The Case for Judicial Revision of Contracts in French Law (And Beyond)

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This article is concerned with various "goal-based" arguments that could be made against judicial revision of contracts in French law. It addresses arguments arising from the will of the parties, from judicial deference, and from the security and efficiency of transactions. None of these arguments, however, appears conclusive against the practice of judicial revision, which therefore deserves to be supported. The author concludes by showing how judicial revision illustrates the ascendancy of consensus over conflict and the wider phenomenon of publicization of contract. It is further suggested that legislative intervention might serve to deflect some of the potential criticism against judicial revision and might therefore be preferable to the present situation.

Cet article s'attarde à peser divers arguments téléologiques qui pourraient être invoqués à l'encontre de la révision judiciaire du contrat en droit français. Les arguments tirés de la volonté des parties, de la réserve des tribunaux et de la sécurité et efficience des transactions sont ainsi considérés. Aucun de ces arguments ne justifiant une remise en cause de la pratique de la révision judiciaire, celle-ci doit donc être appuyée. En guise de conclusion, cet article démontre comment la révision judiciaire illustre l'ascendant de la coopération sur l'antagonisme et, plus généralement, le phénomène de publicisation du contrat. Il suggère en outre qu'une intervention législative aurait l'heur de rencontrer certaines des objections soulevées à l'encontre de la révision judiciaire et se révélerait dès lors préférable à la situation actuelle.

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Synopsis

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[L]a justice veut qu'on ait égard non seulement à l'obligation, mais encore à l'état de celui qui doit.
Bossuet[1]

Introductiou

Classical contract law has long adhered to the recognition of a private sphere, that is, a domain from which individuals may in principle legitimately exclude the state. Somewhat paradoxically, one of the corollaries of this commitment to individualism has been an adherence to the Rule of Law through a strict attachment to the doctrine of sanctity of contract. The state's "ironclad insistence on performance"[2] has meant that allowance for excuses has traditionally been severely limited. Of course, it was never questioned that contracts that proved impossible to perform were not binding: *impossibilium nulla obligatio est.* But courts and authors alike were hard-pressed openly to venture beyond that qualification. This façade, however, did little to hide the fact that there prevailed a somewhat inchoate feeling of dissatisfaction, a feeling that the recognized qualification was underinclusive and that the formalist rhetoric of "sanctity of contract" was empty.

The judicial response to the rigours of the doctrine of sanctity of contract took the shape of thorough and fact-sensitive inquiries into the particular contracts coming before the courts.[3] Such a "hands-on" approach gave its expression to the emergence of "a general duty to respect the interest of others", that is, a "general duty substitut[ing] closer bonds of social solidarity than those recognized by the ideals of private autonomy".[4] In a particularly insightful passage, Demogue illustrates this approach:

> [l]es contractants forment une sorte de microcosme. C'est une petite société où chacun doit travailler dans un but commun qui est la somme des buts individuels poursuivis par chacun, absolument comme dans la société civile ou commerciale. Alors à l'opposition cntre le droit du créancier et l'intérêt du débiteur tend â se substituer une certaine union.[5]

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[1]J.-B. Bossuet, "Sermon sur la justice" in *Sermons*, ed. by H. Massis, vol. 2 (Paris: A la Cité des Livres, 1930) 57 at 84.

[2]M. Kelman, *A Guide to Critical Legal Studies* (Cambridge, Mass.: Harvard University Press, 1987) at 25.

[3]*Ibid.*

[4]H. Collins, "The Decline of Privacy in Private Law" in P. Fitzpatriek & A. Hunt, eds, *Critical Legal Studies* (Oxford: Basil Blackwell, 1987) 91 at 102. See also R.M. Unger, *Law in Modern Society* (New York: Free Press, 1976) at 209.

[5]R. Demogue, *Traité des obligations en général*, vol. 6: *Effets des obligations* (Paris: Rousseau, 1931) no. 3 at 9.

The consequence of the advent of the age of solidarity is that "one takes no entitlements [such as enforcement of the contract on its precise terms] for granted".[6] It is in that context that the phenomenon of judicial interventionism in contract by French courts, with particular reference to the topic of revision, must be examined.

A survey of French caselaw reveals that judges do revise contracts.[7] "Revision" is here understood to refer to any judicial intervention which modifies a contract directly or functionally (*i.e.*, indirectly) with a view to enforcing it in its amended version.[8] While the word "révision" itself is unknown to the French *Code civil*,[9] the available data suggests that use of revision as a judicial remedy by French courts is widespread, whether as an answer to a defect in formation or in performance of the contract. Given the importance revision has acquired, it would be unreal to relegate it to the obscure status of an exception to an allegedly dominant norm such as sanctity of contract.[10] Rather, it would be more honest to acknowledge the "development of a contradictory paradigm"[11] to the traditional rule of sanctity. The present situation is thus perhaps best described as saying that while the prevailing rule is not sanctity, it is not *not sanctity* either. Contemporary authors generally refuse to acknowledge this development,[12] although some have recently been prepared to do so in the most cautious of terms.[13]

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[6]Unger, *supra*, note 4 at 207.

[7]See P. Legrand, "Judicial Revision of Contracts in French Law: A Case-Study" (1988) 62 Tul. L. Rev. 963.

[8]*Ibid.* at 967-70. See also H. Collins, *The Law of Contract* (London: Weidenfeld & Nicolson, 1986) at 151: "[J]udicial revision involves a termination of the existing contract and, *where appropriate*, the formation of a new contractual relation between the parties on terms which are fair" (emphasis supplied to show how this definition is broader than that offered above); and G. Cornu, ed., *Vocabulaire juridique* (Paris: Presses universitaires de France, 1987) *vbo* révision: "Modification d'un acte juridique (spéc. de son contenu monétaire), en vue de son adaptation aux circonstances".

[9]See G. Rouhette, "La révision conventionnelle du contrat" (1986) 38 Rev. int. dr. comp. 369, no. 2 at 370.

[10]Kelman argues that liberalism has traditionally maintained its internal consistency by hiding its inherent contradictions in precisely this way, *i.e.*, by treating one of the terms of the contradiction as "privileged" and the various derogations from it as so many "exceptions": *Supra*, note 2 at 3-4.

[11]*Ibid.* at 20.

[12]See *infra*, note 136 and accompanying text.

[13]See J. Mestre, "Le juge face aux stipulations contractuelles" (1988) 87 Rev. trim. dr. civ. 110, no. 5 at 113: "il est indéniable que, après une longue période de strict respect judiciaire de la loi contractuelle, se manifeste *un certain frémissement de la jurisprudence*, l'amorce peut-être d'une attitude plus active" (emphasis original); and B. Berlioz-Houin & G. Berlioz, "Le droit des contrats face à l'évolution économique" in *Études offertes à Roger Houin* (Paris, Dalloz-Sirey: 1985) 3 at 29: "le juge contemporain manifeste *une certaine tendance* à 'oublier' l'interdiction d'immixtion dans les contrats" (emphasis supplied).

A broad sample of decisions shows that judicial intervention can be explained on two grounds.[14] French courts revise contracts in order to prevent the abuse of defenceless parties and to prevent the abuse of the legal system. More specifically, the cases show the adoption of a prophylactic stance by the courts. They involve a "counterfactual *abus de droit*", that is, an abuse which *would* arise if the courts did *not* intervene to prevent it.[15] This abuse may arise either at the formation or performance stages.[16]

The courts justify their intervention in two ways. First, judges ostensibly act to preserve the integrity of the parties' contractual intention. The cases however show that the revision itself is eventually performed in reliance on the courts' *own* conception of what the parties' intention would have been in the given circumstances. It is as if the courts had before them the original wishes of the parties, and then applied them to the subsequent circumstances. Second, courts intervene out of a concern to uphold *ordre public.* Here again, some of these revisions effectively rest on the courts' own conception of what the parties' intention would have been in given circumstances. Other revisions are grounded on the outright imposition of an external standard on the parties. The courts then use an independent standard of fairness based on all the circumstances — including what the parties originally intended — to revise the contract.

The techniques used by the courts to carry out the revision process are varied: they may substitute a quantum (for example, reducing the contract price), sever a term, substitute a new term for an existing provision of the contract, add a term to the contract, or read down the scope of a term to reduce some of its usual legal effects.

French law, as suggested by Zweigert and Kötz's *praesumptio similitudinis,*[17] is hardly idiosyncratic in the way it resorts to the remedy of judicial revision. It is believed that an examination of English contract law will show the discerning observer that, although they may be doing so quietly, English judges also revise contracts in many instances and in many ways. In this regard, various English decisions not traditionally understood in terms of revision, when approached functionally, are unmistakable examples of the

[14]These observations summarize the conclusions reached in the earlier study on which this article builds: see Legrand, *supra,* note 7.

[15]See, *e.g.,* Collins, *supra,* note 4 at 158: "[T]he values of paternalism and co-operation provide guidelines for the incidence of judicial revision".

[16]Sandel shows how the emergence of an abuse at the later stage of performance is quite independent of any abuse that may take place at the earlier stage of entering into the agreement: M.J. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982) at 106-09.

[17]K. Zweigert & H. Kötz, *An Introduction to Comparative Law,* trans. T. Weir, vol. 1: *The Framework,* 2d ed. (Oxford: Clarendon Press, 1987) at 36.

process. Thus, in the context of a sale of land, a seller who is responsible for an innocent misdescription that is held not to affect the property in any substantial way may enforce the contract subject to an abatement of price.[18] While this case offers an example of revision by substitution of quantum,[19] the judiciary's treatment of restraint-of-trade clauses shows an example of revision by severance of a term. Indeed, while English courts are prepared to cross out clauses that are void as being unreasonable and contrary to the public interest — thereby effectively maintaining a revised agreement — they will not go so far as to write clauses into the contract.[20] Another example involves revision of a contract by the addition of a term.[21]

The so-called "doctrine of substantial performance" in English law allows a party who has only partly performed her obligations nonetheless to enforce the contract if her failure of performance does not substantially deprive the other party of what she bargained for. A classic illustration of the workings of the doctrine is offered by *H. Dakin & Co., Ltd* v. *Lee*.[22] Once again, a functional view of this case leads to the conclusion that the Court is revising the quantum of the contract based on actual performance.[23]

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[18]See J.T. Farrand, *Contract and Conveyance*, 4th ed. (London: Longman, 1983) at 53.

[19]The maritime salvage cases provide one of many further illustrations. See, *e.g.*, *The Medina* (1876), 2 P.D. 5; *The Port Caledonia and The Anna*, [1903] P. 184; and *Akerblom* v. *Price, Potter, Walker, & Co.* (1881), 7 Q.B.D. 129 at 133 (Brett L.J.).

[20]See J.D. Heydon, *The Restraint of Trade Doctrine* (London: Butterworths, 1971) at 280-91; and G.H. Treitel, *The Law of Contract*, 7th ed. (London: Stevens, 1987) at 388-89.

[21]On the facts of the relevant case, a highrise block of flats had been let to tenants. As the stairway lights, lifts, and rubbish chutes were repeatedly vandalized, the landlord simply gave up maintaining the flats. Upon the tenants' refusal to pay rent, the landlord sued. In their defence, the tenants argued that the landlord had an obligation to repair and maintain the facilities. The English Court of Appeal stated that the landlord corporation was under no such liability to repair and maintain because there was no express obligation compelling it to do so in the lease agreement and none could be implied therein. The House of Lords however overruled the decision, and implied an obligation to repair and maintain so as to give business efficacy to the contract: *Liverpool City Council* v. *Irwin* (1976), [1977] A.C. 239 (H.L.).

[22](1915), [1916] 1 K.B. 566 (C.A.).

[23]The plaintiff-builder had contracted with the defendant to repair her house for a fixed sum. Eventually, the defendant refused to pay on the ground that the work had not been performed according to contract specifications. The builder sued in recovery of the contract sum. The evidence disclosed that the work derogated from the contract in three minor respects. The Court of Appeal opted to revise the contract: the defendant was made to pay the contract sum less the amount required to right the defects. Such "apportionment of consideration", viewed in functional terms, is but a substitution of quantum. Indeed, it may be thought that that exercise in revision goes even further to the extent that the builder's obligations are themselves revised: he is no longer held to completion of the contract according to its original terms, but is effectively made to perform pursuant to contraetual terms as defined by the court itself.

Other well-known cases offer examples of judicial revision by substitution of quantum[24] or of a provision.[25]

Two leading legal systems, at the heart of their respective legal families,[26] thus offer numerous instances of judicial revision. One may confidently assume that similar illustrations would emerge from a consideration

[24]See, *e.g.*, *Grist* v. *Bailey* (1966), [1967] Ch. 532, which offers a far-reaching illustration of judicial revision. The case concerned the sale of a house. The parties had agreed on a sale price of £850 in the common belief that the sale was subject to a protected tenancy. In fact, both parties were mistaken because the then tenant was not entitled to this status as of right and had indeed left without having made any claim in this respect. As Goff J. stated at 542: "But if tenant he ever was, it was certainly not the existing tenancy contemplated by the parties". As a result, the vendor refused to complete the transaction. When the buyer claimed specific performance, the vendor counter-claimed for rescission. The Court of Chancery dismissed the main action. It granted rescission on condition that the buyer be offered an opportunity to acquire the house at its proper value assessed at £2250.

This decision implies an alteration of the nature of the contract itself. Initially, there were two contractual obligations: the buyer had to buy and the seller had to sell. Following the intervention of the Court, there is now a *power* in the hands of the buyer to subject both the vendor and himself to two contractual obligations. For the vendor, this obligation will be his original one; for the buyer, it will consist of a harsher one than was initially the case, the object of his obligation (the price) having been increased substantially. One might well see in this decision an instance of substitution of quantum "with a difference".

