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SPECIAL ISSUE ARTICLE

Comparing legal styles

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Abstract

The question of legal 'style' is a central one in comparative law, as mainstream comparative law tends to downplay its importance. The kinds of comparative law scholarship that have attracted most attention in the last decades – the 'harmonisation projects' and the 'legal origins' literature (perhaps also the 'legal formant' literature) – indeed adopt a functionalistic approach to legal systems, whereby only the *outcome* of judicial decisions (and the factors causally feeding into them) matters – that is, their *style* does not. This narrow perspective has led to arguments in favour of harmonisation of law worldwide – the thesis according to which law everywhere does and should converge so as to facilitate transnational commerce and globalisation more generally. I propose to argue that legal style matters, as law is about much more than just resolving disputes. Specifically, it is also, and most importantly, a collective statement of identity. To illustrate, I plan on analysing some of the most striking stylistic differences between French and English law, and outline the different such statements emerging from them.

Keywords: contract law; legal philosophy; comparative law

1 Introduction

It has been claimed that attachment to style is a characteristic feature of French civil law (Kasirer, 2003a). French legal actors would value the stylistic elegance of their legal texts more than would, in particular, their English counterparts. This would largely follow from the civil law being grounded in written, primarily codal, law: where all attention is turned to the drafting and interpretation of legal canons, the literary form of these canons naturally takes on a special significance (Kasirer, 2003b, p. 4). The scholarly roots of the civil law as 'learned law' would also play a part here, as musing over stylistic considerations seems a luxury that only scholars, sheltered from the daily grind of actual dispute resolution, can afford (Kasirer, 2003b, p. 4). A particular challenge for comparative law would thus ensue: as linguistic style is among the features of a text most prone to getting 'lost in translation', French civil law might for the most part – or for its most peculiar part – prove untranslatable. As such, it would be uncognisable by non-native actors, and ultimately uncomparable with any law written in a different language (Kasirer, 2003b, pp. 3ff.).

That claim seems questionable on a number of fronts. For one, the argument concerning sources of law presumably can be turned on its head: as English law is primarily judge-made, it is in its judicial decisions, not its statutory law and attendant scholarly commentaries, that concerns for literary style, if any, would have to be found. And many English judges indeed have been praised for the elegance of their prose (Henderson, 2015; Younger, 1980). Certainly, the terse, almost mathematical, style of French judicial decisions (Macdonald, 1985, p. 583; Tunc, 1974) pales in comparison. Second, and most importantly, equating legal style with the personal drafting style of the authors of legal texts seems unduly reductive. If law is more than just written words, legal style has to be more than just literary style. And whatever else there may be could prove sufficient to allow us to steer clear of, or at least manage and cope with, the pitfalls of translation and ensuing bars to comparison.

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I here propose to argue that legal style concerns much more than just the literary quality of legal texts and that, properly understood, it in fact is central to *all* law – that is, not just that of particular legal systems. Only, different legal systems boast *different* legal styles, which it falls to comparative law to identify and compare. And, whereas translatability indeed is a prerequisite of comparability, legal style so understood is more easily translatable, and therefore more easily cognisable to outsiders, than is literary style. Section 2 offers reflections on the meaning and importance of legal style. As illustration, we thereafter turn, in Section 3, to the comparative examination of French and English contractual styles, which I will argue do differ fundamentally from one another yet are cognisable, in some way and to some extent, to legal actors from any system.

2 'Legal style'

While common dictionaries admittedly seize on literary style as a particularly salient epitome of 'style' writ large,[1] they define that notion more broadly, in terms of 'a particular manner or technique by which something is done, created or performed'.[2] The little academic writing devoted to the subject appears to be concentrated in such areas as management ('managerial styles'),[3] education ('teaching/learning styles')[4] and the arts ('musical/architectural/painting/fashion/etc styles').[5] In law, 'style'-related academic discussions do tend to concern the literary style of different kinds of legal drafting[6] and, more narrowly still, the various accepted formats for legal authority citations (Office of the Reporter of Decisions Supreme Court of the United States, 2016; The University of Melbourne, 2018; *Hong Kong Law Journal*, 2018).

The above definition nonetheless seizes on a common thread running through these various instantions of 'style', which I would analyse as the combined ideas of 'form' (by opposition to 'substance') and 'pattern' (by opposition to 'punctual and disjointed occurrences'). 'Fashion style', for example, refers to the way in which people dress rather than to their actually wearing clothes – the form rather than fact of dressing. 'Literary style' likewise connotes the *manner* in which a text is written rather than the content of its message. The emphasis is on the *how* things are done rather than *what* is being done.[7] But more is needed before such 'hows' can qualify as 'style' proper. A fashion 'style' emerges only where a particular way of dressing is repeated over time, to the point where some consistency can be identified running through the accumulation of punctual dressing instances. Similarly, with literary 'style', expressing something in a particular way only once or twice will not suffice to conclude as to the existence of a particular literary 'style' – form over substance *together with* pattern over punctual instances, then.

The legal world boasts its own set of fashion, literary, artistic, etc. styles. Official and unofficial dress codes apply in and outside courtrooms and reflect the various values typically associated with law: sobriety, impartiality, efficiency, decorum and so on. The same has been said of courtroom visual art and architecture (Bell, 2001, p. 20, note 7, referring to Jacob, 1994, note 7; Legrand, 1999a, p. 5 (pointing to Jacques-Louis David's painting of Napoleon writing his code)). Legal documents likewise are known to evince different kinds of literary styles: statutory texts and court documents tend to be written in a terse, matter-of-fact prose whereas scholarly writings and judicial decisions (at least in common-law jurisdictions) may be more lyrical, elegant, personalised.

[1] '[A] distinctive manner of expression (as in writing or speech)', Mirian-Webster (5 August 2018) [online]. Available at: https://www.merriam-webster.com/dictionary/style (accessed 30 April 2019).

[2] *Ibid.*; English Oxford Living Dictionaries (29 September 2016) [online]. Available at https://en.oxforddictionaries.com/definition/style (accessed 30 April 2019) ('A particular procedure by which something is done; a manner or way').

[3] E.g. Matsa and Miller (2012); Martinsons (2001).

[4] E.g. Sheve *et al.* (2010); LaCasse (2017).

[5] E.g. Crocker (2011); Hopkins (2014); Silbergeld (1982).

[6] E.g. Carlson, Livermore and Rockmore (2016); Nikitina (2018); Adams (2004/2018); Garner (1991/2002).

[7] E.g. Martinsons (2001).

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But style also comes into play in law in a different, and possibly more fundamental, way that is perhaps most obvious in the context of comparative law. An enduring debate among comparative lawyers has to do with whether they should be comparing the various rules, arguments, techniques, etc., adduced in the context of litigation or else the final outcomes of such litigation (who wins, who loses and in what circumstances) across legal systems.[8] Whereas proponents of 'functionalism' insist that law is primarily about solving social problems – an instrument of social engineering – 'expressivists', perhaps also known as 'culturalists',[9] view it as more significantly geared to expressing collective ideals, the values held dear by the local community, which ultimately embody and define the community's collective identity (Tushnet, 1999, p. 1225; Brand, 2007; Sunstein, 1996; Lasser, 2003).[10] Functionalists accordingly consider that comparative law ought to focus on the outcomes of judicial decisions rather than on the means deployed to justify those decisions whereas expressivists would have it the other way round: as decisional justifications and arguments, unlike decisional outcomes, necessarily call into play collective ideals, *they* should be the primary target of comparative studies. The functionalist/expressivist debate bears directly on the question of whether world law is (or ought to be) converging, to the detriment of its cultural diversification, insofar as it has been convincingly established that judicial outcomes in fact tend to converge across legal systems while the justifications supporting these outcomes would vary substantially.[11] More importantly for present purposes, because that debate centres on whether comparative lawyers should privilege *what* courts do over *how* they do it – the *substance* vs. *form* of law – it speaks directly to the present issue of legal style: as expressivists emphasise the latter, they stand as potential flag-bearers for legal style, understood as reasoning style, in a way that functionalists do not.

This paper pursues an expressivist agenda insofar as it reviews French and English legal materials' bearing on various contractual issues – the (very different) *how*, rather than (somewhat similar) *what*, of French and English contract law – with a view to showing that they evince altogether different forms of argumentation – that is, altogether different reasoning styles, or *Denkstils*.[12] Whereas standard comparative contract-law accounts typically stop at pinpointing punctual differerences between the targeted bodies of law (Grenon and Bélanger-Hardy, 2008; Debruche *et al.*, 2012; Fairgrieve, 2016; Farnsworth, 2006; Gordley, 2001; Harris and Tallon, 1991) or else at connecting the various differences to contrasting substantive principles,[13] this one goes one step further, for it aims to reduce the various differences and substantive principles uncovered on each side to more fundamental argumentation forms. A fully expressivist account admittedly would have us go further still and attempt, in addition, to decipher the normative statements, collective ideals, etc. being conveyed through these different *Denkstils*.[14] For now, however, we will confine ourselves to just exposing and contrasting the *Denkstils* respectively emerging from the French and English contract materials surveyed for what they are, leaving aside whichever moral and/or social meanings they might otherwise carry.

Importantly, an analysis of legal style(s) grounded in reasoning structure(s) arguably is 'legal' in a very different way from those based on dress, prose or art, even where the latter are confined to what

[8]See generally Michaels (2006); Graziadei (2003); Husa and Smits (2011); Hyland (2009, Chapter 2); Zweigert and Kötz (1977/1998).

