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TRADITION AND TECHNIQUE OF CODIFICATION IN THE MODERN WORLD: THE LOUISIANA EXPERIENCE*

*John H. Tucker, jr.***

It has now been 160 years since France adopted its Civil Code, and thereby started a movement for the codification of civil law throughout the world. But in that lapse of time there have been cataclysmic changes in the social, political, economic, and physical circumstances of life which necessitate an examination of the laws by which we live in order to find out whether they are adequate and proper in this fantastic space age which characterizes the modern world.

Within the past decade, new nations have been swept into existence on a wave of anti-colonialism. Many of them need to have a complete redaction of their private as well as their public laws after it has been determined objectively to what extent, if any, the laws of the colonizing sovereignties have affected or supplanted local laws. The laws of some of these new nations are as primitive and immature as the aboriginal society to which they apply.

The problems which arise out of the necessity to establish, make known, and apply adequate systems of law in these countries are staggering in their implications, and perhaps transcend in importance the pressure of circumstance to revise the firmly established and time-tested codes of the mature nations of the world.

France adopted its great Civil Code in 1804, and it became the prototype of most of the civil codes in the modern world. France is now undertaking a reformation of that Code, because of the great changes which have occurred since its adoption. The cause for this reformation is eloquently pleaded in a report to the Minister of Justice by the President of the Commission to

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Reform the Civil Code, accompanying the first part of the *avant-projet* of the Civil Code.¹ The same changed conditions are compelling reasons for other civil law countries, particularly those with mature codes,² to follow again the leadership of France and do likewise.

In every country, a study of the objectives, the sources, and the techniques of redaction by which the institutions of the civil law have been established or codified, and of the processes by which they have been applied and developed, will be of great value. For that purpose, a consideration of the tradition and techniques of redaction and development of the principal institutions of Roman and French law, with some attention to Spanish legal institutions, will be of great value. The civil law that commenced with the Twelve Tables in Rome and reached its apogee in the *Code Napoléon*, from which it proliferated to all the civilized world, is a valid and pervasive force in a great part of the modern world; and because of the antiquity and merit of its antecedents, its history is indispensable in any consideration of the problems of drafting or revising existing codes to meet the needs of the modern world.³

I.

The codifications of the civil law discussed here have not always had the same objectives, which have been determined to a large extent by existing circumstances.

The history of the XII Tables, the first grand monument of the Roman law, is obscure and may be but dimly described through the mists of time. Some scholars doubt that it existed at all, and in any event, that it existed at the time ascribed to it. The weight of modern scholarship, however, is on the side of

1. AVANT-PROJET DE CODE CIVIL PRÉSENTÉ À MONSIEUR LE GARDE DES Sceaux MINISTRE DE LA JUSTICE PAR LA COMMISSION DE RÉFORME DU CODE CIVIL — PREMIÈRE PARTIE, RAPPORT PRÉLIMINAIRE À MONSIEUR LE GARDE DES Sceaux MINISTRE DE LA JUSTICE 7 (December 20, 1953).

2. Louisiana adopted its first Civil Code, based on the French Code, in 1808, reformed it in 1825, and made an editorial revision in 1870.

3. Here reference is intended to the XII Tables; Justinian's *Corpus Juris Civilis*; the Customary Law of France as redacted in the sixteenth century; the French Code of 1804 in which Roman and customary law coalesced; and the *Siete Partidas*.

The Codes of Switzerland, Germany, Greece, and Italy, and the tentatives to codification in the Netherlands, are illustrative of techniques of codification, but their procedures are not so divergent from the pattern of redaction illustrated by Rome, France, Spain, and Louisiana to warrant extended discussion here.

authenticity. Legendary accounts of the causes which brought about the redaction of the XII Tables, and the manner in which this first Civil Law Code was produced, are generally credible.⁴

In the beginning of the Republic, Roman laws were based wholly on unwritten customs,⁵ and all functions of government were completely controlled by the patricians. The plebeians, in their long struggle for independence, insistently demanded that the laws by which they lived and were governed be reduced to writing. As a result, the compilation of the XII Tables was undertaken and adopted about 449-450 B.C. The political class struggle was the immediate cause of this early redaction of the civil law. But, in every system of law, there comes a time when primitive custom, through long, repeated, and known usage, attains the force of law; and then redaction is forced by necessity for uniformity, certainty, and publicity.

The redaction of the customary law of France, unwritten theretofore, was brought about by the pressure of diversity, imprecision, and administrative difficulties. The rule of the "personality of laws" tended to cause a multiplicity of customary regions; within a regional custom, the requirements of usage and notoriety for validity of a custom resulted in diversity; and imprecision and administrative difficulty were caused by the necessity of proving a particular usage relied upon as any other fact. These and other considerations developed the pressure for the codification of the customary law. As a result, the Ordinance of Montilz-les-Tours, decreed by Charles VII on April 17, 1453, ordered the redaction of the customs, but the work was not undertaken immediately and was not completed until the early part of the sixteenth century.

There were many customs: about sixty general and over three hundred local customs. The defects in the first redaction were made apparent by criticisms of eminent jurists, and the customs were reformed in the latter part of the same century. Redaction and reformation avoided the uncertainty and the var-

4. JOLOWICZ, HISTORICAL INTRODUCTION TO ROMAN LAW 106 (1952); 1 SHERMAN ROMAN LAW IN THE MODERN WORLD 33 (2d ed. 1922): "But the battle as to the authenticity of the XII Tables was won in 1902 by their able defender, the French Girard of the law faculty of the University of Paris, who successfully refuted all these contentions."

