Termination of Contract

French civil code 1804

Article 1184

La résolution doit être demandée en justice, et il peut être accordé au défendeur un délai selon les circonstances.

Resolution must be requested through legal proceedings, and it may be granted to the defendant a delay according to circumstances.

French civil code 2016

Article 1226

Le créancier peut, à ses risques et périls, résoudre le contrat par voie de notification. Sauf urgence, il doit préalablement mettre en demeure le débiteur défaillant de satisfaire à son engagement dans un délai raisonnable.

La mise en demeure mentionne expressément qu'à défaut pour le débiteur de satisfaire à son obligation, le créancier sera en droit de résoudre le contrat.

Lorsque l'inexécution persiste, le créancier notifie au débiteur la résolution du contrat et les raisons qui la motivent.

Le débiteur peut à tout moment saisir le juge pour contester la résolution. Le créancier doit alors prouver la gravité de l'inexécution.

The creditor may, at his risk and peril, terminate the contract by way of notice. Barring urgency, he must beforehand have put the debtor in default on notice to perform his undertaking within a reasonable delay.

The notice to perform states expressly that if the debtor fails to fulfil his obligation, the creditor will have the right to terminate the contract.

Where the non-performance persists, the creditor notifies to the debtor the termination of the contract and the reasons motivating it.

The debtor may at any time refer to the judge to contest the termination. The creditor must then prove the gravity of the non-performance.

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Article 1184(3) of the 1804 French civil code concealed at the very least a commitment to the deep distrust into which the individual is readily held in France; a time-honoured aversion for the unfettered play of the market; a well-honed social demand for state interventionism; an assumption that only the state can optimally bring to bear the appropriate dose of "*solidarité*" that must feature within a French contractual relationship on account of a deeply-rooted concern for formal equality; and the deployment of a strongly assertive state.[1] I claim that an interpretive view of law-as-culture *yields* these various dimensions of the law-text as being key elaborative features of the rule compelling the principled requirement for judicial authorization before a contract can be "terminated", and I maintain that it is such ideas that explain why the French law-text refused until the 2016 reform to allow a party unilaterally to declare the contract at an end subject to the payment of damages in case of subsequent retaliatory litigation – which is, in a nutshell, the standard position obtaining in the common-law tradition (not to mention Germany). Observe that, in the wake of a 1998 decision of the *Cour de cassation*, French courts had occasionally appeared willing to ignore the civil code's demand for a judicial pronouncement and showed themselves prepared to validate a unilateral "termination" of contract although within strict limits involving an assessment of the "seriousness" of the misbehaviour of the party allegedly in breach (the relevant French word, arguably setting a higher threshold, is "*gravité*").[2] The presence of dissenters, a feature of every legal culture, can assist, as was the case here over a number of years, in confirming the strength of the governing pattern. In this instance, dissent also accounted in time for the relaxation of the rule, if within a stringent framework, under the 2016 reform.[3] To those who

[1] For a leading scholarly treatment probing the intellectual depths of French anti-individualism, see Lucien Jaume, *L'Individu effacé* (Fayard, 1997). The prominency of "*solidarité*" in French thought can readily be traced to Emile Durkheim (1858-1917) – and through him to Rousseau who, in his eighteenth-century *Du contrat social*, famously paired the contractual and social themes. See Jean-Jacques Rousseau, *Du contrat social*, in *Œuvres complètes*, vol. 3 (Bernard Gagnebin and Marcel Raymond eds, Gallimard 1964 [1762]), pp. 347-470. For a discussion of "*solidarité contractuelle*", see Emile Durkheim, *De la division du travail social* (Presses Universitaires de France, 2007 [1930]), pp. 177-209. Unsurprisingly, Durkheim devoted a course of lectures to Rousseau's *Du contrat social*, which was first published in 1918 shortly after his death: Emile Durkheim, *Le Contrat social de Rousseau* (Pierre Hayat ed, Kimé 2008 [c 1900]). For detailed examinations of "*solidarité*" in French political philosophy, see *e.g.* Jean-Fabien Spitz, *Le Moment républicain en France* (Gallimard, 2005); François Ewald, *L'Etat providence* (Grasset, 1986). For his part, René Demogue is widely acknowledged to be an early defender of the idea of "*solidarité*" in the French law of contractual obligations. *E.g.*: René Demogue, *Traité des obligations en général*, vol. 6 (Rousseau, 1931), p. 9. In his doctoral dissertation, however, Etienne Gounot, later a law professor in Lyon, had argued twenty years earlier that a contract epitomized "a principle of union and *solidarité*": E Gounot, *Le Principe de l'autonomie de la volonté en droit privé* (Rousseau, 1912) 376 ["*un principe d'union et de solidarité*"] (my emphasis).

