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The Civil Law Notary as a Case Study of Preventive Normativity

Abstract

This article examines the production of legal certainty beyond adjudication by developing the concept of preventive normativity as a distinct mode of legal governance. It argues that dominant legal frameworks tend to equate normativity with judicial decision-making and overlook institutions that operate upstream of litigation.

Preventive normativity is defined as a form of legal authority exercised ex ante, through institutional design and anticipatory legal control, whose effectiveness lies in stabilizing legal relations before disputes arise. The article situates this concept within a broader theory of legal governance, showing how legal systems may redistribute normative authority beyond courts while preserving the central role of adjudication.

The civil law notary is examined as a case study through which preventive normativity is concretely operationalized. Rather than defending a particular institution, the analysis uses the notarial model to illustrate how legal certainty may be produced through configurative authority, institutional impartiality, and the embedding of legality into legal relations at their formation.

By moving from case study to theory, the article proposes a more comprehensive account of legal certainty—one that integrates prevention and adjudication as complementary dimensions of legal ordering. This perspective contributes to contemporary debates on legal governance, uniform law, and the management of legal uncertainty in complex legal systems.

Introduction

Legal certainty is commonly presented as one of the central aims of any legal system. Yet, despite its apparent ubiquity, the concept remains largely framed through a particular institutional lens: that of judicial adjudication. In dominant legal discourse, security of legal relations is often understood as the product of ex post mechanisms—court decisions, liability regimes, and the authoritative settlement of disputes. This litigation-centered conception, deeply rooted in both common law traditions and contemporary legal theory, implicitly equates normativity with adjudication and authority with judicial intervention.

Such an approach, however, leaves unexplored a significant dimension of legal norm production: the capacity of legal systems to generate certainty **before** disputes arise. By focusing almost exclusively on conflict resolution, prevailing theories tend to obscure institutions whose primary function is not to decide disputes, but to prevent their emergence. The absence of litigation is thus interpreted not as the result of effective legal structuring, but as a mere absence of observable legal activity. This blind spot has contributed to a structural undervaluation of preventive legal mechanisms within comparative and theoretical analyses of law.

This adjudicative bias becomes particularly visible in cross-system comparisons between civil law and common law traditions. In such contexts, institutions that operate upstream of litigation are frequently misunderstood or dismissed as formalistic, redundant, or economically inefficient. Their contribution to legal certainty remains difficult to apprehend precisely because it does not manifest itself through judicial output, case law, or adversarial proceedings. Legal certainty produced ex ante tends to remain invisible within frameworks designed to measure law through disputes and their resolution.

Beyond its practical manifestations, the adjudicative paradigm also exerts a powerful influence on legal theory itself. Dominant theoretical frameworks tend to conceptualize normativity through the prism of judicial authority, enforcement, and sanction. Legal norms are frequently understood as acquiring their determinacy and binding force primarily at the moment of adjudication, when uncertainty is resolved through authoritative interpretation. This orientation has shaped not only doctrinal analysis, but also the methodological tools through which legal systems are evaluated, compared, and reformed.

Such an approach, however, risks conflating **normativity** with **adjudication**, and **legal authority** with **judicial decision-making**. By treating courts as the principal—if not

exclusive—sites of norm production, it obscures the existence of institutional mechanisms that structure legal relations prior to conflict. The capacity of law to generate certainty before disputes arise is thus rendered theoretically marginal, despite its practical significance in complex legal environments.

The concept of preventive normativity proposed in this article is not intended as a descriptive label for isolated practices, nor as a functional critique of adjudication. Rather, it constitutes a conceptual intervention aimed at expanding the analytical framework of legal theory. Preventive normativity designates a form of legal authority that operates ex ante, through institutional design and anticipatory legal control, and whose effectiveness lies in the stabilization of legal relations before they become contested.

Framing the inquiry in these terms allows the analysis to move beyond system-bound or profession-centered debates. The civil law notary is therefore not examined here as a model to be defended or transplanted, but as an empirical site through which a broader theoretical claim can be articulated. By situating the notarial institution within a general theory of preventive normativity, the article seeks to illuminate a dimension of legal ordering that remains under-theorized, yet increasingly central to contemporary legal governance.

Against this background, this article challenges the assumption that legal normativity is necessarily reactive and that legal certainty can only be produced through adjudication. It advances the concept of **preventive normativity**, understood as a form of legal norm production exercised ex ante, through institutional design and delegated authority, prior to the crystallization of conflict. Preventive normativity does not compete with adjudication, nor does it seek to replace judicial authority. Rather, it operates in a different temporal and functional register, embedding legality, coherence, and stability into legal relations at their inception.

The recognition of preventive normativity requires a shift in analytical perspective. Instead of asking how law resolves disputes once they arise, it invites inquiry into how law structures private relations so as to minimize the likelihood, intensity, and social cost of future conflicts. This perspective foregrounds the role of institutions whose authority is exercised upstream of litigation, and whose effectiveness lies precisely in the absence of disputes rather than in their adjudication.

Within this theoretical framework, the civil law notary offers a particularly instructive case study. Frequently misunderstood in common law discourse—often assimilated either to a mere authenticator of signatures or to a redundant transactional intermediary—the notary is rarely examined as an institutional actor of legal normativity. Yet, when considered through the lens of preventive normativity, the notarial institution reveals a distinct mode of legal authority, grounded in impartiality, delegated public power, and anticipatory control of legality. Its function is not to resolve disputes, but to neutralize legal risk by transforming private intentions into legally stabilized situations.