5. The *Leges Regiae*, legislative fragments attributed by Pomponius to the early monarchy, would be an exception if authentic. BRUNS, FONTES ROMANI (7th ed. 1909).

iability of the unwritten law, and the rules of the customs thereafter rested upon law and no longer depended on usage.⁶ But territorial multiplicity and diversity still remained.

From the time of the adoption of the XII Tables to the adoption of Justinian's codification, the law of Rome was developed and greatly expanded by these usual processes: (1) Legislation in the forms of *leges* under the Republic, *Senatus Consulta* under the Principate, and *Edicta, Decreta, Epistolae, and Mandata* under the Dominate; (2) *Interpretatio*, first exercised by the Consuls, then by the Praetors, and finally by the Emperor, as the judicial power was shifted, coming finally to rest wholly in the Emperor; (3) Doctrine, or the writings and teachings of the jurists, who thereby shaped the beginnings of Roman law and developed it into a mature jurisprudence fitted to be a law for all the world. But the classical period of Roman law, made so by the great jurists, came to an end sometime during the last half of the third century. The post-classical, pre-Justinian period was characterized by a great mass of diffuse, unorganized laws, and bereft of the scientific spirit and great abilities of the classical jurists. It was a period in which the tendency was toward stabilization, wherein lies a great urge to codification.

One of the first manifestations of this tendency toward stabilization was the consolidation of the *Edictum Perpetuum* during the reign of Hadrian. The edicts of the praetors by which they annually announced the rules they intended to follow while in office were a vital content of the *Jus Honorarium*. The mass of the edicts accumulated over the centuries was very considerable at the close of the Republic, but the annual accretions during the empire decreased as the *imperium* of the Emperor increased. Finally, Hadrian believed that the *Edictum* should be given a permanent, definite, and authoritative status as a statute, so that it might be received and followed throughout the empire. Accordingly, he commissioned Salvius Julianus, then urban praetor, to revise and consolidate the edicts so as to become a part of imperial legislation, with approval of the Senate. This was done and thereafter the power to amend or interpret

6. A well-organized attack on the great mass of the unwritten common law has been made in the United States by the American Law Institute, a private institution that has codified most of the subjects of the common law in separate parts called "Restatements." These are unofficial and derive authority only from their intrinsic excellence and integrity. A revision of the Restatements is now in progress.

the *Edictum* rested in the emperor and not in the praetors. It is known as the *Edictum Perpetuum*, or *Edictum Hadrianum*, or *Edictum Julianum*, or *Edictum Salvianum*. The *Senatus Consultum* approved it about 129 or 131 A.D.; and thereafter, in the opinion of one modern scholar, "the *Lex Annuæ*, as the Republicans proudly termed their masterpiece, had become stereotyped as an edictum. Thus ended a great chapter in the history of Roman Jurisprudence."

The wide territorial expansion of the Roman Empire brought great pressure to bear on all phases of the government at Rome to consolidate the many victories of its generals by assimilating its new subjects into the Roman state. The extension of its laws to its new subjects was a primary means to this end. Julius Caesar recognized very early that codification was a necessary concomitant of rapid assimilation of newly-conquered countries into the Roman state. The division between Roman citizenship, to which the *Jus Civile* only applied, and other Roman subjects and aliens, for whom the *Jus Gentium* and *Jus Honorarium* were available, persisted as an impediment to effective codification. The Edict of Caracalla (*Constitutio Antoniniana*, 212 A.D.), whereby Roman citizenship was extended to all free inhabitants of the Empire, seems to have removed these obstacles, although there is some doubt about the exact implications of that constitution. In any event, it seems that, after this constitution, uniformity of laws was a means to the end of consolidation of the Empire. During this period, there were several noteworthy attempts at codification of imperial laws.

First was the *Codex Gregorianus*, a private venture at codification, adopted about 300 A.D. It consisted of an orderly arrangement of imperial enactments from Hadrian (117-138) to Diocletian (284-305). It is not extant. For its contents, reliance must be placed on references in later Roman and barbarian codes. It was followed by a collection of imperial constitutions of a similar type, known as the *Codex Hermogenianus*, somewhat but not much later, probably before 323 A.D. It covered the period of about 296 to 304. Both were private publications, but they were regarded as authoritative until Justinian's time.

These two codes were followed, but not superseded, by the *Codex Theodosianus* (438), a much more important pre-Justinian Code, which, however, did not relate back beyond Constan-

tine (306-337). It was ordered by Theodosius II (408-450), Emperor of the Eastern Empire, who was worried about the low state of legal science and learning in his empire. He wanted to stabilize the law by making it more certain. He founded, or revived, the law school at Byzantium at the same time. He also planned, but was never able to achieve, other codifications designed to organize systematically complementary codes out of procedural and doctrinal materials, such as Justinian a century later was to accomplish in his monumental *Corpus Juris Civilis*. Valentinian III (425-455) adopted the Theodosian Code for the Western Empire. As with most ante-Justinian legal texts, it has not come down to us intact; but a large portion has been preserved and supplemented from some of the Barbarian codes which are largely based upon it.⁷

One other manifestation of the tendency toward stabilization of the law in the ante-Justinian period was the constitution decreed by Theodosius and Valentinian in 426, now known as the *Law of Citations*, which was designed to establish a fused canon for the utilization of the doctrinal works of the classical jurists. This law attempted to confine authoritative effect to the writings of only five of the great jurists of Roman law, *viz.*, Papinianus, Paulus, Ulpianus, Modestinus, and Gaius, and to regulate the precedence to be accorded them. But it was soon felt that this was too restrictive, and, accordingly, like authority was given to the works of those jurists who had been cited in the works of the five jurists originally named.

