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ORIGINS OF MODERN CODIFICATION OF THE CIVIL LAW: THE FRENCH EXPERIENCE AND ITS IMPLICATIONS FOR LOUISIANA LAW

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INTRODUCTION

Knowledge of the sources of civil codes is valuable for several reasons. The natural curiosity of scholars needs to be

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satisfied when sources are identified inaccurately¹ or not at all.² Aside from this, disclosure of sources reveals something of the intellectual temper of the authors and of the time that brought the finished code into existence. On a more practical level, such knowledge aids interpretation of contemporary codes, especially when the antecedents of ambiguous code provisions can be brought to light. For Louisiana law, the sources of the French Civil Code of 1804 are particularly valuable. Indeed, any study of the French code is pertinent to Louisiana law; the French code was one of the principal sources of the Digest of the Civil Laws of 1808,³ and the Digest itself was the foundation of the Louisiana Civil Code of 1825.⁴ Thus, to the extent provisions of the French Civil Code of 1804 persist in the Louisiana Civil Code of 1870, currently in force,⁵ the investigation of the origins of the former will shed light on Louisiana law.

It is truly surprising that a subject of such interest has not received in France, with one exception,⁶ the detailed and critical

1. This was sometimes true in the case of the Louisiana *Projet* of 1823. See note 548 *infra* and accompanying text.

2. This was the case with the Louisiana Digest of the Civil Laws or Civil Code of 1808. See notes 499-517 *infra* and accompanying text.

3. See notes 499-505 *infra* and accompanying text.

4. See note 573 *infra* and accompanying text.

5. ~~*Id.* Over one thousand articles of the Louisiana Code fit this description. See notes 547-74 *infra* and accompanying text.~~

6. The exception is represented by a work in four volumes published only two years after enactment of the Civil Code. See J.-M. Dufour, *Code civil des Français avec les sources où toutes ses dispositions ont été puisées* (1806). The author stated in the title page: "Where after each Article is reproduced either the Roman Law from which it was translated, the provision from the Custom, Ordinance, prior Law, or Text of Authors from which it was copied or taken, or the particular reason for which it was adopted." Despite the preceding assertion, there are many provisions without any indication of sources; in several instances the source mentioned is not the direct source, but the indirect or remote one; in other cases the author indicates that the provisions are "new" when in fact they have specific sources; there are also a number of situations in which several references are given when it is possible to identify only one, and many instances of *renvoi* to other provisions which are not justified. Nevertheless, this work is the only one of its kind and would only need a careful critical revision and supplementation with references to the *projets* which preceded the Civil Code (only exceptionally the *Projet* of the Year VIII is mentioned). It would be necessary also to indicate the degree of influence received from the source, for example "verbatim," "almost verbatim," "substantially influenced" and "partially influenced" as a basic classification. See notes 226-65 *infra* and accompanying text. On occasion, however, Dufour states: "this is article X" (from such and such work, statute, etc.); "this provision is taken from . . ."; "this provision is similar to article . . ."; "this provision was literally reproduced from . . ."; "this provision is contrary to the opinion expressed by . . ."; etc.

analysis it deserves. At most, there are a few studies on specific aspects⁷ or on an individual writer as a source.⁸ The generally accepted view on the origin of the French Civil Code of 1804⁹ was expressed by Planiol and Ripert:

The sources utilized in the drafting of the civil code were of various kinds. The principal ones were: customs, particularly that of Paris, Roman law, royal ordinances, statutes of the Revolution.

Customary law supplied most of the provisions concerning incapacity of married women, marital power, community of property among spouses, and many rules on successions.

Roman law was especially utilized for the system of ownership, the general rules on obligations, those of some contracts, the dowry system.

Royal ordinances were principally maintained for certificates relating to civil status (Ord. of April 1667), donations, wills, and substitutions (Daguesseau's Ords. of 1731, 1735, and 1747), proofs (Ord. of Moulins of 1556 and that of April 1667), and cancellation of mortgages (Edict of 1771).

