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Confiance légitime

*Daniel Jutras**

Life is filled with disappointed expectations. In the maelstrom of human interactions, we make all sorts of assumptions about the state of affairs, the ways in which others will behave, the recurrence of stable practices, the veracity of what appears to be real. We adjust our own behaviour on the basis of these assumptions. Often these assumptions prove to be wrong, and relying on them turns out to be detrimental. Does the law care? Should it care?

As a legal idea, detrimental reliance sits uneasily between two destinies. In one story, it becomes the foundational principle for all of the law of obligations, explaining and justifying the enforcement of contracts and the reparation of wrongful harm. In the opposing story, it disintegrates—and disappears—into a multiplicity of discrete legal doctrines, each with its own peculiar conditions and effects. Neither story is compelling. Detrimental reliance is at its normative best when it can be imagined as a distinct and cohesive set of private law rules giving effect to a basic intuition: reasonable assumptions can be relied upon and should produce effects in law, under the right circumstances. But this intuition is not sufficiently precise to be operational. More needs to be said to avoid the perils of equivocation.

Beginning with Lon Fuller's socio-legal idea of "stable interactional expectancies," there are a number of well-known efforts to establish detrimental reliance as a general principle, if not the foundational principle of the law of obligations itself. Xavier Dieux in Belgium, citing Jean Carbonnier in France, himself citing Gino Gorla in Italy, stated that the legal (and moral) basis of contractual obligation is not the promise of the debtor, but the reasonable reliance of the creditor, who puts his faith in the words of the promisor, changes his position, and thereby exposes himself to loss when the promise fails. Yet one cannot escape the sense that these authors were looking at two sides of the same coin. In the context of recip-

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rocal agreements, promise and reliance are not severable. Similarly, in the Anglo-American world, the battle raged for a couple of decades at the end of the twentieth century, between the contract-as-promise believers and their contract-as-reliance detractors. But of course, reliance and promise never fully merge as the basis for contractual obligation. In all jurisdictions, a contractual promise is valid and enforceable as such, whether or not it has been relied upon. Conversely, not all instances of reliance yield contractual remedies. Not much seems to be gained by forcing the law of contracts into the reliance mould. The same can be said with parallel efforts to explain the entire law of wrongful harm through detrimental reliance. While it is true, in a sense, that all wrongdoing (intentional or negligent) is behaviour that violates the reasonable assumption of social actors that others will respect their significant interests, there is no analytical traction drawn from that statement. Reliance here is notional, much like consent is notional in the concept of the social contract. The idea of private law as protection of legitimate, detrimental reliance at once explains everything, and nothing.

On the other hand, both common law and civil law are replete with examples of private law obligations and legal outcomes flowing from the moral intuition that reasonable assumptions deserve protection. Traditional and more recent doctrines in the common law tradition, loosely gathered under the old label of "estoppel" and often connected to equity, provide variable remedies to the person who relies to his detriment on mistaken assumptions induced by the non-wrongful conduct or words (short of binding promise) of others. Proprietary estoppel, promissory estoppel, equitable estoppel, estoppel by representation—the categories are numerous, overlapping, and rendered even more obscure by virtue of their connection to other estoppel doctrines—estoppel *per rem judicatam*, estoppel by deed or estoppel by convention—that have very little to do with the protection of reliance. Most efforts to come up with shared characteristics for the many varieties of estoppel have come up short.

Civil law traditions also give effect to "*confiance légitime*" and provide remedies for detrimental reliance through discrete institutions scattered across the law of property and obligations. The retroactive annihilation of transfers of real rights, in cases of nullity, is subject to limits that protect the rights acquired in good faith by third parties, relying on the apparently valid rights of their authors. Payments made to the apparent creditor by a debtor in good faith are deemed to be valid. Simulated contracts will be given effect whenever third parties in good faith demand so. The person whose conduct or words give reason to others to believe in the existence of a mandate conferred on an apparent mandatary will be bound by the actions of that mandatary. In contractual negotiations, good faith obligations to provide information will fall on the shoulders of the person whose words or conduct induce another to rely on mistaken assumptions.

Withdrawal from contractual negotiations, or unilateral resiliation of a contract, even where authorized by law, both might yield obligations for the person who fails to take account of the reasonable reliance of his counterpart.

As a set, both in the civil law and the common law, the separate doctrines share a family resemblance that begs for recognition. These discrete legal outcomes are tied to the fulfillment or protection of legitimate expectations, giving effect to the intuition that there is a moral duty to protect others from detrimental reliance that one has unwittingly induced, a duty that is distinct from the duty to fulfill one's promises, the duty not to cause harm intentionally or negligently, and the duty to return unjust enrichment.

Indeed, these rules, concepts, and doctrines are not fully explained within existing categories of private law. In the absence of an exchange of consent or promises, these legal effects do not flow from contractual arrangements in the strict sense. The behaviour that induces reliance is not inherently or always wrongful or negligent—the fit with the law of torts or wrongdoing is not obvious. The remedies that flow from the protection of *confiance légitime* often depart from the standard sanctions for contractual breach or wrongdoing. Sometimes, detrimental reliance is the source of obligations for another (as in the case of the obligation of information). Other times, detrimental reliance is the source of legal effects, but no obligation is created (such as when contracts, *pouvoir* or authority, or rights that don't really exist in strict law are treated as effective and are given effect for the benefit of third parties). Sometimes, detrimental reliance produces legal obligations when it is induced by the words or deeds of the eventual debtor (as in the case of apparent mandate). Other times, one might feel the burden of protected detrimental reliance without having induced it at all (as in the case where claims are extinguished by the good faith debtor's payment to the apparent creditor).

In short, it is not easy to bring together the different manifestations of the broad moral intuition, to draw clear boundaries around this duty to protect "*confiance légitime*," or to turn it into a general principle with effective and operational characteristics. The lack of a firm set of shared characteristics for these different manifestations of the law's concern for detrimental reliance stands in the way of its recognition as a fourth pillar of the law of obligations, beyond contract, wrongdoing, and unjust enrichment. Because stand-alone institutions are always suspect, several general principles and theories—good faith, the "*théorie de l'apparence*," the idea of *fin de non-recevoir*, an open-ended obligation not to contradict oneself, *culpa in contrahendo*—are drawn into service in an effort to justify legal outcomes that fall outside of the margins of the formal law of obligations, emanating the scent of exceptional, corrective, equitable reme-

dies in civil law. None of the theories fully captures all the juridical manifestations of the broad moral intuition.

Thus, despite its recent resurgence in civil law and transnational private law, the doctrine of *confiance légitime* remains fragmented and subsidiary. It cannot be stated in crisp formulas (unlike the principle of good faith), and tries in vain to seize the ground occupied by older and decidedly more modest theories (such as the multifarious estoppel or the theory of "*apparence*"). Most of all, it is perhaps too subversive to gain a foothold within a liberal conception of private relations, where the focus remains on narrowly defined restrictions to personal freedom (in the form of promise or the imperative not to positively harm another) rather than in the protection of the faith that we place in one another. A general principle protecting legitimate expectations, reasonable reliance, and confidence in others is an altruistic counterpoint that runs up against the generalized *caveat emptor* at the very heart of the modern law of obligations.

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