Building restrictions may not impose upon the owner of an immovable or his successors the obligation to pay a fee or other charge on the occasion of an alienation, lease or encumbrance of the immovable. [Acts 2010, No. 938, §2, eff. July 2, 2010.]

Art. 779. Building restrictions may be enforced by mandatory and prohibitory injunctions without regard to the limitations of Article 3601 of the Code of Civil Procedure.

todos los dueños de los inmuebles afectados. Una vez constituidas, pueden modificarse o extinguirse conforme a lo dispuesto en este Título. [Sec. 1, ley n.º 309 de 1999, vigente desde el 16 de junio de 1999].

Art. 777. Las restricciones constructivas son bienes inmuebles incorpores y derechos reales equivalentes a las servidumbres reales.

Se rigen por la aplicación de las normas de las servidumbres reales en tanto su aplicación sea compatible con la naturaleza de las restricciones constructivas.

Art. 778. Las restricciones constructivas pueden imponer a los dueños de inmuebles las obligaciones de hacer que sean razonables y necesarias para el mantenimiento del plan general. Las restricciones constructivas no pueden imponer al dueño del inmueble o a sus sucesores la obligación de pagar cargo alguno en ocasión de la enajenación, el arrendamiento o el gravamen del inmueble. [Sec. 2, ley n.º 938 de 2010, vigente desde el 2 de julio de 2010].

Art. 779. Las restricciones constructivas se pueden hacer valer mediante medidas judiciales de carácter coercitivo o prohibitivo con prescindencia de las restricciones del artículo 3601 del Código Procesal Civil.
Art. 780. Building restrictions may be amended, whether such amendment lessens or increases a restriction, or may terminate or be terminated, as provided in the act that establishes them. In the absence of such provision, building restrictions may be amended or terminated for the whole or a part of the restricted area by agreement of owners representing more than one-half of the land area affected by the restrictions, excluding streets and street rights-of-way, if the restrictions have been in effect for at least fifteen years, or by agreement of both owners representing two-thirds of the land area affected and two-thirds of the owners of the land affected by the restrictions, excluding streets and street rights-of-way, if the restrictions have been in effect for more than ten years. [Amended by Acts 1980, No. 310, §1. Acts 1983, No. 129, §1; Acts 1999, No. 309, §1, eff. June 16, 1999.]

Art. 781. No action for injunction or for damages on account of the violation of a building restriction may be brought after two years from the commencement of a noticeable violation. After the lapse of this period, the immovable on which the violation occurred is freed of

Art. 780. Según lo dispuesto en el acto por el que se las haya creado, las restricciones constructivas pueden modificarse, ya sea que la modificación reduzca o intensifique la restricción, y pueden extinguirse o rescindirse. A falta de tal disposición, se pueden modificar o extinguir las restricciones constructivas respecto de la totalidad o una parte del área restringida por acuerdo de los dueños que representen más de la mitad del área afectada por las restricciones, excluidas las calles y las servidumbres de paso sobre calles, si las restricciones estuvieron vigentes al menos por quince años, o por acuerdo de ambos dueños que representen dos tercios del área afectada y dos tercios de los dueños del predio afectado por las restricciones, excluidas las calles y las servidumbres de paso sobre las calles, si las restricciones estuvieron vigentes por más de diez años. [Modificado por sec. 1, ley n.º 310 de 1980. Sec. 1, ley n.º 129 de 1983, sec. 1, ley n.º 309 de 1999, vigente desde el 16 de junio de 1999].

Art. 781. No se puede iniciar una acción tendiente a obtener una medida judicial ni a obtener una indemnización a consecuencia del incumplimiento de una restricción constructiva después de dos años desde el inicio de un incumplimiento notorio. Transcurrido este plazo, el
the restriction that has been
violated.

Art. 782. Building restrictions
terminate by abandonment of the
whole plan or by a general
abandonment of a particular
restriction. When the entire plan is
abandoned, the affected area is
freed of all restrictions; when a
particular restriction is abandoned,
the affected area is freed of that
restriction only.

Art. 783. Doubt as to the
existence, validity, or extent of
building restrictions is resolved in
favor of the unrestricted use of the
immovable. The provisions of the
Louisiana Condominium Act, the
Louisiana Timesharing Act, and
the Louisiana Homeowners
Association Act shall supersede
any and all provisions of this Title
in the event of a conflict. [Acts
1999, No. 309, §1, eff. June 16,
1999.]

TITLE VI. BOUNDARIES

CHAPTER I. GENERAL
PRINCIPLES

[Acts 1977, No. 169, §1.]

Art. 784. A boundary is the line
of separation between contiguous
lands. A boundary marker is a

TÍTULO VI. DE LAS LÍNEAS
DIVISORIAS

CAPÍTULO 1. PRINCIPIOS
GENERALES

[Sec. 1, ley n.º 169 de 1977].

Art. 784. Se considera línea
divisoria la que separa dos predios
contiguos. El marcador de línea
natural or artificial object that marks on the ground the line of separation of contiguous lands.

Art. 785. The fixing of the boundary may involve determination of the line of separation between contiguous lands, if it is uncertain or disputed; it may also involve the placement of markers on the ground, if markers were never placed, were wrongly placed, or are no longer to be seen.

The boundary is fixed in accordance with the following rules.

Art. 786. The boundary may be fixed upon the demand of an owner or of one who possesses as owner. It may also be fixed upon the demand of a usufructuary but it is not binding upon the naked owner unless he has been made a party to the proceeding.

Art. 787. When necessary to protect his interest, a lessee may compel the lessor to fix the boundary of the land subject to the lease.

Art. 788. The right to compel the fixing of the boundary between contiguous lands is imprescriptible.

Art. 789. The boundary may be fixed judicially or extrajudicially. It is fixed extrajudicially when the parties, by written agreement, determine the line of separation.
between their lands with or without reference to markers on the ground.

Art. 790. When the boundary is fixed extrajudicially costs are divided equally between the adjoining owners in the absence of contrary agreement. When the boundary is fixed judicially court costs are taxed in accordance with the rules of the Code of Civil Procedure. Expenses of litigation not taxed as court costs are borne by the person who has incurred them.

Art. 791. When the boundary has been marked judicially or extrajudicially, one who removes boundary markers without court authority is liable for damages. He may also be compelled to restore the markers to their previous location.

CHAPTER 2. EFFECT OF TITLES, PRESCRIPTION, OR POSSESSION

Art. 792. The court shall fix the boundary according to the ownership of the parties; if neither party proves ownership, the boundary shall be fixed according to limits established by possession.

Art. 793. When both parties rely on titles only, the boundary shall be fixed, the line divisor between their lands with or without reference to markers on the ground.

Art. 790. Cuando la línea divisoría se fija extrajudicialmente, los costos se dividen de manera equitativa entre los dueños contiguos salvo acuerdo en contrario. Cuando la línea divisoría se fija judicialmente, se regulan las costas conforme a las disposiciones del Código Procesal Civil. Los gastos de litigación que no se fijen como costas judiciales están a cargo de la persona que los contrajo.

CAPÍTULO 2. DEL EFECTO DE LOS TÍTULOS, LA PRESCRIPCIÓN O LA POSESIÓN

Art. 792. El juez fija la línea divisoría según el derecho de propiedad de las partes; si ninguna de ellas demuestra su derecho de propiedad, se fija de acuerdo con los límites establecidos por la posesión.

Art. 793. Si el derecho de ambas partes se funda solo en los títulos,
fixed according to titles. When the parties trace their titles to a common author preference shall be given to the more ancient title.

Art. 794. When a party proves acquisitive prescription, the boundary shall be fixed according to limits established by prescription rather than titles. If a party and his ancestors in title possessed for thirty years without interruption, within visible bounds, more land than their title called for, the boundary shall be fixed along these bounds.

Art. 795. When the boundary is fixed extrajudicially, the agreement of the parties has the effect of a compromise.

Art. 796. When visible markers have been erroneously placed by one of the contiguous owners alone, or not in accordance with a written agreement fixing the boundary, the error may be rectified by the court unless a contiguous owner has acquired ownership up to the visible bounds by thirty years possession.

Art. 794. Si una parte prueba la prescripción adquisitiva, la línea divisoria se fija conforme a los límites establecidos por la prescripción, en vez de por los títulos. Si una parte y sus antecesores en el título poseyeron por más de treinta años sin interrupción, dentro de límites visibles, más terreno del que indica el título, la línea divisoria se fija en esos límites.

Art. 795. Si la línea divisoria se fija extrajudicialmente, el acuerdo de las partes surte efectos como transacción.

Art. 796. Cuando solo uno de los dueños contiguos colocó marcadores visibles erróneamente o de manera que no coincide con un convenio escrito de fijación de los límites, el juez puede rectificar el error a menos que el dueño contiguo haya adquirido la propiedad hasta los límites visibles mediante posesión por treinta años.
TITLE VII. OWNERSHIP IN INDIVISION


Art. 797. Ownership of the same thing by two or more persons is ownership in indivation. In the absence of other provisions of law or juridical act, the shares of all co-owners are presumed to be equal.

Art. 798. Co-owners share the fruits and products of the thing held in indivation in proportion to their ownership.

When fruits or products are produced by a co-owner, other co-owners are entitled to their shares of the fruits or products after deduction of the costs of production.

Art. 799. A co-owner is liable to his co-owner for any damage to the thing held in indivation caused by his fault.

Art. 800. A co-owner may without the concurrence of any other co-owner take necessary steps for the preservation of the thing that is held in indivation.

Art. 801. The use and management of the thing held in

TÍTULO VII. DE LA PROPIEDAD EN INDIVISIÓN

[Sec. 1, ley n.° 990 de 1990, vigente desde el 1 de enero de 1991].

Art. 797. La propiedad en indivisión es la propiedad de la misma cosa por parte de dos o más personas. A falta de otras disposiciones legales o convencionales, se presumen iguales las partes de todos los copropietarios.

Art. 798. Los copropietarios comparten los frutos y los productos de la cosa objeto de la propiedad indivisa en proporción a su titularidad. Cuando los frutos o productos son producidos por un copropietario, los demás tienen derecho a sus partes después de deducidos los costos de producción.

Art. 799. El copropietario responde ante los demás por todo daño sobre la cosa objeto de la propiedad en indivisión causado por su culpa.

Art. 800. Un copropietario puede, sin el asentimiento de los demás, tomar las medidas necesarias para la preservación de la cosa en indivisión.

Art. 801. El uso y la administración de la cosa en
indivision is determined by agreement of all the co-owners.

Art. 802. Except as otherwise provided in Article 801, a co-owner is entitled to use the thing held in indivision according to its destination, but he cannot prevent another co-owner from making such use of it. As against third persons, a co-owner has the right to use and enjoy the thing as if he were the sole owner.

Art. 803. When the mode of use and management of the thing held in indivision is not determined by an agreement of all the co-owners and partition is not available, a court, upon petition by a co-owner, may determine the use and management.

Art. 804. Substantial alterations or substantial improvements to the thing held in indivision may be undertaken only with the consent of all the co-owners.

When a co-owner makes substantial alterations or substantial improvements consistent with the use of the property, though without the express or implied consent of his co-owners, the rights of the parties shall be determined by Article 496.

When a co-owner makes substantial alterations or substantial improvements inconsistent with the use of the property or in spite of the objections of his co-owners, the
rights of the parties shall be determined by Article 497.

Art. 805. A co-owner may freely lease, alienate, or encumber his share of the thing held in indivision.

The consent of all the co-owners is required for the lease, alienation, or encumbrance of the entire thing held in indivision.

Art. 806. A co-owner who on account of the thing held in indivision has incurred necessary expenses, expenses for ordinary maintenance and repairs, or necessary management expenses paid to a third person, is entitled to reimbursement from the other co-owners in proportion to their shares.

If the co-owner who incurred the expenses had the enjoyment of the thing held in indivision, his reimbursement shall be reduced in proportion to the value of the enjoyment.

Art. 807. No one may be compelled to hold a thing in indivision with another unless the contrary has been provided by law or juridical act. Any co-owner has a right to demand partition of a thing held in indivision. Partition may be excluded by agreement for up to fifteen years, or for such other period as provided in R.S. 9:1702 or other specific law.
Art. 808. Partition of a thing held in indivision is excluded when its use is indispensable for the enjoyment of another thing owned by one or more of the co-owners.

Art. 809. The mode of partition may be determined by agreement of all the co-owners. In the absence of such an agreement, a co-owner may demand judicial partition.

Art. 810. The court shall decree partition in kind when the thing held in indivision is susceptible to division into as many lots of nearly equal value as there are shares and the aggregate value of all lots is not significantly lower than the value of the property in the state of indivision.

Art. 811. When the thing held in indivision is not susceptible to partition in kind, the court shall decree a partition by licitation or by private sale and the proceeds shall be distributed to the co-owners in proportion to their shares.

Art. 812. When a thing held in indivision is partitioned in kind or by licitation, a real right burdening the thing is not affected.

Art. 813. When a thing is partitioned in kind, a real right that burdens the share of a co-owner
attaches to the part of the thing allotted to him.

Art. 814. An extrajudicial partition may be rescinded on account of lesion if the value of the part received by a co-owner is less by more than one-fourth of the fair market value of the portion he should have received.

Art. 815. When a thing is partitioned by licitation, a mortgage, lien, or privilege that burdens the share of a co-owner attaches to his share of the proceeds of the sale.

Art. 816. When a thing is partitioned in kind, each co-owner incurs the warranty of a vendor toward his co-owners to the extent of his share.

Art. 817. The action for partition is imprescriptible.

Art. 818. The provisions governing co-ownership apply to other rights held in indivision to the extent compatible with the nature of those rights.


copropietario sigue a la parte asignada a él.

Art. 814. La división extrajudicial puede anularse por lesión si el valor de la parte recibida por el copropietario es menor por más de un cuarto del valor de mercado de la parte que debería haber recibido.

Art. 815. Cuando una cosa se divide por licitación, la hipoteca, el gravamen o privilegio que afecta la parte de un copropietario sigue a su parte de los fondos obtenidos de la venta.

Art. 816. Cuando una cosa se divide en especie, cada copropietario asume la garantía de vendedor frente a sus copropietarios en la medida de su parte.

Art. 817. Es imprescriptible la acción de división.

Art. 818. Las disposiciones relativas a la propiedad en indivisión rigen para otros derechos que se tengan de forma indivisa en tanto sean compatibles con la naturaleza de tales derechos.

Arts. 819-822. [Derogados. Sec. 1, ley n.° 514 de 1977].

Arts. 823-855. [Derogados. Sec. 1, ley n.° 170 de 1977].

Arts. 856-869. [Derogados. Sec. 1, ley n.° 169 de 1977].
INTRODUCTORY NOTE TO THE ENGLISH TRANSLATION OF THE CIVIL CODE OF NORTH KOREA

Joseph Cho*

Often labeled a “hermit kingdom,”¹ many wonder if law and order exists and is in effect in the Democratic People’s Republic of Korea (“DPRK” or more commonly known as “North Korea”). In reality, the DPRK is subject to a codified system of law.² The Civil Code forms part of such legal system. More specifically, the Civil Code serves as an integrated body of rules governing private law in the DPRK.

I. HISTORY AND STRUCTURE OF THE DEMOCRATIC PEOPLE’S REPUBLIC OF KOREA CIVIL CODE

The law of DPRK has evolved over the years in synchronization with ongoing transformations and developments of the country’s socioeconomic system. On the nature of law, Kim Il-sung, the founder of the DPRK, once posited, “[t]he law is not something immutable. Rather it evolves to reflect changes in the underlying socioeconomic system and also in the state of class conflicts.”³ Following the end of Japanese colonial rule over Korea in 1945, under the leadership of Kim, the North Korea regime attempted to purge Japanese colonial practices, while abrogating the vestiges of Japan’s colonial legal

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¹ See generally Jihyun Kim, Understanding the Hermit Kingdom as It Is and as It Is Becoming: The Past, Present and Future of North Korea, I J. OF CONTEMPORARY ASIA 46 (2016).


Meanwhile, the DPRK leadership embarked on various legislative initiatives to pursue the People’s Democracy Revolution (인민민주주의혁명, “PDR”).

During the PDR phase, for instance, the DPRK enacted the Law on Land Reformations (토지개혁에 대한 법령) on March 5, 1946 based on a decision of the North Korean Interim People’s Committee (북조선임시인민위원회, “NKIPC”). The purpose of this particular piece of legislation was to expropriate, and without any compensation, the lands of Japanese colonialists, pro-Japanese figures, and landowners in the DPRK and to freely distribute expropriated lands to farmers with meager land ownership. Under this legal structure, the historical métayage system within the DPRK was permanently abolished. Meanwhile, a system of private land ownership for agricultural workers was firmly established, with the State claiming ownership to some of the lands, forests, and irrigation facilities expropriated, which paved the way for a Socialist state ownership regarding North Korean lands and resources.

In addition, on August 10, 1946, based on the 58th decision of the NKIPC, “a law was enacted to nationalize key factories, firms, mines, power plants, transportation, the postal service, banking, commerce, and cultural organizations.” Under the Law on Nationalization of Industry, Transit, Transportation, Postal Service, Banks etc. (산업 교통 운수 체신 은행 등의 국유화에 관한 법령), therefore, all key industrial and cultural facilities owned by Japan and pro-Japanese capitalists were expropriated without any compensation.

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5. Annotation, supra note 3, at 13.
6. Id.
7. Id.
8. Id. Under the system of métayage, “the cultivator (métayer) uses land without owning it and pays rent in kind to the owner.” See Métayage Land Ownership, BRITANICA. https://perma.cc/L3NL-E9JT. (Last Visited July 15, 2022).
compensation and subsequently nationalized, providing the legal basis for Socialist state ownership over the key industrial facilities.\textsuperscript{11} Following these transitional legislative measures, which brought about visible offshoots of the PDR, the DPRK moved on to adopt more stringent measures to bend the country inexorably toward a Socialist society.

Following the onset of the Korean War in 1950, there appeared two draft Civil Code bills. Influenced by the Soviet Union’s Civil Code, which was enacted in 1922, DPRK’s first draft Civil Code in 1950 consisted of four books including General Principles, Law of Things, Law of Obligations, and Succession Law.\textsuperscript{12} This draft was never passed into law.\textsuperscript{13} Meanwhile, DPRK’s second draft Civil Code in 1958 contained six books consisting of General Principles, Law of Possession, Law of Indebtedness, Copyright Law, Law of Creative Inventions, and Law of Succession.\textsuperscript{14} Not unlike its predecessor, this draft was never enacted.\textsuperscript{15}

In the meantime, the DPRK regime steadfastly “moved toward building an independent and industrialized Socialist nation” based on the philosophy of Juche or self-reliance and determination.\textsuperscript{16} Such efforts culminated in the inauguration of the Socialist Constitution in 1972, which replaced the DPRK’s first Constitution promulgated in 1948.\textsuperscript{17} Under the 1972 Constitution, “private ownership was totally eliminated, ushering in the completion of the Socialist central economic planning system.”\textsuperscript{18} The 1972 Constitution has been amended and supplemented on eight different occasions.\textsuperscript{19}

\begin{itemize}
\item \textsuperscript{11} Annotation, supra note 3, at 14.
\item \textsuperscript{12} Id., at 11.
\item \textsuperscript{13} Id., at 21.
\item \textsuperscript{14} Id., at 20.
\item \textsuperscript{15} Id., at 21.
\item \textsuperscript{16} Goedde, supra note 4, at 1269.
\item \textsuperscript{17} Joseon Minjujuui Inmin Gonghwaguk Sahoejuui Heonbeob (조선민주주의인민공화국 사회주의헌법) [North Korean Constitution] (1972).
\item \textsuperscript{18} Id., at 1295.
\item \textsuperscript{19} See Constitution of North Korea, WIKIPEDIA. https://perma.cc/C67B-DYZX. (Last visited July 15, 2022). See also Juliana Dowling & Dae Un Hong, The Enshrinement of Nuclear Statehood in North Korean Law: Its Implications
\end{itemize}
Against the foregoing backdrop, the Civil Code of the DPRK ("DPRK Civil Code") was enacted in 1990. Being a relatively new legislation, it has been amended a total of three times to date. The DPRK Civil Code consists of four parts: General Part (Part 1), Law of Ownership (Part 2), Law of Obligations (Part 3), and Civil Liability and Prescription (Part 4).

Part 1 of the DPRK Civil Code is divided into three chapters: Chapter 1 addresses the basics of civil law, while Chapter 2 and Chapter 3 deal with the parties to civil legal relations and with civil juridical acts, respectively. Part 2 contains the general principles of ownership (Chapter 1), State ownership (Chapter 2), social cooperative ownership (Chapter 3), and private ownership (Chapter 4). In addition, Part 3 of the Civil Code consists of the general principles of obligation (Chapter 1) followed by contracts based on planning (Chapter 2), contracts not based on planning (Chapter 3), and enrichment without cause (Chapter 4). Lastly, Part 4 includes two chapters on civil liability (Chapter 1) and civil prescription (Chapter 2), respectively.

In light of how it is structured, the North Korean Civil Code is considered patterned after the pandekten system originated in Germany, with its own characteristics. Initially developed by Georg Arnold Heise and subsequently theorized and put to pedagogical use by Frederich Carl Von Savigny, the most salient feature of this German system of codification is placing general provisions of overarching implications at the forefront followed by more specific provisions. In this regard, the North Korean Civil Code is similar to

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22. Id., at 11-12.
the Civil Code of South Korea, which has also embraced the *pandekten* system.²⁴

II. METHODS OF TRANSLATION AND RELEVANCE

The original text of the DPRK Civil Code is available online.²⁵ Based on that text, translating the DPRK Civil Code into English was a solo project. Throughout the process of crafting a draft translation, the Annotation proved to be an invaluable tool and was consulted to as needed as it helped with understanding the relevant context, syntax, and terminologies of certain clauses reflecting North-South differences in the Korean language including legal language. Subsequently, during the process of editing, Mariano Vitetta, Research Associate at the Center of Civil Law Studies of Louisiana State University, gave an expert hand in terms of adapting the text to civilian language under Professor Olivier Moréteau’s graceful guidance.

As noted above, from a legal standpoint, private economic activities are considered illegal in the DPRK. Against this backdrop, it is noteworthy that the purpose of the civil law in the DPRK is to “strengthen the material and technological bases of the Socialist economy system based on civil regulation of property relations, thereby contributing to guarantee the People’s self-reliant and creative lifestyle.” It is hoped that this English translation may help readers understand and appreciate the constitutive elements of the civil law of the DPRK based on the above purpose and related details.

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²⁴ Wu Ying-Chieh, *Trust Law in South Korea*, in *TRUST LAW IN ASIAN CIVIL LAW JURISDICTIONS* 46 (Lusina Ho & Rebecca Lee eds., Cambridge U. Press 2013).

THE CIVIL CODE OF THE
DEMOCRATIC PEOPLE’S
REPUBLIC OF KOREA

BOOK 1. GENERAL PART

CHAPTER 1. THE BASICS OF
THE CIVIL LAW

Article 1. Purpose of the civil law

The civil law of the DPRK strengthens the material and technological bases of the socialist economy system based on civil regulation of property relations, thereby contributing to guarantee the People’s self-reliant and creative lifestyle.

Article 2. Object of the civil law

The civil law of the DPRK regulates property relations formed on equal footing between institutions, corporate bodies, organizations, and citizens. The State guarantees the autonomous status of parties to civil legal relations in relation to...
to institutions, corporate bodies, organizations, and citizens.

Article 3. Principle of socialist ownership of the means of production

Socialist ownership of the means of production is what underpins the economy of the DPRK. In property relations, the State will continuously strengthen the socialist economic system by augmenting organized management and operation of the People’s economy founded on socialist ownership.

Article 4. Principle of planned-property transactions

Planned-property transactions will be pursuant to agreements based on the People’s economic plans. The State will enter into property transactions and realize them so that the participating institutions, corporate bodies, and organizations can duly perform the planned projects.

Article 5. Principle of observance of contractual rules

The State will ensure that institutions, corporate bodies, and organizations implement the Taean Work System,¹ which is a type of

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¹ Translator’s Note: the Taean Work System was introduced in December 1961 by Kim Il Sung, the DPRK’s founder, on his visit to the Taean Electrical Appliance Plant. Under the Taean Work System, the ultimate authority and responsibility for managing and operating factories and enterprises belongs to the party committee at the factory or enterprise. In this centralized approach to economic management with the party committee at its core, higher level officials assist lower-level functionaries and workers in an environment of close comradery and consultation.
대안의 사업체계의 요구를 구현하며 계약규율을 엄격히 지키도록 한다.

제 6 조 (인민의 복리증진원칙)

인민들의 생활을 책임지고 돌보는 것은 사회주의 국가의 본성적 요구이다. 국가는 기관, 기업체, 단체가 공민과 재산관계를 설정하고 실현하는 데서 인민들의 복리증진을 위한 시책이 근로자들에게 더 잘 미치도록 하는데 깊은 관심을 돌린다.

Article 6. Principle of promotion of the People’s welfare

Taking responsibility and caring for the People’s lives is a primordial demand of a socialist state. The State will develop a keen interest in ensuring that policies of promoting the People’s welfare affect the workers at large in connection with the formation and realization of property relations between, on the one hand, institutions, corporate bodies, or organizations and, on the other hand, citizens.

제 7 조 (재산관계자들의 편의보장원칙)

공민이 참가하는 재산관계는 계약을 비롯한 행위와 사건에 따라 이루어진다. 국가는 재산관계에 근로자들이 일상적으로 널리 참가할 수 있도록 온갖 평의와 조건을 보장한다.

Article 7. Principle of guarantee of convenience of parties to property relations

Property relations in which citizens participate take place via juridical facts and acts, including contracts. The State will ensure that various accommodations and conditions be met so that the workers may routinely and widely participate in property relations.

제 8 조 (민사관계 당사자들 사이의 협력과 방조원칙)

집단주의는 사회주의사회생활의 기초이다. 국가는 기관, 기업체, 단체와 공민이 서로 협력하고 방조하는 집단주의원칙에서 재산관계를 설 정하고 실현하도록 한다.

Article 8. Principle of cooperation and assistance among parties to civil relations

Collectivism is what underpins socialist social life. The State will ensure that institutions, corporate bodies, organizations, and citizens form and realize property relations according to the principle of...
collectivism by which they assist and cooperate with each other.

Article 9. Principle of respect of State and social interests

In setting up and realizing property relations, the State will strictly guarantee the interests of individual institutions, corporate bodies, organizations, and citizens, while prioritizing the interests of the State and of society at large.

Article 10. Effects of related civil treaties

In the event of any discrepancy between this Civil Code and a treaty between the DPRK and a foreign state in respect of civil activities, the latter shall be followed.

CHAPTER 2. PARTIES TO CIVIL LEGAL RELATIONS

Article 11. Parties to civil legal relations

The parties to civil legal relations include institutions, corporate bodies, organizations, which operate with independent expenditure budgets or with a self-supporting account system, and citizens. Joint ventures incorporated within the DPRK and foreign corporations recognized by the law will be parties to civil legal relations.
제 12 조 (기관, 기업체, 단체의 등록)

조직된 기관, 기업체, 단체는 해당 기관에 등록하여야 창설된 것으로 인정한다. 기관, 기업체, 단체는 해당 기관에 등록된 때부터 민사상 권리를 가지거나 의무를 질 수 있는 민사권리능력과 그것을 자신이 직접 실행할 수 있는 민사행위능력을 가진다.

Article 12. Registration of institutions, corporate bodies, and organizations

Organized institutions, corporate bodies, and organizations will be deemed formed when registered with the applicable authorities. From the time of registration, institutions, corporate bodies, and organizations will be entitled to exercise civil rights and assume obligations with the legal capacity to enforce such rights and obligations by themselves.

제 13 조 (기관, 기업체, 단체의 민사권리능력)

기관, 기업체, 단체는 자기의 본선업무에 맞는 범위안에서 민사권리능력을 가진다. 자기의 본선업무를 해당 기관에 등록된 기관, 기업체, 단체는 그것을 마음대로 변경할 수 없다.

Article 13. Civil legal capacity of institutions, corporate bodies, and organizations

Institutions, corporate bodies, and organizations will have the legal capacity that is consistent with the nature of their respective tasks. These tasks may not be arbitrarily altered by institutions, corporate bodies, and organizations registered with the applicable authorities.

제 14 조 (대표자와 대리인에 의한 민사법률행위)

기관, 기업체, 단체의 관리책임자는 그 기관, 기업체, 단체의 대표자이다. 기관, 기업체, 단체는 자기의 대표자가 대리자가 위임하는 대리인을 통하여 민사법률행위를 한다.

Article 14. Civil juridical acts by representatives and mandataries

The representatives of institutions, corporate bodies, or organizations will be responsible for their management. Each institution, corporate body, and organization will engage in civil juridical acts through its representative or a mandatory appointed by the representative.
제 15 조 (기관, 기업소, 단체의 민사책임)

기관, 기업소, 단체는 자기가 관리하고 있거나 소유하고 있는 재산으로 민사책임을 진다.

제 16 조 (기관, 기업소, 단체의 병합과 분리)

기관, 기업소, 단체가 갈라지거나 합쳐지는 경우 그의 민사상 권리의무도 갈라지거나 합쳐진다. 기관, 기업소, 단체가 폐지되거나 해산을 결정한 경우 그가 가지고 있던 채권채무는 해당 업무를 위임받은 청산인이 처리한다.

제 17 조 (기관, 기업소, 단체의 민사권리능력과 행위능력의 소멸)

기관, 기업소, 단체의 민사권리능력과 민사행위능력은 그 기관, 기업소, 단체의 폐지 또는 해산이 해당기관에 등록된 때에 없어진다.

제 18 조 (민사법률관계 당사자로서의 국가)

국가는 국가소유관계를 비롯한 일정한 민사법률관계에서 직접 당사자로 된다. 이 경우 국가는 해당한 권한을 부여한 기관을 통하여 당사자로서의 권리를 행사하며

Article 15. Civil liability of institutions, corporate bodies, and organizations

Institutions, corporate bodies, and organizations assume civil liability with the properties they manage or own.

Article 16. Merger and division of institutions, corporate bodies, and organizations

When institutions, corporate bodies, and organizations are divided or merged, their civil rights and obligations will be divided or merged accordingly. When any institutions, corporate bodies, or organizations are wound up or a resolution is passed for their dissolution, their rights and obligations will be handled by an authorized liquidator.

Article 17. Extinction of the civil legal capacity of institutions, corporate bodies, and organizations

The civil legal capacity and capacity to act of institutions, corporate bodies, and organizations will cease to exist when their dissolution or liquidation is registered with the applicable authorities.

Article 18. The State as a party to civil law relations

The State may become a direct party to certain civil law relationships, including state ownership. In this case, the State will exercise its rights and perform its obligations through an organ to
의무를 리행한다.

제 19조 (공민의 민사권리능력)

공민의 민사권리능력은 출생과 함께 생기며 사망과 함께 없어진다. 모든 공민은 민사권리능력을 평등하게 가진다. 법이 따로 정하지 않은 한 누구도 공민의 민사권리능력을 제한할 수 없다.

제 20조 (공민의 민사행위능력)

공민의 성인나이는 17살이다. 17살에 이른 공민은 민사법률행위를 독자적으로 할 수 있는 민사행위능력을 가진다. 16살에 이른자는 자기가 받은 로동보수의 범위안에서 민사법률행위를 독자적으로 할 수 있으며 그 범위를 벗어나는 행위는 부모나 후견인의 동의를 받아야 할 수 있다.

제 21조 (민사행위무능력자, 신체기능장애자의 민사법률행위)

민사행위무능력자, 신체기능장애자는 부모나 후견인을 통하여 민사법률행위를 한다. 성인의 민사행위무능력자인정은 재판절차로 한다.

which applicable authority is delegated.

Article 19. Citizen’s civil capacity of enjoyment

Citizens have civil legal capacity upon birth, and that capacity ceases upon death. All citizens have equal civil legal capacity. Unless otherwise provided by law, no citizen may restrict the civil legal capacity of another citizen.

Article 20. Citizen’s civil capacity of exercise

Citizens will come of age upon turning seventeen. A citizen who has reached the age of majority is entitled to independently enter into civil juridical acts. Upon reaching the age of sixteen, a person may independently enter into civil juridical acts up to the amount of his or her labor wages; any act exceeding such limit may be undertaken only with parental or a tutor’s consent.

Article 21. Civil juridical acts of the incompetent and the disabled

The incompetent and the disabled make civil juridical acts through a parent or a legal tutor. Whether an adult is incompetent or not is to be determined through court proceedings.
제 22 조 (소재불명자, 사망자의 인증)

마지막소식이 있는 때부터 3 년이 지나도록 소식이 없는 공민에 대하여서는
리해관계자의 신청 에 따라 공증기관이 소재불명자로
인증할 수 있다. 소재불명자로
인증된 후 2 년, 소식이 없거나
마지막소식이 있는 때부터 5 년,
생명에 위험을 준 사고가 있은
때부터 1 년이 지나도록 소식이
없는 공민에 대하여서는 앞으로
 같은 절차에 따라 사망자로
인증할 수 있다.

제 23 조 (소재불명자, 사망자인증의 취소)

소재불명자 또는 사망자로
인증되었던 공민이 나타났거나
소식을 보내어 거처를 알려온
경우 공증기관은 본인이나
리해관계자의 신청에 따라
해당한 인증을 취소한다. 이
경우 변경된 재산 관계는
취소할 수 있으나 새로 성립된
결혼관계는 취소시킬 수 없다.

제 3 장 민사법률행위

제 24 조 (민사법률행위의 형식)

민사법률관계의 성질, 변경,
소멸을 목적으로 하는
법률행위는 의사표시를 말이나

Article 22. Certification of an absent person whose whereabouts are unknown and of the deceased

A citizen whose whereabouts have been unknown for three years from the last contact may be certified by the public authority as absent at the request of an interested party. The foregoing procedure is applicable mutatis mutandis to the death certification of a citizen who remains certified as absent for two years, has lost contact for a period of five years from the very last contact, or who has had no contact within one year from a fatal accident.

Article 23. Revocation of certification of an absent or deceased person

If a person who has been certified as absent or deceased appeared in person or resumed contact with the news of his or her whereabouts, the public authority will revoke the certification at the request of an interested party. In the event of such revocation, any affected property relations may be rescinded, but a newly formed marital relationship cannot be dissolved.

CHAPTER 3. CIVIL JURIDICAL ACTS

Article 24. Formalities of civil juridical acts

A juridical act intended to create, modify, or extinguish a civil legal relationship may be made
서면 같은 것으로 할 수 있다. 그러나 법이 요구하는 경우에는 서면으로 하거나 공증을 받는다.

제 25 조 (민사법률행위의 취소, 변경)

민사법률행위를 한 자는 법에서 허용하거나 상대방이 동의하는 경우에만 자기가 한 행위를 취소하거나 변경할 수 있다.

Article 25. Revocation and modification of a civil juridical act

Any person who has made a civil juridical act may only revoke or modify the act subject to the other party's consent or to the extent permitted by law.

제 26 조 (민사법률행위의 유효조건)

민사법률행위는 국가의 법과 사회주의적생활규범에 맞게 하여야 법적 효력을 가진다. 국가의 법과 사회주의적생활규범에 어긋나는 행위, 국가와 사회에 해를 준다는 것을 알면서 하는 행위, 허위적으로 하는 행위, 민사행위능력이 없는 공민이 하는 행위는 효력을 가지지 못한다.

Article 26. Validity of a civil juridical act

A civil juridical act is only legally valid when made in accordance with the laws of the State and socialist norms of life. An act violating the laws of the State or socialist norms of life, any purposeful act harming the State and society, an act of misrepresentation, and an act by an incompetent citizen shall be null.

제 27 조 (무효한 법률행위의 효과)

민사법률행위의 효력이 없어진 경우 당사자들이 이미 주고받은 돈이나 물건은 서로 상대방에게 돌려준다. 그러나 국가의 법과 사회주의적생활규범에 어긋난다는 것을 알면서 행위를 한 자에게는 해당 돈이나 물건을 돌려주지 않고 국고에 넣는다.

Article 27. Effects of nullity of a juridical act

When a juridical act is rendered null, any money or goods exchanged between the parties shall be returned to each other. However, if a party knew that the act in question might be contrary to the laws of the State or socialist norms of life, the money or goods in question shall not be returned but shall be vested with the State treasury.
제 28 조 (취소할수 있는 민사법률행위의 형태)

속히워서 한 민사법률행위, 본질적인 내용에 대하여 착오를 범한 민사법률행위, 강요로 본의 아니게 한 민사법률행위, 16 살에 이른자가 부모나 후견인의 동의없이 한 민사법률행위는 취소할 수 있다. 취소는 2 개월안에 하여야 한다.

Article 28. Types of annulable civil juridical acts

Any civil juridical act that arises as a result of deceit, a civil juridical act with an error on the essential elements thereof, an unintended civil juridical act under violence, and any civil juridical act by a person who has turned sixteen without parental or a tutor’s consent, may be annulled. The nullity shall be declared within two months.

제 29 조 (민사법률행위취소의 효과)

민사법mayın행위가 취소된 경우에 당사자들이 이미 주고받은 돈이나 물건은 서로 상대방에게 돌려준다. 그러나 상대방을 속였거나 강요하여 민사법역행위를 하게 한자의 돈이나 물건은 그에게 돌려주지 않고 국고에 넣는다.

Article 29. Effects of nullification of civil juridical acts

When a civil juridical act is annulled, any money or goods exchanged between the parties shall be returned to each other. Notwithstanding the foregoing, the money or goods of a party who induced the other party into a civil juridical act through deceit or violence shall not be returned to such responsible party, but shall be vested with the State treasury.

제 30 조 (민사법률행위의 효력)

민사법률행위의 효력은 일정한 조건의 발생과 결부시킬 수 있다. 이 경우 당사자는 조건의 발생을 앞당기거나 방해하는 행위를 하지 말아야 한다.

Article 30. Effect of a civil juridical act

The effect of a civil juridical act may be subject to the occurrence of certain conditions. In such a case, the parties shall not engage in an act that accelerates or unduly interferes with the occurrence of those conditions.
제31조 (민사법률행위의 대리)
기관, 기업소, 단체와 공민은
법이 정한 경우나 자신이 직접
수행하여야 할 경우를 내놓고는
대리인을 통하여
민사법률행위를 할 수 있다.

제32조 (대리의 종류)
대리는 법에 의하여 하는
법정대리와 위임에 의하여 하는
위임대리가 있다. 대리인은
반드시 민사행위능력을 가진
공민이어야 한다.

제33조 (대리행위의 법적효과)
대리인은 대리를 위임한자의
이름으로 민사법률행위를 하며
그 행위의 법적효과는 대리인을
위임한자에게 돌아간다. 대리를
위임한자는 대리인과
법률행위를 한 제3자 앞에
d래권의 범위 안에서 이루어진
모든 행위의 결과에 대하여
책임한다. 대리권의 범위를
 넘는 대리행위의 결과는
d래인이 책임진다.

제34조 (대리의 위임형식)
대리의 위임은 말로 하거나
서면으로 한다. 공민이 대리를
말로 위임할 경우에는 그
사실과 대리권의 범위를
상대방에 알려주어야 한다.
기관, 기업소, 단체는
서면으로만 대리를 위임할 수

Article 31. Representation for civil juridical acts
Institutions, corporate bodies, organizations, and citizens may make civil juridical acts through a representative except when the law provides otherwise or when making such acts by themselves is required.

Article 32. Types of representation
Representatives may be determined by law or by a contract of mandate. A representative shall be a citizen with legal capacity to act.

Article 33. Legal effects of an act of representation
A representative makes a civil juridical act in the name of the principal with the legal effect of such act binding the principal. The principal shall be responsible for the consequences of a juridical act made by a representative within the scope of the representation towards the other party to the act. The consequences of an act beyond the scope of representation shall be borne by the representative.

Article 34. Means of authorization
An act of authorization may be done in writing or orally. In the event of oral authorization by a citizen, the fact of such authorization, along with the scope of authority, shall be notified to the other party. Institutions, corporate bodies, and organizations
may appoint representatives only in writing, and the accompanying power of attorney or credentials shall detail the scope of authority:

Article 35. Obligations of representatives

A representative shall perform acts of representation in good faith and within the scope of mandated authority. A representative shall be responsible to the principal for damages arising from the representative's failure to perform in good faith and within the authority of the representative to perform.

Article 36. Extinction of mandate

A mandate will cease to exist upon the death of either principal or mandatary or when the mandatary becomes incapacitated. A mandate by contract will cease to exist when the principal has terminated the underlying authorization, or the mandatary has turned down the mandate. When the principal terminates a mandate authorized orally, such termination must be notified to the other party.
제 2편 소유권제도

제 1장 일반규정

제 37조 (소유권의 형태)
조선민주주의인민공화국에서 재산에 대한 소유권은 그 소유형태에 따라 국가소유권, 사회협동 단체소유권, 개인소유권으로 나누어진다.

제 38조 (소유권의 발생기초)
소유권은 법이나 계약 그 밖의 행위와 사건에 기초하여 발생한다. 소유권은 법에 기초하는 경우 법에 정한 범위, 계약에 기초하는 경우에는 따로 합의하지 않는 한 계약을 밟고 그 대상을 넘겨받은 때부터 발생한다.

제 39조 (소유권자의 권한)
소유권을 가진 자는 법인 정한 범위안에서 자기의 소유재산을 점유하거나 리용, 처분할 수 있다. 재산에 대한 처분은 해당 소유권을 가진자만이 할 수 있다.

제 40조 (비법점유재산의 반환청구)
소유권을 가진자는 자기의 재산을 다른자가 비법적으로 점유하고 있을 경우 그 반환을 요구할 수 있다.

BOOK 2. SYSTEMS OF OWNERSHIP

CHAPTER 1. GENERAL PRINCIPLES

Article 37. Types of ownership

Depending on the type of ownership, property ownership in the DPRK is divided into state ownership, social cooperative collective ownership, and private ownership.

Article 38. The foundational basis of ownership

Ownership arises on the basis of law, contract, and other acts and facts. Ownership arises in accordance with the timing prescribed by law, if based on the law, and when it is based on a contract, when the contract is made and the object of contract is handed over unless agreed otherwise.

Article 39. Authority of owner

An owner may occupy, use, or dispose of his or her own property within legal limitations. Property may only be disposed of by the rightful owner.

Article 40. Request for return of unlawfully occupied property

Owners are entitled to demand the return of their property if a third party possesses that property illegally.
제 41 조
(소유권실현방해행위의
배제청구)
소유권을 가진자는
자기소유권의 실현을 방해하는
행위를 하는자에 대하여 그
행위를 그만둘 것을 요구할 수
있다.

Article 41. Objection to interference with exercise of property

An owner is entitled to make a person interfering with the owner’s exercise of ownership cease to do so.

제 42 조 (공동소유권)
소유권은 여럿이 공동으로
가질 수 있다. 공동소유재산을
점유하거나 리용, 처분하는 것은
공동으로 소유권을 가진자들의
합의에 따라 한다.

Article 42. Co-ownership

Ownership can be held jointly. Possession, use, or disposal of property held in co-ownership shall be mutually agreed between the co-owners.

제 43 조 (공동소유재산의 분할)
공동으로 소유권을
가진자들은 공동소유재산에서
자기의 몫을 갈라 가질 수
있다. 재산을 현물로 가르기
어려울 경우에는 자기 몫에
해당하는 값을 받을 수 있다.
공동으로 소유권을 가진자들의
 몫이 명백하지 않은 경우
그들의 몫은 같은 것으로 본다.

Article 43. Division of property held in co-ownership

Co-owners may receive and keep their pro-rata shares of interest in property held in co-ownership. When it is difficult to partition property held in co-ownership in kind, each owner may receive a sum corresponding to his or her pro-rata share. When the pro-rata shares of interest among the co-owners are not clearly ascertainable, they are deemed equal in proportion.

제 2 장 국가소유권

제 44 조 (국가소유의 성격과
원천)
국가소유는 전체 인민의
소유다. 국가소유는 국유화한
재산, 국가투자로 마련한 재산,

Article 44. Nature and origin of State ownership

State ownership is the property of the entire people. State ownership consists of nationalized property, assets acquired through
국가기업소의 생산물,
국가기관, 기업소가 산 재산,
국가의 결정에 따라 국가기관,
기업소에 넘어온 재산,
협동단체나 공민이 국가에
바친 재산, 그 밖에 국고에
 넘어온 재산으로 이루어진다.
국가소유권의
대상에는 제한이 없다.

