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THE ROLE OF THE LOUISIANA STATE LAW INSTITUTE IN LAW IMPROVEMENT AND REFORM

*J. Denson Smith**

BACKGROUND

As a loyal and devoted disciple of the civilian tradition of codification, Louisiana is in a unique position to utilize an organization such as the Louisiana State Law Institute. Indeed, the Institute, in large measure, may be counted as the fruition of a policy dear to the heart of Edward Livingston. He believed with firm conviction that the making of law should belong exclusively to the legislative branch of the government.¹ To him codification was the most hopeful method of ensuring protection against the evils of judge-made law. At the same time, he was well aware of the impossibility of foreseeing and providing for all legal eventualities. "The idea of forming a body of Laws, which shall provide for every case that may arise, is chimerical; the continual change which takes place in the state of Society; the new wants, new relations, new discoveries, which continually succeed each other, and which cannot be foreseen; would alone render it impossible to provide Laws for their Government. Therefore, even, if men could be found capable of framing regulations, sufficiently minute and comprehensive, to embrace all present relations, and to govern the intercourse of the present day, the System would in the course of years be as inconvenient, and as ill suited to our descendants, as the antiquated Laws, of which we complain, are now to us."²

Livingston also recognized that in cases where the positive law was silent, the judge should decide according to natural law or reason, or received usages. This was not a matter of choice but of necessity, for, "in the litigation of individual rights, he must decide between the two parties, and in order to do this, if he can find no rule, he must of necessity frame one."³

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1. See *Preliminary Report of the Code Commissioners, Projet of the Civil Code of 1825*, 1 LA. LEGAL ARCHIVES XCI (1937).

2. *Id.* LXXXVIII.

3. *Id.* XCI.

In consequence, some system was needed to assure that the legislative body was kept informed of the decisions rendered in cases where the positive law was silent so that it might be enabled from time to time to explain ambiguities, supply deficiencies, and correct errors resulting therefrom. It was Livingston's hope that through this process the Code, although imperfect at first, might continue to approach that perfection to which all peoples should aspire in their laws. His plan for bringing this about called for the judges "to lay at stated times, before the General Assembly, a circumstantial account of every case for the decision of which they have thought themselves obliged to recur to the use of the discretion" given by the Code.⁴ In addition, reports of the "ordinary cases of construction" were to be made by a commissioned officer. There would thus be no need or justification for the development of a doctrine of *stare decisis*, and the integrity of the Code would be preserved against the eroding effects of judicial pronouncements not sanctioned by the Legislature. As a result, "the departments of government will be kept within their proper spheres of actions. The Legislature will not judge, nor the Judiciary make laws."⁵

LAW IMPROVEMENT AGENCIES IN LOUISIANA

Although Livingston's plan for the submission of reports by the courts to the Legislature was conveyed to the members of the Legislature in the form of the preliminary report made by the commissioners appointed to formulate a *projet* for the revision of the Civil Code, it was not included in the proposed Code and was not enacted into law. There are, however, a number of agencies actively interested in law improvement and reform that are to a very considerable extent answering the need he would have satisfied by requiring the submission of reports by the judges.

Law Reviews

Very few decisions involving any jurisprudential development of the law, whether by way of analogies drawn from existing texts or through reliance by the courts on the authority to decide according to equity, escape careful scrutiny in the pages of the law reviews published by Louisiana's law schools. Therein can be found not only many searching investigations

4. *Id.* XCII.

5. *Id.* XCIII.

into the validity of judicial pronouncements but also recommendations for legislation designed to overcome the effect of decisions considered out of harmony with established principles or policies, or the developing mores. This is as Livingston would have had it.

Bar Associations

Bar associations also answer the need of which Livingston was so clearly aware. The various sections or committees of these organizations on the local and state levels give thorough consideration to all areas of the law where reformulation may seem necessary and desirable. Their recommendations, as should be the case, reflecting as they do the deficiencies of the law in action, carry great weight.