7. See A.-J. Arnaud, *Les origines doctrinales du Code civil Français* (1969) [hereinafter cited as Arnaud]. This title is misleading in that it would seem to refer to the doctrinal texts which are sources of the Code. The author makes such references only occasionally; for instance, he does so when he investigates the origin of the expression "*de la façon la plus absolue*" in article 544 (where the word used is "*manière*"); when he studies the rule of the autonomy of will in article 1134 which he traces to Domat; when he cites Pothier in regard to property, vices of consent, etc.; and when he mentions Bourjon, Pocquet de Livonnière, and Prévot de la Jannée. *Id.* at 91, 103, 189, 198, 203, 287, 208. Otherwise, his study deals mostly with the intellectual background and professional formation of the Code's drafters. This is not surprising since he acknowledged that his study was inspired by D. Mornet's book, *Les origines intellectuelles de la révolution française*. *Id.* at 6 n.27. As he states, "Ultimately, our purpose was to define the personality and evaluate the nature and degree of culture of each author of the Code civil." *Id.* at 26. He announced his intention (inspired by Vigier's essay, *De la nécessité d'une édition du Code civil au point de vue historique*, in *Le Code civil, 1804-1904, Livre du Centenaire* 25 (1969), to examine in a later work the origin of each of the 2281 provisions in the Civil Code. *Id.* at 4 nn.18, 19 & 21. As indicated earlier, see note 6 *supra*, that work had already been carried out by Dufour in 1806, albeit imperfectly.

8. See P. Fenet, *Pothier analysé dans ses rapports avec le Code civil* (1826); R. Martinage-Baranger, *Bourjon et le code civil* (1971) [hereinafter cited as Martinage-Baranger].

9. See 1 G. Baudry-Lacantinerie & M. Houques-Fourcade, *Traité théorique et pratique de droit civil* 59-60 (2^e éd. 1902); L. Josserand, *Cours de droit civil positif* 28 (2^e éd. 1932); 1 C. Aubry & C. Rau, *Cours de droit civil français* 55 & 56 (16^e éd. 1936); 1 G. Marty & P. Reynaud, *Droit civil* 111 (1956); 1 A. Colin & H. Capitant, *Traité de droit civil* 129 & 130 (L. Julliot de la Morandière éd. 1957) [hereinafter cited as Colin & Capitant]; J. Carbonnier, *Droit civil* 154 (1969); 1 M. de Juglart, *Cours de droit civil* 37 (6^e éd. 1970).

Statutes of the Revolution were mainly retained in regard to *majority, marriage and the mortgage system*.¹⁰

However, a few pages earlier, Planiol and Ripert had indicated:

[Domat] published in 1694 *Les lois civiles dans leur ordre naturel*, a celebrated work which places him in the first rank among those who prepared the way to the civil code. . . .¹¹

Bourjon contributed much to the preparation of the [civil] code. . . .¹²

The works of Lamoignon were very useful to Chancellor Daguesseau and to the redactors of the civil code. . . . Their provisions [Daguesseau's ordinances on donations, wills and substitutions] have passed, in great part into the Code Napoleon. . . .¹³

From [the Treatises of Pothier] the civil code has been drawn in great part.¹⁴

The contradiction between the preceding statements, especially the last one, and the earlier list of the sources used in the drafting of the French code (customary law, Roman law, royal ordinances, statutes of the Revolution) is obvious: the list quite clearly omitted legal writings. This omission represents a serious flaw in the prevailing doctrinal position concerning the sources of the Code. With the exception of the statutes of the Revolution,¹⁵ the other sources are not direct sources. The Custom of Paris, Roman law, and the royal ordinances generally were adopted only indirectly through the writings of commentators, principally Domat and Pothier.

10. See 1 M. Planiol & G. Ripert, *Traité élémentaire de droit civil* 34 (12^e ed. 1940) (emphasis in the original) [hereinafter cited as Planiol & Ripert]. Beyond these four sources, the authors add two more of a secondary character: the jurisprudence of the old parliaments (especially on the law of absence) and canon law (marriage, legitimation). *Id.* It should be noted that the royal ordinances on civil status certificates only influenced the Civil Code through the revolutionary legislation; the royal ordinances had no direct effect on the Code. In addition, the laws of the Revolution were of decisive importance for ownership and classification of property in the Code. The customary law, mainly, through doctrine, also had a substantial influence on the law of servitudes.

11. Planiol & Ripert, *supra* note 10, at 21.

12. *Id.*

13. *Id.* at 24.

14. *Id.* at 21.