[9]Though 'culturalists', who view law as a cultural expression, clearly also qualify as 'expressivists', the reverse may not be true insofar as one could imagine expressivists who deny that what is expressed by law is culturally determined. The more general, 'expressivist' label is favoured here only insofar as the precise source and nature of law's message, cultural or otherwise, are irrelevant for present purposes.

[10]See generally Anderson and Pildes (2000).

[11]E.g. Zweigert and Kötz (1977/1998).

[12]'Thought styles', as Ludwik Fleck coined them, and which he did see as inherently collective rather that individual, as *Denkkollektiv* ('thought collective'). See generally Siwecka (2011). Fleck's *Denkstil* indeed has been analogised to Kuhn's 'paradigm' (Kuhn, 1962/1970) and Foucault's 'episteme' (Foucault, 1966).

[13]'Subjective' vs. 'objective' conceptions of contract (David and Pugsley, 1985; Nicholas, 1982/1992) or 'moralistic' vs. 'pragmatist' conceptions (Sefton-Green, 2011, cited in Micklitz, 2011).

[14]For examples of comparative lawyers engaging in precisely such interpretive exercises, see Sefton-Green (2011); Legrand (1996, pp. 64–75); Samuel (1994, pp. 171–203); Atiyah (1987, pp. 18–26); Merryman (1975, esp. pp. 867ff.).

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can be observed in and around the legal world. The dress code of legal actors is just that: not so much the fashion style of law as that of the *individuals* involved in it. And, beyond the patterns that can be identified in different kinds of legal writing, courtroom art and architecture, such styles similarly ultimately remain those of *individual actors* – however numerous they may be. The fact that these styles emerge from aggregated individual behaviour indeed makes no difference here, for (objective) law arguably is more than just the sum of its individual (subjective) parts. As John Rawls forcefully argued (1993/2002, esp. pp. 54ff.), a rule or judgment can be (objectively) right or wrong as a matter of law quite apart from what individual legal actors – even all of them in unison – (subjectively) think of it. In contrast to law-related fashion, prose and art, which accordingly go to (aggregate) individual behaviour, legal reasoning is the stuff of objective law. Legal reasoning does not just *track* local legal values; it *embodies* and ultimately serves to *constitute* them. For, if law is, as some legal theorists have claimed (Rawls, 1993/2002; Waldron, 2012; Postema, 2014; Kelsen, 1967), the sum of the arguments that it is considered legitimate to adduce to justify state coercion in any given community, law ultimately *is* but those arguments. Whereas dress, architecture and literature indeed can be described as 'law-related', then reasoning – the form of legal arguments – would partake of legal essence.[15]

If that is right, *all* legal systems are ultimately style-heavy (not just French civil law) and their respective styles are to some extent translatable, and thus amenable to mutual comparison. All legal systems, that is, boast a particular form of argumentation, which can (and in my view ought to) be the object of comparative law to compare (Valcke, 2018). Of course, the translatability objection here must be taken seriously, as it must in the comparison of all areas of human affairs involving a strong cultural dimension.[16] But it arguably is not nearly as intractable for the comparison of reasoning styles as it has been said (Kasirer, 2003a, pp. 3ff.) to be for the comparison literary styles. In literary unlike in reasoning styles, the words at once are the medium for conducting the comparison and the very object of that comparison. That a foreign literary style might get (entirely) 'lost in translation' hence is hardly surprising. In contrast, there is reason to think that a foreign reasoning style to some extent might survive its translation, even if some of its original linguistic form does not. After all, a community's reasoning style in this respect is no different than any other aspect of its cultural identity. One and the same foreign language can be, and commonly is, used to describe the different, say, culinary or gardening habits of the French and the English. There is little problem in a German comparatist describing these peculiar habits to his peers, in German.[17] In sum, whereas linguistic commensurability might pose an intractable problem when it comes to comparing literary styles, it does not when it comes to describing legal styles understood as reasoning styles. To illustrate, the remainder of this paper offers a description, in English, of what I take to be the most fundamental difference between English and French contractual styles.

3 English and French legal styles in contracts

I would suggest that the most fundamental difference between English and French contractual styles is best apprehended through a parallel with what philosopher Stephen Darwall has formalised as

[15]For a fuller argument to that effect, see Chapter 1 of my *Comparing Law – Comparative Law as Reconstruction of Collective Commitments* (Valcke, 2018).

[16]That objection, according to which 'ideas [are] products of their times and of the social statuses of their proponents', was voiced by Karl Mannheim, among other prominent intellectual figures (Sagarin and Kelly, Fall 1969 to Winter 1970, pp. 292–302). Mannheim, however, was careful not to fall into complete relativism, as he defended 'relationism', according to which perspective differences across time and social location variations appear problematic only from the standpoint of an abstract, disembodied theory of knowledge. See generally Longhurst (1989, pp. 1–197).

[17]It has (rightly) been suggested, however, that the resulting German understanding of French and English culinary/gardening habits might not be the *same* understanding as the French's and English's own. E.g. Legrand (1999b, p. 1056). For an argument that this is not problematic from a hermeneutic standpoint, as it merely involves the foreign and local understandings dialectically interacting with one another within the larger interpretive community that comprises them both, see my *Comparing Law* (Valcke, 2018, Chapter 3, Part III, ss. iii–v).

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'second-personal' and 'third-personal' styles of justification in the moral realm (2006): whereas Darwall's 'second-personal' style of moral justification arguably matches English contractual reasoning, his 'third-personal' style would in contrast aptly represent French such reasoning. Section 3.1 lays out Darwall's typology in the context of moral reasoning. Section 3.2 then transposes that typology to the legal context, respectively applying it to English and French contract law.

The reader will notice that the array of rules and doctrines gathered in Section 3.2 is such as to foreclose the possibility of any one of them being analysed in any depth, at least in the context of a single paper. That is quite deliberate. Seeing that style calls into play patterns, trends, accumulations of iterations, unearthing any kind of style necessarily involves casting a very wide net, correspondingly curtailing opportunities for in-depth analysis of the iterations caught. After all, a pattern is only as strong as the iterations of it are numerous. Hence, Section 3.2 was deliberately written so as to privilege breadth over depth.

Finally, it is also worth reiterating that, while Darwall's taxonomy itself targets moral philosophy, the present argument, being about rhetorical structure only, says nothing, directly or indirectly, about the moral (or immoral) content of the English and French rules and doctrine surveyed. The aim here merely is to expose, via the structural analogy with Darwall's models, the different English and French legal rhetorics for what they are, not to discuss their relative merits. In particular, we here remain entirely agnostic as to whether one of these models or legal systems might somehow prove 'superior' to the other, by some moral, ethical or any other standard.[18]

3.1 The second- and third-person styles in moral analysis

Under Stephen Darwall's analysis, a justification or reason for action is 'second-personal' insofar as 'it is grounded in (*de jure*) authority relations that an addresser takes to hold between her and her addressee' (2006, p. 4). Second-personal reasons, that is, draw their normative force from the standing of authority that one person (the addresser) enjoys vis-à-vis another (the addressee). It is not the content of these reasons so much as the fact that they are uttered by a particular addresser to a particular addressee in the context of a particular authority relation that makes them authoritative: their authority calls into play, and derives from, that which is already present in the relationship tying the parties to one another. As Bruce Chapman puts it (2012, p. 411), they involve 'the parties' joint exercise of a collective or shared rationality'.[19] Thus, second-personal reasons naturally *presuppose* an interpersonal relation, and one that is authoritative as such.[20]

In contrast, the validity of third-personal reasons is not dependent on any particular framework of individual interaction. Several individuals clearly can 'share' a same set of third-personal reasons in the sense that all may be directly accountable to these reasons at the same time and in the same way. But the reasons would apply to these individuals 'severally',[21] not 'jointly' – not by virtue of any particular relation between them – with the result that they in principle could indiscriminately apply to any number of other individuals as well. In sum, whereas, in the case of second-personal reasons, the

[18]Darwall himself does go this extra step. Having described his two models, he then proceeds to demonstrate that the third-personal, unlike the second-personal, is 'defective' insofar as, though producing reasons for action, it cannot generate duties proper. From the present perspective, this naturally begs the question of whether a legal system sharing that model's rhetorical structure would prove 'defective' in the same way (legally and/or morally), which, as indicated, we do not, and need not, take up here. Suffice it to say, however, that one should resist assuming that the moral defect of one of Darwall's models *necessarily* translates into a legal defect in the corresponding legal system. Darwall's argument applies only to moral reasoning and it could be, for example, that the defect he outlines is in fact cured when the model is transposed to the legal realm (i.e. that the intervention of legal institutions somehow suffices to translate the (moral) reasons for action into legal duties proper).

[19]Chapman (2012) uses Darwall's second-person paradigm to expose the normative significance of legal rules being defeasible.

[20]'[E]ach claim and counterclaim is authoritative for the other party … merely because of the … fact that the authority actually *makes* that claim *as an authority*' (Chapman, 2012, p. 412, emphasis in original).

[21]Markovits uses this word in the same way in his 'Contracts as collaboration' (2004), e.g. p. 1514.

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reasons presuppose a pre-existing rational connection between the individuals, in the case of third-personal reasons, *the reasons* are what link the individuals to one another.