제 45 조 (국가소유권의 대상)

다음의 재산은 국가만이
소유할 수 있다.
1. 지하자원, 산림자원,
   수산자원을 비롯한
   나라의 모든 자연부원
2. 철도, 항공운수,
   체신기관과 중요 공장,
   기업소, 항만, 은행
3. 각급 학교 및 중요
   문화보건시설

제 46 조 (국가소유권의 담당자)

국가소유권의 담당자는 전체
인민을 대표하는 국가이다.
국가는 나라의 부강발전과
인민들의 복리향상을 위하여
자기 소유의 재산을 제한없이
점유하거나 리용, 처분할 수
있다.

Article 45. Object of State ownership

The following may only be owned by the State:
1. All natural resources in the
country including underground resources, forest resources, and fisheries;
2. Railways, means of airfreight,
   postal institutions, and main
   factories, business entities,
   ports, and banks;
3. Schools of all levels and significant cultural and health facilities.

Article 46. Person in charge of State ownership

The person in charge of State ownership is the State representing the entire People. The State may occupy, use, or dispose of its own property without any limitations in order to further the country's wealth and to promote the overall welfare of the People.
Article 47. Realization of State ownership

State ownership is realized directly by the State or through individual state agencies and business entities. State institutions and business entities have managerial oversight over the properties entrusted to them and may occupy, use, or dispose of them in their own name under the direction of the State.

Article 48. Transfer of State ownership and managerial oversight

If the property of a state institution or business entity is supplied or sold to a social cooperative or a citizen, the State’s ownership therein is transferred to the social cooperative or the citizen. However, if the property of a state institution or business entity is supplied or sold to another state institution or business entity, only managerial oversight is transferred thereby.

Article 49. Right to use State-owned fixed property

The State retains ownership of all modern farm machinery, including tractors, rice transplanters and harvesters, which the State has collocated to cooperative farms, and of fixed properties including cultural facilities, threshing floors, livestock cages, and warehouses that are funded by the State for cooperative farms; the cooperative farm is accorded the right to use the foregoing...
협동농장은 국가가 지원하여 준 고정재산을 그 사명에 맞게 자기의 재산처럼 리용할 수 있다.

제 50 조 (국가소유재산의 살림집 리용권)

국가는 살림집을 지어 그 리용권을 로동자, 사무원, 협동농민에게 넘겨주며 그 리용권을 법적으로 보호한다. 인민정권기관은 리혼당사자들 사이에 국가소유의 살림집리용권과 관련한 분쟁이 제기될 경우 해당 재판소의 판결서등본에 기초하여 살림집리용권자를 새로 정해주어야 한다.

제 51 조 (국가소유재산의 반환청구)

국가기관, 기업소는 자기 재산이 권한없는자로부터 사회협동단체나 공민에게 넘어간 경우에 그러한 반환을 요구할 수 있다.

제 52 조 (임자없는 물건의 소유권)

임자없는 물건은 국가소유로 한다. 임자없는 물건에는 소유권을 가진 자가 없거나 소유권을 가진 자를 알 수 없는 물건이 속한다.

Article 50. Right to use family residences owned by the State

The State builds family residences and transfers the right to use them to workers, clerks and cooperative farmers, while legally protecting said right. If a dispute arises as to who has the right to use a state-owned family residence in the context of a divorce, the People's Government Agency will determine the rightful user pursuant to a certified copy of a decision by a court of competent jurisdiction.

Article 51. Request for return of State-owned property

State agencies and business entities may request the return of their property when the property is transferred to social cooperatives or citizens by a person lacking rights to convey the property.

Article 52. Ownership of things without an owner

Things without an owner are owned by the State. Things without an owner include things with no ownership or whose owner cannot be ascertained.
CHAPTER 3. SOCIAL COOPERATIVE OWNERSHIP

Article 53. Nature and origin of social cooperative ownership

Social cooperative ownership is the collective ownership of workers belonging to a social cooperative. Ownership of a social cooperative consists of the property acquired by members of the social cooperative, any property self-funded by the social cooperative, products of the social cooperative, property purchased by the social cooperative, and the property the ownership of which is transferred by the State to the social cooperative.

Article 54. Object of social cooperative ownership

Social cooperatives can own land, agricultural equipment, ships, small and medium-sized factories, business entities, and other property necessary for their business activities.

Article 55. Person in charge of social cooperative ownership and their authority

The person in charge of the ownership of social cooperative is each individual social cooperative. Social cooperatives may occupy, use, or dispose of their property according to the manifested intent of their constitutive members under the principles of democracy. Disposal of land, however, shall be in accordance with
제 56 조
(사회협동단체소유권의 이전)
사회협동단체가 생산한 제품이 국가기관, 기업소 또는 다른 사회협동단체나 공민에게 공급, 판매되는 경우에 그에 대한 소유권은 상대방에 넘어간다.

제 57 조(사회협동단체소유재산의 반환청구)
사회협동단체는 자기 소유의 재산이 권한없는 자로부터 다른 사회협동단체나 공민에게 넘어간 경우 그 반환을 요구할 수 있다.

제 4 장 개인소유권

제 58 조 (개인소유의 성격과 원천)
개인소유는 근로자들의 개인적이며 소비적인 목적으로 위한 소유이다. 개인소유는 로동에 의한 사회주의 분배, 국가 및 사회의 추가적 혜택, 터벌경리와 비롯한 개인 부업경에서 나오는 생산물, 공민이 삼거나 상속, 증여받은 재산 그 밖의 법적 근거에 의하여 생겨난 재산으로 이루어진다.

what the law dictates.

Article 56. Transfer of social cooperative ownership
When a product produced by a social cooperative is supplied and sold to a national institution, business entity, or other social cooperative or citizen, ownership of the product is thereby conveyed to the other party.

Article 57. Request for return of social cooperative-owned property
A social cooperative may request the return of its property if the property is transferred by somebody lacking the right to convey to another social cooperative organization or citizen.

CHAPTER 4. PRIVATE OWNERSHIP

Article 58. Nature and origin of private ownership
Private ownership is reserved for workers’ personal and consumption purposes. Private ownership covers any property resulting from the socialist distribution of labor, additional benefits of the State and society, products of workers’ side jobs, including those from private gardens, any property bought, donated to or inherited by citizens, and property based on other legal grounds.
제 59 조 (개인소유권의 대상)
공민은 살림집과 가정생활에 필요한 여러 가지 가정용품, 문화용품, 그 밖의 생활용품과 승용차 같은 기재를 소유할 수 있다.

Article 59. Subject of private ownership
Citizens may own various household items necessary for their residence and home life, cultural products, and any other property, including household goods and passenger vehicles.

제 60 조 (개인소유권의 담당자와 그 권한)
개인소유권의 담당자는 개별적공민이다. 공민은 자기 소유의 재산을 사회주의적생활규범과 소비적 목적에 맞게 자유로이 점유하거나 리용, 처분할 수 있다.

Article 60. Person in charge of private ownership and his or her authority
The person in charge of private ownership is each individual citizen. Citizens are free to possess, use, and dispose of their own property in accordance with socialist norms and consumption purposes.

제 61 조 (가정재산에 대한 공동소유권)
가정성원으로 된 공민은 가정의 재산에 대한 소유권을 공동으로 가진다.

Article 61. Co-ownership of community property
Citizens who are members of the same household hold community property in co-ownership.

제 62 조 (개인소유재산의 반환청구)
공민은 자기 소유의 재산을 권한없는 자에게서 넘어받는다는 것을 알면서 가진 공민을 상대로 그 반환을 요구할 수 있다. 잃어버린 물건에 대하여서는 그 사실을 모르고 가진 경우에도 반환을 요구할 수 있다.

Article 62. Request for return of private property
A citizen can demand return of his or her property from another citizen who knowingly took over the property from someone who had no right to convey title thereto. Regarding lost property, its return may be requested even from the one who took possession of the property unknowingly.

제 63 조 (상속권)
국가는 개인소유재산에 대한

Article 63. Inheritance rights
The State guarantees inheritance rights over privately-owned
상속권을 보장한다. 공민의 개인소유재산은 법에 따라 상속된다. 공민은 유언에 의하여도 자기 소유의 재산을 가정성원이나 그 밖의 공민 또는 기관, 기업체, 단체에 넘겨줄 수 있다.

제 64 조(채권자와 채무자의 지위)
채권자는 일정한 재산상 행위를 수행할 것을 요구할 수 있는 권리를 가지며 채무자는 일정한 재산상 행위를 수행하여야 할 의무를 가진다.

제 65 조(채권자와 채무자의 권리의무)
채권채무관계에서 채권자와 채무자는 권리를 가지면서 그에 대응한 의무를 함께 가질 수도 있고 권리나 의무의 하나만을 가질 수도 있다.

제 66 조(채권채무관계의 발생기초)
채권채무관계는 인민경제계획을 비롯한 국가의 행정문건이나 계약 그 밖의 행위와 사건에 기초하여 설정된다.

property. A citizen's private property is inherited pursuant to law. Citizens may, by testament, transfer any private property to their family members or other citizens, institutions, business entities, or organizations.

Article 64. Status of creditors and debtors
An creditor has the right to demand fulfillment of a certain obligation, while a debtor has an obligation to perform a certain obligation.

Article 65. Rights and obligations between creditor and debtor
In a relationship involving obligations, the creditor and the debtor may have rights and corresponding obligations or have either a right or an obligation.

Article 66. Doctrinal foundation of obligations
Obligations result from the State's administrative documentation, including the People's Economic Plan, contracts, or other judicial acts and facts.
제 67조 (채무이행의 방조)

채권자는 채무자의 채무이행에 응당한 방조를 주어야 한다. 이 의무를 어기여 채무이행에 지장을 준 채권자는 채권에 제한을 받거나 해당한 책임을 진다.

제 68조 (채무위반으로 생기는 손해방지)

채권자는 채무자가 채무를 어기여 생긴 손해가 커지는 것을 막기 위한 대책을 세워야 한다. 이 의무를 어기여 손해가 커진 경우에 보상을 요구할 채권자의 권리는 그만큼 제한된다.

제 69조 (채권채무관계에서의 값)

채권채무관계에서 값은 국가가 정하였거나 평가한 값 또는 당사자들이 합의한 값으로 정하고 계산한다.

제 70조 (여러 당사자들 사이의 채권채무)

채권채무관계에서 채권자나 채무자가 여럿인 경우에 각자는 채권이나 채무의 몫을 분할하여 가질 수도 있고 련대적으로 가질 수도 있다.

Article 67. Assistance in the performance of obligations

A creditor shall provide any relevant assistance to the debtor in the performance of the obligation. A creditor who has adversely affected the debtor’s performance in violation of this obligation cannot exercise his or her right in full or assume appropriate liability.

Article 68. Mitigation of damage resulting from default

A creditor shall devise a plan to mitigate any damage resulting from the debtor’s default. When this obligation is violated and results in additional damage or loss, the creditor’s right to seek damages shall be reduced proportionately.

Article 69. Values in an obligation

A value or price in an obligation will be determined and computed by what the State has determined or assessed or based on what the parties have agreed upon.

Article 70. Obligations with multiple parties

In an obligation involving multiple creditors or debtors, the creditors and debtors may have the right or obligation proportionately or solidarily.
제 71 조(분할채권채무자의 권리의무)
분할채권자들은 자기 몫의
리행만을
요구할 권리를 가지며
분할채무자들은 자기 몫의
채무만을 리행할 의무를 진다.

제 72 조( acompound obligations without defined prestations

제 73 조(연대채권채무의 의무)
연대채권자들은 자마다
채무의 전부 리행
을 요구할 권리를 가지며
연대채무자들은 자마다 채무를
전부 리행할 의무를 진다.

제 74 조(연대채권자,
채무자들사이의 관계)
채무를 전부 리행한
연대채무자는 다른
연대채무자들에게 그들 각자가
부담하여야 할 몫을 보상하도록
요구할 권리를 가지며 채무를
전부 리행받은 연대채권자는
다른 연대채권자들에게 해당한
몰을 나누어줄 의무를 진다.

Article 71. Rights and obligations of a creditor and debtor to a divisible obligation
The creditor of a divisible obligation is only entitled to demand performance of the creditor’s share of the obligation, while a debtor of a divisible obligation is obligated to perform the debtor’s share of the obligation.

Article 72. Divisible obligations without defined prestation
In a divisible obligation in which it is not feasible to ascertain whether the prestation among the creditors or debtors are unequal, such prestations will be presumed equal.

Article 73. Solidary obligations
Solidary creditors are each entitled to demand performance of the entire obligation, while solidary debtors are each obligated to perform the entire obligation.

Article 74. Relationship among solidary creditors and debtors
A solidary debtor who has rendered the whole prestation is entitled to demand performance from the remaining debtors their individual shares, while a solidary creditor who has received the whole prestation is obligated to distribute such prestation on a pro-rata basis to the other creditors.
제 75 조 (련대채권자의 청구권행사제한)
련대채권자는 자기의 청구권을 행사하는 데서 다른 렌대채권자의 이익을 척박하지 말아야 한다. 한 렌대채권자가 자기의 청구권을 포기한 경우에 그것은 다른 렌대채권자에게 영향을 주지 않 는다.

Article 75. Restriction on a solidary creditor’s right to claim
In exercising their right to claim, a solidary creditor shall not affect the rights of the remaining solidary creditors. If a solidary creditor waives his or her right to claim, such waiver shall not affect the remaining joint creditors.

제 76 조 (련대채무의 면제)
채권자가 한 렌대채무자의 채무를 면제시킨 경우 그가 부담하기로 되었던 못만을 다른 렌대채무자의 몫은 적어진다.

Article 76. Waiver of a solidary obligation
When a creditor waives the obligation of a solidary debtor, the shares of remaining debtors will diminish in proportion to the obligation waived.

제 77 조 (채권채무의 양도)
채권자나 채무자는 자기의 채권이나 채무를 제 3 자에게 넘겨줄 수 있다.
채권을 제 3 자에게 넘겨주려는 채권자는 그에 대하여 채무자에게 알려야 하며 채무를 제 3 자에게 넘겨주려는 채무자는 채권자의 동의를 미리 받아야 한다.

Article 77. Transfer of rights and obligations
A creditor or a debtor may transfer or assign their rights or obligations to a third party. In such event, the creditor must inform the debtor regarding the transfer or assignment, and the debtor must obtain the creditor’s prior consent.

제 78 조 (제 3 자의 허물로 생긴 채무)
제 3 자의 허물로 생긴 채무를 채권자앞에 리행한 당사자는 제 3 자에게 해당한 보상을 요구할 권리를 가진다.

Article 78. Obligations resulting from the fault of a third party
A party who has performed in favor of a creditor an obligation resulting from the fault of a third party is entitled to a relevant compensation from the third party.
제 79 조 (채무리행당사자)

채무자는 채무를 자기가 직접 리행하여야 한다. 채무자가 직접 리행하지 않아도 되며, 채무는 제3자에게 위임하여 리행하게 할 수 있다. 이 경우 채무자는 제3자의 채무리행에 대하여 채권자 앞에 책임진다.

Article 79. Party responsible for performance

A debtor is personally liable for an obligation. Regarding an obligation for which personal performance by the debtor is not required, the debtor may authorize a third party to perform instead. In this case, the debtor will remain responsible to the creditor for the third party’s performance of the obligation.

제 80 조 (채무리행기간의 준수)

채무자는 채무를 정해진 기간안에 리행하여야 한다. 채무리행을 지연시키거나 채무리행의 접수를 지연시킨 당사자는 그에 대한 책임을 진다.

Article 80. Performance within term

An obligor must perform an obligation within the term agreed upon. The party that has delayed performance of an obligation or acceptance of what has been performed will be liable for such delay.

제 81 조 (채무리행방법)

법이나 계약에서 달리 정하지 않은 한 채무는 한변에 리행하여야 하며 채무를 나누어 리행하는 경우 채권자는 그 리행의 접수를 거절할 수 있다.

Article 81. Means of performance

Unless otherwise established by the law or a contract, an obligation will be performed on a single-performance basis. When an obligation is performed in installments, the creditor is entitled to refuse such performance.

제 82 조 (채무리행에서 물건의 질)

장표가 같은 종류의 물건으로 유상으로 넘겨주는 채권채무관계에서 채무자는 질이 가장 좋은 물건을 넘겨주어야 한다. 물건을 단순으로 넘겨주기로 되어있을 경우에는 중간 정도의 질을 가진 물건을 넘겨줄 수 있다.

Article 82. The quality of goods in performing an obligation

In an obligation involving paid transfer of things designated in species, the debtor will hand over a thing of the best available quality. When an obligation involves a gratuitous transfer of things, the obligor may hand over a thing of medium quality.
제 83 조 (특정물이 없어졌거나 쓸 수 없게 된 경우의 채권채무)

정표가 다른 특정된 물건을 대상으로 하는 채권채무관계에서 그 물건이 없어졌거나 쓸 수 없게 된 경우 해당 채권채무관계는 없어진다. 그러나 손해에 대하여서는 허물있는자가 보상할 책임을 진다. 정표가 같은 종류의 물건을 넘겨주기로 한 채권채무관계에서 물건이 없어졌거나 손상되면 채무자는 같은 종류의 다른 물건을 넘겨주어야 한다.

제 84 조 (종류물의 특정물에로의 전환)

정표가 같은 종류의 물건 가운데서 채권채무의 대상이 개별적으로 정하여진 그때부터 그 대상물은 정표가 다른 특정된 물건으로 된다.

제 85 조 (종속재산의 인도)

채산을 넘겨주는 채권채무관계에서는 넘겨주는 채산과 함께 그에 종속된 재산도 넘겨주어야 한다.

제 86 조 (채무리행장소)

채무는 법이나 계약이 정한곳에서 준비하여야 한다. 법이나 계약에서 정하지 않은 경우 돈으로 물어야 할 채무는 채권자의 주소지나

Article 83. An obligation when a specific thing is lost or rendered obsolete

In an obligation involving a specific thing, when such thing is lost or its use is rendered obsolete, the obligation is extinguished. Regarding any resulting loss, however, the party at fault will assume liability therefor. In an obligation involving transfer of generic things, when such a thing is lost or damaged, the debtor is obliged to provide for another thing of the same species.

Article 84. Conversion of generic things into specific things

As soon as the object of an obligation is specifically identified among generic things, the object will turn into a specific thing.

Article 85. Transfer of component parts

In an obligation involving transfer of property, any component parts annexed thereto should be transferred as well.

Article 86. Place of performance

An obligation will be performed at the place designated by law or contract. When such place is not otherwise designated, an obligation involving payment of money
거래은행에서, 부동산으로 넘어주어야 할 채무는 부동산 소재지에서 그 밖의 채무는 채무자의 소재지 또는 주소지에서 리행하여 한다.

제 87 조 (보상한 파손물의 소유권)
채무의 대상으로 된 물건을 심히 손상시킨 경우에 그 값의 전부를 보상한자는 해당 물건에 대한 소유권을 가진다.

제 88 조 (채권채무관계에서 선택권)
채권채무관계에서 당사자는 여러 행위들 가운데서 어느 하나를 선택하여 수행하는 것으로 정할 수 있다. 법이나 계약에서 행위의 선택권을 가지는 자를 정하지 않은 경우 선택권은 채무자에게 있다.

제 89 조 (선택권행사의 지연)
선택권을 가진자가 채무리행기간이 되도록 행위를 선택하지 않으면 선택권은 상대방에 넘어간다.

제 90 조 (계약의 체결)
계약은 한편 당사자의 제의와 상대편 당사자의 승낙에 의하여 이루어진다. 제의를 한 당사자는 상대방이 그 제의를 접수한 때로부터 해당 제의를 일방적으로 취소할 수 없다.

will be performed at the creditor’s address or trading bank, an obligation involving transfer of an immoveable at the location of the immoveable, and all other obligations will be performed at the debtor’s fixed residence or address.

Article 87. Title to a destroyed thing for which payment is made
If a thing that has become the object of an obligation is damaged beyond economic repair, the person who has paid in full therefor will acquire title over the thing.

Article 88. Right to choose in an obligation
The parties to an obligation may choose to perform one of multiple performance options. Unless otherwise prescribed by law or contract, the right to choose the performance option lies with the debtor.

Article 89. Delay in the exercise of choice
When the party with the right to choose fails to make a choice until the period of performance elapses, the right of choice will shift over to the other party.

Article 90. Formation of contract
A contract is made by a party’s offer and the other party’s acceptance thereof. The party making an offer cannot unilaterally cancel the offer after the other party has received such offer.
Article 91. Terms of contract
Contracting parties must agree on the essential terms of a contract such as its object, period of performance, and price. It is forbidden to enter into any contracts that result in unearned income to a citizen.²

Article 92. Types of contracts
Contracts may be gratuitous or onerous. Contracts to which institutions, business entities, and organizations are parties are onerous.

Article 93. Contract formalities
Contracts between institutions, business entities, and organizations shall be in writing. When entered into orally, the contract has to be proven. Contracts between an institution, business entity, or organization, on the one hand, and a citizen, on the other hand, or a contract between citizens may be entered into orally unless the law prescribes otherwise. In the event of a dispute over the formation and terms of a contract, a written contract prevails in court or arbitration proceedings.

² Translator’s note: In relation to overarching prohibition on unearned income under this article, as further set forth in Article 221 of the DPRK Civil Code, while lending and borrowing money or goods between citizens is permitted, all private loan agreements in the DPRK shall be gratuitous. Hence, entering into a loan agreement with interest or equivalent charges is prohibited in principle.
 제 94 조 (부동산거래계약)
부동산거래를 내용으로 하는
계약은 서면으로 맺고 공증을
 받아야 효력을 가진다.

Article 94. Immovable sale con-
tract
A contract dealing with the sale
of an immovable is not valid un-
less it is executed in writing and
notarized.

제 95 조 (계약의 동시리행)
두 당사자들이 다같이 의무를
지는 계약은 서로 동시에
리행하는 것을 원칙으로 한다.
한편 당사자가 자기의 의무를
리행하지 않은 경우 상대편
당사자는 자기의 의무리행을
보류할 수 있다. 채권자는
채무자가 장해진 기간에 의무를
리행하지 않을 경우 채권대상을
잡아둘 수 있다.

Article 95. Concurrent perfor-
mance of contract
In principle, a bilateral contract
between two parties, in which both
sides undertake obligations, is to
be performed concurrently. But if
a party has failed to perform that
party’s obligations, the other party
may suspend the performance of
that other party’s obligations. A
creditor may put the object of obli-
gation on hold if the debtor fails to
perform the obligations within the
prescribed period.

제 96 조 (계약의 취소)
한편 당사자가 정해진
기간안에 계약을 리행하지 않을
경우 상대편 당사자는 계약을
취소할 수 있으며 그것으로
하여 입은 손해를 보상받을 수
있다.

Article 96. Termination of contract
If a party does not perform a
contract within the period agreed
upon, the other party may termi-
nate the contract and receive com-
pensation for any damage result-
ning from the termination.

제 97 조 (계약대상의 검사)
계약대상을 접수한자는
그것을 제때에 검사하고 나타난
결함을 상대방에 알려야 한다.
계약대상의 결함에 대하여
허물있는자는 결함을
고쳐주거나 대상을 다른 것으로
바꾸어주거나 그 값을 낮추어야
한다.

Article 97. Inspection of the object
of the contract
The party that has received the
object of the contract must inspect
it in a timely fashion and notify the
other party of any manifest defect.
The party who is at fault for the
defect must fix it, offer a replace-
ment for the defective object, or
lower its value.
제 98 조 (계약대상의 숨은 결함에 대한 책임)

계약대상을 접수한자는 숨은 결함을 상대방에 알려 책임을 물을 수 있다. 숨은 결함에 대한 책임은 정해진 기간내에 물어야 한다.

Article 98. Liability for latent defects

The party who has received the object of the contract is entitled to hold the other party liable for a latent defect therein upon notification of the defect. Liability for redhibitory defects must be claimed within a prescribed period.

제 99 조 (계약대상이 없어졌거나 손상된데 대한 책임)

계약대상을 점유하고 있는자는 그것이 없어졌거나 손상된데 대하여 책임져야 한다. 그러나 계약 당사자에게 허물이 없거나 자연재해 같이 어쩔 수 없는 사유로 계약대상이 없어졌거나 손상된데 대하여서는 책임지지 않는다.

Article 99. Liability for the loss or destruction of the object of the contract

A party who possesses the object of contract is liable for any loss or damage of the object. Despite the foregoing, the party in possession is not liable for the loss or damage for which that party is not at fault or otherwise caused by inevitable reasons, including fortuitous events.

제 100 조 (제 3 자를 위한 계약)

계약은 제 3 자를 위하여 맺을 수 있다. 이 경우에 계약의 효력은 계약을 맺은 자와 함께 제 3 자에게도 발생한다.

Article 100. Contract for third-party beneficiaries

Contracts can be entered into for the benefit of a third party. In this case, the effect of such a contract is extended not only to the contracting parties, but also to the third-party beneficiary.

제 2 장 계획에 기초하는 계약

제 101 조 (계획에 기초하는 계약의 목적)

계획에 기초하는 계약은 인민경제계획을 실행하며

Article 101. Purpose of contracts based on planning

A contract based on planning will be entered into pursuant to the People’s Economic Plan to
Article 102. Terms of a contract based on planning

Contracting parties are obligated to determine the terms of contract so that the People's Economic Plan can be implemented in the most accurate and reasonable fashion. Institutions, business entities, and organizations should inform the planning agency in a timely manner if the Plan is deemed to contain obvious shortcomings.

Article 103. Contract formation

A contract is entered into when agreement is reached on all matters prescribed by law. Any dispute relating to contract formation will be resolved by arbitration.

Article 104. Amendment to contract based on planning

A contract will be modified accordingly when the People's Economic Plan is supplemented or adjusted. Amendments to a contract will occur when a party receives a notice of supplementation or adjustment to the Plan from the other party or when both parties receive such a notice from a competent State agency.
제 105 조 (자재공급계약의 체결)
기관, 기업소, 단체가 국가의 자재공급계획에 기초하여 자재를 주고받는 행위는 자재공급계약에 따라한다. 자재공급계약은 대안의 사업체계의 요구와 자재를 주고받는데서 상업적형태를 리용한테 대한 국가적요구에 맞게 맺고 리행하여야 한다.

Article 105. Formation of a material-supply contract
The act of exchanging supplies by institutions, business entities, and organizations under the State’s material-supply plan will be pursuant to a material-supply contract. Material-supply contracts must be entered into and performed in accordance with demands of the Taean3 business system and of the State in exchanging materials by utilizing the medium of commerce.

제 106 조 (자재공급계약의 당사자)
자재공급계약의 당사자는 국가의 자재공급 세부계획에 따라 자재를 주고받는 기관, 기업소, 단체가 된다. 자재공급계약에 의하여 공급자는 계획에 예견된 자재를 수요자에게 넘겨줄 의무를 지며 수요자는 그것을 넘겨 받고 해당한 값을 물 의무를 진다.

Article 106. Parties to a material-supply contract
Parties to a material-supply contract are institutions, business entities, and organizations that exchange materials according to the State’s detailed material-supply plan. Under a material-supply contract, a supplier is obligated to deliver the materials stated in the Plan to the consumer, and the consumer is obligated to accept them and pay the corresponding value.

제 107 조 (자재공급계약의 합의조건)
자재공급계약의 당사자는 공급할 자재의 이름, 규격, 질, 공급기간, 수량, 값과 그것을 주고받는 방법, 포장하는 방법, 거래은행 같은 조건에 대하여 합의를 보어야 한다.

Article 107. Terms of a material-supply contract
The parties to a material-supply contract must agree on its terms, including the name, specifications, quality, supply period, quantity and value of the goods to be supplied, means of exchanging and packing the goods, and trading bank.

3. See supra note 1.
제 108 조 (자재공급방법)
공급자는 자재를 제때에
운수기관을 통하여
실키보내주거나 자기 창고에서
수요자에게 내주어 야 한다.
운수기관을 통한 수송조직에
대하여서는 공급자가 책임지며
여기에 드는 수송비는 수
용자가 부담한다.

제 109 조 (공급된 자재의 검수)
공급된 자재의 검수는
수요자가 한다. 수요자는
자재에 사고가 있으면 공급자를
렴히시키고 그로부터
사고조서를 받을 수 있다.
정당한 리유없이 사고확인을
자연시키거나 거절한 당사자는
수요자가 작성한 사고조서에
근거하여 책임진다.

제 110 조 (공급된 자재의 숨은
결함처리)
공급된 자재의 숨은 결함을
발견한 수요자는 공급자에게
알리고 그로부터 사고조서를
받아야 한다. 긴급하거나
사고의 원인과 내용에 대하여
분쟁이 있을 경우에는 해당
감독기관의 참가 밑에
사고조서를 작성할 수 있다.
숨은 결함에 대하여 수요자는
자제를 넘겨받은 때로부터
3 개월 안에, 기계설비인

Article 108. Method of supplying materials
A supplier must deliver materials on time through carriers or
hand them over directly to the customer from the supplier’s own
warehouse. When delivering goods through a carrier, the sup
plier is responsible for the overall scheme of logistics and for the
costs of transportation incurred thereby.

Article 109. Inspection of materials supplied
A consumer is responsible for inspecting any materials supplied.
In the event of an incident relating to supplied materials, the con
sumer is entitled to an incident report from the supplier in the pres
ence of the supplier. The party who delays or refuses to confirm
the occurrence of an incident without justifiable grounds is lia
ble on the basis of an incident report drawn up by the consumer.

Article 110. Curing redhibitory vices in the materials supplied
Upon discovery of redhibitory vices in the materials supplied, the
consumer must inform the supplier and receive an incident report
from the supplier. In the event of an emergency or a dispute over
the cause and particulars of an incident, an incident report may be
drawn up in the presence of supervisory authority. For redhibitory
vices, the consumer can hold the supplier accountable within three
months from the delivery of
경우에는 시 운전이 끝날 때까지 공급자에게 책임을 물을 수 있다.

제 111 조 (계약된 자재의 공급조절)
수요자가 공급받은 자재를 사장량비하여 지불능력을 잃은 경우 공급자는 계약된 자재의 공급을 조절할 수 있다.

제 112 조 (자재값의 청산)
수요자는 자재를 넘겨받은 다음에 값을 체재에 물어야 한다. 자재의 품종, 규격, 질 값이 계약조건과 맞지 않을 경우 수요자는 값을 물지 않고 자재를 공급자에게 돌려보낼 수 있다. 그러나 변질될 수 있거나 긴급한 대책을 요구하는 자재는 돌려보내지 않고 값만 납출 수 있다.

제 113 조 (상품공급계약의 체결)
기관, 기업소, 단체들이 국가의 상품공급계획에 기초하여 상품을 주고받는 행위는 상품공급 계약에 따라한다. 상품공급계약은 주문제에 의하여 생산과 소비를 올게 련결시키며 인민들의 물질문화적수요를 충족시킬데 대한 국가적 요구에 맞게 맺고 리행하여야 한다.

Article 111. Control of the supply of contracted materials
If the consumer becomes incapable to make payments by wasting or squandering supplied materials, the supplier can control the supply of contracted materials.

Article 112. Settlement of the price of materials
Upon receipt of materials, the consumer will make timely payments. If a specific material’s type, specifications, or quality values do not conform to the terms of contract, the consumer can return the non-conforming material to the supplier without payment. However, for any material that may deteriorate or requires urgent countermeasures, the customer may keep them with a proportionate reduction in price.

Article 113. Formation of product-supply contracts
Any act of exchanging goods by institutions, business entities, and organizations pursuant to the State product-supply plan will be subject to product-supply contracts. A product-supply contract will properly interconnect production and consumption based on bespoke order system, meet the requirements of the State in furtherance of the material and cultural
Article 114. Obligations of the parties to a product-supply contract

Under the terms of a product-supply contract, the supplier is obligated to deliver consumables as established in the Plan to the consumer, and the consumer is obligated to receive them and to pay a corresponding price.

Article 115. Parties to a product-supply contract

The parties to a product-supply contract include any business entity that exchanges products according to the State’s product allocation plan as well as wholesale and retail business entities. A trading entity or cooperative farm responsible for product sales on behalf of the supplier may also qualify as a contracting party.

Article 116. Contractual terms relating to a product-supply contract

The parties to a product-supply contract must agree on its terms and conditions as set forth in Article 107 above.

Article 117. Method of delivery of products

A supplier must deliver contracted products on time through a carrier or deliver them directly to the consumer’s warehouse. In each case, the product must be accompanied by a written statement...
명세서를 수요자에게 보내주어야 한다.

제 118 조 (공급된 상품의 검수)
공급된 상품의 검수는 수요자가 하며 그 과정에 나타난 결함에 대해 사고처리는 이 법 제 109 조 2 항의 규정에 따라 한다.

제 119 조 (공급된 상품의 숨은 결함처리)
공급된 상품의 숨은 결함에 대한 사고처리는 이 법 제 110 조 제 1 항의 규정에 따라 한다.
신용보증기간이 정하여지지 않은 상품의 숨은 결함에 대하여는 상품을 넘겨받은 때부터 3 개 월안에 책임을 물을 수 있다.

제 120 조
(농업생산물수매계약의 체결)
수매기관이 국가의 수매계획에 기초하여 농산물을 사들이는 행위는 농업생산물수매계약에 따라 한다. 농업생산물수매계약은 땅과 원료를 계획적으로 동원하여 농장원들의 생산의욕을 높일 때 대한 국가적 요구에 맞게 맡고 리행하여야 한다.

of supply addressed to the consumer.

Article 118. Inspection of supplied products
The consumer is responsible for inspection of the supplied products, and curing any vices that are discovered in the process is subject to Article 109(2) of this Code.

Article 119. Curing redhibitory vices in supplied goods
Redhibitory vices in supplied products shall be cured in accordance with Article 110(1) of this Code. Regarding any product redhibitory vices for which a contractual warranty is unavailable, those vices can be claimed within three months from delivery of the product.

Article 120. Formation of an agricultural produce purchase contract
The act of buying agricultural products by purchasing agencies based on the State’s purchasing plan is subject to the terms of an agricultural produce purchase contract. Agricultural produce purchase contracts should be executed and carried out in accordance with national demands for planned mobilization of mass crops and raw materials, with a view to incentivizing farmers’ crop production.
제 121 조(농업생산물수매계약 당사자의 의무)
농업생산물수매계약에 의하여 생산자는 합의한 농산물을 생산하여 수매기관에 넘겨줄 의무를 지며 수매기관은 그것을 넘겨받고 해당한 값을 물 의무를 진다.

Article 121. Obligations of parties to an agricultural produce purchase contract
Under a contract for the purchase of agricultural produce, the producer is obligated to produce the agricultural produce agreed upon and deliver such produce over to the purchasing agency, and the purchasing agency is responsible for receiving the produce and making a corresponding payment.

제 122 조(농업생산물수매계약의 합의조건)
농업생산물수매계약의 당사자들은 수매품의 수매기간, 수량, 값, 질, 규격과 보관, 수송방법 같은 조건에 대하여 합의를 보아야 한다.

Article 122. The terms of an agricultural produce purchase contract
The parties to a contract for the purchase of agricultural produce must agree on its terms and conditions, such as the period of purchase, quantity, value, quality, specifications, storage, and means of transportation in relation to the produce being purchased.

제 123 조(수매품의 질과 규격)
수매품의 질과 규격은 국가의 수매계획에 따라 정한다. 국가의 수매계획에 지적하지 않은 경우에는 당사자들이 합의하여 정한다.

Article 123. Quality and specifications of purchased goods
The quality and specifications of purchased goods are determined based on the State purchasing plan. The parties must agree on those terms separately and decide on them, if they are not already indicated on the State purchasing plan.

제 124 조(수매품의 포장재와 용기)
수매품의 포장재와 용기는 수매기관이 보장한다. 생산자가 마련하게 된 포장재와 용기는 생산자가 보장한다. 이

Article 124. Packaging and containers of purchased goods
The packaging and containers of purchased goods are warranted by the purchasing agency. The packaging and containers
provided by the producer are warranted by the producer, in which case the value of such packaging and containers shall be borne by the purchasing agency.

Article 125. Term of purchase

Contracting parties must observe the period of purchase. The purchasing agency must pay damages to the producer damages if the agency fails to purchase the agricultural produce within the period established in the contract.

Article 126. Inspection of produce to be purchased

Purchasing agencies must purchase agricultural produce by accurately inspecting the quality of produce and measuring its quantity. Agricultural produce cannot be purchased in the form of measuring their volumes by placing them in storages or warehouses.

Article 127. Storage of purchased agricultural produce

It is the purchasing agency’s responsibility to take away or store agricultural produce purchased at the producer’s warehouse or otherwise locally purchased. However, any grains purchased without packaging or bulky items may be stored at the producer’s premises under the responsibility of the purchasing agency.
제 128 조( 기본건설시공계약의 체결)
기관, 기업소, 단체가 국가의 기본건설계획에 기초하여 기본건설을 위탁하는 행위는 기본건설시공계약에 따라 한다. 기본건설시공계약은 건설을 집중화하며 건설원가를 낮추고 건설물의 질을 높일데 대한 국가적 요구에 맞게 맺고 리행하여야 한다.

제 129 조( 기본건설시공계약 당사자의 의무)
기본건설시공계약에 의하여 시공주는 건설대상을 완공하여 건설주에게 넘겨줄 의무를 지며 건설주는 정해진 건설조건을 보장하고 완공된 건설물을 제때에 넘겨받을 의무를 진다.

제 130 조( 기본건설시공계약의 합의조건)
기관건설시공계약의 당사자들은 건설대상과 규모, 건설대상의 작공, 완공날자와 당사자들이 지켜야 할 사항 같은 조건에 대하여 합의를 보아야 한다. 기본건설시공계약은 계획년도를 기준으로 하여 건설대상별로 맺는다.

Article 128. Formation of a basic construction contract
The act of entrusting basic construction by institutions, business entities, and organizations based on the State basic construction plan is subject to the terms of a basic construction contract. Basic construction contracts must be executed and performed in accordance with national demands for centralizing construction, lowering construction costs, and improving the overall quality of nationwide constructions.

Article 129. Obligations of parties to a basic construction contract
Under a basic construction contract, a contractor is obligated to complete the object of construction and transfer it to the owner upon completion. The owner is obligated to guarantee the specified terms of construction and to accept the completed object of construction on time.

Article 130. Terms of a basic construction contract
The parties to a basic construction contract must agree on the terms and conditions of construction, including the object of construction and its size, the respective dates of construction commencement and completion, and any other conditions that the parties must comply with. Basic construction contracts are entered into for each object of construction based on the annual period of planning.
제 131 조(건설조건의 보장)
건설주는 공사에 지장이 없도록 건설부지와 설계를 보장하여야 한다. 건설부지안의 건설과 시설물을 옮기는 작업은 건설주의 의뢰에 의하여 시공주가 할 수 있다.

Article 131. Guarantee of the terms of construction
The owner must arrange the site of construction and design so that the underlying construction is not unduly interfered with. At the entrustment of the owner, the contractor may carry out work at the site of construction, while relocating related facilities.

제 132 조(건설대상의 착공 및 완공날자와 조업기일준수)
시공주는 건설대상의 착공 및 완공날자와 조업기일을 지켜야 하며 설계와 기술문건대로 공사의 질을 보장하여야 한다.

Article 132. Observance of the dates of commencement and completion of construction and of work milestones
A contractor must duly observe the agreed dates of commencement and completion of construction as well as work milestones and also ensure the quality of construction according to relevant design and technical documentation.

제 133 조(공사실적의 확인)
건설주는 건설공사에 지장이 없도록 공사실적을 제때에 확인해 주어야 한다.

Article 133. Confirmation on the progress of construction
The owner should check on the progress of construction in a timely manner so that the underlying construction is not unduly interfered with.

제 134 조(건설물의 인계인수)
시공주와 건설주는 준공검사에서 합격된 건설물만을 넘겨주고 받을 수 있다. 준공검사는 계약된 공사가 끝나고 조립능력에 해당한 부하시운전이 진행되었을 경우에 한다.

Article 134. Delivery and acceptance of construction deliverables
The contractor may only deliver, and the owner may accept, the deliverables of construction that have passed the completion inspection. A completion inspection may be conducted if, upon completion of the contracted construction, the load test run
제 135 조(건설물의 보증)

시공주는 건설물을 건설주에게 넘겨준 때부터 1 년안에 나타난 결함에 대하여 고쳐줄 의무를 진다. 이 경우 드는 비용은 허물있는자가 부담한다.

Article 135. Guarantee on construction

The contractor is obligated to correct defects appearing within one year from the final delivery of the construction to the owner. In this case, the cost of correction is borne by the party at fault.

제 136 조(화물수송계약의 체결)

국가의 수송계획에 맞물린 짐을 운수기관을 통하여 나르는 행위는 화물수송계약에 따라한다. 화물수송계약은 수송조직을 합리적으로 하여 화물수송계획을 질량적으로 수행할 데 대한 국가적 요구에 맞게 맺고 리행하여야 한다.

Article 136. Formation of cargo transportation contracts

Carrying of cargoes through a carrier in accordance with the State transport plan is subject to the terms of a cargo transportation contract. The cargo transportation contract must be executed and performed in accordance with the requirements of the State for rationalizing the system of transport to implement cargo transport plans both qualitatively and quantitatively.

제 137 조(화물수송계약당사자의 의무)

화물수송계약에 의하여 짐을 운수기관에 넘겨주고 운임을 물 의무를 지며 운수 기관은 그 짐을 운반하여 짐받을자에게 넘겨줄 의무를 진다.

Article 137. Obligations of parties to a cargo transportation contract

Under a cargo transportation contract, the consignor is obligated to hand the cargo over to the carrier and to pay for the freight, and the carrier is obligated to ship the cargo out to the consignee.

제 138 조(화물수송계약의 합의조건)

화물수송계약의 당사자는 짐의 이름, 수송량, 보내는 곳과 당하는 곳, 짐을 식고부리는 corresponding to the operational capacity is in progress.
방법과 보내는지, 받을자의 이름 같은 조건에 대하여 합의를 보아야 한다.

제 139 조(짐과 운수수단의 보장)
짐보내는 자는 계약된 짐을 정해진 규격대로 운수기관에 제때에 넘겨주어야 하며 운수기관은 그 짐의 성격에 맞는 운수수단을 배정하여야 한다.

제 140 조(짐을 싣고부리는 작업)
짐을 싣고부리는 작업은 달리 합의된것이 없는 한 짐임자가 한다. 짐을 싣고부리는 작업을 맡은 당사자는 정해진 작업기간을 지켜야 한다.

제 141 조(짐의 보관관리)
운수기관은 짐받음을자에게 짐을 넘겨줄 때까지 짐을 잘 보관관리하여야 한다. 운수기관은 나르는 짐을 마음대로 쓰거나 남에게 넘겨주지 말아야 한다.

제 142 조(수송기간의 준수)
운수기관은 가장 합리적인 수송료를 거쳐 정한 기간안에 짐을 목적지까지 실어날라야 한다. 이 의무를 어긴 경우

Article 139. Guarantee of cargoes and means of transportation
A consignor must timely hand over the contracted cargo to the carrier, and the carrier must designate the means of transportation suitable for the nature of the cargo.

Article 140. The work of loading and unloading cargoes
Unless agreed otherwise, the cargo owner is responsible for the loading and unloading of cargoes. The party responsible for the task of loading and unloading must observe the specified period of work.

Article 141. The safekeeping of cargoes
A carrier is responsible for safekeeping the cargo until it is handed over to the consignee. Carriers shall neither make arbitrary use of the cargo being carried nor hand any cargo over to a third party.

Article 142. Observance of the transportation period
A carrier must carry all cargoes to their destination points within the period agreed upon via the most reasonable route of
짐임자는 더 늦은 운임의 지불을 거절할 수 있으며 늦게 도착한 짐에 대한 연착보상금을 받을 수 있다.

제 143 조 (도착짐의 통지)
운수기관은 짐이 도착하면 제때에 짐받을자에게 알려야 한다. 짐받은자는 도착한 짐을 정한 기간안에 찾아가야 한다. 이 의무를 어기면 보관료나 해당한 료금을 물어야 한다. 런데수송으로 나른 짐에 대한 보관료나 제재금은 짐을 넘겨주는 운수기관이 적용하는 비율에 따라 계산한다.

제 144 조 (도착짐의 검사)
짐받는자는 짐을 검사하고 사고가 있으면 운수기관으로부터 사고조서를 받고 해당한 손해보상을 청구할 수 있다. 정당한 이유없이 사고조서작성을 거절한 운수기관은 그 사고에 대하여 책임진다.