The Legislative Council

From the same point of view, the importance of the Legislative Council, Louisiana's newly created legislative service agency,⁶ as reflected in its accomplishments, its published studies and reports, should not be overlooked. The great increase in the work of the legislative body, demonstrated by the amazing number of bills presented to each session of the Legislature proposing new laws or modifying or repealing existing laws, could hardly have been foreseen a century and a quarter ago. For years the imperative need for some agency of the Legislature to provide research, and legal and clerical assistance to its members so that they will be adequately informed of all relevant facts bearing on the need for legislation, the contents of proposed bills, their justification and effect, and of the proper functioning of the Legislature itself, has been obvious. Through the Legislative Council this sort of service is now available.

The Judicial Council

The work and organization of the courts and the administration of justice generally are now also under the close scrutiny of a Judicial Council acting with the aid of an administrative officer and a staff of assistants.⁷ Keeping the laws up to date and free of deficiencies and incongruities is an incomplete solu-

6. La. Acts 1952, No. 51, p. 135. See the article in this symposium, Asseff, *The Louisiana Legislative Council*, 16 LOUISIANA LAW REVIEW 701 (1956).

7. The organization and work of the Council is spelled out in La. Sup. Ct. Rule 21 (1955). See also *The New Louisiana Judicial Council*, 2 LA. B.J. 149 (1954).

tion of the problems of government if their administration is so inefficient and costly as to occasion a virtual denial of their beneficial effects. This is the rampart that will be watched by the Judicial Council so that the lines of communication between the people and their laws will be preserved.

The Law Institute

None of the foregoing agencies answers the need for a permanent organization charged with the responsibility of maintaining a continuing program of basic law revision and reform. This need is particularly felt in Louisiana where the civilian tradition of codification of basic laws remains a proud and vigorous heritage. And here it is that the Louisiana State Law Institute finds its *raison d'être*.

The influence of Livingston's ideas may be sensed in the language of the legislative act which chartered, created and organized the Louisiana State Law Institute as an official advisory law revision commission, law reform agency, and legal research agency of the State of Louisiana. The following provisions will there be found:⁸

"1. To consider needed improvements in both substantive and adjective law and to make recommendations concerning the same to the legislature.

"2. To examine and study the civil law of Louisiana and the Louisiana jurisprudence and statutes of the state with a view of discovering defects and inequities and of recommending needed reforms.

"3. To cooperate with the American Law Institute, the Commissioners for the Promotion of Uniformity of Legislation in the United States, bar associations and other learned societies and bodies by receiving, considering and making reports on proposed changes in the law recommended by any such body.

"4. To receive and consider suggestions from judges, justices, public officials, lawyers and the public generally as to defects and anachronisms in the law.

"5. To recommend from time to time such changes in the law as it deems necessary to modify or eliminate antiquated

8. LA. R.S. 24:204 (1950).

and inequitable rules of law, and to bring the law of the state, both civil and criminal, into harmony with modern conditions.

"6. To render biennial reports to the legislature, and if it deems advisable to accompany the reports with proposed bills to carry out any of its recommendations.

"7. To make available translations of civil law materials and commentaries and to provide by studies and other doctrinal writings, materials for the better understanding of the civil law of Louisiana and the philosophy upon which it is based.

"8. To recommend the repeal of obsolete articles in the Civil Code and Code of Practice and to suggest needed amendments, additions and repeals.

"9. To organize and conduct an annual meeting within the state for scholarly discussions of current problems in Louisiana law, bringing together representatives of the legislature, practicing attorneys, members of the bench and bar and representatives of the law teaching profession."

The Institute has functioned primarily as an agency dedicated to the improvement of Louisiana's fundamental legal institutions. The formulation of legislation to meet particular needs has not been a primary objective. Although this has been done to a limited extent, in most such cases the Institute's recommendations have come as by-products of its excursions into the whole body of the general laws, such as its revision of the Louisiana General Statutes, its statutory obligation to keep the Revised Statutes in a constant state of revision, and its concern for those enactments that make up Louisiana's system of codified law.