When the Western Empire was overthrown in 476, the barbarians used these three early codifications as the basis of codes for their Roman subjects in the conquered and occupied territories, according to the rule of the "personality of laws" then in force. These codes were based, in addition, on an abridgment of the *Institutes* of Gaius, and fragments from Papinianus' *Responso* and Paulus' *Sententiae*. They include:

(1) *Lex Romana Burgundionum* (for Roman subjects in Southeastern France), established about 501 A.D.

7. The Theodosian Code and Novels and the Sirmundian Constitutions have been translated into English with commentary, glossary, and bibliography by Clyde Pharr (1952). The translation of the Code and Constitutions is based on the text of MOMMSEN, *THEODOSIANI LIBRI XVI CUM CONSTITUTIONIBUS SIRMUNDIANIS* (1905) and of the Novels on that of MOMMSEN-MEYER, *LEGES NOVELLAE AD THEODOSIANUM PERTINENTES* (1905).

(2) *Lex Romana Visigothorum*, or *Breviarium Alaricianum* (*Breviary of Alaric*), established by Alaric II in 506 for Roman subjects of the Visigoths in Spain and Southern France. This code was repealed by Recesvind about 650 for his Franco-Spanish subjects, but it remained the basis of the law of Southern France until it was supplanted by the Roman law of Justinian, following the revival of Roman law at the University of Bologna in the 12th century.

(3) *Edictum Theoderici*, promulgated about 500 by Theoderic the Great, King of the Ostrogoths, for his Roman subjects in Northern Italy as well as for his own people.

The Visigoths had codified their own customary law at about the same time, in the *Code of Euric* or *Codex de Tolsa*, as the legislative power passed to them with the fall of the Western Empire. It later became the *Antiqua* or *Lex Visigothorum*.

Gondebad first established a code for the Burgundians in their relations with one another and with his Roman subjects. The latter had their own laws for themselves. He later abolished the *Breviary of Alaric*.

In Justinian's Eastern Empire, although considerable law revision had already taken place, in order to make the law known to his subjects, a great deal more was necessary before it could be said that the structure and organization of the whole body of the law was equal to the merit of its content. There must be read into these circumstances the Emperor's great ambition to restore the whole of the Roman Empire under a single emperor and, as a necessary part of that larger ambition, his desire to make his codification an authoritative binding statement of the whole body of Roman law. He intended that his codification would take the place of all former laws, interpretations, and doctrinal writings, and be the only source of law in the Empire. He hoped by this means to unify the law throughout the Empire, and to supplant the diffused mass of pre-existing law with his *Corpus Juris Civilis*.⁸ But centuries would elapse before his

8. Not all scholars are of this opinion. Paul Kreuger is quoted as saying: "It is hardly possible to doubt that the principal motive for the work of Justinian in the matter of legislation was his one of glory, his personal vanity." COLLINET, *LA GENÈSE DU DIGESTE, DU CODE ET DES INSTITUTES DE JUSTINIEN* 29 (1952).

But Collinet does not agree, for he says, *id.* at 32: "In a word, the purpose of Justinian is to give new life to the old law of the Western Empire, to the classical law; a practical measure connected with the general political purpose of Justinian to bind the Byzantine Empire to the Empire of the most brilliant

great work would be received in the former Western Empire, as a result of work of the scholars in the universities and not of imperial authority.

The operation of the principle of the "personality of laws" gave Spain and France two entirely different systems or sources of law: Roman law for Roman subjects of the Visigoths and Burgundians in Spain and Southern France; and customary law for the barbarian invaders themselves, particularly those who settled in Northern France. The population pattern of national origins made Northern France a region of unwritten customary laws, and Southern France a region of the written Roman law. No such geographical division took place in Spain, which solved the difficulty of diversity by adopting early codifications of Teutonic customs (*Code of Euric*), and of Roman law (*Lex Romana Visigothorum*), and having them later merge in the *Forum Judicum* (*Fuero Juzgo*).

The Roman law established for Spain and France was based on the pre-Justinian law. Justinian's *Corpus Juris Civilis*, which was the basis for the twelfth century revival of Roman law at Bologna, was thereafter adopted in France and Spain: in France, by the teachings and writings of its jurists; in Spain, by the incorporation of much of the *Digest* in Spain's greatest legal institution, *Las Siete Partidas*, written in 1265 and promulgated in 1348.

The French Civil Code was adopted primarily to unify the law of France, to accomplish which it was necessary to develop a single statement of law out of a multiplicity of jurisdictions and diversity of laws, partly based on Roman law in the South, partly on the customary law in the North. The urge toward codification did not originate with the Revolution; it had existed for several centuries. Louis XI expressed the desire for "one measure, one weight and one law" for France. Several unsuccessful attempts had already been made after the Revolution, when Napoleon as First Consul appointed a commission to prepare a civil code.