15. See note 28 *infra* and accompanying text. These statutes are sometimes improperly termed "intermediary law."

Unfortunately, this error is not the only one which has been committed. Writers have generally failed to acknowledge the influence exercised by the various *projets*¹⁶ of the Civil Code prepared during the revolutionary period.¹⁷ In fact, the Civil Code of 1804 completed a long process of gestation that began in 1789 with the *Projet d'Olivier*¹⁸ and continued through the *Projet Philippeaux* of the same year, the *Plan Durand-Maillane* of 1793, the three Cambacérés *Projets* of 1793, 1794 and 1795, respectively, the Jacqueminot *Projet* of 1799, and, lastly, the *Projet* of the Year VIII (1800). The failure to trace the influence of those *projets* has resulted in an erroneous identification of both the sources and structure or organization of the French Civil Code.¹⁹

On the basis of a critical comparison of texts, the sources of the Civil Code of 1804 are: the *Projet* of the Year VIII; the various observations made on that *projet* by the Court of Cassation, the Courts of Appeal, the Council of State [*Conseil d'État*], the Tribunal, and the Legislative Body [*Corps législatif*]; other observations that influenced the final drafting; and the writings of Domat and Pothier.

In turn, the sources of the *Projet* of the Year VIII are found in the Third Cambacérés *Projet*, the Jacqueminot *Projet*, the

16. An exception must be made in the case of the *Projet* Jacqueminot with regard to which it was said that "[a] certain number of provisions of the present Code were borrowed from it literally." See Colin & Capitant, *supra* note 9, at 127 n.2. It has also been said, with some exaggeration, that the *Projet* Jacqueminot "was taken in block into the Civil Code." See Arnaud, *supra* note 7, at 219 n.660. An observation was also made to the effect that succession appears at the beginning of Book II of the Civil Code, among the manners of acquiring ownership, just as it does in the *Projets* Cambacérés. See A. Valette, *De la propriété et de la distinction de biens*, *Commentaire des titres I et II du livre II du Code civil* 113 (1879).

17. The situation, of course, must have appeared sufficiently clear to contemporary lawyers who closely followed legislative changes, particularly the efforts to codify civil law through the successive *projets*. For instance, in reproducing in full the text of the First *Projet* Cambacérés of 1793, Fenet inserted a number of figures in the margin, without any explanation or indication as to what they referred, but which are the numbers of the articles in the Code of 1804 influenced by that *projet*. Fenet must have known that the influence had been transmitted through the intermediate *projets*. These annotations have been completely overlooked. See 1 P. Fenet, *Recueil complet des travaux préparatoires du Code civil* 17-98 (1827). [hereinafter cited as 1 Fenet].

18. The *Projet d'Olivier* itself benefited from several centuries of development and would not have been possible without Roman law, French customary law, and especially the natural law school. See notes 103-11 *infra* and accompanying text.

19. See note 7 *supra* and accompanying text.

Rural Code, and the writings of Pothier and Domat, as well as those of Bourjon and Pocquet de Livonnière.

The sources of the Jacqueminot *Projet* were the Third Cambacérès *Projet* and Pothier's writings.

The sources of the Third Cambacérès *Projet* were mainly the Second and First Cambacérès *Projets*, and, to a lesser extent, Pothier and the *Répertoire de jurisprudence* by Guyot.

The Second Cambacérès *Projet* derived from the First Cambacérès *Projet* and, in small part, from doctrinal writings, especially those of Pothier.

The sources of the First Cambacérès *Projet* were the statutes of the Revolution concerning civil status, marriage, divorce, and ownership; the Custom of Paris; the *Répertoire de jurisprudence* by Guyot; the *Décisions nouvelles* by Denisart; the writings of Pothier and Domat; and the *Plan* Durand-Maillane.

The *Plan* Durand-Maillane had its sources in enactments of the Revolution, the Custom of Paris, and Roman law.

The *Projet* Philippeaux found inspiration in the general principles derived from revolutionary ideals, customary and Roman law, and the ideas of natural law.

The *Projet* d'Olivier had the following sources: Roman law, Domat's writings, the Custom of Paris, Lamoignon's Decisions, and, above all, natural law.

The pages that follow discuss generally the impact of the French Revolution on civil law legislation and then, chronologically, the eight *projets* that led to the French Civil Code of 1804. Finally, this article examines the influence of that code upon codification of the civil law in Louisiana.