[25]*Harvela Investments Ltd* v. *Royal Trust Co. of Canada (C.I.) Ltd* (1985), [1986] A.C. 207 (H.L.) illustrates the technique of substitution of a term for an existing provision of the contract. R.T. held shares in a company which gave it an effective control of that company. On 15 September 1981, it invited H.I. and S.L. to make offers to purchase its shares. This offer expired on 16 September, and completion of the purchase was to take place within thirty days thereof. One of the terms of the invitation read: "In the event that closing shall not take place within 30 days other than by reason of any delay on our [R.T.'s] part interest shall be payable by the purchaser on the full purchase price at a rate higher by 4 per cent than the Bank of Montreal prime rate from time to time for Canadian dollar loans". R.T. eventually acccpted S.L.'s bid. This decision was disputed by H.I. who sought specific performance from R.T. A four-year litigation period involving the three parties ensued. From this litigation, it emerged that S.L.'s bid had been of a kind that, under the implied terms of the offer, he had not been entitled to make and that R.T. had not been entitled to accept. S.L. had made a "refcrential bid" — *i.e.*, a bid by reference to another bidder's offer — rather than a "fixed bid". The House of Lords accordingly dcclared that R.T. had been bound to transfer the shares to H.I. throughout.

Having adjudicated on the matter of ownership of shares, it remained for the Court to decide on the question of interest. In substance, H.I. argued that the vendor, R.T., was not cntitled to interest because the delay for completion was attributable to its own actions. It was the vendor who had erroneously accepted S.L.'s bid — the source of the ensuing litigation. For its part, R.T. submitted that interest was payable because it was not to blame for the delay. It was S.L. who had submitted the wrong type of bid and had thereafter maintained his right to the shares.

The House of Lords took the view that "the vendors [R.T.] are not entitled to interest at the contractual penal rate imposed by the invitation": *ibid.* at 236 *per* Lord Templeman. In the Court's opinion, however, while the delay was to be attributed to the vendor, it was not blameworthy. It also noted that H.I. had had the use of the purchase price throughout the four years of litigation and was also to benefit from the very substantial profits made by the company

of derivative systems such as those of Quebec, Ontario, or Louisiana. The question therefore arises whether this practice deserves to be supported. This article answers in the affirmative. While it focuses on French contract law, many of the conclusions reached may be "transplanted" to other civil law jurisdictions, especially those where the legal system is closely modelled on that of France, such as Belgium and Italy, and, albeit perhaps with greater care, to common law jurisdictions. This article seeks to demonstrate the inadequacy of leading arguments against revision that arise from such "goal-based" values as the will of the parties, judicial deference, and the security and efficiency of transactions.[27] This critical evaluation further highlights the need for the French legislature to consider an intervention on the subject.

I. The Will of the Parties

No contemporary French jurist would take the view that the will theory affords the exclusive explanation for the various rules in modern contract law.[28] Yet, for mainstream jurisprudence, it is still generally accepted that respect for the parties' will underlies the better part of the law of contract.[29]

(and its subsidiaries) during that period, which the Court deemed unconscionable. According to the Court, H.I. could have paid the purchase price into Court on the completion date to earn interest and therefore was "not entitled to the benefit of interest attributable to the purchase money as well as the profits attributable to the contractual property": *ibid.* at 237 *per* Lord Templeman. H.I. would therefore have to pay the vendor's interest at the judicial rate applicable to monies paid into Court. This decision offers a clear example, performed at the highest level of the judiciary, of a judicial revision of contract by way of substitution of a new term for an existing provision of the contract.

[26]See, on the theory of "legal families", Zweigert & Kötz, *supra*, note 17 at 63-75.

[27]For an ethical argument in favour of judicial revision, see Legrand, *supra*, note 7; and *supra*, text accompanying notes 14-16. This article goes beyond ethical justification. See, for greater precision, J. Bell, *Policy Arguments in Judicial Decisions* (Oxford: Clarendon Press, 1983) at 23: "Ethical reasons justify a result by showing that it will conform to some ethical standard, such as fairness, which is valuable in itself. Non-ethical or goal-based reasons justify a decision by showing that it advances some accepted goal, such as greater wealth for the community or a better environment. They seek to show ways in which the decision will be good for individuals in society, whereas ethical arguments do not turn so much on the benefits accruing from the decision, as on its moral desirability."

[28]The *locus classicus* on this whole subject remains E. Gounot, *Le principe de l'autonomie de la volonté en droit privé* (thesis, Dijon, 1912). For a critique, see G. Rouhette, "La force obligatoire du contrat [:] observations critiques" in D. Tallon & D. Harris, eds, *Le contrat aujourd'hui: comparaisons franco-anglaises* (Paris: L.G.D.J., 1987) 27, no. 5 at 32, who writes that "la construction de Gounot ... est un travestissement de la vérité historique".

[29]See, *e.g.*, J. Carbonnier, *Droit civil*, vol. 4: *Les obligations*, 12th ed. (Paris: Presses universitaires de France, 1985) no. 9 at 46; J. Flour & J.-L. Aubert, *Droit civil*, vol. 1: *Les obligations [.] L'acte juridique* (Paris: Armand Colin, 1975) no. 126 at 88 & no. 95 at 70; V. Ranouil, *L'autonomie de la volonté [.] Naissance et évolution d'un concept* (Paris: Presses universitaires de France, 1980) at 152; and J.-L. Bergel, *Théorie générale du droit* (Paris: Dalloz, 1985) no. 236 at 268. But see J. Ghestin, *Traité de droit civil*, vol. 2: *Les obligations [.] Le contrat*, 2d ed.(Paris: L.G.D.J., 1988) nos 31 to 155-5 at 20-160.

Many authors would thus be prepared to argue that the judicial revisions found in contemporary French contract law should be dismissed as violating the sanctity traditionally granted to the will of the parties. The argument might well take the following form: "Any revision of contracts rewrites the agreed allocation of risks, for even where the contract omits to deal with an eventuality, the law presumes an intended distribution of losses".[30] This objection is misconceived, whether regarding the cases where the courts revise by reliance on their own conception of the parties' contractual intention or respecting those cases where they impose outright an external standard on the parties.

A. The Courts' Own Conception of the Parties' Contractual Intention

The reply to the argument that judicial revision carried out according to the court's conception of contractual intention challenges the supremacy of the parties' will is two-fold. First, the idea of "intention" is now considered genuinely wider than was once believed. On a philosophical level it has been demonstrated that someone may be intending something without having a mental picture of it before her.[31] Therefore, for a court to say that a party must have "intended" something which had not occurred to her at the time may show faithfulness rather than disloyalty to the will theory. Second, the courts may, by way of "interpretation" of the contract, rightly invoke the parties' intention to ascertain the genuine content of an absent or inadequately-expressed will. By shedding light on the parties' true will, the courts again remain loyal to one of the central tenets of the will theory. It is believed that this doctrine of "interpretation", properly understood, is wide enough to account for the judicial revision of contracts carried out in reliance on the courts' own conception of the parties' contractual intention. In the words of Radbruch, "juristiche Interpretation nicht Nachdenken eines Vorgedachten, sondern zu Ende Denken eines Gedachten".[32] This claim will now be considered at greater length.

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[30]Collins, *supra*, note 4 at 152.

[31]See L. Wittgenstein, *Philosophical Investigations*, 3d ed., trans. G.E.M. Anscombe (Oxford: Basil Blackwell, 1967) at 33; and H.F. Pitkin, *Wittgenstein and Justice* (Berkeley: University of California Press, 1972) at 67-70. See also, *e.g.*, N.E. Simmonds, *Central Issues in Jurisprudence* (London: Sweet & Maxwell, 1986) at 18-19.

[32]G. Radbruch, "Arten der Interpretation" in *Recueil d'études sur les sources du droit en l'honneur de François Gény*, vol. 2 (Paris: Sirey, n.d.) 217 at 218 (legal interpretation is not rethinking what has already been thought, but thinking it through to the end). I am indebted to Dr J. Bell for supplying this reference.

1. "Interpretation" and "Denaturation"

The matter of "interpretation", being a question of fact, comes within the exclusive province of the lower courts. Therefore, one is initially concerned with them. In this respect, two points are clear. First, lower courts may rightly interpret contracts.[33] Indeed, an important decision of the *Cour de cassation* suggests that they *must* do so.[34] What, then, does "interpretation" precisely mean? Articles 1156 to 1164 of the French *Code civil*, under the general heading "De l'interprétation des conventions", show that the codifiers' preoccupations were strictly concerned with the elucidation of ambiguous contracts. Indeed, Villey underlines that this narrow meaning of "interpretation" is the only one compatible with orthodox legal positivism, already the dominant philosophy when the Napoleonic Code came into force.[35]

Excesses were nonetheless eventually indulged in by lower courts to the point where the *Cour de cassation* felt justified in stating that "denaturation" was prohibited.[36] This is the second point of agreement; the courts may not denature contracts, that is, they may not tamper with clear and precise contractual terms.[37] But this concept is not devoid of ambiguity. For example Cornu, although accepting its strong evocative power, argues that the concept of "denaturation" is not scientific, and denies that it has any intrinsic substance. According to him, "denaturation" is little more than a convenient shorthand for "interpretation carried too far". "Denaturation" would therefore be akin to "interpretation"; indeed, it also involves in its essence a search for meaning.[38] If one were to draw an axis representing the continuum of interpretation, one would get "elucidation" at one end (*i.e.*, what is certainly permitted) and "denaturation" at the other (*i.e.*, what is positively disallowed):

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[33]*Cass. Ch. réun.*, 2 February 1808, S.1808.I.480 (Rep. Merlin).

[34]*Cass. com.*, 7 January 1975, D.1975.516 (Annot. P. Malaurie).

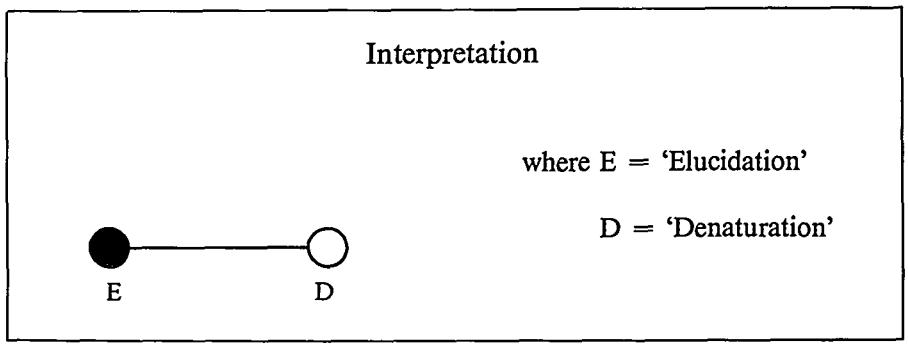
[35]See M. Villey, *Philosophie du droit*, vol. 2: *Les moyens du droit*, 2d ed. (Paris: Dalloz, 1984) no. 219 at 168.

[36]*Cass. civ.*, 15 April 1872, D.P.1872.I.176.

[37]See, for a general examination of the interaction between the powers of the lower courts and those of the *Cour de cassation*, T. Ivainer, *L'interprêtation des faits en droit* (Paris: L.G.D.J., 1988) nos 194-249 at 179-221.

[38]See G. Cornu, *Regards sur le Titre III du Livre III du Code civil* (Paris: Les Cours de Droit, 1976) nos 171-72 at 130-32.

DIAGRAM 1



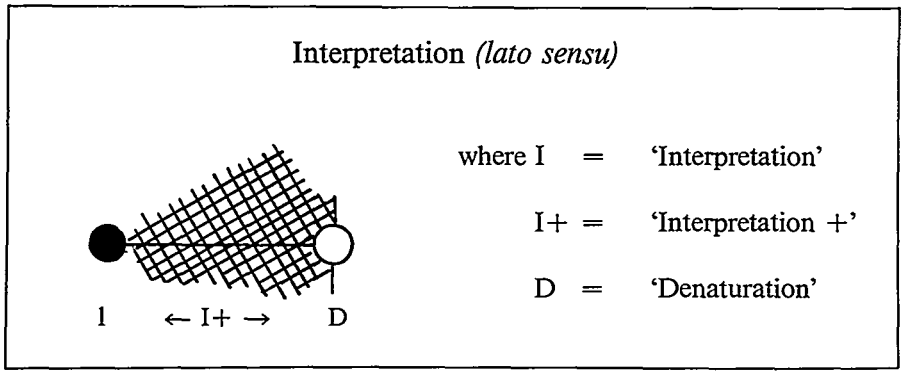
Since E and D represent two discrete points on the continuum, there is a necessary space between them. This space or grey area could perhaps be referred to as "elucidation +". Unfortunately, neither the word "elucidation" nor any accurate synonym is used in practice. Courts and authors alike are content merely to talk of "interpretation", thus effectively lending a second sense to this word. Faithfulness to current terminology therefore commands that the grey area be referred to as "interpretation +". This, of course, is liable to cause some confusion, and one must carefully distinguish "interpretation" *lato sensu* (referring to the whole of the continuum) from "interpretation" *stricto sensu* (referring either to the outer end on the left of the continuum or, when used with the mathematic symbol "+", to the grey area). It is with "interpretation" in this latter sense that this discussion is more immediately concerned.

2. The Grey Area

The question to be asked at this stage concerns the grey area: is this area a "no court's land"? To rephrase the question in the opposite sense, is an exercise of judicial power within this area (that is, going beyond mere "interpretation" *stricto sensu* but falling short of "denaturation") legitimate? The answer must be positive. It is clear from the numerous decisions of the

Cour de cassation on the matter that the supreme court has never said that lower courts must not go beyond E, but rather that they must always fall short of D. In Cornu's words, "on reste, presque jusqu'au bout dans l'interprétation".[39] Any point situated to the left of "denaturation" on the diagram is therefore within the legitimate powers of the lower courts:

DIAGRAM 2



Do the courts therefore have a free hand within the grey area, as long as they make what they are doing look like genuine "interpretation +"? There is evidence that this is effectively the case in practice. Thus, an erroneous interpretation of the contract will not be quashed because a false interpretation nevertheless remains an interpretation, albeit an "interpretation +" verging on denaturation. Moreover, it has been shown that the concept of "clarity" — an ambiguous notion at the best of times — does not mark a clear-cut differentiation between "interpretation +" and "denaturation". For instance, a contract which apparently clearly states "X" may yet be interpreted as stating "Y" or "Z" so long as the lower courts express themselves in the proper way, making use of the proper formulas and offering

[39] *Ibid.*, no. 171 at 131.

the proper reasons to support their conclusions.[40] This is possible because the *Cour de cassation* confines the exercise of its supervisory power to expressed reasons and, even then, proves most lenient as to their insufficiency or erroneousness.[41] One therefore appreciates why the plea of denaturation, although by far the most popular of the grievances submitted to the *Cour de cassation*, practically never succeeds.[42] These observations illustrate the extensive freedom enjoyed by the lower courts within the grey area.