[2] *E.g.*: Civ. 1st, 9 July 2002, Bull. I, no. 187, p. 145; Civ. 1st, 28 October 2003, Bull. I, no. 211, p. 166.

[3] For an authoritative discussion of the new provision, see Olivier Deshayes, Thomas Genicon, and Yves-Marie Laithier, *Réforme du droit des contrats, du régime général et de la preuve des obligations*, 2d ed. (Lexis Nexis, 2018), pp. 573-79.

do not like "legal culture" and would leave untheorised the contractual scheme to which article 1184(3) of the 1804 French civil code gave effect for over two centuries, I address my questions: what is your competing model of epistemic cohesion in (French) law? Or do you not like the idea of (French) epistemic cohesion either?

In order to generate the sort of *interpretive yield* that, alone, can permit a meaningful or profound understanding of the law-text, a comparatist must be prepared to approach law *as culture* (that is, to treat law as law-as-culture) and to ascribe epistemic relevance to the law-text's constitutive features – to its jurimorphs – in appreciation of the fact that these form an integral part of the law-text, that these exist *as* the law-text that therefore exists *as* culture. In other terms, the comparatist writing on article 1184(3) of the 1804 French civil code must be disposed to be *writing culture*. This close-reading strategy stands opposed to the positivist's closed reading. For positivists, the ideas of "suspicion of the individual", "market-aversion", "*solidarité*", "state activism", and so forth ought perhaps to concern sociologists, economists, or political theorists but certainly not jurists – a disciplinary reaction that resolutely and disappointingly rides roughsod over the question 'why' (as in '*Why* was the French provision formulated as it was?', '*Why* the historical demand for legislation compelling judicial intervention to the exclusion of any other process?').[4]

From the perspective of the interpreter of a legal culture such as a comparatist who is willing to offer an overture *to* the language of the law-text, which is also an overture *of* the language of the law-text, there can be nothing that is quintessentially "legal" or automatically outside the "legal" (out of law, outlawed). Because there is no algorithm to determine the vectors of cultural extension, the quality of "legality" (if this be the apt word) is thus conferred to heterogeneous elements – the beliefs, the desires, the commitments – that the comparatist connects or assembles, that he collocates, that he understands or interprets as pertaining to the "legal", that he ascribes to "legality", and that he thus names "the French law of 'termination' of contract" while meaning, in effect, "the French law-as-culture of 'termination' of contract" (I leave to one side, here, the not insignificant fact that the French themselves would refer to "*résolution*").[5] A comparativist favouring a culturalist approach to foreign law in pursuit of meaningful, that is, profound or thick understanding, can therefore be expected to maintain that state activism or distrust of the individual prove to be more significant dimensions of the law-text – thus deserving to be traced at length – than whatever

[4] To the extent that Duncan Kennedy argues that law, even so-called 'technical' law, is not apolitical – and that the claim that law is apolitical is itself political – I discern congruence between his views and mine. See D Kennedy, 'The Political Stakes in "Merely Technical" Issues of Contract Law' (2002) 10 Euro R Private L 7. Adde: P Legendre, *Dogma: instituer l'animal humain* (Fayard 2017) 156: '[T]echnique is not *neutralizable*.'