This is best grasped through the following example given by Darwall. Suppose I cause you pain by stepping on your foot. There are many different reasons that you might adduce to try to convince me to remove my foot. You might assume that, like you, I consider that pain is generally to be avoided and undertake to get me to realise that my foot pressing on yours indeed causes you pain, which state of affairs consequently is worth undoing. That would be a third-personal (or 'epistemic') reason, as it would appeal to a value (pain aversion) that we share but that has nothing to do with any particular authority relation between us. Indeed, that reason may well be operative without your telling me anything at all. I do need to realise that my foot causes you pain, but I may be able to come to that realisation on my own (from personal experience or your resounding 'ouch!') or because some nosy (and similarly pain-averse) passer-by brings it to my attention. It follows that whether it is your or someone else's foot that is being stepped on does not really matter: the pain-aversion reason applies all the same. Likewise, moreover, were it someone else than I doing the stepping. For,

> '[i]n desiring that you be free of pain, [I] would [merely] see this possible state of affairs as a better way for the world to be, as a possible outcome or state that … "ought to exist for its own sake".' (Darwall, 2006, p. 5, quoting Moore, 1993, p. 34)

And, when you 'give' me that reason for removing my foot, you accordingly are not 'so much *addressing* it to [me] as *getting* [me] *to see* that it is there anyway, independently of *your* getting [me] to see it or even of your ability to do so' (Darwall, 2006, p. 6, emphasis added).

Alternatively, instead of getting me to *desire* to remove my foot from yours, you might just *demand* that I do so. That would be a good enough reason for me to oblige inasmuch as I recognise that, for whatever reason, we prima facie both hold exclusive authority with respect to our respective bodies. It would be valid, that is, regardless of whether or not my foot actually causes you pain or whatever else might motivate your demand. To the extent that we both recognise that we hold exclusive authority with regard to our respective feet, my demanding that you remove yours from mine *justifies* your doing so. That would be a second-personal reason, as it obtains only as between you and I: it is valid only insofar as it concerns a particular bodily interaction between us in a context of mutual recognition of authority over our respective bodies. In contrast, the nosy passer-by making the same demand (with respect to your foot) would carry no weight for the simple reason that, as she lacks any kind of authority with respect to my and your person, she is a complete outsider regarding the particular I-step-on-your-foot interaction at play. The passer-by admittedly has other available reasons through which to achieve the same result. She could try telling me 'Don't you see that stepping on people's feet without their permission is immoral?' or 'What would the world look like if all did this?', but these would, again, be third-personal reasons – reasons that, insofar as they are valid at all, would be so for all footed individuals, not just me personally. It would be a situation, in other words, where

> 'each party looks past the other to the (moral) world and, more particularly, towards some (moral) fact in that world …. *It is as if each party really had no essential role for the other*… [a situation where] each party [is] accountable not so much to each other, and each other's claim, as to a moral truth in the world which, while common to them, stands independent of each party and what each party claims.' (Chapman, 2012, pp. 410–411, emphasis in original)

Another example would be that of a parent telling her child to eat his vegetables. As any parent knows, third-personal reasons – 'Veggies are good for you!', 'I picked your favourites!' or even the harsher 'No dessert otherwise, Buddy!' – rarely work and one is ultimately faced with reverting to the good old second-personal: 'Because I say so!' This last reason is valid on its own, but only because it is uttered in the context of a pre-existing parent–child relationship and parents are endowed with natural authority over their children. For the purpose of that particular interaction, anybody else just 'saying

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so' would carry no weight whatsoever. In contrast, the earlier third-personal reasons are valid irrespective of how and by whom they are brought to the child's attention. If vegetables are in fact 'good for you', that state of affairs in itself supplies a valid reason to eat vegetables and the same is true of a state of affairs wherein dessert as a rule comes only after vegetables have been ingested. It follows that, if the child were in a position to test the truth of these statements and discover that they are in fact untrue – as it turns out, vegetables are not good for you and/or the dessert rule is rarely if ever implemented – they would lose all authority. That is so because, again, the validity of third-personal reasons is conditional upon their correspondence with some true state of affairs that transcends the particular relationship in the context of which they are uttered.

Now, it admittedly is possible for the because-I-say-so statement to be likewise interpreted in a transcendental third-personal fashion. If, by those words, the mother means 'because I am your mother *and mothers know best what is good for their children*', the reason given indeed becomes third-personal, for the mother's statement is then offered merely as evidence of the truth that vegetables are in fact 'good for you': mothers generally know and speak the truth, with the result that, when they say something, it most likely is true. And here again, if it is not actually the case that mothers know best or that they speak the truth, or if it turns out that that particular mother got it wrong on that particular occasion, the because-I-say-so reason loses all authority.[22] Only where that reason is meant to refer to nothing *beyond the particular authority relation prevailing between the parties* does it carry inherent power as a second-personal reason: 'After all, … [a second-personal claim] is authoritative for the other party, not because it is true … but merely because of the (source-based, content-independent) fact that the authority actually *makes* that claim *an authority*' (Darwall, 2006, p. 17, emphasis in original).

3.2 The second- and third-person styles in English and French contract analysis

Darwall's second- and third-person paradigms arguably nicely track the different contractual styles respectively emerging from English and French contract doctrine.[23] I indeed would suggest that an examination of that doctrine reveals that contracts tend to be considered inherently authoritative at English law, whereas that authority tends to be treated as transcendent at French law. This is most obvious from the rules on contract interpretation: the inherent normativity of the parties' intention at English law would explain the heavier constraints there placed on the determination, *ex ante*, of what is to count as such intention, such as the inclination towards literalism (the 'plain meaning' rule and 'four corners' approach, inadmissibility of pre-contractual negotiations, the Parol Evidence rule, etc.)[24] and attendant corrective measures (rectification, *non est factum*).[25] It would also account for the fact that much of the *ex post* disciplining of party behaviour that is carried out through explicit legal rules at French law tends to be accomplished more surreptitiously by English courts, through the 'secret weapons'[26] concealed under standard party intention reconstruction. Mistake, frustration and even remedies indeed are, at English law, commonly conceptualised as issues of interpretation (implied terms, implicit risk allocation, rules of construction)[27] and unfair terms more readily struck out than rewritten by courts.[28]

[22]'In other words, the obligation [the child feels] is not so much source-based as content-dependent. But if this is what grounds the [father's] authority, then we are really only beholden to the background reason to which the epistemic authority, and the claim he makes, is a useful guide' (Darwall, 2006, p. 12).

[23]Of course, on both sides, that doctrine ultimately has to be enforced by a court, i.e. by an objective third party standing above the two parties, which brings in a third-personal dimension to the picture. However, as that is a constant between the French and the English (and all other) legal systems, it is here set aside so as to concentrate on the one variable that interests us: the (different) rhetorical styles that this (common) third party will deploy in justifying its disposition of the case in the two systems. My thanks to Peter Cserne and Pavlos Eleftheriadis for raising that point.

[24]*Ingram v. Little* [1961] 1 Q.B. 31 (CA), as per Lord Devlin, dissenting, para. 80.

[25]*Ibid*., at para. 81.

[26]*George Mitchell Ltd. v. Finney Lock Seeds Ltd.* [1983] Q.B. 284, as per Lord Denning.

[27]*Ibid*., at paras. 79, 80, 84–85.

[28]*Bell v. Lever Bros; Ingram v. Little*, para. 83.

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When interpreting a contract, English courts arguably feel no need to look past the contract itself precisely because they consider the contractual relation to be an intrinsic source of reciprocal authority between the parties. Once the existence of a contract is established – that is, that fact alone suffices to generate a particular relation of authority between the parties – one wherein any claim they might have against one another that can be shown to be properly based in that contract is *ipso facto* justified. There may, of course, be reasons to bar such claims at a subsequent stage of the analysis (duress, public policy violation, etc.) but many such reasons will ultimately come down to there really being (despite appearances) no contract at all (i.e. contract void) or else to the claim actually not being connectable to the contract (i.e. based in misinterpretation of the contract). In that sense, it can be said that the contract (or a party to the contract in that capacity[29]) just 'saying so' provides a good enough (second-personal) reason for enforcement – one just as good as your demanding that I remove my foot from yours or a parent ordering her child to eat his vegetables. In all three cases alike, the *ought* is directly derived from the *is* (I ought to remove my foot *because* the other foot's owner actually demands it; the child ought to eat his vegetables *because* his parent ordered him to do so; the parties to the contract ought to do X and Y *because* the contract so provides).[30] The *ought* accordingly is 'content-independent' (I ought to remove my foot *regardless* of your reason for demanding it; the child ought to eat the vegetables *regardless* of whether they are good for him, his favourite or whether dessert will ensue; the parties are bound by their contract *regardless* of that contract's particular purpose and substance) as well as valid only as between the particular parties (the two foot owners, the parent and the child, the parties to the specific contract).