Consequently, it is erroneous to suggest, as is traditionally done, that the courts may not revise contracts in reliance on their own conception of the parties' contractual intention. The reality is that the courts may legitimately revise contracts on that basis, provided that they operate within the free area. In other words, this brand of judicial revision is unobjectionable so long as it is dressed as "interpretation +".[43]

While the precise demarcation line between what is "interpretation" and "interpretation +" remains elusive, two points must be stressed. First, the boundary-crossing is relatively smooth.[44] Second, as courts move away from mere "interpretation" (that is, as they move to the right of the continuum), "the more palpably are they imposing an agreement".[45] Yet, to the extent that they constantly remain within the grey area, at no time may the legitimacy of their interventions be questioned.

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[40]See, *e.g.*, G. Marty, *La distinction du fait et du droit [.] Essai sur le pouvoir de contrôle de la Cour de cassation sur les juges du fait* (thesis, Toulouse, 1929) nos 151-52 at 316-22. See also A. Rieg, "Force obligatoire des conventions" in *Juris-classeur civil, sub* art. 1134 (Paris: Éditions Techniques, n.d.) no. 27; C. Perelman, *Logique juridique*, 2d ed. (Paris: Dalloz, 1979) at 173; and N. MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1978) at 95.

[41]MacCormick rightly stresses, however, that the *Cour de cassation* can theoretically choose to treat a problem in such a way that will allow it "to assert its jurisdiction" and that will provide it with "the opportunity of giving its own ruling on the point": MacCormick, *ibid.*

[42]See Cornu, *supra*, note 38, no. 164 at 125-26.

[43]In Collins's words, "the rules [of law] create the *illusion* that judicial discretion is eliminated and that revision of contracts is prohibited": *Supra*, note 4 at 155 (emphasis supplied). But, as Rieg puts it, "[l]es juges du fond *peuvent*, en fait, modifier une convention sous le couvert de l'interpréter; il suffit pour cela d'une 'apparence d'interprétation' bien motivée": A. Rieg, "Force obligatoire des conventions" in *Juris-classeur civil, supra*, note 40, no. 27 (emphasis supplied). See also R. David, "Le dépassement du droit et les systèmes de droit contemporains" in Archives de philosophie du droit, *Le dépassement du droit*, vol. 8 (Paris: Sirey, 1963) 3 at 14: "le mot d'interprétation dissimule une activité des . . . juges . . . qui est dans la réalité très largement créatrice". Ost and van de Kerchove confirm the existence of this phenomenon: "il apparaît qu'en dépit de la grande liberté de choix que l'interprétation des termes juridiques confère nécessairement au juge, celui-ci s'emploie à dissimuler soigneusement le pouvoir qu'il exerce en fait . . ., mais, mieux encore, l'exerce de telle sorte que les choix opérés apparaissent singulièrement canoniques": F. Ost & M. van de Kerchove, *Jalons pour une théorie critique du droit* (Brussels: Facultés universitaires Saint-Louis, 1987) at 357-58.

[44]See Ghestin, *supra*, note 29, no. 309 at 333.

[45]C. Fried, *Contract as Promise* (Cambridge, Mass.: Harvard University Press, 1981) at 61.

3. Revision as "Interpretation +"

How do the lower courts make revision appear like "interpretation +"? A first way is for them to justify their result openly on interpretive grounds — as they do when they actually revise the contract according to their *own* conception of the parties' intention. One may also identify a second approach where decisions, although not mentioning the words "interpretation" or "intention", nonetheless covertly rely on what the court assumes would have been the parties' contractual intention in the circumstances that eventually materialized.

A celebrated decision of the *Cour de cassation* offers an apposite example.[46] At an auction sale, a purchaser paid 55,000 FF for a painting attributed generally to the Fragonard School. After much restoration work had been performed, the purchaser and a number of experts became convinced that the painting was an original of Fragonard himself. On the basis of these authoritative opinions, the painting was sold to the state for a sum of 5,150,000 FF. Having learned of this fact, the original vendor brought suit, claiming that the original sale was null because there had been an *erreur sur la substance.* The argument was that while the vendor thought it had been selling a work of the School, it had in fact been selling a genuine Fragonard. The *Cour de cassation* agreed and cancelled the original sale. As the painting belonged to the state as a purchaser in good faith, it could not be returned.[47] The Court however ordered the original purchaser to perform a *restitution par équivalent.* The Court assessed this equivalence as the difference between the original sale price and the re-sale price of the painting; the original purchaser therefore would have to remit 5,095,000 FF to the vendor. By fixing the equivalence with reference to the value of the painting *after* its authenticity had been established, the *Cour de cassation* functionally increased the price of the original sale a hundred-fold. In other words, the sale of the painting stood, but at a new price which deprived the purchaser of all its profit from the re-sale. Without resorting to the words "interpretation" or "intention", the Court set the price at the amount at which it believed the parties would have transacted if the facts that eventually came out had been known to them at the time of the original sale. Likewise, in the *réfaction* cases,[48] decided pursuant to article 1184 of the French *Code civil,* the courts are concerned to fix the contract price at the amount that they believe the aggrieved party would have offered for the partially-

[46]*Cass. civ. 1re,* 16 October 1979, Gaz.Pal.1980.Somm.60.

[47]Art. 2279, para. 1 French *Code civil.*

[48]The doctrine of *réfaction* refers to judicial reductions of price in commercial contracts, with particular reference to cases of inadequate delivery. See Legrand, *supra,* note 7 at 1035-37; and, for a recent extension of the doctrine to contracts of services, Paris, 17 March 1987, D.1988.219, Annot. J.-R. Mirbeau-Gauvin (contract for rental of meeting hall).

unperformed obligation of her co-contractor if the transaction had taken place on that basis.[49] Although the courts may prefer to keep silent about their thought processes, it appears that the exercise very much remains one of interpretation, and, more specifically, of "interpretation +".

Whether done openly or covertly, it is clear that courts that resort to the parties' contractual intention are intervening within the free area and therefore acting legitimately. But it is no less clear that the lower courts do not enjoy completely unfettered powers. For one thing, they must act within the limits of the free area, which means that they are compelled to present the substance (that is, the revision of the contract) in a particular form (that is, "interpretation +").

That the legitimacy of numerous instances of judicial revision of contracts should be grounded on a legal fiction is perhaps less surprising in French law than it would be in the common law tradition. Resort to legal fictions has long been commonplace in French law, as indeed in all legal systems of Roman origin.[50] According to Fuller, the fiction is but a false statement having utility. It hardly matters whether it is believed by its author or not.[51] The utility contemplated by Fuller is that of allowing for the reconciliation of a specific legal result with some premise or postulate. The "pretense" that the courts are involved only in "interpretation +" reconciles the revision effectively taking place (that is, the legal result) with the doctrine of sanctity of contract (that is, the premise). The fiction "make[s] it appear that the postulate assumed has in fact not been departed from".[52]

By resorting to the legal fiction of "interpretation +" — a course of action which incidentally bolsters the view of an increasingly individualized

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[49]See J.-R. Mirbeau-Gauvin, Annotation of Paris, 17 March 1987, D.1988.219, no. 15 at 222.

[50]Fuller observes that French law's conception of legal fictions is significantly broader than that of the common law tradition: L.L. Fuller, *Legal Fictions* (Stanford: Stanford University Press, 1967) at 28. See generally P. Foriers, "Présomptions et fictions" in C. Perelman & P. Foriers, eds, *Présomptions et fictions en droit* (Brussels: Bruylant, 1974) 7, no. 12 at 17; J. Schmidt-Szalewski, "Les fictions en droit privé" in Archives de philosophie du droit, *Réformes du droit de la famille*, vol. 20 (Paris: Sirey, 1975) 273, no. 30 at 291; R. David, *Les grands systèmes de droit contemporains*, 9th ed. by C. Jauffret-Spinosi (Paris: Dalloz, 1988) no. 100 at 145-46; and Bergel, *supra*, note 29, no. 282 at 325-27.

[51]See Fuller, *ibid.* at 9; Perelman, *supra*, note 40 at 62.

[52]Fuller, *ibid.* at 55. See also J.-L. Bergel, "Le rôle des fictions dans le système juridique" (1988) 33 McGill L.J. 357 at 365: "Les fictions peuvent ainsi avoir pour objet de fournir une justification logique à des solutions créées en marge du système établi". Bergel borrows from von Jhering and identifies this particular use as the "fonction dogmatique" of the fiction.

contractual justice[53] — the court is able to achieve what may be called "Aristotelian equity".[54] Through revision, it mitigates (or "corrects") the abuse that would otherwise occur, and renders justice in the case before it. Yet, as the court intervenes under a pretense of interpretation of the contract, it is able to make justice *according to law*. Because it only stretches so far, the fiction of "interpretation +" correlatively prevents the court from giving free rein to its own sense of fairness which otherwise would clearly amount to "denaturation".

It is important to observe that the use of a legal fiction carries with it the implication that a new concept is being shaped. In Fuller's language, the fiction is "an inevitable accompaniment of progress in the law itself".[55] The birth of the new concept is foreshadowed by the strained use of the old linguistic term (in this case, the word "interpretation"). Through the fiction, the boldness of the change is tempered, and the various audiences to which decisions are addressed, including the courts, may grow accustomed to the new idea.[56]

B. The Outright Imposition of an External Standard on the Parties

The cases that do not purport to revise contracts by relying on the courts' own conception of the parties' intention cannot be explained by reference to the continuum of interpretation discussed above. Indeed, this type of judicial revision takes place completely outside the "interpretation-denaturation" axis. The objection levelled against it is that the courts, by imposing outright an external standard on the parties to the contract, are violating a central tenet of the will theory: that an agreement is binding on the parties and on the courts themselves according to its original terms, as stated in article 1134, para. 1 of the French *Code civil*.[57]

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[53]See P.S. Atiyah, *From Principles to Pragmatism* (Oxford: Clarendon Press, 1978) at 12-13 (reprinted in P.S. Atiyah, "From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law" (1980) 65 Iowa L. Rev. 1249 at 1256-57), who offers the increased use of techniques having an in-built flexibility, such as interpretation, as an illustration of the growing measure of judicial "pragmatism". In addition, see, *e.g.*, R. Pound, "Individualization of Justice" (1938) 7 Fordham L. Rev. 153; and F. Ewald, *L'État providence* (Paris: Grasset, 1986) at 490-93.

[54]See C. Georgiadis, "Equitable and Equity in Aristotle" in S. Panagiotou, ed., *Justice, Law and Method in Plato and Aristotle* (Edmonton, Alta: Academic Printing & Publishing, 1987) 159 at 163-65.

[55]Fuller, *supra*, note 50 at 22.

[56]See P. Foriers, "Présomptions et fictions" in C. Perelman & P. Foriers, eds, *supra*, note 50, no. 22 at 23-24.

[57]Art. 1134, para. 1 French *Code civil* reads: "Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites".

In reply, it may be said that even the most ardent will-theorists must, when faced with the clear formulations of articles 1134 and 6 of the French *Code civil*, acknowledge the subordination of contract to the *droit objectif*.[58] Thus, Rouhette writes that the word "légalement" in article 1134 asserts the heteronomy of the individual will.[59] Second, one may say that the judicial revision of contracts carried out on the basis of an external standard are no more than assertions of this ascendancy of the *droit objectif* over the parties' agreement; revisions are therefore legitimate and accord with the will in the essential, but limited, role which it plays as *criterion* of the contract. These claims will now be given further consideration.

1. Contract and *droit objectif*

Kelsen's observations on contract suggest that its binding character is to be attributed to the law or custom. He postulates that a contract creates a juridically-binding rule or norm,[60] and argues that a fundamental distinction be drawn between the two complementary dimensions of contract: the "procedure" and the "conventional rule".[61] Kelsen observes that out of a "procedure" of contract-making involving a bare combination of psychological wills there emerges a norm. How are the wills able to generate such a norm?[62] In the absence of any natural or logical explanation for this phenomenon, Kelsen concludes that the causal relationship must itself be juridical:

> la convention est obligatoire dans la mesure où l'ordre juridique la considère comme un état de fait créateur de droit; ou, en d'autres termes, dans la mesure où une norme d'un degré supérieur (la loi, ou une norme coutumière) autorise les sujets à créer (par délégation) une norme d'un degré inférieur. La raison de validité de la convention se ramène donc à celle de la loi ou de la norme

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[58]Art. 6 French *Code civil* reads: "On ne peut déroger, par des conventions particulières, aux lois qui intéressent l'ordre public et les bonnes moeurs".

[59]G. Rouhette, "La force obligatoire du contrat [:] observations critiques" in D. Tallon & D. Harris, eds, *supra*, note 28, no. 65 at 47.

[60]See H. Kelsen, "La théorie juridique de la convention" in Archives de philosophie du droit et de sociologie juridique (Paris: Sirey, 1940) 33, no. 1 at 33-35.

[61]*Ibid.*, nos 2-3 at 35-37; and Kelsen, *Pure Theory of Law*, trans. M. Knight (Berkeley: University of California Press, 1970) at 260. See also G. Rouhette, *Contribution à l'étude critique de la notion de contrat*, vol. 1 (thesis, Paris, 1965) no. 91 at 344-48. In addition, see J. Raz, "Promises and Morality in Law" (1982) 95 Harv. L. Rev. 916 at 932-33, who distinguishes "the formation of promises" from "the content of the promissory obligation".