[5] In my opinion, the most rewarding treatment of the wide range of theoretical issues arising as regards the translatability of law is in S Glanert, *De la traductibilité du droit* (Dalloz 2011). See also S Glanert (ed), *Comparative Law – Engaging Translation* (Routledge 2014). For my own effort, see P Legrand, 'Mind the Gap! Translation of Foreign Law Is Not What You Think' (2021) 8 Revista de Investigações Constitucionais/J Constitutional Research 601.

the courts may have been saying about the semantic extension of "termination" (or "*résolution*") as a matter of posited law, these judicial pronouncements accordingly losing the analytical focality that they have traditionally been holding for positivists. Incidentally, I argue that there is nothing in the tracing of the civil code provision to the social demand for a strong state, or to discomfort in the face of an unregulated market, to suggest anything like a reification, a totalization, or a stereotypification of knowledge. While the comparatist's tracing remains the best answer he can offer in order to make meaningful sense of the singular foreign law as it dwells locally, any tracing is ever provisional – thus, whenever the comparatist, after some time away, returns to the foreign law-texts envisaged as repositories of traces, something different is bound to catch his eye. Once more, not only are traces constitutive of the law-text, but their coming forth cannot be extraneous to the comparatist's intervention. Increased knowledge of French history or of French society or of the French civil code, for example, could lead the comparativist, in due course, to revisit his tracing or to invent new traces with a view to enhancing his understanding of the French law of "termination" of contract further still.[6]

It is not a matter for comparatists of ridding themselves of posited law (which would be silly), but of coming to it *obliquely*. The fact is that all formulations of the posited law can beneficially be envisaged as cultural expressions and that no formulation of the posited law can therefore safely escape a cultural interpretation. In the words of Lawrence Rosen speaking of law, "one cannot fail to see it as part of culture".[7] I insist that, as I make these various claims, I am not arguing that law exists only as culture, or that the legal can be reduced exclusively to the cultural. What I do contend, however, is that such legal artefacts as statutes or judicial decisions exist *as* incorporative cultural forms, irrespective of what other existences they may also harbour. Thus, statutes and judicial decisions exist as the articulators or vectors of a cultural sensibility that is actually inscribed in the textual fragments themselves and that can be traced to arrays of historical, political, economic, social, philosophical, ideological, linguistic, and other cultural formations having undergone a process of jurimorphing – of transformation into the statute or judicial decision, *as* the statute or judicial decision.

I argue that what positivism has deemed superfluous – positivism's unthought – can be said to matter, interpretively speaking, even more than what it has held to count: the ideas permeating the words of the law-text can be appreciated as revealing us more about the law than a purportedly "legal" exegesis of these words themselves could ever do, irrespective of how much seemingly "legal" analyticity one could bring to their reading. Consider Geoffrey

[6] There appears no creditable way in which such an improved appreciation of foreign law can be denigrated as 'a position of "hyperparticularity"', and there seems to be no reasonable sense in which one can hold that 'hyperparticularity is too pessimistic a view of the possibilities of learning': VC Jackson, *Constitutional Engagement in a Transnational Era* (Oxford University Press 2010) 179. Quarrying is querying, and querying is learning – *n'en déplaise*...

[7] Rosen (n 198) 5.

Wilson: "It would be unwise […] to regard anything in Japanese society as prima facie irrelevant to the understanding of Japanese law on first setting out to get to grips with it. The links between law and language, law and the political or social and economic order, law and the history and traditions of the country, its codes of morality, its senses of justice and the relationship between the legal profession and other professions and between legal scholarship and other forms of scholarship, the relative standing of different actors in and around the legal system, all have their impact on law and its administration and the definition of law and legal scholarship".[8] In more succinct language, Thomas Bernhard, although not a jurist, exclaims how, potentially, "[t]he world is utterly, thoroughly legal".[9] Note that, as is the case with any research endeavour, while knowledge-making will owe much to the dependence of the knowledge-production exercise upon the comparativist-at-law's enculturation and on the insights that his singularity will allow him to contribute (or not) to the interpretive task at hand, it will also, pragmatically speaking, have something to do with temporally emergent contingency (I have in mind, for example, the serendipity of one's readings – a book may be missing in the library at the time of one's research visit – and the existential randomness dictating one's encounters and conversations with members of the local legal "community").