The relevance of this case study extends beyond the notarial institution itself. The notary serves here not as the object of a professional or system-specific analysis, but as an empirical anchor for a broader theoretical claim: that legal certainty may be produced through institutional mechanisms operating ex ante, independently of judicial adjudication. By examining the notary in this light, the article seeks to illuminate a category of normativity that remains under-theorized in mainstream legal thought.

Accordingly, this article proceeds in three stages. It first examines the structural dominance of adjudicative models of legal certainty and the theoretical assumptions that underpin them. It then develops the concept of preventive normativity as a distinct mode of legal norm production, emphasizing its temporal, institutional, and functional characteristics. Finally, it analyses the civil law notary as a case study of preventive normativity, illustrating how delegated authority and institutional impartiality contribute to the anticipatory production of legal certainty.

By repositioning preventive institutions within legal theory, the article ultimately aims to broaden the conceptual framework through which legal certainty is understood. In an era marked by increasing transactional complexity and mounting pressure on judicial systems, acknowledging the normative significance of ex ante mechanisms invites a reconsideration of how legal systems design authority, allocate functions, and manage legal risk.

I. The Adjudicative Paradigm of Legal Certainty

The dominant understanding of legal certainty in contemporary legal theory is deeply shaped by an adjudicative paradigm. Legal certainty is primarily conceived as the outcome of dispute resolution through judicial decision-making, with courts occupying a central position in the production of normative authority. This part first examines the theoretical foundations of

this litigation-centered conception of legal certainty (A), before turning to its structural limitations and blind spots (B).

A. Legal Certainty as a Product of Adjudication

In much of modern legal thought, legal certainty is implicitly equated with the capacity of the legal system to resolve disputes authoritatively and predictably. Courts are understood as the primary sites where law acquires determinacy, coherence, and binding force. Within this framework, normativity is largely perceived as reactive: law intervenes once a conflict has arisen, and its authority is expressed through adjudication.

This conception finds its roots in both common law and civil law traditions, albeit through different historical trajectories. In common law systems, the centrality of adjudication is closely linked to the doctrine of precedent. Judicial decisions do not merely resolve individual disputes; they constitute a primary source of law, generating norms that structure future conduct. Legal certainty, in this context, is associated with the predictability of judicial outcomes and the stability of case law. The accumulation of precedents allows legal actors to anticipate how courts are likely to rule, thereby reducing uncertainty through the projection of past decisions into future situations.

In civil law systems, although legislation formally occupies a central position, adjudication nevertheless plays a crucial role in concretizing abstract norms. Courts are tasked with interpreting statutory provisions, resolving ambiguities, and adapting general rules to particular factual circumstances. Legal certainty is thus often framed as the result of consistent judicial interpretation and the harmonization of jurisprudence. Even where the judge is not conceived as a formal law-maker, adjudication remains the privileged mechanism through which legal meaning is stabilized.

Across both traditions, a shared assumption emerges: that uncertainty is an inherent feature of social relations, and that law intervenes primarily to resolve conflicts ex post. Legal certainty is achieved when a dispute is brought before a competent authority, examined according to established procedures, and resolved by a binding decision. The authoritative settlement of the dispute retroactively clarifies the legal situation, allocating rights and obligations and, in doing so, producing certainty.

This adjudicative model also underpins many contemporary analytical approaches to legal systems. Empirical assessments of legal certainty frequently rely on indicators related to

judicial performance, such as the speed of proceedings, consistency of judgments, accessibility of courts, or effectiveness of enforcement mechanisms. The quality of a legal system is thus measured by its capacity to process disputes efficiently and to deliver authoritative resolutions. Within such frameworks, the absence of litigation is often treated as analytically neutral, rather than as a potential indicator of effective legal structuring.

From a normative standpoint, the adjudicative paradigm reinforces a conception of legal authority that is closely tied to coercion and sanction. The binding force of law is understood to derive from the possibility of enforcement through judicial means. Norms acquire practical significance insofar as they can ultimately be invoked before a court and enforced against unwilling parties. Legal certainty, in this sense, is inseparable from the threat of adjudication and the prospect of compulsory compliance.

This perspective has important consequences for how legal institutions are categorized and evaluated. Institutions whose primary function is not to resolve disputes, but to structure legal relations before conflict arises, tend to occupy a marginal position within adjudication-centered theories of law. Their contribution to legal certainty is difficult to capture, precisely because it does not culminate in judicial decisions, published judgments, or enforceable sanctions. As a result, such institutions are often perceived as ancillary, optional, or even redundant, rather than as integral components of the legal order.

The adjudicative paradigm thus shapes not only theoretical conceptions of legal certainty, but also broader intuitions about what counts as "real" law. Law is associated with conflict, authority with judgment, and certainty with resolution. Normativity is conceived as something that emerges after disagreement, rather than as something that can be embedded into legal relations at the moment of their formation. This temporal orientation toward ex post intervention constitutes one of the defining features—and one of the principal limitations—of litigation-centered models of legal certainty.

It is precisely this limitation that calls for closer examination. By focusing almost exclusively on adjudication, prevailing theories risk overlooking forms of legal normativity that operate upstream of litigation and whose effectiveness lies in the prevention, rather than the resolution, of disputes. These blind spots, and their implications for the understanding of legal certainty, will be addressed in the following subsection.

B. The Structural Limits of an Adjudication-Centered Conception of Legal Certainty

While the adjudicative paradigm offers a powerful account of how legal certainty is produced through authoritative dispute resolution, it also reveals significant structural limitations. By privileging ex post intervention, this model systematically overlooks dimensions of legal normativity that operate prior to the emergence of conflict. These blind spots are not incidental; they stem from the very architecture of litigation-centered conceptions of law.

