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The General Principles of Contract Law in the “Ordonnance” on the Reform of Contract Law

Mustapha Mekki*

INTRODUCTION

Finally, the reform of contract law has taken place. After 10 years of waiting, Title III of Book III of the French Civil Code has been revised.¹ The revision was done by “Ordonnance”—legislation developed without going through Parliament.² The Ordonnance, which was published in February 2016,³ contains numerous changes to French contract law that are meant to better align the law with the economic and social realities of today.⁴ This Essay is not concerned with all of the intricacies of the reform, but rather will provide analysis of its general principles, namely “good faith” and “freedom of contract,” which are explicitly detailed in the proposal.⁵

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1. See Jean-Jacques Urvoas, *Conseil des ministres du 10 février 2016: Réforme du droit des contrats, du régime général et de la preuve d'obligations*, VIE PUBLIQUE, <http://discours.vie-publique.fr/notices/166000323.html> [<https://perma.cc/8XCD-8SEL>] (last visited Mar. 2, 2016).

2. See *id.*; 1958 CONST. art. 38 (Fr.).

3. See Urvoas, *supra* note 1.

4. See *id.*; MINISTÈRE DE LA JUSTICE, RÉPUBLIQUE FRANÇAISE, RÉFORMER LE DROIT DES CONTRATS 1 (Feb. 25, 2015), available at http://www.justice.gouv.fr/publication/j21_dp_projet_ord_reforme_contrats_2015.pdf [<https://perma.cc/QEP4-SGZS>]; Bénédicte Fauvarque-Cosson, *Towards an Important Reform of the French Civil Code*, MONTESQUIEU L. REV., Oct. 2015, at 2–3.

5. Ordonnance 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations [Ordonnance 2016-131 of February 10, 2016 on the Reform of Contract Law, and the General Scheme of Proof of Obligations] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Feb. 11, 2016, arts. 1102, 1104, at 26 (Fr.) [hereinafter Ordonnance]. In this Essay, English translations of the final Ordonnance utilize the English translation of the Draft Ordonnance for those portions of the final Ordonnance that are identical to the Draft Ordonnance. For the English language version of the Draft Ordonnance, see MINISTÈRE DE LA JUSTICE, RÉPUBLIQUE FRANÇAISE, DRAFT ORDONNANCE FOR THE REFORM OF THE LAW OF CONTRACT, THE GENERAL REGIME OF OBLIGATIONS, AND PROOF OF OBLIGATIONS arts. 1102, 1103 (J. Cartwright, B. Fauvarque-Cosson & S. Whittaker trans., 2015) [hereinafter DRAFT ORDONNANCE], available at <http://www.textes>

The general principles contained in the Ordonnance are nothing new to the civilian's conception of contract law, but the form of their presentation is innovative. Unlike in previous Civil Codes, the general principles of good faith and freedom of contract are reflected in express statutory language.⁶ Although the Ordonnance does not say that these provisions represent general principles,⁷ such a conclusion is clear from both their placement in the Ordonnance and the language of the Enabling Law of February 16, 2015.

As Article 8 of the Enabling Law of February 16, 2015 makes clear, the reform aims to, among other things, affirm the general principles of contract law (*principes généraux du droit des contrats*), such as good faith (*bonne foi*) and freedom of contract (*liberté contractuelle*).⁸ In the Ordonnance, these principles are expressly provided for by articles 1104 and 1102, respectively, which are contained in a preliminary chapter—within Section 1 of Title III—entitled “Preliminary Provisions” (*Dispositions préliminaires*).⁹ This placement is significant because it shows the relative importance of the principles, which are meant to generally apply to all of the articles that follow in Title III, Sub-title 1, concerning the sources of contractual obligations.

Although the presentation of general principles is somewhat innovative, overall, the project is quite moderate and does not present a revolution of ideas. Thus, the Ordonnance respects the advice of Portalis: “[C]autious about novelty in legislative matters is necessary because, while it is possible in a new undertaking to calculate the advantages a theory offers, it is impossible to anticipate all the drawbacks that practice alone can

.justice.gouv.fr/art_pix/Draft-Ordonnance-for-the-Reform-of-the -Civil-Codepdf.pdf [https://perma.cc/D3LE-T7TN]. For the French language version of the draft Ordonnance, see MINISTÈRE DE LA JUSTICE, RÉPUBLIQUE FRANÇAISE, PROJET D'ORDONNANCE DU PORTANT RÉFORME DU DROIT DES CONTRATS, DU RÉGIME GÉNÉRAL ET DE LA PREUVE DES OBLIGATIONS (2015), available at http://www.justice.gouv.fr/publication/j21_projet_ord_reforme_contrats_2015.pdf [https://perma.cc/M2WN-28PC]. It is important to note, however, that what was article 1103 in the Draft Ordonnance is now article 1104 in the final Ordonnance. See *id.*

6. Ordonnance, *supra* note 5, arts. 1102, 1104.

7. *Id.*

8. Loi 2015-177 du 16 février 2015 relative à la modernisation et à la simplification du droit et des procédures dans les domaines de la justice et des affaires intérieures [Law 2015-177 of February 16, 2015 on the Modernization and Simplification of the Law and Procedures in the Areas of Justice and Home Affairs], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Feb. 16, 2015, p. 2961 (Fr.) [hereinafter Enabling Law of February 16, 2015]; see also Augustin Aynès, *Dispositions Préliminaires*, 118 JOURNAL DE SOCIÉTÉS [J. SOCIÉTÉS] 12 (2014) (Fr.).

