



JAMES GORDLEY

 <https://orcid.org/0000-0001-7474-625X>

Tulane Law School

The Betrayal of the French Civil Code: A Tragedy in Three Acts

Abstract

French jurists have thought that their Civil Code expresses an individualism characteristic of the ideals of the French Revolution and the principles of liberalism. Property was regarded as a right of the owner that was unlimited in principle. Contract was defined in terms of the will of the parties to contract on whatever terms they chose. The drafters of the Code, however, were among the last adherents of an older natural law tradition in which the rights of an owner were limited by the purposes for which property rights were created, and the terms of a contract must be just. This article describes the drafter's debt to that tradition and how it was ignored by jurists in the 19th century.

Keywords: French Civil Code, lésion, injury, cause, liberalism, abuse of rights

Słowa kluczowe: Kodeks Napoleona, krzywda, przyczyna zobowiązania, liberalizm, nadużycie prawa

French jurists have thought that their Civil Code was the expression of an individualistic conception of liberty that was born of the French Revolution and matured into 19th century liberalism – or as some say, bourgeois liberalism. This individualism is shown *par excellence* in its treatment of contract and property. Contract was defined in terms of the will of the parties who could contract on whatever terms they chose. Property meant the unqualified right of an owner to do as he wishes with what he owns. That, supposedly, is the teaching of the Code.

As we will see, this individualistic conception of contract and property rights was not that of the Code or its drafters. It was read into the Code by 19th century jurists. The drafters preserved the work of earlier jurists who believed that the terms of a contract must be just, and that the rights of an owner were limited by the purposes for which private property was established. These earlier jurists had also recognized that contracts are entered into by the will of the parties and that an owner can use his rights as he chooses. The innovation of the 19th century jurists was not to introduce those ideas. It was to

dispense with earlier ones concerning the duty to contract on fair terms the limitations of an owner's rights.

Without those ideas, the freedom of contract and the rights of a property owner became conceptually unlimited. No doubt, 19th century liberals approved. Political and philosophical liberalism place a high value on liberty. But the 19th century jurists did not arrive at their conceptions of contract and property because they were liberals. Some of them were, and some of them were not. The jurists defined contract and property as they did because they had lost the ideas that would enable them to define them differently.

Since the 20th century, the 19th century jurists' conception of contract and property have been regarded as the product of 19th century liberalism. Liberalism has been criticized for neglecting the harm that can be done by private individuals exercising their rights. The strong can exploit the weak, and owners can use their rights to the detriment of others. Critics concluded that the rights of individuals should be restricted in order to promote the social good. The same criticism was made of 19th century conceptions of contract and property. If the freedom of contract is conceptually unlimited, a stronger party can exploit a weaker one. If the rights of an owner are conceptually unlimited, he can exercise them to injure another. The solution seemed to be the same: to restrict these rights to promote the social good.

Paradoxically, this solution preserved the 19th century conception of how far the freedom of contract and the right to property extend. Until the law restricts their rights, the parties can contract on whatever terms they choose, and the owner can use his property however he likes. In contrast, for the pre-19th century jurists, a contracting party did not have the freedom to drive an unfair bargain. An owner's rights were limited by the purposes for which property was instituted. He was not exercising his rights if he overstepped those limits and injured another. An owner who did so, like a party who drove an unfair bargain, was acting unjustly.

To prevent an injustice is, of course, good for society. But the injustice is done to the person who was injured when the other contracting party drives an unjust bargain or oversteps his rights. It is a wrong to his victim rather than a harm to society in general. The offender's rights are not violated when he is prevented from wronging the victim. In contrast, when a person is deprived of rights to promote the social good, the harm he suffers should be weighed against the benefit to others. In an appropriate case, he may be entitled to compensation for the loss of his right. But that is not so when he is prevented from exercising a right that he never had.

Contemporary French jurists still regard relief for a harsh bargain as a restriction on freedom of contract. When relief is given, the reason, they say, is to prevent the exploitation of a weaker party. They do not explain how terms can be exploitive unless they are unfair, and why relief should be given unless that unfairness is an evil to be remedied. Similarly, when the law prohibits an owner from using his property in a way that bothers his neighbor, they say he "abused his rights." They do not explain what constitutes an abuse or why the law would confer a right and then prohibit its exercise. Despite their criticism of the 19th century jurists, they conceive of freedom of contract and the rights of an owner in much the same way. They continue to believe that those conceptions are enshrined in the Code. They still have no use for ideas of the pre-19th century jurists concerning the duty to contract on fair terms the limitations of an owner's rights.

We will present this story, as the title suggests, as a tragedy in three acts. In Act One, the Code is drafted on the basis of earlier ideas that had been accepted for centuries. In Act Two, these ideas are forgotten, and the Code provisions governing contract and property are interpreted in terms of the will of the contracting parties and the will of the owner. In Act Three, this change is understood in ideological terms, as an expression of liberal individualism, and the solution is believed to be to restrict private rights to promote the social good. In the end, we are imprisoned by 19th century conceptions.¹ Betrayal may be too strong a word. Nevertheless, it is the story of how, in the 19th century, jurists ignored the work of their predecessors and read their own ideas into a Code that they professed to interpret faithfully.

A similar story could be told about the change in the conceptions of contract and property in other jurisdictions as well. We will limit ourselves to France. The clarity and precision for which French jurists are noted makes their story an easier one to tell. The worldwide influence of the French Civil Code makes the telling of it a priority.

Act One: Drafting the Code

According to Jean-Louis Halpérin and André-Jean Arnaud, the revolutionary feature of the French Civil Code is the reorganization of fields such as contract and property around modern individualist principles.² Among them are the freedom of the parties to contract on whatever terms they choose and the freedom of the owner to do with his property what he likes. René Savatier described these principles as two of the “pillars [that] support the entire construction of the Napoleonic Code.”³

There are two reasons, *prima facie*, to doubt that the drafters refashioned private law on new, individualistic principles. First, they denied that they were breaking with the past. Jean-Étienne-Marie Portalis, the chairman of Bonaparte’s drafting committee, explained that “instead of changing the laws, it was almost always more useful to offer the citizens new reasons for loving them,” since “history shows us hardly two or three good laws promulgated in the space of several centuries.”⁴ The rules concerning property law were therefore “conformable to that which has been practiced in every time. We have only changed or modified those which were not any longer in accord with the present order of things or of which experience has shown the inconvenience.”⁵ “[I]n treating contracts – he said – we have developed those principles of natural law applicable to all.”⁶ J. Portalis did not think these principles were newly discovered. They were the

¹ For a fuller discussion of some of the issues raised in this lecture, see Gordley, “The Abuse of Rights”, 33; Gordley, “Myths of the French Civil Code”, 459.