A first limitation lies in the temporal orientation of adjudication. Judicial intervention is, by definition, reactive. Courts are seized only once a dispute has crystallized, when legal relations have already deteriorated into conflict. Legal certainty, in this framework, is achieved retrospectively: the legal situation becomes clear only after rights and obligations have been contested, interpreted, and imposed by an authoritative decision. This temporal lag implies that uncertainty is tolerated—indeed accepted—as a normal condition of social relations until a dispute arises. The costs associated with uncertainty, including economic inefficiency, relational breakdown, and social mistrust, are treated as inevitable by-products of legal ordering rather than as variables subject to institutional design.

A second limitation concerns the epistemic function attributed to litigation. Adjudication-centered models assume that disputes are the primary sites through which legal meaning is clarified and stabilized. Yet this assumption presupposes that uncertainty is best addressed through antagonistic procedures, where opposing parties present competing interpretations before an impartial arbiter. Such a model underestimates the extent to which uncertainty may be reduced through anticipatory clarification, structured legal advice, and ex ante verification of legality. By framing conflict as the privileged moment of legal rationalization, adjudicative theories marginalize non-adversarial modes of norm production.

This bias has further consequences for the evaluation of legal institutions. Institutions that do not generate case law, judgments, or enforceable sanctions struggle to be recognized as contributors to legal certainty. Their effectiveness remains analytically invisible precisely because success manifests itself in the absence of disputes rather than in their resolution. Preventive mechanisms, by definition, leave few doctrinal traces. They produce no precedents, generate no reported decisions, and offer little material for litigation-based metrics. As a result, their normative contribution is often underestimated or dismissed altogether.

A third limitation of the adjudicative paradigm lies in its narrow conception of legal authority. Authority is commonly associated with the power to decide disputes and to impose binding

outcomes backed by coercion. This conception leaves little room for forms of authority exercised through guidance, structuring, and anticipatory control. Yet legal systems routinely rely on institutions whose authority operates without coercion, not by sanctioning non-compliance, but by shaping conduct in advance. The adjudicative model struggles to account for such forms of authority, as they do not fit neatly within a sanction-centered understanding of normativity.

These limitations become particularly salient in complex legal environments characterized by high volumes of transactions and increasing regulatory density. In such contexts, reliance on ex post adjudication alone risks overwhelming judicial systems and exacerbating legal uncertainty rather than alleviating it. The more disputes arise, the more pressure is placed on courts to restore certainty retroactively. Adjudication thus becomes both indispensable and insufficient: indispensable as a mechanism of last resort, insufficient as a comprehensive strategy for managing legal risk.

Finally, the adjudicative paradigm tends to obscure the distributive effects of legal uncertainty. Access to adjudication is unevenly distributed, often dependent on resources, procedural knowledge, and institutional accessibility. When legal certainty is primarily produced through litigation, those who lack the means or capacity to engage in judicial processes remain exposed to prolonged uncertainty. Preventive mechanisms, by contrast, may offer more egalitarian forms of legal stabilization, precisely because they intervene before conflict escalates into adversarial proceedings.

Taken together, these structural limitations reveal the need for a broader conceptual framework. Legal certainty cannot be fully understood if it is reduced to the outcome of judicial adjudication. A theory of legal normativity that neglects ex ante mechanisms remains incomplete, as it fails to capture how law structures social relations before disputes arise. This observation does not call for the abandonment of adjudication, but for its repositioning within a more comprehensive account of legal ordering—one that recognizes the normative significance of preventive institutions.

It is this broader framework that the next part seeks to construct. By developing the concept of preventive normativity, the article aims to articulate a mode of legal authority capable of addressing uncertainty upstream of litigation, thereby complementing—and in certain respects correcting—the limitations of adjudication-centered models of legal certainty.

II. Preventive Normativity: Concept and Structure

Preventive normativity designates a mode of legal norm production that intervenes before disputes arise and independently of judicial adjudication. In order to grasp its theoretical significance, it is first necessary to clarify its defining characteristics as a distinct form of legal production (A), before examining the institutional conditions that make such normativity possible, particularly the role of delegated authority and structural impartiality (B).

A. Preventive Normativity as a Distinct Mode of Legal Production

Preventive normativity refers to a form of legal norm production that operates **prior to the crystallization of disputes**, rather than in response to them. It constitutes neither a diminished version of adjudicative normativity nor a mere complement to judicial authority. Instead, it represents a structurally distinct modality through which law organizes social relations ex ante. To conceptualize preventive normativity is therefore to challenge the widespread assumption that legal norms derive their authority and effectiveness primarily from adjudication.

The defining feature of preventive normativity lies in its **temporal orientation**. Whereas adjudicative normativity intervenes after uncertainty has materialized into conflict, preventive normativity seeks to structure legal relations at a stage where uncertainty remains fluid and legal risk is still manageable. Legal intervention is not triggered by disagreement, but by the anticipation of potential conflict. Law, in this sense, does not merely react to social disorder; it actively shapes the conditions under which legal relations are formed.

This temporal displacement has important conceptual consequences. Preventive normativity is not primarily concerned with sanctioning non-compliance or resolving wrongdoing. Its object is **legal indeterminacy** rather than legal violation. By clarifying rights, obligations, and legal effects at the moment of formation, preventive normativity reduces the space within which future disagreement may arise. Legal certainty is thus produced not retrospectively, through authoritative settlement, but prospectively, through anticipatory structuring.