THE FRENCH REVOLUTION AND THE CODIFICATION OF THE CIVIL LAW

In the many centuries before the Revolution, the French legal system had been divided into two large areas. In the North, *le pays de droit coutumier*, customary law of Germanic origin prevailed.²⁰ The South, the Midi, was known as *le pays de droit*

20. The customary law predominated in most of the country. There were about sixty *general customs*, so called because they were observed in a whole province, e.g.,

écrit because its legal system developed out of the written, pre-Justinian Roman law.²¹ The division, however, already weakened by the early decrees of national scope issued by the revolutionary Assemblies,²² was finally eliminated only with the enactment of the Civil Code in 1804.²³

Despite the absolute power of the monarchy, the *Ancien Régime* was characterized by diversity. Unity existed only in the king's person. Although the need to unify the various systems had long been felt in France, from the system of law to that of weights and measures, no progress had been made.²⁴ Legislative

Anjou-Maine, Berry, Bourgogne, Bretagne, and Normandie, as distinguished from those which only applied in a small region or in a town or city, or even in a section of a town, of which there were around three hundred. But the Custom of Paris, because of the traditional influence of the capital city on the political and intellectual life of the country and the excellence of its provisions, prevailed over all of them. It was even considered the general custom of the kingdom. From the original oral form, the various customs began to be written down early in the sixteenth century. The Custom of Paris, for example, had its first redaction in 1510 and then in 1580. Strictly speaking, therefore, customary law was also "written law." It has been said that the course of the river Loire represented the line of demarcation between the two legal areas; this is erroneous. Angoumois and Auvergne (both to a great degree under customary law) penetrated considerably south of that line. See 1 F. Olivier Martin, *Histoire de la coutume de la prévôté et vicomté de Paris* 57, 64-68, 122-26 (1922) (reprinted 1972); Planiol & Ripert, *supra* note 10, at 14-17.

21. To be sure, the Roman law followed in Gaul was not Justinian's; his legislation had not been received there because Gaul had been separated from the Empire in the fifth century. Instead, its law derived from the works of jurists of the third century and the Theodosian Code of 438. In addition, the region of customary law was not the only one which had customs; some southern areas had their own. There was, for example, a Custom of Bordeaux and a Custom of Toulouse. Planiol & Ripert, *supra* note 10, at 15.

22. For instance, the decree of August 4, 1789, which abolished feudalism; the decree of September 20-25, 1792, on the civil status of citizens; and the decree of the same dates on divorce. See notes 41-57, 69-81 *infra* and accompanying text.

23. Decree of 30 ventose, year XII (Mar. 21, 1804), 14 J. Duvergier, *Collection complète des lois, décrets, réglemens, avis du conseil d'État* 342 (2^e éd. 1836) [hereinafter cited as [1804] Duv.], that is, the "Law on the unification of the civil laws in a single body under the title *Code civil des Français*," promulgated the following 10 germinal (Mar. 31), provided in art. 7: "Beginning the day on which these laws become executive, the Roman laws, ordinances, general or local customs, statutes, regulations, cease to have the force of law, either general or particular, in matters which are the object of the laws composing the present Code." *Id.* at 343.

24. The efforts to unify weights and measures, currency, and the administration of justice go back to Philip V (1316-1322). See J. van Kan, *Les efforts de codification en France, Étude historique et psychologique* 13 (1929) [hereinafter cited as van Kan]. Economic unification required a uniform system of weights and measures and therefore a Commission was appointed to that effect in May of 1790. See A. Soboul, *Précis d'histoire de la révolution française* 503 (1962) [hereinafter cited as Soboul]. The *Cahiers de doléances* (Notebooks of Grievances) [hereinafter cited as *Cahiers*] of 1789 repeatedly referred to unification, particularly of law, in civil, procedural and penal matters. Almost

unification of the country had to precede and prepare the ground for codification of law. That unification only began with the convocation of the Estates General,²⁵ later transformed into the National Assembly in June of 1789.²⁶ It should be noted, however, that in that year two *projets* of a civil code were sent to the National Assembly.²⁷

Civil law legislation enacted during the Revolution has been commonly referred to as "intermediary law." However, the name is misleading in that it implies a transitory nature, which is far from being true.²⁸ On the contrary, it had lasting effects and influence.

60,000 of those Notebooks offer an expansive view of France. It has been asserted that the French Revolution was the only one in which the various estates of society separately gave an authentic testimony of the ideas and sentiments they entertained before the Revolution itself would distort or modify them. See A. de Tocqueville, *L'Ancien régime et la révolution* 399 (1856). Referring to the *Cahiers* of the nobility, this author said: "It may be concluded after reading their notebooks that the only thing these noblemen lacked in order to make the revolution was to be commoners." *Id.* at 413.