9. Ordonnance, *supra* note 5, arts. 1102, 1104.

reveal.”¹⁰ This caution, however, does not hinder the project’s attempts to balance economic efficiency and contractual justice. One can see this point by studying the principle of freedom of contract and the principle of good faith as presented in the proposal.¹¹

These two principles are the pillars of the contractual temple, but context is necessary to fully appreciate and understand them. As a result, this Essay will proceed in two stages, as is customary for French lawyers. First, this Essay will discuss the genesis of the general principles, explaining their origin and relevance.¹² Second, this Essay will examine the content of these general principles, explaining the advantages of the articles as written as well as how to improve them.¹³

I. GENESIS OF THE GENERAL PRINCIPLES OF CONTRACT LAW

The introduction of general principles in the French Civil Code is not really a surprise, because the spirit of these principles has long existed in positive law. Historically, however, the consecration of these principles has not been explicit. Whereas some scholars support a clearer statement of good faith and freedom of contract,¹⁴ other scholars are opposed to the explicit consecration of general principles in the Civil Code,¹⁵ making some of the reform provisions controversial.¹⁶ To fully comprehend this controversy, one must understand both the emergence of the general principles of contract law and their relevance.

A. Emergence of General Principles of Contract Law

The emergence of the general principles of French contract law occurred in two respects. First, the development occurred outside of the French legal system, within other civil law jurisdictions and international projects. Next, the development took place within the French legal system. Consequently, this Section will consider both the development beyond French law and the development by French law.

10. Alain Levasseur, *Code Napoleon or Code Portalis?*, 43 TUL. L. REV. 762, 767 (1969).

11. See Philippe Dupichot, *Les principes directeurs du droit français des contrats*, REVUE DES CONTRATS [RDC], Jan. 2013, at 387–99.

12. See *infra* Part I.

13. See *infra* Part II.

14. Bénédicte Fauvarque-Cosson & Denis Mazeaud, *Terminologie contractuelle commune*, DROIT COMPARE ET EUROPÉEN, Feb. 2008, at 272.

15. FRANÇOIS TERRÉ, PHILIPPE SIMLER & YVES LEQUETTE, *DROIT CIVIL: LES OBLIGATIONS* 454 (10th ed. 2009).

16. See *infra* Part I.B.1.

1. Beyond French Law

The principles of freedom of contract and good faith expressed in the *Ordonnance* are not necessarily innovative. There are many foreign civilian codes providing for these general principles. Those codes, however, do not apply the principles uniformly. On the one hand, some codes apply these principles to all subjective rights. Examples include the treatment of good faith in the Swiss¹⁷ and Spanish¹⁸ Civil Codes. On the other hand, some codes apply these principles to contract law only. Examples include the treatment of good faith in the Quebec Civil Code¹⁹ and the treatment of freedom of contract in the Italian²⁰ and Spanish²¹ Civil Codes. Still other jurisdictions, including France under its pre-revision Civil Code, hold the general principles of good faith and freedom of contract to be implicit.²²

In contrast with the French Civil Code, the private (scholars) codes and European projects enshrine these tenets as guidelines or general principles. The general principles are understandably entrenched in scholar's codes, because the formulation of these principles is very useful for a process of harmonization between legal systems and the principles can be identified by induction of the variety of rules of contract law. Take for example the first Principles of European Contract Law, which begin with "general provisions."²³ In the general provisions, a principle of freedom of contract,²⁴ a duty of good faith,²⁵ and a duty of cooperation are stated.²⁶ A second example can be found in the UNIDROIT Principles, which also begins with "general provisions."²⁷ In these general provisions,

17. SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB], CODE CIVIL [CC], CODICE CIVILE [CC] [CIVIL CODE] Dec. 10, 1907, SR 210, RS 210, art. 2 (Switz.).

18. CÓDIGO CIVIL [C.C.] art. 7 (Spain).

19. Civil Code of Québec, S.Q. 1991, c. 64, art. 1375 (Can.).

20. CODICE CIVILE [C.C.] art. 1322 (It.).

21. C.C. art. 1255 (Spain).

22. See CODE CIVIL [C. CIV.] art. 1123, 1134 (Fr.) (2015). For related provisions under Argentine, Chilean and Colombian law, see M. Mekki, *Good Faith and Fair Dealing in the Common Frame of Reference*, 4 EUR. REV. CONTRACT L. 338 (2008).

23. COMM'N ON EUR. CONTRACT LAW, PRINCIPLES OF EUROPEAN CONTRACT LAW (Ole Lando & Hugh Beale eds., 2000) (EC).

24. *Id.* art. 1:102.

25. *Id.* art. 1:201.

26. *Id.* art. 1:202.

27. INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW [UNIDROIT], UNIDROIT PRINCIPLES 8 (2010), available at <http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf> [<https://perma.cc/N6TH-77XD>].

there is stated a principle of freedom of contract,²⁸ a principle of binding force of contracts,²⁹ a principle of good faith,³⁰ and a principle of prohibiting inconsistent actions to the detriment of the other party.³¹ There are many examples of this trend in other contexts as well.³²

Although the enshrinement of general principles in the different European projects or private (scholars) codes is meant to effectuate a policy of harmonization between diverse legal systems, such formalization may have a place in French contract law as a standalone legal system. In fact, this idea is not without precedent.³³

2. By French Law

The Ordonnance's current language and its inclusion of explicit statements of the general principles of good faith and freedom of contract were strongly inspired by some earlier drafts.³⁴ For example, Francois Terré's draft offers introductory provisions in sections 3 through 6, which provide for the freedom of contract, limitations on freedom of contract, good faith, and the prohibition of contradiction.³⁵ The group, chaired by François Terré, explained that these principles "allow [the Legislature] to broadcast in the clarity and transparency, the essence of contract law and spirit that animates it."³⁶

The Chancellery was seduced by this idea in the first draft of May 2008.³⁷ This first draft contained a Chapter II, entitled "Guiding

28. *Id.* art. 1.1.

29. *Id.* art. 1.3.

30. *Id.* art. 1.7.

31. *Id.* art. 1.8.

32. *See, e.g.*, Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, PARL. EUR. DOC. (SEC 2011/0284) (EC).

33. *See infra* Part I.A.2.

34. *See* Circulaire du 30 mai 1996 relative à la codification des textes législatifs et réglementaires [Circular of May 30, 1996 on the Codification of Legislative and Regulatory Texts], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 5, 1996, art. 2.2.3, at 8263 ("Les auteurs d'un code s'efforceront de regrouper en tête du code des principes qui gouvernent la législation du domaine.").

35. POUR UNE RÉFORME DU DROIT DES CONTRATS (François Terré dir., 2009) [hereinafter TERRÉ PROJECT].

36. Carole Aubert de Vincelles, *Les principes généraux relatifs au droit des contrats*, in POUR UNE RÉFORME DU DROIT DES CONTRATS 117 (François Terré ed., 2009).

37. MINISTÈRE DE LA JUSTICE, PROJET DE RÉFORME DU DROIT DES CONTRATS (2008) [hereinafter 2008 PROJET].

Principles,” which contained articles on the principle of freedom of contract, the binding force of the contract, and good faith.³⁸ The provisions were also inspired by the guiding principles of the civil trial contained in preliminary articles of the Civil Procedure Code.³⁹ Given the resistance of some authors (for example, Ghози, Lequette, and Leveneур),⁴⁰ however, the project in February 2009 had removed any reference to the “guiding principles” while preserving in “introductory provisions” article 5 on the freedom of contract and article 6 on good faith.⁴¹

Ultimately, a moderate position for the Ordonnance was chosen. On the one hand, while the enabling law speaks of “general principles,”⁴² the Ordonnance does not.⁴³ On the other hand, the general principles of good faith and freedom of contract are clearly defined in Chapter I on “Preliminary Provisions.”⁴⁴ On this point, the Ordonnance is the exact replica of the February 2009 project.⁴⁵ Nevertheless, some may question the wisdom of including explicit general provisions in that chapter.

B. The Relevance of the General Principles of Contract Law

Although one may be convinced of the relevance of the general principles of contract law, it is nevertheless important to proceed in an intellectually honest manner. Consequently, before discussing the strength of these principles, it is important to expose the weaknesses observed by some scholars.

38. *Id.* arts. 15–18.

39. CODE DE PROCÉDURE CIVILE [C.P.C.] arts. 1–24 (Fr.); *see also* HENRY MOTULSKY, ÉCRITS: ÉTUDES ET NOTES DE PROCÉDURE CIVILE 275 (2d ed. 2010).

40. Alain Ghози & Yves Lequette, *La réforme du droit des contrats: brèves observations sur le projet de la chancellerie*, REVUE DES CONTRATS [RDC], Dec. 2008, 2609; Rémy Cabrillac, *Le projet de réforme du droit des contrats: Premières impressions*, JURISCLASSEUR PÉRIODIQUE [J.C.P.], Oct. 2008, at 190; Laurent Leveneур, *Projet de la Chancellerie de réforme du droit des contrats: à améliorer*, CONTRATS CONCURRENCE CONSOMMATION [C.C.C.], Nov. 2008, at 10.

41. MINISTÈRE DE LA JUSTICE, PROJET DE RÉFORME DU DROIT DES CONTRATS (2009) [hereinafter 2009 PROJET].

42. *See* Enabling Law of February 16, 2015, *supra* note 8.

43. Ordonnance, *supra* note 5, arts. 1102, 1104.

44. *Id.*

45. 2009 PROJET, *supra* note 41.

1. The Weaknesses of the General Principles of Contract Law

The introduction of the principles of good faith and freedom of contract in the Civil Code has sparked sharp criticism. This criticism usually focuses on one of two causes of concern: exogenous causes or endogenous causes.

a. Exogenous Causes

The first line of criticism focuses on exogenous causes of concern, which are those causes outside of the principles themselves. For these critics, the Civil Code is not meant to be a doctrinal work that requires the definition of general principles.⁴⁶ Instead, these critics suggest that it is the role of the judge, and not the legislator, to articulate the scope and nature of the general principles that transcend the law.⁴⁷ In the words of Carbonnier, the Civil Code is a “precious jewel,”⁴⁸ which cannot contain everything and anything.