제 145 조 (인민경제계획에 맞물리지 않은 화물의 수송)
기관, 기업소, 단체와 공민이 인민경제계획에 맞물리지 않은 짐을 운수기관을 통하여 나르는 것은 화물수송계약서에 따른다.

shipment. If this obligation is violated, the cargo owner may refuse to pay additional fares thereby incurred and be entitled to moratory damages for any late deliveries.

Article 143. Notification of cargo arrival
A carrier must timely inform the consignee upon arrival of the cargo at the point of destination. The consignee must claim the cargo within the specified period. If this obligation is violated, the consignee will be charged for storage fees or their equivalent. Storage charges or penalties for cargoes carried in the form of joint shipment are calculated based on the ratios set and applied by the cargo carrier.

Article 144. Inspection of cargos arrived
Upon inspection of the cargo arrived, the consignee may receive an incident report from the carrier in the event of an incident and claim damages relating to the incident. A carrier that refuses to draw up an incident report without justifiable grounds is held liable for the incident.

Article 145. Transportation of cargos not related to the People's Economic Plan
Transportation of cargos that are not related to the People's Economic Plan, by institutions, business entities, organizations, or citizens through carriers is subject
CHAPTER 3. CONTRACTS NOT BASED ON PLANNING

Article 146. Purpose of contracts not based on planning

Contracts that are not based on planning are entered into to ensure that the State's people-oriented policies better reach out to the citizens and also to guarantee the normal management activities of institutions, business entities, and organizations.

Article 147. Objects that cannot be subject to contracting

Any objects, rare metals, or other state-controlled products that can only be owned under national approval cannot form the object of contract.

Article 148. Formation of a purchase and sale contract

The act of selling and buying items among retail business entities, purchasing agencies and citizens or between citizens shall be in accordance with the terms of a purchase and sale contract. Purchase and sale contracts will be executed and performed to adequately ensure the People's consumption demands.
제 149 조(팔고사기계약당사자의 의무)

팔고사기계약에 의하여 파는자는 물건을 사는자에게 소유권을 넘겨줄 의무를 지며 사는자는 물건을 넘겨받고 값을 물 의무를 진다. 물건을 파는 것은 그에 대한 처분권이 있는자만이 할 수 있다. 처분권이 없는자가 물건을 판다는 것을 알면서 벗은 팔고사기계약은 효력을 가지지 못한다.

제 150 조(소매계약당사자)

기업소가 생산하여 공급한 상품에 대한 팔고사기계약에서 파는자로는 소매상업기업소가 된다. 소매상업기업소는 주민들의 수요에 맞게 상품주문서를 만들고 상품을 제때에 확보하여 팔아주어야 한다.

제 151 조(보증기간에 나타난 결함)

신용보증기간이 정해진 상품을 산자는 그 기간안에 나타난 결함에 대하여 상품을 판자에게 그 책임을 물을 수 있다.

제 152 조(수매계약대상과 당사자)

 국가계획에 있는 농산물, 회유금속과 국가 통제품을

Article 149. Obligations of the parties to a purchase and sale contract

Under a purchase and sale contract, the seller is obligated to hand over the ownership of the goods being purchased to the buyer, and the buyer is obligated to accept said goods and pay the purchase price. Selling goods may only be done by those who have the right to dispose of them. A purchase and sale contract entered into with the knowledge that the contemplated sale is by a person without the right to sell or dispose of the property is null.

Article 150. Parties to retail contracts

In a purchase and sale contract related to goods produced and supplied by a corporate body, the seller is a retail business entity. Retail business entities must prepare product orders meeting the needs of citizens, while securing and selling the products ordered on time.

Article 151. Defects manifested during the warranty period

A buyer who purchases a product with a fixed period of warranty can hold the seller liable for any defects arising in the warranty period.

Article 152. Parties to a purchase contract

With regards to agricultural produce, rare metals and state-
제외한 농축산물과 토산물, 원료와 자재, 일반용품을 사들이는 당사자로는 수매기관이 된다. 수매기관은 기본수매품종의 등급기준과 값을 공시하고 그에 따라 수매품을 사들여야 한다.

제 153 조(수매계약기간의 준수)
수매기관은 계약된 물건을 정해진 기간 안에 사들여야 한다. 이 의무를 어긴 경우 수매시키는자는 해당 물건을 다른 수매기관에 팔 수 있으며 생긴 손해를 보상받을 수 있다.

제 154 조(수매품의 수송)
수매품을 수매장소까지 나르는 일은 수매시키는자가 하며 수매장소로부터 다른 장소로 나르는 일은 수매기관이 한다.
수매품의 나르는 일은 앞 항과 다르게 계약한 경우 운반을 담당하는자는 해당 운임을 상대방으로부터 받을 수 있다.

제 155 조(시장에서 팔고사기계약)
공민이 생산한 농축산물 생산물은 농민시장에서만 생산자와 소비자 사이에 합의된 controlled goods under the State plan, the purchasing agency becomes a party to the acquisition of agricultural produce, local products, raw materials, and equipment and other general goods. The purchasing agency must disclose the rating standards and values of basic varieties to be purchased and acquire them accordingly.

Article 153. Observance of the contracted period of purchase
The purchasing agency must buy the contracted items within a set period. If this obligation is violated, the seller may sell the item to another purchasing agency and be compensated for the resulting damages.

Article 154. Transportation of purchased items
The seller is responsible for carrying purchased items to the location of sale, and the purchasing agency is responsible for carrying them therefrom to a different location. If the carriage of the item being purchased is arranged in a different manner than the foregoing, the party in charge of the carriage may receive the corresponding fares from the other party.

Article 155. Purchase and sale contracts in the market
Agricultural produce produced by citizens can be sold and bought on farmers’ markets at prices.
제 156 조 (작업봉사계약의 체결)
공민이 물건을 만들거나 수리, 가공하거나 그 밖의 일을 맡기며 행위는 작업봉사계약에 따라 한다. 작업봉사계약은 근로자들에 대한 편의봉사를 잘할 수 있게 맺고 리행하여야 한다.

Article 156. Formation of a work service contract
The act by citizens of making, repairing, or processing things and entrusting related matters is subject to the terms of a work service contract. The work service contract is executed and performed to facilitate quality services for workers.

제 157 조 (작업봉사계약당사자의 의무)
작업봉사 계약에 의하여 작업하는 자는 주문받은 일을 하고 그 결과를 작업받는자에게 넘겨줄 의무를 지며 작업받는자는 작업결과를 넘겨받고 해당한 종사료를 물 의무를 진다.

Article 157. Obligations of parties to a work service contract
Under a work service contract, the contractor is obligated to perform the work ordered and deliver the result to the hiring party, and the hiring party is obligated to accept the deliverables and pay out the corresponding service charges.

제 158 조 (작업봉사계약의 체결시기)
작업봉사 계약은 당사자들이 말로 합의하고 일감을 주고받은 때에 맺어진다.

Article 158. Timing of a work service contract formation
A work service contract is made when the parties exchange work following oral agreement.

제 159 조 (작업받는자의 의무)
작업받는자는 일감을 넘겨줄 때에 요구조건을 알려주면서 기술자료를 함께 주어야 한다. 이 의무를 어긴 경우 작업하는자는 작업기간을

Article 159. Obligations of the hiring party
The hiring party should provide technical data together with specifications when commissioning work. If this obligation is violated, the contractor may proportionately extend the period of work or modify the schedule of deliveries.
제 160 조(작업에 필요한 자재, 부속품의 보장)

작업하는 자는 계약에서 따로 정하지 않은 한 자재나 부속품을 자가 부담하여야 한다. 작업받는자가 자재나 부속품을 부담하기로 정한 경우 작업하는자는 그것을 검사하고 결함이 있으면 상대방에 제때에 알려야 한다.

제 161 조(작업대상물의 취급)

작업하는자는 작업받는자가 낸 작업대상을 소중히 다루고 자재, 부속품을 소비기준과 기술규정의 요구에 맞게 쓰야 한다. 쓰고 남은 자재와 부속품은 작업결과와 함께 작업받는자에게 돌려주어야 한다.

제 162 조(작업대상을의 구조변경금지)

작업하는 자는 작업대상의 구조를 마음대로 변경시키거나 작업받는자가 낸 작업대상에서 부분품을 떠내거나 자재와 부속품을 바꾸어쓰지 말어야 한다.

Article 160. Guarantee of materials and accessories needed for work

The contractor is responsible for arranging necessary materials and accessories unless the contract specifies otherwise. If the hiring party is obligated to secure such materials or accessories, the hiring party must inspect them and inform the contractor of any defects.

Article 161. Handling of the object of work

The contractor must handle the objects of work provided by the hiring party with care and use any materials and accessories in accordance with the standards of consumption and technical regulations. Any unused materials and accessories must be returned to the hiring party in addition to the deliverables of work.

Article 162. No structural modification of the object of work

The contractor shall not arbitrarily alter the structure of the object of work at will nor remove any parts from such object or replace any materials and accessories contained therein.
제 163 조(작업기간의 준수)
작업하는자는 작업기간을 지켜야 한다. 작업받는자는 정해진 기간까지 작업하는자가 작업을 끝내지 못할 것이 명백한 경우 계약을 취소하고 입은 손해를 보상받을 수 있다.

Article 163. Observance of work period
The contractor must observe the work period. The hiring party may terminate the contract and be compensated for damages incurred if it is clear that the worker will be unable to finish the work on time.

제 164 조(작업의 질보장)
작업하는자는 작업결과의 질을 보장하여야 한다. 작업한자는 보증기간이 정해진 경우 그 기간안에 나타난 결함에 대하여 남의 허물이 아닌 한 자가 책임진다.

Article 164. Quality assurance of work
The contractor must ensure the quality of the deliverables. If a warranty period is in place, the contractor is responsible for any defects arising within that period, unless any such defect is attributable to a third party.

제 165 조(작업결과를 넘겨받을 의무)
작업받는자는 작업결과를 제때에 넘겨받아야 한다. 이 의무를 어긴 경우에 작업한자는 정해진 보관료를 받을 수 있다.

Article 165. Obligation to receive the deliverables
The hiring party must accept deliverables on time. If this obligation is violated, the contractor may receive a fixed storage fee.

제 166 조(보관계약의 체결)
물건을 맡기고 보관하는 행위는 보관계약에 따라 한다. 보관계약은 기관, 기업소, 단체의 경영상 편리와 인민들의 생활상 편의를 보장할 수 있게 맡고 리행한다.

Article 166. Formation of a contract of deposit
Things are entrusted and stored under a deposit contract. Deposit contracts are entered into and performed to ensure the managerial convenience of institutions, business entities, and organizations, as well as increased convenience in life of the People.

제 167 조(보관계약당사자의 의무)
보관계약에 의하여 물건을 보관하는자는 그 물건을

Article 167. Obligations of parties to a contract of deposit
Under a deposit contract, the depository is obligated to keep the
보관하였다가 보관시간자에게 돌려줄 의무를 지며 물건을 보관시간자는 그것을 찾고 해당한 보관료를 물 의무를 진다.

제 168 조(보관계약의 체결시기)

보관계약은 당사자들사이에 말로 합의하고 물건을 보관하는자에게 넘겨주거나 보관하는자가 물건을 넘겨받고 해당한 표식물을 상대방에 내준 때에 맺어진다.

보관계약은 기간을 정하고 밝을수도 있고 기간을 정하지 않고 밝을수도 있다.

제 169 조(물건을 보관시키는자의 의무)

물건을 보관시키는자는 그 물건을 보관하는데서 주의하여야 할 점을 보관하는자에게 알리주어야 한다. 이 의무를 어겨 보관물에 생긴 손해가 보관하는자에게 준 손해는 물건을 보관시간자가 책임진다.

제 170 조(물건을 보관하는자의 의무)

보관하는자는 계약대로 물건을 보관하여야 한다. 성질상 관리를 필요로 하는 물건은 성실히 보관관리하여야 한다. 보관하는자는 보관물을 관리하는데 들어 비용을

Article 168. Timing of formation of a contract of deposit

A contract of deposit is made when, following the parties’ oral agreement, the thing deposited is delivered to the depositary or when the depositary issues a note of receipt to the depositor. A contract of deposit may be made with or without a fixed period of deposit.

Article 169. Obligations of the depositor

The depositor must inform the depositary of any precautions in safekeeping the items deposited. In case of failure to perform this obligation, the depositor will be liable for any resulting damage to the things deposited or to the depositary.

Article 170. Obligations of the depositary

The depositary must protect the things deposited according to the terms of the contract. Any items deposited which by nature require management must be kept safe in good faith. The depositary may recover from the depositor the cost
of safekeeping the things deposited.

Article 171. Deposit of goods in the ordinary course of business

Any entities that take goods on deposit in the ordinary course of business such as inns, theatres, or halls, are responsible for any loss or damage to the items deposited. However, the depositary is not responsible for any items stored separately by the depositor.

Article 172. Obligation to retrieve goods deposited

A depositor is obligated to retrieve the goods deposited on time. The depositary is entitled to charge higher storage fees if the depositor has failed to retrieve the property deposited after the period of deposit.

Article 173. Obligation to restore goods deposited to original condition

The depositary must return the things deposited to the depositor in the original condition. When taking in a sealed or packaged item, the depositary must return it as is. When taking in an item after checking its contents, the depositary should re-check the contents before returning the item.

Article 174. Obligation to return property deposited

The depositary must return the property deposited to the
돌려주어야 한다. 물건을 받고 표식물을 내준 경우에는 해당 표식물을 내놓는자에게 물건을 돌려주면 보관의무는 없어진다.

제 175 조(법적의무 없이 하는 재산의 보관관리)
공민은 법적의무없이도 다른 공민이나 국가사회협동단체의 재산을 보관관리할 수 있다. 이 경우 재산을 보관관리하는 자는 해당 사실을 재산임자에게 알리고 자기 재산처럼 보관관리하여야 하며 그것을 보관관리하는 데인 비용을 재산임자에게서 보상받을 수 있다.

제 176 조(법적의무 없이 보관관리하는 재산의 처리)
법적의무없이 남의 재산을 보관관리하는자는 불가피하게 그 재산을 처분한 경우 받은값만큼 재산임자에게 돌려주어야 한다.

제 177 조(빌리기계약의 체결)
공민의 도서, 생활용품이나 문화오락기구, 체육기자재 같은 것을 빌리는 행위는 빌리기계약에 따라 한다. 빌리기계약은 인민들의 다양한 물질문화적수요를 원만히 depositor with due care and preciseness. When a note of receipt is issued, the depositary’s obligation to store the property deposited extinguishes upon returning the property to a person presenting the note.

Article 175. Management of property without being obligated to do so
A citizen may keep and manage the property of another citizen or a national social cooperative without being bound to do so. In this case, the person who keeps and manages the property must notify the owner regarding such property management, store and manage the property as if it were his or her own, and is entitled to recover the costs of storage and management from the owner.

Article 176. Handling of property being managed with no legal obligation
A person who stores and manages another person’s property without being bound to do so must return any proceeds received to the owner.

Article 177. Formation of a loan
The act of lending things such as citizens’ books, household goods, cultural entertainment tools, and sports equipment is subject to the terms of a loan. The loan must be entered into and performed to adequately ensure the
보장할 수 있게 맺고
리행하여야 한다.

제 178 조(빌리기계약당사자의
의무)

빌리기계약에 의하여 물건을
빌려주는자는 빌리는자가
그것을 일정한 기간 리용하도록
넘겨줄 의무를 지며 빌리는자는
사용료를 물고 해당 물건을
리용한 다음 빌려준자에게
돌려줄 의무를 진다.

제 179 조(빌리기계약의 형식)

공민이 도서, 특허물, 록음물,
록화물 같은 자료를
해당기관으로부터 빌리는
계약은 무상 또는 유상으로
맺는다.

제 180 조(쓸 수 있는 상태의
물건을 빌려줄 의무)

빌려주는자는 물건을 그
본성에 맞게 쓸 수 있는
상태에서 넘겨주어야 하며
결함이 있는 물건을 빌려주는
경우 그 사실을 빌리는자에게
알려주어야 한다. 이 의무를
어겨 빌린자에게 준 손 해는
보상하여야 한다.

제 181 조(빌린 물건을
계약조건과 용도에 맞게 쓸
의무)

빌리는자는 빌린 물건을
계약조건과 용도에 맞게 쓸며
그 구조를 마음대로 변경시키지
마자 하야 한다. 빌리는자가 빌린

People’s diverse material and cultural needs.

Article 178. Obligations of parties to a loan

Under a loan, the lender is obligated to deliver the item lent to the borrower for a certain period, while the borrower is obliged to pay borrowing fees, use the object lent and return the lent object after use to the owner.

Article 179. Formalities of loan

When a citizen borrows things such as books, patents, recordings, or videos from applicable institutions, the underlying contract may be onerous or gratuitous.

Article 180. Obligation to lend things in usable condition

The owner must hand over the lent property in a usable condition according to its nature, and when a defective item is lent, the borrower must be informed. When this duty is violated resulting in damage to the borrower, such loss shall be compensated.

Article 181. Obligation to use the lent things according to the terms and conditions of the contract

The borrower must use the lent things according to the terms and conditions of the contract and should not change the design of the things at will. Before modifying
the structure of the lent item, the owner’s consent must be obtained.

Article 182. Repair of lent items

Any large-scale repairs of a borrowed item will be done by the owner, medium-scale repairs are allocated according to the terms of the contract, and any small-scale repairs will be undertaken by the borrower. If the party in charge of medium or small-scale repairs should fail to perform timely repairs resulting in severe damages to the borrowed item, the other party may rescind the contract.

Article 183. Sub-lending of lent property

Under a loan, the borrower can sub-lend the lent item to a third party with the consent of the owner. In this case, the borrower remains responsible to the owner for the performance of the contractual obligations.

Article 184. Contract of loan with a deposit

Under a contract of loan with a deposit, the owner may refuse to return the deposit until the lent property is returned to the owner.
제 185 조(위탁계약의 체결)
기관, 기업소, 단체가 판매, 수매나 그 밖의 재산거래를 다른 기관이나 공민에게 위탁하는 행위는 위탁계약에 따라 한다. 위탁계약은 적은 노력과 자금으로 온갖 경제적예비와 잠재력을 동원 리용할 수 있게 맺고 리행 하여야 한다.

제 186 조(위탁계약당사자의 의무)
위탁계약에 의하여 위탁받는자는 위탁하는자로부터 위탁받은 재산거래행위를 위탁하는자의 부담으로 수행할 의무를 지며 위탁하는자는 그 결과를 넘겨받고 해당한 보수를 지불할 의무를 진다. 위탁계약은 서면으로 맺어야 한다.

제 187 조(위탁받은 행위수행에 필요한 조건의 보장)
위탁하는자는 위탁받은 행위를 하는데 필요한 돈이나 물건을 먼저 상태에 넘겨주어야 한다.

제 188 조(위탁받은자의 의무)
위탁받은자는 계약조건에 맞게 위탁받은 행위를 하여야 한다. 위탁받은자가 계약조건의 범위를 벗어나는 행위를 하러

Article 185. Formation of consignment contracts
The act of consigning by an institution, business entity, or organization of sales, purchases, or other property transactions to another institution or citizen is subject to a consignment contract. Consignment contracts must be made and performed in a way that mobilizes a variety of economic reserves and potentials with minimal efforts and funds.

Article 186. Obligations of parties to a consignment contract
Under a consignment contract, the consignee is obligated to carry out the act of property transaction entrusted by the consignor at the expense of the consignor, while the consignor is obligated to accept the outcome of consignment and pay the corresponding compensation. Consignment contracts must be made in writing.

Article 187. Guarantee of conditions necessary for performing what has been consigned
The consignor must first deliver to the consignee any money or things necessary to perform what has been consigned.

Article 188. Obligations of the consignee
A consignee must perform the entrusted act in accordance with the terms of contract. Before the consignee acts outside the scope
할 경우에는 위탁한자의 동의를 받아야 한다.

제 189 조 (위탁받은자에 대한 제 3 자의 청구권)
위탁계약과 관계없이 위탁받은자에게 청구권을 가지고 있는 제 3 자는 위탁행위를 위하여 받았거나 위탁한자에게 넘겨주기로 된 돈이나 물건에서 청구권을 실행할 수 없다.

Article 189. A third party claim against the consignee
Regardless of the existence of a consignment contract, a third party with a claim against the consignee cannot enforce his or her claim on the money or goods that are received for consignment or are otherwise to be consigned to the consignor.

제 190 조 (유리한 행위결과의 처리)
위탁받은자는 위탁한자가 요구한것보다 더 유리하게 한 행위의 결과도 나 위탁한자에게 넘겨 주어야 한다.

Article 190. Treatment of favorable results
The consignee should hand over to the consignor the results of consignment, even when they are on more favorable terms than those initially requested by the consignor.

제 191 조 (위탁행위결과에 대한 보수와 비용의 지불)
위탁한자는 위탁받은자로부터 행위결과를 제때에 넘겨받고 해당한 보수와 그가 들인 비용을 지불하여야 한다.

Article 191. Remuneration on the outcome of consignment and payment of fees
The consignor must take in the results of what the consignee has performed on time and pay the corresponding remuneration and fees incurred.

제 192 조 (기관, 기업소, 단체사이의 재산거래에서 계약규범의 적용)
이법에서 규정한 팔고사기 계약, 작업봉사 계약, 보관계약, 빌리기 계약, 위탁계약은 기관, 기업 소, 단체사이에

Article 192. Application of contractual rules to transaction between institutions, business entities, and organizations
The provisions herein relating to purchase and sale contracts, work service contracts, contract of deposit, contract of lease, and consignment contract shall apply
Article 193. Formation of a passenger transportation contract

Any act of travel by citizens using means of transportation, including trains, cars, ships, and airplanes, is subject to the terms of a passenger transportation contract. Passenger transportation contracts must be executed and performed to ensure the safety and convenience of the People while travelling.

Article 194. Obligations of parties to a passenger transportation contract

Under a passenger transportation contract, the passenger is obligated to pay the fare, and the transportation agency is obliged to transport the passenger to the point of destination. A passenger transportation contract is entered into when the transport agency approves a passenger’s use of the mode of transportation in question by issuing tickets.

Article 195. Guarantee of the terms of travel

The transportation agency must ensure the provision of conditions and facilities necessary for travel including the provision of medical services and meals to the passengers.
Article 196. Obligation to transport passengers to their points of destination

When unable to transport a passenger to the point of destination, the transportation agency must ensure an alternative mode of transportation is provided.

Article 197. Refund of ticket price and extension of its validity period

The transportation agency must refund all or part of the fare or extend the validity period of the ticket if a passenger demands a refund within prescribed period or when the agency becomes incapable of transporting the passenger.

Article 198. Rights of passengers

Passengers may accompany pre-school children without a ticket and may use the mode of transportation in question with permitted baggage allowance.

Article 199. Observance of the order of travel

During the process of travel, passengers must use the mode of transportation chosen, facilities, and equipment with care and observe established travel order. If this obligation is violated, the transportation agency may seek compensation from the unruly passenger or force the passenger to disimbarl.
제 200 조 (저금계약의 체결)

공민이 저금기관에 돈을 저축하는 행위는 저금계약에 따라 한다. 저금계약은 높고있는 돈을 경제건설에 효과있게 리용하며 인민들의 생활장을 도모할 수 있게 맺고 리행하여야 한다.

Article 200. Formation of a savings contract

The act of saving money by citizens at savings institutions is subject to the terms of a savings contract. A savings contract is executed and performed so that any excess monies can be used efficiently to develop the economy and to improve the People’s lives in general.

제 201 조 (저금계약당사자의 의무)

저금계약에 의하여 저금하는 공민이 저금기관에 돈을 맡기면 저금기관은 그것을 저금하였다가 저금한 공민의 요구에 따라 내줄 의무를 진다. 저금계약은 저금기관이 돈을 받고 저금하는 공민에게 저금증서를 내준 때에 맺어진다.

Article 201. Formation of a savings contract

When a citizen makes a deposit under a savings contract with a banking institution, the institution is obligated to save the amount deposited and to allow that such amount be withdrawn at the request of the citizen. A savings contract is entered into when the savings agency receives money and issues a certificate of savings to the depositor citizen.

제 202 조 (저금하는 공민의 권리)

저금계약에서 저금하는 공민은 저금의 종류와 액수를 마음대로 정할 수 있다. 저금기관은 저금한 공민의 요구에 따라 이익 받은 저금을 다른 종류의 저금으로 바꾸거나 다른 저금기관에 옮겨주어야 한다.

Article 202. Rights of a depositor citizen

Citizens making a deposit under a savings contract can freely choose the type and amount of savings. At the request of the depositor citizen, the banking institution must transfer the existing deposit to another type of account or to another banking institution.

제 203 조 (저금하는 돈을 받거나 저금한 돈을 내줄 의무)

저금기관은 공민이 요구하면 어느때든지 저금하는 돈을

Article 203. Obligation to take and return deposits

At the request of a citizen, a banking institution must take or
return a deposit. The banking institution will be held accountable when it authorizes a wrongful withdrawal as a result of not accurately checking the identity of the withdrawer.

Article 204. Confidentiality
Banking institutions should maintain savings confidential and not disclose any details.

Article 205. Formation of insurance contracts
An insurance contract covers any act whereby a citizen takes insurance to protect life, health, or property. An insurance contract is executed and performed to protect the people from any damage caused by unforeseen disasters and to mobilize use of idle monies.

Article 206. Obligations of parties to an insurance contract
Under an insurance contract, the insured is obligated to pay insurance premiums to the insurer, and the insurer is obligated to pay out insurance proceeds or indemnity to the beneficiary in the event of an insured loss. An insurance contract is entered into when the insurer issues an insurance policy to the insured.

Article 207. An intentional act or loss
If a third party who has a relationship with the insured or otherwise has an interest in securing
고의적으로 보험사고를 일으킨 경우에는 보험금이나 보험보상금을 주지 않는다.

제 208 조(허물있는 제 3 자에 대한 보상청구)
제 3 자의 허물로 일어난 사고에 대하여 보험보상금을 내준 보험기관은 그에 대한 보상을 제 3 자에게 요구할 수 있다. 제 3 자가 보험사고를 일으킬 경우 보험에 든 공민은 그 사고결과를 고착시켜야 한다. 이 의무를 어기면 보험보상금을 적게 받거나 전혀 받지 못할 수 있다.

제 209 조(인체보험료의 납부)
생명보험, 어린이보험, 재해보험 같은 인체보험계약을 맺은 공민은 정해진 기간안에 정기적으로 보험료를 물어야 한다. 인체보험에 든 공민이 정해진 기간까지 보험료를 물지 않으면 보험효력이 없어지며 보험료를 물면 그때부터 보험효력이 다시 생긴다.

제 210 조(인체보험금의 지불)
보험기관은 인체보험에 든 공민이 사망하였거나 로동능력을 잃었을 경우 해당한 보험금을 내 주어야 한다. 생명보험과 어린이보험에서는 보험기간이 되고 보험에 든 공민이 보험료를 다 못면 만기보험금을 내준다.

insurance proceeds or indemnity intentionally causes a loss, insurance proceeds or indemnity will not be paid out.

Article 208. Right to subrogation

When an insurer pays out insurance proceeds for a loss caused by the fault of a third party, the insurer is entitled to recover against the third party. If a third party has caused a loss, the insured must mitigate the outcome of the loss. When this obligation is not performed, the insured may receive less or no insurance proceeds.

Article 209. Payment of life insurance premiums

Citizens who are parties to an insurance contract of human lives, such as life insurance, insurance for minors, and accident insurance, are required to regularly pay premiums on or before each due date. If such premiums are not paid timely, the effect of insurance will be lost until the premiums due are paid.

Article 210. Payment of insurance proceeds

An insurer must pay the appropriate insurance proceeds if the insured under a human life insurance policy has died or lost his or her ability to work. In the context of life insurance and insurance for minors, when the term of insurance has lapsed and the insured has paid off all outstanding
제 211 조(재산보험료의 납부)

재산보험에 든 공민은 정해진 기간안에 보험료를 물어야 한다. 보험사고가 없이 계약기간이 지난 경우 지불된 보험료는 보험기관의 수입으로 한다.

제 212 조(재산보험사고의 통보)

재산보험에 든 공민은 보험사고가 일어났을 경우 곧 보험기관에 알리고 손실을 덜기 위한 대책을 세워야 한다. 이 의무를 어긴 경우에는 보험보상금을 적게 받거나 전혀 받지 못할 수 있다.

제 213 조(위임계약의 체결)

재산거래와 그 밖의 법률적의의를 가지는 행위를 남에게 위임하는 행위는 다른 법률근거가 없는 한 위임계약에 따라 한다.

제 214 조(위임계약당사자의 의무)

위임계약에 의하여 위임받는자는 위임받는 행위를 위임하는자의 이름과 부담으로 수행할 의무를 지며 위임하는자는 위임받은자가 위임받은 범위에서 한 행위의 결과를 넘겨받을 의무를 진다.

premiums, matured endowments are to be paid.

Article 211. Payment of property insurance premiums

A citizen under a property insurance policy must pay premiums within a prescribed period. If the term of contract lapses without the occurrence of a covered loss, the premium paid will remain the insurer’s income.

Article 212. Notification of a covered property loss

A citizen under a property insurance policy must immediately notify the insurer when a covered loss occurs and must take measures to mitigate loss. If this obligation is not honored, the insured may receive less or no insurance proceeds.

Article 213. Formation of a contract of mandate

Delegation of property transactions and other acts of legal significance to a third party is subject to a contract of mandate in the absence of any other legal basis.

Article 214. Obligations of the parties to a contract of mandate

Under a contract of mandate, a mandatary is obliged to carry out the mandated act under the name and burden of the principal, and the principal is obliged to accept the results of the acts performed by the mandatary.
제 215 조(위임할 수 없는 행위)
양자관계나 유언같이 본인자신의 직접적인 의사표시를 필요로 하는 행위는 위임할 수 없다.

제 216 조(위임받은 범위의 준수)
위임받은자는 위임받은 범위안에서 행위를 하여야 한다. 위임받은 행위를 원만히 수행하기 위하여 불가피한 경우에는 그 범위를 벗어나는 행위를 할 수 있다.

제 217 조(위임받은 행위과정에서 생긴 손해의 책임)
위임받은자는 위임받은 행위를 하는 과정에 자신의 허물로 일으킨 손해에 대하여 위임한자앞에 책임진다. 그러나 어느 당사자의 허물도 없이 생긴 손해에 대하여서는 위임한자가 책임진다.

제 218 조(위임수행정형의 통보)
위임받은자는 위임한자의 요구에 따라 위임받은 행위의 수행영향을 그에게 알려주어야 한다.

Article 215. Acts which cannot be delegated
Any act that requires the principal's direct communication of intent, such as adoption and wills, cannot be delegated.

Article 216. Observance of the scope of mandate
A mandatary must act within the scope of the mandate. The mandatary may act outside the scope of authority if such act is inevitable to perform the mandated act.

Article 217. Liability for damage incurred while performing a mandate
A mandatary is liable to the principal for any damage caused by the mandatary's own fault while performing the mandated act. However, the principal is liable for any damage occurred without the fault of either party.

Article 218. Status report
At the principal's request, the mandatary must inform the principal on the status of his or her performance of the mandate.
제 219 조(위임행위에 들인 비용의 보상)

위임한자는 계약조건에 맞게 위임받은자가 한 행위의 결과를 제때에 접수하고 그가 들인 비용을 보상하여야 한다. 위임한자는 자기의 허물로 위임받은자가 위임받은 행위를 하는 과정에 입은 손해에 대하여 보상할 책임을 진다.

제 220 조(위임계약의 취소)

위임계약 당사자는 위임계약을 어느때든지 취소할 수 있다. 계약을 취소한 당사자는 그것으로 하여 상대방이 입은 손해를 보상할 책임을 진다.

제 221 조(꾸기계약의 체결)

공민들 사이에 돈이나 물건을 꾸어주고 꾸는 행위는 꾸기계약에 따라 한다. 꾸기계약은 무상으로 맺는다. 리자 또는 리자 형태의 물건을 주고받는 꾸기계약은 맺을 수 없다.

제 222 조(꾸기계약당사자의 의무)

꾸기계약에 의하여 꾸어주는 공민이 돈이나 물건을 꾸는 공민에게 넘겨주는 경우 꾸

Article 219. Reimbursement of fees incurred during the course of a mandate

A principal must timely accept the results of the acts performed by the mandatary in accordance with the terms of the contract and compensate for the fees incurred by the mandatary. The principal is responsible for compensating any damage suffered by the mandatary in the course of performing a mandated act, whenever the damage is attributable to the principal.

Article 220. Termination of a contract of mandate

A party to a contract of mandate may terminate the agreement at any time. The terminating party is responsible for compensating the damage suffered by the other party as a result of the termination.

Article 221. Formation of a loan for consumption

The act of lending and borrowing money or goods between citizens is subject to a contract of loan for consumption. These contracts are gratuitous. Entering into a loan for consumption with interest or any goods in lieu of interest is prohibited.

Article 222. Obligations of parties to a loan for consumption

Under a loan for consumption, when the lender lends money or things to a borrower, the borrower
공민은 꾸어준 공민이 계 액수가 같은 돈이나 종류와 량이 같은 물건을 갚을 의무를 진다. 꾸기계약은 꾸어주는 공민이 돈이나 물건을 상대방에 넘겨준 때에 맺어진다. is obligated to pay back the identical sum of money or to return the same amount of things of the same kind. A loan for consumption is made when the lender hands over money or things to be lended to the borrower.

제 223 조(꾸기계약 리행기간)

기간을 정하고 꾸기계약을 맺은 경우 꾸어준 공민은 기간이 되어야 꾸어준 돈이나 물건을 갚을 것을 요구할 수 있으며 꾸 공민은 기간이 되기전이라도 그것을 갚을 수 있다.

Article 223. Period of performance in a loan for consumption

Under a fixed-term loan for consumption, the lender cannot demand the repayment of the money or things borrowed until the term elapses, while the borrower is free to pay back the same before the due date.

제 224 조(꾸기계약의 리행대상)

공민은 꾸 돈이나 물건은 정한 기간안에 갚아야 한다. 같은 물건이 없는 경우에는 상대방과 합의하고 다른 물건으로 갚을 수 있다.

Article 224. The object of performance in a loan for consumption

The borrower must repay the borrowed money or things within a fixed period of time. If what has been borrowed is no longer available, the borrower may repay with a different item subject to mutual agreement with the lender.

제 225 조(은행대부계약의 체결)

은행기관이 기관, 기업소, 단체에 돈을 꾸어주는 행위는 은행대부계약에 따라 한다. 은행대부계약은 재정규율을 강화하며 화폐자금을 아껴쓰고 그 회전을 촉진시킬 수 있게 맺고 리행하여야 한다.

Article 225. Formation of a bank loan contract

An act by a banking entity of lending money to institutions, business entities, and organizations shall be governed by a bank loan contract. Bank loan contracts shall be executed and performed to strengthen financial oversight, effect frugal use of monetary funds, and to facilitate the flow of funds.
제 226 조(은행대부계약당사자의 의무)
은행대부계약에 의하여 은행기관은 대부받는 기관, 기업소, 단체와 화폐자금을 넘겨줄 의무를 지며, 대부받는자는 그 자금을 리용하고 원금과 리자를 은행기관에 물 의무를 진다. 은행대부계약은 은행기관이 대부받는자의 신청을 승인하고 대부금을 넘겨준 때에 맺여진다.

Article 226. Obligations of parties to a bank loan contract

Under a bank loan contract, the banking institution is obligated to hand over a loan to the borrower institution, business entity, or organization, and the borrower is obligated to use the loan and pay back the principal with interest to the lender. A bank loan contract is made when the banking institution approves the loan application of a borrower and thereby delivers the money.

제 227 조(대부의 반환원천담보)
은행대부계약은 대부의 반환원천이 담보되는 조건에서 맺는다. 대부를 받으려는자는 문건으로 자기의 대부금반환능력을 은행기관에 담보하여야 한다.

Article 227. Security for loan repayment

A bank loan contract is made on the condition that repayment of the loan is secured. A prospective borrower shall guarantee his or her ability to repay the loan in writing.

제 228 조(대부금을 지정된 항목에 쓰의 의무)
대부받은자는 대부금을 류용하거나 사장량비하지 말고 지정된 항목에 쓸어야 한다. 이 의무를 어긴 경우 은행기관은 대부금을 기간 전에 회수하거나 다음번 대부를 중지할 수 있다.

Article 228. Obligation to use the loan for designated items

A borrower shall not misuse or squander the loan received but use it for the designated purpose. If this obligation is violated, the banking institution may accelerate the repayment of the loan or suspend the next loan.

제 229 조(대부금의 반환)
대부받은자는 원금과 리자를 정해진 기간안에 은행기관에 물어야 한다. 이 의무를 어긴 경우에는 기간이 지난날부터 더 높은 품의 리자를 물어야 한다.

Article 229. Loan repayment

The borrower is obligated to repay the principal with interest to the banking institution within a fixed period. In case of nonperformance of this obligation, a higher
제 230 조 (합동작업계약의 체결)

기관, 기업소, 단체가 국가자금으로 살림집이나 시설물 같은 것을 건설하는 작업을 같이 하고 그에 대한 리용권을 나누는 행위는 합동작업 계약에 따라 한다.

합동작업계약은 예비와 가능성을 동원하여 건설물의 수요를 보장할 수 있게 맺고 리행하여야 한다.

제 231 조 (합동작업계약당사자의 의무)

합동작업계약의 당사자는 공동작업에 참가할 의무를 지며 작업참가정도에 따라 작업결과물의 리용권을 나누어 가진다.

합동작업계약은 서면으로 맺고 공증을 받아야 한다.

제 232 조 (합동작업계약의 합의조건)

합동작업계약의 당사자는 작업대상, 기간, 작업실적의 계산방법, 작업결과물을 나누는 원칙, 합동작업대표의 권한같은 조건에 대하여 합의를 보아야 한다.

rate of interest shall be charged after the due date.

Article 230. Formation of a joint work contract

An act by institutions, business entities, and organizations of constructing home residences or facilities with state funds and apportioning the right to use them shall be governed by a joint work contract. Joint work contracts shall be concluded and executed to meet the increasing demand for construction works by mobilizing reserved resources.

Article 231. Obligations of parties to a joint work contract

The parties to a joint work contract have an obligation to participate in the joint work and share the right to use deliverables in proportion to their participation in the work. A joint work contract must be in writing and notarized.

Article 232. Terms of joint work contract

The parties to a joint work contract shall agree on any applicable conditions, such as the object of work, the work period, the method of calculating work results, how to distribute work results, and the authority of the joint work representative.
제 233 조(합동작업대표의 선출)

계약당사자들은 계약을 원만히 리행하기 위하여 합동작업대표를 선출한다. 합동작업대표는 계약당사자들의 대표로서 합동작업에 대하여 책임진다.

제 234 조(합동작업결과물의 분할)

합동작업대표는 작업이 끝나면 계약당사자들에게 작업실적에 따라 작업결과물을 나누어 리용할데 대하여 해당 기관에 제기하여야 한다.

제 235 조(부당리득의 반환의무)

법적근거없이 남의 손실밑에 부당하게 리득을 얻은자는 그 부당리득으로 하여 손해를 입은자에게 해당리득을 돌려주어야 한다.

제 236 조(부당리득의 반환시기)

부당리득자는 리득이 부당하다는 것을 알 때로부터 그 리득에서 생긴 재산을 손해를 본자에게 돌려주어야 한다.

CHAPTER 4. ENRICHMENT WITHOUT CAUSE

Article 233. Appointment of joint work representative

The contracting parties choose a joint work representative to perform the contract in an agreeable manner. In the capacity of representing the contracting parties, the joint work representative is responsible for the overall joint work.

Article 234. Division of joint work deliverables

When the work is completed, the joint work representative will address the relevant agency regarding where the contracting parties will use distributed deliverables according to the output of work.

Article 235. Obligation to return anything obtained via enrichment without cause

A person who has been enriched without cause at the expense of another person shall return the gain to that person.

Article 236. When to return the gain

The person enriched without cause must return to the impoverished person any gains resulting from the enrichment without cause from the time the enriched person became aware of the enrichment being without cause.
제 237 조(부당리득의 반환원칙)

부당리득과 그로부터 생긴 재산은 현물로 돌려주는 것을 원칙으로 하며 현물로 돌려줄 수 없는 경우에는 그 값을 물어야 한다.

제 238 조(부당리득재산의 보관관리)

부당리득과 그로부터 생긴 재산을 돌려준자는 그것을 보관관리하고 돌려주는 데 든든 비용을 보상받을 수 있다.

제 239 조(돌려받을자를 알 수 없는 부당리득의 처리)

부당리득을 돌려받을자를 알 수 없는 경우에 부당리득자는 그 리득을 해당 기관에 바쳐야 한다.

제4편 민사책임과 민사시효제도

제1장 민사책임

제 240 조(민사책임조건)

기관, 기업소, 단체와 공민은 남의 민사상 권리를 침해하였거나 자기의 민사상 의무를 위반하였을 경우 민사책임을 진다. 그러나 같은 소유의 기관, 기업소, 단체라

Article 237. Principle of returning anything obtained via enrichment without cause

In principle, anything obtained via enrichment without cause shall be returned in kind, and if such return is not feasible, a corresponding amount shall be paid.

Article 238. Management of the property obtained via enrichment without cause

Anyone who returns anything obtained via enrichment without cause can be compensated for the expenses incurred in keeping and returning such things.

Article 239. Enrichment without cause when the recipient is unknown

If the person entitled to enrichment without cause cannot be ascertained, the person enriched without cause will donate the enrichment without case to the relevant institutions.

Article 240. Conditions of civil liability

Institutions, business entities, organizations, and citizens incur civil liability when they violate other persons’ civil rights or their own civil obligations. However, even when institutions, business entities, and organizations are
하더라도 그 소유에 속하는 다른 기관, 기업체, 단체의 허물에 대하여서는 민사책임을 지지 않는다.

제 241 조(허물에 의한 민사책임)
민사책임은 범이 달리 정하지 않은 한 허물이 있는 자가 전다. 계약 또는 법률 이긴자가 자기에게 허물이 없다는 것을 증명하지 못하면 허물은 그에게 있는 것으로 본다.

Article 241. Fault-based civil liability
A person who is at fault incurs civil liability, unless otherwise provided by law. If a person who fails to perform a contract or violates the law fails to prove the absence of fault, he or she will be deemed to be at fault.

제 242 조(민사책임의 형태)
민사책임은 재산의 반환, 원상복구, 손해보상과 위약금, 연체료 같은 제제금의 지불, 청구권의 제한 또는 상실의 형태로 지운다. 이 경우 서로 다른 민사책임형태를 병합하여 지울 수 있다.

Article 242. Types of civil liability
The remedies for civil liability are restitution or restoration of property, payment of damages and monetary penalties, payment of other surcharges including late charges, and restriction on or loss of claims. In this case, multiple civil remedies may be applicable at the same time.

제 243 조(행위무능력자의 위법행위에 대한 책임)
민사행위능력이 없는 자가 남의 민사상 권리를 침해하였을 경우에는 부모 또는 후견인에게 민사책임을 지운다. 부모나 후견인의 통제에서 벗어나 있는 기간에 침해행위를 하였을 경우에는 그를 통제할 의무를 진 자에게 민사책임을 지운다.

Article 243. Liability for tortious conduct of the incompetent
When an incompetent person violates a person’s civil rights, civil liability therefor will rest on a parent or a tutor. When a violation occurs during a period outside the control of a parent or tutor, civil liability will be imposed on the person who is responsible for overseeing the incompetent.
제 244 조(부분적행위능력자의 위법행위에 대한 책임)

16 살에 이른 부분적행위능력자가 남의 민사상 권리 침해하여 손해를 일으킨 경우 자기 지불 능력의 범위를 벗어나는 부분은 그의 부모나 후견인이 민사책임을 진다.

제 245 조(기관, 기업체, 단체성원의 위법행위에 대한 책임)

기관, 기업체, 단체의 성원이 직무수행과정에 남이 재산이나 인체에 해를 준 경우에는 그 기관, 기업체, 단체가 민사책임을 진다.

제 246 조(비법점유재산의 반환)

남의 건물을 비롯한 재산을 비법적으로 점유한 기관, 기업체, 단체와 공민은 그것을 임자에게 돌려주어야 한다. 재산을 현물로 돌려줄 수 없을 경우에는 해당한 값을 돌려야 한다.