Louisiana adopted a civil code in 1808, because of the confused state of its laws resulting from rapid changes in its gov-

period of Roman history. This is why the principal element of that codification ought to be the *Digest*, a compilation formed from fragments of the works of the classical jurists adapted to the spirit of the East in the VI century." (Author's translations.)

ernment, for only twenty days elapsed between the formal transfers from Spain to France and from France to the United States. In this brief interim, nothing was done by France to reestablish French law; and Spanish law, not French law, prevailed in Louisiana when it was transferred to the United States. The Code of 1808 was not based on Spanish law, but it was adopted with the title "A Digest of the Civil Laws Now in Force in the Territory of Orleans with Alterations and Amendments Adopted to Its Present System of Government." The juriconsults appointed to prepare this Digest chose as their model the *Code Napoléon* of France, although Spanish law prevailed.⁹ Later, the Supreme Court of Louisiana held that Spanish law still prevailed unless it had been repealed expressly or by necessary implication by the Digest (Code of 1808).¹⁰ This led to the redaction of the Code of 1825, and upon its adoption all former Spanish law was repealed.

The Civil Code of Louisiana was revised in 1870, but it was an editorial revision, and not a substantive reform. It is essentially the Code of 1825, with these editorial changes: (1) the elimination of all articles relating to slavery; (2) the incorporation of all acts which amended the Code passed since 1825; and (3) the integration of acts passed since 1825, dealing with matters regulated by the Code without specifically amending it. This revised Civil Code of 1870 is the Code in effect today. It reproduces in whole or in part approximately 1800 articles of the 2281 articles of the *Code Napoléon*.

It may be noted, too, that the Codes of 1808 and 1825 were written in French, and that the English text is the translation. For that reason, it has been held by the Supreme Court of Louisiana that, in case of conflict between the two texts, the French text will prevail.¹¹

9. For references to Louisiana sources on this point see Tucker, *Source Books of Louisiana Law*, in 1 LOUISIANA LEGAL ARCHIVES, PROJET OF THE CIVIL CODE OF 1825 xv (1937), reprinted from 6 TUL. L. REV. 280 (1932).

10. *Cottin v. Cottin*, 5 Mart.(O.S.) 93, 94 (La. 1817).

11. La. Acts 1807, pp. 190-193; Dubuisson, *The Codes of Louisiana; Originals written in French; Errors in translation*, 25 LA. BAR A.R. 143 (1924); *Dufour v. Camfranc*, 11 Mart.(O.S.) 675, 701 (La. 1822); *Egerton v. 3rd Municipality of New Orleans*, 1 La. Ann. 435 (1846); *Phelps v. Reinach*, 38 La. Ann. 547 (1886); *Straus v. City of New Orleans*, 166 La. 1035, 118 So. 125 (1928); *Sample v. Whitaker*, 172 La. 722, 135 So. 38 (1931).

II.

The important and essential steps in codification or codal reformation which have characterized the procedures whereby the great institutions of the civil law have been developed are:

- (1) Careful preparation of a *projet* from existing material by expert jurists;
- (2) Thorough discussion of the *projet* on a broad base of professional opinion;
- (3) Adoption by the law-making function of the state—now, in nearly every state, the Legislature or Parliament.
- (4) Post-codification development by doctrine and jurisprudence.

Today, there are formidable obstacles to codification or reform, but there are advantages, too, never enjoyed by the jurists who fashioned the civil law in the past. The road ahead may be long, but it is not impassable.

III.

A. The first problem in the preparatory process concerns the objective of the codification. Is it to be one of mere revision, "to reduce the bulk, clear out the refuse, condense and arrange the residuum, so that the people, the lawyer and the judge could know what they had to practice and obey," according to the formula of David Dudley Field?¹² Or shall it be a real reformation, a shaping of the juridical structure to changes in political, social, and economic philosophy, manifested in special legislation not wholly in accord with the philosophy of the Code at the time of its conception.¹³

Herein lies the basis of 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. Holmes said that "the truth is that the law is always approaching but never reaching consistency. It is forever adapting new principles from life on one end and always retains old

12. Field has been called the father of American legal reform. He was a common law lawyer. His concept of codification is elaborated in *FIELD CENTENARY ESSAYS 17* (1949), written in his honor, and published by New York University School of Law.

13. *AVANT-PROJET DE CODE CIVIL Partie I*, at 12.

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."

In Louisiana, in a preliminary, and as yet unpublished, *exposé des motifs* concerning the reformation of the Civil Code, the Louisiana State Law Institute, charged with that duty, adopted expressly the philosophy of one of the chief architects of the *Code Napoléon* who said:

"In outlining the plan of this legislation, we have felt it our duty to guard against the spirit of the system which tends to destroy all, and against the spirit of superstition, of bondage and of laziness, which tends to respect all. . . . The scythe may be used with indifference on fallow ground; but in a cultivated field there should be pulled only parasite plants which choke out useful crops. In coming to our civil law, we have thought it sufficient to draw a line of separation between the reforms required by the present state of the republic, and the ideas of real order which time and the respect of the people have consecrated. New theories are only the system of some individuals; ancient maxims are the spirit of centuries."¹⁴

And, in the same *exposé des motifs*, the Institute adopted the formula of the dean of all American legal scholars, who once said: "Law must be stable and yet it cannot stand still. . . . In law we rely upon experience and reason. . . . Law is experience developed by reason and reason tested by experience. For experience we turn to history. For reason we turn to philosophy."¹⁵

B. But in Louisiana circumstances forced the Institute to make other supplementary decisions in preparation for its work on the reformation of the Civil Code, for much legislation dealing with Civil Code and Code of Practice subjects existed outside of those two Codes in the General Statutes, and the Civil Code itself contained considerable matter which was strictly procedural. Moreover, the General Statutes had not been revised since 1870 and were completely disorganized.