This line of criticism dates back to the Civil Code of 1804, which did not incorporate a preliminary paper entitled “On the Law and the General Statutes” that was contained in an earlier draft by Portalis.⁴⁹ This section was designed to be partially empiricist and partially jusnaturalist and, as a result, it was criticized for being too doctrinal. As with the Ordonnance today, many felt the general principles should not be explicitly stated in the Civil Code and the legislature chose to scrap the section.

b. Endogenous Causes

The second line of criticism, which is the most popular today, focuses on endogenous causes of concern. Under this line of criticism, it is the principles themselves that are the subject of denunciation. Several disadvantages of explicit general principles are highlighted in this regard. The first disadvantage is that the principles are expressed in general and abstract terms, which gives too much power to the judge.⁵⁰ The second disadvantage is that the principles are naturally contentious factors,⁵¹

46. See JEAN-LOUIS BERGEL, *THÉORIE GÉNÉRALE DU DROIT* 92 (4th ed. 2003).

47. *Id.*

48. Yves Lequette, *Recodification civile et prolifération des sources internationales*, in *LE CODE CIVIL, 1804-2004: LIVRE DU BICENTENAIRE* 171 (2004).

49. 2 P. A. FENET, *RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL* 3 (1836).

50. Ghozi & Lequette, *supra* note 40, no. 3.

51. *Id.* no. 5.

which encourage bickering and division.⁵² The third disadvantage is that the principles may give rise to a “*super-jus commune*,”⁵³ allowing the principles to turn away from the set of rules governing the contract.

Although the above causes of concern are valid, they are not nullifying. These weaknesses must be considered in relation to the strengths of the general principles, which tip the scale in favor of inclusion.

2. *The Strengths of the General Principles of Contract Law*

Although some scholars focus on the above weaknesses of the general principles of contract law, these principles also have strengths. The strengths of the general principles of contract law derive from their functions. The general principles of contract law have three main functions: a technical function, an axiological function, and an educational function.

a. Technical Function

The first function of the general principles of contract law is the technical function. The technical function can be seen as two complementary functions: a normative function and a logical function. On the normative level, the generality of the principles⁵⁴ benefits judges because the idea serves as an invaluable guide to interpretation,⁵⁵ which the judge may use to correct or supplement the law to suit particular circumstances. The judge who is equipped with a general principle may also act to complete the law when the law is silent.⁵⁶ Some may be concerned that such principles give the judge too much flexibility, but this

52. Dupichot, *supra* note 11, at 398–99; see also Yves-Marie Laithier, *Les principes directeurs du droit des contrats en droit comparé*, REVUE DES CONTRATS [RDC], Jan. 2013, at 410–29 & n.151 (discussing *force d'expansion*).

53. Pascal Ancel et al., *Points de vue convergents sur le projet de réforme du droit des contrats*, JURISCLASSEUR PÉRIODIQUE [J.C.P.], Nov. 26, 2008, at 20 (Author's translation).

54. Dominique Bureau, *L'ambivalence des principes généraux du droit devant la Cour de cassation*, in LA COUR DE CASSATION ET L'ÉLABORATION DU DROIT 181, 193 (Nicolas Molfessis dir., 2004).

55. PASCALE DEUMIER, INTRODUCTION GÉNÉRALE AU DROIT 23 (2d ed. 2013).

56. See, e.g., Cour de cassation [Cass.] [supreme court for judicial matters] com., Nov. 3, 1992, Bull. civ. IV, No. 338, at 241 (Fr.).

concern is empirically baseless, as an analysis of positive law confirms that there is no appreciable excess on the part of judges.⁵⁷

In addition to the normative function, the technical function can be evaluated on a logical level. Because French law is structured around a distinction between principles and exceptions, it is important to lay down the general principles to proceed to a rationalization of contract law. This rationalization is especially important because positive contract law is not limited to the Civil Code, as business contracts, consumer contracts, and employment contracts, to name a few examples, are governed also by the Commercial Code, Consumer Code, and the Labor Code. Thus, the Civil Code provides for the general law, a referent, which must include unifying principles.

b. Axiological Function

The second function of the general principles of contract law is the axiological or political function,⁵⁸ which suggests that the general principles are the embodiment of values that transcend the legal system.⁵⁹ In this regard, the general principles are, in the words of Professor Philippe Dupichot, the “cement of law”,⁶⁰ they constitute the “quintessence” of contract law.⁶¹ By formalizing these principles,⁶² the legislator expresses the contract’s essence.⁶³

c. Educational Function

The third function of the general principles of contract law is the educational function, which suggests that the general principles provide an influential model for other jurisdictions.⁶⁴ This model is an informative backdrop of contract law that—to distinguish the technical function—has effect outside national borders. A focus on the educational function is

57. Cf. Dominique Fenouillet, *Regards sur un projet en quête de nouveaux équilibres: présentation des dispositions du projet de réforme du droit des contrats relatives à la formation et la validité du contrat*, REVUE DES CONTRATS [RDC], Jan. 2009, at 279.

