

Louisiana Law Review

Volume 17 | Number 3

Golden Anniversary Celebration of the Law School

April 1957

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Repository Citation

John H. Tucker jr., *The Role of the Law School in Law Reform*, 17 La. L. Rev. (1957)

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The Role of the Law School in Law Reform

John H. Tucker, jr.

I am profoundly grateful to my Law School and to my University and its Board of Supervisors for conferring upon me this degree of Doctor of Laws *honoris causa*, the highest honor which it can give to one of its students. I am humbly proud that it has been given to me — surely the greatest distinction I have ever received. My relations with the University have been so intimate for so many years that it is difficult to say all that I would like to say and which I feel so deeply.

I am not unaware of the great significance of this Golden Anniversary of the Law School for I have been one of the family for more than four-fifths of its existence. The student of today can no more envision the school of yesteryear than we of that early day could then have envisioned in our wildest flights of fancy the magnificent institution we have today. There is strong temptation therefore to recount the intervening history of its development, with its trials, tribulations, and triumphs. But today I would rather look to the road ahead for the challenging call of opportunity and obligation sounds from the future and not out of the past.

When this Law School started, it sufficed for it to be concerned only with the preparation of lawyers for the practice of law, and that, of course, is still its primary mission. But today the American law school is a vital part of the complex process of the evolution and development of the law by which we live, and this school is bound to play an increasingly important part in this field of endeavor.

Roscoe Pound said that "The law must be stable and yet it cannot stand still." "Here," said Cardozo, "is the great antinomy confronting us at every turn. Rest and motion, unrelieved and unchecked, are equally destructive. The law, like human kind, if life is to continue, must find some path of compromise. Two distinct tendencies, pulling in different directions, must be harnessed together and made to work in unison. All depends on the

wisdom with which the joinder is effected." Holmes, somewhat earlier, said that "the truth is that the law is always approaching but never reaching consistency. It is forever adopting new principles from life on one end and it always retains old ones from history at the other which have not been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow."

All of this implies a struggle in which *vis inertiae* strives to maintain the status quo against the evolutionary forces which are trying to accommodate the law to changed ideas and conditions. Out of this struggle, problems of law reform are generated which are the primary concern of the entire legal profession. Therein lie obligations and opportunities for the law school because no segment of the legal profession is so well qualified and equipped to assume leadership in the field of law revision and law reform.

Here I am speaking of general law — the law of persons, of things, of the different modifications of ownership, of different modes of acquiring the ownership of things — in a word, law such as that which is contained in our Louisiana Civil Code.

The initiation of laws which affect political, social, and economic changes is the primary concern of political, social, and economic scientists. The immediate interest of the jurist in these laws is technical, although he must be vitally concerned with its impact on the general law which is his primary concern, even if, as one writer has claimed, "social legislation is a strange thing in the eyes of courts and lawyers."

Let me explain how the evolution of law creates these problems of law revision and law reform, using the Civil Code of Louisiana as an example.

Louisiana adopted its first Civil Code in 1808, modeled largely on the Code of Napoleon; rewrote it in 1825, more nearly like the Code Napoleon than the 1808 Code, and revised it editorially in 1870.

But the text of the Code today is no longer completely representative of the body of the civil law of Louisiana because of juridical development and great political, social, and economic changes since its adoption nearly one hundred and fifty years ago.

The Louisiana Civil Code was intended by those who drafted it to be a codification of general principles to be applied by deduction to particular cases, and extended and amplified by analogy beyond its precise provisions. That is the underlying objective of all civil law codes. This process, of course, is the function of the courts and in the intervening years since adoption, the resulting jurisprudence has become an auxiliary but primary source of law which exists outside of the Code itself.

In Louisiana, the outstanding example of this process is its basic mineral law, which is contained in the jurisprudence of the Supreme Court, and rests upon the analogy which the right created by the sale or reservation of minerals bears to the right defined in the Civil Code as a predial servitude. This complex jurisprudence which has been accumulating for more than forty years, caused the State Bar Association to request the State Law Institute to make a study of the basic mineral law and make recommendations concerning its restatement by statute.

The Civil Code has been affected by doctrinal discussion to a considerable degree, at first by borrowings from the French jurists from the time of the adoption of the Code until well into this century. Then the bar grew in numbers while its French speaking segment diminished in size, and recourse to these jurists became much less frequent. However, since the establishment of the law reviews at Tulane, Loyola, and Louisiana State University, Louisiana has done much to establish its own doctrine. Of course by "doctrine" reference is intended to the writings of jurists, and in France is said to bear the same relation to the science of law that public opinion does to politics. But whatever the origin, doctrine has played a prominent part in developing the civil law in Louisiana beyond the texts by which it was adopted so many years ago.