On the French side, in contrast, insofar as contracts are considered inherently a-normative, their normativity would need to come from some external source. Indeed, the fact of a contract's existence at the outset seems to be treated as just that: a fact like any other, which may (or may not) come to be endowed with legal authority (by the court) at some later[31] stage. As the contract presumably carries no inherent authority, second-personal reasons are unavailable to support claims by the parties, and any such claims must accordingly rest on reasons that transcend their contractual relationship, namely third-personal reasons. Where legal authority is not *immediately* present, in other words, it cannot but be (externally) *mediated*: where the contract 'saying X and Y' is not a good enough reason for X and Y to be legally binding, some other reason must be found that transcends the contract altogether. In the same way as a total stranger might convince me to remove my foot from yours by making me empathetically feel your pain or that a child might in principle disregard a stranger's order to eat vegetables yet undertake to do so for health reasons, the law might deem X and Y legally valid not so much because the contract provides X and Y as because these provisions align with some moral or efficiency perspective, for example. As the *ought* here is marked off from the *is*, it is content-dependent as well as impersonal. It is content-dependent in that it obtains only insofar as the content of the statement 'X and Y are moral/efficient' (like 'your foot hurts me' or 'vegetables are good for you') is shown to be in fact true. It is impersonal in that it does not matter *how* (and hence also *by whom*) such truth is established. The binding force of X and Y hence holds or falls with the

[29]A claim not supported by the contract indeed would fail to qualify as one that could be made by a 'party to the contract in that capacity'.

[30]Of course, in all three cases, this holds only insofar as the two parties are regarded as being in a pre-existing authority relation that allows such demands on the part of the addresser. Otherwise, the addresser's demand will have to be prefaced with an argument (from the addresser or otherwise) as to the existence of such a relationship. Even then, however, the demand and the authority relation argument would, crucially, remain distinct from one another. It simply will be the case that the addresser just 'saying so' is authoritative as such, with no need for anything else to bear on the parties' interaction, from the moment that the authority relation is established, which is the central point here.

[31]The chronology is primarily conceptual rather than temporal here, though it can be both, particularly where, as in the French system, temporally distinct steps often reflect conceptually distinct ones. See my *The Different Rhetorics of the French and English Law of Contractual Interpretation* (Valcke, 2009, pp. 77–114).

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truth of their being moral/efficient, regardless of the identities of the parties, and the means deployed in, debating that truth.[32]

The remainder of this paper flags some rules of English and French contract rules that arguably seem to confirm this fundamental difference in the conception of contractual authority in the two systems. First looking to English doctrine (Section 3.2.1), we review in turn the bargain-based (objective) conception of contract and attendant doctrine of consideration, some rules of formation, some rules of remedies and the function of Equity in contract adjudication more generally. We thereafter turn to the French (rough) counterpart doctrines (Section 3.2.2), namely the promise-based (subjective) conception of contract and the *causa* requirement, rules of formation, *les sanctions de l'inexécution*, the function of *l'équité* in contract adjudication.

3.2.1 English doctrine (Objective) bargain and consideration

Contracts can be inherently authoritative only insofar as they can be conceptualised as individuated 'shared rationalities', which conceptualisation arguably permeates the bargain conception of contract and pillar doctrine of consideration.

As philosopher Michael Bratman has explained, for there to be a 'shared rationality' (he calls it 'joint intentional activity'), there must be more than just 'coinciding' or even 'correlated' intentions between two individuals (Bratman, 1999, pp. 98–108).[33] Two persons independently casting votes for the same candidate in an election would be an example of coinciding voting intentions; these intentions would become 'correlated' were the voting action of each a factor for the other (as where one might vote for a particular candidate only if others do as well). In either case, however, the most that can be said is that these individuals 'are *in* agreement'; it cannot be said, further, that 'there is *an* agreement between them' (Markovits, 2004, note 72, emphasis in original). For there to be *an* agreement, the individuals' respective intentions would have to join into an altogether new, *shared* rationality – one that did not exist before insofar as it is indeed conceptually distinct from either and the sum of the individual rationalities that founded it.[34] And such shared rationality can only emerge where the two parties' intentions are self-consciously 'interlocking' (Bratman, 1999, p. 102).[35] It in other words requires that

> 'each participant's intention to join in [it] … *be common knowledge among the participants*. Two people who pursue a common intention and adjust their intentions and actions in all the ways [that common intention] requires nevertheless fail to act jointly unless these features of their actions are *out in the open between them*.' (Markovits, 2004, p. 1455, emphasis added)

Publicness is here essential, then, not merely so that each participant can be made aware of the other's intention, but also and most importantly so that these intentions can in fact come together, such coming together necessarily taking place in the public space between the parties.[36]

[32]It is on this basis that Markovits (2006, p. 1374) lumps together will, efficiency and harm accounts of contract: all three in his view are 'exercises in casuistry … proceeding from antecedent, moral principles to the special case of contract in order to govern contractual practise'.

[33]Usefully discussed in Markovits (2004, pp. 1452ff.) and in Bridgeman (2009).

[34]This is Kant's concept of contract as a 'united will'. See Ripstein (2009, pp. 111ff.).

[35]As Markovits explains (2004, pp. 1454–1457), 'interlocking' intentions are necessarily 'mutually responsive' on Bratman's account. Unlike Markovits, however, I take such responsiveness to pertain, in the contractual context, to formation rather than performance of contracts. Mutuality in formation is present where the parties' individual intentions are given in exchange for one another, regardless of what is required for these intentions to be subsequently performed; mutuality in performance, in contrast, involves the parties subsequently carrying on their intentions in an interactive way. The absence of mutuality in performance in what Bratman describes (1999, p. 104) as 'pre-packaged cooperation' is what causes Markovits to exclude such pre-packaged co-operation from the realm of contracts proper ('contracts as collaboration'). But, like Bridgeman (2009, pp. 393–399), I see no reason to insist on the stricter requirement of mutual performance and consider that pre-packaged co-operation indeed accounts for many forms of joint action commonly regarded as contracts proper.

[36]'Public' accordingly is here meant in the same sense as the Rawlsian idea of 'public justification'. See Rawls (1999/2002, pp. 54ff.).

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I agree with Bratman that this account of a 'shared rationality', involving 'interlocking' intentions, largely matches the English conception of contract as bargain and attendant doctrine of consideration.[37] As Peter Benson describes it (2001, pp. 154ff.), and contrary to Fuller's notorious claim (1941), consideration is not just evidence of contractual intention; it is to a large extent constitutive of that intention. It serves not so much to *confirm* the presence of two correlated individual intentions as to actually *weld* these intentions together. The presence of (merely) correlated intentions indeed is sufficiently established through the offer and acceptance requirements: where I accept your offer, my acceptance by definition 'refers to', 'responds to', is 'prompted by' that offer and, conversely, your offer by definition is meant to 'prompt' my acceptance (Fuller, 1941, note 37). But more is needed in order for these (correlated yet still separate) intentions to interlock into a new, common contractual intention. What we need, in particular, is a joint declaration of the parties to that effect: a joint declaration that *they both mean* their respective commitments to be mutual – what is sometimes referred to as an *animus contrahendi*.[38] That declaration can be explicit or implicit but, as explained, it must, in order to be joint, necessarily be public in the sense above.

Consideration arguably stands for precisely such a joint, public statement of mutuality: '*by the express or implied terms of the supposed contract*, the promise and the consideration must purport to be the motive each for the other'[39]; 'the promise and consideration must each *appear* as inducements of the other; it must be possible *reasonably to view* each side … as the effect [and] the cause of the other' (Benson, 2001, p. 156, emphasis added). This would explain why, where the consideration takes the form of a return promise, the two promises cannot possibly be analysed in isolation from one another. As noted by Pollock (1950, p. 144), the return promise cannot logically be a valid consideration unless it is binding, but the same is true of the first promise, with the circular result that neither can be binding unless the other one already is. As it turns out, this logical conundrum simply evaporates under the account of contract as bargain: the two promises are binding *only insofar as they are considered together*, as just one joint statement of mutuality.

It is well known that the bargain idea radiates through English contract law and serves to explain many of its finer segments.[40] It obviously accounts for all direct extensions of the consideration doctrine, for example, the rules pertaining to unilateral contract modifications and to third-party beneficiaries. Insofar as the parties' bargain fully determines their contractual relation, any valid modification to that relation – even such as may be desired by both parties – must account for and build on that bargain in some way: to allow the parties to reinvent their relation merely through a new set of offer and acceptance would be to treat their initial bargain as not binding on them. The requirement that valid contract modifications be supported by new consideration, over and above that initially bargained for,[41] hence serves to confirm the binding force of the initial bargain – likewise with respect to privity of contract and third-party claimants: as such claimants by definition stand outside the bargain, the (second-personal) claims made possible by that bargain are in principle

[37]As apparently do Markovits (2004) and Bridgeman (2009), whose respective accounts of common-law contracts likewise build on Bratman's teachings. I nonetheless refrain from using either of these accounts here, for a number of reasons. Markovits's account of 'contract as collaboration' comes with a set of moral justifications that, in addition to being unnecessary for present purposes, may cause it to be inapplicable to business contracts (2004, pp. 1421, 1467). If so, that account would clearly be unsuited to the present purpose of analysing the *United Rentals* decision, which involved precisely such a contract, in addition to being lacking in explanatory power more generally, since many contracts indeed are business contracts. As Bridgeman's account of 'contracts as plans' arguably is more morally neutral, it seems more suitable at first sight. Yet, Bridgeman claims his account extends to such other systems of contract law as European civil law (2009, p. 379), which the present account crucially aims to exclude. That claim, however, is not entirely convincing. For one, the doctrine of consideration, which Bridgeman acknowledges is absent in civil law, plays a central role in his own account (2009, pp. 380–381).