[62]As Rouhette puts it, "on comprend que le contrat produise des effets voulus. Mais on ne s'explique pas que ces effets soient juridiques": Rouhette, *ibid.*, no. 110 at 395.

coutumière qui instituent la convention comme état de fait créateur de droit (*pacta sunt servanda*).[63]

It is therefore only because and insofar as the superior norm (*i.e.*, the law or custom) confers on the psychological wills the power to create an inferior norm (*i.e.*, the contract) that the wills may successfully do so. For Godé, "il est évident que si la volonté produit des effets juridiques, ce n'est qu'en vertu d'un pouvoir conféré par la loi".[64] According to Kelsen, the reason why the law grants juridical value to the psychological wills is that "le législateur veut laisser aux sujets de droit le soin de régler eux-mêmes leurs intérêts économiques et autres, et ... estime qu'une réglementation indépendante et autonome de ces intérêts est la solution la mieux indiquée et la plus juste."[65]

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[63]H. Kelsen, "La théorie juridique de la convention" in Archives de philosophie du droit et de sociologie juridique, *supra*, note 60, no. 13 at 48.

While Rawls also agrees that actual contracts or promises are not binding in themselves, he argues that they are so binding on account of a pre-existing principle rather than because of state intervention. In his words, "[t]he obligation to keep a promise is a consequence of the principle of fairness": J. Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971) at 346. See also Portalis in P.A. Fenet, ed., *Recueil complet des travaux préparatoires du Code civil*, vol. 14 (Paris: Au Dépôt, 1827) at 130: "A Dieu ne plaise que nous voulions affaiblir le respect qui est dû à la foi des contrats ! mais il est des règles de justice qui sont antérieures aux contrats mêmes, et desquelles les contrats tirent leur principale force. Les idées de juste et de l'injuste ne sont pas l'unique résultat des conventions humaines. Elles ont précédé ces conventions, et elles doivent en diriger les pactes".

[64]P. Godé, *Volonté et manifestations tacites* (Paris: Presses universitaires de France, 1977) no. 8 at 17. See also J. Hauser, *Objectivisme et subjectivisme dans l'acte juridique* (Paris: L.G.D.J., 1971) no. 13 at 62.

[65]H. Kelsen, "La théorie juridique de la convention" in Archives de philosophie du droit et de sociologie juridique, *supra*, note 60, no. 13 at 48. Interestingly, these cardinal ideas of utility and justice may be traced at least to Portalis's *Discours préliminaire* to the *Projet de Code civil*. See Portalis in P.A. Fenet, ed., *supra*, note 63, vol. 1 (1830) at 510.

Some of the benefits from the standpoint of utility and justice generated by the law's recognition of contraet as creating a juridically-binding norm are explored by such authors as J. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) at 324-25; J.L. Mackie, *Ethics* (Harmondsworth: Penguin, 1977) at 110-11; Fried, *supra*, note 45 at 13-14; and F.H. Buekley, "Paradox Lost" (1988) 72 Minn. L. Rev. 775 at 775, who argues that "legal and moral obligations to perform promises are justified by the felicific consequences of a convention of promise keeping". But see P.S. Atiyah, "The Legacy of Holmes Through English Eyes" in *Holmes and the Common Law: A Century Later* (Cambridge, Mass.: Harvard Law School, 1983) 27 at 57, who writes that "[t]here *is* an obligation to perform a contract .... It is a moral obligation and it is *because* of this moral obligation, that the law often provides a legal remedy to an aggrieved party" (emphasis original). Rather, it is believed that the law provides a legal remedy because there is a *legal* obligation to perform a contract. This legal obligation itself arises because the law confers on the psyehological wills the power to create a norm. Atiyah indeed retreats from his initial position in the revised version of his essay: see P.S. Atiyah, *Essays on Contract* (Oxford: Clarendon Press, 1986) 57 at 60, where he substitutes the words "legal obligation" for "moral obligation".

Despite its attractiveness, Kelsen's analysis suffers from his unduly positivistic approach. To suggest that the power-conferring rule, or superior norm, only consists of the law or the custom misconceives the important role played by other sources of law (in its widest sense) in practice. Nor is there much room in Kelsen's system for a recognition of the *rights* of individuals, despite the fact that his obligation-oriented approach is attenuated in the specific context of contract.[66] On the whole, it therefore appears that, without detracting in any significant sense from the thrust of Kelsen's observations on contract, one could substitute with profit the concepts of *droit objectif* and *droit subjectif* for the Kelsenian notions of "superior norm" and "inferior norm". The power held by an individual to enter into and bind oneself to a contract would thus be envisaged as a *droit subjectif*. It is agreed that a *droit subjectif* owes its existence to the *droit objectif*, traditionally defined as the compendium of rules and principles governing life in society[67] — including, therefore, judicial decisions.[68] Ghestin and Goubeaux express the relationship between the two levels of *droit* in these words:"Ce sont les règles juridiques établies par les autorités compétentes qui déterminent les prérogatives des particuliers".[69] Of course, it may be argued that some *droits subjectifs*, far from being conferred by the *droit objectif*, inhere to the individual. Whether this is so or not, it remains that the efficacy of any *droit subjectif* is a direct function of its recognition by the *droit objectif*: "Cette analyse s'impose à l'observateur de la réalité juridique telle qu'elle est concrètement vécue. Nul ne peut invoquer devant un tribunal un droit qui ne serait consacré".[70] With respect to contract, these observations suggest that it is only because and insofar as the *droit objectif* so decrees that the agreement is binding on the parties.[71]

The supremacy of the *droit objectif* not only arises at the normative level but also affords an accurate description of the present condition of the law of contract as reflected in various legislative texts allowing a party to

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[66]See generally O. Ionescu, *La notion de droit subjectif dans le droit privé*, 2d ed. (Brussels: Bruylant, 1978) nos 27-29 at 64-70.

[67]See G. Cornu, *Droit civil [.] Introduction — Les personnes —Les biens*, 2d ed. (Paris: Montchrestien, 1985) no. 10 at 15; and Bergel, *supra*, note 29, no. 30 at 44.

[68]See, on caselaw as a source of *droit objectif*, J. Ghestin & G. Goubeaux, *Traité de droit civil*, vol. 1: *Introduction générale*, 2d ed. (Paris: L.G.D.J., 1983) nos 438-45 at 354-58.

[69]*Ibid.*, no. 175 at 128.

[70]*Ibid.*, no. 175 at 128-29.

[71]As Rouhette puts it, "rien n'interdi[t] que le [d]roit impos[e] ce que la Nature ne peut réaliser": Rouhette, *supra*, note 61, no. 113 at 408. And Ghestin thus writes that "[l]a force obligatoire du contrat ne trouve pas son fondement dans la volonté des parties mais dans le *droit objectif*": Ghestin, *supra*, note 29, no. 173 at 179 (emphasis supplied).

re-open her transaction under certain conditions.[72] Moreover, this supremacy derives express support from the texts of the French *Code civil* themselves. As has been mentioned above,[73] article 1134, para. 1 — as do other provisions of the *Code* such as article 544 on the right of ownership — clearly states its subordination to the *droit objectif*.[74] The pre-eminence of the objective dimension within contract law is amplified by article 6 of the *Code* which subordinates all contracts to *ordre public* [75] — a subset of *droit objectif* which has been systematically widened by the courts and the legislator throughout the years.[76] Considering these provisions, Rouhette rightly concludes that the role of the *droit objectif* in contract can no longer be seen as exceptional or derogatory. Rather, it acts as a "restriction normale et permanente à l'activité contractuelle".[77] In this, he reflects the opinion of many of the classical authors such as Duranton, Demolombe, Marcadé, and Mourlon — the so-called *Exégètes* — who rejected the notion of an autonomous will and rather gave recognition to the idea of the supremacy of the law.[78]

2. Revision as *droit objectif*

a. Legitimacy

The recognition of the pre-eminence of the *droit objectif* within the framework of contract law affords significant support for the judicial revision of contracts based on the outright imposition of an external standard on

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[72]See *Loi no 78-22 du 10 janvier 1978*, D.1978.Lég.84, s. 7, para. 1 (borrower in credit transactions contemplated by the *loi* — that is, relating to contracts of sale and services *not* involving real property — has seven days to re-open agreement); *Loi no 81-5 du 7 janvier 1981*, D.1981.Lég.46, s. 22 (subscriber of life insurance policy: thirty days); *Loi no 72-1137 du 22 décembre 1972*, D.1973.Lég.17, s. 3 (buyer of goods from door-to-door salesperson: seven days); and *Loi no 72-6 du 3 janvier 1972*, D.1972.Lég.61, s. 21 (subscriber of certain savings schemes: fifteen days). See generally G. Cas & D. Ferrier, *Traité de droit de la consommation* (Paris: Presses universitaires de France, 1986) nos 461-75 at 418-26; and G. Rouhette, "'Droit de la consommation' et théorie générale du contrat" in *Études offertes à René Rodière* (Paris: Dalloz, 1981) 247, no. 12 at 258.

[73]See *supra*, text accompanying note 59.

[74]See, *e.g.*, H. Batiffol, "La 'crise du contrat' et sa portée" in Archives de philosophie du droit, *Sur les notions du contrat*, vol. 13 (Paris: Sirey, 1968) 13 at 26-27; and A.-J. Arnaud, *Les origines doctrinales du Code civil français* (Paris: L.G.D.J., 1969) at 213.

[75]See, *e.g.*, P. Malaurie, *L'ordre public et le contrat* (Reims: Matot-Braine, 1953) no. 400 at 259. For the text of art. 6 French *Code civil*, see *supra*, note 58.

[76]See generally J. Ghestin, "L'ordre public, notion à contenu variable, en droit privé français" in C. Perelman & R. Vander Elst, eds, *Les notions à contenu variable en droit* (Brussels: Bruylant, 1984) 77 at 77-97.

[77]Rouhette, *supra*, note 61, no. 4 at 6.

[78]See G. Rouhette, "La force obligatoire du contrat [:] observations critiques" in D. Tallon & D. Harris, eds, *supra*, note 28, no. 5 at 32-33.

the parties. Since it is the *droit objectif* that accounts for the binding character of agreements, nothing prevents it from qualifying its own doctrine of sanctity of contract in circumstances which it deems appropriate. In the words of Demante and Colmet de Santerre, "la loi, qui forme le lien [contractuel], peut dans certains cas le relâcher ou le dissoudre".[79] Indeed, the *droit objectif* does precisely this in cases of *force majeure*, where it releases both parties from the contractual commitments they had agreed upon. Nothing prevents the *droit objectif* from doing likewise in other situations. These relaxations may be legislative, since statutes are an integral part of the *droit objectif*, or may take the form of judicial decisions, these being another essential constituent of the *droit objectif*. Internal coherence is maintained within the *droit objectif* through a hierarchy of sources whereby judicial decisions may not run contrary to legislative texts. Consequently, the qualifications judicial decisions put on the doctrine of sanctity remain faithful to the general structure of contract law. One cannot therefore deny the legitimacy of such judicial interventions any more than one can dispute that of legislation "impinging" on contract.[80] Morin puts the matter most aptly when he writes that "[l]a force obligatoire reposant sur les exigences de l'équité et les nécessités de l'ordre social doit être sous leur dépendance".[81]

b. The Will as Criterion of the Contract

Though not accounting for the binding character of the contractual relationship, the will (or combination of wills) remains the criterion of the contract;[82] it retains a vital, though limited, role as the trigger of contractual obligation. While the parties are bound because the *droit objectif* so decrees, in essence they are bound — at least in the narrow sense — because they have chosen to be.

Since the *droits subjectifs* thus remain, if not as a source, then certainly as goals and as means of achieving the *droit objectif*,[83] it must be stressed that judicial revision of contracts does not challenge the will in its capacity as a criterion of the contract. On the contrary, judicial revision, as a constituent part of the *droit objectif*, effectively honours the parties' decision to enter into an agreement by ensuring the survival of that particular contractual relationship on the best possible terms for each of them, given the

[79]Demante & Colmet de Santerre, *Cours analytique de Code civil*, 2d ed., vol. 5 (1883) no. 50 at 64, cité in *ibid.*, no. 5 at 33, not. 83.

[80]P.S. Atiyah, Book Review of *Contract as Promise*, by C. Fried (1981) 95 Harv. L. Rev. 509 at 524.

[81]G. Morin, *La révolte du droit contre le Code* (Paris: Sirey, 1945) at 35-36.

[82]See Ghestin, *supra*, note 29, nos 178-1 to 178-5 at 188-91.

[83]See Ghestin & Goubeaux, *supra*, note 68, no. 176 at 131; and Gounot, *supra*, note 28 at 341.

circumstances before the court. In this sense, the role of a judge vis-à-vis the existing contract is not unlike that of the author responsible for adding a chapter to a book that is already partially written. Just as the author is constrained by the existing story, her obligation being to create the best possible work of art out of existing materials,[84] so too is the judge limited by the terms of the contract. This accounts for a reconciliation of the judicial revision and the will of the parties; this sentiment is well expressed by Ripert, who writes that "[a]u fond, c'est encore respecter le contrat que de le reviser".[85]

On the whole, judicial revision arising out of the outright imposition on the parties to the contract of an external standard may therefore be said not to challenge the will theory because the practice derives direct support from the supremacy of the *droit objectif*, both at the normative and descriptive levels, since it is in harmony with the will in its capacity as a criterion of the contract.

C. Observations

This hierarchy of *droits* shows how the *droit objectif*'s limitations on the parties' freedom within the contractual sphere through the judicial revision of contracts is justified. The *droit objectif* does not grant any *droit subjectif* in an open-ended fashion. When a party purports to use a *droit subjectif* for a different purpose than that for which it was conferred — such as abusing a defenceless co-contractor or the legal system itself — the courts deem it appropriate to prevail over the contract and revise its terms.

While no compelling case is here made for a legislative intervention, such a course of action would serve to sanction judicial revision of contracts, legislation remaining the superior and more obvious expression of the *droit objectif*. Legislative intervention would signal the end of a judicially-employed legal fiction. In the absence of legislation, the fiction would have to die "through a shift of connotation from facts to legal relations".[86] Thus, the word "interpretation", which still commonly involves the pretense that obscure clauses are present in the contract, would come, through a process of re-definition, to be simply a way of stating that the case is a proper one for judicial intervention. Because this change might take a long time, truth

[84]See R. Dworkin, "Law as Interpretation" (1982) 60 Tex. L. Rev. 527 at 540-48 (reprinted in R. Dworkin, *A Matter of Principle* (Oxford: Clarendon Press, 1986) at 158-64). But see S. Fish, "Working on the Chain Gang: Interpretation in Law and Literature" (1982) 60 Tex. L. Rev. 551.