제 247 조(재산비법침해의 책임)

남의 재산에 손해를 준 기관, 기업체, 단체와 공민은 그 재산을 원상대로 복구하여야 한다. 재산의 원상복구가

Article 244. Liability for tortious conduct of the partially competent person

If a partially competent person who has reached the age of 16 causes damages by infringing on another person’s civil rights, the partially competent person’s parent or tutor will assume civil liability for what lies beyond the scope of the partially incompetent person’s ability to pay.

Article 245. Responsibility for tortious conduct of members of an institution, business entity, or organization

When a member of an institution, business entity, or organization has harmed another’s property or body in the course of performing the member’s duties, the institution, business entity, or organization will assume civil liability for such harm.

Article 246. Return of unlawfully possessed property

Institutions, business entities, organizations, and citizens that unlawfully possess another person’s property, including a building, shall return such property to the owner. If return in kind is not feasible, damages will be paid instead.

Article 247. Restitutionary responsibility

Institutions, business entities, organizations, and citizens who have caused loss to others’ property shall restore the property to its original state. When restoring
불가능한 경우에는 같은 종류의 다른 물건을 주거나 그 값을 물어야 한다.

제 248 조(인신침해의 손해배상)

사람이 건강과 생명에 해를 준 기관, 기업소, 단체와 공민은 해당한 손해를 보상하여야 한다. 사람의 존엄과 명예를 심히 썰어버리고 인격에 지울 수 없는 손상을 남긴 자는 시효에 관계없이 피해자에게 보상하여야 한다.

제 249 조(관리하고있는 짐승이 남에게 준 손해의 보상)

관리하고있는 짐승이 남의 재산이나 인체에 해를 준 경우 짐승의 임자나 관리자는 그 손해를 보상하여야 한다. 그러나 피해자에게 허물이 있을 경우에는 보상책임이 덜어지거나 면제된다.

제 250 조(국토환경보호법규위 반에 의한 손해의 보상)

국토와 자원을 보호하고 자연환경을 보존, 조성하며 환경오염을 방지할 때 대한 국가의 범을 어기여 남의 재산에 손해를 준 기관, 기업소, 단체와 공민은 해당한 손해를 보상하여야 한다.

the property to its original state is not feasible, other goods of the same kind or a corresponding money value will be offered instead.

Article 248. Payment of damages for bodily harm

Institutions, business entities, organizations, and citizens that have harmed a person’s health and life shall compensate for such harm. Whoever seriously damages a person’s dignity and honor, leaving indelible harm on the victim’s body and character, shall compensate the victim regardless of the period of prescription.

Article 249. Compensation of damage caused by domesticated animals

When a domesticated animal harms a person’s property or body, the owner or manager of the animal shall compensate for the harm. However, if the victim is at fault, the owner or manager’s liability will be reduced proportionately or be exempted.

Article 250. Payment of damages for violation of laws on protection of national environment

Institutions, business entities, organizations, and citizens that have damaged another person’s property in violation of applicable laws for the protection of the national territory and resources and for the conservation and creation of natural environments or for the prevention of environmental
제 251 조(공동침해행위의 연대적책임)
여러인이 공동으로 남이 재산이나 인체에 해를 준 경우에는 연대적으로 민사책임을 진다.

제 252 조(계약위반의 책임)
계약에 기초하는 계약을 어긴자는 위약금이나 연체료를 물어 벌이 따로 정하지 않은 한 생긴 손해를 보상할 책임을 진다.
계약에 기초하지 않은 계약을 어긴자는 손해를 보상할 책임을 진다.

제 253 조(계약을 람변 당사자들이 위반한 책임)
계약당사자들이 다같이 람은 계약을 위반하였을 경우에는 각자가 해당한 민사책임을 진다.

제 254 조(계약의 변경, 취소 시 손해보상)
계약의 변경 또는 취소는 손해보상을 요구한 당사자의 권리에 영향을 주지 않는다.

pollution shall compensate for any damage incurred.

Article 251. Solidary liability for joint tortious conduct
When multiple persons jointly harm a person's property or body, they shall be solidarily liable.

Article 252. Liability for default
Unless otherwise prescribed by law, a person who fails to perform a contract based on a plan shall be liable to compensate for any damage incurred by paying a monetary penalty or moratory damages compensating loss caused by delay in performance. Any person who fails to perform a contract not based on a plan shall compensate the resulting damage.

Article 253. Liability for a mutual breach of contract
If the parties to a contract mutually violate the terms of contract, each party will assume proportionate civil liability.

Article 254. Damages in the event of contract amendment or termination
Any amendment to or termination of a contract shall not affect a party's right to claim damages.
제 255 조(주위환경에 큰 위험을 줄 수 있는 대상에 의하여 까진 손해의 책임)
기관, 기업소, 단체는 주위환경에 큰 위험을 줄 수 있는 대상을 다루거나 작업을 하는 과정에 남의 재산이나 인체에 해를 준 경우 허물이 없어도 민사책임을 진다.
그러나 피해자에게 중대한 과실이 있는 경우에는 책임을 지지 않는다.

제 256 조(정당방위와 긴급피난 시 책임면제)
공민이 정당방위를 위하여 또는 자연재해나 비법침해로부터 국가와 사회의 리익을 보호하기 위하여 필요한 정도를 넘지 않는 범위에서 불가피하게 남의 재산이나 인체에 해를 준 경우에는 민사책임을 지지 않는다.

제 257 조(긴급피난으로 발생한 손해의 보상)
국가와 사회의 리익을 위하여 불가피하게 남의 재산에 손해를 준 경우 그로 하여 구원된 재산의 임자는 해를 입은자의 손해를 보상하여야 한다.

제 258 조(민사책임과 행정적, 형사적책임의 관계)
민사책임은 위법행위에 대한 행정적, 형사적책임을 배제하지 않는다.

Article 255. Liability for damage by ultrahazardous objects

Institutions, business entities, and organizations shall assume strict civil liability in the event of causing damage to another person’s property or body while dealing with ultrahazardous objects or engaging in ultrahazardous activities. However, such liability will not be incurred when the victim has been grossly negligent.

Article 256. Exemption of liability in the context of self-defense and necessity

A citizen will incur no civil liability when he or she inevitably harms another person’s property or body to the extent necessary for self-defense or for protecting the interests of the State and society from natural disasters or unlawful infringement.

Article 257. Compensation of loss from an act of necessity

When the property of a person is inevitably damaged for the benefit of the State and society, the owner of the property thus salvaged shall compensate for the loss of the person harmed.

Article 258. Relationship between civil liability and administrative and criminal liability

Civil liability does not exclude administrative and criminal liability for tortious conduct.
제 2 장 민사시효

조 (민사시효의 적용)

민사상 권리의 실현을 보장받기 위한 재판이나 중재의 제기는 민사시효 기간안에 하여야 한다.
 이를 어기면 재판, 중재절차에 의한 권리의 실현을 보장받지 못한다.
 국가소유 재산의 반환청구에 대하여서는 민사시효가 적용되지 않는다.

제 260 조 (공민이 당사자로 나서는 민사시효기간)

기관, 기업소, 단체와 공민사이 또는 공민사이의 민사시효기간은 1년으로 한다.

제 261 조 (기관, 기업소, 단체사이의 민사시효기간)

기관, 기업소, 단체사이의 민사시효기간은 다음과 같다.

1. 제품의 대금청구와 보증금 반환청구, 공급한 제품의 규격, 완비성 및 전본의 위반과 파손, 부패변질, 수량부족, 그밖의 계약조건위반으로 하여 발생한 손해보상청구와 위약금, 연체료의 지불청구 및 운수,
2. Front and other claims in relation to transportation and postal services;

3. Two years in relation to claims arising from offshore civil transactions unless prescribed otherwise under the relevant treaty;

(Article 261.3 of the Civil Code of 1990. Applicable periods under each pertinent treaty in relation to claims for damages in connection with any incident involving directly imported and accepted goods and to claims in connection with international carriage transportations and transnational telecommunications).

Article 262. Period of civil prescription in relation to claims by publicly funded entities and business entities

In relation to claims by publicly funded entities and corporations, the period of civil prescription shall be deemed expired if the budgetary year in which a claim arose has lapsed, even when the period of prescription is yet to run out.

Article 263. Property after the period of civil prescription

Any property with an extinguished prescription period will become ownerless property. Institutions, business entities, and organizations shall timely surrender
법이 정한 절차에 따라 재매에 해당 기관에 바쳐야 한다.

제 264 조(민사시효기간이 지난 다음 민사상의무의 자발적 리행)

민사시효기간이 지난 다음 자기의 민사상의무를 자발적으로 리행한자는 시효기간이 경과한 사실을 몰랐다 하더라도 그 반환을 요구할 수 없다.

Article 264. Voluntary discharge of a civil obligation after a civil prescription period

One who voluntarily performs one’s own civil obligation after the expiry of prescription period cannot reclaim whatever has been performed, even if that person was not aware that the prescription period had run out.

제 265 조(민사시효기간의 정지)

민사시효기간의 마지막 3 개월안에 자연재해같이 어체할 수 없는 사유로 청구권을 행사할 수 없었을 경우에 시효기간의 계산은 정지되며 그 사유가 없어지면 기간의 계산은 계속된다.

나머지 시효기간이 3 개월이 못될 경우에는 3 개월까지 연장한다.

Article 265. Suspension of prescription periods

When a claim cannot be exercised within the last three months of a prescription period due to an excusable cause such as a fortuitous event, calculation of the period of prescription will be suspended provided that it will resume when the cause ceases to exist. When the remaining period of prescription is less than three months, it will be extended by three months.

제 266 조(민사시효기간의 중단)

다음과 같은 경우 민사시효기간의 계산은 중단된다.

1. 채권자가 재판 또는 중재를 제기하였을 경우
2. 은행기관을 통한 지불청구에 대하여 채무자가 채무를 확인하였을 경우

Article 266. Interruption of civil prescription periods

The calculation of civil prescription periods will be interrupted in the following cases:

1. When a creditor has filed suit or initiated an arbitration;
2. When the debtor has confirmed the existence of an obligation in response to a demand for payment by a banking institution;
3. When a debtor has acknowledged an obligation in an ordinary contract dispute, not based on a planned contract, to which multiple citizens, or institutions, business entities, organizations, on the one hand, and citizens, on the other hand, or institutions, business entities, and organizations are party.

When a period of prescription is interrupted, it will be calculated anew from the point of interruption.

Article 267. Extension of prescription periods

Where it is determined that a plaintiff has an excusable reason not to commence a suit or arbitration within a period of prescription, the adjudicating court or arbitration tribunal may extend the period of prescription.

Article 268. Mandatory application of civil prescription periods

Courts and arbitration tribunals shall apply civil prescription periods even if no party to the proceedings alleges prescription.

Article 269. Commencement of civil prescription periods

A civil prescription period shall commence from each of the following:

1. When the period of performance has arrived in relation to an obligation with a fixed period for performance;
2. 리행기간이 지정되지 않은 채무에 대하여서는 채무가 생긴 때

3. 기관, 기업소, 단체사이에 공급한 제품의 규격, 완비성 및 건본의 위반과 파손, 부패변질, 수량부족, 그밖에
계약조건위반으로 하여 발생한 손해보상청구는 그에 대한 사고조서를 작성하였거나 작성하기로 된 때

제270 조 (민사시효기간의 시작날자)

민사시효기간은 일간, 월간, 년간으로 정하며 그 계산은 시효기간을 계산하여야 할 사유가 생긴 다음날부터 시작한다.

제271 조 (민사시효기간이 끝나는 날)

민사시효기간은 시효기간을 계산하여야 할 사유가 생긴 날자와 같은 날이 지나면 끝나며 같은 날자가 없을 경우에는 그 달의 마지막날이 지나면 끝난다.

시효기간의 마지막날이 일요일, 명절일이거나 국가에서 정한 휴식일인 경우에는 그 다음 첫 로동일을 시효기간의 마지막날로 한다.

2. When an obligation has been created in relation to any obligation without a fixed period of performance;

3. In relation to products supplied between institutions, business entities, and organizations, when an incident report is drawn up or such report is due in relation to a claim of damages arising out of breaches pertaining to the specifications and completeness of supplied products, their corruption and deterioration, lack of quantity, or from other contractual breaches.

Article 270. Starting date of a civil prescription period

Civil prescription periods shall be fixed on daily, monthly, and yearly bases. Their calculation shall start the day after a cause to calculate the period of prescription arises.

Article 271. End date of a civil prescription period

A civil prescription period ends when the same day as the date on which the reason for calculating the prescription period arises, lapses, and if there is no such date, it ends after the last day of that month. If the last day of a civil prescription period falls on a Sunday, a traditional or statutory holiday, the prescription period shall end on the next business day.
CODIFICATION OF CIVIL LAW IN AZERBAIJAN:
HISTORY, CURRENT SITUATION AND DEVELOPMENT PERSPECTIVES

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ABSTRACT

The Civil Code is the second most important legal act in the country after the Constitution, and the first in terms of volume. Due to its important role in the lives of citizens, the Civil Code is sometimes informally referred to as the “Economic Constitution.” At the same time, the Civil Code is the main document setting the rules for a market economy. This article is devoted to the processes of codification of civil law in Azerbaijan over the past 100 years. During the twentieth century, through the codification of civil law, Azerbaijan has adopted three Civil Codes, far more than many other countries. At the same time, this article describes the drafting of civil legislation from scratch through the transition from a planned economy to a market economy after gaining independence in the 1990s.

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At the end of the article, the existing problems of the civil legislation of the Republic of Azerbaijan are discussed and a number of suggestions are put forward as solutions.

Keywords: Azerbaijan, Civil law, private law, codification, normative legal act, Civil Code, pandect system, legal reforms

I. INTRODUCTION

Codification is the combination of normative legal acts into a single normative legal act by reworking them in terms of form and content. The codification of a legislation envisages a critical review of the existing normative legal acts in the field of certain relations, raising the quality of the legislation to a higher level and ensuring its compactness. The codification aims to eliminate contradictions, inconsistencies between normative legal acts, as well as norms, duplications, obsolete provisions, and gaps that have not been justified over the years. In the process of codification, the developers try to consolidate and systematize the existing norms, as well as to revise their content and sequence and to ensure the maximum completeness of the legal regulation of the relevant area of relations. In addition to generalizing existing legislation, the codification envisages the creation of new norms that reflect the urgent needs of social practice.

The result of the codification is a new consolidated legislative act (code, statute, charter, etc.) with a stable content, replacing the existing normative legal acts in the specific field of law. The simplification and updating of legislation as the most important feature of codification allows it to be accepted as the most perfect and highest form of legislative activity.

The Civil Code is the second most important legal act in the country after the Constitution, and the first in terms of volume. Due to its importance in the lives of citizens, the Civil Code is informally

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In countries with a civil law system, the Civil Code is the main document that sets the rules for a market economy and covers important areas such as property, transactions, compensation, and unjust enrichment. For some of these countries, the Civil Code separately regulates business entities, the legal capacity of individuals, guardianship, family relationships, inheritance, and even private international law.

To date, there are not many books and scientific works on codification in the legal world. The fundamental work of French professor Rémy Cabrillac on the codification of law is particularly noteworthy. In this work, he analyzes the main legislative codes implemented in the world. It turns out that the first set of laws in the world is not, as many believe, the Hammurabi code of laws adopted in ancient Babylon in 1780 BC, but in fact, the Code of Ur-Nammu that was drafted around 2100-2050 BC by the Sumerian king Ur-Nammu, founder of the Third Dynasty of Ur.

In modern history, there are three civil codes that could be considered as the most crucial ones in terms of quality and impact on other countries’ civil law codification: (1) the French Civil Code of 1804 (Napoleonic Code); (2) the German Civil Code of 1896 (Bürgerliches Gesetzbuch); (3) the Swiss Civil Code of 1907. The French Civil Code of 1804 is distinguished by its simple language. The language of the German Civil Code of 1896 is not simple, and it is often argued that this legal act is intended not for the general public, but rather for professional lawyers. Nevertheless, the German Civil Code is characterized by its refined legislative technique.

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2. R. CABRILLAC, LES CODIFICATIONS 10 (Presses universitaires de France 2002).
In 1907, the Swiss Civil Code was adopted by the amalgamation of the simple language of the French Civil Code and the high legislative technique of the German Civil Code. Civil codes adopted in many countries in the twentieth century were drafted on the basis of these three codes.

Throughout history, the ancient states of Azerbaijan have had a rich tradition of civil law, and during different periods, law statutes and codes were compiled through the codification of laws in the field of civil law. Examples of this are the Avesta, the primary collection of sacred books of Zoroastrianism created during the Atropatene period, the Aguen Collection of Laws adopted by Vachagan III during the Caucasus Albania, the Matikan e Hazar Datastan adopted during the Sassanid Empire, the Code of Uzun Hasan compiled by the head of the Aghgoyunlu state Uzun Hasan, the Dastur-ul-Amal adopted by Shah Tahmasib I and the collection of decrees Jameyi-Abbas adopted by Shah Abbas I during the Safavid Empire, the Jar-Tala Code of the khanate period, etc.

This article mainly provides information on the codification activities carried out in the field of civil legislation in Azerbaijan over the last 100 years. During the twentieth century, Azerbaijan adopted three civil codes: two during the Soviet Union, in 1923 and 1964, and the present one in 1999, under the modern Republic of Azerbaijan, which proclaimed its independence in 1991.

II. THE AZERBAIJAN SSR CIVIL CODE OF 1923

The Azerbaijan Democratic Republic (ADR) was proclaimed on May 28, 1918, but due to the tense political and social conditions, the ADR only existed for 23 months. Although short-lived, the ADR had a wide range of legislative activities in various fields of law but did not manage to adopt the Constitution and the Civil Code in such a short time span.

On April 28, 1920, the Bolshevik Russia occupied Azerbaijan and established the Soviet Socialist Republic in Azerbaijan instead
of a democratic republic. After the collapse of the ADR, the Azerbaijan Interim Revolutionary Committee became the de facto supreme body of state power, exercising the highest legislative and executive power in Azerbaijan. One of the first measures of this Committee in the field of civil law was the abolition of private ownership of land in the country. According to the decree issued on May 5, 1920, the _mulkadar_ (landowner), _khan_ and bey lands, as well as the lands of mosques, churches, monasteries, and their property were confiscated and given to the working class. Thus, the people of Azerbaijan were stripped of their freedom and right to own properties that were confiscated as all wealth was now under the state.

Under the Soviet regime, Azerbaijan witnessed great changes in the legal system initially established by the ADR, by fully adopting the Russian socialist legal system. The civil law system was completely replaced by the socialist law of the Russian Soviet Federative Socialist Republic (RSFSR). During the Soviet period, the civil legislation of Azerbaijan did not significantly differ from the civil legislation of other socialist republics of the Soviet Union, with some exceptions. However, in the 1920s, some features of traditional law and customary law in the field of family, marriage and inheritance were still preserved in the country.

On May 6, 1921, the First All-Azerbaijani Congress of Soviets began its activities, and as a result, Azerbaijan became a completely Soviet socialist country. On May 19 of the same year, the Azerbaijan Soviet Socialist Republic (Azerbaijan SSR) adopted its first Constitution.

In the early years of the Soviet Union, civil legislation in Azerbaijan was committed to Lenin’s motto: “We do not recognize anything ‘private.’ For us everything in the field of economy means public, and not private.”

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4. V. I. Lenin, O zadachakh Narкомюста v uslovijah novoj ekonomicheskoj politiki: Pis’ma D. I. Kurskomu, 44 Polnoe sobranie sochinenij 389 (Moskva, 1964), (V. I. Lenin, On the Tasks of the People’s Commissariat of
were plans to abolish civil law altogether, since all social and legal relations in the country that were to be established would be public. For this reason, some Soviet lawyers suggested the adoption of an economic or a social code rather than a civil code. However, the deep economic crisis highlighted the need to attract private investment, including foreign capital. The New Economic Policy (NEP), proposed by Lenin in 1921, could only succeed with the support of the new civil law system. Thus, on October 31, 1922, the Civil Code of the RSFSR was adopted, and then, under the instructions of the Central Executive Committee of the Azerbaijan SSR, the People’s Commissariat of Justice began to prepare a new Civil Code on the basis of Russian legislation.

On June 16, 1923, at the third session of the second convocation of the Central Executive Committee of the Azerbaijan SSR, the first Civil Code of the Azerbaijan SSR (hereinafter referred to as “the Civil Code of 1923”) was adopted and came into force on the day of its publication. On September 8 of the same year, the Civil Code was published in the journal Bakinskiy Rabochiy (Baku Worker). Unlike the Civil Codes of other Soviet republics, the Azerbaijan SSR Civil Code of 1923 was unique for it included sections covering the rights of marriage, family, and guardianship. In other Soviet republics, these relations were regulated by separate codes and laws. The decision of the Central Executive Committee of the Azerbaijan SSR on this Civil Code stated that disputes in civil law relations that existed from April 28, 1920, to the date of entry into force of the Civil Code of 1923 were to be regulated by the legislation which was in force at the time. However, due to gaps existing in the legislation in force at the time, the use of the new Civil Code was recommended. For earlier disputes, the Civil Code of 1923 was applied only in cases where it was used in favor of the Soviet state, and this

This legislative act became the first Civil Code in the history of Azerbaijan. At the same time, it was one of the first civil codes in the world to belong to a socialist state. With the entry into force of this Code, the formation of Soviet civil law in Azerbaijan was formalized by summarizing less than two years of experience in the development of civil law institutions in the context of the NEP.

The Civil Code of 1923 included many issues related to the nature and rules of implementation of the NEP. This Civil Code consisted of 8 sections (general provisions, property law, law of obligations, copyright law, law of inheritance, marriage law, family law, guardianship law) and 524 articles (only 83 of them had been commented).

There were 51 articles and 5 chapters in the general provisions section. It contained the main provisions, norms on legal subjects (persons), legal objects (property), agreements and the statute of limitations. The main provisions stated that civil rights that did not contradict social and economic purposes were protected by law (article 1) and that civil law disputes should be settled in court (article 2). The second chapter, which defined the norms for legal entities (persons), consisted of 16 articles and was divided into two groups: individuals (articles 4-12) and legal entities (articles 13-20). Article 5 reflected the scope of the legal capacity of individuals. An interesting point was that the Civil Code of 1923 did not specify the moment of formation of an individual’s legal capacity. There were two juvenile periods: under 14 and between 14 and 18. The Code stipulated that every citizen of Azerbaijan has the right to move freely throughout the territory of the Republic, to acquire or transfer property, to establish industrial and commercial enterprises, to choose professions not prohibited by law, and to conclude agreements. Article 8 set out the grounds for termination of legal capacity. According to the Code, associations, departments, or organizations of

5. Akbarov & Salimov, supra note 3, at 389.
persons capable of acquiring property, acting on obligations, filing lawsuits, and responding were considered legal entities. The third chapter, covering six articles, regulated issues related to legal objects, i.e., property (articles 20-25). Any property for which civil turnover was not prohibited by law could act as a civilian object. Property withdrawn from civil circulation could be the object of civil law only to the extent specified in the law. Land was considered state property and could not be the subject of special turnover. Land acquisition could only take the form of a right of use. The fourth chapter of the Code, which regulated agreements, consisted of 18 articles (articles 26-43). Article 27 dealt with the forms of agreements. The fifth chapter of the Code was called the “the statute of limitations” and consisted of eight articles (articles 44-51). It defined the statute of limitations, the rules of commencement, suspension, and resumption of the statute of limitations. The statute of limitations was 3 years.

The second section of the Code was called “property law.” This section consisted of three chapters (property rights, construction rights, property mortgages). The Civil Code of 1923 established three forms of ownership: state property (nationalized and municipalized), cooperative property, and private property. Non-municipal constructions, trade enterprises with hired workers not exceeding the amount provided by special laws, industrial enterprises, production tools and means, money, securities, and other valuables, including gold and silver coins, foreign currency, household appliances, household and personal use processed goods, goods the sale of which is not prohibited by law, and any property not excluded from private circulation could be the subject of private property. Confiscation of property was allowed only as a punishment in special cases provided by law. State property was preferred as the main form of property. Land, subsoil resources, forests, water, public railways, and their mobile equipment could only be state property. The second and third chapters were devoted to construction rights and issues of mortgaging property, respectively.
The third section of the Code was called the “law of obligations.” This included general provisions and obligations arising from agreements, in particular liabilities such as property leases, sales, exchanges, donations, contracts, orders, purchases, storage, and partnerships. This section also covered liability for damages.

The fourth section of the Code was called “copyright law.” It should be noted that among the republics of the Soviet Union, only the Civil Code of Azerbaijan included a section on copyright law. In other republics, this field of law was regulated by separate legislative acts.6

The fifth section of the Code was called “inheritance law.” This section covered the forms of inheritance, the circle of heirs, the mass of the inherited property, the rules of inheritance, intestate succession, and testamentary succession. According to the law, the circle of persons called to inherit by law and testament included those who were related by kinship in a direct descending line (children, grandchildren, and descendants), those who have been adopted (including their kinship in a direct descending line), as well as the poor and incapacitated people who were completely dependent on the testator for at least one year before his (her) death.

Finally, the last three sections of the Code were devoted to the laws of marriage, family, and guardianship. The marriage had to be registered with special state bodies in accordance with the law. According to article 442 of the Code, a marriage could be declared invalid by the People’s Court only in cases strictly provided by law. The death of one of the spouses was also considered a ground for divorce. Marriages concluded on the basis of religious rites and with the help of clergy were not the same as marriages registered by the Civil Registry Office and did not create any rights or obligations for those entering into such marriages. However, religious and ecclesiastical marriages concluded before the date of publication of the Code in accordance with the conditions and forms provided for in

the laws previously in force had the force of a registered marriage. One of the most important conditions for marriage was the consent of the couple. The age of marriage was set at 16 for women and 18 for men. Children born out of wedlock were considered as children born to parents who were lawfully married. Refusal to appoint a guardian or trustee was not allowed. The Code set out a list of requirements for appointed guardians or trustees. According to article 492, guardianship was imposed on minors, the mentally ill, the wasteful, and those whose characteristics were found to be dangerous or impossible to leave without social protection.

In connection with the adoption of the Code of the Azerbaijani SSR on acts of marriage, family, guardianship, and civil status in 1928, sections on the laws of marriage, family and guardianship were removed from the Civil Code of 1923.

Over the years, the articles of the Azerbaijan SSR Civil Code of 1923 became more difficult both in terms of content and interpretation. Moreover, with the strengthening of socialist principles and the introduction of planning elements in civil law, the number of imperative legal norms increased.

Although the Civil Code of 1923 was based on the German experience, it was very incomplete, as the Code mainly regulated the relations between socialist organizations arising from administrative normative legal acts and life relations between citizens.

Since the adoption of the civil codes of the republics of the Soviet Union in the 1920s, they have been regarded by USSR legal experts as temporary legislative acts of transition. Alexander Goykhbarg, a social democrat and Bolshevik professor of law who led the drafting of these civil codes, spoke of the civil codes of the transition period as a protection of the interests of the state from individual entrepreneurs.7

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7. A.G. Goykhbarg, Lenin и советское право, in 2 Советское право 5-6 (1924), (A.G. Goykhbarg, Lenin and Soviet Law, in 2 Soviet Law 5-6 (1924)).
The Civil Code of 1923 emphasizes the socio-legal nature of the restriction of private property and the regulation of property relations, i.e., in order to ensure the protection of the interests of the socialist state from individuals, public law prevails over private law. Article 6 of the Civil Code of 1923 dealt with the possibility of restricting civil rights not only by a court decision, but also by other cases and rules established by law. For example, people declared illegitimate did not have civil legal capacity because the law did not protect them. Additionally, taking into account the course taken for the development of market relations, the legal regulation of the activities of individual entrepreneurs was defined as one of the objectives of the Civil Code of 1923. In addition to the norms inherent in the Soviet state, the Code also contained the rules of law inherent in the market economy, which formed the basis of the law of capitalist countries. The norms of the Code legally defined the framework in which the state allowed the activities of capitalist elements, and established a system of measures against the abuse of the NEP. In the Civil Code of 1923, there were harmonious norms of law of both bourgeois and Soviet nature. The main reason for this was the introduction of the NEP, which was the main factor that prompted the codification of Soviet law.

The Azerbaijan SSR Civil Code of 1923, which adjusted the new types of economic relations, regulated property relations in the country in accordance with the interests of socialist construction. Some provisions of the Code were declarative and contradictory. The Civil Code of 1923 became a strong and flexible tool for regulating property relations in Soviet Azerbaijan for over 40 years.

III. THE AZERBAIJAN SSR CIVIL CODE OF 1964

The development of the USSR after World War II was characterized by significant economic growth and social reforms that required new civil legislation. In the 1960s, the USSR saw the need to develop a new civil code, as in the sessions of the Central Executive Committee and in the intersessional period, the Presidium of the
Central Election Commission applied numerous amendments and adjustments to the Civil Code of the 1920s, which was outdated and no longer met the requirements of the time. With the adoption of the Law of the USSR of February 11, 1957, “On Reliability of the Legislation on the Organization of Courts of the Union Republics, the Adoption of Civil, Criminal and Procedural Codes,” Azerbaijan was officially allowed to adopt a new civil code.8

On December 8, 1961, the Supreme Soviet of the USSR adopted the Fundamentals of Civil Legislation of the USSR and the Union Republics, which entered into force on May 1, 1962. This Law was a codified legislative act of the USSR uniting the main provisions of civil law.9 These Fundamentals consisted of a preamble and 8 sections (129 articles in total): (1) General provisions; (2) Law of property; (3) Law of obligations; (4) Copyright law; (5) Law of discovery; (6) Law of invention; (7) Law of succession; (8) Legal capacity of aliens and stateless persons and application of foreign civil laws, international treaties and agreements. With the adoption of this legislative act, the work on drafting a new civil code was accelerated.

While considering the drafts of the civil codes of the Union republics, special attention was paid to the issues of defining the scope of relations and the boundaries of civil code, which should be regulated by civil laws. Much attention was paid to the problem of the relationship between the civil legislation of the USSR and the Union Republics, the system of civil codes, the content of civil law institutions (collective farm property, damages, acquisition period, inheritance, etc.) and legislative techniques. Many of the proposals put forward by the republics for the adoption of new civil codes were not accepted by the central leadership due to their all-union significance. At the same time, the exchange of experience between legal

8. Law of the USSR dated February 11, 1957 “On the assignment to the jurisdiction of the union republics of legislation on the organization of the courts of the union republics, the adoption of civil, criminal and procedural codes.”

Thus, in accordance with the Fundamentals of Civil Legislation drafted in 1961 within the framework of the Second All-Union Codification in the USSR, on September 11, 1964, the Supreme Soviet of the Azerbaijan SSR adopted the second Civil Code of the Azerbaijan SSR (hereinafter referred to as “the Civil Code of 1964”), which entered into force on March 1, 1965. The Civil Code of 1964, again, in essence, did not differ much from the Civil Code of the RSFR, adopted the same year. The new Civil Code consisted of 9 sections and 574 articles: (1) General provisions; (2) Agency and power of attorney; (3) Law of ownership; (4) Law of obligations; (5) Copyright and related rights; (6) Law of discovery; (7) Law of invention, rationalization proposal and industrial design; (8) Law of inheritance; (9) Legal capacity of aliens and stateless persons and application of foreign civil laws, international treaties, and agreements. As can be seen, the Azerbaijan SSR Civil Code of 1964 included new sections on copyright and related rights, law of discovery, law of invention and international law.

The Civil Code of 1964 began with a preamble, more like a political declaration or a constitutional provision. The preamble proclaimed that the Soviet Union had achieved the complete and decisive victory of socialism and had begun to build a broad communist society. By creating such semi-constitutional provisions in the preamble of the Civil Code of 1964, Soviet lawyers described the goals of communism at this stage, the socialist economy, and its future. According to the preamble, the main purpose of Soviet civil law was to remain steadfast in upholding the communist ideology. It should be noted that even the Civil Code of 1923 was not so attached to political ideology as the Civil Code of 1964.

It should also be noted that the provisions of the Civil Code of 1964 show a significant evolution in the understanding of the social function of civil law in the USSR. In the 1920s, civil law was seen as a “narrow horizon of bourgeois law” that would disappear in
communist society, but in the 1960s, civil law was already seen as a means of contributing to the building of communist society.\(^{10}\)

Compared to the Civil Code of 1923, the Civil Code of 1964 demonstrated better structural and legislative techniques. This Code contained separate sections on intellectual property and private international law and provided for a broader system of liability law.

The Civil Code of 1964 recognized only one real right: the right to property. There were only two types of property: socialist property and private property. Apart from the property rights of socialist enterprises, the Civil Code of 1964, unlike the Civil Code of 1923, did not recognize limited property rights (for example, the right to construction). Prominent Russian jurist Yevgeny Sukhanov believes that the main reason for the removal of limited property rights from the civil codes of the Union Republics in the 1960s was the “de facto” exclusivity of state land rights and the exclusion of other limited rights, including servitudes (the right to use someone else’s property).\(^{11}\)

The first paragraph of article 89, which deals with state property, explicitly allows tautology: “The state is the sole owner of all state property.” However, in the author’s opinion, this provision was purposefully drafted in this form, because such a formulation would nullify any attempt of socialist enterprises to present their property as property rights. The second paragraph of this article clearly defines the real rights of socialist enterprises over their property:

State property transferred to state organizations is under the practical management of these organizations, these organizations shall exercise the right to own, use and dispose of property within the limits established by law in accordance with the purposes of their activities, planned tasks and the purpose of the property.

\(^{10}\) V. Gsovski, Soviet Civil Law: Private Rights and Their Background Under the Soviet Regime 576 (Ann Arbor 1949).

At that time, the legal nature of this concept of “practical management” provoked heated debates among Soviet civilists. Some fundamental researchers of civil law think that the creation of such a real law is perhaps the most notable contribution of Soviet lawyers to the science of law. In fact, the concept of “practical management” was not a novelty of the Civil Code of 1964. It already existed in 1921 at the time of the introduction of the NEP and was recognized by the Soviet legal doctrine, but it was simply not formally included in the Civil Code of 1923. That is why the nature of the property rights of Soviet enterprises was the subject of scientific controversy in the 1920s.

According to Boris Martynov – a professor at the Moscow State Institute of International Relations – in Soviet civil law the relationship between the state and enterprises is similar to the concept of “fiducia” in Roman law and “trust” in general law. Martynov also uses the “divided theory of property” of the medieval feudal period to explain the division of property rights between the Soviet state and socialist enterprises. On this basis, he attributes the concept of dominium directum (direct property) in Roman law to the state, and the concept of dominium utile (dependent property) to enterprises. However, Martynov’s theory ignores the substantive differences between the concepts of fiducia, divided property, and trust. Thus, although in the concept of fiducia the fiduciary is not the owner of the property, in matters of trust and divided property, several persons are considered to be the owners of the property as the property is divided between them.

In order to avoid any reference to the “divided theory of property” of the feudal era, Soviet scholars began to insist that the real owner of property was the state only. According to them, the right of enterprises to property is not a property right and should not be classified using traditional concepts of property. Thus, a new real law that combined the components of administrative and civil law –

12. O. S. Ioffe, Development of Civil Law Thinking in the USSR 211-212 (Giuffré 1989).
the law of “practical management” emerged. The Soviet doctrine of civil law accepted the right of “practical management” as a kind of limited real law. Although enterprises could exercise all the rights (possession, use, and disposition) of the owner, the state retained the right to increase the property (accession), and this was a decisive factor in determining the true owner of the property (i.e., the state).

The Civil Code of 1964 declared that private property originated from socialist property and was a means of meeting the needs of citizens. Unlike the Civil Code of 1923, the Civil Code of 1964 recognized only two types of property: socialist property (state or nationwide property, property of collective farms, other cooperative organizations and their associations) and private property (one of the means of meeting the needs of citizens). Private property was a substitute for special property.

The peculiarity of the Civil Code of 1964 was that it regulated property relations in a society where there was no private ownership of the means of production and land. Private property was not encouraged and was subjected to various restrictions. In fact, by its legal nature, private property in the Soviet civil law doctrine was nothing more than limited special property. Private property – limited to certain objects of a certain size – could only be owned by an individual and was ultimately intended to meet the material and moral needs of the owner. It was emphasized that it was illegal for citizens to receive “effortless income” from private property. Article 101 of the Civil Code of 1964 stated that a citizen may personally own one house (or part of a house). The maximum size of a house or part (parts) of a house belonging to a citizen by right of personal ownership may not exceed 60 square meters of living space. Private property could be inherited from one owner to another. If a citizen acquired a second home through a donation or inheritance, he had to sell, donate, or otherwise alienate any of those

13. Id. at 215-221.
homes at his own discretion within a year. If it was not possible to sell the house within a year, the state organized a forced sale. In cases where it was not possible to sell the house compulsorily due to the lack of a buyer, the house was transferred to state ownership free of charge. In such cases, a citizen’s right to property depended on his luck: if there was a buyer, the owner could exercise his right of ownership, and if there was no buyer, the house was confiscated by the state. In other words, the state deprived the citizen of property.

Despite all these restrictions, private property could be considered special property, as the owner was given the right to own, use and dispose of the property. It is impossible to disagree with the opinion of the Soviet scientist Vladimir Gsovsky that “Soviet property rights showed that even in a socialist state, even a small amount of private property is inevitable.”

The Civil Code of 1964 defined two types of agreements: oral agreements and written agreements. The first refers to agreements that could be concluded orally for transactions up to 100 rubles, as well as for immediate transactions. Written agreements were of two types: simple agreements and agreements that had to be notarized. Simple written agreements were to be concluded during transactions of the state, cooperatives, public organizations, and citizens in excess of 100 rubles, as well as transactions required by law in writing. For example, a loan agreement of more than 50 rubles had to be concluded in simple written form. Types of transactions, such as home sales, donations, and wills, had to be notarized.

For the first time, the Civil Code of 1964 regulated the relations arising from the contracting of agricultural products, i.e., the conclusion of a contract for the purchase by the state. The contract regulated the relations between the collective farms, state farms and other farms that cultivate and produce agricultural products and the socialist organizations that receive these products. Despite the

15. The Azerbaijan SSR Civil Code of 1964, article 104.
existence of a contract of deposit in economic practice, the Civil Code of 1923 did not mention this. New articles (articles 421-432) on the contract of deposit were added to the Civil Code of 1964. According to the contract of deposit the depositary undertakes to safeguard property transferred to him by another party, and to return such property in good condition.

The Civil Code of 1964 also determined state compensation with regards to protecting socialist property. During the Soviet people struggle against Nazi Germany, many citizens were injured in bombings and other hostile operations while heroically rescuing socialist property. Due to the lack of relevant provisions in the Civil Code of 1923, the courts had difficulty determining the compensation to be paid by the state. The Civil Code of 1964 embodied this practice, as the article included the compensation for injury caused by the rescue of socialist property. Injury sustained by a citizen in rescuing socialist property from a danger threatening it must be compensated for by the organization whose property the injured party has rescued.\textsuperscript{18}

For the first time, an article on protection of honor and dignity was created in the Civil Code of 1964. The foundations of civil law defined litigation as the primary method of protecting civil rights. According to the Civil Code of 1964, there were courts of general jurisdiction, arbitrations, arbitral tribunals, and comrade judgement courts in Azerbaijan.

The predominance of socialist property and the degradation of private property created negative trends in the USSR’s economy and society. In the late 1980s, the inefficiency of the socialist economy was already an indisputable and accepted fact. To alleviate the difficulties, the Gorbachev government introduced \textit{perestroika} (reconstructing) and a series of unprecedented political and economic reforms. However, these reforms were ineffective, and on December 26, 1991, the USSR collapsed.

\textsuperscript{18} The Azerbaijan SSR Civil Code of 1964, article 468.
IV. THE AZERBAIJAN REPUBLIC CIVIL CODE OF 1999

The end of the twentieth century is considered a period of renaissance in civil law and is often associated with reforms in post-communist countries, including the need to build a market economy and a free society, as Soviet legal doctrine denied the division of law into public and private.

The collapse of the Soviet Union brought an end to the old system of public relations, and changes to the socio-political context in Azerbaijan. These changes would later pave the way for the implementation of necessary political, legal, and economic reforms, as well as the development of a market-oriented economy and the rule of law. For this to happen, it was necessary to adopt the basic law of the country – the Constitution. A commission of 33 people was established in 1994 under the chairmanship of national leader Heydar Aliyev to prepare the draft Constitution of the independent Republic of Azerbaijan. The yearlong nationwide discussion resulted in a referendum held on November 12, 1995, that adopted the draft Constitution, which entered into force on November 27 of that year.

The new Constitution defined the foundations of modern society and the state, of political institutions and the basic principles of building the Azerbaijani economy. The adopted new basic law was an impetus for the beginning and implementation of reforms in various spheres of life in the Republic of Azerbaijan. It also marked an important step in terms of proclaiming equality of rights and protection of human rights in the country. Thus, with the adoption of the new Constitution, Azerbaijan was heading toward a new direction of building the Rule of Law of the country.

This historical period prompted three major changes in the country: (1) a new phase for the country’s economy; (2) a strengthening of the principle of freedom of contract and the right to private property; (3) the administration of a stable and predictable legal environment for entrepreneurial activity. Economic relations in Azerbaijan had to be modernized on the basis of market principles, and public administration had to move from an administrative-command
system to a democratic system. Existing laws in the Soviet era were based on the concepts of state property and public administration in the economy, and the hastily drafted new laws on property after independence did not meet the requirements of the time. This situation made it necessary to prepare and adopt a new, fundamental legal document – the Civil Code, which was supposed to adapt civil law relations to the new political and economic realities. The deep and rapid social reforms carried out in the Republic of Azerbaijan in the 1990s also warrant the adoption of a new civil code as soon as possible. The civil legislation of the Republic of Azerbaijan had to be created from scratch, as the legislation of the former Soviet era served the interests of a centrally regulated economy and was by no means suitable to build a market economy.

Azerbaijan’s experience in the field of civil law was insufficient, as there were not enough local specialists in this field. During the Soviet period, the creation of the country’s legislation was largely under the hands of Russian legal experts. As a result, in the first 8 years of independence, the Republic of Azerbaijan was unable to adopt a new civil code and had to make do by amending the Civil Code of 1964. Thus, the young Republic was faced with the task of creating a modern civil legislation that would represent a complex and consistent system of interrelated, complementary legal norms.

The transition from a planned economy to a market economy involved a profound transformation process. This transformation process included extensive legislative reforms based on the Western model. The role of German lawyers in the preparation of the draft of the new civil code should be especially noted. Based on the Agreement signed between the Governments of Azerbaijan and Germany on December 8, 1997, the lawyers of the German Technical Cooperation Society (GTZ) began to provide full support to legal reforms in Azerbaijan within the project “Legal Reforms in Transition”.19

19. On January 1, 2011, through the merger of three German international development organizations, the Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ), the Deutscher Entwicklungsdienst (DED) and the
GTZ implemented the project on behalf of the German Federal Ministry for Economic Cooperation and Development (BMZ). The project’s head for the Commonwealth of Independent States (CIS) was Rolf Knieper, a GTZ lawyer and professor at the University of Bremen.

A question may be asked: why is it that the United States, usually very active in contributing toward the legal reform of other countries, did not play any role in Azerbaijan? The main reason for this was section 907 of the Freedom Support Act, adopted by the US Congress in 1992 at the initiative of the Armenian lobby and prohibiting direct US aid to Azerbaijan government.

One of the first projects of German legal experts in Azerbaijan was a seminar in the Milli Majlis (National Assembly, the legislative branch of government in Azerbaijan) held by Rolf Knieper on the methods of drafting legislation for members of parliament. During the Soviet era, laws were drafted mainly in Moscow, not in Baku, which was why in the first few years of independence, there were very few local legal specialists in the field of drafting laws. It should be noted that GTZ, along with Azerbaijan, also provided assistance in drafting civil codes in Georgia, Armenia, Moldova, Mongolia, Tajikistan, Turkmenistan and Uzbekistan.

In the drafting process of the new Civil Code, the German legal experts were mainly involved in the development of legal norms that play an important role in the daily lives of citizens, including lease, property, and land contracts. They did not participate in the development of norms in areas such as inheritance and family law, because these areas had the characteristics and traditions of the Azerbaijani people. Thus, it would not be appropriate for foreign experts to develop norms in this area. In other words, the German legal experts were mainly active in drafting provisions that played a major role in economic development.