[38]*Gallen v. Allstate Grain Co. Ltd.* (1984), 9 D.L.R. (4th) 496 (BCCA).

[39]Justice Holmes in *Wisconsin & Mich. Ry. Co. v. Powers* (1903) 191 US 379, para. 386, cited in Benson (2001, p. 156, emphasis added).

[40]E.g. Waddams (2017, Chapter 2).

[41]*Stilk v. Myrick* (1809) 2 Camp. 317; 170 E.R. 1168.

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unavailable to them.[42] Wherever courts have allowed third-party claims, moreover, they arguably have done so in steadfast loyalty to the bargain principle, as they would just find a way to shoehorn the claimants within the bounds of the bargain through such (bargain-consistent) devices as agency,[43] unilateral contract[44] or plain old contractual interpretation.[45]

Formation

The objective theory of contract, which informs the English rules on contract formation, is a direct corollary of contract as bargain. The same considerations as mandate that bargains be public in the sense described above also mandate that '[i]n contracts you do not look into the actual intent in a man's mind. You look at what he said and did. A contract is formed when there is, to all outward appearances, a contract'.[46]

The public dimension of contract is perhaps most striking in the rule that revocation of an offer is ineffective until the offeree has been properly notified.[47] When I make you an offer, I reach out to you and effectively place that offer in the public space between us – the only space where our contemplated bargain could possibly be struck. If I want to cancel that offer, I have no choice but to return to that same space: I can retrieve the offer only from where I initially placed it (as it is *my* offer, no one else could have had the power to move it around). My attempting to revoke my offer only internally, in a space beyond your reach, therefore cannot but be ineffective.

That public dimension likewise determines the English treatment of unilateral mistake, epitomised through the landmark case of *Smith v. Hughes*.[48] At issue, there was the notorious sale of oats that the buyer thought were old and the seller knew to be new. The judgment shows the court primarily concerned to determine which of the many elements in the parties' interaction could reasonably be seen as falling within the realm of their bargain, precisely because it arguably saw in that bargain a 'shared rationality' built by the parties for the purpose of determining their rights and obligations with respect to that interaction, which rationality should accordingly be considered inherently and exclusively authoritative in that regard. As the sale was by sample (and no words had been exchanged about the oats being of a particular quality), the court concluded that the parties had bargained for the oats in the sample, whatever their particular quality. It followed that the buyer's subjective belief that the old were old, and the seller's subjective awareness of that belief, were deemed irrelevant: the parties' internal beliefs and knowledge simply happened to fall among the many elements that could be safely ignored insofar as they remained peripheral to the bargain.

Notably, these beliefs and knowledge being 'internal' to the parties did not appear to be determinative: had they been disclosed to other individuals, or even to the parties themselves but in another context, they presumably would have been found irrelevant all the same. Though such beliefs and knowledge might arguably fall within the realm of the bargain in certain circumstances (e.g. fiduciary situations), they clearly do not in cases of commercial sales by sample. On the present account, then,

[42] *Tweddle v. Atkinson* (1861) 1 B. & S. 393; 121 E.R. 762.

[43] *Midland Silicones Ltd. v. Scruttons Ltd.* [1962] A.C. 446 (HL).

[44] *New Zealand Shipping Co. Ltd. v. A.M. Satterthwaite & Co. Ltd.* [1975] A.C. 154 (PC).

[45] In the Canadian cases of *London Drugs Ltd. v. Kuehne & Nagel International Ltd.* ([1992] 3 S.C.R. 299) and *Fraser River Pile and Dredge Ltd. v. Can-Dive Services Ltd.* ([1999] 3 S.C.R. 108), the Supreme Court of Canada purported to create a new exception to the rule of privity of contract, but justified such exception on the basis of (implicit) contractual risk allocation.

[46] *Storer v. Manchester City Council* [1974] 3 All E.R. 825 (CA), para. 828.

[47] *Henthorn v. Fraser* [1892] 2 Ch. 27 (CA). See *contra*: *Dickinson v. Dodds* ((1876), 2 Ch. D. 463 (CA)), where the English Court of Appeal was satisfied that the offer had been revoked where the offeree discovered through his own means that the offeror had had had a change of heart.

[48] (1871) L.R. 6 Q.B. 597: 'If whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms' (Blackburn J. in *Smith v. Hughes*, para. 607). Although *Smith v. Hughes* is the case most commonly cited in support of this proposition, the general idea predates it. See *Scott v. Littledale* (1858) 8 E & B 815; *Cornish Abington* (1859) 4 H. & N. 549, para. 556.

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an 'objective' theory of contract is one wherein, consistently with the (second-personal) reading of *Smith v. Hughes* just advanced, the parties' claims are fully and immediately determined by the bargain between them.

Remedies

With respect to remedies, it is well established that the expectation measure of damages – also known as 'loss of the bargain' or 'performance' measure (Friedmann, 1995, p. 630) – is meant to reflect precisely what is owed under the contract, no more, no less.[49] The duty to mitigate and the bar on consequential damages likewise aim to ensure that the promisee get exactly what was bargained for, insofar as both are default rules and hence viewed as implied in the bargain unless specified otherwise.[50] Where contract performance is not easily reducible to a money value, the court has the power to order specific performance,[51] but the ultimate objective remains the same: like damages, specific performance aims to approximate as best can be the contractual performance bargained for.[52]

Most importantly for present purposes, the choice and amount of the remedy are unaffected by the particular reason(s) or motive(s) behind the breach: liability for breach is 'strict' (Farnsworth, 1982/2004, §2.8, discussed in Bridgeman, 2009, note 34, pp. 349–350, 381–382). Whereas some breaches undoubtedly are more morally reprehensible than others, all are equal from the legal (objective) perspective of the bargain, which indeed does not prohibit breach, or certain kinds of breaches, but rather mandates that substitute performance be provided wherever real performance is not. This is why it has been said of the law that it takes a 'generally encouraging stance' (Markovits, 2004, p. 1498) towards certain kinds of breaches, namely 'efficient' ones: where a more lucrative opportunity arises that would leave the promisor better off after having fully compensated the promisee or where the cost of performance outweighs its value to the promisor, breaching the contract is 'efficient' and hence economically advisable as well as legally permitted.[53] By fixing the amount of compensation to the loss of bargain, then, the law effectively allows contract breaching where efficient. Here again, the bargain is treated as the exclusive source of authority between the parties: motives are irrelevant insofar as they do not enter the realm of that bargain.

Equity

But what of Equity, one might ask, which often brings into play moral, thus third-personal, factors of subjective motive, character, good faith and the like? Such doctrines as rectification and *non est factum* indeed involve the courts acting 'in conscience', thus bringing into play subjective intention and attendant relevant moral factors. When doing so, however, the courts arguably leave the second-

[49] *Wertheim v. Chicoutimi Pulp Company* [1911] A.C. 301 (PC).

[50] See e.g. Alderson B. in *Hadley v. Baxendale* ((1854), 9 Exch 341, 156 E.R. 145, para. 151): '[T]he damages which the [non-breaching] party ought to receive … should be such as … may reasonably be supposed to have been *in the contemplation of both parties, at the time they made the contract*. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract … would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances *so known and communicated*.… *For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as the damages in that case*' (emphasis added). This reading of *Hadley v. Baxendale* was recently confirmed by the House of Lords (per Lord Hoffmann) in *Transfield Shipping Inc. v. Mercator Shipping Inc. (The Achilleas)* [2008] UKHL 48. On mitigation, see Chief Justice McLachlin's suggestion that, insofar as the duty to mitigate is a rule of law rather than construction, it cannot be regarded as a 'duty' proper (i.e. only 'duties' grounded in the contract qualify as such). ('A plaintiff is not contractually obliged to mitigate, and in this sense the term "duty to mitigate" is misleading' (*Southscott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51, para. 72).

[51] *Falcke v. Gray* (1859) 29 L.J. Ch. 28.

[52] *Contra*: Smith (2004, p. 402); Webb (2006). (Both Smith and Webb consider specific performance to be identical to contract performance.)

[53] The efficient breach literature is voluminous. See e.g. Shavell (2006–2007); Posner (2009).

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personal realm and cross over into the third-personal, long favoured by their Canon law-inspired, Continental counterparts (as we will see shortly).[54]

This certainly is consistent with the view of Equity put forward by some authors,[55] according to which it would govern the relation of the parties to the court, as a public institution, rather than the relation of the two parties to one another, governed by private law. On that account, the parties would in fact be connected to one another only mediately (third-personally), through their common accountability to the same public institution, under Equity, whereas they would be interconnected directly (second-personally) at Common Law. The suggestion that courts switch realms when they act in Equity also fits with the familiar patterns of justification: English courts generally offer greater justification where they counteract (at Equity) rather than enforce (at Law) bargains, insofar as such justifications are necessary in the (non-inherently authoritative) third-personal realm and unnecessary in the (inherently authoritative) second-personal. If anything, however, this serves to reiterate the centrality of the bargain as analytical baseline, and corresponding prevalence of the second-personal realm, in English law.