On the other hand, it has been observed that "[o]nly Montesquieu, a conservative in everything which conforms to the variable nature of things—the soil, climate, customs and history—appears little inclined toward uniformity." P. Sagnac, *La législation civile de la révolution française* (1789-1804) 4 (1898) (reprinted 1971) [hereinafter cited as Sagnac]. The reforms asked for in the *Cahiers* were still to be undertaken during the first years of the Revolution, but the uniformity of a number of systems was indispensable for both economic and other kinds of unification. See G. Lefebvre, *La révolution française* 589 (1963) [hereinafter cited as Lefebvre].

25. A serious financial crisis and the revolt of the aristocracy had forced the convocation of the Estates General, which had not met since 1614. See Soboul, *supra* note 24, at 97.

26. On the 17th, the name was changed on the motion of Sieyès, and the Estates General was proclaimed National Constituent Assembly the following July 9. See Soboul, *supra* note 24, at 108, 110. As remarked by this author, in the aristocratic society of the *Ancien Régime*, traditional law distinguished three orders or estates: the Clergy, the Nobility (both privileged orders), and the Third Estate, which included the great majority of the country. The three orders originated in the Middle Ages according to a sharp distinction among those who prayed, those who fought, and those who worked in order to support the other two. *Id.* at 21. But the estates did not constitute social classes since each one was divided into several groups, more or less antagonistic. *Id.*

27. The *Projet d'Olivier* and the *Projet Philippeaux*. See notes 108 & 148 *infra* and accompanying text.

28. The following statement was made by Sagnac: "[A]s regards the law of the Revolution, after combating it from 1800 to 1804, [the jurists] have forgotten it and ignore it deliberately. They call it 'intermediary law' as though it had been a transitory law, absolutely different from the law of 1804 and contributing nothing to it. The indifference of jurists and historians with respect to the civil legislation of the Revolution still persists. Nevertheless, in the civil order, the Revolution created the foundations of present-day France." See Sagnac, *supra* note 24, at I. Following the research started by Sagnac, new studies have been published on the legislation of the Revolution: M.

The legislative activity that put an end to the *Ancien Régime* may be divided, like the Revolution itself, into several stages:

1. The National or Constituent Assembly (June 17, 1789, to September 30, 1791);
2. The Legislative Assembly (September 30, 1791, to September 21, 1792);
3. The Convention (September 21, 1792, to October 26, 1795);
4. The Directory (October 27, 1795, to November 9, 1799, or 18 brumaire year VIII);
5. The Consulate (December 25, 1799, to May 20, 1804).²⁹

Before discussing the revolutionary enactments, it is advisable to formulate some considerations of a general nature. The series of historical events culminating in the Revolution had complex causes of an economic, social and ideological character. As the capitalism of commerce, finance and manufacture progressed, undermining medieval economy and society, the ambitions of the bourgeoisie expressed themselves in attacks against traditional ideas. Experimental rationalism which, after having created modern science, attempted in the eighteenth century to extend its control to all aspects of human life, had furnished the bourgeoisie with a philosophy. Particularly in France,

Garaud, *La révolution et l'égalité civile* (1953); M. Garaud, *La révolution et la propriété foncière* (1958).

29. The Revolution produced three Constitutions: the Constitution of September 3, 1791; that of June 24, 1793, and the Constitution of 5 fructidor, year III (Aug. 22, 1795). The first was the work of the Constituent Assembly; the Convention voted the other two. The Constitution of 1791 was monarchical and representative, and it essentially responded to two principles: national sovereignty and division of powers. The Constitution of 1793 established universal suffrage; the legislative power was entrusted to a single assembly, indivisible and permanent, elected for one year, and in certain cases provided for a referendum by the people; the executive power resided in an Executive Council of 24 members. The Constitution of the Year III, according to Emeine, was the Constitution of 1791 improved and amended, converting a monarchical into a republican constitution. The legislative power was composed of two chambers called Councils: the Council of Five Hundred and the Council of Ancients. The former had the exclusive initiative of laws while the latter could only approve or reject them in block, without power to amend them. The executive power resided in an Executive Directory composed of five members; one left office every year and was not to be reelected until the end of five years according to a list of ten names for each Director which was prepared by the Council of Five Hundred; and the election was entrusted to the Council of Ancients. See A. Emeine, *Précis élémentaire de l'histoire de droit français de 1789 à 1814, Révolution, consulat & empire* 31, 33, 46-47, 50-54 (1911) [hereinafter cited as Emeine].