² Halpérin, *L’Impossible Code civil*, 56–7, 276–8; Arnaud, *Les Origines doctrinales*.

³ Savatier, *Les Métamorphoses*, 2, 5–6.

⁴ Portalis, “Discours préliminaire prononcé lors de la présentation du projet de la Commission du gouvernement”, in: Fenet, *Recueil*, vol. 1, 467.

⁵ *Ibid.*, 509.

⁶ *Ibid.* For similar remarks as to the lack of innovation in the provisions on contract law in a previous draft, see Cambacérés, “Discours préliminaire prononcé par Cambacérés, au Conseil des cinq cents, lors de la présentation du 3. Projet de Code civil (Messidor an IV)”, in: Fenet, *Recueil*, vol. 1, 74.

fruit of a legal science that was centuries old. “Few cases – he said – are susceptible of being decided by a statute, by a clear text. It has always been by general principles, by doctrine, by legal science, that most disputes have been decided. The Civil Code does not dispense with this learning but, on the contrary, presupposes it.”⁷ The cultivation of this legal science “presupposes compendia, digests, treatises, and studies and dissertations in numerous volumes.”⁸ He was not speaking only of treatises and studies yet to be writing but of those which had been written and from which the drafters of the Code had drawn their principles.

Second, even if these drafters, intelligent as they were, had wished to rebuild private law on new principles, they did not have time. N. Bonaparte, who thought he knew how to get a job done, gave them a short deadline, and in fact, J. Portalis’ draft of the French Civil Code was produced in four months. Most of this time, one suspects, was spent on the law of marriage and family property and inheritance which had to be rewritten and harmonized. Two-thirds of the texts of the Code have close parallels in the works of Jean Domat (1625–1696) and Robert Pothier (1699–1772). There are close parallels in nearly all the provisions governing contracts and property. When the drafters borrowed from earlier writers, and nothing in the drafting history indicates that that they meant anything different than these earlier writers, there is no reason to imagine that they were formulating individualistic principles of which these writers knew nothing.

In the tradition in which R. Pothier was writing, contract was not defined in terms of the will alone but in terms of two *causae* or reasons which the parties might have for making a contract and which the law would respect. One was to confer a benefit on another person, and the other was to obtain something of equivalent value in exchange for what one gave. R. Pothier said that “every contract must have an honest cause.”⁹ In some contracts, the *cause* is “the liberality which one party wishes to exercise towards the other.” They are “contracts to do good” (*contrats de bienfaisance*).¹⁰ In other contracts, the *cause* “is that which the other party gives him or obligates himself to give him.” They are contracts of mutual interest (*contrats intéressés de part et d’autre*).¹¹ They require “equality so that one of the parties is injured if he gives more than he receives [...]”¹²

The members of the drafting committee, J. Portalis, Jean de Cambacérès and François Tronchet explained that the nature of a commutative contract required equality.¹³ According to J. Portalis:

To determine the principle, one must begin with truths that are agreed upon. Now it is admitted that a contract of sale is a commutative contract, that is to say, one in which each party gives only in order to receive an equivalent, or, if one will, a price proportionate to the value of the thing which he

⁷ Portalis, “Discours préliminaire”, in: Fenet, *Recueil*, vol. 1, 471.

⁸ *Ibid.*

⁹ Pothier, *Traité des obligations*, § 41.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*, § 33.

¹³ Cambacérès, “Discussion du Conseil d’état, Procès-verbal de la séance du 30 frimaire an XII (22 déc. 1803)”, in: Fenet, *Recueil*, vol. 14, 43; Tronchet, “Discussion du Conseil d’état, Procès-verbal de la séance du 7 pluviôse an XII (28 jan. 1804)”, in: *ibid.*, 63.

transfers. Therefore, it is of the essence itself of the contract that it be rescinded when the equivalent of the thing is not provided.¹⁴

Article 1108 of the Code provided that one of the “conditions [that] are essential for the validity of an agreement [is] a licit *cause* of the obligation.” According to article 1104, a contract is “commutative” (*commutatif*) when “each of the parties commits himself to give or do a thing that is regarded as the equivalent of that which is given or done for him.”

According to R. Pothier, when the performances to be exchanged are unequal, in principle, “the injury *lésion* (injury) that the party suffers [...] is sufficient in itself to render the contract invalid (*vitieux*).”¹⁵ For practical reasons, however, a legal remedy is not given for any inequality. Although “any *lésion* that there may be renders the contract iniquitous, and one is obligated in conscience (*le fors intérieur*) to pay the just price, nevertheless, in the external forum adults will not be heard to complain of *lésion* in their agreement unless it is great (*énorme*), a limitation which has been wisely established for the security and freedom of commerce [...]”¹⁶ “Normally a *lésion* of more than half the just price is considered to be great [...]”¹⁷ Moreover, in many types of contracts, no relief is given even for a *lésion* of more than half the just price. “Contracts whose object is moveable goods (*les choses mobilières*) are not subject to rescission for *lésion* whatever it may be, The Coutume d’Orleans art. 446 so provides.”¹⁸ One reason is that “our fathers considered that wealth consists in land and made little of goods.”¹⁹ Another is that “commerce would be troubled if one allowed rescission for *lésion* in regard to goods.”²⁰

The Code provisions simplified the law. Article 1118 of the Code provided that “*Lésion* only invalidates an agreement in certain contracts and among certain persons as will be explained in the same section.” According to article 1674, “if the seller is injured (*lésé*) by more than seven-twelfths of the price of an immovable, he has the right to demand the rescission of the sale, even if he has expressly renounced the power to make this demand in the contract and has declared that he wishes to make a gift of the excess.” Article 1675 provides, “To know whether there has been a *lésion* of more than seven-twelfths, it is necessary to appraise the immovable according to its condition and value at the time of the sale.” There is no indication that the drafters viewed relief differently than R. Pothier: in principle, contracts of exchange require equality but relief must be limited for practical reasons.²¹

R. Pothier was restating a principle that had been recognized by two authors he frequently cited Hugo Grotius (1583–1645) and Samuel Pufendorf (1632–1694), who were drawing on the work of earlier jurists such as Leonard Lessius (1554–1623), Luis de

¹⁴ Portalis, “Discussion du Conseil d’état, Procès-verbal de la séance du 21 nivose an XII (12 jan. 1804)”, in: *ibid.*, 46–7. He made the argument about the nature of a commutative contract in Portalis, “Discussion du Conseil d’état”, in: *ibid.*, 43.