58. Dupichot, *supra* note 11, at 396.

59. See DEUMIER, *supra* note 55, at 23.

60. Dupichot, *supra* note 11, at 396 (Author’s translation).

61. Ancel et al., *supra* note 53, at 20.

62. See generally Muriel Fabre-Magnan, *Avantages ou inconvénients des principes directeurs?*, REVUE DES CONTRATS [RDC], Oct. 2012, at 1430–41.

63. See Dupichot, *supra* note 11, at 396–97.

64. *Id.* at 396.

strategic,⁶⁵ because the principles allow better circulation of the French model in an increasingly competitive legal environment.⁶⁶

Although the educational function is strategic and, along with the other advantages of general principles, supports the inclusion of general principles in the Civil Code, it is beyond the scope of this Essay to discuss the value of including more general principles than have been already stated, namely freedom of contract and good faith. With the justification for these general principles in mind, this Essay will now turn to the exegesis of the principles.

II. THE EXEGESIS OF THE GENERAL PRINCIPLES OF CONTRACT LAW

Although freedom of contract and good faith have long stood as implicit general principles of contract law under the civil law tradition—both in France and beyond⁶⁷—the explicit statement of those general principles in the Ordonnance has not been without controversy. As a result, the Ordonnance is a compromise work. This compromise is clear from the language of articles 1102 and 1104, which embody the rules of freedom of contract and good faith, respectively.

A. A Statement of “Controlled” Freedom of Contract

Article 1102 of the Ordonnance lays down the general principle of freedom of contract in two parts.⁶⁸ The first part provides for a broad statement of the principle: “Everyone is free to contract or not to contract, to choose the person with whom to contract, and to determine the content and form of the contract, within the limits imposed by legislation.”⁶⁹ The second part provides for limitations on that freedom, namely rules of public order.⁷⁰ These limitations suggest a compromise position that supports an express freedom of contract only to the extent that it is “controlled.”

1. General Principle of Freedom of Contract

The first part of article 1102 provides a formal integration of the principle of freedom of contract into the French Civil Code.⁷¹ By formally

65. *Id.* at 396; *see also* Fabre-Magnan, *supra* note 62, at 1430–41.

66. *See generally* Laithier, *supra* note 53, at 410–30.

67. *See supra* Part I.

68. Ordonnance, *supra* note 5, art. 1102.

69. *Id.*

70. *Id.*

71. *See id.*

integrating a principle of freedom of contract, the aim of the legislature is to show its commitment to a neo-liberal concept of the contract, which holds out freedom of contract as a first principle⁷² or, in the words of Laurent Leveneur, a “basic principle.”⁷³ But one may ask whether this symbolic reiteration of the legislature’s commitment is useful.

The reiteration of the legislature’s commitment to the principle of freedom of contract in the Civil Code may be seen as superfluous. Indeed, the principle of freedom of contract is sacred today outside the Civil Code. For example, the Constitutional Council has described, as recently as 2013, the freedom of contract as a freedom of constitutional value.⁷⁴

Yet enshrining the principle of freedom of contract in the Civil Code, and thereby giving the principle legislative value, may add to the constitutional value that the principle already enjoys. As the previous Part makes clear, such enshrinement has axiological and educational functions.⁷⁵ These functions justify the formal presence of freedom of contract in the opening of Title III. With this justification in mind, it is appropriate to turn to the content of the formal presentation of the freedom of contract.

The formal presentation of the freedom of contract outlines four specific freedoms: (1) the freedom “to contract or not to contract”; (2) the freedom “to choose the person with whom to contract”; (3) the freedom to determine the “content” of the contract; and (4) the freedom to determine the “form” of the contract.⁷⁶ This statement is more nuanced than statements of the freedom of contract in other jurisdictions. For example, many jurisdictions define freedom of contract only in terms of the freedom to contract and the freedom to determine the contract’s content.⁷⁷ In addition, some jurisdictions may have an express statement of the freedom of form, but that statement is usually separate from the statements of the freedom to contract and the freedom to determine the contract’s content.⁷⁸

72. See Cécile Pérès, *La liberté contractuelle et l’ordre public dans le projet de réforme du droit des contrats de la Chancellerie*, RECUEIL DALLOZ, Feb. 2009, at 381, 386.

73. L. Leveneur, *La liberté contractuelle en droit privé*, L’ACTUALITÉ JURIDIQUE DROIT ADMINISTRATIF [AJDA], 1998, at 676 (Author’s translation).

74. See Conseil constitutionnel [CC] [Constitutional Court] decision No. 2013-672DC, June 13, 2013, J.O. 9958 (Fr.).

75. See *supra* Part I.B.2.

76. Ordonnance, *supra* note 5, art. 1102.

77. See, e.g., Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, PARL. EUR. DOC. (SEC 2011/0284), art. 1 (EC).

78. See, e.g., *id.* art. 6.

It is important to note, however, that the formulation in article 1102 is rooted in earlier proposals.