that philosophy awakened class consciousness and innovative daring. On the eve of the Revolution, even though the leaders of the Enlightenment were already dead, nothing had been lost of their thought.³⁰ The intellectual origins of the French Revolution were also linked to the philosophical currents which, starting from Descartes, had first awakened and then developed the critical powers which generate new ideas. The Enlightenment, in every aspect of human activity, had substituted Reason for authority and tradition.³¹

Natural law also supported criticism of the privileges and vestigial institutions of feudalism. Indeed, arbitrariness in all its manifestations, and even administrative inefficiency, could be attacked on the ground of natural law. Originating with the stoics of antiquity, the doctrine of natural law was later expounded by eminent theologians and legal scholars in the Middle Ages. It continued to have distinguished proponents in the seventeenth and eighteenth centuries.³²

On the other hand, one of the truly positive aspects of the *Ancien Régime* was, undoubtedly, its long and rich legal tradition. In the second half of the twelfth century, at Montpellier, Placentin (Placentinus) applied the scientific method to the study of Roman law as developed by the Bologna School.³³ Later, Roman law scholars such as Cujas (Cujacius), Doneau (Donellus), and Favre (Faber),³⁴ among others, produced brilliant works and teachings. They followed a humanistic approach that scholars would later develop in various directions.

Throughout the sixteenth, seventeenth and eighteenth centuries, there were writers who knew both "written" and custom-

30. See Lefebvre, *supra* note 24, at 60. By the middle of the eighteenth century, within a period of only a few years, works of the greatest influence appeared in quick succession: G. Buffon, *The Natural History* (1749); E. Condillac, *Treatise on Sensations* (1754); 1 D. Diderot, *Encyclopedia* (1751); C. Montesquieu, *The Spirit of the Laws* (1748); J.-J. Rousseau, *Discourse on the Origin of Inequality Among Men* (1755); J.-J. Rousseau, *Emile* (1762); J.-J. Rousseau, *The Social Contract* (1762); F. Voltaire, *Essay on the Customs and the Spirit of Nations* (1756). See also Soboul, *supra* note 24, at 53-54.

31. See Soboul, *supra* note 24, at 52.

32. See Lefebvre, *supra* note 24, at 67.

33. See F. Olivier Martin, *Précis d'histoire du droit français* 92 (5^e éd. 1953) [hereinafter cited as Olivier Martin]; P. Viollet, *Histoire du droit civil français* 22 (3^e éd. 1905) (reprinted 1966).

34. See Olivier Martin, *supra* note 33, at 24.

ary law. Dumoulin, d'Argentré, Loisel, Domat, d'Aguessau, Bourjon, Lamoignon, Boutaric, Argou, Pocquet de Livonnière, Pothier and many others contributed valuable works to legal science.³⁵ It is not surprising, therefore, that when the Revolution needed legal scholars and lawyers to draft the constitutions, laws and decrees that transformed the archaic legal structure of the *Ancien Régime*, and later, the *projets* of the civil code, it had no difficulty in finding men of excellent professional ability. Merlin, Berlier, Treilhard, and Jacqueminot were only a few.³⁶

The National Assembly declared its desire to pursue the codification of the civil law quite early. It resolved at its session of July 5, 1790, that "[t]he civil laws shall be revised and amended by the legislators, and a general code of laws, simple, clear and appropriate to the constitution, shall be prepared."³⁷ This decision was reiterated by the decree of August 16 of that year on judicial organization,³⁸ and was later adopted in the Constitution of September 3-14, 1791, as follows: "A code of civil laws, common to the whole kingdom, shall be drafted."³⁹

Before this goal could be attempted, however, there were more pressing tasks for the National Assembly. First, the abolition of feudalism, one of the principal objectives of the Revolution, had to be carried out. The feudal system had lost all justification. Far from rendering any useful service, it merely provoked resentment and opposition. Although feudalism no longer existed as a political force, it continued nevertheless in the economic order and in personal relationships.⁴⁰

35. *Id.* at 272-73.

36. See the membership of the committees which drafted the three *Projets* Cambacérès and the *Projet* Jacqueminot, note 17 *supra*, and notes 200, 294 *infra*.

37. See 1 Fenet, *supra* note 17, at xxxvi.

38. Tit. II, art. 19, provided: "The civil laws shall be revised and amended by the legislatures; and a general Code of laws, simple, clear and appropriate to the Constitution, shall be prepared." Decree of Aug. 16, 1790, tit. II, art. 19, [1790] Duv., *supra* note 23, vol. 1, at 312-13.