THE WORK OF THE INSTITUTE

The Louisiana Revised Statutes of 1950

The Institute's major efforts at law reform and improvement have been productive. The Louisiana Revised Statutes of 1950 were enacted into law at a special session of the Legislature. They are contained in seven large volumes including the index and tables. The last previous revision had been in 1870. Since that date the Louisiana General Statutes had been accumulating at an accelerated rate in unorganized array and without any

plan or symmetry. The result was that the discovery of the statutory law was attended by great difficulty as well as uncertainty. In its work of revision the Institute had to deal with approximately twelve thousand separate acts. It was a project of such proportions that it could not have been undertaken by the Legislature itself. Likewise, the assumption of such a lengthy task by a legislative committee would not have been feasible. But the Law Institute was ideally suited for the assignment because of its permanency, its composition and its operational methods. In mandating the Institute to prepare the revision of the General Statutes, the Legislature directed it to "simplify their language, to correct their incongruities, to supply their deficiencies, and to arrange them in order."⁹ This procedure resulted in a reduction of the volume of the statutory law by at least fifty percent.

The Louisiana Criminal Code of 1942

In a way of speaking, the Institute had won its spurs prior to the revision of the General Statutes by the preparation of a *projet* for a new Criminal Code for Louisiana. This was enacted in 1942 by act 43. In adopting the proposed Code that replaced a veritable jungle of criminal legislation, the Legislature directed that the comprehensive comments which the Institute had prepared in explanation of the texts of the articles should be published with the Code. In this fashion the views of the Institute were made readily available to all interested persons and constituted some assurance that the provisions of the new Code would be applied in harmony with the spirit that dominated their preparation. It is gratifying to find that, by and large, this theory has proved sound.

The Projet of a new Constitution for Louisiana

By act 52 of 1946, the Legislature, perhaps in recognition of the fact that Louisiana's present Constitution is severely burdened with matters that properly should be left to legislative disposition, a condition that inevitably must provoke frequent resort to the amending process and that has resulted in the longest, the most involved and perplexing Constitution of all the forty-eight states, instructed the Institute to prepare a draft or *projet* for a new Constitution. The Institute was further directed

9. La. Acts 1942, No. 42, p. 136.

to submit with the *projet* notes and studies explanatory of the draft.

The product of the Institute's labors over a period of years in discharging this mandate was published in 1954 in four volumes made up into five books bearing the title, "Projet of a Constitution for the State of Louisiana with Notes and Studies." The *projet* as submitted by the Institute is slightly more than one-fourth the length of the existing Constitution.. This is significant, of course, only because it is indicative of the fact that it suggests methods by which the shackles on efficient government resulting from an overburdened constitution may be removed. The notes and studies give detailed consideration to every problem that may be of substantial consequence in the preparation of a new Constitution for Louisiana.

The sole objective of the Institute was to prepare an instrument not definitive of the serious problems that must be weighed and resolved by a constitutional convention, but one that could be used as a guide and as a framework for the organization of the work of a convention. It sought to define the problems and to present in organized form the data to be considered in resolving them. The draft was not presented for adoption or rejection as a whole but only as a starting point to chart a course for the orderly direction of the deliberations of the convention.¹⁰

The Compiled Edition of the Civil Codes and Related Projects

The Institute received its legislative charter in 1938.¹¹ Its initial undertaking was the completion of a Compiled Edition of the Louisiana Civil Codes and the publication of the Projets of the Louisiana Civil Code and Code of Practice of 1825. Thereafter it screened the Louisiana General Statutes for enactments dealing with matters covered by the Civil Code and published them in a separate volume.¹² These projects were undertaken not only because of their intrinsic merit but also because the Institute was looking forward to the time when it would be called upon to undertake revisions of the Code of Practice and the Civil Code. This time has now been reached.

10. A bill calling for a constitutional convention is now under consideration at the 1956 regular session of the Louisiana Legislature.