*Internationale Weiterbildung und Entwicklung (InWEnt), the German Corporation for International Cooperation GmbH (GIZ) was established.*
Finally, 8 years after gaining the independence, with the support of German legal experts, the Azerbaijan Republic Civil Code (hereinafter referred to as “the Civil Code of 1999”) was adopted on December 28, 1999 and came into force on September 1, 2000. An interesting point is that although the Civil Code of 1999 was originally planned to come into force on June 1, 2000, it was postponed for 3 months.

The Civil Code of 1999, which is currently in force, is the largest legal act in the national legislative system of Azerbaijan. Its structure is divided into general and special parts, consisting of 10 sections, 74 chapters and 1,325 articles.

The first section of the Civil Code of 1999 contains introduction provisions (legislation in the area of civil law, civil rights and obligations and their protection), the second section is about persons (natural persons and legal entities), the third section deals with the rights on property and articles, the fourth section is about agreements, the fifth section introduces periods (period of limitation), the sixth section consists of the general part of the law of obligations, the seventh section covers the obligations arising from agreements, the eighth section involves the obligations arising out of law, the ninth section deals with the obligations arising from the violation of civil rights (delicts), and the tenth section is about inheritance law.

The General part of the Civil Code of 1999 states that the purpose of the Code is to secure the freedom of civil relationships based upon the equality of the parties without prejudice to the rights of other persons. Unlike the civil codes of the Azerbaijan SSR, the new Code proclaims the equality of the subjects of civil law, the free will of the subjects of civil law, the independence of the participants of civil relationships with respect to their property, as well as the inviolability of property and freedom of contract.

In the Special part, the relations arising mainly from the right of obligation and the right of inheritance are regulated. According to the Code, obligations arising from agreement, law and violation of civil rights (delicts) are different. The Code regulates the
distribution of inheritance by law and will (intestate succession and testamentary succession).

Azerbaijan’s civil legislation is based on the principles of freedom of contract, inviolability of property, non-interference in private affairs, renunciation of previous norms inherent in the administrative-command system of economic planning. These principles are heavily based on the pandectist system of the German Civil Code of 1896 (Bürgerliches Gesetzbuch) and the latest features of the Dutch Civil code. The essence of the systematization of civil law norms in the pandect system is to divide the norms of the civil code into general and special parts. Azerbaijan’s civil legislation has features such as the division of the Civil Code into general and special parts, and the clear division of material and procedural norms. The codification of civil law in Azerbaijan is based on the theory of monism of private law, as civil and commercial relations are regulated by only one code. Therefore, the Civil Code of 1999 regulates economic relations of natural persons and legal entities, as well as the status and legal relations of commercial organizations.

Compared to the civil codes of most other CIS countries, the Azerbaijan Republic Civil Code of 1999 is more influenced by German civil law, treating ownership, pledge, mortgage, easement, and usufruct as independent property rights. Even some articles of the Civil Code of 1999 are taken directly from the German Civil Code BGB of 1896. For example, article 439.2 of the Civil Code of 1999 on the performance of monetary obligations, which is very relevant nowadays, is drafted on the basis of paragraph 244.2 of the German Civil Code BGB of 1896.

At the same time, some chapters and articles of the Civil Code of 1999 are directly influenced by the Model Civil Code of the CIS and the Russian Federation Civil Code. Although the Model Civil Code of the CIS is adopted as the basis for the national civil codes of Russia, Belarus, Kazakhstan, Kyrgyzstan, Tajikistan, Uzbekistan and Armenia, the legislators from Azerbaijan, Georgia, Moldova, and Turkmenistan have chosen their own path in the development
of national civil codes, with only partial harmonization with the Model Civil Code of the CIS.\textsuperscript{20}

An example of the direct influence of the Model Civil Code of the CIS and the Russian Federation Civil Code is in article 10 of the Civil Code of 1999 on the customs of business activity. The list of sources of civil law in the theory of Russian civil law also includes business customs. Article 5 of the current Civil Code of the Russian Federation, called “The Customs of the Business Turnover,” states that the custom of the business turnover shall be recognized as the rule of behavior, which has taken shape and is widely applied in a certain sphere of business activities, and which has not been stipulated by legislation, regardless of whether it has or has not been fixed in any one document. The customs of the business turnover, contradicting the provisions of legislation or to the agreement, obligatory for the participant in the given relationship, shall not be applied. The content of this article is exactly the same as article 5 of the Model Civil Code for the CIS, called “business practices.” A comparative analysis shows that the content of article 10 of the current Civil Code of 1999, called “The customs of business activity,” is completely taken from these two codes. In the Special Part of the Civil Code of 1999, most of the provisions in Section 7, “The obligations arising from agreement,” including the types of agreements, are taken from the Section 4 “Particular Kinds of Obligations” of the second part of the Civil Code of the Russian Federation. Another feature of the codification of civil law in Azerbaijan is the formation of a separate Family Code in accordance with the Russian model, taking the norms of family law beyond the scope of civil law regulation.

However, there are many differences between the Azerbaijan Republic Civil Code of 1999 and the Civil Code of the Russian Federation, especially in terms of structure. For example, unlike the

\textsuperscript{20} A.A. Богустов, Проблемы взаимодействия модельного и национального гражданского законодательства стран СНГ, in 3 Рос. Юстиция 21-24 (2012), (A.A. Bogustov, Problems of Interaction of Model and National Civil Legislation of the CIS Countries, in 3 Russian Justice 21-24 (2012)).
Civil Code of the Russian Federation, the Azerbaijan Republic Civil Code of 1999 does not contain separate sections on intellectual property and private international law. Relations arising from intellectual property rights in Azerbaijan, along with the Civil Code, are mainly regulated by separate legal acts.

The preparation of a civil code is a long and arduous process. For instance, it took a full 66 years to draft the Civil Code of the People’s Republic of China, adopted in 2020 and considered the “Civil Code of the XXI Century,” as the first draft was prepared back in 1954. Over the years, extensive and detailed discussions have been held among legal experts on the drafts, scrutinizing every section, chapter, article, sentence, and even every word.

As aforementioned, in the first few years of independence, Azerbaijan did not do much to draft new civil legislation and codify civil law due to the lack of local legal experts in the field of codification of civil law in the country. Although at first glance it seems that it took 8 years to adopt the Civil Code of the Republic of Azerbaijan, this document was in fact prepared in a very short time and its draft was not published in advance for public discussions.

The practice of applying the Civil Code in independent Azerbaijan for almost 21 years showed that further improvements are needed. Numerous, or more precisely, 107 amendments made to the Code and 40 articles removed from the Code from 1999-2020 confirms this opinion. Some of these amendments indirectly acknowledge the poor quality of some provisions of the Code, which include the rewriting of various articles of the Civil Code, discussions of new drafts of Chapter 4 on legal entities, as well as articles on limited liability companies and cooperatives, and the renaming of Chapter 50 on insurance contracts and Chapter 54 on securities.

Unlike the French Civil Code, the language of the Azerbaijan Civil Code is quite complex, with many abstract sentences and expressions that are incomprehensible to ordinary citizens. The main purpose of the adoption of the Civil Code should be to protect the rights of ordinary citizens, and to meet their current interests and needs. Thus, in order to meet this purpose, the Civil Code should be
The Azerbaijan Republic Civil Code of 1999, which was prepared in a short period of time and adopted without public discussions, has its shortcomings such as inconsistencies, mixed provisions, weak legal technique, and a large number of imperative norms. In some cases, the failure to write the provisions of the Civil Code in plain language creates difficulties in interpreting individual articles, which directly affects the correct interpretation and application of the law. Several provisions of the Russian Civil Code and the German Civil Code have been systematically and mechanically incorporated into Azerbaijani Civil Code without in-depth analysis. Despite these shortcomings, the Azerbaijani society has a relatively more promising regulator in the Civil Code of 1999 compared to the Civil Codes of the Soviet era.

V. CURRENT SITUATION AND DEVELOPMENT PERSPECTIVES

The history of the codification of civil law in Azerbaijan shows that all three civil codes adopted during the twentieth century are based on the traditions of civil law and, in most cases, include some provisions from the civil codes of other European countries. At the same time, it should be noted that the main role in the formation of civil law in Azerbaijan was played not by the classic pandect or institutional codes (German Civil Code and French Civil Code, respectively), but primarily by the soviet-style Civil Code of 1922. As a result of differences in economy, politics and lifestyle, Azerbaijan’s civil legislation has always had its own peculiarities. The existence of specific features of Azerbaijani civil law does not mean a departure from civil traditions, and in many cases can be compared with the provisions of civil law in countries belonging to the romano-germanic tradition of law. In this sense, the Civil Code, adopted in 1999, has a special and important meaning in terms of
harmonizing the civil law of Azerbaijan with the civil law of European countries.

In general, the current civil law system in Azerbaijan can be characterized as transformed from a socialist to a romano-germanic legal system and oriented to a market economy. The civil legislation of Azerbaijan demonstrates certain features that reflect the national and common Islamic traditions. The way of life, thinking, and traditions of the nation have had a significant impact on the evolution and development of the national legal system.

Almost 30 years have passed since Azerbaijan gained independence. The country emerged from the severe crisis of the early 1990s, built an independent economy, and became one of the leaders among the countries of the South Caucasus and the CIS. During these years, the Republic of Azerbaijan has implemented fundamental economic reforms that ensure the transition from a centralized economy to a market economy and a society that develops through the rule of law. Economic reforms are not possible without legal reforms that form the basis of the development of the state and society. Civil law plays a key role in building the market foundations of the economy. The poor quality of the Civil Code directly affects the development of Azerbaijan’s economy, including non-oil sector and entrepreneurship.

As Azerbaijan has reached a new level of economic development, there is a need and ground for the country’s civil law to enter a new stage of development. Although Azerbaijan has been building a national legal system for almost 30 years, significant progress has been made only in the field of public law. More successful legal acts in terms of legal language and legal techniques have been adopted in the areas of constitutional law, administrative law, criminal law and other public law. The Azerbaijan Republic Civil Code of 1999, which is the basis of private law and contains the provisions of civil law, is still far from perfect. After the reforms in the civil legislation, many shortcomings were identified in the application of the norms reflected in the Civil Code of 1999, and these shortcomings can be eliminated only through the further development of civil legislation.
Public law can be developed on the basis of a deductive method, and sometimes even most of the foreign law can be completely copied and applied in the country. In private law, this is not possible, as the inductive method must be applied to the development of special legal norms, including in-depth study, analysis and discussion of the experience and needs of society. The experience of developed countries once again shows that the national legal system is developing mainly on the basis of scientific discussions in the field of private law. For the development and proper application of Azerbaijan's legislation, the country needs real and effective scientific discussions, not simulations. Existing laws should be constantly reviewed and criticized, and suggestions for their improvement should be made regularly.

Legislative activity in Azerbaijan is carried out almost exclusively by members of the Milli Majlis, the country’s legislature. It is impossible to carry out proper legislative activity without taking into account the views of judges, lawyers, legal experts, scientists and civil society groups in the field of lawmaking. Transparency of lawmaking should be increased in Azerbaijan. To do this, scientific and practical conferences on civil law should be held in the country on a regular basis with the involvement of legal experts and public activists. In order to properly understand and legally apply legal norms, it is very important to clearly interpret their scientific understanding and rules of practical application. Discussions held at such conferences can contribute to improving the quality of legislative work, increasing the legal culture of the population, increasing the authority of law and the state.

Evaluating the results of the civil legislation adopted since the country’s independence, it can be said that although most issues related to the establishment and development of the civil law system have been resolved, there is a great need for reform and re-regulation of the civil legislation. Thus, the emergence of new public relations is inevitable, and in this regard, as a dynamically developing country, Azerbaijan must move toward the improvement of civil
legislation in order for the legislation to meet new requirements and keep pace with the times. In other words, it is very important to improve the existing civil legislation in Azerbaijan in line with the pace of development of public relations. The rapidly developing and changing public relations in the country give special urgency to the search for ways to optimize the practical application of the law.

Although the Civil Code is the main legislative act for the formation and development of market relations in the country, its effective implementation in the daily life of society remains an unresolved problem. To this end, the legislature, the courts and lawyers must work together to continuously improve the Civil Code. In order to study international experience in the field of civil law, it is necessary to regularly exchange views and apply the practices that are considered successful in the context of public relations in the country.

One of the main objectives of legislative activity is to ensure the principle of legal certainty in public relations. The principle of legal certainty, as one of the key aspects of the rule of law, requires the absence of “gray zones” that are not regulated by law, both among citizens and between citizens and the state.

The language of the Civil Code must be clear, fluent, and understandable to ordinary citizens, and the definition of the objects and subjects of civil law relations in the provisions of the Code must be precise and detailed, taking into account specific issues. Uncertainties in the Civil Code should not be allowed so that the parties do not implement these provisions in their own way.

At present, the issue of completing the legal system, ensuring its structuring, eliminating the contradictions and gaps adopted in previous years is urgent. Thus, the author makes the following proposals for the optimization of civil law in Azerbaijan:

1. Revision of all civil legislation, elimination of contradictions and re-codification of laws;
2. Inclusion in the Civil Code of norms regulating new public relations and reliably protecting the rights of citizens;
3. Further improvement of the basic principles of the civil legislation of Azerbaijan in accordance with the new level of development of market relations;

4. The practice of law enforcement and interpretation of laws should be reflected in the Civil Code;

5. Improving the norms on protection of property rights, healthy competition, implementation of agreements and anti-monopoly activities;

6. Use of the latest successful experience of civil codes of a number of European (Switzerland, the Netherlands, Belgium) and Asian (China, Japan, South Korea, Singapore) countries in the modernization of civil legislation of Azerbaijan;

7. More active involvement of foreign scientists and experts in the preparation of draft proposals on amendments and additions to the Civil Code;

8. Elimination of flawed language style and weak legislative techniques of the Civil Code, as well as making the language of the Code simpler and more understandable for citizens;

9. Improving the effectiveness of law enforcement practices;

10. Awareness of judges and lawyers through trainings;

11. Developing the legal awareness of citizens through mass media;

12. Public discussion of the adoption of new laws and amendments to conflicting laws that meet modern challenges with the participation of scholars and experts in the field of private law.

No country in the world has a perfect, flawless legislative and legal system. Legislation is in the process of ongoing reforms, and it is important that these reforms are in line with the dynamics of social development.

The need for reform in the civil legislation of Azerbaijan in the 1990s stemmed primarily from the desire to eliminate all norms that embodied the administrative and planned regulation of property
relations. Today, in contrast to the reforms of the 1990s, the need for modernization and reform of civil legislation arose primarily from the need to ensure the stability of civil law and civil turnover. This, in turn, undoubtedly requires a more precise regulation of the norms on sources of civil legislation as a basis for future legal reforms.

Summarizing the above proposals, it can be said that the concept of development and reform of civil legislation in Azerbaijan should be transformed into a single strategy aimed at more effective regulation of market relations in country, gradually eliminating the “transitional” nature of market relations.
NATURAL AND ARTIFICIAL NEURAL NETWORKS:
THE CHILEAN LEGAL FRAMEWORK

Carlos Amunátegui Perelló*

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ABSTRACT

Neuro-law and neuro-rights are emerging legal fields in the intersection of law, ethics, and technology. The aim of this study is to present the legal and scientific foundations of the matter, highlighting the Chilean regulation model on the problem.

Key words: Chile, Neurorights, neural networks, Brain Computer Interfaces

I. INTRODUCTION

When McCullach and Pitts, in their 1943 paper, established the neurons as the elemental unit of computation of the brain,¹ they did not imagine the practical importance that such a discovery would eventually have in the future of information technologies. At the

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time, there were no digital computers,\textsuperscript{2} no information theory,\textsuperscript{3} and Turing’s machine was nothing but a trivial mathematical pursuit. Based on the ideas of Norbert Wiener’s school of Cybernetics,\textsuperscript{4} Warren McCullach, a neurology researcher, had the intuition that the brain was fundamentally a universal Turing machine.\textsuperscript{5} The idea, in its most basic elements, is quite simple. At the time, it was well known that neurons communicated with each other through electrical signals, action potentials, which originated in one neuron and were transmitted, either electrically or chemically, to other neurons through synapses.\textsuperscript{6} The signal was always the same, although it could be modulated through neurotransmitters and could have the effect of inhibiting or activating other neurons. These synapses formed networks and, through a process that was not quite clear then, these networks became thoughts and ideas.\textsuperscript{7} He wondered, if the neurons could either fire or be in repose, did they behave as a digital model of thought? Could these neurons be represented as

\begin{itemize}
  \item \textsuperscript{2} In 1943, the most widely known computer was Vannevar Bush’s Differential Analyzer, which was built in the 1920s. See Flo Conway & Jim Siegelman, The Dark Hero of Information Age. In Search of Norbert Wiener the Father of Cybernetics 76 (Basic Books 2005). Although the Nazis had built a kind of programable computer, the Z2, and the British had constructed the Colossus as a digital device that could make fast calculations, the knowledge of the very existence of such machines was secret and a matter of national security.
  \item For the impact of McCullach and Pitts theories on Cybernetics, see Norbert Wiener, Cybernetics or Control and Communication: in the Animal and the Machine 66 (MIT Press 2019).
  \item For a simple description of the idea, see Michael Airbib & James Boniauto, From Neuron to Cognition via Computational Neuroscience (M.A Airbib and J.J. Boniauto eds., MIT Press 2016).
\end{itemize}
numbers 0 and 1, in a sort of Boolean system that computes a result through a network of synaptic connections? The idea seemed fascinating, but he lacked the mathematical knowledge to prove it, and so entered the genitor in the equation. Did I write genitor? Of course. Walter Pitts was a young man who, as a child, became a run-away kid in the streets of Chicago. He taught himself logic and mathematics and worked as a janitor in the Chicago University, to be able to discretely attend classes. He eventually met McCulloch and was able to give a formal coherence to his intuitions. The paper they wrote together, titled “A Logical Calculus of the Ideas Immanent in Nervous Activity,” was one of the most groundbreaking pieces ever written either in mathematics or neurology, for it modelled a way in which a set of neurons could process information, and in practical terms, a brain could work. Eventually McCulloch and Pitts’ neuron model became the basis of modern computational neurology.

8. The binary number system is usually referred to as Boolean numbers in honor of George Boole. In 1847, he postulated the possibility of reducing the logical system to a formal representation similar to arithmetical calculus. To do so, he suggested the use of a number system of zeros and ones, where zero would represent falsehood, while one would stand for truth value. On the matter he stated: “I purpose to establish the Calculus of Logic, and that I claim for it a place among the acknowledged forms of Mathematical Analysis, regardless that in its object and in its instruments it must at present stand alone.” See George Boole, The Mathematical Analysis of Logic 4 (Henderson & Spalding 1847). Nevertheless, these ideas had been previously proposed by Leibniz, including the usage of a binary number system. See Gottfried Leibniz, Dissertatio de Arte Combinatoria 6-7 (Lipsiae 1666).

9. The idea is implied in the Turing-Church thesis. Both Alan Turing and Alonzo Church reached the same conclusion through different roads. Turing made a thought experiment in his famous 1937 article: Alan Turing, On Computable Numbers, With an Application to Entscheidungsproblem, 42:2 Proceedings of the London Mathematical Society 230 (1937). He designed a theoretical machine, known as a Turing Machine, that could, in principle mechanically make any calculation conceivable if it was properly instructed through an infinite paper tape which would only include zeros and ones. If any calculation is reducible to a mechanical procedure, provided it is sufficiently described, and any logical procedure could be reduced to an arithmetical formulation, then all logic and all mathematical can be operated mechanically. Church’s lambda argument is more difficult to grasp, but essentially gets to a similar conclusion. See Alonzo Church, The Calculus of Lambda-conversion, Annals of Mathematical Studies (1941).

Although incomplete, as the brain is more complex than what the paper suggested, it remains foundational.

Nevertheless, although the brain does not work exactly as the model suggested, it eventually became apparent that a machine could be built to behave as an artificial neuronal network.\textsuperscript{11} This idea was put forward by Frank Rosenblatt in his 1957 paper,\textsuperscript{12} which argued that a machine that imitated the mathematical workings of McCullach and Pitts’ model could learn from examples and become “intelligent.” The “perceptron,” the first artificial neural network, was the result of this inquiry, and the research on machine learning seemed promising. Although the project of building artificial neural networks was eventually abandoned during the 1970s due to a theoretical critique made by Minsky and Papert\textsuperscript{13} and the lack of practical results in an age where computing power and data accumulation was negligible, its reemergence, thanks to the work of Hinton and LeCun, brought amazing results to the field of Artificial Intelligence.\textsuperscript{14} Modern artificial intelligence is based on the construction

\textsuperscript{11} On the matter, it has been said that “while the McCulloch–Pitts neuron no longer plays an active part in computational neuroscience, it is still widely used in neural computing, the technological application of networks of adaptive artificial neurons”. See Airbib & Boniauto, supra note 7.

\textsuperscript{12} Frank Rosenblatt, \textit{The Perceptron. A Perceiving and Recognizing Automaton,} CORNELL AERONAUTICAL LABORATORY (1957).

\textsuperscript{13} Marvin Minsky initially worked in the early 1950s on artificial neural networks. In fact, his doctoral work was on the matter (MARVIN MINSKY, \textit{THEORY OF NEURAL-ANALOG REINFORCEMENT SYSTEMS AND ITS APPLICATION TO THE BRAIN MODEL PROBLEM} (Princeton U. Press 1954)). However, he rapidly became disabused of the notion. Eventually, his theories on Artificial Intelligence led him in the very opposite direction, towards the so-called symbolist school of thought. In 1970 he published, together with Seymour Papert, a mathematical refutation of the Perceptron. See MARVIN MINSKY, & SEYMOUR PAPERT, \textit{PERCEPTRONS. AN INTRODUCTION TO COMPUTATIONAL GEOMETRY} (MIT Press 1970). It basically asserted a mathematical proof of the impossibility of implementing a NOR function in a perceptron. This is quite important, for the absence of this particular function would mean that a perceptron is not a universal Turing machine, and therefore, unable to perform every computation. To make things worse, Rosenblatt never got to defend his perceptron. He died in an accident soon after the publication of the book.

\textsuperscript{14} Essentially, during the 1970s and early 1980s, the work on artificial neural networks became an underground matter. In fact, the most important papers on the matter were not published in computer science journals, but in cognitive psychology ones. During the early 1980s, there were two major breakthroughs on
and training of neural networks, which are rapidly gaining more general capabilities in the last few months, as larger models which incorporate attention mechanisms are implemented.\textsuperscript{15} Just to give a glimpse of the status of these models, GTP-3 writes more words every day than all the comments made on Twitter during the same timeframe. In a sense, it can be said that language is becoming a region dominated by machines. Artificial neural networks have put artificial intelligence at the center of legal and economic debate, to regulate such entities and their activities. The hazards that can emerge from its use have become evident in the last decade and different perspectives on their regulation have emerged quite recently. Nevertheless, the construction and use of artificial agents is not the only possibility that neural networks offer. One of the most interesting and powerful possibilities open to technology is the interconnection between natural neural networks and artificial ones.

\textsuperscript{15} Attention is a proper mechanism applied to language models. It was first suggested in 2017, and basically treats language as a prediction problem, making a neural network guess the next word considering or attending to the previous words that were put forward. See Ashish Vaswani et al., \textit{Attention is All You Need}, in \textit{Advances in Neural Information Processing Systems} (I. Guyon, U. Von Luxburg, S. Bengio, H. Wallach, R. Fergus, S. Vishwanathan, R. Garnett eds., 2017). For a detailed analysis see Stuart Russell & Peter Norvig, \textit{Artificial Intelligence: A Modern Approach} 868 (Pearson 2020).
II. BRAIN MACHINE INTERFACES

One of the most interesting technologies that have emerged from the convergence of artificial and natural neural networks is to build means of communication between both kinds of information systems, which are usually called Brain Machine or Computer Interfaces (BMI or BCI). Both terms are popular. These can have different purposes, such as restoring functionality to senses, as cochlear\textsuperscript{16} and retinal implants,\textsuperscript{17} restoring motor capabilities,\textsuperscript{18} regulating brain activity\textsuperscript{19} or simply facilitating the interaction between machines and human beings. These technologies can literally make the blind see, the deaf hear and the paralytic walk, with the potential to have profound social and economic effects in our society.

The devices measure neural activity and then process the information obtained to understand and interpret it. Some of these devices are designed to be invasive, being implanted inside a person’s skull, but most have a non-invasive nature, measuring the nervous system’s activity from outside the user’s body. Most of these


\textsuperscript{17} Cochlear implants, although originally developed in the 1950s, have significantly improved in complexity and precision since the development of multi-channel implants, which directly stimulate the nervous system. See James Naples & Michael Ruckenstein, \textit{Cochlear Implant}, 53 OTOLARYNGOLOGIC CLINICS OF NORTH AMERICA 87 (2020); Shenoy & Yu, supra note 16, at 953.

\textsuperscript{18} These technologies are currently being used to assist amputees and paralyzed people to restore some motor capabilities. See Shenoy & Yu, supra note 16, at 954.

\textsuperscript{19} When patients of the Parkinson disease become resistant to pharmacological treatment, namely levodopa, they sometimes receive a deep brain stimulator to help them regulate their neural activity. These devices deliver electrical impulses inside the brain, specifically through electrodes implanted in the thalamic nuclei to help the patient control dysfunctional activity. The first trail was made in 1997, and it has since then evolved into an important therapeutic technique. See Alim Louis Benabid, \textit{Deep Brain Stimulation for Parkinson’s Disease}, in 13 \textit{CURRENT OPINION IN NEUROBIOLOGY} 696 (2003); Shenoy & Yu, supra note 16, at 955.
devices can only read the nervous system’s activity, though some can also write in it, through different mechanisms. To measure the nervous system’s activation, there is a range of possibilities. One of the most popular options is that of electroencephalograms (EEGs), which is a technology that has been in use since the 1920s.\textsuperscript{20} Usually, they are deployed in a non-invasive fashion, to measure the electrical activity inside the brain and grossly determine which areas of the brain are active and how active they are, by reading the brain’s activity as waves. Although they can only express a general picture of the nervous system, they are relatively cheap and are being used in different contexts, for instance to develop mind control robots and toys,\textsuperscript{21} to determine levels of concentration in students,\textsuperscript{22} and other various possibilities. These devices are on sale at different marketplaces and can even be 3-D printed at home.\textsuperscript{23} Until recently, Meta was working to make these interfaces commercially viable, by

\begin{itemize}
  \item \textsuperscript{20} Activity in the nervous system can be measured and analyzed through the registration of the electrical impulses that are produced by the neurons when activating their action potentials. It is an old technique with almost a hundred years of medical practice. It was first applied to humans in 1924 by the German physician Hans Berger. See James L. Stone & John R. Hughes, \textit{Early History of Electroencephalography and Establishment of the American Clinical Neurophysiology Society}, \textit{30 Clinical Neurophysiology} 28 (2013). The procedure is performed by registering the electrical activity in the brain through electrodes positioned over the skull. It is a non-invasive technology and there is an on-going effort to miniaturize this technology to make it easily available. One can find many BMIs on the market which are basically EEGs. See Marcello Ienca and Roberto Andorno, \textit{Towards New Human Rights In the Age of Neuroscience and Neurotechnology} 13 Life Sciences, Society and Policy 2 (2017); See also Marcello Ienca, Committee on Bioethics, Council of Europe, \textit{Common Human Rights Challenges Raised by Different Applications of Neurotechnologies in the Biomedical Fields} 11 (2021), \url{https://perma.cc/LVU9-8Y3H}.
  \item \textsuperscript{21} Presently, there is quite a number of toys available in marketplaces such as Amazon based on these technologies. One of the coolest examples is the Star Wars Science Force Trainer, which consists of a headband which contains a basic EEG used to control the holographic image of an X-Wing fighter. The EEG reads the brain waves of the user and moves the image accordingly. It costs about a hundred US dollars.
  \item \textsuperscript{22} According to The Guardian, primary schools in China experimented with headbands containing EEGs to supervise the level of concentration of students. See Michael Standaert, \textit{Chinese Primary School Halts Trial of Device that Monitors Pupils' Brainwaves}, \textit{The Guardian} (November 1, 2019), \url{https://perma.cc/297W-HZZJ}.
  \item \textsuperscript{23} There are literally hundreds of models to download. See Yeggi, Search Engine for 3D printable Models, \url{https://perma.cc/297W-HZZJ}.
\end{itemize}
replacing or complementing more traditional ways to interact with computers, such as keyboards.\textsuperscript{24}

Another possibility is to use EEGs intracranially, that is to say, to install electrodes inside the skull and to connect them directly to the brain, which is usually known as iEEG. This technology provides some important risks and features. To install them, a surgery is needed, and eventually there is a need to charge them, as their batteries are depleted. There is also a risk of infection or even brain damage as parts of the device decay. These devices also hold additional capabilities, for they cannot only read more accurately neuronal activity, but can also send electric signals to activate certain zones of the nervous systems.\textsuperscript{25} Nowadays, they are used to give deep brain stimulation to Parkison’s disease patients,\textsuperscript{26} but some companies, most famously Neuralink, intend to use them as a communication device to connect the nervous system to the Internet.

One other option is to use functional magnetic field imaging (fMRI) to measure neuronal activity.\textsuperscript{27} FMRI s give a precise image of the brain’s activity, including cell activation, but the cost is rather high, and the machines do not seem suitable for miniaturization, therefore they only seem fit for non-invasive research and clinical purposes at the moment.

There are other technologies that could eventually be used to facilitate communication between nervous system and artificial

\textsuperscript{24} Apparently, on July 2021 Meta cancelled this program. See David Heaney, Facebook Cancels Head-Mounted BCI Research, Will Focus on Wrist, UPLOAD (July 15, 2021), https://perma.cc/C86B-CLW4.

\textsuperscript{25} On the matter, see Ienca & Andorno, supra note 20.

\textsuperscript{26} On the matter, see Joseph Parvizi & Sabine Kastner, Human Intracranial EEG: Promises and Limitations, 21 NATURE NEUROSCIENCE 474 (2018).

\textsuperscript{27} Functional MRIs are an image technology based on measuring the magnetic field created by the concentration of oxygen in blood. As blood uses iron to carry oxygen, and iron generates a magnetic field, this can be used to establish the neural activity in the brain. The first images ever captured by this technique were published in Nature in the 1970s. See Paul C. Lauterbur, Image Formation by Induced Local Interactions: Examples Employing Nuclear Magnetic Resonance, 242 NATURE 190 (1973). However, it was not used on humans until 1982. For a detailed explanation, see Dafne Shohamy & Nick Turk-Browne, Imaging and Behavior, in PRINCIPLES OF NEURAL SCIENCE 111 (Eric Kandel, John D. Koester, Sarah H. Mack, Steven A. Siegelbaum eds., McGraw-Hill 2021).
agents, such as optogenetics, but the aforementioned options seem to be the most viable possibilities.

Considering these technological possibilities, the Chilean Senate, with the collaboration of academics from different disciplines such as Rafael Yuste, who championed the idea, promoted a constitutional reform of the Constitution and a bill to regulate these technical possibilities.

III. LAW AND REGULATION

The idea of using neurorights has only been evoked recently. The seminal works of Andorno and Ienca are fairly recent (2017), although a more general neuro-ethics perspective can be traced back to the 1990s. Anyhow, until recently, no positive law system had adopted a perspective regarding neuronal activity as a protected legal interest. On October 7, 2020, two proposals were put forward in the Chilean Senate by the Comisión de Futuro (Commission for the Future) presided by senator Girardi: one to reform Chile’s Constitution to include the protection of neuronal activity, and a bill proposal to regulate neuro-technologies. Several academics were called upon to participate both in the Constitutional reform and the bill proposal, among which the author of this article.

28. Optogenetics consist in genetically modifying neurons to make them sensible to light. This is nowadays only used on animals, and there are important ethical issues to consider before applying them to humans, but the technology is quite interesting. It consists in inserting part of the genetic information from photosensitive algae into the neurons. See Larry Abbott, Attila Losonczy, & Nathaniel Sawtell, *The Computational Bases of Neural Circuits that Mediate Behavior, in PRINCIPLES OF NEURAL SCIENCE* 99 (Eric Kandel, John D. Koester, Sarah H. Mack, Steven A. Siegelbaum eds., McGraw-Hill 2021).


31. Its official name is: “Sobre protección de los neuroderechos y la integridad mental, y el desarrollo de la investigación y las neurotecnologías” (On the Protection of Neurorights and Mental Integrity, and the Development of Research and Neuro-technologies), and it is processed at Boletín Nº 13828-19. See the web page of the Senate of Chile, Tramitación de proyectos, https://perma.cc/TYX7-KB7S (last visited January 1, 2022).
The Constitutional reform was finally approved unanimously by Congress on October 25, 2021, adding a new paragraph to article 19N°1 of the Constitution to protect brain activity and the information collected from it. Meanwhile, the bill proposal has also been unanimously approved by the Senate on December 7, 2021 and is currently being discussed by the House of Representatives, where a swift approval is expected.

The basic aim of the bill proposal is not to regulate the technologies in themselves, but some of its applications that can be questionable. Ingenuity is one of the most precious attributes of the human mind, and it should be properly endorsed, rather than limited. In this spirit, the bill distinguishes between research, medical applications, and plain commercial uses. For each purpose, there is a distinct set of rules that applies regarding the particularities of these fields, but any deployment of a neurotechnology must comply with the fundamental rights established in the law and the Constitution, which are the framework for the deployment of any information technology.

Any neurotechnology that intends to be deployed in Chile must follow a simple registration mechanism analogous to the framework given to any medical device. In this sense, the law takes a medical standpoint and demands of non-clinical devices a compliance to the

32. Although neuro-technologies are an emergent phenomenon, plenty of commercial uses are being implemented and even new fields are coming into scene. One of the most popular is neuromarketing, “not only to infer mental preferences, but also to prime, imprint or trigger those preferences” (Ienca & Andorno, supra note 20, at 4) and many others are emerging.

33. Proyecto de ley de neuroderechos sobre protección de los neuroderechos y la integridad mental, y el desarrollo de la investigación y las neurotecnologías, Bulletin 13.828-19, art. 4:

Las personas son libres de utilizar cualquier tipo de neurotecnología permitida. No obstante, para intervenir a otros a través de ellas, se deberá contar con su consentimiento libre, previo e informado, el cual deberá entregarse de forma expresa, explícita, específica o, en su defecto, con el de quien deba suplir su voluntad de conformidad a la ley. El consentimiento deberá constar por escrito y será esencialmente revocable.

34. Id. art. 7:

Las neurotecnologías deberán ser previamente registradas por el Instituto de Salud Pública para su uso en las personas.
rules of therapeutic instruments so that their quality and security can be verified. In this process, the intended uses of the technology must be stated.\textsuperscript{35} The bill declares certain uses as explicitly prohibited, such as aiming to influence human conduct without the user’s consent, exploiting weaknesses of certain vulnerable groups, extracting data without the user’s explicit consent, or affecting the neuroplasticity of vulnerable groups, children, and young adults. Some of these prohibitions were inspired by the European Proposal of Harmonized Rules on Artificial Intelligence,\textsuperscript{36} while others, such as the one regarding neuroplasticity, refer to a specific problem of neurotechnologies.\textsuperscript{37} These prohibitions are intended to protect the privacy of neuronal data, which is declared sensitive by the bill proposal, and its cognitive liberty.\textsuperscript{38}

Regarding consent, the bill proposal keeps the general dispositions regarding scientific research and therapeutical applications, which are already regulated by recently approved bills.\textsuperscript{39} However, for commercial applications, consent is especially regulated

\textsuperscript{35} Id. art. 8:
Por resolución fundada, la autoridad sanitaria podrá restringir o prohibir el uso de neurotecnologías, en razón de afectar indebidamente derechos fundamentales, en casos tales como:
1) aquellos que influencian la conducta de la persona, sin su consentimiento;
2) aquellos que explotan las debilidades de grupos específicos;
3) aquellos que extraen datos de manera no autorizada o sin el consentimiento de su titular;
4) aquellos que afectan negativamente la neuroplasticidad, especialmente, de niños, niñas y adolescentes;


37. Missing these critical periods for neurodevelopment is crucial because the faculties and capabilities that are missed cannot be later acquired. Classical experiments on the matter go back to the 1940s, when René Spitz “provided more systematic evidence that early interactions with other humans are essential for normal social development” (Joshua Sanes, Experience and the Refinement of Synaptic Connections, in PRINCIPLES OF NEURAL SCIENCE 1230 (Eric Kandel, John D. Koester, Sarah H. Mack, Steven A. Siegelbaum eds., McGraw-Hill 2021)).

38. On the matter, see Christoph Bublitz, My Mind is Mine!? Cognitive Liberty as a Legal Concept, in COGNITIVE ENHANCEMENT, AN INTERDISCIPLINARY PERSPECTIVE 233 (E. Hildt, AG Franke eds., Springer 2013).

39. These matters are regulated by the recently approved bills, Ley 20.584 on rights and duties of patients and Ley 20.120 on scientist research on human beings.
requiring it to be free, informed, and specific, given in a written form, establishing possible negative consequences and the privacy of the data. Another important matter is that any application of neuro-technologies, besides medical uses, must be reversible, meaning that it should be possible to put an end to the use of neuro-technologies without any detectable negative effects. Regarding liability, the project opted for a strict regime in the case of commercial applications, to favor the position of the consumer regarding possible tort claims.

All these regulations seem simple, do not threaten the development of neuro-technologies, but rather give a clear framework to develop the field while respecting the autonomy and dignity of the user.
THE CONSTITUTIONAL RESHAPING OF SOUTH AFRICA’S SUCCESSION LAWS

François du Toit*

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ABSTRACT

The South African Constitution of 1996 has had a significant impact on all the branches of South African law, including its succession laws. The Constitution has transformatively reshaped important aspects of South Africa’s succession laws over the past two-and-a-half decades. This Article surveys the reshaping of two such aspects critically, namely (i) the extension of spousal inheritance under the Intestate Succession Act of 1987 and the Wills Act of 1953 as well as the extension of parental inheritance under the former statute; and (ii) the limitation of testamentary freedom. The aforementioned developments occurred by and large at the hands of the South African courts under the influence of constitutional and public policy imperatives regarding equality and non-discrimination. The Article shows that many of these developments are positive and worthy of emulation, but that a handful of the judgments in which these developments occurred, are open to criticism.

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I. INTRODUCTION

South Africa’s succession laws determine which assets pass by inheritance to a deceased person’s successors (or beneficiaries).\(^1\) Succession in South Africa occurs principally in accordance with the deceased’s valid will or, in the absence of a valid will, through intestate succession.\(^2\) The Wills Act\(^3\) regulates aspects of the former, whilst the latter is by and large governed by the Intestate Succession Act.\(^4\) The South African law of testate succession is a mixture of Roman-Dutch law and English law,\(^5\) whereas the origins of its common law of intestate succession\(^6\) date back to the Schependomsrecht, one of the intestate succession systems in operation in the Dutch province of Holland during the sixteenth century.\(^7\) The law of succession resorts under the broader category of South African private law.\(^8\)

The South African Constitution\(^9\) and its Bill of Rights\(^10\) in particular impact all branches of South African law, including its

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2. JAMNECK & RAUTENBACH, supra note 1, at 1; DE WAAL & SCHOEKAN-MALAN, supra note 1, at 2–3.
3. Wills Act 7 of 1953 (S. Afr.).
4. Intestate Succession Act 81 of 1987 (S. Afr.).
6. South Africa also recognizes the customary laws of intestate succession of its Black people: see JAMNECK & RAUTENBACH, supra note 1, at 4–5. This branch of intestate succession laws falls outside this Article’s scope.
7. JAMNECK & RAUTENBACH, supra note 1, at 3; DE WAAL & SCHOEKAN-MALAN, supra note 1, at 14–15.
8. JAMNECK & RAUTENBACH, supra note 1, at 3.
10. Id. at Ch. 2.
private law and thus also its succession laws. It is unsurprising that South African courts, when adjudicating on constitutional challenges to South Africa’s succession laws, have reshaped these laws in consonance with constitutional imperatives in general and the prescripts of the Bill of Rights in particular. This constitutional reshaping occurred regarding South Africa’s testate as well as its intestate succession laws. Two aspects of the constitutional reshaping of South Africa’s succession laws are surveyed in this Article: (i) the extension of inheritance in terms of the Intestate Succession Act and Wills Act to persons not traditionally recognized as a deceased’s surviving spouse or parent and (ii) the limitation of testamentary freedom beyond the instances in which South African law traditionally restricted testators when disposing of their property by last will and testament. These two aspects provide ample evidence of the transformative effect of the Constitution regarding South Africa’s succession laws. However, the manner in and the extent to which South African courts have undertaken the reshaping of these laws are not beyond reproach, and the Article also touches on criticism of aspects of the courts’ constitutionally transformative methodologies in this regard.

II. THE EXTENSION OF SPOUSAL AND PARENTAL INHERITANCE

The Intestate Succession Act as well as the Wills Act provide for the devolution of assets to a deceased person’s surviving spouse in certain instances. The Intestate Succession Act designates the surviving spouse as a deceased’s sole intestate heir if the deceased is not survived by descendants, and as a co-heir in the event that the deceased is survived by a spouse as well as descendants. The Wills

11. § 2 of the Constitution states that the Constitution is South Africa’s supreme law and that all law or conduct inconsistent therewith is invalid; § 8(1) of the Constitution determines that the Bill of Rights applies to the entirety of South African law; § 8(2) of the Constitution renders the Bill of Rights binding on all natural and juristic persons.
12. Intestate Succession Act, supra note 4, at § 1(1)(a).
13. Id. at § 1(1)(c).
Act permits the accrual of testamentary benefits in favor of a testator’s surviving spouse when a descendant of that testator renounced (rejected) those benefits.\textsuperscript{14} However, neither statute contains a definition of “spouse” or “surviving spouse” for purposes of the operation of the aforementioned provisions. The traditional meaning attributed to “spouse” or “surviving spouse” in the above contexts is of a person to whom the deceased was married (at the time of the deceased’s death) in a valid civil marriage solemnized in accordance with the Marriage Act.\textsuperscript{15} Writing in 1983 (during the pre-constitutional era), Erasmus et al note the following distinguishing features of such a valid civil marriage:

- a civil marriage is a voluntary, life-long union of one man and one woman;
- persons of the same sex cannot enter into a civil marriage;
- a civil marriage is a monogamous union; and
- a civil marriage must be solemnized by a competent marriage officer in accordance with the provisions of the Marriage Act.\textsuperscript{16}

The foregoing points to the limited meaning traditionally ascribed to “spouse” or “surviving spouse” for purposes of the directives in the Intestate Succession Act and Wills Act that appertain to these persons. South African courts have, during the post-constitutional era, extended inheritance rights under both statutes to persons who do not fall within the confines of this limited meaning. The courts did so with firm reliance on constitutional rights and norms, in particular those regarding equality and non-discrimination as well as human dignity. A similar development occurred regarding the Intestate Succession Act’s engagement with parental inheritance. The Act designates a deceased’s parent or parents as an intestate heir or

\textsuperscript{14} Wills Act, \textit{supra} note 3, at § 2C (1).
\textsuperscript{15} Marriage Act 25 of 1961 (S. Afr.). \textit{See} Daniels v Campbell 2003 (9) BCLR 969 (C) 985H, 988F.
heirs when the deceased is not survived by a spouse or descend-
ants. Parentage in this regard traditionally carries the limited meaning of single-generational blood relationship in the case of a biological child (i.e., the child’s biological father or mother) or, alternatively, parenthood established through a legally valid adoption in the case of an adopted child (i.e., the child’s adoptive father or mother). These points are considered the “traditional objectively determinable criteria of who a ‘parent’ is.” However, a South African court departed from this traditional meaning of “parent”, for purposes of the Intestate Succession Act, by relying on constitutional rights and norms.

The specific instances in which South African courts undertook the broadening of the traditional spousal and parental concepts will now be considered in greater detail.

A. Muslim and Hindu Marriages

In Daniels v Campbell, the Constitutional Court decided that “spouse” for purposes of the Intestate Succession Act includes a party to a monogamous Muslim marriage. Such a party does not qualify in terms of the spousal concept’s abovementioned traditional limited meaning because a marriage concluded in accordance with Muslim rites is typically not solemnized by a marriage officer appointed in terms of the Marriage Act, and such a marriage is thus also not registered in accordance with the Marriage Act’s pre-
scripts. The Constitutional Court opined in Daniels that the limited meaning traditionally ascribed to “spouse” is unfairly discriminatory in its intent and impact, because it exalts a particular conceptualization of marriage to which Muslim marriages do not conform.