Crucially, enculturation, singularity, and serendipity are enough to ensure that no two understandings of a foreign legal culture will ever be identical – another application of Leibniz's Law to the effect that if there is more than one, there is difference. Each understanding – to the extent that it deserves to be qualified as such – will differ from all other understandings since each understanding will be the result of the comparatist's singular assemblage and deployment of some cultural traits in preference to others, out of all the cultural traits that he will have ascertained, out of all the cultural traits that were available to him to ascertain.[10] Moreover, the meaning of each understanding – what a given understanding will be taken to signify – will depend on the readers' or listeners' adhesion as they receive the comparatist-at-law's cultural claims, the readers and listeners themselves being encultured also. As adhesion – the comparatist's to the foreign and the comparatist's interlocutor to the comparison – emerges as an extraordinarily complex arrangement, it is clear that from a culturalist standpoint the process of ascription of meaning through a valorization of law-as-culture is incompatible with the idea of the "legal" ever being

[8] Geoffrey Wilson, "English Legal Scholarship", (1987) 50 Modern L.R. 818, p. 831.

[9] Thomas Bernhard, "Ist es eine Komödie? Ist es eine Tragödie?", in *Erzählungen* (Suhrkamp 2001 [1967]), p. 74 ["*(d)ie Welt ist eine ganz und gar, durch und durch juristische*"].

[10] While writing from a theoretical vantage point that claims the merits of interpretive consensualism — whose feasibility and opportunity I dispute – Hans-Georg Gadamer, in an oft-quoted passage, argues the very contention that I hold in the body text: "It suffices to say that one understands *differently, when one understands at all*". "[O]ne understands *differently*, *when one understands at all*": Hans-Georg Gadamer, *Truth and Method*, 2d English ed. (Joel Weinsheimer & Donald G. Marshall transl., Continuum 2004 [1960]), p. 296 ["Es genügt zu sagen, daß man *anders* versteht, *wenn man überhaupt versteht*"].

structurally closed: one never reaches the stages at which a foreign law-text can convincingly be said precisely to "begin" or "end", definitely. Far from there being anything like the certainty that positivism craves as regards the ascertainment of foreign law, a culturalist appreciation of the legal, which is a differentialist apprehension of it, shows how law-texts cannot be secured against pervasive semantic movement, how within interpretation there must prevail *undecidability*. In brief, the comparatist-at-law could have discerned further traces beyond the ones that he made into the focus of his study, and he could have uttered something different from what he said about the traces that he addressed (which he would have done, for example, if his stock of references had been more extensive or if he had brought to bear a more sophisticated knowledge of the language in which the primary materials are written).

The idea of "legal culture" contests deeply-ingrained juristic ways in another important respect. Traditionally, "[t]he grand ideals of justice, of impartiality and fairness, have seemed to remove law from the ordinary, disordered paths of life".[11] If you will, justice, on account of what has been apprehended as its necessary transcendentality, has been deemed not to be reconcilable with any given singular configuration of the "legal", whether elsewhere or here, and jurists interested in achieving justice have accordingly found themselves disregarding or discrediting law's specific occurrences. John Rawls's thoroughly abstract *A Theory of Justice* offers an influential application of such postulates.[12] For its part, comparative law invites jurists to revisit the assumption that justice – or at least something akin to justice – must be completely detached from localism. Indeed, it is reductionist to denigrate local knowledge as being inherently prejudiced – in the derogatory rather than the etymological sense of the term – because of its situatedness. Why should local knowledge be deemed structurally feckless or biased, and why should it find itself stigmatized as a source of embarrassment, as something that one needs to overcome? In effect, "[t]o say that the law is cultural does not by itself dismantle the force of the idea of justice, quite to the contrary.[13] *Pace* Rawls, it is arguable that a compelling argument about justice indeed requires not a process of abstraction, but a strategy of concretization.[14]

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[11] Robert Post, "The Relatively Autonomous Discourse of Law", in Robert Post (ed.), *Law and the Order of Culture* (California, 1991), p. vii.