The freedoms articulated in article 1102 must be considered in light of legal limitations, as the article itself makes clear.⁷⁹ These limitations derive from other areas of the law and restrict a party's ability to employ article 1102's enumerated freedoms. For one, the freedom to contract is limited by the proliferation of forced contracts, such as those concerning insurance and the environment.⁸⁰ Second, the freedom to choose the person with whom to contract is limited by preemptive rights of public interest or private interest, such as the principle of non-discrimination.⁸¹ Third, the freedom to determine the content of the contract is limited by the proliferation of imperative statutes, such as those concerning standard contract requirements for the sale or lease of real estate.⁸² Finally, the freedom to determine the form of the contract is limited by imperative statutes that dictate a specific form.⁸³

Although these limitations are significant, they do not completely call into question the principle of contractual freedom that is articulated in article 1102. It may be more appropriate, however, to reword the article to reflect the power of such limitations. Of course, regardless of such a change, article 1102 provides a statement of limitations quite distinct from the limitations discussed above.

2. *Limitations on the Freedom of Contract*

In addition to limits imposed by other areas of the law, the second paragraph of article 1102 makes clear that the principle of freedom of contract is limited in another important way. The principle of freedom of contract is limited by "rules of public order" (*règles qui intéressent l'ordre public*).⁸⁴ This limitation is expressed in purposeful and careful language, which should be considered with precision.

The language of article 1102 speaks of "rules" of public order as limitations on the freedom of contract. This word choice is appropriate—

79. Ordonnance, *supra* note 5, art. 1102.

80. See Carine Franc & Aurélie Pierre, *Compulsory Private Complementary Health Insurance Offered by Employers in France: Implications and Current Debate*, 119 HEALTH POL'Y 111, 111–16 (2015).

81. See generally CHRISTOPHER MCCRUDDEN & SACHA PRECHAL, *THE CONCEPTS OF EQUALITY AND NON-DISCRIMINATION IN EUROPE: A PRACTICAL APPROACH* (2009).

82. See, e.g., C. CIV. art. 1582 (Fr.).

83. See, e.g., Ordonnance, *supra* note 5, art. 1171.

84. *Id.* art. 1102.

and preferable to the term “laws”⁸⁵—because it recognizes the multidimensional nature of the term “public order,” which includes, among other things, legal and judicial dimensions.

This recognition is consistent with the jurisprudence.⁸⁶ The judge may acknowledge a rule of public order in two cases. In the first case, the judge may interpret a statute as a rule of public order that cannot be altered by contract.⁸⁷ This method presents a legal rule of public order.⁸⁸ In the second case, the judge may create a rule of public order without any statutory or textual basis for that interpretation.⁸⁹ This method presents a strictly judicial or virtual rule of public order.⁹⁰

Public order may also take on a moral dimension, yet—unlike the François Terré Projet and the 2008 and 2009 projets of the Chancery⁹¹—no reference is made to “bonnes mœurs” (*boni mores*) in the Ordonnance. Although some may see this omission as significant, technically it is not of much importance, because public order can be defined functionally as a limitation on individual wills.⁹² Such a limitation may be imposed on moral grounds, creating a humanistic public order and protecting the dignity of the human person. Symbolically, however, the formal disappearance of morality marks the decline of morality in French contract law. Thus, this formula could still be improved.

Two other considerations are notable when contemplating the improvement of the provision of freedom of contract. First, the article should speak of “violation” of rules of public order rather than “derogation,” because a derogation is not necessarily unlawful.⁹³ Second, the principle should not be included in the preliminary section of the Civil Code (under article 6), because rules of public order are most relevant in the context of juridical acts.⁹⁴ In these circumstances, it seems appropriate that this limit is at the beginning of Title III of Book III of the Civil Code, along with the provision concerning the principle of good faith.

85. Pérès, *supra* note 72, at 383–84.

86. *See, e.g.*, Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Oct. 29, 2014, Bull. civ. I, No. 178 (Fr.); Soraya Amrani-Mekki & Mustapha Mekki, *Droit des contrats*, RECUEIL DALLOZ, Mar. 2015, at 529, 535.

87. GEORGE A. BERMAN & ETIENNE PICARD, INTRODUCTION TO FRENCH LAW 218–19 (2008).

88. *Id.*

89. *Id.*

90. *Id.*

91. TERRÉ PROJET, *supra* note 35; 2008 PROJET, *supra* note 37; 2009 PROJET, *supra* note 41.

92. *See* Pérès, *supra* note 72, at 383.

93. *Id.* at 386–87.

94. *Id.*

B. A Minimalist Principle of Good Faith

Article 1104 lays down the principle of good faith. In doing so, the Ordonnance opts for a minimalist formula: “Contracts must be negotiated, formed and performed in good faith.”⁹⁵ Consequently, this formula requires some explanation. As this Section will show, although it is possible to outline the essence of this formulation of the principle of good faith, the question remains whether that principle is silent on critical issues.

1. The Essence of Article 1104

In essence, the principle of good faith contemplates the honest behavior of the contractor. This is a general standard of conduct that governs a party’s actions in the negotiation, formation, and performance of obligations. Although the Ordonnance makes this scope of the principle of good faith explicit, it is still a minimalist formula.