17. Intestate Succession Act, supra note 4, at § 1(1)(d).
19. Id. at 568.
20. 2004 (5) SA 331 (CC).
21. Id. at para. 3.
22. Id. at para. 19.
The Court thus declared that the constitutional values of equality, tolerance and respect for diversity justify ascribing a broad and inclusive meaning to the word “spouse” for purposes of the Intestate Succession Act.\(^{23}\) In the result, the Court ruled that the term “spouse” in the Intestate Succession Act must be interpreted to include a party to a monogamous Muslim marriage and, therefore, that such a spouse is capable of inheriting in terms of that Act.\(^{24}\) The position of a party to a monogamous Hindu marriage is akin to that of a party to a monogamous Muslim marriage insofar as a Hindu marriage is typically not solemnized by a duly appointed marriage officer and is therefore not registered under the Marriage Act.\(^{25}\) It therefore came as no surprise when the erstwhile Durban and Coast Local Division of the Supreme Court (now known as the KwaZulu-Natal High Court, Durban), bound by the precedent set by the Constitutional Court in Daniels, subsequently ruled in Govender v Ragavayah that the Intestate Succession Act must be interpreted to include a party to a monogamous Hindu marriage as a spouse who can inherit in terms of that Act.\(^{26}\)

Another reason for the exclusion of a party to a Muslim marriage from the spousal concept’s traditional limited meaning is the potentially polygynous nature of such a marriage. In Hassam v Jacobs,\(^{27}\) the Constitutional Court had to determine whether or not a surviving spouse to a polygynous Muslim marriage can inherit in terms of the Intestate Succession Act. The Court decided that a failure to broaden the Intestate Succession Act’s spousal concept to include widows of polygynous Muslim marriages will occasion material disadvantage for such widows to which their counterparts in otherwise valid civil marriages or monogamous Muslim marriages are not exposed;\(^{28}\) moreover, that the resultant discrimination against widows of

\(^{23}\) Id. at para. 21.  
\(^{24}\) Id. at para. 37.  
\(^{25}\) Govender v Ragavayah 2009 (3) SA 179 (D) at para. 12 (S. Afr.).  
\(^{26}\) Id. at para. 42.  
\(^{27}\) 2009 (5) SA 572 (CC).  
\(^{28}\) Id. at para. 34.
polygynous Muslim marriages conflicts with the constitutional principle of gender equality. However, the Constitutional Court in Hassam was unable to follow an approach similar to that adopted in Daniels and thus to interpret “spouse” for purposes of the Intestate Succession Act to include all the parties to a polygynous Muslim marriage. This is because the Act uses “spouse” in the singular only: reading this word to include multiple spouses in a polygynous Muslim marriage would, in the opinion of the Court in Hassam, unduly strain the Act’s language insofar as it would bring about a significant departure from the commonly-understood meaning of the word “spouse”, as it appears in the singular in the Intestate Succession Act. The Court therefore utilized the so-called “reading-in remedy” to cure the Intestate Succession Act’s unconstitutionality on point: it ordered that the Act must be read as if the words “or spouses” appear after the word “spouse” wherever the latter word is used in the Act. Hassam’s effect is therefore that the distribution of an intestate estate must always take account of the polygynous nature of the Muslim marriage(s) to which the deceased was a party and that all the surviving spouses of such a marriage(s) are capable of inheriting from the deceased’s estate in terms of the Intestate Succession Act.

The Constitutional Court echoed the above approaches to the broadening of the spousal concept when it ruled on the Wills Act’s provision that permits accrual in favor of a surviving spouse. In Moosa v Minister of Justice, the Court held that confining the meaning of “surviving spouse” in the Act’s accrual provision to monogamous unions violates the equality rights of the parties to a polygynous Muslim marriage. The Court again cured the resultant constitutional invalidity of the accrual provision by employing the reading-in remedy and it ordered that the accrual provision must be

29. Id. at para. 37.
30. Id. at para. 48.
31. Id. at para. 57.
32. 2018 (5) SA 13 (CC).
33. Id. at para. 12.
For the purposes of this subsection, a ‘surviving spouse’ includes every husband and wife of a monogamous and polygamous Muslim marriage solemnized under the religion of Islam.  

B. Same-Sex Life Partnerships

The spousal concept’s traditional limited meaning precludes persons of the same sex from entering into a civil marriage. In the result, the surviving partner to a permanent same-sex life partnership did not qualify as a spouse for purposes of the Intestate Succession Act. In Gory v Kolver (Starke and Others Intervening), the Constitutional Court ruled that any differentiation regarding the intestate succession rights of opposite-sex spouses (who can inherit on intestacy) and permanent same-sex life partners (who cannot inherit on intestacy) amounts to unfair discrimination against the latter; moreover, that the Intestate Succession Act’s failure to include surviving partners to permanent same-sex life partnerships within its regulatory ambit is inconsistent with the constitutional rights to equality and human dignity. The Court consequently ordered that the Intestate Succession Act must be read as though the following words are included after the word “spouse” wherever this word appears in the Act: “[O]r partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support.” Gory therefore renders a surviving partner to a permanent same-sex life partnership a competent intestate heir in respect of the deceased partner’s estate.

34. Id. at para. 21. Note that the court used the generic term “polygamous” in the reading-in order, but that “polygynous” would have been preferred because a Muslim husband is permitted to marry more than one wife whereas the converse – polyandry – is not permitted under Islamic law.
35. 2007 (4) SA 97 (CC).
36. Id. at para. 19.
37. Id. at para. 66.
The Gory judgment was handed down shortly before the commencement of the Civil Union Act. This Act enables any two competent persons to conclude a civil union, either in the form of a marriage or as a civil partnership. Parties of the same sex as well as those of the opposite sex can enter into a civil union. The Civil Union Act states pertinently that the word “spouse” in any law includes a civil union partner. Pursuant to the Civil Union Act, a spouse for purposes of the Intestate Succession Act thus also encompasses a civil union partner, thereby rendering a surviving civil union partner a competent intestate heir of the first-dying partner. This statutory development raised the question of whether or not the Constitutional Court’s abovementioned order in Gory endured in the aftermath of the Civil Union Act: in light of the fact that the Constitutional Court made that order in Gory at a time when the formalization of same-sex relationships was legally impermissible – which impermissibility the Civil Union Act eradicated – can same-sex life partners who have not formalized their relationship in terms of the Civil Union Act still avail themselves of the protection afforded by the Gory order? The Constitutional Court answered this question in the affirmative in Laubscher v Duplan.

In Laubscher, the Constitutional Court opined that same-sex partners who formalized their relationship in terms of the Civil Union Act constitute a new category of intestate heirs for purposes of the Intestate Succession Act; however, this new category excludes the category of intestate heirs yielded by Gory. For purposes of intestate inheritance, the parties to a civil union are, according to Laubscher, therefore clearly distinguishable from same-sex life partners who have not formalized their relationship in terms of the Civil Union Act. In the result, the Court held that same-sex life partners

38. Civil Union Act 17 of 2006 (S. Afr.). The Civil Union Act commenced on November 30, 2006 and the Gory judgment was handed down a week prior to this commencement date.
39. Id. at § 1.
40. KOS v Minister of Home Affairs 2017 (6) SA 588 (WCC) at para. 23 (S. Afr.).
41. Civil Union Act, supra note 38, at § 13(2)(b).
42. 2017 (2) SA 264 (CC).
(or cohabitants) who meet the requirement of mutual support laid down in Gory continue to enjoy intestate succession rights (as per the Gory order) until such time as the Legislature amends the Intestate Succession Act to align it with the effects of the Civil Union Act.43 One may be forgiven for thinking that Laubscher produced somewhat of an anomaly insofar as the decision to keep the Gory order in effect in the Civil Union Act’s aftermath created inequality between opposite-sex life partners who chose not to marry or enter into a civil union (which choice negated – at least at the time when Laubscher was decided44 – intestate inheritance on the death of the first-dying partner) and same-sex life partners who chose not to enter into a civil union (which choice does not negate intestate inheritance on the death of the first-dying partner). Indeed, the Constitutional Court admitted as much in Laubscher45 but because this issue was not pertinent before the Court in Laubscher, it was not called upon to engage with the inequality conundrum.46 Instead, the Constitutional Court reasoned in Laubscher that it is best left to the Legislature to address any equality-related inconsistencies between the Gory order’s continued operation on the one hand, and the effects of the Civil Union Act’s operation on the other hand.47

It is instructive to note that the Constitutional Court first acknowledged the choice principle mentioned in the previous paragraph when it handed down its judgment in Volks v Robinson.48 In this decision, the majority of the Constitutional Court denied a surviving opposite-sex life partner’s claim for spousal maintenance on the death of the first-dying partner. The choice principle (or argument) advanced by the majority of the Court in Volks prescribes in broad terms that parties who can legally enter into a civil marriage (or conclude a civil union) but chose not to do so, ought, by reason

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43. Id. at para. 55.
44. See II. C. below.
45. Laubscher, supra note 42, at para. 31.
46. Id. at para. 52.
47. Id. at para. 32.
48. 2005 (5) BCLR 446 (CC).
of their choice, not to receive any of the benefits (such as spousal maintenance claims or intestate succession rights) yielded by a civil marriage (or a civil union). This principle therefore precludes, at least *prima facie*, intestate succession on the death of a same-sex or opposite-sex life partner where the cohabitating partners could have legally formalized their relationship but chose, for whatever reason, not to do so. The choice principle is not uncontroversial in South African jurisprudence and has elicited criticism from some academic commentators. It is therefore regrettable that Laubscher’s circumstances did not require the Constitutional Court to engage substantively with this principle. The Constitutional Court’s subsequent judgment on intestate succession between opposite-sex life partners called for a fundamental engagement with the choice principle but as is shown next, the controversy regarding this principle persisted even in this judgment.

**C. Opposite-Sex Life Partnerships**

Predictably, it was simply a matter of time before a surviving opposite-sex life partner would challenge the Intestate Succession Act’s constitutionality on the basis that the extension of intestate succession rights to permanent same-sex life partners who have not formalized their relationship (as per Gory and Laubscher), whilst withholding those rights from similarly situated opposite-sex life partners, occasions unfair discrimination against the latter category of persons. Such a challenge came before the Western Cape High Court, Cape Town in *Bwanya v The Master*. The Court held that no constitutionally-justifiable reason exists why surviving partners to permanent opposite-sex life partnerships are excluded from the spousal concept for purposes of intestate inheritance under the

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49. *Id. at para. 92.*
50. *See, e.g., Anita Cooke, Choice, Heterosexual Life Partnerships, Death and Poverty, 122 SALJ 542 (2005); Michael Cameron Wood-Bodley, Intestate Succession and the Survivor of an Unformalised Same-Sex Conjugal Relationship: Laubscher NO v Duplan 2017 (2) SA 264 (CC), 39 Obiter 276 (2018).*
51. *2021 (1) SA 138 (WCC).*
Intestate Succession Act. It therefore ordered that, whenever the Intestate Succession Act’s spousal concept applied, the Act must be read to include a partner in a permanent opposite-sex life partnership in which the partners had undertaken reciprocal duties of support. Some academic commentators welcomed the High Court’s decision in Bwanya. The Constitutional Court handed down the confirmation judgment in Bwanya little over a year later.

The Constitutional Court delivered three separate judgments in its decision in Bwanya. Two of these judgments are pertinent to the present discussion. The majority of the Court expressly rejected the abovementioned choice principle enunciated in Volks. The majority opined that Volks was wrongly decided; however, not to the extent that it could summarily break with the precedent set by Volks. The majority therefore identified two considerations that distinguished Bwanya from Volks and thus permitted the majority not to follow Volks. The first consideration rested on the evidence presented to the Court in Bwanya (evidence that was not considered in Volks) that showed that many women in opposite-sex relationships have no real or realistic choice regarding whether or not to marry. The reasons in this regard include women’s lack of “bargaining power” in relationships; the dependence of women and children, if there are any, on the financial strength of the men in the relationships; and the mistaken belief by one or both partners in a permanent life

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52. *Id.* at para. 190.
53. *Id.* at para. 233.
55. *Bwanya v The Master of the High Court* 2022 (3) SA 250 (CC) (S. Afr.).
56. The Constitution, § 167(5) states that the Constitutional Court makes the final decision regarding whether an Act of Parliament, among others, is unconstitutional or not: once a High Court, the Supreme Court of Appeal, or a court of similar status has issued an order of constitutional invalidity of any such Act, the Constitutional Court must, in a subsequent hearing, confirm such an order before it has any force.
partnership that they are in a legally binding “common law marriage.”58 In light of these reasons, the majority dismissed the choice principle insofar as it prohibits extending intestate succession rights to surviving permanent opposite-sex life partners.59 The majority emphasized, secondly, that the “choice question” posed in Volks is in fact the wrong question for purposes of the matter before the Court in Bwanya: the more fundamental question is whether or not permanent life partnerships deserve constitutional and legal protection in and of themselves.60 The majority answered this question in the affirmative, whilst acknowledging that proving the existence of a life partnership may at times be difficult. The majority nevertheless argued that probative challenges are no bar for identifying and extending legal recognition and protection to such a partnership.61

In light of the foregoing, the majority held that excluding surviving permanent opposite-sex life partners from enjoying benefits under the Intestate Succession Act amounts to constitutionally prohibited discrimination. In the result, the majority ordered that the omission from the Intestate Succession Act of the words “or partner in a permanent life partnership in which the partners have undertaken reciprocal duties of support” after the word “spouse” wherever this word appears in the Act, is unconstitutional and invalid. In order to remedy this invalidity, the majority ordered that the Intestate Succession Act must be read as though the words “or partner in a permanent life partnership in which the partners have undertaken reciprocal duties of support” appear after the word “spouse” wherever this word appears in the Act. However, the majority suspended this order for a period of eighteen months from the date of the judgment to enable the South African Parliament to take legislative steps to cure the constitutional defects identified in Bwanya.62

58. Id. at para. 62.
59. Id. at para. 66.
60. Id. at para. 68.
61. Id. at paras. 75–78.
62. Id. at para. 95.
The first dissenting judgment in Bwanya is also instructive for purposes of this Article.\textsuperscript{63} This judgment focused, among others, on the marked differences between a marriage (or a civil union) and a life partnership, in particular regarding the legal certainty yielded by the former as opposed to the uncertainty regarding the existence (or not) of the latter.\textsuperscript{64} It is submitted that Bwanya’s facts underscore the first dissenting judgment’s stance in this regard. The Western Cape High Court found quite readily that the applicant (the surviving partner) and the deceased were indeed permanent life partners who had undertaken reciprocal duties of support.\textsuperscript{65} The facts on which the Court based this finding were the following: the relationship between the applicant and the deceased existed from early 2014 until the deceased’s death in early 2016 – little more than two years;\textsuperscript{66} the applicant and the deceased moved in together, but the applicant retained a separate abode for work purposes;\textsuperscript{67} the applicant averred that she and the deceased intended to start a domestic cleaning business together (no evidence was advanced that this anticipated venture came to fruition) as well as that the deceased assisted her in obtaining a driver’s license and that he was going to pay for her driving lessons and also buy her a car for use in the cleaning business.\textsuperscript{68} The applicant alleged furthermore that she and the deceased contemplated having a child together;\textsuperscript{69} the applicant admitted that the deceased paid all the household and other expenses and that her contribution to the relationship occurred by way of “love, care, emotional support and companionship”;\textsuperscript{70} and the applicant averred that the deceased asked her to marry him\textsuperscript{71} but that the

\textsuperscript{63} The second dissenting judgment in Bwanya held that Volks was not clearly wrongly decided and thus constitutes binding legal precedent: \textit{id. at para. 197.}
\textsuperscript{64} \textit{Id. at paras. 98 and 111–118.}
\textsuperscript{65} Bwanya, supra note 51, at paras. 141–142.
\textsuperscript{66} \textit{Id. at paras. 5 and 25.9.}
\textsuperscript{67} \textit{Id. at paras. 7–8.}
\textsuperscript{68} \textit{Id. at paras. 13–14.}
\textsuperscript{69} \textit{Id. at para. 16.}
\textsuperscript{70} \textit{Id. at para. 19.}
\textsuperscript{71} \textit{Id. at para. 23.}
preparations for the marriage were yet to be finalized pending arrangements to be made with the applicant’s family in Zimbabwe.72 The first dissenting judgment in the Constitutional Court’s decision in Bwanya remarked that many of these actions are found, to varying degrees, in many relationships, ranging from high school sweethearts to adult lovers, but that this does not establish the existence of a permanent life partnership that yields rights and obligations similar to those that attach to a marriage (or a civil union).73 Secondly, the first dissenting judgment was not convinced by the majority’s stance on the incorrectness of the choice principle: the first dissenting judgment opined that the choice whether or not to enter into marriage may at times be a difficult one, but it remains a real choice and not merely an illusionary one (as the majority suggested). The first dissenting judgment was consequently unpersuaded that women are “helplessly trapped in some of these relationships” due to the reasons advanced in the majority judgment to support its stance that many women in opposite-sex relationships have no real or realistic choice regarding whether or not to marry.74

The Constitutional Court’s judgments in Bwanya highlight the challenges, difficulties and tensions associated with extending intestate succession rights beyond legally formalized relationships. Given that legal certainty is a particularly potent arrow in any private lawyer’s quiver, the reasoning advanced in the first dissenting judgment in this case is, it is submitted, indeed persuasive. This is not to say, of course, that intestate succession rights should not be granted to permanent opposite-sex life partners who have undertaken reciprocal duties of support. How this must occur and the extent to which it must happen are matters best left to the Legislature rather than the courts—a fact on which both dissenting judgments in Bwanya concurred.75 In this light, the majority of the Constitutional Court’s temporary suspension of its orders in Bwanya to allow the

72. *Id.* at para. 25.8.
73. *Bwanya, supra* note 55, at para. 117.
74. *Id.* at para. 126.
75. *Id.* at paras. 149, 195.
South African Parliament to enact appropriate legislation regarding, among others, the intestate succession rights of permanent opposite-sex life partners appears extremely prudent and sensible.

D. Parentage in Extended-Family Households

In *Wilsnach v TM*, a decision of the Gauteng High Court, Pretoria, the Court had to adjudicate on intestate succession rights in an extended-family household where one of the deceased’s biological parents assumed no parental role whatsoever and was effectively replaced in this role by the deceased’s grandmother. The deceased whose estate was at issue in this case was a severely disabled person by reason of complications at birth. A claim for the medical negligence that caused the deceased’s disabilities was settled out of court and, when the deceased died aged five, his estate comprised the sizeable remainder of the settlement amount. The deceased’s biological parents (the first and second respondents in the matter) survived him and would have been the deceased’s sole intestate heirs in terms of the Intestate Succession Act. However, these parents provided little by way of parental care during the deceased’s short life. In fact, the deceased’s father did not care for the deceased at all and played no role in the deceased’s life. The deceased and his mother resided with the deceased’s maternal grandmother (the third respondent in the matter) and they thus formed a so-called “extended-family household.” The deceased’s grandmother was his primary caregiver and was granted full parental rights and responsibilities regarding his guardianship. This factual matrix prompted the

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76. 2021 (3) SA568 (GP).
77. *Id.* at paras. 6–7.
78. *See* II. above.
80. *Id.* at par. 13. *See* LF and Another *v* TV 2020 (2) SA 546 (GJ) at para. 41 (S. Afr.) where the Court expressly included grandparents as members of a child’s extended family.
executor of the deceased’s estate to request a declaratory order on exactly who the deceased’s intestate heirs were.

The Court opined that the declaratory order called for a determination of the meaning of the word “parent” for purposes of the Intestate Succession Act. The Court noted that the Act contains no definition in this regard and therefore proffered that the matter turned on the word’s proper interpretation.82 It then looked at the broad meaning ascribed to “parent” for purposes of the Children’s Act83 and concluded that the word should be interpreted widely, also for purposes of the Intestate Succession Act, to include someone who, although not a biological parent, fulfilled parental duties and functions, and thus essentially played the role of a parent, in a child’s life.84 In light of this interpretation, the Court held that it would “offend the entire constitutional scheme and the values it is founded upon” if the deceased’s absent father was to be regarded as a parent (and thus an heir) for purposes of the Intestate Succession Act merely on the strength of his biological connectedness to the deceased.85 The Court ruled that the deceased’s mother, despite not providing continuous care to the deceased, could still properly be considered the deceased’s parent for purposes of the Intestate Succession Act.86 Significantly, the Court ruled furthermore that the deceased’s grandmother, who primarily and substantially carried the burden of caring for the deceased,87 was “entitled to be called a parent in truth, in reality and in law.”88 In the opinion of the Court, such a conclusion is consistent with the grandmother’s relationship with the deceased and, moreover, aligned to the objectives of both the Children’s Act and the Constitution insofar as advancing the best interests of the child is concerned.89 The Court thus found that the deceased’s grandmother was his parent for purposes of the Intestate

82. Id. at paras. 35, 37, 48.
83. Children’s Act 38 of 2005 (S. Afr.).
84. Wilsnach, supra note 76, at paras. 42, 58.
85. Id. at paras. 65–66, 68.
86. Id. at paras. 70, 76.
87. Id. at para. 77.
88. Id. at para. 81.
89. Id. at para. 76.
Succession Act and that she and the deceased’s mother were the deceased’s sole intestate heirs.\(^90\)

Wilsnach’s outcome can certainly be regarded as just and equitable; however, the manner in which the Court achieved this outcome, in particular its interpretative reliance on the Children’s Act, is criticizable. This is so because the legislative histories and contexts of the Intestate Succession Act and the Children’s Act are quite different: the former lays down succession rules based on a strictly generational approach to blood relationship—an approach that can be traced back to the old Schependomsrecht—whereas the latter sets out contemporary principles regarding the care and protection of children and, moreover, defines parental responsibilities and rights \textit{vis-à-vis} those children. The Court’s reliance in Wilsnach on the meaning of “parent” in a statute that has little, if anything, in common with the Intestate Succession Act is thus historically and contextually highly suspect.\(^91\) It is therefore submitted that the parental concept in the Intestate Succession Act must retain its limited meaning of single-generational biological connectedness or parenthood through a valid adoption. Doing so, even in respect of the abhorrent conduct of the deceased’s father and the laudable actions of the deceased’s grandmother in Wilsnach, need not contravene the Constitution and its underlying values as the Court in this case would have one believe: Wilsnach’s outcome could have been achieved without any judicial tampering with the meaning of “parent” for purposes of the Intestate Succession Act. De Waal and Mills\(^92\) as well as Van Vuren\(^93\) correctly point out that the same result could probably have been achieved if the deceased’s grandmother had instituted a claim against the deceased estate for the expenses she incurred in caring

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\(^90\) Id. at paras. 83, 93.

\(^91\) See, e.g., De Waal & Mills, supra note 18, at 569: the co-authors regard the Court in Wilsnach’s incorporation of the Children’s Act’s definition of “parent” into the Intestate Succession Act as “problematic.”

\(^92\) De Waal & Mills. supra note 18, at 570–571.

\(^93\) Louis van Vuren, From What Constitutes a Parent, to Soundness of Mind: Three Fiduciary-Related Court Case Summaries by FISA, WITHOUT PREJUDICE (Quarter 1, 2021), https://perma.cc/5PZK-2A7P.
for the deceased, coupled with an application to have the deceased’s father declared unworthy to inherit based on his total neglect of his son. Such a course of action would have secured ample compensation for the deceased’s grandmother and would have bestowed an intestate inheritance on the deceased’s mother to the exclusion of his father. Unfortunately, the Court in Wilsnach was ostensibly persuaded by the particularly disconcerting facts of the case to follow a different and rather dubious interpretative approach to resolving the matter: Wilsnach is therefore a hard case that made bad law or, as De Waal and Mills contend, a case that “raises more questions than it provides answers.”94 In light of the private lawyer’s need for legal certainty referred to earlier, this can never be a satisfactory outcome.

III. THE LIMITATION OF FREEDOM OF TESTATION

Freedom of testation is a cornerstone of South Africa’s testate succession laws.95 Many of Civil Law’s typical limitations on testamentary freedom, such as forced heirship and mandatory asset claims, cannot be obtained in South Africa. One limitation on testamentary freedom that South Africa shares with its civilian counterparts, is that effect is not given to testamentary provisions that are contra bonos mores or, in contemporary phraseology, that violate public policy. South African courts have traditionally applied the public policy limitation on freedom of testation with circumspection and restraint. Some patently untenable testamentary provisions, for example, those aimed at the destruction of existing marriages, have consistently been adjudged as offending public policy.96 These provisions that are clearly in contravention of public policy aside, South African courts have traditionally refrained from invoking public policy to intrude on testators’ dispositive choices, in particular their choices in respect of instituting and excluding beneficiaries under

94. De Waal & Mills, supra note 18, at 571.
95. In re BOE Trust Ltd 2013 (3) SA 236 (SCA) at paras. 26–27 (S. Afr.).
96. See, e.g., Ex parte Swanevelder 1949 (1) SA 733 (O) (S. Afr.); Ex parte Isaacs 1964 (4) SA 606 (GW) (S. Afr.); Oosthuizen v Bank Windhoek Ltd 1991 (1) SA 849 (Nm) (S. Afr.).
testamentary gifts. In *Campbell v Daly*, the erstwhile Transvaal Local Division of the Supreme Court stated its position as follows:

The mere fact that the dispositions in a will may appear to be unreasonable, unfair, capricious, or otherwise unacceptable does not empower a Court to depart therefrom. The testator is at liberty to be as generous or restrictive in his bequests as he pleases.

South African courts have, during the post-constitutional era, used public policy to an ever-greater extent to limit testamentary freedom, even in instances that were earlier regarded as beyond reproach pursuant to the legal position stated in Campbell. This has principally occurred in respect of testators’ choices to include some and to exclude others from benefitting under testamentary gifts. The courts did so with firm reliance on constitutional rights and norms, in particular those regarding equality and non-discrimination. In *Minister of Education v Syfrets Trust Ltd*, it was said in this regard that contemporary South African public policy is rooted in the Constitution and the fundamental values it enshrines. When, therefore, a court must adjudicate on a policy-based challenge to a restricted testamentary gift, it must be guided by “the founding constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism.” Proceeding from this point of departure, South African courts have used public policy progressively to undo what they deemed the constitutionally-untenable consequences of restricted testamentary gifts. A dual distinction can broadly be drawn in this regard, namely between courts’ engagement with testamentary charitable trusts on the one hand, and their engagement with non-charitable (or private) testamentary bequests on the other hand.

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97. 1988 (4) SA 714 (T).
98. *Id.* at 720H.
99. 2006 (4) SA 205 (C).
100. *Id.* at para. 24.
A. Charitable Trusts

In Syfrets Trust, the erstwhile Cape Provincial Division of the High Court ruled that a testator’s exclusion of non-White, female, and Jewish students at a public university from benefitting under a testamentary bursary trust fell afoul of constitutionally founded public policy. The Court held that limiting bursary eligibility to White students only occasioned indirect discrimination on the grounds of race and/or color; moreover, that the exclusion of female and Jewish students from bursary eligibility constituted direct discrimination on the grounds of gender and religion.101 The Court therefore ordered that the restrictions in respect of bursary eligibility must be struck from the testator’s will.102 The Supreme Court of Appeal followed suit in Curators, Emma Smith Educational Fund v University of KwaZulu-Natal103 when it dismissed an appeal against the KwaZulu-Natal High Court, Durban’s order to strike a racial restriction on eligibility under a testamentary bursary trust from the testator’s will.104 In arriving at this conclusion, the Supreme Court of Appeal remarked that “racially discriminatory testamentary dispositions will not pass constitutional muster”105 and that “[t]he constitutional imperative to remove racially restrictive clauses that conflict with public policy from the conditions of an educational trust...must surely take precedence over freedom of testation, particularly given the fundamental values of our Constitution.”106 The Western Cape High Court, Cape Town subsequently produced a similar outcome in In re Heydenrych Testamentary Trust107 when it ordered the excision of racial and gender eligibility restrictions from three separate testamentary bursary trusts. The Court also ordered the variation of these trusts’ provisions to make the bursaries available to students

101. Id. at para. 33.
102. Id. at paras. 47, 49.
103. 2010 (6) SA 518 (SCA).
104. Id. at para. 50.
105. Id. at para. 38.
106. Id. at para. 42.
107. 2012 (4) SA 103 (WCC).
of all races and genders. In arriving at this conclusion, the Court observed that “the impugned conditions... constitute unfair discrimination on grounds of gender and race and are in conflict with s 9(4) of the Constitution and the public interest.”

The decisions above can be supported insofar as they dealt with testamentary charitable trusts. These trusts possess a distinct public dimension by reason of their defining characteristic, namely that they operate for the public benefit. In this light, a charitable trust can rightly be regarded as a “public trust” that must comply with the demands of public law norms. In *Ex parte Henderson* it was said that “public benefit” in the context of a charitable trust does not necessarily denote benefitting the public at large, but that it also encompasses the bestowal of benefits on sections of society. However, in such a case, the particular section or group must be sufficiently large and representative; moreover, the bequest to that section or group must advance the public interest. The public benefit characteristic of a charitable trust thus generally engages the size of the beneficiary class, the extent to which that class represents society at large, and the advancement of the public interest. In the case of a testamentary charitable bursary trust bequest to students, or a designated group of students, at a public school or university, the public benefit characteristic usually demands that the beneficiary class must constitute a sufficiently large and representative cross-section of society; additionally, that the bequest to this class must serve some public interest (for example, the educational advancement of

108. *Id.* at para. 23.
109. § 9 is the Constitution’s equality clause.
112. 1971 (4) SA 549 (D).
113. *Id.* at 554A.
The judicial striking-out of the ineligibility criteria in *Syfrets Trust, Emma Smith* and *Heydernych* therefore broadened the relevant beneficiary classes to include students at the respective universities or schools, regardless of these students’ race or color, gender, or religion. In the result, the excision of the ineligibility criteria in these cases ensured that the bursary gifts complied fully with the public benefit characteristic of charitable trusts. As such, the striking-out of the ineligibility criteria in these cases conformed to contemporary South African public policy as informed by public law norms on equality and non-discrimination, thereby rendering the judicial variation of the wills at issue a justifiable limitation on the respective testators’ freedom of testation.\(^\text{115}\)

**B. Private Bequests**

In *King v De Jager*,\(^\text{116}\) the Constitutional Court ruled that the exclusion of two co-testators’ female descendants as fideicommissary heirs under a testamentary *fideicommissum* over certain immovable property occasioned unfair gender-based discrimination. The Court reasoned that, in the majority judgment in particular, that unfairly discriminatory disinheritances in private bequests are *ipso jure* in violation of public policy and thus unenforceable in terms of the common law *boni mores* (or public policy) rule.\(^\text{117}\) The Court also found that the gender-based discrimination wrought by the disinheritance in this case conflicts with the Constitution’s equality directive\(^\text{118}\) which, in conjunction with its violation of public policy, rendered the impugned clause governing the *fideicommissum* unenforceable.\(^\text{119}\) The Court finally ruled that the offending clause also fell afoul of the Promotion of Equality and Prevention of Unfair

\(^{114}\) Harvey v Crawford 2019 (2) SA 153 (SCA) at para. 60 (S. Afr.).
\(^{115}\) Wilkinson v Crawford 2021 (4) SA 323 (CC) at para. 127 (S. Afr.).
\(^{116}\) 2021 (4) SA 1 (CC).
\(^{117}\) Id. at para. 96.
\(^{118}\) Id. at para. 130.
\(^{119}\) Id. at para. 158.
Discrimination Act\textsuperscript{120} and that it was unenforceable on this ground as well.\textsuperscript{121}

The King judgment is contentious, because it concerned a private bequest and not a charitable (and thus public) gift such as those at issue in the cases discussed in the preceding part. One is reminded of Lord Wilberforce’s famous statement in \textit{Blathwayt v Baron Cawley},\textsuperscript{122} namely that the choice of beneficiaries, if it is made in a testator’s limited and private sphere, is not tantamount to discrimination because it does not operate over a larger and more impersonal (read: public) field.\textsuperscript{123} It is therefore difficult to conceive how the co-testators’ female descendants in King, who had no legal entitlement to the specific testamentary gifts bestowed under the private \textit{fideicommissum}, nor indeed any right at all to inherit from the co-testators, could successfully claim that the testators’ private choice to institute others and not them as fideicommissary heirs occasioned unfair discrimination, even if the testators’ choice involved one or more of the non-discrimination grounds listed in the Constitution’s equality clause.\textsuperscript{124} This is not to say that public policy has no role whatsoever to play in regard to private testamentary bequests. It is submitted, however, that public policy’s role in this regard is to prohibit a testator from visiting substantially incontestable harm (to borrow from Robins JA in \textit{Canada Trust Co v Ontario Human Rights Commission}\textsuperscript{125}) on a beneficiary when making such a bequest. In King, the Constitutional Court advanced neither any cogent reason why the female descendants’ disinheritance was substantially and incontestably harmful to them specifically, nor any explanation of exactly what manner of actual harm befell each of these descendants by reason of their disinheritance.

\textsuperscript{120} Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (S. Afr.).
\textsuperscript{121} King, \textit{supra} note 116, at para. 163.
\textsuperscript{122} [1975] 3 All ER 625 (HL).
\textsuperscript{123} \textit{Id.} at 636.
\textsuperscript{124} \textit{See} Harvey, \textit{supra} note 114, at para. 64; Wilkinson, \textit{supra} note 115, at para. 131.
\textsuperscript{125} 69 DLR (4th) 321 at para. 36.
It is therefore submitted that a private testamentary gift and the institution and disinheription of beneficiaries under such a gift in particular must be adjudged primarily in regard to its private consequences which, if not substantially and incontestably harmful to those excluded as heirs, should not be disturbed by a Court. The Constitutional Court’s judgment in King is thus open to criticism insofar as the Court bridged the public/private divide in the law of gifts far too readily and, in doing so, intruded unduly on the testators’ freedom of testation.

IV. CONCLUDING REMARKS

South African courts have, since the advent of the country’s current constitutional dispensation, reshaped its succession laws to conform to the founding constitutional values of human dignity, equality, the advancement of human rights and freedoms, non-racialism, and non-sexism. In the vast majority of cases, this reshaping is to be welcomed, in particular when it occasioned an expansion of succession rights to parties to whom the law theretofore afforded no rights to inherit either on intestacy or in terms of a will. South African courts’ methodologies in this regard can serve as a guide to courts and/or legislatures in other jurisdictions grappling with similar challenges. In a few cases, however, the courts handed down dubious judgments based on questionable reasoning – ostensibly to achieve outcomes they perceived as equitable and just but, nevertheless, outcomes that do not accord with the basic tenets of South Africa’s succession laws. These judgments created considerable legal uncertainty and will hopefully be revisited by the appropriate courts in the future.

The constitutional reshaping of South Africa’s succession laws brings the intersection of private law and public law generally, and in the law of gifts and trusts specifically, to the fore. The manner in and the extent to which courts ought to engage with this intersection is a contentious and challenging issue on which individual judges and academic commentators often disagree. As long as this
intersection and the attendant constitutional reshaping of succession laws rest on objective (or objectively determinable) criteria (such as the existence of a religious union when broadening intestate succession rights or compliance with the requirements set for a particular testamentary institution when altering the provisions of a will), courts can generally venture sure-footedly into the constitutional reshaping of succession laws. However, when courts discard such criteria and, moreover, derogate from the existing succession rights of others in attempts to arrive at just and equitable outcomes in succession cases, they find themselves on thin ice where they should proceed with the utmost caution and restraint in order not to open the cracks (or chasms) of legal uncertainty. The Legislature is certainly better placed to undertake law reform in these contentious cases.
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_Successions of Toney_ presents a rich debate over the requirements
of form mandated for notarial testaments in the Louisiana Civil
Code. The case lays bare the encroachment of common law testa-
ments into Louisiana courts and the possible erosion of the civil law
emphasis on adherence to legislation.

I. BACKGROUND

Mr. Ronnie Robert Toney passed away on January 19, 2015.\(^1\) He
was predeceased by his wife, Jeanette Rena Toney. Both died tes-
tate, with both leaving their entire estates to Mrs. Toney’s brother,
Richie Glenn Gerding, in the event one predeceased the other. On
April 13, 2015, Mr. Gerding sought to file and probate both testa-
ments.

\(^*\) J.D./D.C.L. (May 2021) Paul M. Hebert Law Center, Louisiana State
University. The author would like to thank Professor Elizabeth R. Carter for her
help with research and editing.

\(^1\) Successions of Toney, 226 So. 3d 397, 399 (La. 2017).
Mr. Toney’s testament, dated August 2, 2014, consisted of three numbered pages, to which an affidavit was attached. The first two pages of the will were initialed in print by Mr. Toney in the bottom left corner. The third page consisted of the testator’s signature and a clause in which three witnesses certified that the testator signed the will and declared it his last will and testament. The affixed affidavit included a similar clause by which the testator verified that, in the presence of witnesses, he signed and executed the testament freely as his last will and testament. Following a similar clause by the witnesses is a certification by the notary that the testator “signed, swore to and acknowledged” and the witnesses “subscribed and sworn to” the affidavit. Notably, the affidavit included a space to mark the “county” in which the testament was executed.  

On May 6, 2015, John Huey Pierce Jenkins, Mr. Toney’s uncle, filed a petition to annul Mr. Toney’s testament, alleging that the notarial testament failed to comply with the requirements prescribed by Louisiana Civil Code article 1577. In seeking to annul the testament, Mr. Jenkins alleged several deficiencies in the form of Mr. Toney’s notarial testament. First, the testament lacked Mr. Toney’s signature on each separate page. Rather, the first two pages were initialed in print, a departure from article 1577(1)’s requirements. Further, the code-mandated attestation clause was in a form inconsistent with article 1577(2). The final deficiency alleged was that the notary, witnesses, and testator were not in each other’s presence at the time the testament was executed.  

Upon review of the testament, the trial court judge found the testament to be absolutely null for want of form for the reasons alleged by Mr. Jenkins. This decision was affirmed by the Court of Appeal. Upon application to the Louisiana Supreme Court, Mr. Gerding

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2. *Id.* at 399-400. The affidavit seems to have been of a standard form common in other states.  
4. *Id.* at art. 1577(2).  
5. *Toney*, 226 So. 3d at 399.
argued that the deficiencies found in Mr. Toney’s testament were minor and that the testament was overall sufficiently compliant with the formal requirements prescribed by the Civil Code.\textsuperscript{6}

II. THE DECISION OF THE COURT

The Louisiana Supreme Court affirmed the decisions of the prior courts, holding that the testament significantly and materially deviated from the formal requirements set forth in the Civil Code.\textsuperscript{7} While acknowledging that there is normally a general presumption in favor of the validity of testaments and substantial burden of proof to rebut it, the court adheres to the mandatory language contained in article 1573.\textsuperscript{8} The court found that the printed initials at the bottom of the first two pages of the document did not satisfy article 1577’s requirements. As to the attestation clause, the court found that, even taking all the various clauses found in the testament and affidavit in aggregate, there was nothing substantially similar to the attestation clause in article 1577 sufficient to find one present in the testament.

This case included two dissents and a concurring opinion. Chief Justice Johnson argued that the strict adherence to the codal requirements constitutes an elevation of form over function. In her view, in the absence of an allegation of fraud, Mr. Toney’s intent should have prevailed, and the attestation clause was sufficient for formal purposes.\textsuperscript{9} Justice Weimer also criticized the elevation of form over substance, arguing that the majority ignored the clear testamentary intent by refusing to piece together the elements of a valid attestation clause. The court also ignored long-standing lower court decisions in finding the initialing of the first two pages of the testament to be a significant deviation from form.\textsuperscript{10} Justice Crichton concurred in

\begin{itemize}
\item \textsuperscript{6} \textit{Id.} at 401.
\item \textsuperscript{7} \textit{Id.} at 407.
\item \textsuperscript{8} \textit{La. CIV. CODE ANN.} art. 1573 (2018) (“The formalities prescribed for the execution of a testament must be observed or the testament is absolutely null.”).
\item \textsuperscript{9} \emph{Toney}, 226 So. 3d at 409.
\item \textsuperscript{10} \textit{Id.} at 410-411.
\end{itemize}
the majority opinion but wrote to express his concern over the “pro-
lieration of widely available and generic legal templates” that pre-
ent major deviation from codal form requirements. He stated that it
is the court’s duty to uphold the law as it is absent legislative change
in order to prevent the “metastization” of legal error in codal inter-
pretation.11

III. COMMENTARY

This commentary aims to address several issues raised in Succession of Toney. First, consideration is given to the dissent’s argument
that an allegation of fraud or something similar is necessary to
properly consider formal deficiencies in notarial testaments. Next
under consideration is the issue of “substantial compliance” with ar-
ticle 1577’s attestation clause requirement and recent developments
on the issue. Then, Justice Crichton’s concurrence will be further
addressed. Finally, a proposal will be made for a path to avoid ab-
solute nullity by formal deficiency, based on trends in other civil
and mixed-law jurisdictions.

A. The Necessity of Alleging Fraud to Raise Issues of Form

In this case, both the appellate and Supreme Court decisions car-
ried dissents arguing that, because no fraud was pled, the intent of
the testator should have prevailed over the formal deficiencies.12
While the desire to adhere to testamentary intent is a proper goal,
the willingness to ignore multiple formal deficiencies in the absence
of alleged fraud defeats the purpose of the code articles governing
notarial testaments.

It is accepted that the articulated purpose of testamentary formal-
ities is to safeguard against, among other things, fraud and undue
influence.13 If this is the purpose, it follows necessarily that

11. Id. at 411-412.
12. Id. at 401, 409.
13. KATHRYN VENTURATOS LORIO, 10 LOUISIANA CIVIL LAW TREATISE
deviation from these formal requirements is a threshold indicator of fraud or something similar. As it relates to the actual testament, a fault in form that materially deviates from those formal requirements laid out in the code articles necessarily indicates potential fraud without the need for pleading it or providing evidence to support it. While this may be a somewhat strict interpretation of legislative intent, it is compatible with the language of the relevant articles.

As a practical matter, the parties challenging a facially deficient testament may benefit from not having to allege fraud or similar vices. Such allegations can cause a tremendous amount of family conflict and lead to expensive, drawn-out litigation. Nullifying the deficient testament based on form prevents any inquiry into issues of potential fraud and allows a certain measure of judicial efficiency. Based on these considerations, the majority in *Toney* ruled correctly in affirming the decisions of the lower courts.

It is important to remember that, where a testament may fail as a notarial form, it may still be upheld if it meets the formal requirements of another testamentary form.\(^{14}\) Given that Louisiana only allows for olographic and notarial testaments, a notarial testament that deviates from the necessary form may still be upheld if it satisfies the requirements for an olographic will as laid out in article 1575,\(^{15}\) which is not the case here.

**B. Substantial Similarity in Art. 1577’s Attestation Clause Requirement**

Louisiana Civil Code article 1577(2) provides a sample of a proper attestation clause. This, however, is not required. Rather, an attestation clause is accepted so long as it is “substantially similar” to the form provided.\(^{16}\) In *Toney*, the court looks favorably upon the

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14. *Id.*
16. *Id.* at art. 1577(2).
summary provided by the First Circuit in *Succession of Brown*, which listed three necessary elements in an attestation clause:

(1) the testator signed the will at its end and on each separate page, (2) the testator declared in the presence of the notary and witnesses that it (the instrument) was his will, and (3) in the presence of the testator and each other, they (the notary and witnesses) signed their names on a specific date.\(^{17}\)

So long as these elements are satisfied, the attestation clause is substantially similar so as to withstand scrutiny under the article. In approving this list of elements, the Supreme Court upholds the “substantially similar” language of article 1577 and rejects a strict adherence standard found in prior jurisprudence.

Recently, the Louisiana Supreme Court issued two decisions regarding “substantial similarity” in article 1577. In *Succession of Bruce*, the testament at issue contained an attestation clause that failed to state that the testament was signed by the testator “at the end;” rather, it only stated that the testator signed “on each page.”\(^{18}\) The Third Circuit Court of Appeals found that the lack of the phrase “at the end” in the attestation clause constituted a material deviation sufficient to nullify the testament based on “strict adherence.”\(^{19}\) In so doing, the lower courts accepted the argument that an attestation clause must strictly adhere to the language provided in article 1577(2).