A further clarification is required to avoid conflation between preventive normativity and other forms of ex ante legal intervention. Preventive normativity must be distinguished, first, from **ex ante regulation**. Regulatory norms typically operate through general prescriptions addressed to an indeterminate class of subjects and rely, ultimately, on ex post

enforcement for their effectiveness. By contrast, preventive normativity intervenes at the level of **concrete legal situations**, configuring specific legal relations through institutionally authorized acts whose normative force does not depend on subsequent sanction.

Preventive normativity must also be differentiated from **risk allocation mechanisms** commonly found in private ordering. Contractual clauses may distribute risks among parties, yet such arrangements remain contingent upon future interpretation and dispute resolution. Preventive normativity, by contrast, constrains the interpretive horizon itself. By embedding legality into the formation of legal relations, it reduces the range of plausible disagreement and stabilizes expectations independently of future adjudication.

This distinction underscores a central feature of preventive normativity: its capacity to produce **normative closure** without recourse to judicial authority. The legal effects generated ex ante are not merely provisional or advisory; they shape the legal landscape within which future events unfold. Normativity here is exercised through **configuration rather than command**, through the structuring of legal meaning rather than its imposition after the fact.

Importantly, preventive normativity should not be assessed solely in terms of efficiency or dispute reduction. While such outcomes may follow, they are not its defining criterion. Preventive normativity is fundamentally a mode of legal production: it generates legal meaning, stabilizes legal relations, and contributes to the intelligibility of the legal order. Its significance lies not in replacing adjudication, but in complementing it by addressing legal uncertainty at a stage where law can intervene with minimal adversarial cost.

Preventive normativity must be distinguished from private prudence or informal risk management. While private actors may attempt to secure their interests through negotiation, warranties, or contractual safeguards, such practices do not in themselves amount to normativity. Anticipation becomes legally normative only when it is embedded within an **institutional framework** capable of conferring recognized legal effects. Preventive normativity presupposes the intervention of legally authorized institutions whose role is to stabilize legal relations in a manner that transcends individual consent.

For this reason, preventive normativity cannot be reduced to private ordering. Its normative force does not derive solely from agreement, but from the legal authority that frames, validates, and constrains that agreement. Through institutional intervention, future interpretive discretion is narrowed, avenues for contestation are limited, and the legal consequences of

subsequent events are pre-configured. Normativity here is exercised through **legal configuration**, not through adjudicative imposition.

Nor should preventive normativity be conflated with regulatory normativity in its classical sense. Regulatory norms typically prescribe general standards of conduct ex ante, while relying on ex post enforcement to ensure compliance. Preventive normativity operates at a different level. It intervenes within concrete legal situations, tailoring legal structure to specific relationships and contexts. Its function is not to impose abstract behavioral rules, but to stabilize particular legal configurations before they become contentious.

This mode of norm production also implies a distinct conception of legal authority. Preventive normativity is neither legislative nor judicial in the traditional sense. It occupies an intermediate institutional space, grounded in **delegated legal authority** exercised in close proximity to the formation of legal relations. This authority does not decide disputes; it shapes the conditions under which disputes are less likely to arise. Legal certainty is thus produced as an anticipatory outcome of institutional design rather than as a by-product of coercive enforcement.

A further characteristic of preventive normativity is its **structural invisibility** within litigation-centered accounts of law. Because its effectiveness is measured by the absence of disputes, it leaves few traces in case law, judicial statistics, or precedent. Preventive normativity does not generate judgments; it generates stability. This invisibility partly explains why such forms of normativity remain under-theorized within legal scholarship that equates norm production with adjudicative output.

Yet this invisibility should not be mistaken for marginality. In increasingly complex legal environments, the costs of restoring certainty ex post are rising, and judicial systems face growing congestion. Preventive normativity reallocates normative effort upstream, reducing both the likelihood and the social cost of legal conflict. It offers a complementary response to the limits of adjudication by addressing uncertainty at a stage where legal intervention is less adversarial and potentially more effective.

Understanding preventive normativity therefore requires a shift in perspective. Rather than viewing legal certainty exclusively as the product of dispute resolution, it invites a broader conception of legal ordering—one that recognizes the normative significance of institutions designed to operate before conflict arises. This conceptual framework sets the stage for

examining the institutional mechanisms that enable preventive normativity to function in practice, which is the focus of the following subsection.

B. Delegated Authority and Structural Impartiality

Preventive normativity cannot operate in the absence of institutional authority. Anticipation alone does not suffice to produce legal normativity; it must be coupled with a form of legally recognized power capable of conferring stability and binding force upon legal relations. This authority is neither legislative nor judicial in the classical sense. It derives instead from a **delegation of public authority**, exercised ex ante and oriented toward the stabilization of legal situations before they become contentious.

Delegated authority plays a decisive role in distinguishing preventive normativity from informal coordination or private ordering. While private actors may structure their relations through consent, their arrangements remain vulnerable to future contestation precisely because they lack institutional anchoring. Delegated authority transforms anticipation into normativity by embedding legal relations within a framework that constrains future interpretive discretion. It does so not by imposing outcomes through coercion, but by pre-configuring the legal effects of actions in a manner that is recognized as authoritative within the legal system.

This authority operates through **ex ante legal control**. Rather than intervening to resolve disputes, institutions endowed with delegated authority assess legality, coherence, and sustainability at the moment legal relations are formed. Such control does not entail adjudication, but it nevertheless performs a normative function. By verifying that legal acts conform to applicable norms and by structuring them accordingly, preventive institutions reduce the scope for future disagreement. Legal certainty emerges not from the threat of sanction, but from the alignment of private arrangements with the normative order at inception.