One other juridical development tending to diminish the integrity of the Code and to increase the pressure for its revision has been the adoption of much legislation ancillary to the Code and in some cases paroxysmal in nature.

This evolution in the civil law, juridical in origin, points to the importance of revision of the Code. When the Code is considered in the light of the economic, political, and social changes which have occurred since the last revision over eighty years ago,

revision and reformation become of compelling importance. Consider these developments:

We now travel by land, water, and air all over the world at unbelievable speeds. The development of the automobile has brought us the means of individual travel on magnificent highways which extend everywhere.

Electric light and power and natural gas are now being carried to the farm as well as the city.

Agriculture has become mechanized.

The radio, television, and the telephone now serve everybody. The horizon of electronics seems to be limitless. We live in the atomic age.

The oil and gas industry has become the most important business in Louisiana.

The weight of population has shifted from rural areas to the cities.

Movable property has become the chief source of wealth.

The corporation is the usual form of ownership in the conduct of business.

Interstate and international commerce have developed far beyond the imagination of Louisianians of earlier generations.

These economic changes have created legal problems which profoundly affect the Code and its underlying philosophy.

Changes in political philosophy also have had their effect.

The moratoria of the depression, the price and rent controls of the war, and the fair trade acts are evidence of a shift in philosophy which strikes at freedom of contract.

Governmental concern with the cause of labor brought about the enactment of the Fair Labor Standards Act and the National Labor Relations Act, the interpretation of which has created a massive body of labor law which in some respects infringes on the general private law in the Code.

The increase in the number, kinds, and amounts of taxes, federal and state, has given rise to a gigantic new field of law in which there are problems which cut straight across almost

every business transaction and personal relationship. As a result there is the ever-present urge to readjust the general law in order to minimize or escape the crushing weight of ever-increasing taxation.

Radical changes in social philosophy have had their impact on the general law of the Code.

The adoption of social security laws, the emancipation of women, the obsolescence of devices such as dowry, the softened attitude towards illegitimacy — these are examples of legislation reflecting changes in social ideas which compel re-evaluation of the codal provisions to which they are related.

The problems and questions arising out of this record of evolution and development of law in Louisiana under the regime of the Civil Code are not without their counterparts in the common law jurisdictions of her sister states.

Although their general law is largely unwritten, the mass of the law, resulting from a veritable torrent of decisions, creates the same problems of law revision and law reform. Long ago Tennyson expressed it thus :

“Mastering the lawless science of our law,
That codeless myriad of precedent
That wilderness of single instances.”

Everywhere, then, the general law is undergoing continuous evolutionary changes inherent in its own processes, and complicated by the pressure of expanded special legislation reflecting changes in economic, political, and social ideas. The resulting problems of law reform and law revision are pervasive and complex, and the basic objectives are sometimes inconsistent. Generally the solutions sought should maintain the integrity of the general law, with which special legislation should be harmonized and made consistent, and therein lies the continuing obligation of the legal profession.

Some years ago Professor Sunderland, then President of the Association of American Law Schools, referred to this situation in what well might be a text for this discussion. He said :

“The public has become thoroughly disillusioned as to the inherent evolutionary power of the law. Legislation is the order

of the day. Codification doubtless will follow. Will the profession lead, or will the leadership pass to laymen? The answer must largely be made in the law schools."

The constitution and function of the courts preclude their participation in the work of law revision and law reform, except insofar as individual members participate in extra-judicial efforts to revise and reform. That is so because the juridical effect of jurisprudence is a part of the problem of law reform, and while solution must be sought from the courts, the impulse or stimulus toward solution must be supplied extrinsically.

In France it is said that decisions are counted at the Palace (of Justice) but that they are weighed at the University. That aphorism implies the vital force which objective discussion of the opinions of courts exerts in the evolution and development of law. In our scheme of government, the court of last resort has the final determination of a particular case, but the life of the resulting rule of law is only stable as the rule itself is sound. I have an abiding conviction that bad law is and should be ephemeral and that only sound law is permanent. The opinions of courts should be such as to withstand fair and objective criticism, without which jurisprudence itself will suffer.