The Louisiana Supreme Court rejected the strict adherence argument, finding that strict adherence is in direct conflict with 1577(2)’s “substantial similarity” language. Noting that the only defect in the attestation clause at issue was the lack of “at the end,” the court looked to the legislative history of article 1577 and its statutory predecessor, La. R.S. 9:2442. Prior to the codification of 1577, an iteration of La. R.S. 9:2442 included sample attestation clause language stating that the will was signed “on each page,” rather than

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17. *Toney*, 226 So. 3d at 405.
19. *Succession of Bruce*, 289 So. 3d 121 (La. App. 3 Cir. 2020).
“on each page and at the end.” The latter phrasing was added in 1980 as a matter of semantics rather than substantive change. Accordingly, the court found that “on each page” necessarily indicated that the testament was signed at the end and was therefore substantially similar to the sample clause provided in article 1577(2).\textsuperscript{20}

In *Succession of Liner*, issued on the same day as *Bruce*, the court ruled that an attestation clause stating that the testator “signed” was not substantially similar to the sample clause found in article 1579(2),\textsuperscript{22} invalidating the testament at issue. The court found that “signed” “did not establish that the testament was signed at the end and on every page” of the testament at issue, instead only certifying that the will was signed at least once.\textsuperscript{23}

These cases add some nuance to the *Toney* decision by delving further into what constitutes “substantial similarity” to the codal requirements for the attestation clause. As the cases indicate, it is sufficient to state that the testament is signed on each page, as that inherently indicates the final page is signed at the end. However, it is not enough to simply say that the testament is signed, as that only guarantees that the document is signed at least once, be it on the final page or any other page. These decisions also serve to rebut the contention that strict adherence is required in attestation clauses. Such an interpretation of article 1577(2) goes directly against the “substantially similar” language found in the article. In ruling as it did in these cases, the Louisiana Supreme Court upholds 1577(2)’s more permissive “substantial similarity” requirement as opposed to a fundamentally incompatible strict adherence standard.

\textsuperscript{20}Succession of Bruce, 2021 WL 266390 at *3.
\textsuperscript{21}Id. at *4.
\textsuperscript{22}This article dictates the requirements for a notarial testament where the testator is unable to read. Section 2 of this article provides for an attestation clause similar to that found in art. 1577.
C. The “Metastization” of Legal Error in Notarial Testaments

As mentioned above, Justice Crichton concurred in the opinion to raise the issue of the proliferation of generic testament formats that, while permissible in common law jurisdictions, fail in light of Louisiana’s formal requirements. This was plainly the case in Toney, as the record supports that the testament in question followed a common law format. As this issue is unlikely to go away any time soon, it is worth further discussing the problems this issue presents.

Louisiana, like every civil law jurisdiction, recognizes legislation and custom as the sources of law. As legislation is the solemn expression of legislative will, it follows that legislation should be followed above all else. Articles 1573 and 1577 are such expressions of legislative will and must be adhered to in the absence of other legislation to the contrary. Accordingly, any notarial testaments that materially deviate from article 1577 will be absolutely null in light of 1573. To grant validity to deficient common law testamentary formats is to undermine the civilian nature of Louisiana law by allowing judicial fiat to validate codal noncompliance.

To avoid such issues, perhaps further legislation is necessary. At the very least, there needs to be a clear indication (beyond codification) to the public that Louisiana has specific formal requirements in the preparation of notarial testaments. It is almost certain that one is able to find a Louisiana-compliant testament format online.

The prevalence of this issue regarding attestation clauses also speaks to a concerning trend among Louisiana attorneys and notaries. Article 1577 has been codified in the Louisiana Civil Code since 1997; prior to that, it had existed as a creature of statute since 1952. The language has changed very little over its life, with only small semantic alterations conducted when changes were made. This article provides clear, unambiguous wording and a sample clause. With such a clear requirement, usable language, and the

25. Id. at art. 2.
penalty of absolute nullity for deviation, there is no valid reason for the exclusion of a compliant attestation clause. The fact that this issue keeps coming up speaks to a lack of basic diligence in the drafting and notarizing of notarial testaments that rises to the level of legal malpractice or notarial liability. Those parties to a testament found null on these grounds should have a clear cause of action against these attorneys or notaries who fail to comply with clear co-dal mandate.

D. Comparing Approaches to Formal Deficiency: Louisiana and Quebec

In a recent Louisiana Law Review article, Professor Ronald J. Scalise, Jr. noted that many civil law and mixed-law jurisdictions are moving away from strict formalism in testamentary form. 26 Specifically, many of these jurisdictions have been trending away from absolute nullity as a consequence of deviation. While it is unnecessary to go into the weeds on the trend, it would be beneficial to compare Louisiana’s approach with that of Quebec, a similarly situated mixed-law jurisdiction.

Article 1573 of the Louisiana Civil Code, as already observed, requires that formal requirements must be satisfied on pain of absolute nullity. Quebec Civil Code article 713, an equivalent to article 1573, is similar to the extent that formal requirements must be satisfied; however, it does not have absolute nullity as the consequence for failure to meet requirements. 27 Rather, article 714 allows for a testament to survive formal deficiency if it meets the essential requirements of the given form and if it "unquestionably and unequivocally contains the last wishes of the deceased." 28 By this article, a notarial testament that fails for certain flaws in form can otherwise be valid if 1) the essential aspects of the form are observed, and 2)

27. QUEBEC CIVIL CODE art. 713.
28. Id. at art. 714.
it can be demonstrated that the testament indisputably contains the testator’s intent.

As can be seen, the Quebec approach is more permissive than Louisiana’s. It leaves a certain amount of discretion to judges in determining the validity of a testament and strikes a seemingly fair balance between requiring legal form requirements and upholding the testamentary intent of the testator. What remains unclear from article 714 is what is defined as an “essential requirement.” The lack of absolute nullity is certainly more forgiving than Louisiana’s near “all-or-nothing,” strict formal requirements.

The comparison between the approaches of Quebec and Louisiana is drawn in order to demonstrate a possible path forward for a more forgiving Louisiana law on notarial testament form requirements. Such an approach may be to the benefit of Louisiana testators. It is unclear how exactly article 714’s standards would deal with attestation clauses but, as a purely scholarly matter, Louisiana may wish to consider such an approach.
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I. INTRODUCTION

A reading of the Louisiana Civil Code shows that Louisiana law does not differ from major civil law jurisdictions when it comes to define usufruct and the distribution of rights and obligations between usufructuaries and naked owners.¹ A full owner who reserves for herself a lifetime usufruct over a property she donates has the right to enjoy the property as she pleases. As such, the naked owner is under an obligation not to interfere with that enjoyment.² However, in Cole v. Thomas, the First Circuit Court of Appeal limited the right of the usufructuary when it held that the usufructuary could

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¹ See generally LA. CIV. CODE. ANN. arts. 550–606 (2022). Full ownership grants a person the right to use, enjoy, and alienate the thing. Full ownership may be divided into a usufruct and naked ownership. A usufructuary has the right to use and enjoy the property for a certain amount of time. When a usufructuary retains that right, the remaining right in the thing is called naked ownership. Campbell v. Pasternack Holding Co., Inc., 625 So. 2d 477, 484 n.13 (La. 1993); JOHN RANDALL TRAHAN, LOUISIANA LAW OF PROPERTY: A PRÉCIS 184 (2012).
² LA. CIV. CODE. ANN. arts. 539, 605 (2022).
not evict the naked owner solely on the basis that the usufructuary 
no longer desired the naked owner to live on the property.  

II. BACKGROUND

In 2005, Mrs. Cole donated the disputed land to Ms. Thomas, her 
granddaughter. The act of donation transferred the naked ownership of the property to the granddaughter, but the grandmother reserved the usufruct of the property for life. The granddaughter placed a mobile home on the donated property behind the grandmother’s residence and moved onto the property. In 2007, the granddaughter executed an affidavit to immobilize the mobile home. The affidavit declared that the “mobile home shall be permanently attached to” the donated property. The grandmother signed the affidavit as a witness.

In 2014, the grandmother brought an action against her granddaughter, seeking to dissolve the donation inter vivos pursuant to article 1562 of the Louisiana Civil Code, “which provides for the dissolution of a donation subject to a suspensive condition when the condition can no longer be fulfilled.” The grandmother alleged that the donation was given with the understanding that her granddaughter would care for her and further alleged that the granddaughter failed to fulfill that obligation, thus failing to fulfill the suspensive condition. Accordingly, the grandmother asked that the court invalidate the donation and evict the granddaughter, taking into account that the grandmother had a lifetime usufruct over the property and that she no longer desired her granddaughter to remain on the

4. Id. at 958.
5. Id.
6. Id.
7. Id.
8. Id.
9. Id.
10. Id.
11. Id.
property. This gave rise to the issue as to whether or not the usufructuary of the property has a legal right to evict the naked owner from the property simply because she no longer desires for the naked owner to live on the property.

The trial court held a bench trial and denied the grandmother's request to invalidate the act of donation. Based on the four corners of the document, the trial court found no legal basis to revoke the donation and therefore ruled that the granddaughter maintained naked ownership of the property. In other words, the donation was free of suspensive condition. However, the trial court granted the grandmother’s request to evict the granddaughter from the property. Since the grandmother reserved the usufruct of the property for life and did not want her granddaughter on the property while the grandmother was alive, the trial court concluded that the latter, as the usufructuary, had the right to evict the granddaughter.

On appeal, the granddaughter alleged that the grandmother was not entitled to a judgment of eviction. The First Circuit Court of Appeal agreed, holding that the grandmother, as usufructuary, was not entitled to a judgment of eviction under the provisions of article 4702 of the Louisiana Code of Civil Procedure. The court noted that:

Eviction is a proper remedy for an owner of immovable property, who wishes to evict a lessee or “occupant” therefrom, after the purpose of the occupancy has ceased. . . . It is well settled that an eviction proceeding is not the appropriate remedy to determine real rights to immovable property.

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12. Id.
13. Id. at 959.
14. Id.
15. Id.
16. Id. at 960.
17. Id.
18. Id.
19. Id. at 961.
20. Id. at 963.
21. Id.
For these reasons, the court found that the grandmother was not the owner of the property on which the granddaughter resided, and therefore, did not have a right to bring an eviction proceeding under the provisions of article 4702 of the Louisiana Code of Civil Procedure.\(^\text{22}\)

The granddaughter also argued that “the proper procedural vehicle for the resolution of an alleged disturbance of the usufructuary’s use and enjoyment of the property is a possessory action,” and that the grandmother “failed to prove the elements required to prevail in a possessory action.”\(^\text{23}\) Again, the court agreed, noting that a usufruct is a real right which, on immovable property, is protected only by a possessory action.\(^\text{24}\) Accordingly, the grandmother, as the usufructuary, failed to institute any of the appropriate real actions available to her that would have allowed her to protect her right to possession and enjoyment of the disputed property.\(^\text{25}\)

Even if the grandmother had brought a possessory action, the court explained that she “would have been required to demonstrate that there had been an eviction or some other physical disturbance preventing her from enjoying her possession of the property” in order to prevail.\(^\text{26}\) According to the court, a usufructuary’s desire to no longer have the naked owner living on the property was insufficient grounds for eviction.\(^\text{27}\) Therefore, the First Circuit Court of Appeal found that the trial court erred in concluding that the grandmother established legal grounds to evict her granddaughter and reversed the trial court’s judgment.\(^\text{28}\)
In *Cole v. Thomas*, the First Circuit Court of Appeal improperly limited the rights of a usufructuary when it held that the usufructuary could not evict the naked owner solely on the basis that the usufructuary no longer desired the naked owner to live on the property.\(^{29}\) To understand the issues with the First Circuit’s analysis, it is imperative to compare the rights of a full owner to the rights of a usufructuary and a naked owner.\(^{30}\) There are three elements to ownership: *usus*, *fructus*, and *abusus*.\(^{31}\) *Usus* is the right to use the thing; *fructus* is the right to derive income from the thing; and *abusus* is the right to alienate the thing.\(^{32}\) Satisfaction of these three elements, known as full ownership, creates a right to “direct, immediate, and exclusive authority over a thing,” thus allowing the owner to use, enjoy, and dispose of the property as permitted by law.\(^{33}\)

On the contrary, “[a] usufruct is a real right of limited duration on the property of another.”\(^{34}\) A real right, in turn, grants direct and immediate authority over a thing.\(^{35}\) In the act of donation in *Cole v. Thomas*, the grandmother reserved the usufruct for life and donated the naked ownership to her granddaughter.\(^{36}\) As the usufructuary, the grandmother was entitled to the *usus* and *fructus* of the property until her death.\(^{37}\) The remaining right in the thing is called naked ownership.\(^{38}\) Because the grandmother reserved the *usus* and *fructus* for herself, the act of donation merely transferred naked ownership

\(^{29}\) *Id.*

\(^{30}\) *See generally id.*

\(^{31}\) Campbell v. Pasternack Holding Co., Inc., 625 So. 2d 477, 484 n.13 (La. 1993).

\(^{32}\) *Id.*


\(^{35}\) *Id.* at art. 476 cmt. (b) (citing Yiannopoulos, Civil Law Property §§ 87, 90, 97 (1966)).

\(^{36}\) *Cole*, 247 So. 3d at 958.

\(^{37}\) *Id.*

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to the granddaughter.39 Neither the grandmother nor the granddaughter retained full ownership of the disputed property.40

The usufructuary and the naked owner have different rights in the property and owe different obligations to one another.41 The usufructuary is entitled to the usus and fructus of the property, whereas the naked owner is entitled to the abusus of the property.42 Because naked ownership is subject to the usus and fructus of another, the naked owner may only dispose of her naked ownership; the alienation or encumbrance of the property cannot affect the usufruct.43 Furthermore, the naked owner is under an obligation not to interfere with the rights of the usufructuary.44

It should be accepted that the usufructuary’s right to use the thing is as extensive as an owner’s right.45 In other civil law jurisdictions, the usufructuary generally enjoys all of the rights that the owner enjoys.46 The right of full ownership is “exclusive,”47 meaning that the right to the enjoyment of a thing is attributed to a certain person, to the exclusion of all others.48 “The owner has the power to exclude all third persons from any use, enjoyment or disposal of his property,”49 even if the exclusion causes a third party to suffer some harm.50 Since the usufructuary’s right of usus and fructus should be as extensive as an owner’s right, the court in Cole v. Thomas should have held that the grandmother, as the usufructuary, had the right to exclude the granddaughter from the use or enjoyment of her

39. Cole, 247 So. 3d at 958.
40. Id.
42. Campbell, 625 So. 2d at 484 n.13.
43. LA. CIV. CODE. ANN. art. 603 (2022).
44. Id. art. 605.
45. 3 A.N. YIANNOPoulos, LA. CIV. L. TREATISE, PERSONAL SERVITUDES § 2.2 (5th ed. 2020).
46. Id.
47. TRAHAN, supra note 1, at 118.
48. 3 MARCEL PLANIOL & GEORGES RIPERT, TRAITE PRATIQUE ET THEORIQUE: LES BIENS 220–21, at par. 212 (2d ed. 1952).
50. PLANIOL & RIPERT, supra note 48.
property solely on the basis that the grandmother no longer desired the granddaughter to live on the property. Nevertheless, the court found that the usufructuary lacked the right to obtain the eviction of the naked owner both procedurally and substantively.51

A. The First Circuit’s Procedural Analysis

Procedurally, the First Circuit held that the usufructuary was not entitled to bring an eviction proceeding under article 4702 of the Louisiana Code of Civil Procedure.52 Article 4702 provides that “an owner of [an] immovable property” can evict an “occupant” from the property once the purpose of the occupancy has ended.53 The owner must deliver a written notice to vacate to the occupant, and the occupant has five days from its delivery to vacate the premises.54 An owner is defined to include a lessee, and an occupant is defined to include “a sharecropper; half hand; day laborer; former owner; and any person occupying immovable property by permission or accommodation of the owner, former owner, or another occupant, except a mineral lessee, owner of a mineral servitude, or a lessee of the owner.”55

The Cole v. Thomas ruling strictly construed the language “owner of immovable property,” to exclude usufructuaries.56 The court noted, “It is well settled that an eviction proceeding is not the appropriate remedy to determine real rights to immovable property.”57 Although the court cited jurisprudence to support this

51. See Cole, 247 So. 3d at 963.
52. See id.
53. LA. CODE CIV. PROC. ANN. art. 4702 (2022).
54. Id.
55. Id. art. 4704.
56. Cole, 247 So. 3d at 963.
57. Id.
assertion, these cases did not clearly articulate the strict construction of the phrase “owner of immovable property.”

In *Millaud v. Millaud*, the Fourth Circuit Court of Appeal addressed a similar issue relating to article 4702. The Millauds, a husband and wife, each owned a one-half interest in the disputed property. As a result of the judgment of possession in the wife’s succession, the husband became the usufructuary of the entire property. Each of the Millauds’ two children inherited a one-third interest in their mother’s one-half share of the property. The father filed a claim to evict his children under article 4702. The *Millaud* court noted that the relationship between a usufructuary and a naked owner is not of the same nature as that between a lessor and a lessee. Thus, the Fourth Circuit concluded that a naked owner is not an occupant envisioned by the eviction articles, and therefore, that eviction was not the proper remedy.

However, one dissenting judge argued that the father clearly qualified as an owner, while the children, as the partial naked owners, qualified as occupants within the meaning of the eviction articles. The eviction articles were designed to give owners the right to expel “illegal tenants or occupants without the burdensome expense and delay of a petitory action.” The dissenting judge

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58. See id. (first citing Champagne v. Broussard, 401 So. 2d 1060, 1064 (La. Ct. App. 3d 1981); and then citing Tartan Transp. & Constr., Ltd. v. McDonald, 436 So. 2d 1270, 1271 (La. Ct. App. 1st 1983)).
59. Id.
61. Id. at 44–45.
62. Id.
63. Id. According to the judgment, the two children and the husband were “each naked owners of an undivided one-third interest in their mother’s half ownership of the property.” Id. at 45 n.3.
64. Id. at 46.
65. Id. at 45–46 (distinguishing that the naked owner has a third party vested with a real right before him, not a creditor. The usufructuary can ask no more of him than could any other third party. As long as the naked owner does not diminish nor disturb the usufructuary’s enjoyment, he is free of all responsibility towards the usufructuary).
66. Id. at 46.
67. Id. at 47 (Landrieu, J., dissenting).
68. Id.; Skannal v. Jones, 384 So. 2d 494, 495 (La. Ct. App. 2d Cir. 1980).
concluded that the term *occupant* should not be given a restrictive interpretation.\textsuperscript{69} Rather, *occupant* should be broad enough to include anyone occupying the property without a legal right to do so.\textsuperscript{70} Therefore, the partial naked owners did not have the right to continue to occupy the property over the objection of the usufructuary.\textsuperscript{71}

As the Civil Code makes clear, laws are to be applied as written if they are clear and unambiguous and do not lead to absurd consequences.\textsuperscript{72} If the legislative language is susceptible of different meanings, then it must be interpreted as conveying the meaning that best conforms to the law’s purpose.\textsuperscript{73} The purpose of the eviction articles is to give owners the right to expel “illegal tenants or occupants” in a quicker and less expensive way than a petitory action.\textsuperscript{74} However, the ruling from *Cole* does not conform to that purpose. Rather, that ruling indicates that when full ownership has been separated between a usufructuary and a naked owner, the quick and less expensive eviction procedure can never be used to evict an invader.

According to the First Circuit, the usufructuary does not have the right to evict the naked owner from the property because the usufructuary is not the “owner of immovable property” as required by the eviction articles.\textsuperscript{75} Therefore, the usufructuary cannot use the eviction articles against any person, even if that person has no right to be on the property. Considering that the usufructuary’s right to use the thing should be as extensive as an owner’s right and that the legislature intended for owners to use these eviction articles as a quick solution for owners, the First Circuit erred procedurally when it denied the usufructuary the right to evict the naked owner under article 4702 of the Louisiana Code of Civil Procedure.

\textsuperscript{69} *Millaud*, 761 So. 2d at 47 (Landrieu, J., dissenting).
\textsuperscript{70} *Id.*
\textsuperscript{71} *Id.*
\textsuperscript{72} *L.A. CIV. CODE. ANN.* art. 9 (2022).
\textsuperscript{73} *Id.* art. 10.
\textsuperscript{74} *Millaud*, 761 So. 2d at 47 (Landrieu, J., dissenting); *Skannal*, 384 So. 2d at 495.
\textsuperscript{75} *Cole*, 247 So. 3d at 963.
B. The First Circuit’s Substantive Analysis

Regarding the substance of the matter, the First Circuit held that the usufructuary cannot evict the naked owner solely on the basis that the usufructuary no longer desired the naked owner to live on property. The court correctly noted that the usufruct of immovable property is protected by the possessory action. However, the court incorrectly held that she “failed to prove the elements required to prevail in a possessory action.”

To maintain a possessory action, the possessor must allege and prove that (1) she had a real right at the time the disturbance occurred; (2) she had possession quietly and without interruption for more than a year immediately prior to the disturbance; (3) the disturbance was one in fact or law; and (4) the possessory action was instituted within a year of the disturbance. The Cole court failed to consider whether the grandmother properly alleged a disturbance in fact.

Satisfying a disturbance-in-fact element is simple. A disturbance in fact is any physical act that prevents the possessor of a real right from enjoying her possession quietly or that throws any obstacle in the way of that enjoyment. The usufructuary has the right to enjoy the property, and the naked owner has the obligation not to interfere with the rights of the usufructuary. The grandmother suffered a disturbance in fact when the granddaughter refused to leave the property after the grandmother told her to, as there was no contractual right, such as a lease, to allow the granddaughter to stay. The refusal to leave the property is enough to satisfy a disturbance in fact because it is a physical act that throws an obstacle in the

76. Id.
77. See id. at 961.
78. Id.
79. LA. CODE CIV. PROC. ANN. art. 3658 (2022).
80. See Cole, 247 So. 3d at 962.
81. LA. CODE CIV. PROC. ANN. art. 3659 (2022).
82. LA. CIV. CODE. ANN. arts. 539, 605 (2022).
83. See generally Cole, 247 So. 3d 957.
grandmother’s unfettered right of using the land as she pleases and enjoying her possession quietly. Thus, the usufructuary asserting that she had the legal right to evict the naked owner solely because she no longer desired the naked owner to live on the property is enough to satisfy that she suffered a disturbance in fact. The First Circuit erred substantively when it held that the grandmother failed to prove the elements required to prevail in a possessory action.

IV. CONCLUSION

In Cole v. Thomas, the First Circuit Court of Appeal strictly construed the provisions of article 4702 of the Louisiana Code of Civil Procedure and held that article 4702 cannot be used for an eviction proceeding by a usufructuary. The First Circuit failed to accept that the usufructuary’s right to use the thing is as extensive as an owner’s right. Rather, the First Circuit limited the rights of the usufructuary by holding that the fact that the usufructuary no longer desiring the naked owner to live on the property was not sufficient to justify eviction. The Louisiana civil law grants the usufructuary broad rights to enjoy the property, and, in the absence of contractual arrangements, any interference by the naked owner presents a disturbance in fact. Therefore, the holding in Cole v. Thomas contradicts those laws. The grandmother, as the usufructuary, had the legal right to evict the granddaughter, as the naked owner. The First Circuit erred procedurally and substantively in its interpretation of the case.

84. Id.
85. Id. at 963.
86. See id.
87. LA. CIV. CODE. ANN. arts. 539, 605 (2022).
I. INTRODUCTION

This case raises a simple but important practical question: does the fact by the debtor of listing a debt when filing for bankruptcy constitute an acknowledgment of the debt that would interrupt prescription? Typically, a bank will institute a lawsuit when a person stops making payments towards the reimbursement of a mortgage loan. However, the case of *Wells Fargo Bank Minnesota, Nat'l Ass'n v. Holoway* illustrates three important aspects of bankruptcy and acknowledgement of a debt. The Louisiana First Circuit Court of Appeals tackles if an acknowledgment of a debt is enough to interrupt prescription when a borrower in a bankruptcy proceeding acknowledged the debt in his Amended Chapter 13 plan. Bankruptcy procedures require that a debtor list all creditors asserting

* J.D./D.C.L. (May 2022) Paul M. Hebert Law Center, Louisiana State University. The author would like to give special thanks to Professor Olivier Moréteau for his guidance throughout the writing of this case note.

1. *Wells Fargo Bank Minnesota, Nat'l Ass'n v. Holoway*, 2018-1340 (La. App. 1 Cir. 5/24/19); 277 So. 3d 800
claims against him and put together a plan to repay them. Section 101 of bankruptcy code makes clear that the term “claim” may include a claim that is disputed by the person filing for bankruptcy. Second, it determines if a bankruptcy trustee has the authority to acknowledge the mortgage debt on the borrower’s behalf. Finally, the court had to decide whether the entire loan should be cancelled if it prescribes or only the defaulted monthly mortgage payments that were due more than five years before the filing of the instant foreclosure suit were prescribed.

II. BACKGROUND

In Wells Fargo Bank Minnesota, Nat’l Ass’n v. Holoway, the plaintiff, Wells Fargo, sued to enforce a promissory note and mortgage. In December 1999, Defendant Michael E. Holoway executed a promissory note secured by an act of mortgage for land and improvements in Mandeville Louisiana. The defendant failed to pay monthly installments on the loan in September of 2002. The loan was acquired by Provident Bank, subsequent to the defendant’s default. Provident gave Holoway notice of default in accordance with the terms of loan in a letter dated June 11, 2003 and Provident then filed suit to foreclose on the property on August 28, 2003. In December 2003, Holoway filed a petition under Chapter 13 of the U.S. Bankruptcy Code in the U.S. Bankruptcy court for the Eastern District of Louisiana. On August 16, 2004, the automatic stay in the matter was lifted by the court which enabled Provident to continue the foreclosure proceedings. The first bankruptcy suit was dismissed by the court on January 14, 2005. In March of 2007, Holoway filed a second petition for Chapter 13 bankruptcy, and it was converted to a Chapter 7 bankruptcy. Litton Loan Servicing, LLP, filed a claim in the suit regarding the note on behalf of Wells Fargo. On

3. Id. at 803.
4. Id.
5. Id.
September 12, 2008, an “Order of Abandonment” signed by the bankruptcy court removed the property from the bankruptcy estate. The second bankruptcy suit was discharged on November 3, 2008. On June 16, 2009, Wells Fargo filed the instant action seeking to enforce the loan. However, the original foreclosure suit was dismissed on grounds of abandonment pursuant to Louisiana Code of Civil Procedure Art 561 on December 6, 2017. On January 24, 2018, Holoway filed a peremptory exception of prescription. On May 3, 2018, the trial court granted the exception of prescription and ordered Holoway to submit a written judgment. On June 8, 2018, a judgment was signed granting the exception of prescription, dismissing Wells Fargo’s suit, and ordering the cancellation of the inscription of the mortgage in the St. Tammany Parish records. After the judgment was rendered, Wells Fargo filed an appeal and presented three issues for the First Circuit Court of Appeal of Louisiana to examine.

III. DECISION OF THE COURT

The Court of Appeal, First Circuit, found that it would be unjust to rule that a debtor has acknowledged his debt under Louisiana Civil Code article 3436 merely because the debtor properly identified the existence of a claim in bankruptcy filings in compliance with bankruptcy laws. The First Circuit Court found that the defendant did nothing more than identifying an alleged debt and that it was not enough to constitute an acknowledgement as contemplated in Louisiana Civil Code article 3436. Louisiana Civil Code article 3464 provides that prescription is interrupted when the debtor acknowledges the right of the person against whom he had commenced to prescribed. The defendant did not undertake any act of

6. Id.
7. Id. at 804.
8. Id.
9. Id. at 807.
10. Id. at 805-06 citing Titus v. IHOP Rest., Inc., 2009-951 (La. 12/1/09); 25 So.3d 761, 764-765.
reparation or indemnity, he did not make an unconditional offer or payments, and he did not make any action which could reasonably be found to have lulled Wells Fargo into believing that he would not contest liability. Federal Rules of Bankruptcy Procedure 1007 requires a debtor to list all creditors asserting claims against him.\textsuperscript{11} “Claim” is defined in Section 101 of bankruptcy codes as “right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.”\textsuperscript{12} On the second issue, a bankruptcy filing creates an estate, which is comprised of the property of the debtor and other property as defined in 11 U.S.C.A. \textsection 541.\textsuperscript{13} One may note that ‘estate’ is a common law concept not to be found in the Louisiana Civil Code. It designates the aggregate of the debtor’s assets. The trustee is the representative of the estate, not of the debtor. Louisiana Civil Code article 2997 says a principal may authorize a mandatary to acknowledge his debt, but only if the authority is given expressly.\textsuperscript{14} The defendant did not expressly grant authority to the bankruptcy trustee to acknowledge the debt on the defendant’s behalf, and there is no other mechanism under Louisiana law by which to grant authority to acknowledge debt. After reviewing those articles, the court found no merit in this assignment of error.

On the third issue, the Court held that prescription begins to run with respect to each installment at the time the installment becomes due, unless the creditor accelerates the debt by declaring the whole indebtedness due, in which case prescription runs from the date of acceleration.\textsuperscript{15} Louisiana Civil Code article 3463 states that interruption of prescription is considered never to have occurred if a case

\textsuperscript{11} Fed. R. Bankr. P. 1007.
\textsuperscript{12} 11 U.S.C.A. \textsection 101(5) (West).
\textsuperscript{13} 11 U.S.C.A. \textsection 541 (West).
\textsuperscript{14} LA. CIV. CODE. ANN. Art. 2997 (2020) [quote beginning of article plus (3)].
\textsuperscript{15} Harrison v. Smith, 2001-0458 (La. App. 1 Cir. 3/28/02); 814 So. 2d 42, 45.
is later abandoned. The court finds authority from *Harrison*. The court finds that Civil Code article 3463 provides for the effect of both abandonment and voluntary dismissal and does not distinguish between the two in any way. The court finds it appropriate to apply the same logic employed in *Harrison*. The court found no legal basis to construe the resulting erasure of the interruption of prescription to mean that the loan was somehow un-accelerated. The challenged judgment was affirmed.

IV. COMMENTARY

This commentary will first discuss the basis of prescription, where it comes from in the Civil Code and the prescription period in mortgage cases. Next, it will walk through the mechanics of mortgage prescription and how a single monthly payment or the entire mortgage can prescribe. Third, it will an look at examples acknowledgment in the civil code and interpretations in Louisiana cases.

A. Basis and Mechanism of Prescription

Prescription was codified in Book III, Title XXIV, of the Civil Code. As article 3498 indicates, negotiable and nonnegotiable instruments have a prescriptive period. In addition, article 3498 establishes a five-year prescription period on promissory notes and explains the time frame by stating that, “prescription commences to run from the day payment is exigible.” The five year liberative prescription period is further defined in article 3447. The article states that inaction for a period of time will bar any future actions.

Mortgage loans create successive obligations. Though the full balance of the loan is due from the moment the capital is disbursed, the obligation to repay is suspended by a succession of monthly terms. However, companies stipulate acceleration clauses into

19. *Id.* at art. 3447.
contracts. If multiple payments are missed, a mortgage company can accelerate the loan, meaning that the entire unpaid balance is due at once. The date of acceleration in this case was August 28, 2003. On this date, the company who acquired the rights on the loan filed a suit to foreclose on the property. This is what caused the acceleration to occur. According to article 3498, the prescription clock starts running then regarding the payment of the balance of the loan. The prescription period will run until August 28, 2008, unless there is interruption of prescription.

The First Circuit correctly calculated the prescriptive period on the mortgage loan, in accordance with the Civil Code. The fact that the loan was accelerated was not disputed and there was evidence that no claim was ever filed during the five-year period. At the outset, the length of time for prescription argued for by Wells Fargo appears to be contrary to the requirements in article 3498. The claim prescribes exactly five years from the date unless prescription is interrupted. In such situations, creditors typically interrupt the prescription by filing claims and refiling those as time flows. The claim will only prescribe if the bank has been idle for five years. Any act on behalf of the bank showing they did not abandon the action typically interrupts prescription, unless there is a clear acknowledgment of debt by the debtor, because such an acknowledgement interrupts prescription.

B. Acknowledgement of Debt

Under Louisiana law, prescription is interrupted by the acknowledgment of the right of the other party.

Louisiana Civil Code article 3464 states: “Prescription is interrupted when one acknowledges the right of the person against whom he had commenced to prescribe.” What constitutes an acknowledgment is defined in the Civil Code under “Reconnaissance.”

“Reconnaissance de dette” … Black’s law dictionary defines acknowledgment as, “a formal declaration made in the presence of an authorized officer, such as a notary public, by someone who signs a document and confirms that the signature is authentic.” It also defines it as “an acceptance of responsibility.” Merriam Webster defines acknowledgment as, “a declaration or avowal of one's act or of a fact to give it legal validity.” The word is used elsewhere in the Civil Code, such as in article 196 establishing the paternity of a man by acknowledging a child. Though this article does not give a definition, it sets formalities for the acknowledgment of a child to be valid, detail not to be found in article 3464. A look at Louisiana cases will give some context on acknowledgment.

In this context, when a person is lent money and does not pay it back in time in some fashion the lender will try to get the person to acknowledge his debt. In this case, Holoway listed the mortgage debt as one of the debts to be cleared in the bankruptcy proceedings. The question becomes whether Holoway acknowledged that debt when he listed the mortgage on his bankruptcy proceedings. He listed it as “disputed mortgage.” By doing this, he did not express any unequivocal intent to recognize that he was obligated to pay that claim. Louisiana has established jurisprudence in cases dealing with acknowledgement. In Coleman, the Fifth Circuit Court of Appeal of Louisiana held that, recognizing the obligation or creditor’s rights halts prescription before it runs its course. In Bank of New York, the Third Circuit Court of Appeal of Louisiana held “that acknowledgment is the recognition of the creditor’s right or obligation that halts the progress of prescription before it has run its course; acknowledgment acts to interrupt the prescriptive period before it has

Jurisprudence does not seem to give real guidance for this specific case because the question still is: does putting disputed mortgage on bankruptcy proceedings qualify as acknowledgement of a debt?

While Louisiana has provided some guidance as to acknowledgement, the current case gives additional guidance on the term. The First Circuit held that prescription is interrupted when the debtor acknowledges the right of the person against whom he had commenced to prescribe. The acknowledgement can come in any form. It is not subject to any particular formality. However, this case continues Louisiana’s jurisprudence on the undefined term of acknowledgement. Ruling that putting a disputed mortgage on a bankruptcy claim is not enough to interrupt prescription. There is a need to balance the interest of both parties here. On one hand, protecting the interest of a person declaring debt is important so they can prepare their repayment plan. At the same time, they should not be punished for being honest about disputed debts. A requirement that putting a disputed mortgage on a bankruptcy claim acknowledges debt and interrupts prescription will likely not have the results desired. People would likely just not list those disputed debts and try to hide them during proceedings. This does not seem like a viable option. Bankruptcy proceedings and repayment plans will lose value if people are being dishonest about debts.

Finally, the case also held that acknowledgment cannot be done by a trustee in bankruptcy. As said above, the trustee is not an agent for debtor but is an agent for all creditors. The trustee does not have any authority to make an acknowledgment on behalf of the debtor. The job of the trustee is to speak on behalf of the estate but not of the debtor. According to Louisiana Civil Code article 2997, authority must be given expressly to acknowledge a debt. No such express authority was ever given by the debtor to the trustee.

The court has interpreted acknowledgment in Louisiana law. The court developed understanding and interpretation by overlooking cases on bankruptcy proceedings. They have concluded that when a trustee puts a disputed mortgage in a bankruptcy plan, it does not qualify as acknowledgment.
LETTER BY JOHN H. TUCKER, JR. ON THE 1969 REPRINT OF THE DE LA VERGNE VOLUME

INTRODUCTORY NOTE

The letter we publish in our Rediscovered Treasures of Louisiana Law section was written by Colonel John H. Tucker, jr. (1891-1984) and dated December 20, 1969. The letter was identified on September 23, 2020, in the Rare-Book Room and Archives of the Law Library of the Louisiana State University Paul M. Hebert Law Center (LSU Law), by Seth S. Brostoff, at that time Foreign, Comparative & International Law Librarian.

Colonel Tucker was a fine jurisconsult and ardent supporter of the civil law tradition of Louisiana, who fathered the Louisiana State Law Institute. The author of the letter thanks the three recipients for having sent a copy of the 1969 reprint of the de la Vergne Volume of the Digest of 1808,2 with handwritten notes attributed to one of the drafters of that important corpus of the law, namely Louis Moreau-Lislet.3 A new reprint of the de la Vergne Volume was made in 2008, this time under the direction of the Center of Civil Law Studies (CCLS) of LSU Law, to commemorate the bicentennial of that Digest of Civil Laws Now in Force in the Territory of Orleans. That very same year, and as part of the bicentennial celebrations,4 the CCLS published the de la Vergne Volume on a dedicated website, with images of the manuscript notes and a typed transcription of the notes pertaining to the Preliminary Title and Book 1 of the Digest

2. See generally A Digest of the Civil Laws Now in Force in the Territory of Orleans, with Alterations and Amendments Adapted to its Present System of Government (Bradford & Anderson 1808).
of 1808. That online resource made the text of the Digest of 1808 available in open access to scholars from across the globe.

The letter is much more than a thank you note to Paul M. Hebert (1907-1977), then Dean of the LSU School of Law; Joseph M. Sweeney (1920-2000), then Dean of the Tulane University School of Law; and Louis V. de la Vergne (1938-2017), a New Orleans lawyer whose family treasured the manuscript that was eventually donated to the Tulane University School of Law. The letter offers valuable and well researched insights of the significance of the de la Vergne Volume of the Digest of 1808 and of the Civil Code of Louisiana of 1825.

A Tournament of Scholars—in words of Sweeney—took the stage a few years after the letter was drafted. It was ignited in 1971, it dealt with the sources of the Digest of 1808, and it involved Rodolfo Batiza (1917-2007) and Robert A. Pascal (1915-2018). The

7. On the life and work of Paul M. Hebert, see the supplement prepared by Robert A. Pascal to 37 L.A. LAW REV. (1977), particularly Francis C. Sullivan, Paul Macarius Hebert, at 1.

On the life and work of Rodolfo Batiza, see the contributions to issue 2 of 56 TUL. L. REV. (1982), particularly Paul R. Verkuil, Rodolfo Batiza: Scholar and Gentleman, at 457.

On the life and work of Robert A. Pascal, see ROBERT ANTHONY PASCAL: A PRIEST OF RIGHT ORDER (Olivier Moréteau ed, 2018).
Tournament of Scholars alerted readers 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. Above all, the Tournament showed that the inhabitants of Louisiana were, in 1808, able to protect their civil-law heritage from the incursions of the common law.

The letter by Colonel Tucker may be read in the light of the Tournament that followed. It speaks for itself and is published as is, with minimal formatting. It will no doubt feed academic efforts to commemorate the forthcoming bicentennial of the Civil Code of Louisiana of 1825.

Olivier Moréteau & Agustín Parise

I thank you very much for sending me the 1814 reprint of Moreau Lislet’s copy of “A Digest of Civil Laws Now in Force in the Territory of Orleans, Containing Manuscript References to its Sources and Other Civil Laws on the Same Subjects.” This will be a valuable tool for historical research in Louisiana law. Perhaps there are extant other notes, studies or reports made or participated in by Moreau, relating to the Civil Codes of 1808 and 1825, that have not yet come to light.
I am inclined to the belief that the proper place to be assigned to these annotations of Moreau’s should be determined by the circumstances at the time, and what Moreau himself said at other times and places about them.

The territorial resolution of June 7, 1806, appointed “James Brown and Moreau Lislet, lawyers… to compile and prepare, jointly, a Civil Code for the use of the territory… (and to) make the civil law by which this territory is now governed, the ground work of said code.”

For this work these commissioners undoubtedly relied overwhelmingly on the Code Napoleon, adopted in France March 21, 1804, because:

(a) There was some confusion about the laws in force in Louisiana resulting from the changes of sovereign in a short space of time.

(b) The Spanish laws were contained in a multiplicity of ancient codes or enactments, the relative precedence of which were sometimes in question. The principal codification of Spanish law was written in the thirteenth century and established in the fourteenth century.

(c) The antecedents, culture, customs and aspirations of the great majority of Louisiana residents derived out of their French ancestry and inheritance. French was their language, and not many were conversant with Spanish.

(d) There was a scarcity of the works of foreign jurists (see Preface to 1 Mart. O.S.), particularly Spanish (Bernard’s Heirs v. Goldenbow, 18 La. 95, 96).

(e) It was generally believed that there was little difference between French and Spanish law because of their common origins, namely Roman law and the customs. This was particularly so where the common source was Roman law (Bernard’s Heirs v. Goldenbow, 18 La. 95). In that case the court did not hesitate to quote approvingly from French jurists, although the disposition in a will had become operative while Spanish law prevailed.
(f) Although ante-code law in France was a jurisdictional crazy-quilt, originating in the early theory of the personality of laws (i.e., that a man was regulated by the laws of the country of his origin), and depended upon its historical origins in Roman and customary laws, France had a wealth of legal literature dealing with both Roman law and the customs. By its charters Louisiana, as a French colony, was regulated by the customs of Paris until revoked by O’Reilly, Spanish governor, in 1769.

On the other hand, there were few commentaries in Spain on either great division of Spanish law; perhaps because of the coalescence of these two systems of law, first in the primitive *Forum Judicum*, sometimes called *Fuero Juzgo*, (Scott’s translation is called *Visigothic Code*). This related principally to the *Theodosian Code of Imperial Decrees* for Roman law and the *Code of Euric*, or *Codex de Tolsa*, for the law of the Visigoths. The *Forum Judicum* was the forerunner of *Las Siete Partidas*, into which was infused a considerable body of Roman law from the *Justinian Digest*.

I feel sure Moreau thought the antiquity of these Spanish codes prevented their adoption to nineteenth century Louisiana without extensive and thorough research and discussion. The fact that the Civil Code of 1825 was ordered about two years after publication of the translation of *Las Siete Partidas* would indicate as much.

The so-called Civil Code of 1808 was actually entitled “A Digest of the Civil Laws now in Force in the Territory of Orleans.”

Concerning this code, Moreau, himself, said: “But it is easy to perceive, that a work of that nature, however excellent it may be, can only contain general rules and abstract maxims, still leaving many points doubtful in the application of the law; hence the necessity of going back to the original source, in order to obtain new and additional light. It was moreover perceived that the Civil Code did not contain many and important provisions of the Spanish laws in force, nor any rules of judicial proceedings; that the statutes regulating these proceedings had proved insufficient; and that the Superior
Court had in divers instances, and particularly in the case of Cottin vs. Cottin, Martin’s Rep. vol. 5, p. 93, determined that the Spanish laws ‘must be considered as untouched, whenever the alterations and amendments introduced in the digest do not reach them; and that such parts of those laws only are repealed, as are either contrary to, or incompatible with the provisions of the code.’ It thus appeared that a much greater portion of the Spanish laws remained in force than had been at first supposed. It was then doubtless the desire of the legislature to spread generally the knowledge of such of these laws, as are not to be found in the Civil Code, or in the digest of our statutes, that induced them to make provisions for the printing of this statute.” (The Laws of Las Siete Partidas, which are still in Force in the State of Louisiana. Translated from the Spanish by L. Moreau Lislet and Henry Carleton, Counsellors at Law. 1820 p. xxii.)

The plan of the translation pursued was simple. “Each title of the Partidas, is preceded by a list of the titles of the Roman and Spanish laws, and of the Civil Code, relative to the subject it treats of, together with an index of the articles therein contained. (Translation Las Siete Partidas, p. xxiii.)

This is somewhat similar to the situation in the Moreau notes of 1814 relating to the articles of the Civil Code of 1808 which point to Spanish and Roman, or civil law, sources.

Cottin v. Cottin, 5 Martin O.S. 93, generally considered as having caused the revival of Spanish law, was decided in July, 1817. Even before that case, there was some premonitory hints to that effect in a decision of the Supreme Court (Hayes v. Berwick, 2 Mart. O.S. 138,140; 1812). In Cottin v. Cottin, supra, Moreau was the successful advocate for the defendant; Livingston (with Mazureau), the unsuccessful counsel for the plaintiff; and Derbigny, the judge who wrote the opinion. They were the commissioners who drafted the Code of 1825.

It is not too much to assume that Moreau, in preparing the notes of 1814, wanted to show that his Code of 1808 was in large measure, a statement of the Civil Laws in force in the territory at the date of
the adoption of the code; perhaps induced by his position in Cottin
v. Cottin.