As a general principle, the formulation of good faith in article 1104 is the basis for a whole series of technical rules in the future Civil Code. The rules derived from the principle of good faith have two main goals. The first is to ensure the informed consent of the parties. Several rules are designed to ensure informed consent, such as the pre-contractual information obligation,⁹⁶ the willful concealment,⁹⁷ or the failure of a condition caused by the debtor.⁹⁸ The second is to maintain a balanced contract. Rules aimed at maintaining a balanced contract include the fight against unfair terms⁹⁹ and, implicitly, the renegotiation in case of imprevision.¹⁰⁰ Good faith is implicit in these rules, and thus, the somewhat dry formula of article 1104 is revitalized by these different applications. However, Article 1104 is silent on certain aspects of good faith that could use some clarification.

2. The Silences of Article 1104

Article 1104 is silent on a number of important aspects of good faith. This silence raises questions concerning the nature of the principle and its application, as well as other principles that have been left out of the express language of the Ordonnance.

95. Ordonnance, *supra* note 5, art. 1104.

96. *Id.* art. 1112.

97. *Id.* art. 1138.

98. *Id.* art. 1304–03.

99. *Id.* art. 1171.

100. *Id.* art. 1195.

a. Obligation or Duty?

The first question raised by article 1104 is whether good faith is an obligation or a duty. This distinction is important because the interpretation of good faith as a duty, in the broader sense of the term, necessarily implies that persons must act in good faith even though they may not be technically bound by a contract. In contrast, the interpretation of good faith as an obligation, in the narrower sense of the term, suggests that parties only have to act in good faith in regards to an underlying conventional obligation, and thus, the presence of a contractual relationship is necessary.¹⁰¹

Although the Ordonnance does not make clear which interpretation is correct, a broader interpretation of good faith as a duty is the best interpretation for two reasons. First, the language of article 1104 suggests a broad interpretation of the requirement of good faith, because the general principle applies to the negotiation, formation, and performance of a contract.¹⁰² As a result, there will be times when the duty of good faith precedes the formation of the contract, and, as a result, the requirement of good faith cannot be based on the contractual relationship. Second, jurisprudence suggests other times that the duty of good faith will apply despite the fact that there is no enforceable contract.¹⁰³ Thus, the best interpretation of the Ordonnance's formulation of good faith is that it creates a duty that precedes, and perhaps outlives, a valid contract.

b. A "Contractual Prerogative" Versus the "Very Substance of the Rights and Obligations"

Article 1104 also raises a question regarding the sanctions for breach of good faith. The French Court of Cassation inserted uncertainty when it recognized a distinction between the exercise of discretionary rights specifically provided for in a contract (i.e., contractual prerogative) and the substance of the rights and obligations in a contract.¹⁰⁴ This distinction is difficult to understand in practice. The Court considers that when there is a breach of good faith, a court is only allowed to sanction the abusive

101. See Cour de cassation [Cass.] [supreme court for judicial matters] 3e civ., Sept. 14, 2005, Bull. civ. III, No. 166, at 154 (Fr.).

102. Ordonnance, *supra* note 5, arts. 1104.

103. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Mar. 15, 2005, Bull. civ. I, No. 103, at p. 1462 (Fr.).

104. See *Communiqué relatif à l'arrêt n 966 du 10 juillet 2007*, COUR DE CASSATION, https://www.courdecassation.fr/jurisprudence_2/chambre_commerciale_574/arret_n_10678.html [<https://perma.cc/P9RT-F4K7>] (last visited Feb. 3, 2016).

exercise of a contractual prerogative.¹⁰⁵ In the event of a breach of good faith, however, a judge may not impose a sanction that deprives the defaulting party of the substance of his or her rights and obligations. This limitation on the ability of a judge to sanction a breach of good faith decreases the power of the judiciary.

In practice, however, the distinction between contractual prerogatives and substance of rights and obligations is unclear. Ideally, the Ordonnance would clarify this confusion with explicit language concerning the application of the principle of good faith. Like other projects that have tried and failed, however, the Ordonnance does not make such a clarification.¹⁰⁶ This ambiguity not only leaves the treatment of good faith unresolved, but also allows a related problem to persist.

Although this scenario may not be ideal for practitioners valuing certainty or scholars valuing intellectual purity, it is perhaps ideal from a practical standpoint. If sanctions were detailed in the Civil Code, they would not likely be able to account for all the variables and situations that may arise in a given case. Thus, the Ordonnance's unrestricted approach may provide needed flexibility for the judge to cater each ruling to the unique circumstances of the case. This flexibility is especially useful due to the fact that other general principles of contract related to the principle of good faith have to be left out of that principle's formulation in the Ordonnance.

c. Principle of Cooperation

The third question raised by article 1104 is whether the principle of good faith incorporates the principle of cooperation. The principle of cooperation refers to the idea that good faith cannot be reduced to the absence of bad faith because good faith presupposes active conduct that concerns, at least in part, the interests of the other party. Although the duty of cooperation can be seen as relevant to all contracts, it is especially important when the parties are pursuing a common interest or goal. These

105. Cour de cassation [Cass.] [supreme court for judicial matters] com., July 10, 2007, Bull. civ. IV, No. 164 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] 3e civ., Dec. 9, 2009, Bull. civ. III, No. 275 (Fr.).