14. PORTALIS, DISCOURS, RAPPORTS ET TRAVAUX INÉDITS SUR LE CODE CIVIL, *Discours de Présentation de Code Civil* 90, 94, 97 (1844); 1 LOCRÉ, LÉGISLATION CIVILE, CRIMINELLE ET COMMERCIALE DE LA FRANCE 322, 326 (1827) (author's translation).

15. POUND, NEW PATHS OF THE LAW 1, 13 (1950).

These supplementary decisions contemplated then, the following:

1. A complete revision of the General Statutes, which commenced late in 1944 and was completed by the Institute and adopted by the Louisiana Legislature in 1950. This revision attempted no policy changes in the law; it strictly adhered to the Field specifications for a code, hereinabove quoted. Provision was made in the structure of the Revised Statutes for the inclusion of all civil law subjects in one title called "Civil Law Ancillaries," and for all civil procedural law in another title, "Courts and Judicial Procedure," for the sake of easy and non-disruptive removal upon completion of the reformation of the Civil Code and Code of Civil Procedure. The Institute is the official agency for continuous revision of these statutes.

2. A codification of the substantive criminal law, all of which was statutory and uncodified. Here, the decision was to effect a real reformation, and not merely an editorial revision or restatement. The work started in 1940 and was completed by the Institute and adopted by the Legislature in 1942. It was called the Criminal Code, but it is now Title 14, Chapter 1, of the Revised Statutes of 1950.

3. A reformation of the Code of Practice of 1870, first enacted in 1825, but which had been supplemented by a mass of ancillary legislation in the General Statutes, much procedural matter in the Civil Code, and some jurisprudential rules. This work was adopted in 1960 as the Code of Civil Procedure, after approximately ten years of intensive effort. Here, again, the decision was to effect a complete reformation, and not simply a restatement of existing law. The Institute is the agency officially obligated to keep this Code continuously revised.

4. A reformation of the Code of Criminal Procedure, work on which has now been in progress for over six years. Completion is hoped for in 1966. This will likewise be a reformation, and not a restatement of existing law.

5. The fashioning of tools for the profession, not heretofore generally available, necessary for a better understanding of the civil law. They are:

(a) A reprint of the projets of the Civil Code and Code of Practice of 1825, published by the state in 1937.

(b) A compiled edition of the Civil Codes of Louisiana (1808, 1825, and 1870), with corresponding articles from the Code Napoléon. A complete, comparative, bilingual, textual history of the Louisiana Civil Code.

(c) A translation of Planiol and Ripert's *Traité Élémentaire de Droit Civil*, published in 1959.¹⁶ It has already received an authoritative status in Louisiana courts, both state and federal.

(d) A translation of Gény's *Methode d'Interpretation et Sources en Droit Privé Positif* (2d ed. 1954), published in December, 1963.

(e) A translation of Aubry and Rau's *Cours de Droit Civil Français*, Volume 4, "Obligations" (6th ed.), completed but not yet published; and Volume 2, "Biens" (7th ed. 1961), in course of preparation.¹⁷

6. The organization of a special Civil Law Section in the Institute. This section will focus its attention on particular areas of the Civil Code, with the objective of carrying on research into the origin and historical and philosophical development of the subjects being studied. This research will be published and become, it is hoped, Louisiana doctrine and ultimately the basis for reformation of the Civil Code.

C. From its very beginnings, the Civil Law has exhibited an eclecticism in the selection of materials and an awareness of the value of comparative law which has had a profound effect on its codifications. Thus, before any projet was prepared for the XII Tables, a mission was sent to Greece to study the laws of Solon. Justinian's *Corpus Juris Civilis* was the result of a process of selection from the products of the classical period in Roman Law, which itself had been greatly influenced by Greek philosophy. The *Siete Partidas* of Spain was the fusion of early

16. This translation of the Twelfth Edition of 1939 was commenced in 1940 by the late Pierre Crabites, formerly Judge of the Mixed Tribunal in Egypt. He died in 1942, then war intervened. These and other circumstances delayed the completion of this translation, and explain the use of such an early edition with which the translation had begun.

17. The value of these translations is generally recognized, because a large majority of the profession in Louisiana cannot read French, although in the early history of Louisiana French was the prevailing language. Professor T. B. Smith of the University of Edinburgh thinks that it would be much simpler to require a reading knowledge of French as a prerequisite to admission to the law schools in Louisiana. This author agrees, but until that step has been taken, and the present membership in the profession has "shuffled off this mortal coil," there is no alternative to translation.

customary law with the pre-Justinian Roman Law Code of the Barbarians, into which had been integrated a large contribution from Justinian's Digest, particularly in *Partidas* III, V, and VI. The French Code of 1804 is a coalescence of the Roman Law prevalent in the southern two-fifths of France with the Customary Law of the North, tintured by the spirit of political and social philosophy which had been refined in the fires of the Revolution.

Louisiana, confronted with sudden changes of its government in 1803, threatened with the introduction of the alien common law, and not enthusiastic about the Spanish law which had been forced upon it against its will, chose the French Code as the prototype of its first Civil Code in 1808. And when the revival of Spanish law resulted from the *Cottin* decision, Louisiana definitively chose to follow the *Code Napoléon* and abrogate the effect of Spanish law.