¹⁵ Pothier, *Traité des obligations*, § 34.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*, § 35.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ Except for the opinion of Théophile Berlier which was rejected by J. Portalis. See note 47 below.

Molina (1535–1600) and Domingo de Soto (1494–1560), whom historians refer to as the “late scholastics.” In the 18th century, Christian Thomasius (1655–1728) claimed that those who believe in a just price regard value as an intrinsic property of things, like color. The doctrine was founded on sand because value depends “on the mere judgment of men.”²² These writers, however had a quite different idea in mind. For H. Grotius, and S. Pufendorf, as for the late scholastics, unless a price is set by public authority, the just price is the price for which goods are commonly traded as long as there are no monopolies. It depends on the need for them, their scarcity and their cost of production.²³ “Need” meant, not their usefulness, but the amount that buyers were willing to pay. Otherwise, a diamond would sell for less than a loaf of bread.²⁴ The price at which people trade will be set by the *communis aestimatio*, by the judgment of buyers and sellers as to the price that best reflects need, scarcity and cost.²⁵ It varied from day to day and from region to region. In their view, that price represented the value of the goods at the time that they were sold. The risk that the price might fall thereafter was on the buyer, who, in turn, would profit if the price should rise.²⁶

For these writers, the principle of equality in exchange explained the terms that Roman law read into a contract when the parties had made no provision themselves. In Roman law, in sale, lease, and other contracts “of good faith” (*bonae fidei*), a party was bound to whatever terms good faith required. According to the medieval jurists, one of these terms was that a seller was bound to warrant his goods against undisclosed defects. According to H. Grotius, S. Pufendorf, and the late scholastics, equality would be violated if he did not.²⁷ Consequently, the parties could only exclude such a term if equality was preserved in some other way. According to L. Molina, the law would enforce a contract in which the seller refused to provide a warranty provided he reduced the price to preserve equality.²⁸ J. Domat agreed.²⁹

Article 1135 of the French Civil Code provided: “Agreements are obligatory not only as to that which is expressed in them but also as to all the consequences that equity, usage or statute give the obligation according to its nature.” The drafters were paraphrasing J. Domat, who said that the parties are bound “not only by what is expressed but also to everything that is required by the nature of the agreement and to all the consequences that equity, statute and usage give to the obligation one has undertaken.”⁶⁸ Consequently,

²² Thomasius, *De aequitate cerebrina legis*, cap. H, § 14.

²³ Soto, *De iustitia et iure*, lib. 6, q. 2, a. 3; Molina, *De iustitia et iure*, disp. 348; Lessius, *De iustitia et iure*, lib. 2, cap. 21, dub. 4; Grotius, *De iure belli ac pacis*, II.xii.14; Pufendorf, *De iure naturae et gentium*, V.i.6.

²⁴ Molina, *De iustitia et iure*, disp. 348; Soto, *De iustitia et iure*, lib. 6, q. 2, a. 3.

²⁵ Soto, *De iustitia et iure*, lib. 6, q. 2, a. 3; Molina, *De iustitia et iure*, disp. 348; Lessius, *De iustitia et iure*, lib. 2, cap. 21, dub. 2; Pufendorf, *De iure naturae et gentium*, V.i.8. H. Grotius said that the price is determined by “taking account” of these various factors, and used the phrase *communis aestimatio* to describe how a risk is priced in an insurance contract. Grotius, *De iure belli ac pacis*, XII.xiv.23.

²⁶ See Soto, *De iustitia et iure*, lib. 6, q. 2, a. 3; Lessius, *De iustitia et iure*, lib. 2, cap. 21, dub. 4.

²⁷ Grotius, *De iure belli ac pacis*, II.xii.9.I; Pufendorf, *De iure naturae et gentium*, V.iii.1-3; Soto, *De iustitia et iure*, lib. 2, cap. 21, dub. 11; lib. 6, q. 3, a. 2; Molina, *De iustitia et iure*, II, disp. 353; Lessius, *De iustitia et iure*, lib. 2, cap. 21, dub. 11.

²⁸ Molina, *De iustitia et iure*, disp. 353.

²⁹ Domat, *Les Loix Civiles*, liv. 1, tit. 4, § 2.

as we have seen, according to J. Domat, the seller could refuse to warrant his goods only if he reduced the price to preserve equality.

Those who believe that the drafters took an individualistic approach in which all that matters is the will of the parties often cite article 1134:

“Agreements legally formed take the place of law for those who have made them.”

J. Domat had said, “Agreements are engagements formed by the mutual consent of two or more persons who themselves make a law between themselves to do that which they promise each other.” As we have seen, he did not mean that the parties could do so in violation of equity or equality. He was repeating a statement that appeared in a collection of decretals promulgated by the medieval pope Boniface VIII,³⁰ who had taken it in turn from the *Corpus Iuris Civilis*, the 6th century compilation of the Emperor Justinian.³¹ Presumably, they were not endorsing a revolutionary principle regarding the significance of the will. As Alfons Burge noted, the passage says agreements take the place of law; it does not say anything about autonomy.³²

H. Grotius and S. Pufendorf, like the late scholastics, had also endorsed a theory of property law in which property was a right instituted by society to remedy the difficulties that would arise if property were held in common. In principle, or in the beginning, all things belong to everyone. Private ownership was instituted to overcome the disadvantages of common ownership: for example, those who worked hard would receive no more than those who did not, and there would be endless quarrels.³³ In H. Grotius’ account, the ownership of things in common was suited for a simpler society in which human needs were more easily satisfied and people knew each other. Property was instituted when people’s needs became more various and their relationships less cordial and direct. Property rights were then assigned to individuals, either by dividing what was previously held in common or by allowing each person to keep as his own whatever he appropriated before anyone else.³⁴ The owner’s rights, however, were limited by the purpose for which property was instituted. For example, according to H. Grotius, S. Pufendorf and the late scholastics, in time of necessity, one person is entitled to use another’s property to preserve his own life.³⁵

Two of the drafters added qualifications to this theory. J. Portalis and J. Cambacères observed that originally, even when there was a “universal community” of goods,³⁶ each person would have had the right to appropriate what he needed. According to J. Portalis, he would have had a natural right to do so,³⁷ and, according to J. Cambacères, a right by

³⁰ V, 12, Reg. 85 in VI°.

³¹ D. 50.17.23.

³² Bürge, *Das französische Privatrecht im 19. Jahrhundert*, 64–5.

³³ Soto, *De iustitia et iure*, lib. 4, q. 3, a. 1; Molina, *De iustitia et iure*, disp. 20; Lessius, *De iustitia et iure*, lib. 2, cap. 5, dubs. 1–2; Grotius, *De iure belli ac pacis*, II.ii.2; Pufendorf, *De iure naturae et gentium*, II.vi.5; IV.iv.4–7.