Delegated authority also entails a specific relationship to the state. Preventive institutions are not external alternatives to public justice; they are integrated components of the legal order. Their authority is exercised on behalf of the state, even though it does not take the form of judicial decision-making. This integration ensures that the normativity they produce is systemic rather than merely contractual. The legal effects generated are not confined to the parties' subjective intentions, but are embedded within the broader framework of public legality.

A second institutional condition of preventive normativity lies in **structural impartiality**. Institutions tasked with producing legal certainty ex ante must occupy a position of neutrality

vis-à-vis the interests involved. Unlike adversarial actors, whose role is to advance particular claims, preventive institutions are required to maintain balance between parties. This impartiality is not simply ethical; it is functional. It enables the institution to act as an intermediary of legal rationality, ensuring that legal relations are structured in a manner that remains coherent and sustainable over time.

Structural impartiality reinforces the authority of preventive institutions by enhancing their credibility. Because they are not aligned with any single interest, their intervention is perceived as oriented toward the integrity of the legal relation itself rather than toward the advantage of a particular party. This orientation is essential to the production of legal certainty. Legal relations stabilized through impartial intervention are less likely to be perceived as contingent or opportunistic, and therefore less likely to be contested ex post.

The combination of delegated authority and structural impartiality differentiates preventive normativity from other non-judicial mechanisms such as mediation or arbitration. While such mechanisms may facilitate dispute avoidance or resolution, they typically rely on party consent and remain external to the state's normative framework. Preventive normativity, by contrast, is exercised within the legal order itself. Its authority does not stem from contractual agreement alone, but from institutional design and public delegation.

These features explain why preventive normativity is capable of producing durable legal certainty. By intervening at a moment when legal relations are still being formed, and by doing so through institutions endowed with authority and impartiality, the law reallocates normative effort upstream. The result is not the elimination of conflict, but its containment. Disputes may still arise, but their scope, intensity, and social cost are significantly reduced.

This institutional architecture also sheds light on why preventive normativity remains under-theorized. Because its authority is exercised quietly, without public confrontation or adjudicative spectacle, it tends to escape analytical frameworks centered on visible exercises of power. Yet its normative impact is no less real. Preventive normativity demonstrates that legal authority can be exercised without coercion, and that legal certainty can be produced without litigation.

The analysis of delegated authority and structural impartiality thus completes the conceptual framework of preventive normativity. It also prepares the ground for the following part, which examines how these abstract features are embodied within a concrete legal

institution. The civil law notary will be analysed not as a professional figure, but as an institutional configuration through which preventive normativity is operationalized in practice.

III. Preventive Institutions and the Architecture of Legal Certainty

If preventive normativity is to be understood as a genuine mode of legal production rather than as a contingent feature of a particular institution, it must be examined at a level of abstraction that transcends professional categories and national traditions. This part therefore approaches preventive normativity as a model of legal governance (A), before distinguishing it from other non-adjudicative mechanisms with which it is frequently conflated (B).

A. Preventive Normativity as a Model of Legal Governance

Preventive normativity cannot be reduced to an isolated institutional technique or to the idiosyncratic logic of a specific legal profession. It reflects a broader model of legal governance in which legal certainty is produced primarily through ex ante structuring rather than ex post adjudication. This model challenges a deeply entrenched assumption in legal theory: that the core function of law lies in resolving disputes once they arise. Preventive normativity, by contrast, foregrounds the capacity of legal systems to organize normativity upstream, before uncertainty crystallizes into conflict.

From a governance perspective, this entails a reallocation of normative functions within the legal system. Adjudication-centered models tend to concentrate legal authority in courts, treating litigation as the privileged site of norm production. While courts undoubtedly remain indispensable as arbiters of last resort, such concentration reveals structural limits. Judicial intervention is necessarily reactive, temporally delayed, and dependent on the existence of a dispute. As legal systems confront increasing transactional complexity and social interdependence, these limits become more pronounced. Courts are asked to manage uncertainty at scale, a task for which they are institutionally ill-equipped.

Preventive normativity responds to these limits by redistributing normative authority across institutions capable of intervening at different stages of the legal lifecycle. Legal certainty is no longer conceived as the sole outcome of authoritative decisions rendered after conflict, but as the result of an institutional ecosystem in which multiple actors perform complementary normative functions. Within this architecture, courts retain their central role in resolving irreducible disputes, yet they are no longer the exclusive locus of norm production.

This redistribution has significant implications for the management of legal risk. In adjudication-centered systems, uncertainty is largely tolerated until it materializes into a dispute, at which point judicial mechanisms are mobilized to restore order. Preventive governance adopts a different temporal logic. Legal risk is treated as a variable that can be addressed proactively through institutional design. Normative effort is invested earlier, at moments when intervention is less adversarial, less costly, and less disruptive to social relations. The objective is not to eliminate uncertainty altogether, but to reduce the range of plausible disagreement.

From this perspective, preventive normativity functions as a technology of legal anticipation. By clarifying legal effects, structuring obligations, and embedding legality into the formation of legal relations, preventive institutions constrain the interpretive horizon within which future disputes may arise. Legal certainty is thus produced not through the imposition of outcomes after the fact, but through the configuration of legally resilient arrangements at the outset.

This model also entails a distinctive understanding of legal authority. Preventive governance relies on forms of authority that are configurative rather than coercive. Authority is exercised by shaping legal relations, not by sanctioning their violation. Its effectiveness does not depend primarily on the threat of enforcement, but on the credibility of institutional intervention and the durability of the legal structures produced. In this sense, preventive normativity exemplifies a mode of governance that operates quietly, often invisibly, and without the spectacle of conflict.