[12] John Rawls, *A Theory of Justice* (Harvard, 1971). Gayatri Spivak refers to Rawls's "interminable suppositions": G.C. Spivak, *Other Asias* (Blackwell, 2008), p. 29.

[13] Carol J. Greenhouse, "Just in Time: Temporality and the Cultural Legitimation of Law", (1989) 98 Yale L.J. 1650, p. 1650.

[14] Admittedly going beyond the two abstract principles of justice that he developed in *A Theory of Justice* and underlining the need to reformulate the Hobbesian problem of order from the fact of cultural pluralism, Rawls suggests eight principles for application to the international arena in John Rawls, *The Law of Peoples* (Harvard, 1999). But even this normative account of international justice, although it can be said to be taking cultural pluralism more seriously, remains mired in transcendentalism. For example, Rawls endorses "universal rights" and refers to the law of peoples as "[u]niversal in [r]each": *Id*., pp. 80 & 85 [emphasis omitted]. He adds that "universal peace among nations is possible": *Id*., p. 103. One readily hears echoes of the highfalutin idea that an

Consider so-called "affirmative action". While affirmative-action programmes for African-American university students may be approached as defensible in the United States (at least from a certain political standpoint), they would not be regarded as making sense in neighbouring Canada, where universities have however accorded preferential treatment to Aboriginals (which, again, appears sensible, at least from a certain political perspective). This difference is easily explained, and it can arguably be shown to be "just" as long as one accepts that "justice" pertains to local circumstances – and, of course, to local encumbrances – much more significantly than it does to the realm of abstraction or ideas. What comparative law permits one to appreciate is precisely that justice, if dissociated from local ways, can rapidly become shallow and unconvincing. (Needless to add, I accept that local knowledge, including a local conception of "justice", can prove oppressive to a "community" or to certain individuals. And I do not want to claim that whatever is understood as local justice is intrinsically good and must always trump other values (in other words, the comparatist's affirmation of local knowledge must remain impervious to easy equations). What I maintain, though, is that localism cannot be disqualified out of hand as when Jürgen Habermas writes (somewhat portentously) that "[t]he law of a concrete legal community must, if it is to be legitimate, at least be compatible with moral standards that claim universal validity beyond the legal community".[15]

Quite apart from the fact that reference to "culture" shows how the individual exists as a primordially encultured being, for comparative law to validate law-as-culture attests to a commitment to a unit of analysis that no longer regards the technical aspects of the posited law as a controlling centre of the interpretive action and that resolutely includes law-in-situation within its interpretive frame.[16] In no way, however, must a differencing analysis of

"overlapping consensus" on principles of justice is possible: John Rawls, *Political Liberalism* (Columbia, 1993), pp. 134-49. Interestingly, even after *The Law of Peoples*, as committed a universalist as Amartya Sen takes strong exception to Rawls's transcendentalism: see Amartya Sen, *The Idea of Justice* (Harvard, 2009). For a thoughtful assessment of Sen's challenge, see David Schmidtz, "Nonideal Theory: What It Is and What It Needs to Be", (2011) 121 Ethics 772.

[15] Jürgen Habermas, *Faktizität und Geltung* (Surhkamp, 1992), p. 334 ["*das politisch gesetzte Recht einer konkreten Rechtsgemeinschaft, um legitim zu sein, mindestens in Einklang stehen müsse mit moralischen Grundsätzen, die auch über die Rechtsgemeinschaft hinaus allgemeine Geltung beanspruchen*"].