³⁴ Grotius, *De iure belli ac pacis*, II.ii.3. Acquisition by first possession was explained in a similar way by Molina, *De iustitia et iure*, disp. 20, and Pufendorf, *De iure naturae et gentium*, IV.vi.2.

³⁵ Soto, *De iustitia et iure*, lib. 5, q. 3, a. 4; Molina, *De iustitia et iure*, disp. 20; Lessius, *De iustitia et iure*, lib. 2, cap. 12, dub. 12; Grotius, *De iure belli ac pacis*, II.ii.6–7; Pufendorf, *De iure naturae et gentium*, II.vi.5.

³⁶ Cambacères, “Discours préliminaire”, in: Fenet, *Recueil*, vol. 1, 164.

³⁷ Portalis, “Presentation au Corps législatif, et expose des motifs”, par M. Portalis, séance du 28 ventose, an XII (19 mars 1804)”, in: *ibid.*, vol. 11, 112–4. Similar remarks were made by Tribune Grenier in his defence of Portalis’ draft. He explained that property arose when the necessity of a partition of goods among people

convention.³⁸ But, as J. Cambacérés noted, it was not the task of the drafters to decide theoretical controversies about the origin of property.³⁹

The Code is supposed to have endorsed the idea that property is an absolute right.⁴⁰ Article 544 is often cited to support this claim. It provides: “Property is the right to enjoy and to dispose of things in the most absolute manner provided that one does not make a use of them that is prohibited by laws (*lois*) or regulations (*reglements*).” R. Pothier had spoken of “the right to dispose of a thing at his pleasure, provided he does not violate the laws or the right of another.”⁴¹ The medieval jurist Bartolus of Saxoferrato defined property as the *ius perfecte disponendi de re corporali, nisi lege prohibeantur*:⁴² the perfect or complete power to dispose of a corporal thing unless the laws prohibit it. L. Molina quoted this definition with favor.⁴³ The phrase *plena in re potestas* is commonly used to describe the power of an owner in Roman law.⁴⁴ Using the word “absolute” instead of “perfect,” “full” or “complete” does not constitute a revolution in thought.

Act Two: Reimagining the Code

In contrast, the 19th century French commentators on the Code defined contracts in terms of the will of the parties who were free to contract on whatever terms they chose. They defined property as the unqualified right to the owner to use what he owned however he wishes. That was their interpretation of the Code.

For them, the idea of equality in exchange no longer made sense. Jurists who were sympathetic to relief for *lésion* such as Alexandre Duranton, Edouard Colmet de Santerre, and Victor Marcadé said that although inadequacy of the price was not in itself a ground for relief, it was evidence of a “defect in consent”: of fraud, mistake, duress, or a sort of moral constraint.⁴⁵ Jurists who were unsympathetic said that if that were so, relief should not be given for *lésion* but for fraud, mistake or duress. According to Charles Demolombe no relief should be given because value was “subjective,” “variable” and “relative.”⁴⁶ According to François Laurent, the value of things was not “absolute”: things

became clear, but this was less a new convention than the execution of a preexisting right. “Discussion devant le Corps législatif. Discours prononcé par le tribun Grenier, 6 pluviôse, an XII (27 jan. 1804)”, in: *ibid.*, 157.

³⁸ Cambacérés, “Discours préliminaire”, in: *ibid.*, vol. 1, 164.

³⁹ Cambacérés, “Rapport fait à la convention nationale par Cambacérés sur le 1^{er} projet de Code civil, séance du 9 août 1793”, in: *ibid.*, 7; Cambacérés, “Discours préliminaire”, in: *ibid.*, 161.

⁴⁰ See e.g., Arnaud, *Les Origines doctrinales*, 180; Halpérin, *L’Impossible Code civil*, 278; Savatier, *Les Métamorphoses*, 2.

⁴¹ Pothier, *Traité du droit de domaine de propriété*, § 103. For a similar passage, see *ibid.*, § 106.

⁴² Sassoferato, “Commentaria Corpus Iuris Civilis” to 41.2.17.1.

⁴³ Molina, *De iustitia et iure*, II, disp. 3, no. 1.

⁴⁴ Although the phrase does not appear in the Roman texts.

⁴⁵ Duranton, *Cours de droit français*, vol. 10, §§ 200–201; Demante and Colmet de Santerre, *Cours analytique*, vol. 5, § 28bis; Marcadé, *Explication théorique et pratique*, 357–8.

⁴⁶ Demolombe, *Cours*, vol. 24, § 194.

that are worth one amount “from a commercial point of view” might be worth a different amount to the parties because of the “needs, tastes and passions.”⁴⁷

Ch. Demolombe and F. Laurent were too intelligent to have argued as they did if they had understood the meaning of the just price to pre-19th century jurists. It was the market price under competitive conditions. Had they understood what the earlier jurists meant, Ch. Demolombe and F. Laurent might still have argued against their view. They might have argued that a person should not get relief even if he had contracted at a much less favorable price through necessity or ignorance. They did not do so because the conception of the just price that had prevailed for centuries had dropped from sight.

Without the idea of equality in exchange, the doctrine of *cause* became a tautology. It had meant that either a party contracts out of liberality or to obtain a performance of equivalent value in return. Without the idea of equality, the doctrine meant only that when a party contracts, either he receives nothing in return or he receives something. It became hard to see why the Code required a *cause* and what *cause* could mean. Ch. Demolombe, following Charles Toullier and Antoine Marie Demante, described the *cause* as a “determining” rather than an “impulsive” motive.⁴⁸ As F. Laurent pointed out, they left the meaning of a determining motive completely obscure.⁴⁹ M. Demante, Ch. Demolombe, and Charles Aubry and Charles Rau drew an almost unintelligible distinction: *cause* was the reason or motive for which a party obligated himself, as distinguished from the reasons or motives for which he contracted.⁵⁰ In 2016, after over a century and a half of criticism, the Code was amended to delete the requirement that a contract have a *cause*.⁵¹

Without the idea of equality in exchange, the 19th century jurists also found it difficult to explain why the law reads terms into a contract that the parties themselves never envisioned, let alone willed. One could no longer say, like J. Domat, that these terms preserved equality in the value of the performances exchanged. F. Laurent thought that the terms mentioned in the Code were those that the parties would have thought of themselves. The Code listed them “to dispense the parties from writing them into their instruments [...]”⁵² As Samuel Williston said, in response to similar arguments in the United States, “[t]o assume first that everybody knows the law, and, second, that everybody thereupon makes his contract with reference to it and adopts its provisions as terms of the agreement, is indeed to pile fiction upon fiction [...]”⁵³

⁴⁷ Laurent, *Principes*, vol. 15, § 485. That view had been expressed by T. Berlier on the drafting committee and rejected by J. Portalis. Berlier, “Discussion du Conseil d’état, Procès-verbal de la séance du 30 frimaire an XII (22 dec. 1803)”, in: Fenet, *Recueil*, vol. 14, 36.