The law school is the place where this criticism may originate with all propriety. It is by nature objective, because it has no selfish interest in the outcome of litigation. The opportunity for objective discussion, and the means of research and the publication of its critical opinions through the Law Reviews are, in the opinion of Cardozo, the reason why the Law School is playing such a dominant part in the growth of law through the expression of critical opinion. In *The Growth of the Law* he says:

"More and more we are looking to the scholar in his study, to the jurist rather than to the judge or lawyer, for inspiration and for guidance. Historians tell us that in olden days the practice was much followed by the German courts 'of sending up the documents of a case to the law faculty of a university of some standing — Halle, Greifswald, Jena — in order to obtain a consultation as to the proper decision.' A tendency different from this, and yet recalling it in many ways, can be traced even now in the progress of our law. Extra-judicial agencies are assuming an importance that increases year by year. Chief of these agencies is the criticism

and the suggestion of scholars in the universities and in other institutes of learning. Until the rise of the modern law school with its critical method, there was no organ through which professional opinion could disclose itself effectively and promptly. The bar was, indeed, there, but its reaction was slow and casual. It was too loosely organized and too busy at times about winning its own cases to be vigilant, in season and out, for the symmetry of legal science. Sometimes, it is true, when a court had gone woefully astray, there would develop in the course of years an undercurrent of hostile judgment which at intervals would well up and emerge above the surface. The same thing might happen, and more promptly, if the case was a conspicuous one, exciting public interest. Criticism, however, was in the main sporadic and unorganized, and limited too often to muttered disapproval, hardly vocal or audible, and only slowly, if at all, communicated to those whose work was disapproved. The universities have given us for the first time a body of critics ever on the watch.

"This new organ of expression is the university law review. In the preface to one of the supplements of his treatise on Evidence, Wigmore complains, writing in 1915, that the courts were unwilling, as it seemed, to refer to the masters of juristic thought unless the products of their labor were published in a volume. Anything *bound* might be cited, though wrought through no process more intellectual than the use of pastepot and scissors. Pamphlets are anathema. It is perhaps significant that in the preface to the last edition he omits the caustic comment. Judges have at last awakened, or at all events a number of them not wholly negligible to the treasures buried in the law reviews."

He then gave an example of how the criticisms of Ames, Lewis, Stone, and Williston, concerning the decisions of New York courts on the question of the necessity for mutuality in cases of specific performance, eventually led the court of appeals to re-examine the whole subject and put it on a basis consistent with equity and justice. Commenting on this incident, Cardozo said:

"But the interesting thing about the episode is the part played by extra-judicial agencies. Without the critical labors of Ames and Lewis and Stone and Williston, the heresy, instead

of dying out, would probably have persisted, and even spread. It would have gained new vitality with every judgment that confirmed it. Inevitably, too, the process of logic or development by analogy would have pushed it forward into new fields. What saved the day was criticism from without."

This weighing process is an indispensable ingredient of sound jurisprudence and the hysteria of political controversy or the inhibiting effect of "fashions" in legal philosophy should never blind us to the necessity of fair and objective criticism of judicial opinion.

The modern legislature is not designed to perform work of law revision and law reform contemplated by this discussion, although legislative enactment may be the ultimate means by which it is accomplished. Planiol, in discussing the revision of the Code Napoleon, said:

"In fact the modern system of preparing laws by large assemblies has an irremedial vice which is known to all: Contradictory majorities which destroy the cohesion of the text grows out of the conflicts between the diverse groups of which it is composed; moreover, technical competence is frequently lacking. No one can defend the present system employed for the preparation of civil laws. The facts are there. The proof of its difficulties are established."

His observations are equally applicable here. Moreover, the modern legislature is preoccupied with governmental and fiscal affairs, for which the typical legislature finds the length of its sessions far too short. For example, here in Louisiana, the Constitution of 1921 provided a biennial session of sixty days at a time when the state budget for all purposes was only about twelve million dollars. Today, with a budget at about five hundred million dollars and still rising, the regular session, still held to sixty days, is still swamped with proposed legislation — even though a short fiscal session to meet in alternate years has recently been provided by constitutional amendment.

The organized bar cannot cope with these problems. The great changes described and the mass or weight of the law itself has brought about an era of specialization in the profession, in which the tax lawyer, the labor lawyer, the damage suit lawyer, the insurance lawyer, to name some of them, pursue their special-

ties with only the minimum of indispensable contacts with the general law. Sometimes that specialization leads directly to attempted changes in the general law on account of causes originating in the specialized field. An example is the attempts of some of the states of common law origin to introduce a voluntary system of community property, derived from the civil law and from states, with civil law background, such as Louisiana; on account of the impact of the federal income tax law.

The lack of interest of the average practitioner in criminal law and procedure was decried recently by a President of the American Bar Association. It may have led to the Survey of the Administration of Criminal Justice, now being made by the American Bar Foundation. The cumulative effect of this prolonged inattention no doubt caused the American Law Institute to undertake the preparation of a Model Code of Criminal Law. But that does not invalidate Professor Sunderland's thesis, for the law schools largely are furnishing the working segment of those two activities.