11. See LA. R.S. 24:201-205 (1950).

12. LOUISIANA STATE LAW INSTITUTE, *LOUISIANA STATUTES RELATED TO THE CIVIL CODE* (1942).

The Revision of the Code of Practice

The *projet* of a revision of the Code of Practice will be completed within a year. The draft that is being prepared has been supported by extensive research into the procedural laws of many other jurisdictions in this country and abroad. Yet, in recognition of the fact that Louisiana has enjoyed the blessings of an enlightened system of procedure for over a hundred years, changes are being proposed only where experience has demonstrated that improvement, real and not illusory, can be achieved.

The Mineral Law Project

Another current project deals with the substantive mineral law. In this area, the basically sound and praiseworthy efforts of the courts to resolve problems stemming from attempted mineral severances and other types of mineral contracts by analogizing them to similar relationships recognized by the Civil Code have been productive nevertheless of a great degree of uncertainty. In recognition of this and with the realization that the clarification of the law applicable to transactions involving mineral interests cannot be dealt with independently of the Civil Code, the Institute, supported by a request of the Louisiana State Bar Association, has had under way for some time a comprehensive re-survey of the law relating to oil and other related minerals for the purpose of determining the feasibility and desirability of improvement and reform. It prepared and has published an exhaustive report dealing with the Louisiana mineral servitude and royalty doctrines.¹³ This report has been under close study by a carefully constituted committee. Although it is as yet too early to foretell the outcome of these efforts, the resulting conclusions will have a direct bearing on the future revision of the Civil Code.

The Revision of the Civil Code

Some investigation has been undertaken in connection with the legislative mandate to the Institute to prepare a *projet* of a revision of the Civil Code.¹⁴ Liaison has been established with

13. To assure widespread distribution the Institute authorized publication of this report as each installment thereof was completed. See Nabors, *The Louisiana Mineral Servitude and Royalty Doctrines: A Report to the Mineral Law Committee of the Louisiana State Law Institute*, 25 TUL. L. REV. 30, 155, 303, 485 (1950, 1951), 26 TUL. L. REV. 23, 172, 303 (1952).

14. La. Acts 1948, No. 335, p. 810.

the Civil Code Reform Commission of France and the organization, procedures, and accomplishments of that body are receiving careful consideration. In anticipation of this project the Institute has distributed in reprint form to its members a number of studies dealing with the civil law and with the problem of codification. Among these studies is a translation of the Preliminary Report of the Civil Code Reform Commission of France that appeared in the *Louisiana Law Review*.¹⁵ To the same end, as well as to make available to the legal profession generally a standard modern treatise on the civil law, the Institute is engaged in translating Planiol's *Traité élémentaire de droit civil*. It has also published a *Bibliographical History of Louisiana Civil Law Sources — Roman, French and Spanish*, that includes a section on modern French research materials.¹⁶ In the course of the next several months decisions will be made to give more definitive form to the planning for the Civil Code revision project and to provide for the active beginning of work on this serious undertaking in early 1957.

Particular Legislation

Since the provisions of a true code are very carefully inter-related, the effect of particular amendments on related provisions must be thoroughly studied. Great mischief can come from hastily conceived amendments designed to achieve some particular purpose. Aware of this, the Legislature is commendably cautious in dealing with such proposals. A result is that there is a growing practice on the part of the members of the Legislature, as well as other interested persons, to elicit the opinion of the Institute concerning the possible effect of proposed amendments or of independent legislation that may affect the provisions of the Civil Code. When presented with matters of this kind, the Institute's customary procedure is to establish special committees composed of members of the Bar, whether or not members of the Institute, specially qualified by knowledge and experience to make appropriate recommendations to the Council. The particular committee, after careful study, will submit its report together with a draft of the legislation proposed to achieve

15. Translated by Dainow in 16 *LOUISIANA LAW REVIEW* 1 (1955). This report contains a very illuminating discussion of the justification for undertaking a revision of the Code Napoleon.