⁴⁸ Demolombe, *Cours*, vol. 24, §§ 345, 354–5; Toullier, *Le Droit civil français*, vol. 6, § 168; Demante and Colmet de Santerre, *Cours analytique*, vol. 5, § 46.

⁴⁹ Laurent, *Principes*, vol. 16, § 107.

⁵⁰ Demante and Colmet de Santerre, *Cours analytique*, vol. 5, § 46; Demolombe, *Cours*, vol. 24, § 355; Aubry and Rau, *Cours de droit*, vol. 4, § 345.

⁵¹ The reason was “the difficulty of giving the idea of cause a precise definition” and “the criticisms of which it is the object both on the part of doctrine and that of practice.” See “Rapport au Président de la République relatif à l’ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations”. <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000032004539/> (accessed: 7.04.2023).

⁵² Laurent, *Principes*, vol. 16, § 182.

⁵³ Williston, *The Law of Contracts*, vol. 2, § 615.

Another tenet of the pre-19th century jurists that dropped from sight was that private property is instituted to remedy the disadvantage of common ownership, and that therefore the rights of an owner are limited by the purposes for which property rights have been established. Without that idea, the right of an owner to use his property as he chose became unlimited in principle although it might be limited in practice.

An example is liability for using one's property in a way that bothers others. Roman law recognized that sometimes one cannot do so. An owner cannot make smoke if his sole purpose is to bother his neighbor. He cannot do so if he is operating a cheese shop downstairs.⁵⁴ He can do so if he is making a fire in his hearth for domestic purposes. Jurists had tried to explain the difference in result between the case of the cheese shop and that of the hearth.⁵⁵ J. Domat said that it was due to "the character of the locality,"⁵⁶ meaning, presumably, that the locality in question was appropriate for a hearth but not cheese shop. According to R. Pothier, what mattered was whether the smoke "is too thick or too much of an interference."⁵⁷ Neither jurist described these cases as limitations on the owner's property rights.

For the 19th century French jurists, by definition, the owner had the right to use his property as he chose. Limitations such as that these were imposed because life would be impossible if the owners exercised in practice the rights that belonged to them in principle. According to Ch. Aubry and Ch. Rau, the "respective rights of [the] proprietors" of adjacent land were in a "conflict [that] cannot be resolved except by means of certain limits imposed on the natural exercise of the powers inherent in property."⁵⁸ F. Laurent observed that "[a]ccording to the rigor of the law, each proprietor would be able to object if one of his neighbors released on his property smoke or exhalations of any kind, because he has a right to the purity of air for his person and his goods."⁵⁹ If that were so, he admitted, the existence of towns would be impossible.⁶⁰ Thus they arrived at the curious position that the law conferred rights on proprietors that they should not have and which the law prohibited them from exercising.

Act Three: Recharacterizing the Problem

Since the 20th century, many jurists have rejected attempts to explain contract and property law in terms of the will alone. They believe the 19th century jurists were inspired by the philosophical and political liberalism of the time. These jurists could interpret the

⁵⁴ D. 8.5.8.5.

⁵⁵ D. 8.5.8.6.

⁵⁶ Domat, *Les Loix civiles*, liv. 1, tit. 12, §§ 4, 9–10.

⁵⁷ Pothier, "Traité du contrat de société", § 241.

⁵⁸ Aubry and Rau, *Cours de droit*, vol. 2, § 194.

⁵⁹ Laurent, *Principes*, vol. 6, § 144.

⁶⁰ *Ibid.* In a later volume of his work, F. Laurent finally decided that "[t]he Code was wrong to say that the owner has the right to enjoy and to dispose of his thing in the most absolute manner [...]" *Ibid.*, vol. 20, § 417. Nevertheless, he did not suggest any other way that property could be defined.

texts of the Code as they did because these texts reflected the value the French Revolution placed on liberty.

Liberalism places a high value on the will. The 19th century jurists explained contract and tort in terms of the will alone. But to conclude that the 19th century jurists were liberals is a formal fallacy. It is like saying all cats die; Socrates is dead; therefore, Socrates is a cat.

Some of the 19th century jurists were committed to philosophical or political liberalism. Some were not. That was true in France and in many other jurisdictions. Yet throughout the civil and common law world, jurists defined contract and property in a similar way.

Moreover, although the philosophical liberalism of Jeremy Bentham and John Stuart Mill differed from that of Immanuel Kant, the jurists did not participate in disputes like those between utilitarians and Kantians. Véronique Ranouil observed that the French jurists seem hostile to philosophy, and that they never cite I. Kant. Until the end of the 19th century, they never even spoke of the autonomy of the will.⁶¹ She concluded that they must have been using the concept of autonomy of the will “as Monsieur Jourdan used prose – without perceiving it.”⁶² It would be more reasonable to conclude that they were not drawing on the ideas of I. Kant or any other philosophical, economic or political explanation of why the will was important.

A better explanation is that, as we have seen, they had lost track of the ideas that pre-19th century jurists had used to limit what the contracting parties or the owner of property could and could not do. Without these ideas, the freedom of contract and the right of property became conceptually limitless, although the law might impose limitations for pragmatic reasons.

Before the advent of 19th century liberalism, German rationalists such as Gottfried Wilhelm Leibniz (1646–1716) and Christian Wolff (1679–1754) had walked the same path and arrived at the same destination. They were seeking abstract definitions of contract and property from which consequences could be logically deduced. They defined these terms in abstraction from whether the terms of a contract might be just or unjust or how the purposes served by the institution of property limited an owner’s rights.

They defined contracts as rights and duties created by promises.⁶³ Promises are declarations of will. According to G. Leibniz, a promise is a “declaration that something to your benefit is to be done by me.” According to Ch. Wolff, “A promise [...] is a declaration of our will to perform to another joined to the right to require the transfer of that to be performed.”⁶⁴ Thus defined, the parties’ freedom of contract is conceptually limitless. As Klaus Luig observed, for G. Leibniz, contract is “fundamentally governed by the principle of the freedom and equality of the citizens. This equality is also realized in the freedom to make a law for one’s own contractual relations through the *lex contractus* [the law of the contract] [...]”⁶⁵ The parties can contract on any terms they choose. According to G. Leibniz, “in contracts we have the right to gain [...] according

⁶¹ Ranouil, *L'autonomie de la volonté*, 9, 53–5, 79.