In any event, the report of the Commissioners to draft the Code
of 1825, in their preliminary report to the Legislature, February 13,
1823, reprinted in Louisiana Legal Archives, Vol. 1, p. LXXXVII,
says that the Commissioners (Livingston, Moreau and Derbigny)
“consider the principal Object the Legislature had in view, was to
provide a remedy for the existing evil, of being obliged in many
Cases to seek for our Laws in an undigested mass of ancient edicts
and Statutes, decisions imperfectly recorded, and the contradictory
opinions of Jurists; the whole rendered more obscure, by the heavy
attempts of commentators to explain them; and evil magnified by
the circumstance, that many of these Laws must be studied in Lan-
guages not generally understood by the people, who are governed
by their provisions. The Legislative assembly of the Territory made
one step toward the removal of this Evil, by adopting the Digest of
the Civil Law, which is now in force: This was an extremely im-
portant measure; because it was an advance towards the establish-
ment of system and order, in the several points of Jurisprudence,
which are contained in its provisions; because it took away on those
subjects, the necessity of a reference to the Spanish and Roman au-
thorities, and because it demonstrated the practicability of a more
extensive reform. - - But it was necessarily imperfect; not purporting
to be a Legislation on the whole body of the Law; a reference to that
which existed before, became inevitable, in all those cases (and they
were many) which it did not embrace.”

This very important preparatory declaration preceding the Code
of 1825 is interesting and of considerable importance, as may be
judged from the above quotation, but to comment further about it is
quite beyond the purport of this letter.

Suffice it to say that the Civil Code of 1825 reproduces literally,
in most of its content, the text of the Code Napoleon, often amplified
by the intercalation, as articles of the Code of 1825, of concise quotations from the French commentaries on particular articles of the Code Napoleon.

The projet of the Code of 1825 (republished by the state as *Louisiana Legal Archives*, Vol. 1) has an abundance of references to sources in Roman law and French commentaries, but references to Spanish sources are rare.

All Spanish, French and Roman laws in force in Louisiana at the time of the cession to the United States, and all anterior legislation for which special provision had been made in the code, were repealed by Article 3521 of the code itself.

However, decisions of the Supreme Court cast serious doubt upon the efficacy of this repeal in some particular cases. The legislature then passed Act 40 of 1828 repealing the Code of 1808, and Act 83 of 1828 which abrogated the civil laws in effect before the promulgation of the Code of 1825. But these laws still have some vestigial vitality according to the Supreme Court. *(Reynolds v. Swain, 13 La. 193, 199 (1839); Hubgh v. New Orleans and Carrollton Ry., 6 La. Ann. 495 (1851); and Moulin v. Monteleone, 165 La. 169, 165 So. 447 (1923).*

I have recounted these things not in disparagement of, but in great admiration for Moreau Lislet. I think he meant exactly what he said in the prefatory remarks he made to the volume of the Code of 1808 with his notes - - that he was citing civil laws, meaning Roman laws and Spanish laws “with which the laws in the Louisiana Code had some connection.” *(Emphasis mine.)*

I have read a great deal of what Moreau had to say about his own works - - in the translation of the *Partidas*, in the February, 1823, report of the Code Commissioners to the legislature, his Digest of Statutes, 1828, and in the projet of the Code of 1825. I compiled a list of the cases he had with Livingston as his opponent - - there were approximately thirty - - Moreau lost only eight as I remember. You can learn a whole lot about what Moreau thought from these cases.

Moreau was a Frenchman, and when he wrote the Codes of 1808 and 1825 he did so as a Frenchman.
I therefore view the notes in this volume you have sent me as a striking example of Moreau’s great scholarship, and certainly the earliest, and probably the best ever, demonstration of comparative law in action in the history of this state.

It would be well if someone would make a descriptive list of these citations, although I expect some of the works cited will be very hard to come by. If they were difficult to find in 1808 and 1825, what would the situation be now?

I am profoundly grateful to you for sending me this volume reflecting the scholarly industry of one for whom I had a profound admiration for all of my professional life.

Please accept my sentiments of respect and gratitude.

Faithfully,

JHTjr:al

P.S. I spoke to the Tulane Law Review dinner more than thirty years ago on the subject of Moreau Lislet. In discussing it with my good friend, Gaston Porterie, then attorney general, I said that he had perished in the cholera epidemic of 1832 and that it was not known where he was buried. Shortly afterwards, Gaston told me that he had been walking in St. Louis Cemetery No. 1, and found his grave. I visited it myself and found it covered with a flat black stone marker as I remember it, his son was included in the inscription on the stone. I remarked to someone of the law faculty at Tulane that some annual ceremony ought to be instituted in honor of the greatest law writer we had ever had in Louisiana. Sad to relate, when I visited the cemetery after World War II, I found that a tree or something had fallen on the stone marker and broken it up pretty badly, although you still could make out the names. If you ever visit St. Louis No. 1, immediately after entering, turn right on the first alley or path
until you reach the last alley or path near the wall, turn left not very far and you will see it on your right on the ground.

JHTjr
BOOK REVIEW


The doctrine of consideration is one of the great survivors of the common law. It first emerged in something like the modern form in the mid-sixteenth century. Consideration has fended off challenges to its continued existence on more than one occasion in the intervening centuries. Despite its longevity, many modern English lawyers would endorse the sentiments of Lord Goff in White v Jones, who said that “our law of contract is widely seen as deficient in the sense that it is perceived to be hampered by an unnecessary doctrine of consideration.” The requirement of consideration must appear even more perplexing to those schooled in the civilian tradition. It was no great surprise that consideration was excluded when it came to drawing up model rules for European private law in the Draft Common Frame of Reference. This book nevertheless still has some important lessons for civilians. Causa and consideration whilst not identical, share a similar function. Both doctrines are a condition for the validity of informal contracts. At a time when causa seems under some threat, for example in the 2016 reforms of the French Code civil, an account of the history of consideration is particularly apposite. A good understanding of consideration is highly desirable for those who want to engage in the debates about the value of causa.

The strongest reason for the continued requirement of consideration is a not unreasonable concern that some of the work done by consideration will fall on other legal doctrines with uncertain results. There is a systemic explanation for its survival as well. For the most part, the doctrine of consideration has caused few problems. English common law is not noted for making the sort of radical change required by removing the doctrine of consideration. Rather, change tends to take place incrementally. S.F.C. Milsom

2. CHRISTIAN VON BAR ET AL., PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW, DRAFT COMMON FRAME OF REFERENCE Ch 4, Section 1 (Book 2, Sellier 2009).
3. This was a point made by Phang J.A. in Singapore, Gay Choon Ing v. Loh Sze Ti Terence Peter [2009] SGCA 3, [114]-[116].
summed up the general rule: “Fundamental change happens slowly and by stages so small that nobody at the time could see them as in any way important.”

Consideration has been examined by legal historians many times before. There was a rash of scholarship on the origins of the doctrine of consideration as recently as the 1970s. In one of those contributions, A.W.B. Simpson argued that, “Any study of the doctrine of consideration must begin by fixing the ordinary meaning of the word; a legal concept evolves through the progressive refinement of a concept which is not in origin specifically legal.” Simpson was involved in the Oxford Linguistic Philosophy movement in the 1950s, so it isn’t too hard to see his starting point. Laske would agree with Simpson’s observation. Her aim, she explains, “was to trace the advent and early use of the concept of consideration in English contract law, by studying the doctrinal development in parallel with the corresponding terminological evolution.” However, her inspiration is different from Simpson. She characterises it as “akin to Begriffs geschichte work undertaken in German-speaking academia,” and contends that the same approach used in social and political thought and economic structures can be applied to a legal doctrine. Legal history is, by definition, interdisciplinary. Various sub-disciplines have grown up in recent times. To name just a few, these include intellectual history, economic, colonial, and feminist perspectives. A linguistic analysis is still much more unusual. Laske explains that “The present study has attempted to bring together the two ‘sciences’ in an inter-disciplinary space that makes linguistics a

7. CAROLINE I.B. LASKE, LAW, LANGUAGE AND CHANGE: A DIACHRONIC SEMANTIC ANALYSIS OF CONSIDERATION IN THE COMMON LAW 1 (Brill 2020).
8. LASKE, supra note 7, at 10.
means for studying legal concepts.” She distinguishes between a standard “full, general and statistical analysis of the language of law reporting” and her approach here, which involves “the study of how legal concepts materialise, evolve and are translated into the letter of the law.”

Chapter 3 contains quite a lot of necessary discussion of the methodology of functional linguistics, which might be of greater interest to specialists. Indeed, it won’t be much of a surprise to legal historians to learn that the meaning of words depends on cultural context and situation. Chapter 4 takes us into the different types of language used in a legal context: Latin, French, Law French, and English. Laske provides a serviceable summary of the rise of the English language in legal usage. On page fifty-nine, we get on to the doctrine of consideration.

Chapter 5 is called “The Origins of the Concept of Consideration”, but Laske actually provides a brief history of the development of the law of contract from the Anglo-Saxon’s times to the eighteenth century. There are some questionable points of detail and emphasis in this section. Laske observes that, “Between the 13th century and the reforms of the 19th century, procedural formalities dominated common law thinking.” This observation is true up to point if she is talking about the superior courts as opposed to more local courts. But expressed in these terms, Laske underplays the ingenuity of the common lawyers. Her book provides two illustrations of the point: the use of fiction in the development of the writ of trespass and the patently false allegation of *vi et armis*, and the use of the *indebitatus* clause in assumpsit. In such a world, formality is sometimes the handmaiden of legal development; it is not necessary its jailor. Oddly, one procedural matter that is highly relevant to the growth of assumpsit and the seminal litigation in *Slade’s Case*—the different modes of proof in debt and assumpsit (wager of law as opposed to a jury trial)—isn’t mentioned at all. In fact, the jury is central to the history of contract law following the rise of assumpsit.

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10. LASKE, supra note 7, at 3.
11. *Id.*
12. *Id.* at 4.
13. *Id.* at 62.
14. (1602) 4 Co Rep 91 (a).
It would be surprising if the jury trial did not have an impact on the application of the doctrine of consideration as with much else.

Laske’s characterisation of the law prior to the rise of assumpsit is also open to challenge. The idea that English contract law before 1066 “was rather rudimentary”15 is a rather anachronistic way of looking at things. In any event, there was a degree of continuity between pre- and post-Norman law, both in reference to transactions by pledge and agreements more generally.16 It is difficult to know what to make of the statement “It is only with the action of assumpsit that the idea grew of informal agreements as actions in their own right.”17 Whilst it is true that from the fourteenth century in the royal courts, a deed was required in covenant,18 this hardly means that the action played a “minor role in the history of contract”19 or that no one thought that there could be informal contracts. The difficulty was rather that with the imposition of a deed in covenant, gaps appeared in the mechanisms for enforcing informal contracts in the royal courts. Some of these were significant. No general action on an informal agreement was possible in the royal courts because trespass and trespass on the case were deemed not to be appropriate in cases of non-feasance.20 It is quite another thing to assert that “The action of debt was riddled with technicalities and procedural complexities that excluded many meritorious claims for enforcing informal agreements.”21 Debt, after all, remained a very popular action into the nineteenth century. Some debt was formal and used a deed (debt on a bond). Debt on a contract did not require a deed but relied on the presence of quid pro quo. That being said, it could not be used for some transactions. When land was conveyed and the buyer failed to pay the price, debt could be used, but it could not be used in the reverse situation where the price was paid but the land was not conveyed.22 Debt on a contract was also unavailable when someone had

15. LASKE, supra note 7, at 63.
17. LASKE, supra note 7, at 65.
18. Id.
19. Id.
20. Id. at 73-74.
21. Id. at 67.
22. Shipton v. Dogge (1442) YB Trin. 20 Hen VI fo. 34, pl. 4.
failed to perform a service. However, in this situation, debt on a conditional bond was a very useful device, albeit that a deed was needed because it could cover a range of contracts for service.\textsuperscript{23} The local courts and the, rather significant, mercantile courts could also be used. Instead of a single remedy, a patchwork of remedies and courts provided a pretty good range of options. There is after all no reason to think that as now, more than a tiny number of actions ever reached the superior courts.

Laske contends that “the concept of consideration emanated from a diversity of legal sources and this may in part be a reason why its terminology settled only hesitantly,”\textsuperscript{24} and this is probably the only conclusion that can be drawn. Laske then provides an overview of some of the familiar elements of consideration including the rule that consideration need only be sufficient, it need not be adequate, the idea of benefit and detriment, and the cases on forbearance. She makes the interesting point that in as much as natural love and affection was ever valid consideration, it was confined to the special category of marriage cases—a fact that is supported by counting up the references to marriage and consideration in the Year Books and Law Reports.\textsuperscript{25} Having suggested that consideration “was not devised as part of an overall doctrine of contract law,”\textsuperscript{26} Laske concludes that rather “consideration was used to check the floodgates from opening too wide and to limit assumpsit action (sic) to those where the promise was supported by consideration.”\textsuperscript{27} She then suggests that a theory of contract law was only initiated in the eighteenth century by Blackstone and his contemporaries.\textsuperscript{28} It is, of course, difficult to attribute motive in the way that consideration developed. It was undoubtedly some limit on the action of assumpsit. Perhaps the more interesting question is how much of a restriction consideration really was on the action in practice. It does not follow at all that there were no substantive ideas underpinning assumpsit.

\textsuperscript{23} A.W.B. Simpson, \textit{The Penal Bond with Conditional Defeasance}, 82 LQR 392 (1966).
\textsuperscript{24} Laske, \textit{supra} note 7, at 89.
\textsuperscript{25} Id. at 99.
\textsuperscript{26} Id. 104.
\textsuperscript{27} Id.
\textsuperscript{28} Id.
Whilst the thinking of lawyers was often implicit rather than explicit, Ibbetson has shown very convincingly that lawyers did think of assumpsit as founded on a bilateral agreement rather than a promise.\textsuperscript{29} Eighteenth-century writers did begin to explore the rationale of contract. The doctrine of consideration was a major obstacle to a coherent approach. Even Henry Ballow writing in the 1730s, influenced by the Natural Law theorists, was unable to reconcile the basic idea that contracts were formed by assent with the English requirement of consideration. These problems were magnified by the rise of the will theory in the nineteenth century. Legal writers were not alone in seeing difficulties with consideration. Judges felt the same. Laske concludes the chapter with Lord Mansfield. Several aspects of her entirely conventional account are open to challenge, including the claim that Lord Mansfield was advocating a doctrine of unjust enrichment in \textit{Moses v Macferlan}\textsuperscript{30} or that he favoured a moral consideration doctrine. The rest of the book’s material is novel because it involves an entirely linguistic analysis of the doctrine of consideration. Laske’s source materials are some printed yearbooks and reports, along with some dictionaries, abridgments, and some more general language texts. Naturally, this excludes manuscript reports.

Chapter 6 looks at the regularity and context of the words, “assumpsit”, “promise,” and “consideration” over time. Chapter 7 reviews the results of this statistical analysis. Most of the conclusions are not very surprising. But they do confirm the existing impression that the action of assumpsit did not immediately settle down into a particular terminological form until the sixteenth century,\textsuperscript{31} that promise as a term to describe contractual liability was rather marginal,\textsuperscript{32} and that consideration was in general use before lawyers adopted it but became common in a legal sense from the sixteenth century.\textsuperscript{33} Nor is it very surprising that by Lord Mansfield’s time, consideration was becoming more technical and precise in its use.\textsuperscript{34}

\textsuperscript{29} IBBETSON, \textit{supra} note 5, at 102-105.
\textsuperscript{30} (1760) 2 Burr 1005, 1 Wm Bla 219. On this point, see \textit{Roxborough v Rothmans of Pall Mall Australia Ltd} (2001) 208 CLR 516.
\textsuperscript{32} Id. at 182.
\textsuperscript{33} Id. at 184
\textsuperscript{34} Id. at 190
A little more unexpected is Laske’s claim that during the eighteenth century, the term “moral” was often a proximate term to “consideration.” This assertion was evidenced by looking at the prevalence of the words in a sample of cases which “specifically dealt with the consideration as a concept of moral obligation” between the 1760s and 1840s. In the same sample, she also searched for “obligation”, “duty” and “conscience.” But the fact that these patterns show up in a group of specially chosen cases covering ninety years does not convincingly demonstrate that Lord Mansfield was wedded to the concept of moral consideration. In many of the leading cases, Lord Mansfield did refer to “conscience”, but he made free use of terms like “natural justice” and “equity” as well. This kind of language needs to be placed against more fluid notions of precedent. It is going too far to say that he was advocating a legal concept of consideration that included moral obligations in any broad sense. The two leading authorities Atkins v Hill and Hawkes v Saunders were not decided on the basis that a moral obligation provided good consideration. Lord Mansfield was at pains to stress that quite the contrary, these were cases where there was more than a moral obligation or, as he put it, an obligation which “would otherwise only bind a man’s conscience.” These were cases concerning the distribution of estates in which the plaintiff was trying to bring a claim against the executor in their representative or personal capacity rather than pursuing a claim in Chancery. Lord Mansfield’s other examples of claims barred by infancy, limitations, or bankruptcy were a very limited set of moral obligations. It is better to think of these as examples of cases of legal obligation barred by a technicality. Nevertheless, some early nineteenth-century judges did toy with a broader idea of moral consideration. Bosanquet and Puller described

35. Id. at 186
36. Id. at 184.
37. Id. at 168.
38. (1775) 1 Cowp 284.
39. (1782) 1 Cowp 289.
41. Atkins v Hill (1775) 1 Cowp 284, 288–289; Hawkes v Saunders (1782) 1 Cowp 289, 290.
these events in their note to Wennall v Adney\textsuperscript{42} written in 1814, but just as quickly, the idea seemed to fizzle out.

Laske concludes by claiming that “a linguistic and terminological approach also contributes to a better comprehension of the concept of evolution of the law and its socio-cultural content.”\textsuperscript{43} Her study shows both the strength and limits of this approach. It is clearly useful to know that consideration was in wider non-legal use before lawyers adopted it. A linguistic analysis reflects the rise of assumpsit and the way in which consideration became a prevalent technical legal term in the eighteenth century. At the same time, a linguistic analysis does not tell us very much about why either of these things occurred. There are some limits to this approach, even on its own terms. It is difficult to come to robust conclusions without regard to the context. The law reports themselves changed very significantly throughout the study. On a superficial level, the printed reports got longer. Judgments were reported in more detail. There is no reason to assume that the substance of consideration was constant either. In the sixteenth century, consideration reflected the idea of a bargain or exchange and in this respect was similar to the requirement of \textit{quid pro quo} in debt. There were always some cases which are quite difficult to fit within that model. By the nineteenth century, consideration was closely bound together with the idea of serious intention so that whilst the language of benefit and detriment continued to be used for good historical reasons, the veneer of reciprocity was very thin indeed. The results of the linguistic approach will certainly be of interest. But to be truly interdisciplinary, a study like this needs to be more fully immersed in the substantive legal doctrine than this present one.

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\textsuperscript{42.} (1814) 3 B & P 249 (note).
\textsuperscript{43.} LASKE, \textit{supra} note 7, at 196.

I. INTRODUCTION

Louisiana’s unique legal system is based on translation. This book by Vernon Palmer, a professor of law at Tulane University and a world-renowned expert in mixed jurisdictions, sheds light on the seminal work of the translators who were involved in the first major translation effort in the state, translating the Louisiana’s first civil code, the Digest of the Civil Laws Now in force in the Territory of Orleans of 1808, from French into English. This instrument was key to settle the dispute whether the Territory would remain a civil-law or common-law jurisdiction after the purchase by the United States in 1803. This civil code anchored the state in the civil-law tradition, which was reinforced in the wholesale revisions of 1825 and 1870 and the piecemeal amendments in more recent years.

The identity and method of work of those translators had remained invisible1 so far. This book solves a “200-year-old mystery”2 by revealing the translator’s identities and biographies, putting them in the spotlight, for good and for bad. After Palmer’s painstaking research, their names can now be written in black and white: Henry Paul Nugent and Auguste Davezac de Castera.

II. STRUCTURE AND STYLE OF THE BOOK

The book is divided into five chapters and one appendix. It starts with a literary scene depicting a trial in which the soon-to-be-revealed translators were involved, one as a defendant and the other as counsel. Chapter two details the method followed by the author to discover the identities and biographies of the translators. Chapter

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1. Invisibility in translation is a recurring topic in translation studies, and the fundamental work in the area is LAWRENCE VENUTI, THE TRANSLATOR’S INVISIBILITY: A HISTORY OF TRANSLATION (Routledge 2008).
2. See https://perma.cc/Y98H-XLJM.
three and four tell the stories of the translators, a “mercurial man”\(^3\) and an “eloquent docteur.”\(^4\) Between chapter four and five there are some portraits of relevant characters to this research, among which we can see that of Davezac; alas, there is no portrait of Nugent. The translation is put in context in chapter five, which engages in a critical analysis of the translation approach and strategy. As a corollary, the appendix contains selected writings by the translators, who had a somehow prominent public life.

A special comment is due regarding the general style in which the book has been crafted—Professor Palmer writes with eloquence and a literary flavor. The story of the translators starts with a scene in medias res, a technical literary technique Palmer masters, and continues with a very natural flow throughout the rest of the book. The effort by the author to always choose the right word is easily noticeable, and commendable.

II. TWO UNCONVENTIONAL TRANSLATORS

The names have been finally revealed: the Digest of 1808 was translated by Henry Paul Nugent and Auguste Davezac de Castera. Palmer’s initial scene depicts a libel trial followed against Nugent for his writings against a judge. Nugent, in turn, was represented by his co-translator Davezac. The trial was presided by another prominent legal translator: François-Xavier Martin. Palmer’s feeling is that at that trial there was more at stake than mere libel allegations—this trial was opposing competing French-into-English translators.\(^5\)

The search for the identities of the lost translators took the author to the Legislature’s acts authorizing payments to those involved in the drafting and translation of the Digest. He discovered their


\(^4\) Id. at 20.

\(^5\) The rivalry may date back to the times when Nugent fiercely criticized Martin’s translation of Pothier. See Palmer, supra note 3, at 33 (referring to Martin’s “imbecility exhibited in his burlesque translation of Pothier”).
identities through “deduction, extrinsic evidence, and a process of elimination.”

Henry Paul Nugent was a self-proclaimed polyglot born in Ireland who immigrated into the United States after receiving his education in France and England; he also presented himself as a dancer and a dance teacher. Aguste Davezac de Castera was a Frenchman born into a Saint-Domingue family; he immigrated to the United States and trained and practiced as a doctor in North Carolina before settling in New Orleans. By reading his writings, Palmer highlights how persnickety Nugent was in the use of language, both French and English; he was what today is termed a snoot. Davezac also read law in Edward Livingston’s office, who was his brother-in-law. The author also mentions Davezac’s profuse experience translating books from French into English. Both Nugent and Davezac were registered with the Superior Court in New Orleans as sworn translators and interpreters. At a time when there was no formal training in translation or interpretation, being in that roster could be considered tantamount to being professional. In addition to relying on archives and statutes where their names appear, the author draws the big picture of the connections among these two persons and the legal élite of their times. Palmer has found family, professional, political, and business bonds that tie the two men to the translation, as

6. Id. at 13.
7. Id. at 14.
8. Id. at 20.
9. Id.
10. See id. at 32 (where an extract is transcribed of a writing by Nugent chas-tising an actor for his poor pronunciation of English terms).
   There are lots of epithets for people like this — Grammar Nazis, Usage Nerds, Syntax Snobs, the Grammar Battalion, the Language Police. The term I was raised with is SNOOT. . . . A SNOOT can be loosely defined as somebody who knows what dysphemism means and doesn’t mind letting you know it.
   I submit that we SNOOTs are just about the last remaining kind of truly elitist nerd.
12. PALMER, supra note 3 at 15.
13. Id. at 16.
their name is nowhere to be expressly found as translators of the Digest.\textsuperscript{14}

III. THE TRANSLATION UNDER SCRUTINY

While the greatest contribution of this book is the unveiling of the identities of the translators of the Digest of 1808 through historical research using primary sources, chapter five on the quality of the translation is equally important. In this part of the book, Palmer engages in translation criticism.

As soon as the translation was out, it was criticized as “extremely incorrect” by Governor W. C. C. Clairborne.\textsuperscript{15} Officials even thought of getting rid of the English version and keeping the French only. However, no legislative action was taken. Then, the issue became a contested matter in the courts. While judges were reticent to giving prevalence to one version over the other, they eventually established a sensible “French-preference rule.”\textsuperscript{16}

The quality of the French-into-English translation of the Digest and the subsequent codes has been a matter that garnished attention from scholars.\textsuperscript{17} The most important contribution so far is perhaps the analysis carried out by Professor Joseph Dainow in 1972.\textsuperscript{18} However, Palmer’s contribution in this respect goes beyond

\textsuperscript{14} While Palmer supposes that the names of the translators did not appear as such because their product proved to be not as good as expected, another explanation could be that they were kept in the shadows because of a sustained and widespread practice of invisibilizing translators and their work. Especially when it comes to the translation of legislation, some people may fear that recognizing the people who actually were involved in translating would affect the image of the text as the solemn expression of the Legislature, particularly when the text is supposed to be on an equal standing with the original. Hiding the translators’ names may have been a strategy to depersonalize the English text.

\textsuperscript{15} Id. at 46.

\textsuperscript{16} Id. at 47.

\textsuperscript{17} See, e.g., E. B. Dubuisson, Errors of Translation in the Codes, 5 LOY. L.J. 163 (1924); John M. Shuey, Civil Codes—Control of the French Text of the Code of 1825, 3 L.A. L. REV. 452 (1941).

criticizing errors. As a mixed-jurisdictions scholar, he succeeds in taking a deeper look at the general approach and specific strategies adopted by the chastised translators. He found a deliberate attempt by the translators to introduce common-law equivalents. Aware of their role in a developing jurisdiction with an influx of lawyers trained in the common law only, the translators knew that they had to do something else than merely translate to convey the message. Also, the author’s analysis revealed a very questionable practice in how these translators worked: they divided their work in parts and each did his share, without consulting each other and comparing their versions. Though undesirable in principle, time constraints may require dividing large documents for translation among two or more translators, especially in legal contexts. However, a basic good practice to ensure the quality of the final product is that (a) the translators involved work together and agree on translation solutions and style, and/or (b) that a third-party reviser goes through the entire document to polish any discrepancies and makes the text look as if it had been written by a single person. Palmer’s analysis reveals that none of these courses of action were followed. Evidence of the translators’ method of work is the translation of the French term *fruits civils* as *civil profits* in some sections, and as *civil fruits* in

19. This practice is referred to as “batch translation” in DANIEL GOUADEC, TRANSLATION AS A PROFESSION 107 (John Benjamins Pub’g 2007).


21. See GOUADEC, supra note 19, at 107 (explaining that: Parallel or simultaneous translation means the different translators translate their respective batches in the same time interval. The main problem is terminological, phraseological and stylistic consistency between the different batches. This can be achieved upstream by making sure the resources or raw materials (terminology, phraseology, models, and memories) are made available to all the translators and validated and harmonized before the translation starts. It can be achieved downstream by harmonizing the translations during the proof-reading process. It is essential in any case that all the translators concerned be duly advised that other translators are working on different batches of the same job. (emphasis in the original)).
others. The author attributes the inconsistency in the quality and style of the translation to the lack of collaboration between the two translators.

Palmer goes over the famous Batiza-Pascal debate only to highlight how little attention had been paid to the English translation of the 1808 Digest. At this point, his research not only sheds light on the identities of the translators, but also on the sources they used to translate the civil law into English. Among these sources, two merit an express mention: an old English translation of Domat’s *Les Loix civilles dans leur ordre naturel* and Blackstone’s *Commentaries on the Laws of England*. Blackstone’s presence in the Digest revealed the efforts made by the translators to convey a new body of law with language that was familiar to the common-law-trained professionals present in Louisiana at the turn of the 19th century. The author makes clear that these decisions were most probably taken by the translators themselves, without what is known in modern translation studies as a “translation brief,” i.e., instructions from the commissioner of the translation job (in this case, most likely the Legislature). Anyway, they took it upon themselves to “communicate in the language best understood by the anglophone bench and bar.” Palmer gives the translators credit where credit is due: the 1808 translation is portrayed as an “uncatalogued creation,” which served to “accommodate, reconcile, or bridge legal differences and to overcome communication gaps between the traditions.”

24. *See* Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 4 (1971-1972); *see also* Robert Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 TUL. L. REV. 603 (1972). In short, Batiza advocated the theory that most of the sources of the Digest were French in origin, while Pascal held that they were Spanish.
27. *Id.*
28. *Id.*
translation-theory terms, Nugent and Davezac had in mind a purpose or *skopos* that shaped the translation strategies for their work.

Palmer takes a compassionate approach on how the translators used the common law to find “equivalents for the benefit of an anglophone legal audience.” A purist could say that this approach is flawed because the language of the civil law should be conveyed in civilian terms only. Also, some could even allege that by introducing common-law terms the translators lost the opportunity to lay solid foundations for the language of the civil law in English. Let us remember that the Digest of 1808 was the first modern, European-style civil code in English. A balanced approach requires accepting that sometimes it is beneficial for the purpose of the translation to use common-law terminology. Using the common law in those cases takes the text (or author) closer to the reader, and not the other way around.

29. Hans J. Vermeer’s “skopos theory” explains the translating activity by parting from the view that translation is a form of human interaction and, as such, determined by its purpose or “skopos.” See Christiane Nord, *A Functional Typology of Translations, in Text Typology and Translation* (Anna Trosborg ed., John Benjamins Publ’g 1997) (“One of the main factors in the skopos of a communicative activity is the (intended) receiver or addressee with their specific communicative needs.”).
30. *PALMER, supra* note 3, at 53.
32. The author of this review believes that resorting to common-law language to translate the civil law is appropriate mostly for informative purposes. For example, if a lawyer in New York needs a contract translated from Spanish into English to understand whether a lease is part of a merger transaction he is working on, it is likely that the lawyer will not understand if the translation uses civilian English, unless the lawyer is specifically trained in or is generally aware of the civil law. See, e.g., Ejan Mackaay, *La traduction du nouveau code civil néerlandais en anglais et en français, in Jurilinguistique : entre langues et droit/Jurilinguistics: Between Law and Language* (Jean-Claude Gémar & Nicholas Kasirer eds., Bruylant & Éditions Thémis 2005) [hereinafter *Jurilinguistics: Law and Language*] [explaining how a translation of the Dutch Civil Code done using strictly civilian terminology had to be adapted with common-law terms due to pressure from legal practitioners who complained about the understandability of the original translation].
33. Schleiermacher is to be credited for differentiating between two methods: the translator leaves the author in peace, as much as possible, and moves the reader
Palmer presents the dichotomy between translating using civilian language and common-law language as a clash between “literal translation” and “legal transposition.” The common-law terminology referred to by Palmer includes attorney in fact, chattels, consideration, joint and several obligation, loan on bottomry, parol evidence, sales by cant, separation from bed and board, and landlord. What the author calls “transposition” is typically known as translating in one legal system by using “equivalents” from another system. He shows that this translation practice was applied in Louisiana even before the Digest of 1808.35

Scholars studying the legal system of Louisiana have pointed out that there has been a pedagogic purpose in mind in the early codes, especially in the 1825 code.36 This is in stark contrast with the Code Napoléon, which made the case for concise and cut-to-the-chase legislation to be understood by all. Palmer argues that while the Digest of 1808 was not intended to be such a pedagogical tool, the translation was. In translation-theory language, the skopos of the translation was to educate the rising legal community in Louisiana. Palmer accurately exemplifies this approach by analyzing the translation strategy used by Nugent and Davezac in translating headings. Because the translators were probably afraid that their audience would not understand if they translated civilian language transparently, they oftentimes resorted to the strategy of using doublets. This is how “Des obligations solidaires” became “Of Obligations In Solido or Jointly and Severally,” for example. At the time of the
translation, when the language of the civil law was not widely disseminated in English, the translators probably believed that *solidary obligations* would not do the trick, as the term would sound arcane to Louisiana practitioners and judges. That might have been why they resorted to a doublet, using a Latin term (*in solido*) and a common-law equivalent (*joint and several*), which more or less reflected the same idea as the original.

While Nugent and Davezac clearly made an effort to reach the Anglophone legal audience of the time, they also lost some opportunities to establish and consolidate the language of the civil law. After all, their translation was not for informative purposes only, as could be the case with the translation of a civil code for academic purposes. Their translation was intended to be, and actually was, at an equal footing with the original French text. In drafting an official text, they were entitled to resort to the strategy of creating neologisms when neologisms were needed, as they were writing a text that was not only supposed to convey what the law said, but to be the law itself.

Nevertheless, the translation approach was not unsupported by facts, as it is true that the emerging legal community of Louisiana in general was mostly ignorant of the civil law and its codification in the state. Right after the Louisiana Purchase, the influx of common-law lawyers from other parts of the United States grew dramatically, to the point that in the 1803–1805 period 56% of lawyers were Anglophone Americans, and the Francophones only accounted for 37% of the bar.39

Palmer’s general analysis of the translation is followed by an analysis of specific choices by the translators. He recognizes their great share of responsibility in shaping the language of the civil law in English in Louisiana. They coined part of the language which would be used for years to come. One of these examples, for which the author praises the translators, is the use of the *obligee-obligor*

39. *Id.* at 58.
pair. Palmer says that this terminology is a “notable invention.”
This choice by the translators, however, can be criticized on many counts.

The author concedes that the terms were “obscure and musty English law terms that were rarely used even in common-law books,” adding that the usage seemed to be confined to the law of English bonds. The translators used obligee-obligor only in five articles, and they used creditor-debtor in the rest. The author attributes this hesitance to the inexperienced translators, who were dealing with terminology they did not master, and posits that whenever the translators used the new terminology “they applied it precisely backward and mistakenly, thus producing legal nonsense.” Then he offers six examples in which these terms or one of its derivations (i.e., co-obligee) are used to convey a meaning opposite the meaning now in use. For example, article 42 used obligee as a translation of débiteur and article 44 used obligor as a translation for créancier.

These mistakes cannot be lightly attributed to the ignorance of the translators. They might have been baffled by these arcane terms, but also the legal community these days finds this terminology far-fetched. The source of confusion may be that the ending -or in legal English usually designates the active party in a transaction, and the ending -ee is used for the passive party: a lessor is the one who gives a lease over a piece of property to another, called the lessee, who takes the property and undertakes to pay the lease price; a promisor is the one who makes a promise to another called

40. Id. at 61.
41. Id.
42. Cf. Martin Hogg, Obligations, Law and Language 56 (Cambridge 2017) (asserting that John Cowell, in his Institutes of the Laws of England, written in 1651, already referred to the party burdened with the duty as the “debtor” or “obligor.” Hogg makes it clear that Cowell was writing within a “consciously civilian framework”).
43. Id. at 62.
44. Bryan Garner, a leading authority on legal English, believes that “the wisest policy is probably not to handle [these terms] at all.” Obligee; obligor, Bryan A. Garner, A Dictionary of Modern Legal Usage (2d ed., Oxford Univ. Press 2001).
promisee, who is entitled to enforce the promise against the first one; the bailor is the one who gives personal property to another called bailee, so that the bailee has the obligation to take care of the item and return it upon bailor’s request. In the obligor-obligee pair, one is tempted to say that the person who is obligated to the undertaking is the obligee, because it sounds like the passive party in the transaction, just like the lessee receives the property and pays the lease price or the bailee receives the item from the bailor. But in Louisiana law—and in current legal parlance in general—the obligee is the party to whom the performance is owed. The obligor, then, is the party obligated to perform. What led the translators to use the terminology in the opposite direction as compared to how is used nowadays in Louisiana and some other jurisdictions, including common-law jurisdictions, could be the archaic use of that terminology. Black’s Law Dictionary recognizes that an archaic use of obligee is “someone who is obliged to do something.” The same dictionary, in turn, defines obligor (with an “archaic” mark) as “someone who obliges another to do something.”

Palmer explains that the modern Louisianan sense of the terms obligee-obligor consolidated after Louis Moreau-Lislet and Henry Carleton used them in translating *Las Siete Partidas* and the translators of the 1825 Code extended the application of those terms to twenty-three provisions. In both of these cases, obligee was used to translate créancier and obligor to translate débiteur. While Palmer holds that now the terminology is commonplace in civilian parlance, it is hard to accept that it is one of the “civil law’s most useful

45. *Obligee*, BLACK’S LAW DICTIONARY (11th ed. 2019). The dictionary also includes this explanatory warning:

> Several dictionaries, such as *The Random House College Dictionary* (rev. ed. 1995) and *Webster’s New World Dictionary* (4th ed. 2007), define *obligee* in its etymological sense [‘obliged’], as if it were synonymous with *obligor*. *Random House*, for example, defines *obligee* as ‘a person who is obligated to another,’ but that meaning ought to be reserved for *obligor*. An *obligee*, in modern usage, is one to whom an obligation is owed. Bryan A. Garner, *Garner’s Dictionary of Legal Usage* 624 (3d ed. 2011).

46. Id.
expressions,” as the terms still cause a lot of trouble nowadays. A different, clearer terminology would have been and is possible and desirable. As a matter of fact, other civil codes in English use the more transparent creditor-debtor pair. In addition to being plain, this terminology has the added value of being in line with the language of obligations in other tongues.

Criticizing this translation, it needs to be said, is a risky endeavor, as the analysis must take into account usages that were valid back in the early 1800s and that may no longer be valid these days. In general, Palmer does an excellent job as a critic, but some of the cases for which he whips the translators are at least debatable. One of these slippery cases is the translation of animaux as cattle. Palmer is categorical in his judgment of this translation:

Inexplicably, the simple word animaux (animals) proved to be a bête noir. It was systematically translated as ‘cattle,’ a mistake that automatically altered the intended scope of the provision in question. . . . The substitution of the word ‘cattle’ for ‘animals,’ . . . reduced the entire animal kingdom to a single bovine genus and thereby narrowed coverage obviously intended to be wider.

While at first sight it may seem that Nugent and Davezac incurred the mistake of overtranslation by using a type of animal as the hypernym, Palmer then concedes in a footnote that the translators may have used the word adopting “an obsolete meaning that was once current centuries earlier.” The explanation of the term in the Oxford English Dictionary indicates that, after an identification with personal property during feudalism, the term was increasingly

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47. Palmer, supra note 3, at 64.
48. See Garner, supra note 44.
49. Such as the Civil Code of Quebec in English and the Civil Code of Goa, India. The Civil Code of the Philippines uses both creditor-debtor and obligee-obligor.
50. In Spanish, acreedor-deudor; in Italian, creditore-debitore; in Portuguese credor-devedor. And, of course, créancier-débiteur in French.
51. Palmer, supra note 3, at 70
52. Id. at 70 n. 83.
used as “live stock” in English.\(^{53}\) The dictionary provides even more support to the translators’ choice:

II. Live stock. . . . 4.a. A collective name for live animals held as property, or reared to serve as food, or for the sake of their milk, skin, wool, etc. The application of the term has varied greatly, according to the circumstances of time and place, and has included camels, horses, asses, mules, oxen, cows, calves, sheep, lambs, goats, swine, etc. The tendency in recent times has been to restrict the term to the bovine genus, but the wider meaning is still found locally, and in many combinations.\(^{54}\)

In light of this background, it is hard to believe that the translators made such a gross mistake. Writing in the early 1800s, the use of *cattle* as *live stock* in general might have been familiar to the readers of that time.\(^{55}\)

Another great contribution of this book is the unveiling of a “third translator.” This is how Palmer refers to the translators resorting to William Strahan’s translation into English of *Les Loix civiles dans leur ordre naturel*, originally written in French by Jean Domat. Just as the codifiers borrowed from Domat to write the Digest,\(^{56}\) Palmer discovered that the translators took a “labor-saving shortcut”\(^{57}\) as they copied verbatim from Strahan’s translation. While Palmer suggests that the translators could have provided their own version instead of just copycatting the English translator, it is a standard practice in translation to stick to authoritative sources.

\(^{53}\) *Cattle*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) (“Under the feudal system the application was confined to movable property or wealth, as being the only ‘personal’ property, and in English it was more and more identified with ‘beast held in possession, live stock’, which was almost the only use after 1500.”).

\(^{54}\) Id.

\(^{55}\) A good argument in favor of the view of this translation as a mistake would be the finding of cases decided around that time in which the meaning of the term was disputed. If that term was mistranslated, as Palmer suggests, there must have been cases in which the dispute cropped up.


\(^{57}\) PALMER, supra note 3, at 70.
Conversely, attention could be directed at praising the translators for doing their research and resorting to a translation that was very well accepted in the legal community. As a matter of fact, a translator is supposed to concede to previous translations if the quality of the translations is good and enjoys acceptance among the relevant community. However, Palmer hits the nail on the head when criticizing the translators for being led to use strange collocations that are traceable to Strahan, such as knavish possessor for possesseur de mauvaise foi and honest and fair possessor for possesseur de bonne foi. Possessor in bad faith and possessor in good faith would have certainly been better and plainer equivalents. Palmer is right in criticizing the “slavish reliance”\(^\text{58}\) on Strahan’s translation as for these weird terms.

The use of Strahan’s translation by Nugent and Davezac leads Palmer to speculate on how the translators interacted with the redactors of the Digest. The main redactor, Moreau-Lislet, was categorical in setting himself apart from the translation: “We have nothing to do with the imperfections of the translation of the Code—the French text, in which it is known that the work was drawn up, leaves no doubt.”\(^\text{59}\) While that was the position pour la galerie, Palmer suggests that the translators and redactors were in contact,\(^\text{60}\) because otherwise the translators would not have known that extracts of the Digest had been taken verbatim from Domat, which was translated by Strahan. Another possibility could be that the translators discovered Strahan by their own means, but Palmer’s intuition seems to be more accurate, in light of the translators’ lack of sound legal credentials.\(^\text{61}\) Discovering sources and contrasting originals with translations certainly requires legal and translation skills. Nowadays, it has

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\(^{58}\) Id. at 71.

\(^{59}\) Id. at 75.

\(^{60}\) Id.

\(^{61}\) Looking at Moreau-Lislet’s library may be a good idea; see Agustín Parise, A Translator’s Toolbox: The Law, Moreau-Lislet’s Library, and the Presence of Multilingual Dictionaries in Nineteenth-Century Louisiana, 76 LA. L. REV. 1163 (2016).
been understood that collaboration between authors and translators is of the essence to attain optimal results. Especially in the area of legislative translation with the purpose of creating translations which actually are originals, the modern technique of co-drafting is the way to go to guarantee the best product.\textsuperscript{62}

IV. CONCLUSION

Palmer’s analysis has unearthed many interesting facts to understand how the law of Louisiana has been shaped since the drafting and translation of a seminal piece of legislation which afterward, in 1870, became the monolingual English code. The translators were responsible for many of the linguistic choices that shaped the civil law in Louisiana for years to come. However, it is difficult to accept that the civil law was born with this translation as the title of the book suggests or that the civil law was “implanted”\textsuperscript{63} with this translation, as Louisiana was already “deeply rooted in the civil law tradition”\textsuperscript{64} before the enactment of the Digest in 1808. But Palmer is right in pointing that this translation “represented a consequential step in the birth of a distinct kind of civil law in Louisiana.”\textsuperscript{65} After all, Nugent and Davezac might have been the first cooks behind Louisiana’s “legal gumbo.”\textsuperscript{66}

This book was very much needed to understand the origins of codified civil law in the state of Louisiana. It is a great contribution combining legal history, comparative law, and legal translation. The view of an expert in mixed jurisdictions was key to put this translation in perspective as a “unique artifact of Louisiana’s mixed legal

\textsuperscript{62} See, e.g., Susan Šarčević, The Quest for Legislative Bilingualism and Multilingualism: Co-Drafting in Canada and Switzerland, in JURILINGUISTICS: LAW AND LANGUAGE, supra note 32, at 279-292.
\textsuperscript{63} PALMER, supra note 3, at 81.
\textsuperscript{64} Kathryn Venturatos Lorio, The Louisiana Civil Law Tradition: Archaic or Prophetic in the Twenty-First Century; 63 LA. L. REV. 4 (2002).
\textsuperscript{65} Id. at 82 (emphasis added).
\textsuperscript{66} Olivier Moréteau, Mare Nostrum as the Cauldron of Western Legal Traditions: Stirring the Broth, Making Sense of Legal Gumbo whilst Understanding Contamination, 4 J. CIV. L. STUD. 519-520 (2011).
system that mirrors the historical conditions of its day,” yet without avoiding pondering over the shortcomings of the translation. After going through the history of Nugent and Davezac and their translation, one is left with a desire for more. The legal community of Louisiana would welcome a study like this one on the translators and the story behind the translation of the Civil Code of 1825, which was also drafted in French and translated into English. Professor Palmer might want to enlighten us with a sequel, for the benefit of all of us interested in this rich mixed jurisdiction.

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67. PALMER, supra note 3, at 3.