[16] The contours of the "unit" will vary according to the comparative intervention. In other terms, the location of culture will depend on the specific question that the comparatist is addressing. For example, the legal culture at issue might be that of Corsica, of commercial courts in France, or of labour lawyers in Poitiers. In each case, the scales of the comparison will influence what will count as "data", or what will hold as interpretive material. The 'unit' could also be – and, indeed, will often be – coterminous with French jurists as a whole, that is, with the group of legal agents who, let us say, have in common French citizenship or the practice of law in France (that is, to write rapidly, who are 'French') – although even notions like "citizenship" or "practice" can hardly claim impermeable intellectual borders and are not to be envisaged as totalizing structural formations. There is more, for facts are vertiginous. Again, the "legal" is not the only feature of an individual's identity. In effect, any jurist partakes in a seemingly infinite array of ascertainable cultural formations (a phenomenon that currently goes under the designation "intersectionality"). One can therefore be a family lawyer in Lille while being a feminist, a Belgian expatriate, a European, a militant of Amnesty International, a breeder of siamese cats regularly

legal cultures dispense with the usual legal artefacts like statutes and judicial decisions. Indeed, my contention is precisely that cultures are to be found at work, so to speak, *as* statutes and *as* judicial decisions, which must therefore remain one of the principal focusses of research for comparative law. But the posited law cannot be where comparison stops. Rather, it must be where comparison begins its *presencing*; it must act as the comparison's starting-point (I say "starting-point" in order to write economically: as any tracing will reveal, the statute or judicial decision is a construction that necessarily comes after something, that is inherently mired in *subsequence*). For the comparatist, then, the aim is to refuse to take statutes or judicial decisions as so many givens and, through an unceasing movement of oscillation towards and away from the posited, very much like a Heideggerian "*Verwindung*",[17] to try to see how these law-texts are conditioned and shaped by contingent epistemological patterns directed to values – and also how the posited in action sustains and amplifies these values in its own guise.

To return to the French civil code on "termination" of contract, a comparativist favouring a culturalist approach to foreign law in pursuit of meaningful, that is, profound or thick understanding can therefore be expected to maintain that state activism or distrust of the individual prove to be more significant dimensions of the law-text – thus deserving to be traced at length – than whatever the courts may have been saying about the semantic extension of "termination" (or "*résolution*") as a matter of posited law, these judicial pronouncements accordingly losing the analytical centrality that they have traditionally been holding for positivists. Incidentally, I argue that there is nothing in the tracing of the civil-code provision to the social demand for a strong state, or to discomfort in the face of an unregulated market, to suggest anything like a reification, a totalization, or a stereotypification of knowledge. While the comparatist's tracing remains the best answer that he can offer in order to make meaningful sense of the singular foreign law as it dwells locally, any tracing is ever provisional – thus, whenever the comparatist, after some time away, returns to the foreign law-texts envisaged as repositories of traces, something different is bound to catch his eye. Once more, not only are traces constitutive of the law-text, but their coming forth cannot be extraneous to the comparatist's intervention. Increased knowledge of French history or of French society or of the French civil code, for example, could lead the comparatist, in due course, to revisit his tracing or to invent new traces with a view to enhancing his understanding of the French law of "termination" of contract further still.[18]

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entering international competitions, and a long-standing member of the Parti socialiste. Now, the decision by a comparatist to address one specific manifestation of culture only cannot be taken as denying the legitimacy of cultural analysis. In practice, any research endeavour must ultimately contend with the matter of boundedness. Nor can the determination to map one particular feature of the discursive sprawl that is culture be taken to suggest a lack of awareness of the composite character of cultural identity.

[17] For a thoughtful appreciation of Heidegger's emancipatory idea, see Tilman Küchler, *Postmodern Gaming* (Peter Lang, 1994), pp. 1-18 & *passim*.

[18] There appears no creditable way in which such an improved appreciation of foreign law can be denigrated as "a position of 'hyperparticularity'", and there seems to be no reasonable sense in which one can hold that

"hyperparticularity is too pessimistic a view of the possibilities of learning": Vicki C. Jackson, *Constitutional Engagement in a Transnational Era* (Oxford, 2010), p. 179. *Quarrying is querying, and querying is learning – n'en déplaise...*