[85]G. Ripert, *La règle morale dans les obligations civiles*, 4th ed. (Paris: L.G.D.J., 1949) no. 75 at 131. See also Mirbeau-Gauvin, *supra*, note 49, no. 14 at 222: "l'adaptation du contrat traduit l'idée de respect de la volonté des parties".

[86]Fuller, *supra*, note 50 at 32.

(and therefore, security) would remain sacrificed on the altar of formal legitimacy. Clearly legislative change would be preferable to this process.[87] Various reasons may be offered for ridding French law of the fiction of "interpretation +" at its present stage of development. Among these are the facts that the position adopted is intellectually dishonest, and that it makes the judicial role much less useful and effective than it could be. As Llewellyn perspicaciously observes elsewhere, "[c]overt tools are never reliable tools".[88] Finally, the abandonment of the fiction would go a long way towards restoring to the word "interpretation" its original and genuine meaning.

II. Judicial Deference

Besides arguing that the courts may not revise contracts on account of the respect owed to the will of the parties, one may take the view that they ought not to revise contracts for institutional reasons. In other words, a proper understanding by the courts of their role within the legal system and the limitations of their office should cause them to refrain from engaging in the practice of revision. Some of the objections that may be adduced on this ground would traditionally arise in the wider context of judicial law-making. Indeed, judicial revision of contracts shares with judicial law-making the recourse to authority and constraint. Still another objection may be derived from the text of article 1134 of the French *Code civil* itself. None of the leading arguments, however, proves conclusive against judicial revision of contracts.

A. Judicial Law-Making

1. Arbitrariness

An immediate objection to judicial revision of contracts is that the measure of "judicial creativity" necessarily involved in the practice is bound to entail arbitrariness. A number of reasons however suggest that there is much that is mistaken in this particular argument.

Tangible safeguards against arbitrariness or subjectivity of values are varied. One is found in the need for court decisions to be justified by

[87]For Fuller, the fiction is the "pathology of the law": *ibid.* at viii. Perelman writes that it is "l'expression d'un malaise": *Supra*, note 40 at 64.

[88]K.N. Llewellyn, Book Review of *The Standardization of Commercial Contracts in English and Continental Law*, by O. Prausnitz (1939) 52 Harv. L. Rev. 700 at 703.

reasons.[89] As discussed above, although reasons can be insufficient or false, they must be provided. Judicial collegiality and the right of appeal have also rightly been identified as means of avoiding unwarranted subjectiveness.[90] Other elements that significantly attenuate the danger of judicial arbitrariness are less concrete and concern various self-imposed constraints by which the courts seek to abide. As Raz says, "[i]n every case in which the court makes law it also applies laws restricting and guiding its law-making activities".[91]

Consequently, the court has a discernible tendency to show loyalty towards the legislator.[92] Closely related is the respect that a judge feels towards the role she performs, and her desire not to bring it into disrepute[93] or lose her personal credibility.[94] A court therefore remains mindful of the various audiences to which its decision is addressed. Beyond the parties themselves, a judge takes into account the legal profession (fellow judges, lawyers, and academics) and general public opinion.[95] The prevailing importance of the legal audience ensures that a judge does not delve outside an accepted "reservoir" of principles and techniques in reaching her decision — something which the revision cases examined here and elsewhere readily confirm.[96] All these factors combine to make the emergence of a new "phénomène Magnaud" a remote and controllable occurrence.[97]

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[89]See Ghestin & Goubeaux, *supra*, note 68, no. 435 at 352. See also L.J. Jaffe, *English and American Judges as Lawmakers* (Oxford: Clarendon Press, 1969) at 37; and Perelman, *supra*, note 40 at 58.

[90]See Perelman, *ibid.* at 169. See, on collegiality in French law, R. Perrot, *Institutions judiciaires* (Paris: Monchrestien, 1983) nos 267-75 at 262-69, especially no. 272 at 265-66.

[91]J. Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979) at 195.

[92]In the words of Jaffe, "[the will] of those who judge has [also] been trained to accept the authority of the law": Jaffe, *supra*, note 89 at 35. See also H. Batiffol, "Questions de l'interprétation juridique" in Archives de philosophie du droit, *L'interprétation dans le droit*, vol. 17 (Paris: Sirey, 1972) 9 at 25-26; and Ghestin & Goubeaux, *supra*, note 68, no. 480 at 385.

[93]See S. Belaid, *Essai sur le pouvoir créateur et normatif du juge* (Paris: L.G.D.J., 1974) at 276.

[94]See Ost & van de Kerchove, *supra*, note 43 at 42-43, who show that the judge indeed loses credibility when she goes beyond the limits of what is considered tolerable.

[95]The position is aptly put by Ost and van de Kerchove: "le juge prend nécessairement en compte (même si cette opération n'est pas toujours explicite) le contexte formé par le système juridique de référence et le contexte sociétaire global dans lequel les conséquences du jugement vont prendre place": Ost & van de Kerchove, *supra*, note 43 at 357. See also Bell, *supra*, note 27 at 24; Perelman, *supra*, note 40 at 173; and P. Goodrich, *Reading the Law [.] A Critical Introduction to Legal Method and Techniques* (Oxford: Basil Blackwell, 1986) at 149 and 165.

[96]Jaffe, *supra*, note 89 at 36; and Goodrich, *ibid.* at 165: "Certain forms of argument or justification are inadmissible to the legal community". See also *supra*, text accompanying notes 18-25 and 46; and Legrand, *supra*, note 7 at 972-1044.

[97]Under the Magnaud presidency, towards the end of the nineteenth century, the *Tribunal de première instance* of Château-Thierry became well-known for a series of highly unorthodox *jugements d'équité*. See, on the "phénomène Magnaud", F. Gény, *Méthode d'interprétation et sources en droit privé positif*, 2d ed., vol. 2 (Paris: L.G.D.J., 1919) nos 196-200 at 287-307; and Ewald, *supra*, note 53 at 498.

Despite these constraints, situations will inevitably arise where a judge must ultimately make a personal choice. As underlined by Reiter, this is then what the legal system both allows and *requires* her to do; it "does not entail the inference that the task is ... other than judicial".[98] In the words of Ewald, "*[d]iscrétionnaire* ne veut pas dire arbitraire."[99]

The revision cases confirm the weakness of the argument of arbitrariness insofar as they do not indicate random or capricious adjudication. On the contrary, the decisions show that the courts are restrained in their use of revision and that, when they resort to it, they carefully steer a middle course designed to give each party a share in the outcome. This is very much apparent at the stage of formation. While they reject a claim in nullity by X (say, the victim of a *dol*), the courts simultaneously ensure that X will not have to perform according to the original contractual terms, as Y would no doubt wish her to do. Rather, the courts maintain the contract (thus giving a degree of satisfaction to Y) but do so on varied terms so as to make some allowance for X's grievance. In the words of Perrin, "[e]ntre la validité et la nullité de la convention, [la révision] établit un moyen terme, une validité partielle".[100] Decisions on *réfaction* illustrate this approach in the context of performance of the contract.[101]

One must remain mindful of the fact that while the practice of judicial revision entails reference to "situationally sensitive standards"[102] — such as counterfactual *abus de droit*[103] — and therefore confers an important measure of discretion on the judiciary, one is left with what very much remains an intermediate position. This is because the accumulated body of precedents will soon have the effect of sufficiently confining the conditions of revision in practice so that the standard will be considered relatively rule-like (although, admittedly, never as strict as rule-bound legalism would have it).[104]

2. Retroactivity

Another objection that calls for consideration is that courts in revising contracts engage in a form of retroactive law-making. As Raz rightly observes, "the objection to retroactive law-making is based on the frustration

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[98]B.J. Reiter, "The Control of Contract Power" (1981) 1 Oxford J. Leg. Stud. 347 at 371-72.

[99]Ewald, *supra*, note 53 at 495 (emphasis original).

[100]J. Perrin, *Essai sur la réductibilité des obligations excessives* (Paris: Marchal & Billard, 1905) at ii.

[101]*Supra*, note 48.

[102]Kelman, *supra*, note 2 at 27.

[103]See *supra*, text accompanying note 15.

[104]See Kelman, *supra*, note 2 at 19. Goodrich explains, however, how there remains a strong measure of individualized justice even within the confines of the traditional doctrine of precedent: *supra*, note 95 at 161-65.

of justified expectations".[105] This suggests an inquiry by the court into the expectations that a party may legitimately entertain. Through her counsel, a party is aware that the leading remedies contemplated by the French *Code civil* are discretionary, whether it be nullity,[106] *résolution*,[107] *exécution en nature*,[108] or damages (at least as regards their evaluation).[109] She also knows of the "good faith" provision in article 1134, para. 3 of the French *Code civil*[110] — now extending to formation as well as performance of the contract[111] — and of the power of *équité* conferred on the court under article 1135 of the *Code*.[112] Finally, the party is no doubt informed of the decisions rendered in similar cases and appreciates that judges naturally tend to treat like situations in like manner. On the whole, the potential sharpness of retroactivity is therefore blunted. Moreover, it must be said that the effects of any retroactive law-making are confined to the parties to the dispute and to those with causes of action having arisen before the decision is rendered.

Subject to these considerations, there may remain situations where retroactivity causes undeniable prejudice to a party; for instance, when the *Cour de cassation* first removed an exoneration of liability clause from a manufacturer's contract of sale. The manufacturer, had she been in a position to foresee the decision, would have contracted insurance accordingly. The best answer to such situations is offered by Bell: retroactivity must be tolerated because of the substantive justice that it achieves in the long run.[113] The wider societal interest in performance of contracts, which makes itself acutely felt in a number of decisions, must be set against the particular inconvenience generated by retroactivity.

3. Absence of Express Authority

A further objection against the practice of judicial revision is as follows: the courts ought not to revise contracts in the absence of a text of law granting them express authority to do so.

An investigation into the general law-making powers of French courts reveals three points over which there is widespread consensus. The first of

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[105]Raz, *supra*, note 91 at 198.

[106]Art. 1117 French *Code civil*.

[107]Art. 1184 French *Code civil*.

[108]Art. 1184 French *Code civil*.

[109]Arts 1149-1151 French *Code civil*.

[110]Art. 1134, para. 3 French *Code civil* reads: "[Les conventions légalement formées] doivent être exécutées de bonne foi".

[111]See Carbonnier, *supra*, note 29, no. 51 at 209.

[112]Art. 1135 French *Code civil* reads: "Les conventions obligent non seulement à ce qui y est exprimé, mais encore à toutes les suites que l'équité, l'usage ou la loi donnent à l'obligation d'après sa nature".

[113]See Bell, *supra*, note 27 at 20.

these concerns what the courts may not do. It is agreed that the courts may not make law in the sense in which the legislator makes law; they may not lay down a rule of general and permanent application. Article 5 of the French *Code civil*, enacted in reaction to the excesses of pre-Revolution *Parlements*, is clear to this effect.[114] From the judiciary's perspective, this is the only fetter imposed upon it in the name of the doctrine of separation of powers.[115] Montesquieu himself, erroneously believed to have chastised judicial law-making in "weaker" senses, did not in fact go further than oppose law-making of this legislative type.[116] The principle has various ramifications. It is, for instance, widely accepted that the courts may not through their decisions effectively empty a legislative provision or article of the French *Code civil* of all its contents.[117]

The second and third points of consensus concern what the courts can do. It is agreed, at least among authors, that the courts can make law in the sense of applying a particular law or provision of the French *Code civil* to the case before them. The view that the courts merely declare the law has now fallen into desuetude. More significantly, it is agreed that the courts are not only authorized but actually compelled to exercise law-making powers in a stronger sense pursuant to article 4 of the French *Code civil*, which

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[114]Art. 5 French *Code civil* reads: "Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises". See J.P. Dawson, *The Oracles of the Law* (Ann Arbor: University of Michigan Law School, 1968) at 305-14. See also P. Hébraud, "Le juge et la jurisprudence" in *Mélanges offerts à Paul Couzinet* (Toulouse: Université des sciences sociales de Toulouse, 1974) 329, no. 10 at 339; and art. 1351, para. 1 French *Code civil*.

[115]See *Const.*, 4 October 1958, s. 34, para. 1. See also P. Bellet, "Le juge et l'équité" in *Études offertes à René Rodière* (Paris: Dalloz, 1981) 9 at 13.

[116]See Montesquieu, *De l'esprit des lois*, ed. by R. Caillois, vol. 2 (Paris: Gallimard, 1951) liv. XI, c. 6:

> Il n'y a point encore de liberté si la puissance de juger n'est pas séparée de la puissance législative et de l'exécutrice. Si elle était jointe à la puissance législative, le pouvoir sur la vie et la liberté des citoyens serait arbitraire : car le juge serait législateur. Si elle était jointe à la puissance exécutrice, le juge pourrait avoir la force d'un oppresseur.
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> Tout serait perdu si le même homme, ou le même corps des principaux, ou des nobles, ou du peuple, exerçaient ces trois pouvoirs: celui de faire des lois, celui d'exécuter les résolutions publiques, et celui de juger les crimes ou les différends des particuliers.

See generally S. Goyard-Fabre, *La philosophie du droit de Montesquieu*, 2d ed. (Paris: Klincksieck, 1979) at 323-24.