⁶² *Ibid.*, 70.

⁶³ Leibniz, “Definitionum iuris specimen”, 733.

⁶⁴ Wolff, *Jus naturae*, III, § 361.

⁶⁵ Luig, “Leibniz als Dogmatiker”, 239.

to the principle that it is licit for the parties to circumvent each other,”⁶⁶ citing a maxim of Roman law. Ch. Wolff, observed, “one can charge the other as much of a price as he wishes [...]”⁶⁷

For G. Leibniz and Ch. Wolff, the right to property was also by definition unlimited. The owner can do with it whatever he wishes. As K. Luig said, in G. Leibniz’ view, “the thing [is] the object of an absolute right.”⁶⁸ According to Ch. Wolff, the owner “has the right to dispose of a thing subjected to him according to his own judgment (*arbitrio*). The right “of disposing of a thing by one’s own decision, indeed, as one sees fit, we call ownership.”⁶⁹ “By nature, no one is held to give another a reason concerning in what way a thing is used, nor does anyone have the right to impede an abuse of things, so long as whoever is abusing the thing does nothing against the right of another.”⁷⁰ Although such a right is conceptually unlimited, they acknowledged that its exercise might be limited by some other principle or concern. G. Leibniz said that a property owner’s right extends to “what is in his power, or what he may deal with in every way according to his will unless for some particular reason there is an exception.”⁷¹

G. Leibniz and Ch. Wolff wrote decades before the outbreak of the French Revolution and the rise of liberalism. They conceived of contract and property in the same way as the 19th century jurists because they were engaged in the same enterprise. They defined these terms in the abstract without regard to ideas about equality in exchange or the purposes that property rights serve.

Just as it is a mistake to think that the ideas of the 19th century jurists about contract and property were the product of liberalism, so it is a mistake to think that the shortcomings of these ideas are the same as those of liberalism. 19th century liberalism has been criticized for its excessive individualism. By freely exercising their individual rights, the strong can exploit the weak or use their rights to the detriment of society. Therefore, according to critics of liberal individualism, one should curtail the exercise of private rights in order to promote the public good. According to modern jurists, the problem with the 19th century conceptions of contract and property is, again, that a stronger party might use his freedom of contract to exploit a weaker party or an owner might use his property rights in a way that injures others. One should curtail the freedom of contract or the exercise of property rights to promote the public good.

The tragic flaw in this approach is that it presumes that a contracting party is exercising his freedom of contract when he drives an unjust bargain, and that an owner is exercising his property rights when he injures others. To describe the liberty of contract in this way is to assume, like the 19th century jurists, that, in principle, the parties may contract on whatever terms they choose. To say that the owner who injures others is exercising his right to property is to assume that, in principle, the owner has the right to use his property however he likes. Consequently, any restraint on how a contracting party or an owner behaves is conceived to be an interference with their rights.

⁶⁶ Leibniz, “Varia”, 814.

⁶⁷ Wolff, *Jus naturae*, IV, § 319.

⁶⁸ Luig, “Leibniz als Dogmatiker”, 231.

⁶⁹ Wolff, *Jus naturae*, I, § 609, cited II, § 496; II, § 118.

⁷⁰ *Ibid.*, II, § 169.

⁷¹ Leibniz, “De iustitia et novo codice”, 621.

Contemporary French jurists still regard relief from an unfair bargain as an interference with freedom of contract. The reforms of 2016 repealed article 1118 of the Code, which provided that “[...] [*l*]ésion only invalidates an agreement in certain contracts and among certain persons”. It was replaced by article 1168, which provides: “In synallagmatic contracts, the absence of equivalence in the performances is not a cause for the invalidity of the contract unless the law provides otherwise.” The new article has been said to express, perhaps even more clearly, the principle that the 19th century jurists read into the old article 1118: “[...] the principle of indifference with regard to *lésion*.”⁷² Jurists have explained that principle in terms that would not have been out of place in the 19th century. Indifference to *lésion* pays “[...] homage to the liberty of contract.”⁷³ The assumption is that the liberty of contract includes the right to drive an unfair bargain. The principle of indifference to *lésion*

[...] has an economic justification because a contract necessarily supposes that there is a difference in value between the performances (the seller believes that he has sold rather dearly; the buyer believes that he has received a good deal [*acquis à un bon prix*]) which is the very foundation of commercial exchange which it is not appropriate to neutralize.⁷⁴

This argument is like that of Ch. Demolombe and F. Laurent. Those jurists claimed that the value of the performances exchanged cannot be equal because value is “subjective,” “variable” and “relative” and depend on the “needs, tastes and passions” of the parties. The proponents of the doctrine of equality in exchange, however, had not been speaking of the subjective value to the parties. They were speaking of the price of the performances on a competitive market. They thought it was wrong for one party to take advantage of the other’s ignorance or necessity to take more or pay less than that price. Now, as in the 19th century, French jurists do not discuss the merits of that idea. It has dropped out of sight.

As a result, it is hard to explain provisions that do give relief for a harsh bargain such as article 1171 of the Code. It provides:

In an adhesion contract, any clause that creates a significant disequilibrium between the rights and obligations of the parties to the contract is deemed not to have been written. The evaluation of a significant disequilibrium concerns neither the principal object of the contract nor the equivalence of the price to the performance.

The reforms of 2016 tracked the language of an earlier law that gave similar relief but only to consumers.⁷⁵

One might explain article 1171 by saying that inequality or disequilibrium in the value of the performances exchanged is an evil to be remedied, and that this evil is particularly likely to occur in contracts of adhesion. But that would be to return to the ideas of the pre-19th century jurists. It seems to contradict the second paragraph of article 1171. It would contradict the principle of indifference to *lésion* that is supposedly enshrined article 1168. According to Romain Boffa, article 1171 itself violates that principle.

⁷² Pellet, “Le «contenu licite»”, 64.

⁷³ *Ibid.*, 63.

⁷⁴ Seube *et al.*, *Droit des contrats*, 95.

⁷⁵ Loi no. 78–23 of 10 jan. 1978.