39. Decree of Sept. 3-14, 1792, tit. I, [1791] Duv., *supra* note 23, vol. 3, at 241.

40. It has been stated that the feudal regime survived in the following institutions: 1. servitude (*servage*) because the Edict of 1779 abolished it only with regard to the properties of the Crown; for properties of the feudal lords, it had only been attenuated; 2. seigniorial justices (*justices seigneuriales*) whose jurisdiction, though reduced and subordinated to the royal courts, nevertheless still operated; 3. seigniorial rights and taxes such as confiscations, passage, and market rights; 4. the system of feudal tenures of land which imposed personal duties and obligations such as homage, as well as periodical

During the night of August 4, 1789, the historic decree abolishing feudalism was approved. Article I provided:

The National Assembly destroys the feudal regime in its entirety, and decrees that in regard to rights and obligations, both feudal and those relating to ground rents, those derived from mortmain real or personal and personal servitude, and those which represent them, are abolished without indemnity, and all other rights declared redeemable; and the price and manner of redemption shall be set by the National Assembly. Any other rights not suppressed by the present decree shall remain in force until duly extinguished.⁴¹

In addition, the decree abolished without indemnity seignorial justices and tithes,⁴² it also established that all perpetual rents, whether in kind or in cash, whatever their origin, and irrespective of the person or corporation to whom owed, would be redeemable.⁴³ Privileges of a pecuniary or other substantial nature in regard to subsidies were forever abolished,⁴⁴ and it was declared that all citizens, without distinction of birth, were eligible for any office or dignity whether ecclesiastical, civil or military, and that no useful profession could be deemed degrading.⁴⁵

Less than a year later, the decree of March 15-28, 1790, abolished other feudal privileges.⁴⁶ Its preamble explained that the National Assembly approved the decree, having taken into

charges, generally annual, either in cash or in kind to be paid by the tenant (*tenancier*). See Esmein, *supra* note 29, at 58-59.

41. Decree of Aug. 4, 6, 7, 8 and 11, 1789, art. 1, [1789] Duv., *supra* note 23, vol. 1, at 33. It has been said that the intentions were excellent, but that the law was imprudent. See Esmein, *supra* note 29, at 66. Esmein indicated that the Constituent Assembly immediately set itself to the task of determining the conditions of this immense liquidation. On August 12, it appointed a Committee on Feudal Rights presided over by Goupil and whose most influential member was Merlin (from Douai), assisted by Tronchet, Salmon, and Rewbell. See Esmein, *supra* note 29, at 66. The decree also suppressed exclusive rights on pigeon houses and rabbit hutches, eliminated the exclusive right to hunt in areas formerly reserved or interdicted, and gave every one the right to take any kind of game on his property in accordance with police regulations. It provided, however, that the personal pleasures of the King would be maintained in this area, when compatible with the respect due to both property and freedom. Decree of Aug. 4, 6, 7, 8 and 11, 1789, arts. 2 & 3, [1789] Duv., *supra* note 23, vol. 1, at 33-34.

42. Decree of Aug. 4, 6, 7, 8 and 11, 1789, art. 4, [1789] Duv., *supra* note 23, vol. 1, at 34.

43. *Id.* art. 6.

44. *Id.* art. 9.

45. *Id.* art. 11.

46. Decree of Mar. 15-28, 1790, [1790] Duv., *supra* note 23, vol. 1, at 114.

consideration that the feudal regime had been abolished in its entirety. Feudal rights and obligations had been abolished without indemnity and with them those relating to perpetual leases, as well as those depending on or representing them, whether of mortmain, personal or real, or of personal servitude. At the same time, all other rights were maintained until extinguished; however, persons bound were permitted to free themselves of encumbrances. It was also declared that a special law would specify the effects of the abolition of the feudal system and distinguish between those rights which had been abolished and those considered redeemable.⁴⁷

The decree comprised sixty-one provisions distributed among three separate headings, namely: I. Of the general effects concerning the destruction of the feudal regime; II. Of the seignorial rights which are suppressed without indemnity; and III. Of the seignorial rights which are redeemable. The following provisions, among others, are of interest:

All honorific distinctions, superiority and power resulting from the feudal regime, are abolished; . . . rights in rem subsisting until redemption are completely assimilated to simple rents or real estate encumbrances.⁴⁸ Faith and homage, and any other service of a purely personal nature to which vassals who are tenants have been subjected, are abolished.⁴⁹