The distributive consequences of this model are equally significant. Adjudication-centered systems tend to privilege actors who possess the resources, expertise, and temporal capacity required to engage in litigation. Preventive institutions, by intervening before disputes escalate, may offer more inclusive forms of legal protection. By lowering the threshold at which legal expertise becomes relevant, preventive governance reduces dependence on adversarial processes and mitigates inequalities inherent in access to courts.

Finally, preventive normativity contributes to systemic efficiency without undermining judicial authority. As courts face mounting congestion, exclusive reliance on ex post adjudication becomes increasingly unsustainable. Preventive governance alleviates pressure on judicial systems by reducing the volume and intensity of disputes that reach them. This does

not entail a retreat of adjudication, but a reconfiguration of its role within a broader architecture of legal certainty.

At a theoretical level, recognizing preventive normativity as a model of legal governance invites a reconsideration of how normativity itself is conceptualized. Norms need not derive their authority solely from the prospect of judicial enforcement. They may also acquire normative force through institutional design that stabilizes expectations and constrains future interpretation. Preventive normativity thus expands the analytical vocabulary of legal theory, making room for forms of legal ordering that operate upstream of litigation while remaining fully integrated into the legal system.

This model is not system-bound. Although its institutional manifestations vary across legal traditions, the underlying logic of preventive normativity responds to challenges common to contemporary legal orders: complexity, uncertainty, and the limits of reactive governance. Understanding preventive normativity at this level prepares the ground for the following analysis, which distinguishes it from other non-adjudicative mechanisms often invoked as functional equivalents, yet grounded in fundamentally different normative logics.

B. Distinguishing Preventive Normativity from Other Non-Adjudicative Mechanisms

The recognition of preventive normativity as a model of legal governance requires careful conceptual clarification. Because it operates outside adjudication and prior to conflict, preventive normativity is often conflated with a range of non-judicial mechanisms commonly associated with dispute avoidance or conflict management. Mediation, arbitration, and regulatory compliance are frequently presented as functional equivalents. Yet such assimilations obscure fundamental differences in temporal logic, institutional authority, and normative function.

Mediation and conciliation mechanisms, for instance, are primarily oriented toward the management of conflict rather than the production of legal certainty. They presuppose the existence, or at least the imminence, of a dispute and seek to facilitate agreement through dialogue and negotiated compromise. Their normative force derives almost exclusively from party consent. While mediation may prevent disputes from escalating into litigation, it does not operate ex ante in the strict sense developed here. It intervenes once legal relations have already become unstable and does not structurally constrain future interpretation beyond the scope of the agreement reached.

Arbitration, although often portrayed as an alternative to judicial adjudication, similarly remains embedded in a reactive paradigm. Like courts, arbitral tribunals are seized after a dispute has arisen and exercise authority by rendering binding decisions. The distinction lies primarily in the source of authority—contractual rather than sovereign—not in the temporal logic of intervention. Arbitration resolves disputes ex post; it does not reduce the likelihood of their emergence. As such, it reproduces the core features of adjudicative normativity while relocating them outside the state judiciary.

Preventive normativity must also be distinguished from mechanisms of regulatory compliance. Regulatory frameworks aim to guide behavior ex ante through general norms addressed to indeterminate subjects. Their effectiveness, however, remains largely dependent on the prospect of ex post enforcement through inspection, sanction, or judicial review. Preventive normativity operates according to a different logic. Rather than prescribing abstract standards backed by coercion, it configures concrete legal relations through institutionally authorized intervention. Its normative force lies not in deterrence, but in the stabilization of legal meaning at the moment of formation.

Finally, preventive normativity cannot be assimilated to informal legal advice or private risk management. While legal counseling may help parties anticipate potential difficulties, advice alone lacks normative force. Without institutional authority, advisory intervention cannot constrain future interpretation or bind legal relations beyond the subjective intentions of the parties. Preventive normativity presupposes an institutional setting in which anticipatory legal structuring acquires objective legal significance within the legal order.

What unifies these distinctions is the role of authority. Preventive normativity is characterized by the exercise of legally recognized authority prior to conflict. Its normative effects do not depend on consent alone, on coercive enforcement, or on adjudicative resolution. They stem from institutional design that embeds legality into legal relations at their inception. This feature explains both the effectiveness of preventive normativity and its relative invisibility within frameworks that equate normativity with sanction or judgment.

Clarifying these distinctions is not a merely classificatory exercise. It is essential to understanding why preventive normativity constitutes a distinct analytical category rather than a residual form of dispute avoidance. Preventive normativity does not operate at the margins of adjudication; it complements adjudication by addressing forms of legal uncertainty that

adjudicative mechanisms are structurally ill-suited to manage. By intervening upstream, it reshapes the conditions under which disputes might otherwise arise.

By completing this conceptual clarification, the analysis establishes the theoretical conditions necessary for identifying institutions that genuinely operate upstream of litigation. The next part therefore turns to a concrete institutional configuration in which preventive normativity is systematically operationalized. The civil law notary will be examined not as a professional anomaly, but as an institutional embodiment of preventive normativity within a legal order that has deliberately allocated ex ante normative authority for the production of legal certainty.

IV. The Civil Law Notary as a Case Study of Preventive Normativity

The conceptual framework developed in the preceding parts makes it possible to revisit the civil law notary from a perspective that departs significantly from traditional comparative or professional accounts. Rather than approaching the notary as a technical drafter of instruments or as a functional equivalent of other legal professionals, this analysis considers the notarial institution as a concrete embodiment of preventive normativity. The civil law notary offers a particularly instructive case study of how legal certainty may be produced ex ante through delegated authority, institutional impartiality, and anticipatory legal control.