The historical struggle to keep Equity separate from Law indeed arguably testifies to the importance, in the English legal psyche, of preventing the third-personal realm from overtaking the second-personal one. The line was drawn at Equity stepping in merely to 'soften the rigours' of the Law – to 'complement' rather than 'contradict' it – a fine line indeed, yet executed with some success through such English landmarks as the doctrine of estoppel. In illegality cases, for example, estoppel has allowed the courts to distinguish cases where the illegality is integral to the bargain from cases where it is merely peripheral: whereas integral illegality necessarily causes the bargain to be void *ab initio*, illegality that taints the parties' peripheral behaviour or motives bars those parties from making claims on the bargain, but otherwise leaves the bargain intact.[56] Third-party claims and unilateral contract modifications offer other good examples: whereas, as discussed, consideration issues stand in the way of enforcing these types of claims, estoppel has in both cases proven effective to mitigate the resulting unfairness.[57]

The most potent illustration of such a line-drawing exercise, however, might well be found in the historical resistance of English courts to implying a general duty of good faith in all bargains, which resistance was lately emphatically reiterated by the English Court of Appeal. In a recent case involving a catering service contract between a hospital and a commercial caterer,[58] the court indeed insisted that whatever is not explicitly prohibited under the bargain should be considered authorised by it, and that no further constraints ought to be placed on the parties' behaviour within that realm. Here again, a clear line is being drawn between behaviour peripheral to the bargain, which may be sanctioned in Equity, and behaviour captured within the bargain, thus exclusively governed by it.

What is more, that line arguably is tighter than is often believed, despite some judges' notorious determination to fuzzy it over.[59] This is best seen, again, through a close inspection of the above case of *Smith v. Hughes*. Whereas that case is often read as affirming that the seller's failure to disabuse the buyer of his mistake was morally but not legally culpable, I would suggest it was neither. For, once the parties have agreed to be exclusively governed by the sample, it becomes perfectly coherent, *as well as ethically* legitimate (i.e. not disingenuous), for the seller to think to himself 'I know that he is mistaken but I also know that I am entitled to ignore that mistake and rely exclusively on the sample' –

[54]For an insightful account of the Continent-inspired, 'quasi-inquisitorial' procedure used by the English courts of Equity, see Kessler (2005).

[55]E.g. Brudner (with Nadler) (1995/2013).

[56]E.g. *Archbolds (Freightage) Ltd. v. Spanglett Ltd.* [1961] 1 Q.B. 374 (CA).

[57]E.g. respectively Lord Denning's *dictum* in *Central London Property Trust Ltd. v. High Trees Ltd.* [1947] K.B. 130; *London Drugs Ltd. v. Kuehne & Nagel International Ltd.* [1992] 3 S.C.R. 299.

[58]*Mid Essex Hospital Services NHS Trust v. Compass Group UK and Ireland Ltd* [2013] EWCA Civ 200 (case no A2/2012/0883).

[59]Lord Denning in e.g. *High Trees* (note 57 above), *Lewis v. Averay* ([1972] 1 Q.B. 198), *Solle v. Butcher* ([1950] 1 K.B. 671).

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despite emphatic judicial pronouncements to the contrary.[60] The presence of the bargain here has the effect of (morally) relieving the seller from the burden of investigating the moral whereabouts of his interaction with the buyer, in other words.[61] And to reinstate that burden through Equity accordingly would in fact be *in*-equitable: it would be tantamount to Equity, not so much contradicting the Law, as contradicting itself. Within the confines of the bargain, in sum, the second-personal realm swamps all that used to be third-personal space.

3.2.2 French doctrine (Subjective) promise and causa

Whereas the normatively loaded, English conception of contract as bargain hence allows English law to sustain a form of contract analysis that is essentially second-personal in nature, the same cannot be achieved at French law, which, as discussed, conceptualises contract ('*la convention*') as a mere fact, prima facie devoid of any kind of authority. Contracts clearly are authoritative at French law,[62] but that is so arguably only insofar as some independent, third-personal basis has been found to justify that authority. *La doctrine* – a quasi-formal source of law in the French system – is replete with such justifications, which moreover are thoroughly third-personal in content: rare is the French treatise on the law of contractual obligations that does not open with a discussion tracing the binding force of contracts to the morality of promising, itself analysed in terms of Kantian ideals of human agency and the autonomy of the will.[63] George Ripert (1925/1949) is perhaps the most prominent proponent of that view,[64] having repeatedly maintained that human law in general is but enforced morality.[65] With respect to contracts in particular, he remarked:

> '[i]n order to arrive at this conception of the sovereign will, creative of rights and obligations by its force alone, it has been necessary that … philosophy spiritualize the law to extract the pure will from its material forms, that Christian religion impose upon men the faith in the word scrupulously kept, that Natural Law teach the superiority of the contract by rooting in it even society itself.' (Ripert, 1925/1949, p. 37)

Ripert's views have by no means been unanimously endorsed by his peers, many of whom are strong dissenters even to this day.[66] But the sheer volume of the doctrinal writing engulfed in that debate arguably reveals that French scholars are agreed on at least one point: whatever authority governs contracts (if not other forms of legal interaction) does need to be independently – namely third-personally – justified.

[60]See *US West Inc. v. Time Warner Inc.* (unreported A.2d, 1996 WL 307445, para. 10), where the court affirms that 'it is logically impossible for a contracting party, operating in good faith, *both* to have a subjective interpretation of ambiguous language different from that of her counterparty *and* to know of her counterparty's differing interpretation' (emphasis in original). See also *Comrie v. Enterasys Networks, Inc.*, 837 A.2d 1 (Del.Ch., 2003), para. 13 (citing same statement from *US West Inc. v. Time Warner Inc.*).

[61]This is not to deny that disabusing the buyer might not be morally *superior*: doing so where it is not morally required in fact might prove particularly virtuous. It seems fair to say, however, that Equity aims not so much to actively pursue virtue as to sanction moral violations.

[62]Art. 1134 Cc provides: 'Legally formed conventions stand as law for those who made them' (my translation).

[63]See generally Fabre-Magnan (2010, pp. 51–62); Flour and Aubert (1975/1991, §192, pp. 146–147); Gounot (1912); Rouhette (1991, pp. 38–40). As Véronique Ranouil pointed out (1980), the link between the French conception of contract and Kantian ethics in fact is open to question, as Kant himself, in his writings on law, appears to endorse a bargain conception.

[64]My thanks go to Ruth Sefton-Green for directing me to Ripert's work.

[65]In the Preface of his classic *La Règle morale dans les obligations civiles* (Ripert, 1925/1949, p. vii), for example, he announces his intention to 'defend the essential idea that, in the principles of obligations, the positive law cannot violate moral rules or even do without their support'. And, at p. 2, he likewise takes issue with claims that 'modern law might be normatively self-sufficient' and counters that that law in fact remains 'dominated by the great morality that, over centuries of Christianity, has governed the soul of so many peoples' (my translations).

[66]E.g. Henri Capitant (1923), who argued that law and morality cater to distinct dimensions of human life.

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The independent justification most commonly offered relates, as just indicated, to contracts putting in play commitments – exercises in human agency – that morality mandates should be honoured.[67] As Joseph Raz has interestingly noted (1982, p. 937, cited in Markovits, 2004, p. 1511), that justification is not qualitatively different from, say, 'the legal proscription of pornography'. What ties the contract parties to one another on the French account accordingly is not so much the contract itself as the fact that, being both involved in a contractual transaction, they are answerable to the same moral rules on commitment.[68] The parties hence are not *directly* connected to one another through the contract so much as *mediatedly* connected via their shared accountability to a same set of moral ideals. In Ripert's own, again revealing, words:

> '[o]ne must never forget that the promisor and the promisee … are individuals who belong to the same community, whom a sublime morality calls brothers, and who can hold, the first, rights, and the second, obligations, only insofar as that moral law permits [it].' (Ripert, 1925/1949, p. 5)

That account could hardly be more third-personal, as it indeed shows the two parties looking 'past the other to … a moral truth in the world which, while common to them, stands independent of each party and what each party claims' (Chapman, 2012, pp. 410–411).

To be sure, the moral truth in question does command that the promisor be accountable *to* the promisee, but that arguably is so only because her particular commitment provides as much. That is to say, where I promise to do something *for* you, I am obligated *towards you* for no other reason than that is what my promise provides. In particular, no involvement of yours, in the form of return commitment or even just acceptance of my commitment, is required for that obligation to exist between us. That much is suggested by the letter of Article 1108 Cc, which specifies that, with respect to consensual obligations, only 'the consent *of the obligated party*' is required (emphasis added). French law does make correlated consents, secured through the offer and acceptance process – a requirement of *contractual* obligations. But that requirement arguably goes merely to earmarking the obligations as 'contractual', not making them 'obligations' as such. If so, the essential difference between contractual and non-contractual commitments goes to content: contractual commitments, unlike non-contractual ones, are commitments that the promisor (unilaterally) intends that they be accepted by the promisee. The promisee accordingly could demand that the commitment be performed thanks not so much to some privileged normative status vis-à-vis the promisor, but to the fact that the condition appended to that commitment, her acceptance, has materialised.

Presumably, then, the promisor dispensing with that condition, or substituting any other for it, would not affect the commitment's obligatory nature. And French law does motion in that direction, insofar as it shows inclinations to enforcing certain 'unilateral juridical acts', accepted by no one.[69] Though the enforceability of unilateral juridical acts admittedly remains a highly contested issue, the mere fact that French legal scholars have long struggled with it arguably is revealing of the significance that they attach to the *commitment* dimension of juridical acts, whether correlated or not. It thus seems that commitments are commitments are commitments, under French law: whether contractual or not, all are ultimately deserving of enforcement under the moral law of promising.