And now, as the peoples of the world are being drawn closer and closer together by the miracles of science and by the multiplied and pervasive instrumentalities of commercial, political, and social intercourse, the factor of uniformity of law (unification of private law) becomes critically important in many fields of law.¹⁸ The ecumenical movement in matters political and economic cannot be ignored. Here, national organizations such as the French Center of Comparative Law, the International and Comparative Law Section of the American Bar Association, the British Institute of International and Comparative Law, the International Institute for the Unification of Private Law at Rome (*Unidroit*), and many teaching programs in the universities can be of invaluable assistance in making available to all solutions of problems which are common to all. No tentative toward codification can ignore the movement for unification of private law.

There are particular circumstances in which rules of law have been developed by analogy to cope with problems not within the precise terms of the Code: "*Au-delà du Code Civil, mais par le Code Civil.*" Here, the problem of integration may be formidable, as in Louisiana with its mineral law regulating the most important industry in the state.

18. AVANT-PROJET DE CODE CIVIL Partie I, at 23; Louisiana State Law Institute translation, 16 La. L. Rev. 23, 24 (1955).

Louisiana mineral law rests upon two analogies. First, the right to minerals created by sale or reservation apart from the property itself, has been held to be a real right in the nature of a predial servitude, and the rules relating to that servitude have been applied logically and consistently with that right.¹⁹ Second, an oil and gas or mineral lease has been likened by a somewhat attenuated analogy to a predial lease, and the rules relating thereto applied to the mineral lease.²⁰ The mineral law of Louisiana well may be the most massive example of the extension of a Code by analogy to the unprovided-for case. The codification of this law is a problem that must be met, and in the not too distant future, the best solution, perhaps, being to integrate these jurisprudential rules into the Code itself.

D. In the preparation process, the work of redaction has been confided nearly always to the jurist — the expert in the field. The research which must underlie all sound law revision and law reform can only be undertaken in the law schools. Research today is a matter of international concern; the legal scholars of the world are constantly exchanging ideas, and the experiences and practices of one country in solving legal problem may be of great value in the solution of similar questions everywhere. Comparative law is the order of the day — it may well have a decisive influence in code reform.

Justice Cardozo expressed the opinion that this opportunity for objective discussion, and the means for research, and the publication of critical opinions account for the dominant role played by the scholar in the growth of law. In *The Growth of the Law*, he said:

“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 guidance. Historians tell us that in the 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, Griefswald, Jena — in order to obtain a consultation as to the proper decision.’ A tendency different from this, and yet recalling it in many

19. *Frost-Johnson Lumber Co. v. Salling's Heirs*, 150 La. 756, 91 So. 207 (1922).

20. *Spence v. Lucas*, 138 La. 763, 70 So. 796 (1916); *Logan v. State Gravel Co.*, 158 La. 105, 103 So. 526 (1925); *Tyson v. Surf Oil Co.*, 195 La. 248, 196 So. 336 (1940).

ways can be traced even now in the progress of our law. Extra-judicial agencies are now assuming an importance that increases year by year. Chief of these agencies is the criticism and suggestion of scholars in the universities and other institutes of learning."

The role of the jurist in codification is traditional in the civil law. The *Institutes* of Justinian, largely based on the earlier *Institutes* of Gaius, were compiled by Theophilus, a law professor at Byzantium, and Dorotheus, a law professor at Berytus. Justinian's *Digest* (or *Pandects*) was the condensation by selection from the works of some thirty-nine jurists of the classical period of Roman law. The work was done by Dorotheus and Anatolius of the law school at Berytus, and Theophilus and Gratinus of the law school at Byzantium. They were assisted by eleven lawyers from the Byzantine bar.

Justinian's *Corpus Juris Civilis* was the basis for the revival of Roman law in the 12th century at the University of Bologna. But it was the Glossators and Commentators, sometimes called Post-Glossators, all jurists, who rejuvenated Roman law and caused its reception elsewhere in Europe by means of their scholarship. It was the scholars in the universities who brought its reception in France.

Recently, the task of codification has been given sometimes to a single jurisconsult, sometimes to a commission. In Holland, the late distinguished Professor Meijers was entrusted with the work of revision of the Civil Code. Professor René David, outstanding scholar and authority in comparative law, of the law faculty at Paris, alone prepared the Civil Code for Ethiopia, adopted in 1960.

M. Julliot de La Morandière, then Dean of the Faculty of Law at the University of Paris, was named and still is, President of the Commission to Reform the Civil Code of France, pursuant to a decree of June 7, 1945. There are three other professors on the Commission, including its secretary-general. The Commission includes three members of the *Conseil d'Etat*, three members from the Judiciary, and two advocates and a notary — and so all segments of the profession are represented.

In Louisiana, the *avant-projets* of all of the recent codifications have been prepared by professors in the law schools, as-

sisted by advisory committees of lawyers and judges selected because of their particular interest in the subjects of the codifications. These professors carry the burdens of research and redaction. The accomplishments of the past twenty-five years could not have been possible without them.²¹

Only the professor in the law school has the detailed, but panoramic and systematic view of a field of the law that is indispensable for its codification. Only the law school has the facilities for the necessary research. Only the law school can maintain the organized, objective, and critical discussion that is so vital to law reform.

But it also must be said that the recent codifications in Louisiana could not have been accomplished without the active participation of lawyers and judges in discussing the *avant-projets*. For the scientific theory of the academic cloister must be accommodated to the practicality of the forum.

IV.