A. The Notary as an Institution of Ex Ante Legal Authority

The civil law notary occupies a distinctive institutional position within the legal order. Unlike courts, which intervene once disputes have crystallized, the notary operates at a moment when legal relations are still being formed and remain open to structuration. This temporal positioning is not incidental; it is constitutive of the notarial function. The notary's authority is exercised upstream of litigation, at a stage where legal uncertainty can still be managed through anticipatory intervention.

This authority derives from a formal delegation of public power. The notary does not act merely as a private intermediary facilitating transactions, but as a public officer entrusted with the task of conferring legal stability upon private acts. Through this delegation, the legal system reallocates a portion of normative authority away from adjudication and toward ex ante legal control. The notary does not resolve disputes, yet performs a normative function by shaping legal relations in accordance with applicable legal standards before conflict arises.

This ex ante authority manifests itself through a series of legally significant operations: verification of consent, assessment of legality, and structuring of legal effects. These operations are not neutral or mechanical. They involve normative judgment exercised within an institutional framework designed to anticipate and neutralize legal risk. In this sense, the notarial function exemplifies the exercise of configurative authority rather than coercive power. Legal certainty is produced not by imposing outcomes after disagreement, but by structuring legal relations so as to reduce the likelihood of disagreement in the first place[1].

B. The Authentic Instrument as a Technology of Preventive Normativity

Central to the notarial institution is the authentic instrument. Far from being a mere evidentiary formality, the authentic act functions as a juridical technology through which preventive normativity is materialized. Its distinctive legal effects—enhanced probative force and, in many systems, direct enforceability—reflect the institutional authority vested in the notary and the anticipatory logic of the intervention.

The authentic instrument transforms private intentions into legally stabilized situations. This transformation is not reducible to contractual agreement. While the act originates in the parties' will, its normative force derives from institutional validation. The notary intervenes not to replace private autonomy, but to frame it within a legally coherent structure that constrains future interpretation and limits the scope for contestation.

In this respect, the authentic instrument occupies an intermediate normative space between private ordering and judicial adjudication. It produces binding legal effects without recourse to litigation, yet remains fully integrated within the legal order. Its effectiveness lies precisely in its capacity to pre-structure legal consequences, thereby reducing dependence on ex post dispute resolution. Preventive normativity is thus embedded in the form and effects of the act itself.

C. Structural Impartiality and Preventive Justice

A defining feature of the notarial institution is its structural impartiality. Unlike advocates, whose role is to advance particular interests, the notary is institutionally required to maintain balance between the parties. This impartiality is not merely an ethical obligation; it is a functional condition of preventive normativity. It enables the notary to act as an intermediary

[1] Jeanne de Poulpiquet, *La responsabilité civile et disciplinaire des notaires (De l'influence de la profession sur les mécanismes de la responsabilité)* (Librairie générale de droit et de jurisprudence 1974) 88, cited in Cécile Biguenet-Maurel, *Le devoir de conseil des notaires* (Defrénois, Doctorat et notariat, vol 16) 6.

of legal rationality, ensuring that the legal configuration produced is sustainable over time and acceptable to all parties involved[2].

This impartial position distinguishes the notarial function from other non-adjudicative mechanisms such as mediation or arbitration. While those mechanisms rely primarily on party consent and remain external to the state's normative framework, the notarial institution is fully embedded within it. The preventive justice performed by the notary is therefore not private or contractual in nature, but institutional and systemic. Legal certainty is produced not as a contingent outcome of negotiation, but as the result of legally authorized intervention.

Through this combination of delegated authority and structural impartiality, the notary exercises a form of preventive justice. This justice does not adjudicate disputes; it seeks to prevent them by neutralizing legal risk at the moment of formation of legal relations. The notary thus appears not as a judge without a case, but as an institution designed to make the case unnecessary[3].

D. Misunderstanding and Theoretical Implications

The persistent misunderstanding of the civil law notary within adjudication-centered frameworks is not merely the result of institutional unfamiliarity or comparative imprecision. It reflects a deeper theoretical bias embedded in dominant conceptions of legal normativity—namely, the tendency to equate legal authority with judicial decision-making and to treat adjudication as the privileged, if not exclusive, site of norm production. Within such frameworks, institutions that operate upstream of litigation remain conceptually marginal, precisely because their effectiveness does not manifest itself through visible conflict or authoritative judgment.

This bias has significant analytical consequences. By measuring the relevance of legal institutions through their adjudicative output, litigation-centered theories struggle to account for mechanisms whose success is reflected in the absence of disputes rather than in their resolution. Preventive institutions appear normatively insignificant, not because they lack legal authority, but because their mode of operation does not conform to paradigms that equate normativity with sanction, enforcement, or judicial interpretation. The civil law notary is thus

[2] Jean-François Sagaut and Mathias Latina, *Manuel de déontologie notariale* (4th edn, Defrénois, Expertise notariale 2019) 13.
[3] Mathias Latina, 'Le notaire doit être objectif et impartial' (2018) *Defrénois* 34.

frequently reduced to a technical or ancillary role, its normative contribution rendered invisible by theoretical lenses ill-suited to capture ex ante legal intervention.