[117]See H. Batiffol, "Questions de l'interprétation juridique" in Archives de philosophie du droit, *supra*, note 92 at 21.

prescribes a duty of interpretation for the judiciary.[118] This duty implies the power to make, to create law.[119]

It is therefore erroneous to suggest that the absence of a specific provision endowing the courts with a power to revise contracts is in any way indicative of a general legislative prohibition to intervene. Recent legislative texts suggest to a court faced with a legal dispute to draw analogies with one of the growing number of provisions sanctioning particular instances of revision. Although relatively fragile, the "[a]nalogical argument is a form of justification of new rules laid down by the courts in the exercise of their law-making discretion".[120]

Furthermore, it may be claimed that judicial powers in essence do not stem from any particular statutory provision or article of the French *Code civil*. Rather, they inhere to the judicial function itself by virtue of a "constitutional grant of power to try cases and controversies pursuant to law".[121] The judiciary therefore acts as an autonomous organ of the state fulfilling functions which complement those of other state organs.[122] Thus, Ghestin and Goubeaux may rightly say that the creation of judicial rules is not dependent on the legislative will (or absence thereof).[123]

There remains two senses, however, in which the absence of a text weakens judicial intervention. A decision rendered without direct textual authority is naturally subject to legislative overruling.[124] Furthermore, it becomes especially prone to *judicial* overruling and distinguishing.[125]

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[118]Art. 4 French *Code civil* reads: "Le juge qui refusera de juger, sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice". See, *e.g.*, C. Perelman, *Droit, morale et philosophie*, 2d ed. (Paris: L.G.D.J., 1976) at 31; and Belaid, *supra*, note 93 at 38 and 264-65.

[119]See Belaid, *ibid.* at 27; and P. Hébraud, "Le juge et la jurisprudence" in *Mélanges offerts à Paul Couzinet*, *supra*, note 114, no. 10 at 339.

[120]Raz, *supra*, note 91 at 202.

[121]Jaffe, *supra*, note 89 at 35.

[122]See, *e.g.*, Belaid, *supra*, note 93 at 262-63 and 273.

[123]See Ghestin & Goubeaux, *supra*, note 68, no. 441 at 355. In the words of Cardozo, each power is "legislating within the limits of his competence": B.N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921) at 113. Indeed, Bellet has suggested that one ought to talk of a "coopération", rather than a separation, of powers: P. Bellet, "Le juge et l'équité" in *Études offertes à René Rodière*, *supra*, note 115 at 13. See also Perelman, *supra*, note 40 at 84.

[124]See J. Boulanger, "Notations sur le pouvoir créateur de la jurisprudence civile" (1961) 59 Rev. trim. dr. civ. 417, no. 20 at 27-28.

[125]See Raz, *supra*, note 91 at 195; and David, *supra*, note 50, no. 101 at 135.

B. *Article 1134 of the French* Code civil

Before formulating the argument and the reply to it, a few words must be said about the scope of article 1134, para. 1 of the French *Code civil.* Contrary to what is often assumed, this provision is not confined to performance of the contract but also reaches back to formation. Indeed, the words "conventions légalement formées" embrace all contracts vitiated by a defect in consent which have not yet been cancelled. Until nullity is granted by the court, agreements are deemed to be "conventions légalement formées" and as such are regulated by article 1134.[126]

Against this background, the objection that must now be considered is that the courts ought not to revise contracts as to do so runs against an express provision of the French *Code civil.* But the question immediately arises as to whether this provision is a genuine obstacle to judicial revision of contracts. Much current judicial practice, with respect to the theory of *imprévision,* would certainly seem to suggest so.[127] Cornu, for one, talks of the "crainte révérencielle" that still surrounds article 1134, considered to be "tabou" by many judges.[128] This state of affairs is in no small way attributable to the wording of the article itself which, somewhat mystically, equates "contracts" with "law" ("[les conventions] ... tiennent lieu de loi"). There are however various grounds to show that a less constrained view of article 1134 is fully justified.

One may infer, from the other contexts in which Portalis uses them in his *Discours préliminaire,*[129] that the words "tiennent lieu de loi" were never meant to be invested with any sacramental meaning.[130] In article 1134, they would appear to mean no more than the parties must abide by their contract just as they must abide by law.[131] To abide by one's contract is, of course, to perform it on the terms agreed. But judicial revisions do not have to do

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[126]See H.L.A. Hart, "The Ascription of Responsibility and Rights" in *Proceedings of the Aristotelian Society,* vol. 49 (London: Harrison, 1949) 171 at 176.

The words "conventions légalement formées" have been understood by one author to mean "[conventions] présumées économiquement saines": E. de Gaudin de Lagrange, *L'intervention du juge dans le contrat* (thesis, Paris, 1935) no. 6 at 23.

[127]See generally D.-M. Philippe, *Changement de circonstances et bouleversement de l'économie contractuelle* (Brussels: Bruylant, 1986) 53-153, reviewed by P. Legrand, "Beyond Method: Comparative Law as Perspective" (1989) 37 Am. J. Comp. L. 101.

[128]Cornu, *supra,* note 38, no. 89 at 75.

[129]See, *e.g.,* Portalis in P.A. Fenet, ed., *supra,* note 63, vol. 1 (1830) at 471.

[130]See, for an historical explanation of this parallel, G. Rouhette "La force obligatoire du contrat [:] observations critiques" in D. Tallon & D. Harris, eds, *supra,* note 28 at 47, n. 65.

[131]In the words of Rouhette, "[i]l faut n'avoir jamais lu Domat, à qui l'article est emprunté, ni ouvert un Digeste, à quoi renvoit Domat, pour proposer une interprétation aussi dramatique [*i.e.,* "l'assimilation du contrat à la loi, et le caractère sacré de la loi"] d'un texte qui énonce simplement que le contrat est obligatoire": Rouhette, *supra,* note 61, no. 196 at 596.

with breaches of article 1134 by the parties. Rather than involving a party unilaterally undertaking the revision of her agreement, they are concerned with the *courts* varying contracts.

The text of article 1134 is directed at the courts themselves.[132] It tells them two things: that they must not ignore the parties' agreement and, once again, that they must ensure that the parties abide by the contract as initially agreed. Many authors convincingly argue that the application by the courts of a legislative provision such as article 1134 must be made by reference to the present legislator's alleged will[133] — an approach which at once allows due account to be taken of the legislative framework and for proper allowance to be made for socio-economic evolution. The wave of interventionist legislation in the area of contract suggests that the present legislator does not take a dogmatic view towards the enforcement of contracts in strict conformity with their terms. In carrying out their mandate pursuant to article 1134, the courts thus retain the flexibility allowing them to derogate from the doctrine of sanctity of contract in appropriate situations.

Another line of reasoning leading to a similar conclusion is advocated by Batiffol. He notes that the interpretation of an article of the *Code civil* is a search for its *sens*. Given that uncontrovertible premise, Batiffol suggests that the courts may properly stand a good distance from the literal meaning of the text and still be following its *sens*. This is because the word "sens" does not only mean "meaning" but also "general direction".[134] Accordingly, it is entirely proper for a court to ask the parties to perform part of their original agreement rather than annihilate it altogether. It is then following the "general direction" emanating from the text of article 1134, and thus abiding by its "sens".

Finally, it must be remembered that liberties of interpretation have been taken with various texts of the French *Code civil* purporting to be just as fundamental in content as article 1134, para. 1. As is aptly put by Rouhette, "[u]ne fois entrés en vigueur, les textes ont leur vie propre et l'interprétation peut leur conférer une signification très éloignée de celle qu'avaient en vue leurs rédacteurs".[135] Thus, article 11 is now read as conferring on a foreigner all the civil rights not expressly denied her by statute. Likewise, article 1384, para. 1 is commonly understood as having done away with fault as a requirement for civil liability for damage caused by things. Article 1780, for

[132]This second aspect is highlighted by, *e.g.*, A. Rieg, "Force obligatoire des conventions" in *Juris-classeur civil*, *supra*, note 40, no. 21.

[133]See, *e.g.*, Perelman, *supra*, note 40 at 151; and Cardozo, *supra*, note 123 at 120.

[134]See H. Batiffol, "Questions de l'interprétation juridique" in Archives de philosophie du droit, *supra*, note 92 at 18 and 25.

[135]G. Rouhette, "La force obligatoire du contrat [:] observations critiques" in D. Tallon & D. Harris, eds, *supra*, note 28, no. 5 at 32.

its part, is interpreted so that contracts of employment for an indeterminate duration are allowed to stand.

Article 1134 therefore need not preclude judicial revisions of contracts. Yet, the evocative power of the time-honoured formula "*force obligatoire du contrat*" is such that as perceptive an exponent of French law as Cornu continues to deny that the courts actually engage in revisions of contracts.[136] But as David has judiciously observed, a doctrinal movement, however strong, is not necessarily an accurate reflection of the practice being effectively followed at a given point in time.[137]

C. Observations

Although none of the objections discussed appears conclusive, it remains that a direct legislative intervention on the subject of judicial revision would allay the concerns of those arguing against the practice either through the presence of a prohibition in the form of article 1134, para. 1 of the French *Code civil* or in the absence of any textual authority. Legislative intervention would also avoid any inconvenience that could possibly be generated by retroactivity. Finally, it would serve to attenuate what remaining doubts there might be on the question of arbitrariness.

III. The Security and Efficiency of Transactions

Although economic analysis of law has yet to gain the favour of French authors, the significance of security and efficiency for French transactions is not in doubt. Because this discussion focuses precisely on synallagmatic contracts — "contract as exchange" — one may wonder whether the judicial decisions favouring revisions of contract challenge these values. It is believed that they do not, and that judicial revision of contracts actually enhances both security and efficiency. But before this may be established, it is necessary to consider briefly whether the state should intervene in the contractual sphere at all. In other words, before questioning the impact of the judicial revision of a maritime salvage contract on security and efficiency of transactions, it must be asked whether the state should not leave the transaction to the interplay of market forces.

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[136]See Cornu, *supra*, note 38, no. 89 at 75. See also — and perhaps surprisingly given the author's well-known innovative, if not iconoclastic, views on contract law — Rouhette, *supra*, note 9, no. 4 at 373.

[137]See R. David, "Le dépassement du droit et les systèmes de droit contemporains" in Archives de philosophie du droit, *supra*, note 43 at 13; and A. Rieg, "Force obligatoire des conventions" in *Juris-classeur civil*, *supra*, note 40, no. 28.

Judicial revision may "undermin[e] the role of the uninhibited market in determining the distribution of wealth".[138] Yet, there are instances where, considering the economics of a general market rather than a specific contract, state intervention makes it easier for contracting parties to enter into secure and efficient transactions. Such is the case when the courts "automatically" introduce certain implied terms in contracts thereby enhancing predictability and reducing transaction costs.[139] Regarding many of the judicial interventions with which this discussion is concerned,[140] the economic motivation for state intervention is admittedly not so apparent. The ability to enter into and perform certain contracts on their own terms encourages participation in the market.[141] Still, on balance, the strong ethical justification for state intervention overcomes a possible unbalancing of the market.[142]

Accepting that the courts can intervene within the contractual sphere, even if only on ethical grounds, the interest shifts to the nature of their intervention. The alternative to judicial revision is generally nullity or termination of the contract.[143] These conventional remedies generate much insecurity. Moreover, for a court to nullify or terminate the contract is to allow for massive opportunism by one party which is economically inefficient in the long term. It remains to discuss the issue of revision itself at greater length and to establish why it is the more satisfactory course of action from an economic perspective.

A. Security of Transactions

In the language of "economic analysis", it can be said that most people are "risk-averse". This seems a fair assumption to make as regards the great majority of parties entering into a contract. As nicely put by Carbonnier, "[l]e contrat est, peut-être, assez naturellement, une adhésion, un acte de foi, un acte de confiance".[144] On this basis, one may consider the argument from the point of view of security itself — which would otherwise be devoid of any cogency.

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[138]Collins, *supra*, note 4 at 152.

[139]See R.A. Posner & A.M. Rosenfield, "Impossibility and Related Doctrines in Contract Law: An Economic Analysis" (1977) 6 J. Leg. Stud. 83 at 88-89.

[140]See Legrand, *supra*, note 7.

[141]The argument is formulated by Collins: "The strict enforcement of contracts provides incentives for the shrewd and calculating to enter the market to increase their wealth, and so to remove those incentives by judicial review would undo the market system itself": Collins, *supra*, note 4 at 152.

[142]See Legrand, *supra*, note 7; and *supra*, text accompanying notes 13-16.

[143]See Legrand, *ibid.*

[144]J. Carbonnier, *Flexible droit*, 5th ed. (Paris: L.G.D.J., 1983) at 259.

This argument represents a variation on the theme of rule-utilitarianism, as discussed by Atiyah among others.[145] More specifically, an *ad hoc* revision of contract preventing abuse is bound to undermine the long-term security of commercial transactions and thus prove contrary to the common good. This view is forcefully put by Swan: "[i]f people cannot rely on the courts' enforcing those deals that are made in a situation characterized by competition and where the deal is unfair only if one believes that an individual should not be held to a bargain that at the time it was made was as good for him as any other, then contract planning becomes a useless exercise".[146] Cardozo, for his part, writes of "the fundamental interest of society that contracts shall be fulfilled" and adds that the courts must refuse "to sacrifice the larger and more inclusive good to the narrower and smaller".[147]

These passages imply that the concern is with *legal* insecurity, *i.e.*, insecurity generated by the courts (as opposed to insecurity brought about by the parties themselves).[148] Insecurity exists because while the parties remain bound by the doctrine of sanctity of contract, no one being able unilaterally to undertake the revision of her agreement, the courts can nevertheless derogate from this doctrine. Two categories of cases appear particularly vulnerable to the security argument.

1. Sub-Contracts

The importance of the phenomenon of sub-contracts (or chain-contracts) can hardly be exaggerated.[149] The problem posed by sub-contracts is formulated by Flour and Aubert who explain why a court might not want to revise contracts:

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[145]See Atiyah, *supra*, note 53 at 15-23 (reprinted in (1980) 65 Iowa L. Rev. 1249 at 1259-66); and, for a contrast with act-utilitarianism, J.J.C. Smart & B. Williams, *Utilitarianism [:] For and Against* (Cambridge: Cambridge University Press, 1973) at 9-12.

[146]J. Swan, "What Is the Modern Role of Contract?" (1988) 38 U.T.L.J. 217 at 226-27 [book review of P.S. Atiyah, *Essays on Contract* (Oxford: Clarendon Press, 1986)].