A. When the *decemvirs* posted the Ten Tables on the walls of the forum for all to read and discuss, and subsequently, as a result, added two additional tables, they gave the earliest and perhaps the most democratic example of the vital need for thorough discussion in the preparatory stage of code redaction.

Justinian's *Corpus Juris Civilis* was largely a matter of preparation by experts from existing materials, because the emperor was the source of legislative authority. His *Code* and *Novels* were compendiums of imperial enactments. The genius of his work derived from the *Institutes* and the *Digest*, both of which represented the work of the classical jurists. There was little need for critical discussion.

B. The French Code of 1804 was largely the product of discussion during the legislative process of adoption. The four code commissioners had the benefit of prior but unsuccessful attempts at codification. They had a legislature well designed to obtain debate and discussion on a very broad political base. The *avant-projet* was submitted to the appellate courts, and

21. A commission of three lawyers, appointed to draft a revision of the Civil Code, completed a projet for a Revised Civil Code in 1910. But it was not adopted due to heavy criticism from the bar. At that time, however, Louisiana law schools did not have the faculties, facilities, and libraries they possess today.

their detailed criticisms were available. There was a political genius at the head of the government to guide the Code through to adoption. The so-called "preparatory works" which record the many *exposés des motifs*, the *rappports*, and the detailed discussion in the *Conseil d'Etat* are an invaluable source of light for the interpretation of the Code.²²

C. In Louisiana, there is no evidence of extended discussion of the *projets* of the Codes of 1808 and 1825. It must have been thought that the discussions in France were so proximate in time, and the intrinsic worth of the French Code so patent, that little discussion was necessary.

The *projet* of the Louisiana Code of 1825 gives many references to the few French commentators who had discussed the French Code since its adoption, among whom were Malleville, Toullier, and Delvincourt, and some pre-code authorities, such as Pothier and Domat. The truth of the matter is that at that time Louisiana was predominantly French in thought and culture, and the wealth of French legal scholarship was used as Louisiana doctrine just as in France. To all intents, Louisiana relied largely on France for the integrity of its own Code.

D. The modern legislature is not organized or purposed to function as the French legislative process operated when the *Code Napoléon* was adopted. The tempo of life is too swift; the concerns of parliaments are political, administrative, fiscal, and immediate. There is no time for the proper consideration of codifications of large areas of the law. Planiol expressed his fear of the legislature in code revision sixty years ago.²³

22. In Louisiana, a small jurisdiction compared to France, it happens not infrequently that questions arise today for the first time in our legal history. In such cases, these preparatory works often are of great value, where there is little in Louisiana to correspond to the doctrinal writings in France. For example, article 896 of the Code Napoleon says that substitutions are prohibited. Article 1520 of the Louisiana Code says that substitutions and *fideicommissa* are prohibited. To determine why *fideicommissa* was added it is necessary to know exactly what was meant by "substitution" in the French Code, as revealed by these preparatory works, and from there in ancient French law, and in Roman law, including research on the term *fideicommissa* itself.

23. Planiol, *Inutilité d'une Revision Générale du Code Civil*, in 2 LE CODE CIVIL LIVRE DE CENTENAIRE 955 (1904); see also 1 PLANIOL ET RIPERT, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL* n° 119 (12th ed. 1939) "Vices du Procédé Législatif Moderne"; 1 PLANIOL, *A CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE)* no. 119 (1959); see also 1 RIPERT ET BOULANGER, *TRAITÉ DE DROIT CIVIL D'APRÈS LE TRAITÉ DE PLANIOL* n° 135 (1956).

The ultimate function of the legislature, however, is to give vitality to the law. If the *projet* presented to it for adoption is the result of sound preparation and thorough and objective discussion, it matters little that the redaction was accomplished by extrinsic means. Legislative trust depends upon the integrity of the *rédacteurs*, and that has rarely been found wanting in the whole history of the Civil Law.

E. The Louisiana State University Law School initiated the movement for the creation of an agency to plan for and execute a broad, comprehensive program of law reform, law revision, and legal research which resulted in the creation by the Legislature of the Louisiana State Law Institute, as an advisory function of the Legislature.²⁴

The general purposes of the Institute are provided in its Legislative Charter. They are: "to promote and encourage the clarification and simplification of the law of Louisiana and its better adaptation to present social needs; to secure the better administration of justice and to carry on scholarly legal research. . . ." Long-range plans of the Institute were established to accomplish these broad purposes, and operating procedures were adopted following in the tradition of civil law codification and law reform.

The accomplishments and plans of the Institute have been explained previously, as well as the method of preliminary redaction. The method of discussion in the Institute is designed to test the merits of the *avant-projet* on the touchstone of practicality. Objective discussion on a broad professional base is obtained by means of the plan of organization of the Council of the Institute, the working and governing body of the Institute.

The Council of the Institute consists of twelve professors (four members from each of the law faculties of Loyola, Tulane, and Louisiana State University), five judges, five legislators, two representatives from the executive branch of the state government, five members from the organized bar, and nineteen lawyers.²⁵ From its inception, the Council has been kept fairly

24. The legislative charter of the Institute is comprised in Title 24, Chapter 4, Sections 201-205 of the Louisiana Revised Statutes of 1950. The original charter was La. Act 166 of 1938. A history of the Institute is given in 17 LA. STAT. ANN. 53 (1951).

25. Three out of seven honorary members of the Council live in France, *viz.*, Marc Ancel, Conseiller à la Cour de Cassation de France; René David, Professor,

representative of the different geographical, ethnic, and political segments of the profession. The base of membership in the Council is broad, and its opinions have always been objective because the selection of members of the Council has been objective.