Focusing now on contractual commitments, that these commitments involve 'correlated' but not otherwise 'welded' individual consents is confirmed by the fact that consideration is not a requirement for their enforceability. *Causa* of course used to be such a requirement but, as many comparatists have warned (Markesinis, 1978), the difference between these counterpart notions is significant. It first is

[67]'[R]espect of contract is one of the first moral principles' (Ripert, 1925/1949, p. 39). For similar accounts from common-law scholars, see Fried (1981); Shiffrin (2007).

[68]In Mark Van Hoecke's words (2004, pp. 165, 180), French and English contract laws differ in that they respectively focus on 'the intention to create legal consequences' and 'the intention to create legal relations'. (But see his further claim (p. 179) that Continental lawyers tend to focus on the agreement whereas English lawyers tend to focus on exchange of unilateral promises.)

[69]See Fabre-Magnan (2010, pp. 697ff.); Flour and Aubert (1975/1991, pp. 389ff.).

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important to distinguish between what was the *causa* of the contract, taken as a whole (Art. 1108 Cc), and that attached to individual contractual obligations (Art. 1131 Cc). Whereas some French jurists have defended an objective conception of the latter (at least in the context of certain types of contracts),[70] the *causa* of the contract has always been decidedly subjective, as it evinces private motives and moral culpability.[71] The code, after all, explicitly stipulated that a valid contract must exhibit a 'cause *licite*' (rather than just a 'cause'),[72] thus overtly inviting judicial inquiries into the moral acceptability of contractual purposes, which invitation that French courts have not hesitated to take up at every turn.[73]

With respect to the *causa* of individual obligations, a distinction again needs to be made between one-sided contracts ('*contrats de bienfaisance*'), wherein the *causa* of the promisor's obligation was just her *animus donandi* (Art. 1105 Cc), and bilateral contracts ('*contrats à titre onéreux*'), which have traditionally been conceptualised as involving two *causae* (one per promise) that indeed come closest to the consideration of English law. Even then, however, an important difference remains. Whereas, as discussed, the two promises cannot possibly be analysed separately from one another at English law, they arguably can at French law. The explanation for this lies, I would argue, with the above English and French models of contractual interpretation, according to which English law tends to merge the 'ought' and the 'is' in contract analysis whereas French law, in contrast, tends to keep them separate. We saw that, at English law, mutual promises must necessarily be conceptualised as a single package, for that is the only way out of the vicious circle whereby each can be a valid consideration for the other only if it is binding, which it cannot be unless the other already is, and so on. The logical conundrum arguably arises here precisely because consideration combines a factual and a normative dimension: it is not just something that the promisee *does* for the promisee; it also is something that she *ought* to do, for it is the requirement that the consideration be *binding*, in addition to just *present*, that indeed triggers the circularity.

French law, in contrast, has avoided that circularity by distinguishing the obligation as such (the normative component) from its object (the factual component) and defining *causa* by reference to the latter only.[74] The promisor's obligation did require a valid *causa*, but that *causa* was found in the object of the other's obligation, not in that obligation as such. It has accordingly been possible to conceptualise each party's obligation as complete independently from the other: once it was determined what action each party was meant to perform, the requisite *causa* was deemed present, regardless of whether that action *might not have been* obligatory quite yet. It thus seems that even the most objective inception of the traditional French *causa* is still a far cry from English consideration.

Absent the consideration requirement, many of the consideration-related dilemmas of English law of course disappear. Purely consensual contract modifications, unilateral or not, have never been problematic at French law: if correlated individual consents suffice to create a contract, they likewise suffice to undo it. Article 1134 Cc in fact provides that 'legally formed conventions can be revoked only by [the parties'] mutual consent'. The same reasoning applies with respect to extending contract protection to third parties. Contract *burdens*, of course, ought to impact only the parties themselves: the same principle of individual autonomy that mandates that contracts be enforced on the parties also

[70]E.g. Louis-Lucas (1918); Capitant (1923, §4, p. 12); Demolombe (1845/1872, §§246, 347).

[71]E.g. Ripert and Boulanger (1956–1959, vol 2, §287). Most commonly, however, the *causa* of the obligation is associated with the parties' individual motives. See generally Farnsworth (2006).

[72]Arts. 1108, 1133 Cc.

[73]Most commentators nowadays seem agreed that the French *causa* has become just a hodge-podge of highly disparate elements for the courts to seize upon whenever they disapprove of a particular contract. E.g. Sefton-Green (2009).

[74]But see Planiol's critique of *causa*, which largely mirrors Pollock's critique of consideration. While most French treatises ostensibly define *causa* in much the same terms as common-law consideration (as the other party's 'engagement', e.g. Flour and Aubert (1975/1991, § 258)), the examples given almost uniformly point instead to the object of that 'engagement', suggesting, for example, that, in a contract for the sale of a house, the *causa* of the buyer's and the seller's obligations respectively are 'obtaining the house' and 'obtaining the money'.

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prohibits their enforcement on others, as it is the latter's autonomy that would thereby be violated.[75] Article 1119 Cc accordingly confirms that '[o]ne cannot, in general, commit, nor stipulate in one's name, for any other than oneself'. But there is no reason to apply the same restriction to contract *benefits*: so long as the parties clearly 'stipulate' that a third party is to benefit from their contract, no moral objection can stand in the way of that party having that stipulation enforced.[76] Article 1121 Cc moreover specifies that the stipulation becomes irrevocable upon acceptance by the third party. That is fully consistent with French contractual reasoning in general: the third party's acceptance effectively serves to bring her into the contractual realm, as it causes her intention to be correlated with those of the contracting parties. Though the exact nature of the '*stipulation pour autrui*' – contractual derivative or stand-alone institution? – admittedly has been the object of much debate,[77] its possibility remains unchallenged.[78]

Formation

The (third-personal) conception of contract as merely correlated subjective individual intentions is corroborated by the French rules on contracts by correspondence. With respect to such contracts, French doctrine teaches that the acceptance ought to be deemed effective 'from the moment an external manifestation of the [acceptor's] intention has taken place' (Marty and Raynaud, 1962, §111, p. 95, cited in Barnes, 2008, pp. 379–380). French law, like English law,[79] ultimately endorsed the theory of emission, but it is the justification given for this endorsement that is here particularly enlightening. Emission is to be favoured over reception or communication, it is argued, because '[t]o require that the intention of the acceptor be made known to the offeror is arbitrarily to add a new element to the intention and to the contract' (Perillo, 2004–2005, p. 380); '[t]o require knowledge of the acceptance is to add a condition for the formation of contracts which the law does not require' (H., L. and Mazeaud, 1956/1962, §146, p. 120); '[t]he fact that the acceptance is made known to the offeror adds nothing to the legal consequences of the acceptance' (Colin and Capitant, 1914/1924, pp. 95ff.).

In the same spirit, prominent French scholar Robert Pothier taught that, where an offeror changes his mind and revokes the offer before it is accepted, subsequent acceptance attempts by the offeree cannot but be ineffective, as these would then fail to meet the offer.[80] In such a case, the two wills indeed are neither 'coinciding' nor 'correlated', for the second cannot possibly be an 'acceptance', a 'response to' a first that is no longer present. The offeror remains free of contractual liability, as he has broken no promises: he withdrew an offer of promise rather than a promise proper – an offer that could have, but had yet to, become a promise.[81] Moreover, the fact that the offeree might not

[75]See generally Goutal (1979). This is not to say that individuals can deny or even just ignore the existence of contracts to which they are not parties: contracts are 'opposable' to non-parties insofar as, once a contract is validly formed and acquires legal existence, it becomes, legally speaking, an objective entity 'out there' – one with which all must contend as they would with material entities. See generally Wintgen (2004). Contract rights indeed are 'patrimonial' rights that, like property rights, can be bought and sold. See generally Gray (1981).

[76]Art. 1121 Cc.

[77]E.g. Roux (1991).

[78]The substance of the current articles indeed is unchanged in the code-reform proposal. See generally Vogenauer (2009, p. 235).

[79]English law apparently borrowed from the French, in particular from Pothier's writings, on this point. See generally Perillo (2004–2005).

[80]'[I]f I write a letter to a merchant living at a distance, and therein propose to him, to sell me a certain quantity of merchandise, for a certain price; and, before my letter has time to reach him, I write a second, informing him that I no longer wish to make the bargain, or if I die; or lose the use of my reason; although the merchant, on the receipt of my letter, being in ignorance of my change of will, or of my death or insanity, makes answer that he accepts the proposed bargain; yet there will be no contract of sale between us; for, *as my will does not continue until his receipt of my letter; and his acceptance of the proposition contained in it, there is not that consent or concurrence of our wills, which is necessary to constitute the contract* of sale' (Pothier, 1762/1839, p. 18, emphasis added).

[81]The situation, of course, is different if the parties had concluded a separate contract with respect to the offeror keeping the offer open for a certain period. Withdrawing the offer before the end of the stated period would then amount to a breach of that separate contract.

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be aware of the offeror's change of heart is, from a strict (French) contractual perspective, irrelevant: as an offer is first and foremost a statement of private intention, a change in that private intention suffices to negate the offer (provided, of course, that the change can be proven to a court's satisfaction). Whereas the circumstances surrounding the offer and its subsequent withdrawal may perhaps trigger some other form of liability in the offeror,[82] these cannot change the combined facts that a contract requires a promise and an offer withdrawn before acceptance is no promise at all, with the result that contractual liability simply is not possible.