So formulated, the dilemma is reminiscent of that expressed by Descartes, *Discours de la méthode*, ed. by E. Gilson (Paris: Vrin, 1984) at 78: "Non que je désapprouvasse les lois qui ... permettent ... pour la sûreté du commerce ... qu'on fasse des ... contrats qui obligent à y persévérer; mais ... j'eusse pensé commettre une grande faute contre le bon sens, si, pour ce que j'approuvais alors quelque chose, je me fusse obligé de la prendre pour bonne encore après, lorsqu'elle aurait peut-être cessé de l'être, ou que j'aurais cessé de l'estimer telle".

[147]Cardozo, *supra*, note 123 at 139-40.

[148]Max Weber is traditionally perceived as an early exponent of the view that "commercial planning require[s] legal certainty": Kelman, *supra*, note 2 at 43. But it has been shown that Weber's position is not nearly as clear as is often assumed: A.T. Kronman, *Max Weber* (London: Edward Arnold, 1983) at 122-24.

[149]As Savatier wrote long ago, "il cesse d'être possible [d']envisager [les contrats] eux-mêmes isolément. Chacun de ces contrats... doit, aujourd'hui, être mis en liaison intime, en connexion

> [l]e danger économique de toute atteinte portée à la force obligatoire du contrat ... consiste en ce que la révision appelle la révision. ... La vraie raison de maintenir l'intangibilité du contrat est que toute révision aurait inévitablement agi sur l'économie. ... [L]e juge n'aurait jamais pu prévoir si sa décision, particulière par essence, serait, sur le plan général, bénéfique ou nuisible. ... [L]e refus, de la part des tribunaux, de réviser les contrats tient à ... [ce] qu'une politique économique cohérente ne peut être conduite que par voie de dispositions générales, dont les incidences soient susceptibles d'être calculées; à ce titre, elle n'est pas de la compétence judiciaire.[150]

On the whole, the objection appears inconclusive. If the reason to advocate strict adherence to contracts is to prevent contractual instability, the rule, which is prepared to undo a series of contracts and perhaps create the possibility of bankruptcies in the process, soon becomes suspect. The most common alternative to revision — that is, annihilation of the contract, whether through nullity or *résolution* — would lead to even greater insecurity:

> l'anéantissement des contrats est, sans contestation possible, plus grave, il engendre plus d'insécurité dans la vie des affaires que des mesures de réajustement qui modifient certes les rapports contractuels, mais les maintiennent du moins et en préservent l'existence: l'adaptation du contrat est économiquement préférable à sa disparition pure et simple: contrairement aux apparences, adapter le contrat, c'est donc sauvegarder sa stabilité en le faisant échapper à l'anéantissement qui le menace.[151]

The point is that, although a case of revision may have repercussions on sub-contracts, the foreseeable consequences of a "non-revision" are undoubtedly more serious; the danger is that the annihilation of the X-Y contract will in turn lead to that of the Y-Z agreement and so forth with, of course, the attendant risks of financial ruin for enterprises and unem-

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économique avec d'autres contrats": R. Savatier, *Les métamorphoses économiques et sociales du droit civil d'aujourd'hui*, 1st series: *Panorama des mutations*, 3d ed. (Paris: Dalloz, 1964) nos 46-47 at 53.

[150]Flour & Aubert, *supra*, note 29, no. 407 at 315-16. See also P. Malaurie & L. Aynes, *Droit civil [.] Les obligations* (Paris: Cujas, 1985) no. 408 at 279.

[151]J.-P. Delmas-Saint-Hilaire, "L'adaptation du contrat aux circonstances économiques" in P. Durand, ed., *La tendance à la stabilité du rapport contractuel* (Paris: L.G.D.J., 1960) 189, no. 4 at 191. See also G. Morin, "La désagrégation de la théorie contractuelle du Code" in *Archives de philosophie du droit et de sociologie juridiques* (Paris: Sirey, 1940) 7 at 20-21; and A. Rieg, "Force obligatoire des conventions" in *Juris-classeur civil*, *supra*, note 40, no. 30 [1979 *Addendum*]. See also Flour & Aubert, who concede that "l'intangibilité théorique des obligations convenues aboutit, en fait ... à l'inexécution du contrat — qui est génératrice de la pire des insécurités — alors qu'une révision raisonnable en permettrait l'exécution": Flour & Aubert, *supra*, note 29, no. 407 at 315.

ployment for employees.[152] Often, survival of the contract commands revision.

This view may be recast at an even greater level of abstraction. It may be said that the security of transactions and hence, the common good, is better served by insisting on the enforcement of a contract, albeit on revised terms, than on its annihilation. There is therefore a rule-utilitarian case *for* revision. In the words of Weill and Terré, "l'intérêt général lui-même peut exiger la révision du contrat".[153]

A final point is that the security argument developed by Flour and Aubert with respect to sub-contracts, although inconclusive regarding the principle of revision of contracts itself, nonetheless illustrates that a greater degree of coherence than presently provided by judicially-initiated revision might possibly be achieved through legislative intervention.

2. Unlitigated Contracts

In the words of Lord Roskill, to raise the matter of unlitigated contracts as an objection to judicial innovation is to bring forth "the not unfamiliar 'floodgates' argument invariably advanced whenever it is suggested that the law might be changed".[154] The objection itself is spelled out with specific reference to judicial revision of contracts in two leading French texts.[155]

The reply to this most common of consequentialist arguments is two-fold. On the one hand, one may assume that an outpouring of litigation

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[152]See Morin, *supra*, note 81 at 36. See also Kelman, *supra*, note 2 at 43: "[t]o assert that a contractor is nearly as worried about the uncertain legal interpretation of a vague standard as he would be about the potential insolvency of his contracting partner is to engage in mock-empirical fancy"; and J. Mestre, "L'évolution du contrat en droit privé français" in *L'évolution contemporaine du droit des contrats* (Paris: Presses universitaires de France, 1986) 41 at 57 and 55.

[153]A. Weill & F. Terré, *Droit civil [.] Les obligations*, 4th ed. (Paris: Dalloz, 1986) no. 382 at 388. See also Morin, *supra*, note 81 at 36. Just as Cohen long ago expressed the opinion that not enough importance was attached to the question of "enforcement" by prevailing theories of contracts (see M.R. Cohen, "The Basis of Contract" (1933) 46 Harv. L. Rev. 533 at 585), Nozick, for one, now argues that even a "minimal state" should be concerned with "enforcement of contracts": R. Nozick, *Anarchy, State, and Utopia* (Oxford: Basil Blackwell, 1974) at ix. Although this author may be using the term in a different context than the present, it remains that his remark is indicative of the importance he attaches to performance of contracts as opposed to, say, their annihilation. See, for a general discussion of enforceability of contracts in the context of liberalism, H. Collins, "Contract and Legal Theory" in W. Twining, ed., *Legal Theory and Common Law* (Oxford: Basil Blackwell, 1986) 137 at 138-41.

[154]*National Carriers Ltd* v. *Panalpina (Northern) Ltd* (1980), [1981] A.C. 675 (H.L.) at 714. In that decision, the House of Lords held that the doctrine of frustration could apply to leases.

[155]See Flour & Aubert, *supra*, note 29, no. 407 at 316, n. 6; and Cornu, *supra*, note 38, no. 91 at 76.

will result from the practice of judicial revision of contracts. However, in French law as in any legal system, there are procedures available to stop unmeritorious claims at an early stage. More importantly, it may be argued that if an increased volume of litigation is "the route to justice", as well as to a greater degree of security and perhaps efficiency, the phenomenon can hardly be regretted.[156]

On the other hand, one may prefer to qualify that view by arguing that this outpouring will last only for an initial period. This position is adopted by Posner:

> since litigation, especially at the appellate level, generates precedents, the upsurge in litigation will lead to a reduction in legal uncertainty. Hence the amount of litigation will fall in the next period.[157]

Other factors will contribute to a decrease in litigation, once the transitional period of disruption has been overcome. Although the role of the law in business thinking may not be as important as is traditionally assumed,[158] it remains that judicial decisions revising contracts may reasonably be expected to provide a measure of guidance for parties wishing to introduce terms in their transactions so as to regulate, say, an eventual defect in performance. Cases on revision will assist those wanting to revise their agreements out of court in the event of litigation, and thereby encourage such settlements. Revision decisions will dissuade other parties from introducing certain terms in their agreements, as they will know that these will be modified, severed, or read down if litigated and that they will then be required to honour the contract as revised. To the extent that such contentious terms no longer enter contracts, the likelihood of litigation will be much reduced.

B. Efficiency of Transactions

While a consideration of the merits of economic analysis as a descriptive and normative theory of law falls outside the scope of this discussion, it is reasonable to assume for present purposes that efficiency is a value sought by most parties entering into a contract and by society as a whole.

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[156]*National Carriers Ltd* v. *Panalpina (Northern) Ltd, supra*, note 154 at 696 *per* Lord Wilberforce.

[157]R.A. Posner, *Economic Analysis of Law*, 3d ed. (Boston: Little, Brown, 1986) at 511.

[158]See, *e.g.*, S. Macaulay, "Non-Contractual Relations in Business: A Preliminary Study" (1963) 28 Am. Socio. Rev. 55; *id.*, "Elegant Models, Empirical Pictures, and the Complexities of Contract" (1977) 11 Law & Soc. 507; and H. Beale & T. Dugdale, "Contracts Between Businessmen: Planning and the Use of Contractual Remedies" (1975) 2 Brit. J. Law & Soc. 45.

On this basis, one might argue that the practice of judicial revision of contracts is not conducive to efficiency and that the parties to a contract and society itself are therefore worse off as a result. It appears, however, that revisions of contracts do promote efficiency in a number of ways.

1. Promotion of Economic Exchange

This point is similar to that made earlier in the context of security of transactions. On the one hand, the usual alternative to revision, annihilation of the contract, whether by way of nullity or of *résolution*, is undoubtedly inefficient, notably on account of the *restitutio in integrum* that it generates. On the other hand, revision, because it leads to an actual enforcement of the contract, allows the transaction to continue and thereby protects at least part of the economic benefits that flow from agreement.[159] Thus, to support revision is genuinely to "encourag[e] a process by which resources are smoothly moved through a series of exchanges into successively more valuable uses".[160] On the whole, the practice of judicial revision therefore reflects the judiciary's sensitivity to the public dimension of contract. It shows an awareness that a contract, although entered into by two individuals, is representative to some degree of a greater public interest.[161] To the extent that they lead to an increase in the aggregate social wealth, revisions of contracts may be said to be "Kaldor-Hicks-efficient".[162]

Can the practice also be said to be "Pareto-superior", *i.e.*, can judicial revision of contracts make at least one party better off and none worse off

[159]For his part, Delmas-Saint-Hilaire writes that "cette adaptation du contrat ... est ... économiquement utile": Delmas-Saint-Hilaire, "L'adaptation du contrat aux circonstances économiques" in P. Durand, ed., *supra*, note 151, no. 4 at 191.

[160]W.Z. Hirsch, *Law and Economics*, 2d ed. (New York: Academic Press, 1988) at 131. See also Kelman, *supra*, note 2 at 19, who refers to "the underlying social purpose of contract" as being "to facilitate *mutually beneficial* exchange" (emphasis original).

[161]See Cohen, *supra*, note 153 at 562 and 586, who stresses this aspect of the contractual relationship. Recent "critical" scholarship goes even further and calls into question the entire structure of a contract law which traditionally purports to be exclusively private, and shows that it is a mistake to have assigned a strictly supplemental role to the public aspect of contract: see C. Dalton, "An Essay in the Deconstruction of Contract Doctrine" (1985) 94 Yale L.J. 997.

[162]One is here concerned with the *possibility* of compensation. In other words, "S_1 is Kaldor-Hicks efficient to S if and only if in going from S to S_1 the winners *could compensate* the losers so that no one would be worse than he or she was in S and at least one person would be better off than he or she was in S": J. Murphy & J. Coleman, *The Philosophy of Law* (Totowa, N.J.: Rowman & Allanheld, 1984) at 217 (emphasis original).

than if it did not take place?[163] No firm conclusion can be reached in this respect. It may be argued that both parties normally derive some benefit, however small, from the performance of their now revised contract. Since this benefit would not materialize if the agreement were simply annihilated, they are both better off. Yet, allowance must be made for the possibility that an aggrieved party may attach greater value to standing by the letter of her contract and not having further dealings with the party responsible for the defective performance of the agreement, than to the material benefit derived from a judicial revision.

Although it is beyond the scope of this discussion to pronounce on the relative merits of the criteria of these two economic positions, it must be stressed that the pursuit of Kaldor-Hicks efficiency justifies more easily judicial revision of contracts. Since the courts' aim is then to maximize social wealth, they may further their objective by revising a transaction although one of the parties would thereby be worse off — something which the more restrictive Pareto-superiority criterion would not permit.[164]

2. Reduction of Costs

a. Transaction Costs

If the availability of the remedy of revision were greatly restricted, parties wanting to negotiate contractual terms regulating, say, the eventuality of a defect in performance would derive little or no guidance from a diminishing pool of judicial decisions. This lack of knowledge would make planning more complex and thus increase transaction costs. As has been mentioned, the fact that judicial revisions may help to reduce transaction costs can also be illustrated by reference to implied terms, such as *obligations de sécurité* and *d'information*.[165]

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[163]See Posner, *supra*, note 157 at 13. Murphy & Coleman write:

> The Pareto superiority standard applies only where there are no losers. Most social policies and legal rules produce losers as well as winners. The Pareto test is therefore nearly useless in regard to the evaluation of most activity of concern to the social, political, or legal theorist. The Kaldor-Hicks test, based on the *possibility of compensation*, was introduced to obviate this problem and to extend the usefulness of the Pareto rankings . . . . The Kaldor-Hicks criterion enables us to evaluate social policies that produce winners *and* losers. The difference between Pareto superiority and Kaldor-Hicks efficiency is just the difference between *actual* and *hypothetical* compensation. If compensation were paid to losers a Kaldor-Hicks efficient move would become a Pareto superior one" (emphasis original): *Ibid.*

For an additional illustration, see Posner, *ibid.* at 12-13.

[164]See R.A. Long, "A Theory of Hypothetical Contract" (1984) 94 Yale L.J. 415 at 423.