The Council discusses in detail and with considerable deliberation the several parts of an *avant-projet* as they are completed by the reporter and his advisors. Sometimes, debate on a single policy decision may extend over many months. When a part of the *avant-projet* has been approved by the Council, it is published, with comments, as an *Exposé Des Motifs*, and used as the basis of explanatory discussion at the annual meeting of the Institute. Uniformity of style and redaction is obtained by the work of a permanent committee on semantics. The final draft, so approved, becomes the *projet* that is submitted to the Legislature, which has accepted the proposals heretofore submitted with little, if any, discussion.

The Legislature has given the Institute the task of keeping the Revised Statutes of 1950 and the Code of Civil Procedure continuously revised. For the Revised Statutes, the task is primarily editorial. For the Code of Civil Procedure, however, a permanent committee of the Institute, with the reporter who coordinated redaction of the Code as its chairman, is charged with the responsibility of observing the Code in action, in order to propose any changes, additions and omissions indicated by the circumstances.

This plan for code reform and redaction has produced results, but it has been slow — necessarily so, for all engaged in the operation have other tasks to perform. But the nature of the work to be done largely determines the time it will take to do it. If the work is essentially editorial, and does not involve policy decisions, it can proceed with some celerity.²⁶ But if the work to be done involves policy decisions, or decisions as to substance, then progress will and should be slow and deliberate.²⁷

Faculté de Droit, University of Paris; and L. Julliot de La Morandière, Doyen Honoraire, Faculté de droit, Paris.

26. The revised Statutes of 1950 project was completed in about five years. It involved the organization and restatement of the unorganized legislative accumulations of eighty years, but no decisions as to principle were required or made.

27. The work on the Code of Civil Procedure took nearly twelve years, although it contains only 1031 articles. But the Council debated many months about the proposals to combine the petitory, possessory, and jactitory actions into one real

Laws with the patina which comes from accepted usage over a long period of time should not be lightly cast aside, and paroxysmal legislation should be made to justify its right to reception into time-tested codes of general law.

F. This policy of deliberation produces another problem of considerable proportion. Considering the experience in Louisiana with codifications of much smaller content than the Civil Code, and of France with the reform of that Code, it can be seen quite readily that the complete reformation of the Civil Code as contemplated in France and Louisiana will be the work of a great many years. In Louisiana, the task will be even longer than in France, for we do not have the benefit of the wealth of the doctrinal writings of great juris-consults that has marked the development of French law from its beginning. The faculties and the facilities we enjoy today in our law schools in Louisiana are of this generation, but they are effectively leading us back along the return road to the full enjoyment of our rich civil law inheritance.

This means that consideration must be given to the adoption of a policy of incremental legislative enactment as the work is completed. Cohesion and symmetry will be lessened; but the incongruities which would result from keeping the part first finished in limbo until the entire work is completed, in order to adopt the reformed code as a legislative whole, would be formidable indeed.

It is believed in Louisiana, but not yet formally decided, that the policy of incremental adoption is the lesser of the evils, and that they may be minimized by the policy of continuous revision adopted for the Code of Civil Procedure. Following completion of the reformation of the entire Code on that basis, the problems of cohesion and symmetry could be solved in a very short time.

The problem of time generates the problem of schedule of the work. It is believed that the first subjects of reform to be undertaken should be those which are general in nature and basic to much of the Code.

In Louisiana, it is hoped to start the work with civil law action (it did not approve); and likewise to the proposal to substitute a modification of the system of notice pleading of the Federal Rules of Civil Procedure for the fact pleading system prevailing in Louisiana (it did not approve).

studies to be programmed and conducted by the Civil Law Section of the Institute. These studies will include, for each subject: (a) the historical origin and development of the laws relating to the subject; (b) a critical discussion of its interpretation and present status in Louisiana; (c) the problems to solve in connection with the reform; and (d) study of how they have been solved in comparative jurisdictions. These studies will be the material upon which the work of reform of the Code will be based, and in the meantime will go a long way toward supplying the deficiency in Louisiana doctrine.

V.

Fears have been expressed in Louisiana and in France that the times are not propitious for code reform, that the adoption of a new code would render useless a great part of the juridical works which have preceded it, and that it is dangerous to tamper with an ancient and honorable legal institution. I do not share these views. I believe that the foundations of the civil law are indestructible because its precepts are moral and equitable. "*Juris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere.*"²⁸ The great codifications of the civil law have been the distillation and adaptation of time-tested principles to the changed conditions at the time of their adoption. Every one of them was prepared in a tradition which insured its improvement over its predecessor. None of them was a wide departure from existing law and custom.²⁹

The civil law is university law. It has been produced and developed by the learning, philosophy, and character of great jurists and scholars. It could not have been otherwise. The jurists of today are no less learned, no less honest in purpose, and no less strong in character than those who have gone before. I am not afraid.

28. Institutes I.1.3; Digest I.1.10(1).

29. "*Mais rien de durable ne sera fait, si l'on ne tient pas largement compte des expériences du passé, si, tout en acceptant le progrès social, on ne s'appuie pas, comme l'avaient fait les praticiens avertis de 1804, sur les coutumes séculaires de notre peuple.*" 1 COLIN ET CAPITANT, TRAITÉ DE DROIT CIVIL, REFONDU PAR LÉON JULLIOT DE LA MORANDIÈRE 117 (1953).