The importance of the law school in the evolution and development of the civil law has been such as to cause it to be said that "The civil law is university law." In modern times as much could be said respecting all fields of law in both common and civil law jurisdictions. That which has been traditional in civil law countries has become an accepted relationship elsewhere.

Research, which must underlie all law revision and reform, can be undertaken only in the law schools. The horizon of legal research today is international. Scholars of the world are constantly exchanging ideas and the experience and practices of other countries in solving legal problems are of great assistance in the solution of similar questions at home. Comparative law is in the ascendancy, but mostly so in the law schools, although the expansion of American business and influence all over the world is compelling increasing attention from the practicing profession. The facilities for research, from the very nature of things, can be found only in the law schools.

The law schools at all times have a panoramic view of every field of law, kept current with both decision and doctrine. The individual practitioner cannot be expected to have such an organized and encompassing view.

The law schools and the individuals who compose its faculties have or should have complete objectivity. Research and opinion based thereon are only valid when they are completely objective and unbiased. That they have been generally so is implied in the statement of Chief Justice Stone who said that the law schools "are the most powerful agencies in the English speaking world for the organization of a true science of the Common Law."

In the work of law reform the Bench and Bar must have a proper appreciation of the work of the law school and its capacity to do something more than help draft a bill for some particular piece of legislation. The custom of the courts of Germany to send perplexing questions to the law faculties for their opinions was not a bad practice. One time at least the Supreme Court of Louisiana received and published in the report of its decisions the joint report of Coin-Delisle, Delange, Giraud, Duranton, and Marcadé, eminent French jurists of the day, concerning the validity of John McDonough's will.

The University, and its other faculties, should realize the nature and the importance of the research and work done by the Law School in the cause of law revision and law reform. The research and years of study of a Daggett which lead to the preparation and enactment of sound legislation to revise the laws on adoption, is, at the least, as valuable to the state as the experimentation in the agricultural college which leads to the development of a new kind of yam.

The law faculties on their part must welcome the views of the practicing lawyers and be willing to adjust theory to practicality through organized discussion with the Bench and Bar.

Sound law reform and law revision are not the sole province of any segment of the profession. Bench, Bar, and the Law School must labor together in a spirit of complete mutual trust and confidence, which will surely come from the intimate personal relationships which are the inevitable result of laboring together in a common cause.

This interdependence points to the necessity of some organization in which all may work together to accomplish common purposes. The American Law Institute was the first continuing institution of that kind established in this country. Its accom-

plishments, measured in terms of the Restatements, and the model laws it has prepared, are large indeed, but its greatest achievement has been the development of mutual respect and consideration of judge, lawyer, and teacher for one another, brought about by their unselfish work together for the common good. Definition has been given to the parts to be played by each of them, and their works evidence the sound balance that has been established between theory and practicality.

In this respect the influence of the American Law Institute has extended throughout the entire profession, and has given a new perspective to the relationships between the law schools and the practicing profession all over the country.

Here in Louisiana, where the evolutionary problem of its civil law has been used by way of illustration of the necessity for law reform, the example of the American Law Institute has been followed in the establishment of a similar institution for similar purposes.

Eighteen years ago, as a part of the dedication of this building in which we are meeting, the University, by action of its Board of Supervisors, created the Louisiana State Law Institute to perform those functions of leadership implied by Professor Sunderland and described by Justice Cardozo. Soon afterwards the Institute was chartered by the Legislature, which has supplied it ever since with the funds for its operation.

Since 1938, the Institute has accomplished these things :

A Compiled Edition of our Civil Codes :

A Code of Criminal Law, adopted in 1942, probably the first real codification of substantive criminal law in the United States ;

A Revision of the General Statutes, adopted in 1950, thereby bringing order out of the chaotic legislative accumulation of eighty years ;

The Project of a new Constitution, with notes and studies ;

Miscellaneous legislation on varied subjects.

The Institute is now in the completion stages of a revision of the Code of Practice, and soon will undertake the work of revising the Civil Code and the Code of Criminal Procedure,

and the preparation of a Code of Evidence, all at the express direction of the Legislature.

This work has been possible because of the work of the faculties of the law schools at Louisiana State University, Tulane University, and Loyola University of the South. Without them none of this would have been possible. Nor would it have been possible without the consistently devoted counsel, advice, and objective discussion of the projects by the members of the Bench and Bar who compose its Council.

May we always travel the road of law reform and law revision together in complete mutual faith and understanding. The road ahead has no end and is not without its difficulties. But beyond each crest of achievement lies the glittering challenge of still another task, another problem arising out of the evolution and growth of the law to solve.

How these problems are to be solved depends in large measure upon the leadership of the law schools, for the role of the law school in law reform is one of obligation as well as of opportunity.