[O]ne cannot, as like the *projet*, make the two coexist: the principle of liberty of contract and the prohibition of abusive clauses. As has been written, “disequilibrium is the rançon of liberty.”⁷⁶

Classically, the contract is structured around the free encounter of two enlightened wills. Under these conditions, it is not for the judge to pursue an equilibrium, which constitutes an unattainable chimera, but rather to give effect to the will of the parties [...].⁷⁷

Defenders of article 1171 have replied that relief is not given because of the disequilibrium but because the advantaged party had dominated or exploited the other. “[I]t is not the economic disequilibrium of the contract concluded by the parties that is concerned [...]. [T]he significant disequilibrium should only be sanctioned because it is the result of an abuse of domination [...].”⁷⁸ It is not a question of “knowing whether the price is just or unjust [...] but [...] uniquely of the [presence or] absence of abuse.”⁷⁹ “The article does not seek to the correction of a contractual disequilibrium but to counter abuse or domination [...].”⁸⁰

To say a term creates “a significant disequilibrium” cannot mean that it places no risks or burdens on the disadvantaged party. It must mean that the term places risks and burdens on that party which are out of proportion to what he receives in return. That is another way of saying that the value of the performances exchanged is unequal because the disadvantaged party was not compensated for assuming these burdens and risks. If he were compensated, he would not have been exploited. But if the failure to compensate is the evil to be remedied then, as J. Domat said, the evil is a violation of the principle of equality. A seller who waives a warranty must reduce his price to compensate the buyer from bearing the added risk. The principle of equality, however, contradicts the principle of indifference to *lésion* that is supposedly enshrined in article 1168.

Similarly, French jurists have described restraints on an owner’s power to use his property as he pleases as limitations on his property rights. In the mid-20th century, some French scholars formulated a doctrine of *abus de droit* or “abuse of rights.” They maintained it is a general principle of law that a right-holder is not allowed to misuse his rights. They said that French courts had implicitly accepted this principle. Their example was a decision of the Court of Appeal of Colmar⁸¹ which held a property owner liable for building a false chimney for the sole purpose of blocking his neighbor’s window. It was like the Roman case described earlier in which a party makes smoke for the sole purpose of bothering someone who lives upstairs. According to René Demogue:

[T]he expression [...] abuse of rights [identifies] a problem of the limits of every right. Does it not have limits of a kind which are teleological or social? Is it not necessary to understand, as included in every provision of law, [the qualification that] the right hereby recognized can only be exercised for motives in accordance with good social order?⁸²

⁷⁶ Citing Denis Mazeaud in Mazeaud and Genicon, “Protections des professionnels contre les clauses abusives”, 276.

⁷⁷ Boffa, “Juste cause”, 339.

⁷⁸ Grimaldi, “Les maux de la cause”, 815.

⁷⁹ Seube *et al.*, *Droit des contrats*, 92.

⁸⁰ Boffa, “Juste cause”, 339, although, we have seen, he regards this explanation as unsatisfactory.

⁸¹ Colmar, 2 May 1855, D. 1856.II.9.

⁸² Demogue, *Traité des obligations*, vol. 4, 679.

These jurists claimed that they were freeing law from the individualism of the 19th century. R. Demogue said that the doctrine was “in harmony with the reaction which is taking place against individualistic ideas. Today, one wants the individual to act in the general interest.”⁸³ Louis Josserand said that the doctrine “constitutes a living and moving theory of great suppleness, an instrument of progress, a method of adapting law to social needs.”⁸⁴

Nevertheless, they were preserving the 19th century conception of the right to property. The owner had the right to use it as he chose. For the proponents of the new doctrine, he has such a right but he cannot abuse it. His rights “can only be exercised for motives in accordance with good social order.”

Critics charged that under such a doctrine, a judge would be empowered to examine whether an owner’s use of his property promoted good social order, and to restrain him if it did not. According to Marcel Planiol and George Ripert, the doctrine would authorize a court to “remedy every wrong,”⁸⁵ to “ask of each man an account of the motives of his acts [...]”⁸⁶

Today, although the doctrine is widely accepted in France, it has been defanged and declawed. Judges have not used it to promote their own conceptions of a good social order.⁸⁷ They have intervened only in special cases like that of the false chimney. In those cases, it is said that the owner must not abuse his right to use his property as he chooses. Like Ch. Aubry, Ch. Rau, Ch. Demolombe and F. Laurent, one must imagine that the law confers rights on property owners which in these cases it will not allow them to exercise.

For the pre-19th century jurists, the right to property was limited by the purposes for which it was established. At one point, L. Josserand suggested that whether an owner abused his rights depends on the purpose for which the rights are instituted. “[T]o abuse [a right] is to proceed, intentionally or unintentionally, against the purpose of the institution of which one has misunderstood the finality and the function.”⁸⁸ If he had then described the purposes for which the right to property was instituted, and why these purposes were not served in cases like that of the false chimney, he would have returned to the approach of the pre-19th century jurists. Then he might have seen that if property rights are limited by the purpose of the institution of property, an owner who oversteps those limits is not abusing a right. He never had one in the first place.

So far, the story does not have a happy ending. It will have a better one if we learn to consider the past before we try to shape the future.

⁸³ *Ibid.*

⁸⁴ Josserand, *De l'esprit des droits*, 247.

⁸⁵ Planiol and Ripert, *Traité pratique de droit*, vol. 6, 574.

⁸⁶ Ripert, *La Règle morale*, 103bis.

⁸⁷ Robilant, “Abuse of Rights”, 687.

⁸⁸ Josserand, *De l'esprit des droits*, 245.