Viewed through the lens of preventive normativity, the notarial institution exposes the limits of such conceptions. It demonstrates that legal authority may be exercised without coercion, that normativity may operate without adjudication, and that legal certainty may be produced without the mediation of conflict. The notary's intervention does not resolve disputes; it reshapes the conditions under which disputes might otherwise arise. Legal meaning is stabilized not by authoritative decision after disagreement, but by anticipatory structuring that constrains future interpretation[4].

This insight carries broader theoretical implications. It suggests that legal normativity cannot be exhaustively defined by reference to adjudication alone. Norms may acquire binding force through institutional design that embeds legality into social relations at their inception. The authority exercised in such contexts is configurative rather than coercive, operating through the stabilization of expectations rather than through the threat of sanction. Legal certainty, in this view, emerges not solely from the capacity to decide, but from the capacity to structure.

The notarial case thus challenges prevailing assumptions about the relationship between law, authority, and conflict. It reveals that the absence of disputes is not evidence of normative weakness, but may instead signal the presence of effective preventive governance. By bringing this dimension to the fore, preventive normativity invites a reorientation of legal theory—one that recognizes the plurality of normative modes through which legal systems manage uncertainty and maintain order.

E. From Case Study to Theory

The significance of the civil law notary extends well beyond its institutional specificity. Considered as a case study, the notarial institution demonstrates how preventive normativity may be concretely operationalized through institutional design. It shows that legal systems are capable of allocating normative authority upstream, embedding legality into social relations at a moment when legal intervention is less adversarial, less costly, and normatively more effective.

[4] Jean-François Sagaut, 'Sécurité juridique : un défi authentique', in *Sécurité juridique, un défi authentique* (111th Congress of French Notaries, Strasbourg 2015) 9.

What emerges from the notarial case is not a model to be replicated, but a theoretical insight into how legal certainty may be produced through anticipatory mechanisms. The notary illustrates a mode of legal ordering in which normativity is exercised prior to conflict, through institutionalized legal control rather than through retrospective adjudication. This reveals that preventive normativity is not an abstract ideal, but a feasible and coherent form of legal governance.

Importantly, this insight does not call for the transplantation of the notarial institution into legal systems structured around different legal traditions. The value of the case study lies not in its institutional form, but in the normative logic it embodies. Preventive normativity may be instantiated through a variety of institutional arrangements, depending on historical, cultural, and systemic contexts. What matters is not the identity of the institution, but the allocation of authority and the temporal positioning of legal intervention.

From a theoretical standpoint, the notarial case invites a reassessment of how legal systems conceptualize the relationship between adjudication and prevention. Rather than viewing these modes of normativity as competing or mutually exclusive, the analysis suggests that they perform distinct yet complementary functions. Adjudication remains indispensable for resolving conflicts that cannot be prevented; preventive institutions reduce the domain in which such conflicts arise by stabilizing legal relations in advance.

By integrating prevention alongside adjudication, legal theory may move toward a more comprehensive account of legal certainty—one that acknowledges the plurality of normative techniques through which law manages uncertainty. The notarial case thus serves as a bridge between institutional practice and legal theory, illustrating how preventive normativity can inform broader reflections on the design of legal systems in an era marked by complexity, risk, and judicial saturation.

Conclusion

This article has sought to challenge a deeply entrenched assumption in legal theory: that legal certainty is primarily, if not exclusively, produced through adjudication and ex post dispute resolution. By examining the structural limits of adjudication-centered models, it has shown that such conceptions, while indispensable, remain incomplete. They overlook forms of legal normativity that operate upstream of litigation and whose effectiveness lies precisely in their capacity to prevent disputes rather than to resolve them.

In response to this blind spot, the article has developed the concept of **preventive normativity** as a distinct mode of legal production. Preventive normativity is characterized by its temporal orientation, its institutional grounding, and its configurative function. It operates ex ante, before legal uncertainty crystallizes into conflict, and relies on delegated authority and structural impartiality rather than coercion or sanction. Legal certainty, in this framework, is not the retrospective outcome of authoritative decision-making, but the anticipatory result of institutional design.

By situating preventive normativity within a broader model of legal governance, the analysis has demonstrated that such normativity cannot be reduced to private ordering, regulatory compliance, or alternative dispute resolution. Preventive normativity constitutes a distinct analytical category, one that complements adjudication by addressing dimensions of legal uncertainty that judicial mechanisms are structurally ill-equipped to manage. Recognizing this category expands the conceptual vocabulary of legal theory and invites a rethinking of how legal systems allocate normative functions.

The civil law notary has served as a case study through which this theoretical framework has been concretely illustrated. Examined not as a professional figure but as an institutional configuration, the notarial institution exemplifies how preventive normativity may be operationalized through delegated authority, the authentic instrument, and structural impartiality. Its normative contribution does not manifest itself through visible adjudicative output, but through the stabilization of legal relations at their inception. The notary thus reveals the limitations of litigation-centered perspectives and highlights the normative significance of institutions whose success is measured by the absence of disputes.

The implications of this analysis extend beyond the notarial institution itself. In legal systems confronted with increasing transactional complexity and mounting judicial congestion, exclusive reliance on ex post adjudication risks exacerbating uncertainty rather than alleviating it. Preventive normativity offers a complementary response, reallocating normative effort upstream and reducing the social costs associated with legal conflict. This does not entail a displacement of adjudication, but a reconfiguration of its role within a more comprehensive architecture of legal certainty.

Ultimately, acknowledging preventive normativity invites a broader reconsideration of how law functions as a system of governance. It suggests that legal certainty is not merely something that courts restore after conflict, but something that institutions can actively produce

before conflict arises. By integrating prevention alongside adjudication, legal theory may move toward a more complete and realistic account of how legal order is maintained in contemporary societies.