The subjective conception of contract privileged at French law likewise impacts on the treatment of unilateral mistake. In the French equivalent to *Smith v. Hughes* – the case of the fake Louis XV armchair purchased in the belief that it is real[83] – the seller indeed cannot, unlike the English oat grower, just ignore the buyer's mistake and proceed with the sale. She must act so as to correct the mistake; she owes the buyer an *obligation de renseignement* (Fabre-Magnan, 1992). (She is held, in Markovits's words, to a 'cooperation' rather than mere 'collaboration' standard (2004, pp. 1462, 1513).[84]) Unlike the English seller, that is, the French antique dealer simply *lacks any basis upon which to assume* that it is acceptable for her to say and do nothing. Whereas the English seller can rest assured that his knowledge of the buyer's mistake is peripheral and hence irrelevant to their bargain-governed interaction, the French seller can draw no such distinction. She knows that her contractual position is only as strong as it is morally defensible, and that any and all moral considerations accordingly are immediately relevant.[85] As the only morally coherent course of action open to her is to assist in fixing the buyer's promise, the law will deprive her of the benefit of the contract should she fail to do so. In sum, the French seller, unlike the English one, lacks a second-personal reason for ignoring the buyer's mistake and, accordingly, cannot but fall back into the third-personal realm, where any and all moral factors count.[86]

Sanctions de l'inexécution

But where a promise proper is (legally and morally) broken, the sanction is, as one would expect, somewhat stiffer at French than at English law.[87] Though it is unclear whether, in practice, forced performance is ordered any more frequently in France than in England (Treitel, 1989), the French's formal consecration of *exécution en nature* as the primary sanction for breach of contract is widely seen as a loud statement in favour of promise-keeping (*le respect de la parole donnée*).[88] At French law, breaching a contract indeed constitutes a 'fault'[89] – and is arguably remedied as such. Whereas comparative lawyers have tended to focus on the hierarchy of the French sanctions (i.e. the priority of *exécution en nature* over money damages), a more striking feature arguably is the fact that the choice of remedy falls

[82]Withdrawing an offer before the expiration of the stated term or, where no term is stated, before a 'reasonable' time has elapsed is typically treated as a 'fault', which engages the offeror's delictual liability under Art. 1382 Cc. See e.g. Pothier (1762/1839, pp. 18–19).

[83]*R.T.D. civ.* 751 (1970).

[84]One French treatise in fact uses those very words: '[l'exigence de la bonne foi] se traduit par l'émergence d'un *devoir de coopération*, de collaboration entre les contractants' (Terré, Simler and Lequette, 1971/1993, p. 320, emphasis in original).

[85]The moral groundings of the *obligation de renseignement* are seemingly unquestioned in French doctrine (e.g. Fabre-Magnan, 1992, p. 47), which debates merely the question of *what degree* of morality the law should impose on the parties. See e.g. De Caqueray, reporting that Aquinas in such cases favoured adopting more lenient moral standards – 'appropriate not for saints but for regular mortals', cited in Fabre-Magnan (1992, p. 29); Ripert (1925/1949, pp. 6–7) ('Morality teaches us that we ought to worry about the feelings on which legal subjects act, to protect those acting in good faith, to counter those acting out of malice or deception, to chase down fraud or even just fraudulent thoughts. It must be inquired to what extent the law can receive such search of intentions, such purely subjective examination of acts' (my translation)).

[86]More generally, see André Tunc's claim that, of all legal systems, the French offers 'the greatest encouragement to the Good Samaritan' (1966, p. 44). For a broader outlook, see Kortmann (2005).

[87]See generally Rowan (2012).

[88]E.g. Harris and Tallon (1991, pp. 266–270); Romero (1986).

[89]The Quebec Civil Code, which was moulded on the French, is particularly explicit in this regard, as breach of contract is there treated as a particular instance of the more general duty to 'abide by the rules of conduct which lie upon [persons], according to the circumstances, usage or law, so as not to cause injury to another'. See Arts. 1457–1458 CCQ.

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not to the court, as it does in England, but rather to the promisee.[90] This places the promisee – the 'non-faulty' party – in a position to block, in particular, any profit-motivated breach and to appropriate to herself the new profit opportunity. As between the promisor, who needs to commit a fault in order to secure the additional profits, and the promisee, who does not, it presumably is reasoned that it is best to favour the latter. By leaving the choice of remedy to the promisee, then, French law effectively bars the possibility of efficient breaches and redirects profit opportunities to non-breaching parties.

But the French promisee's high hand goes further still. For, where the promisor fails to comply with an order of *exécution en nature*, she is constrained to do so through a procedural mechanism called *l'astreinte*.[91] As a substitute for imprisonment for debts (abolished with respect to non-penal matters in 1867), *l'astreinte* imposes on recalcitrant defendants periodic payments that continue to accumulate for as long as the refusal to comply persists. It is pronounced by the judge *ex officio* and is clearly intended as punitive given that it is payable over and above any compensatory damages owable to the plaintiff. Moreover, its amount is set by reference to such factors as the defendant's conduct, financial resources and frame of mind. Of course, all legal systems punish defendants who fail to comply with court orders. But the French *astreinte* is particular in that the final amount of the fine is payable to the plaintiff rather than the state – which confirms that it might be regarded as a straight punitive transfer from the 'faulty' to the 'non-faulty' party. Though this particular aspect has attracted much criticism from the local legal community, *l'astreinte* appears to continue to be alive and well, widely used and highly effective.[92]

L'équité

None of this should come as any surprise. It is a well-known fact of French legal history that French law was suffused with Canon law from an early day. Unlike English law, which managed to contain canonist influences by confining them to its jurisdiction of Equity, French law is a direct offspring of the medieval Jus Commune, itself a thorough blend of Canon and Roman law. Thus, whereas legal and equitable considerations are conceptualised distinctly at English law, there is no sense in which the legal could not *also be equitable* (at least aspirationally) at French law.

This is perhaps most evident from the omnipresent obligation of good faith, which French scholars have described as the primary 'means through which the moral rule was made to infiltrate the positive law' (Terré *et al.*, 1971/1993). Article 1135 Cc indeed provides that contracts bind 'not only to what is expressed, but also to what follows from equity'.[93] It is also pointedly illustrated through our above example of cases of illegality. We saw that, in such cases, English law typically deploys estoppel with a view to, wherever possible, sanction the parties' morally objectionable behaviour without, for that matter, undermining the contract itself. This is not possible at French law, where the parties' private motives feed directly into the contract through the *causa* requirement. As a *cause licite* is explicitly required for a valid contract under the code, there simply cannot be a contract where the parties harbour illicit motives. The moral (third-personal) analysis, in other words, inevitably swamps the whole of contractual analysis.

[90]Here again, the Quebec Code (Art. 1590 CCQ) is particularly explicit – more so in fact than the counterpart Art. 1142 Cc. French scholars, however, took care to interpret that provision so as to favour specific performance. As Solène Rowan reports (2012, p. 45), moreover, '[s]pecific performance is not only a centrally important remedy in French law, but where the constituent elements of the cause of action have been made out … it is considered to be available as of right … in marked contrast with the narrow availability of specific relief in England, French courts do not have any discretion as to whether to grant the remedy'.

[91]See generally Harris and Tallon (1991); Romero (1986).

[92]*Ibid.*

[93]In the same vein, Art. 1375 of the Quebec Civil Code reads: 'The parties shall conduct themselves in good faith both at the time the obligation is created and at the time it is performed or extinguished.'

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4 Conclusion

Concern for style is not peculiar to French civil law. Insofar as 'style' is here seen as going to reasoning rather than prose, it is central to all law, English law included. And the object of comparative law accordingly is to compare such reasoning styles. At least that is the exercise that the present paper aimed to illustrate.

Drawing on Stephen Darwall's bipartite taxonomy of moral justification structures, I outlined various English contract materials that seem to involve a second-personal reasoning style (bargain and consideration, formation, remedies and Equity), contrasting them with the counterpart French materials, which instead tend to exhibit a third-personal structure (promise and *causa*, formation, *les sanctions de l'inexécution* and *l'équité*).

Further work would be needed to determine whether these opposing tendencies hold beyond the particular materials considered here. As these are mere 'tendencies', one admittedly should expect to encounter at least *some* discrepant materials on each side. For, beyond their differences, English and French contract styles are bound to boast some measure of commonality, if only by virtue of their being both 'legal' and indeed 'contractual'. Nonetheless, the more instances of second- and third-personal structuring that can respectively be detected within English and French contract law, the stronger the case will be that distinct, peculiarly English and French, contractual *styles* can be associated with these bodies of law.

Still, if the central difference here in fact is essentially stylistic, there is no reason to think that it would somehow be confined to the contractual domain. To the contrary, one might expect to find instances of it lacing other areas of English and French private law, procedural or substantive, perhaps even reaching to public law. If so, we would be witnessing, beyond just differing *contractual* styles, differing English and French *legal* styles *tout court*. This would in turn beg the question alluded to earlier concerning the source and moral/social/cultural significance of such differing legal styles. What do they mean? What particular collective values do they speak to? And, reaching back in time, how did they come about? These are just some of the many fascinating questions that comparative law should, I would suggest, aim to answer.

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