Bibliography

Old Editions and Printed Primary Sources

- Domat, Jean. *Les loix civiles dans leur ordre naturel; le droit public, et Legum delectus*. Paris: Chez la veuve Cavelier, 1771.
- Grotius, Hugo. *De iure belli ac pacis libri tres*. Amsterdam: apud Joannem Blaeu, 1670.
- Leibniz, Gottfried Wilhelm. "De iustitia et novo codice". In: Leibniz, Gottfried Wilhelm, *Textes inédits d'après des manuscrits de la Bibliothèque provinciale d'Hanovre*, ed. Gaston Grua, ed. 2. New York: Garland, 1985.
- Leibniz, Gottfried Wilhelm. "Definitionum iuris specimen". In: Leibniz, Gottfried Wilhelm, *Textes inédits d'après des manuscrits de la Bibliothèque provinciale d'Hanovre*, ed. Gaston Grua, ed. 2. New York: Garland, 1985.
- Leibniz, Gottfried Wilhelm. "Varia". In: Leibniz, Gottfried Wilhelm, *Textes inédits d'après des manuscrits de la Bibliothèque provinciale d'Hanovre*, ed. Gaston Grua, ed. 2. New York: Garland, 1985.
- Lessius, Leonardus. *De iustitia et iure, ceterisque virtutibus cardinalibus libri quatuor*. Paris: [s.n.], 1628.
- Molina, Ludovicus. *De iustitia et iure tractatus*. Venice: apud Sessas, 1614.
- Pothier, Robert. "Traité du droit de domaine de propriété". In: *Oeuvres de Pothier: annotées et mises en corrélation avec le Code civil et la législation actuelle*, ed. Jean Joseph Bugnet. Paris: Cosse et Marchal, 1861.
- Pothier, Robert. "Traité des obligations: selon les règles tant du for de la conscience, que du for extérieur". In: *Oeuvres de Pothier: annotées et mises en corrélation avec le Code civil et la législation actuelle*, ed. Jean Joseph Bugnet. Paris: Cosse et Marchal, 1861.
- Pothier, Robert. "Traité du contrat de société". In: *Oeuvres de Pothier: annotées et mises en corrélation avec le Code civil et la législation actuelle*, ed. Jean Joseph Bugnet. Paris: Cosse et Marchal, 1861.
- Pufendorf, Samuel. *De iure naturae et gentium libri octo*. Amsterdam: Hoogenhuysen, 1688.
- Sassoferrato, Bartolus de. "Commentaria Corpus Iuris Civilis". In: *Omnia quae extant opera*. Venice: apud Iuntas, 1615.
- Soto, Dominicus de. *De iustitia et iure libri decem*. Salamanca: Andreas à Portonariis, 1553.
- Thomasius, Christian. *De aequitate cerebrina legis II: Cod. de rescind. vendit. et eius usupractice*. Printed as *Dissertatio LXXIII*. In: Thomasius, Christian. *Dissertationum Academicarum varii imprimis iuridici argumenti*. Halle-an-Salle: Gebauer, 1777.
- Wolff, Christian. *Jus naturae methodo scientifica pertractum*. Published as *Jus naturae*. In: Christian Wolff. *Gesammelte Werke*, ed. Marcel Thomann, vols. 17–24. Hildesheim: Olms, 1972–.

Legal Sources

Roman & Canon Law Sources

D. 50.17.23.

D. 8.5.8.5.

V, 12, Reg. 85 in VI^o.

Decisions

Colmar, 2 May 1855. D. 1856.II.9.

Modern Statutes

Loi n°78–23 du 10 janvier 1978 sur la protection et l’information des consommateurs de produits et de services.

Studies

- Arnaud, André-Jean. *Les origines doctrinales du Code civil français*. Paris: Librairie générale de droit et de jurisprudence, 1969.
- Aubry, Charles and Rau, Charles. *Cours de droit civil français d’après la méthode de Zachariä*. Paris: Cosse et Marchal, 1869–1871.
- Boffa, Romain. “Juste cause (et injuste cause). Brèves remarques sur le projet de réforme du droit des contrats”. *Recueil Dalloz* 6 (2015): 335–41.
- Bürge, Alfons. *Das französische Privatrecht im 19. Jahrhundert. Zwischen Tradition und Pandektenwissenschaft, Liberalismus und Etatismus*. Frankfurt am Main: Klostermann, 1991.
- Demante, Antoine Marie and Colmet de Santerre, Edmont. *Cours analytique de Code civil*. Paris: E. Plon, Nourrit et Cie, 1883.
- Demogue, René. *Traité des obligations en général*. Paris: Rousseau, 1924.
- Demolombe, Charles. *Cours de Code Napoléon*. Vol. 24. Paris: Durand, etc., 1867.
- Duranton, Alexandre. *Cours de droit français suivant le Code civil*. Paris: A. Gobelet, 1834.
- Fenet, Pierre-Antoine, ed. *Recueil complet des travaux préparatoires du Code civil*. Paris: Au depot, rue Saint-Andre des Arcs, 1827; reprinted Osnabrück: Otto Zeller, 1968.
- Gordley, James. “The Abuse of Rights in the Civil Law Tradition”. In: *Prohibition of Abuse of Law: A New Principle of EU Law?*, eds. Rita de la Feria and Stephen Vogenauer, 33–48. Oxford–Portland, Oregon: Hart Publishing, 2011.
- Gordley, James. “Myths of the French Civil Code”. *The American Journal of Comparative Law* 42 (1994): 459–505, DOI: <https://doi.org/10.2307/840698>.
- Grimaldi, Cyril. “Les maux de la cause ne sont pas qu’une affaire de mots”. *Recueil Dalloz* 14 (2015): 814–5.
- Halpérin, Jean-Louis. *L’impossible Code civil*. Paris: Presses Universitaires de France, 1992.
- Josserand, Louis. *De l’esprit des droits et de leur relativité: Théorie dite de l’abus des droits*. Paris: Dalloz, 1939.
- Laurent, François. *Principes de droit civil français*. Paris: A. Durand & Pedone Lauriel, 1867–1878.
- Luig, Klaus. “Leibniz als Dogmatiker des Privatrechts”. In: *Römisches Recht in der europäischen Tradition. Symposium aus Anlass des 75. Geburtstages von Franz Wieacker*, eds. Okko Behrends, Malte Diesselhorst and Wulf Eckart Voss, 213–56. Ebelsbach: Gremer, 1985.
- Marcadé, Victor. *Explication théorique et pratique du Code Napoléon*. Paris: Cotillon, 1859.
- Mazeaud, Denis and Genicon, Thomas. “Protection des professionnels contre les clauses abusives”. *Revue des contrats* 1 (2012): 276.
- Pellet, Sophie. “Le «contenu licite et certain du contact»”. *Droit & Patrimoine* 258 (2016): 61–4.
- Planiol, Marcel and Ripert, Georges. *Traité pratique de droit civil français*. Paris: Librairie générale de droit & de jurisprudence, 1930.
- Ranouil, Véronique. *L’autonomie de la volonté: naissance et évolution du concept*. Paris: Presses universitaires de France, 1980.
- Ripert, Georges. *La Règle morale dans les obligations civiles*. Paris: Librairie générale de droit & de jurisprudence, 1935.

- Robilant, Anna di. "Abuse of Rights: The Continental Drug and the Common Law". *Hastings Law Journal* 61 (2010): 687–748.
- Savatier, René. *Les métamorphoses économiques et sociales du droit privé d'aujourd'hui*. Paris: Dalloz, 1959.
- Seube, Jean-Baptiste, et al. *Droit des contrats – Bilan de la réforme et loi de ratification*. Montrouge: Editions Législatives, 2018.
- Toullier, Charles Bonaventure Marie. *Le Droit civil français suivant l'ordre du Code*. Paris: Jouaust, 1824.
- Williston, Samuel. *The Law of Contracts*. New York: Baker, Voorhis and Co., 1920.

Internet sources

- "Rapport au Président de la République relatif à l'ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations". <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000032004539/> (accessed: 7.04.2023).