106. Ordonnance, *supra* note 5, arts. 1104.

contracts are sometimes called “contracts-organization,”¹⁰⁷ “relational contracts,”¹⁰⁸ “alliance agreements,”¹⁰⁹ or “contracts-cooperation.”¹¹⁰

The typical formulation of the duty of cooperation shows that it is not typically generalized to all forms of contracts but, instead, is limited to the ones discussed above. For example, in Common Contractual Principles AHC-SLC article 0:303, the “duty to cooperate” is formulated as follows: “The parties are bound to cooperate with each other when necessary for the performance of their contract.”¹¹¹ The phrase “when necessary” confirms that this duty cannot be generalized and can be implemented only in certain categories of contracts. Likewise, article 5.1.3 of the UNIDROIT Principles states: “Each party shall cooperate with the other party when such co-operation may reasonably be expected for the performance of that party’s obligations.”¹¹² Again, that duty arises only “when such co-operation may reasonably be expected.”¹¹³

This limited application of the principle of cooperation helps to explain why the principle was not consecrated in the Ordonnance. This reason is technical: the duty of collaboration does not apply to all contracts. An additional reason for not explicitly providing for the principle is political: the “joker”¹¹⁴ of good faith has the potential to act as a “Trojan horse” in the contract, revealing its effects only after an event occurs. The principle of cooperation may act as a “Trojan Horse” because it lends much power and discretion to judges. Ultimately, a consecration of the principle of cooperation is likely not necessary because it is implied in the principle of good faith when circumstances demand it.

107. Paul Didier, *Brèves notes sur le contrat-organisation*, in *L’AVENIR DU DROIT: MÉLANGES EN HOMMAGE À FRANCOIS TERRE* 635–42 (1999) (Author’s translation).

108. IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* (1980). For an analysis of the relational theory of contract, see OLIVIER E. WILLIAMSON, *LES INSTITUTIONS DE L’ÉCONOMIE* (Michel Ghertman dir., 1994).

109. JEAN-FRANÇOIS HAMELIN, *LE CONTRAT-ALLIANCE* (2012).

110. SUZANNE LEQUETTE, *LE CONTRAT-COOPÉRATION* (2012).

111. JEAN-BAPTISTE RACINE ET AL., *EUROPEAN CONTRACT LAW: MATERIALS FOR A COMMON FRAME OF REFERENCE* art. 0:303, at 553 (Bénédicte Fauvarque-Cosson & Denis Mazeaud eds., 2008).

112. UNIDROIT, *supra* note 27, art. 5.1.3.

113. *Id.*

114. Ghozi & Lequette, *supra* note 40, no. 7.

d. Principle of Coherence

The fourth question raised by article 1104 is whether the principle of good faith incorporates the principle of coherence. Under this principle, if a party has caused another to reasonably rely on its representations, that party may not act inconsistently with those representations if doing so would cause a detriment to the other party.¹¹⁵ This consistency requirement is sometimes established by the French Court of Cassation under the current Civil Code article 1134 al. 3, which addresses good faith,¹¹⁶ and has also been expressed in earlier drafts¹¹⁷ and scholar's codes.¹¹⁸ It is important to note, however, that some formulations of the principle of coherence include express limitations on the extent that another party may rely on certain types of representations, such as silence or inaction.¹¹⁹

Again, the question arises: Is the formalization of the principle of coherence within the Civil Code ideal? For the same political and technical reasons discussed above, it is understandable that the legislature did not contemplate its integration. The principle of good faith, alone, may suffice to impart the principle of coherence, as jurisprudence concerning the early version of the Civil Code suggests. A strictly categorical approach to this principle may not be ideal, however, because the principle of coherence can sometimes be detached from the concept of loyalty; the purpose of the principle of coherence is not to punish dishonest behavior because one can breach the duty of coherence without bad faith.¹²⁰ In this case, good faith would not be a suitable foundation, and a distinct principle of coherence would be welcomed.

CONCLUSION

In conclusion, the recent reform to the French Civil Code has taken a historic step by consecrating two general principles of contract law: freedom of contract and good faith.¹²¹ Although the principle of freedom of contract is strictly controlled and the principle of good faith receives a minimalist formula, the meaning, value, and scope of these provisions are

115. See, e.g., UNIDROIT, *supra* note 27, art. 1.8.

116. See also DIMITRI HOUTCIEFF, *LE PRINCIPE DE COHÉRENCE EN DROIT PRIVÉ DES CONTRATS* (2000).

117. TERRÉ PROJECT, *supra* note 35, art. 6.

118. See, e.g., UNIDROIT, *supra* note 27, art. 1.8.

119. See, e.g., TERRÉ PROJECT, *supra* note 35, art. 6.

120. See, e.g., Cour de cassation [Cass.] [supreme court for judicial matters] 3e viv., Jan. 28, 2009, Bull. civ. III, No. 22 (Fr.).

121. Ordonnance, *supra* note 5, arts. 1102, 1104.

not set in stone and will ultimately vary according to interpretation. As French law will always be a combination of law and jurisprudence, so too will the optimistic maxim of Christian faith resonate: “[F]or the letter kills, but the Spirit gives life.”¹²²

122. 2 *Corinthians* 3:6 (New King James).