16. *LOUISIANA STATE LAW INSTITUTE, BIBLIOGRAPHICAL HISTORY OF LOUISIANA CIVIL LAW SOURCES — ROMAN, FRENCH AND SPANISH*, by Kate Wallach, Law Librarian, Louisiana State University (1955).

the desired end. This procedure has been followed also with respect to proposed amendments of the Code of Practice. It should follow as a matter of course that after the anticipated adoption of the revision of the Code of Practice now nearing completion, subsequent proposals for the amendment thereof will be cleared through the Institute in order that their possible effect on the Code, considered as a whole, may be known prior to their adoption.

Through the performance of these functions, in addition to serving as the agency charged with responsibility for integrating newly adopted legislation with the Revised Statutes, the Institute is in a position to render a service of considerable value in preserving the integrity of the Codes and in safeguarding the benefits stemming from the systematic and harmonious arrangement of the Louisiana General Statutes in the revision of 1950.

The Code of Criminal Procedure

To complete the revision of the criminal law so that it will more adequately fulfill its function, the Code of Criminal Procedure is in need of modernization. Plans have already been formulated to enable the Institute to move ahead with such an undertaking at the direction of the Legislature.

ORGANIZATION OF INSTITUTE

The administrative office of the Institute is made up of the Director, the Co-ordinator of Research and clerical assistants. The governing authority is vested in a Council composed of members representing the legislative and executive branches of the government, the courts, both state and federal, the law faculties, and the bar. The Council is headed by a president. There are three vice-presidents, a secretary and assistant secretary, and a treasurer. The Institute is supported by legislative appropriations. The members of the Council serve without pay.

The by-laws provide for a general membership consisting of all members of the Legislature who are lawyers, all judges of the state and federal courts in Louisiana beginning with the district courts, all members of the law faculties of the Loyola, Tulane, and Louisiana State Universities, and not to exceed one hundred and seventy-five practicing lawyers who have prac-

ticed ten or more years and fifty who have practiced at least three years but not more than ten. The general membership convenes annually or at the call of the Council.

ITS OPERATIONAL PROCEDURES

The Council serves in a reviewing capacity for all of the work undertaken by the Institute. For its major projects the actual preparation of the material to be considered by the Council has been customarily delegated to reporters chosen for the particular project under way. The reporters are usually law faculty members. They are, of course, supplied with assistants. Free use is made of advisory committees to give initial consideration to their work and to assure a balanced product. The reporters present their material first to the appropriate committee or committees. After securing committee approval they then present the approved drafts to the Council. This material, accompanied by explanatory notes and comments, is distributed in mimeographed form well in advance of the meeting at which it will be considered. At the time this distribution is made, copies are sent also to the general membership so that the opportunity to comment thereon may be afforded. After approval has been given by the Council, a report is made to the general membership at the annual meeting so that the end product may reflect the extensive experience of that body. Whenever by legislative mandate authority is vested in the Institute to recommend changes in the law, its fixed policy is to do so only when it is convinced that change is needed in the interest of sound improvement.

Throughout its existence the Institute has been sensitive to the importance of keeping the members of the Legislature, the executive branch of the government, the bench and the bar fully informed of what it is doing. In addition to the fact that the chairmen of the judiciary committees are ex-officio members of the Council and the lawyer members of the Legislature are associate members of the Institute, comprehensive biennial reports are submitted to that body. Likewise, a full account of the activities of the Law Institute is given to the Louisiana State Bar Association orally and by printed reports at its annual convention and similar accountings have been made at regional meetings held throughout the state to acquaint the profession with the work being done and the policies being pursued.

Although when its proposals are before the Legislature for consideration the Institute must necessarily undertake to explain them to the proper committees, it has nevertheless striven to avoid any suggestion of trying to exert pressure for their adoption. The Institute realizes the importance of being counted on for objective impartiality in its recommendations and it has sought to avoid being drawn into controversy. This is particularly true where any problem with which it may be concerned may have political overtones. Its desire is to assist in the making of decisions—not to make them. Perhaps it is justified in feeling that it is making an essential contribution toward the realization of Livingston's ideas as well as to a sound and efficient legal system in Louisiana.