[165]*Supra*, note 139 and accompanying text. See, *e.g.*, G. Viney, *Traité de droit civil*, vol. 4: *Les obligations [.] La responsabilité* (Paris: L.G.D.J., 1982) nos 499-512 at 597-620.

b. Opportunity Costs

The reduction that they allow in the opportunity costs is another way in which judicial revisions of contracts promote efficiency. Such reductions provide the right incentives for parties to enter into other, similar wealth-maximizing transactions in the future. Annihilating the contract would, on the contrary, involve higher opportunity costs and thus act as a disincentive to future contracting. Cases on maritime salvage,[166] medical fees,[167] agency fees,[168] and indexation clauses[169] offer examples of reduced opportunity costs made possible through revision of contract. To these may be added the Fragonard decision.[170]

If the courts were to tell the rescuer, physician, agent, or art seller that, because of some defect in formation, the contract to which they are a party is cancelled, the opportunity cost for them would be very high. These parties would feel that their time could have been better spent doing other, more profitable work. Accordingly, they would be unlikely to engage in other rescues, medical treatments, agency work, or art sales in the future, something which would do a disservice to stranded ships, patients, principals, and art buyers in the long run. Courts act so that a party does not unduly regret having entered into a particular transaction in the hope that she will want to do so again. In other words, the courts lend "behavioural consequences" to their judgments.[171] For example, if a court, in the context of indexation clauses, simply terminated the contract and effected a *restitutio in integrum*, the payer would suffer a high opportunity cost given that she could rather have invested the sums paid over a certain period of time and earned income. In order to avoid this result, the courts judicially revise such agreements.

3. Provision of Incentives for Wealth-Maximizing Conduct

Apart from incentives to enter into other contractual transactions in the future, judicial revision of contracts provides an incentive to obey the law. The parties not performing according to the contract are aware that to resort to invalid contractual terms will likely be unprofitable, while the aggrieved parties know that these terms can be attacked without running the risk of being left empty-handed by the annihilation of the contract.

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[166]See Legrand, *supra*, note 7 at 985-86 (reduction of fee claimed by rescuer).

[167]*Ibid.* at 986-87 (reduction of fee claimed by physician).

[168]*Ibid.* at 991-93 (reduction of fee claimed by principal).

[169]*Ibid.* at 975-76 and 1019-24 (revision of non-existent or invalid indexation clauses).

[170]*Supra*, note 46 and accompanying text.

[171]B. Rudden, "Consequences" [1979] Jur. Rev. 193 at 196-97, writing with particular reference to maritime salvage.

Revision thus gives full efficacy to legal rules and, at the same time, maximizes the value of the resources that have been employed to enact them.

C. Observations

This last point raises the issue of the cost of legislation which, at first blush, militates against legislative intervention as regards revisions of contracts. In the words of Ehrlich and Posner, because the formulation of a statutory rule requires negotiation among a number of legislators, "[t]his makes legislative production an extremely expensive form of production".[172] It must however be borne in mind that this remark applies to American representative democracy, which works differently from that of France. It may be that the creation of a rule is relatively inexpensive in a French autocratic and bureaucratic system.

Conclusion

The normative implications of this discussion on the practice of judicial revision of contracts are two-fold. First, it shows that, with particular reference to the matter of enforcement of contracts, co-operation has succeeded over conflict. Mestre indeed writes of the emergence of a "devoir positif de collaboration".[173]

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[172]I. Ehrlich & R.A. Posner, "An Economic Analysis of Legal Rulemaking" (1974) 3 J. Leg. Stud. 257 at 267. See also Posner, *supra*, note 157 at 512-13.

[173]J. Mestre, "L'évolution du contrat en droit privé français" in *L'évolution contemporaine du droit des contrats*, *supra*, note 152 at 53-54 especially 53. This evolution vindicates Kennedy to the extent that the new, formally vaguer development is associated with exacting a greater degree of solicitude from one contracting party for the other than the traditional and stricter sanctity rule would demand. See Kelman, *supra*, note 2 at 55, referring to D. Kennedy, "Form and Substance in Private Law Adjudication" (1976) 89 Harv. L. Rev. 1685. Ewald puts the matter in these terms:

> *Au contrat a succédé le consensus.* ... Le consensus est plus de l'ordre du fait que de la volonté. Il se décline avec interdépendance et solidarité. ... Le consensus exprime un lien, une interdépendance au-delà des désaccords. Inversement, le consensus permet d'affirmer sa différence, son altérité, sans que cela doive aliéner le principe d'une solidarité. ... l'idée de consensus suppose la recherche d'une unité sur la base du conflit, d'une division constitutive": Ewald, *supra*, note 53 at 516-17.

Unger joins Ewald in highlighting "the duties of solidarity owed by the parties to each other and by the judge to the parties": Unger, *supra*, note 4 at 210.

If one strand of feminist legal thought is correct, contract law would, by having fostered revision (*i.e.*, compromise) at the expense of strict adherence to contractual obligations (*i.e.*, conflict), have developed an experience much more closely related to that of women. Frug has put the matter best:

> traditional contract doctrine, by treating the parties as if they had an adversarial relationship, implicitly rejects the more cooperative way in which many women have traditionally experienced power and knowledge. The major form of power

Second, this discussion illustrates the phenomenon of publicization of contract by showing a departure from the classical perception of the agreement as viewed strictly from within, *i.e.*, as perceived solely from the angle of those having entered into it and having to perform it. Previously a strictly private matter, the contract has become an objective entity, distinct from the individuals party to it. The contract now has a value of its own — a pecuniary value that is often considerable. Contract therefore deserves a greater measure of protection. This is especially true in the context of "contrats de situation", *i.e.*, those contracts that have a long-term impact from the point of view of the contracting party.[174] Contract thus appears at once as an "élément de richesse ...[,] un élément de valeur pour l'exploitation"[175] and the "instrument de la 'stratégie' de l'entreprise".[176] In sum, the process of judicial revision shows how individuals entering into a contract create a type of incorporeal object, having a pecuniary value of its own, that does not exclusively belong to them.[177]

This discussion establishes that there are no conclusive "goal-based" arguments against the practice of revision. Along with a strong ethical justification in favour of the practice, one is therefore compelled to the conclusion that judicial revision of contracts should be supported. The question however arises as to how the process can best be achieved. In other words,

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available to most women, given the kind of work they have done, has been the power to nurture and share. Women primarily occupied with family responsibilities have learned to live in the context of relationships that are trusting and interdependent. In this sphere, many women do not respect or adhere to the traditional male view of power as force, authority, and domination: M.J. Frug, "Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook" (1985) 34 Am. U. L. Rev. 1065 at 1133.

MacKinnon makes the same point in somewhat blunter terms when she presents "combat as a peculiarly ejaculatory means of conflict resolution": C.A. MacKinnon, *Feminism Unmodified* (Cambridge, Mass.: Harvard University Press, 1987) at 74. See also C.A. MacKinnon, "Feminist Discourse, Moral Values, and the Law — A Conversation" (1985) 34 Buff. L. Rev. 11 at 27.

[174]M. Cabrillac, "Remarques sur la théorie générale du contrat et les créations récentes de la pratique commerciale" in *Mélanges dédiés à Gabriel Marty* (Toulouse: Université des Sciences sociales de Toulouse, 1978) at 238-39; and J. Mestre, "L'évolution du contrat en droit privé français" in *L'évolution contemporaine du droit des contrats, supra*, note 152 at 56. One is here reminded of the distinction drawn by Macneil between what he calls the "discrete" and the "relational" contract: I.R. Macneil, *The New Social Contract* (New Haven: Yale University Press, 1980) at 10-35.

[175]P. Durand, "Préface" in P. Durand, ed., *supra*, note 151 at iii.

[176]L. Aynes, *La cession de contrat* (Paris: Economica, 1984) no. 4 at 12.

[177]J. Mestre, "L'évolution du contrat en droit privé français" in *L'évolution contemporaine du droit des contrats, supra*, note 152 at 58.

is it desirable to rely on the sole intervention of the courts for judicial revision to be carried out?[178]

The obvious alternative to consider is legislative intervention. As has been mentioned above, legislative initiative presents the advantage of conferring status on the practice of judicial revision, making it more open and less controversial.[179] While it is true that there may be an economic argument opposed to legislation,[180] this form of law-making may be less costly in France than in the United States. Moreover, the French legislator may meet the economic argument by reducing further the costs of legislating; for example, it may derive a statute from the body of judicial decisions and frame it in general rather than specific terms.[181]

The issue therefore is a choice between a self-appointed power of judicial intervention and the legislative conferment of a broad discretion on the courts. While the difference between these approaches remains to a large extent methodological, legislative intervention should be encouraged, if only for reasons of recognition within the wider judicial and extra-judicial community:

> [l]'autorité ... devrait ... intervenir pour réviser les engagements ... . Il conviendrait ... d'apporter au principe de la force obligatoire qui doit demeurer sans réserves pour les parties, *le complément d'un deuxième principe reconnaissant à la justice le pouvoir de réviser les contrats* ... .(emphasis original)[182]

A statute providing for the insertion of an article in the French *Code civil* would be preferable. The *Code*, remaining the cornerstone of French law, should foster the emergence of such a cardinal body of law *within* its provisions.

The adoption of the remedy of judicial revision ought not however to confer an unbridled power on the courts. One must not "livr[er] le contrat au juge".[183] Indeed, who would pay her debts on time if delays were granted by the judiciary as a matter of course?[184] It is therefore crucial that the

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[178]See N. MacCormick, *Legal Reasoning and Legal Theory* (Oxford, Clarendon Press: 1978) at 263, who discusses "means-desirability" arguments. For a general discussion, see Bell, *supra*, note 27 at 31-32.

[179]See *supra*, text accompanying notes 86-87.

[180]*Supra*, note 172 and accompanying text.

[181]See Ehrlich & Posner, *supra*, note 172 at 279-80; and Posner, *supra*, note 157 at 513-14.

[182]G. Morin, "La désagrégation de la théorie contractuelle du Code" in Archives de philosophie du droit et de sociologie juridiques, *supra*, note 151 at 20-21.

[183]Ripert, *supra*, note 85, no. 88 at 156. See also Morin, *supra*, note 81 at 36; and J. Mestre, "Le juge et les conditions de résolution (suite)" (1987) 86 Rev. trim. dr. civ. 313, no. 5 at 315: "Il reste que cet effort de défense du lien contractuel ne saurait valablement se muer en acharnement thérapeutique".

[184]P.S. Atiyah, "Judges and Policy" (1980) 15 Israel L. Rev. 346 at 361.

courts continue to limit intervention to situations where an abuse would arise without such revision.[185] Taking into account the various factors just mentioned, the provision to be introduced in the *Code civil* might be formulated as follows:

> Le juge peut, même d'office, réviser le contrat afin d'empêcher que l'une des parties n'abuse de son co-contractant ou qu'il ne soit fait un usage abusif de la règle juridique. Les circonstances doivent témoigner de l'imminence de l'abus dont le juge entreprend de prévenir la réalisation. Toute stipulation contraire est réputée non écrite.

The chance of such an article being effectively inserted in the French *Code civil* in the near future is admittedly not good. As Ghestin writes, "il reste en France une forte opposition au développement d'un contrôle exercé sur les contrats par les tribunaux".[186] Indeed, while various civil codes now confer a discretion on the judiciary to remedy an *imprévision*,[187] such reform has yet to take place in France. Similarly, there is no French counterpart to the provisions on revision of contract in newly-enacted or proposed civil codes around the world.[188] It thus appears that only very gradually will French contract law develop towards the acceptance of a fully-fledged, generally applicable principle. Only then will the emphasis move from the

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[185]In the words of Ripert, "la révision du contrat ... est inadmissible, si on ne la justifie pas sur cette idée que le contractant ne peut user jusqu'à l'injustice du droit que, juridiquement, lui donne le contrat": Ripert, *supra*, note 85, no. 86 at 153. See also de Gaudin de Lagrange, *supra*, note 126, no. 62 at 234-35:

> les règles souples donnant au juge la possibilité de remédier en équité aux conflits naissant du contrat doivent être étroitement liées au principe fondamental du respect des conventions. Elles ne sauraient y faire échec sans faire oeuvre d'anarchie. Leur but doit être de renforcer l'utilité sociale du principe en en réprimant les abus possibles, d'empêcher que l'équilibre du contrat, la bonne foi et la sagesse des parties, présumées normalement, ne deviennent fictifs en fait, tout en conservant leurs effets légaux dès lors sans cause.

Besides, when they do elect to revise, the courts should heed Tunc's injunction that "[i]l ne s'agit pas de ... bouleverser, mais de ... revoir": A. Tunc, "Préface" in G. Viney, *Le déclin de la responsabilité individuelle* (Paris: L.G.D.J., 1965) i at ii.

[186]Ghestin, *supra*, note 29, no. 578 at 658.

[187]See Greek (art. 388), Italian (art. 1467), Portuguese (art. 437) and Louisiana (art. 1877) Civil Codes. See also New Netherlands Civil Code, bk VI, c. 5, s. 3, art. 11; and Draft Bill on a New Québec Civil Code Reforming the Law of Obligations, deposited before the National Assembly on 23 December 1987, arts 1488-90. For the position in the United States, see U.C.C. § 2-615 (1977); and *Restatement (Second) of Contracts* §§ 261-72 (1981).

[188]See, *e.g.*, Draft Bill on a New Québec Civil Code Reforming the Law of Obligations, *ibid.*, arts 1484 (the obligation arising from an unconscionable clause in the contract may be reduced) and 1488-90 (if the debtor fails to perform according to the terms of the contract, the creditor's remedies include — and may be limited to — reduction of her correlative obligations).

identification of specific instances of revision to the identification and closer definition of the limits of a generalized remedy of revision.[189] There is little doubt, however, that the present phase of "individualization" is "the womb from which 'principles' in their due time will spring".[190] It can only be hoped that this development will not prove unduly long in gestation.

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[189]This passage is adapted from R. Goff, "The Search for Principles" in *Proceedings of the British Academy*, vol. 49 (Oxford: Oxford University Press, 1984) 169 at 182.

[190]J. Stone, "From Principles to Principles" (1981) 97 L.Q.Rev. 224 at 248-53 especially 253.