All privileges, all feudalism and nobility of property having been destroyed, the rights of primogeniture and masculinity in regard to noble feuds, domains and allodial lands, and partitions designated by reason of the quality of persons, are abolished. Consequently, all successions, both direct and collateral, of personal or real property, to be opened on and after the day of publication of the present decree, shall be adjudicated

47. *Id.* The principle that the Committee on Feudal Rights established, and after it the Constituent Assembly, was the distinction between "contractual feudality" (*féodalité contractante*), and "dominant" or "seignorial feudality" (*féodalité dominante*), propounded by Merlin in the report which served as the basis for the decree of March 15-28, 1790, the fundamental statute of the Assembly on this subject. "Contractual feudality" meant the feudal rights resulting from a free agreement or from a grant of land subject to redemption. "Seignorial feudality," on the contrary, comprised the duties and obligations which the feudal lords had imposed by force upon a group of subjects, thus frequently usurping the State's rights. "Seignorial feudality" was to be suppressed without indemnity. See Esmein, *supra* note 29, at 66-67.

48. Decree of Mar. 15-28, 1790, tit. I, art. 1, [1790] Duv., *supra* note 23, vol. 1, at 115.

49. *Id.* tit. I, art. 2.

according to the laws, statutes and customs governing partitions among all citizens, irrespective of the former noble quality of either persons or property; all laws and customs to the contrary, are abolished.⁵⁰

The decree of November 22 - December 1, 1790,⁵¹ relating to national domains, already reflected a new trend. It comprised a number of provisions which were to influence civil law codification. The decree was based on the following considerations:

1. That the public domain had represented for centuries the principal and almost the sole source of national wealth; that it had sufficed for a long time to provide for the expenses of government; that it had been subjected from the beginning to abusive depredations and poor management, and such precious domain on which the prosperity of the nation had rested would have been ruined if its continued losses had not been restored in various ways, particularly through the merger of individual assets owned by the princes who had successively occupied the throne;⁵²

2. That the public domain in its entirety, together with its accretions, belonged to the nation; that such ownership was the most perfect which could be conceived because no superior authority existed which could either modify or restrict it; that the power to alienate, an essential attribute of proprietary rights, was likewise vested in the nation; and that if, in the specific circumstances, the nation had wished to suspend for some time the exercise of that power, since such suspension could only have as its basis the general will, from the moment in which the nation, legally represented, expressed a contrary will, said suspension was terminated;⁵³

50. Decree of Mar. 15-28, 1790, tit. I, art. 11, [1790] Duv., *supra* note 23, vol. 1, at 115. It has been said that even though the legislation of the Constituent Assembly on feudalism was both wise and equitable, it was at the same time too complicated, and in part artificial. In addition, it did not respond to the impatience of public opinion, and the imprudent behavior of some members of the nobility increased that impatience. Consequently, that legislation did not last long, and the Legislative Assembly drastically changed it by the Decree of June 18-July 6, 1792, [1792] Duv., *supra* note 23, vol. 4, at 217. Although it did not repudiate the distinction between "contractual" and "seigniorial" feudality, it required for the latter the production of the original title of enfeoffment. This, in fact, amounted to the suppression of all feudal rights, "seigniorial" or not, because of the difficulty of producing such title. See Esmein, *supra* note 29, at 71, 73.

51. Decree of Nov. 22-Dec. 1, 1790, [1790] Duv., *supra* note 23, vol. 2, at 30.

52. *Id.* Preamble, no. 1.

53. *Id.* Preamble, no. 2.

3. That the yield from the public domain was insufficient for the needs of the nation in order to fulfill its initial purpose; that the principle of its inalienable character had lost its justification, and in addition, would be harmful to the public interest since immovable property, entrusted to a general management, becomes affected by a sort of sterility whereas in the hands of active and vigilant owners such property is fertilized, it multiplies produce, it stimulates circulation, it furnishes nourishment to industry, and it enriches the nation.⁵⁴

The decree contained a number of provisions dealing with the form and conditions for the sale of the national domain, as well as others of various kinds. The following may serve as illustrations:

By national domain properly is meant all immovable property and all rights, real or personal, belonging to the nation whether it has present possession and enjoyment thereof or whether it has only the right to recover possession by way of redemption, reversion, or any other means.⁵⁵

Public roads, streets and squares of cities, rivers, riverbanks, sea dunes, harbors, bays and, generally, all parts of the national territory which are not susceptible of private ownership, are deemed to pertain to the public domain.⁵⁶

All goods and effects, movable or immovable which become vacant, that is, without an owner; the property of persons who die without legitimate heirs, or successions which are abandoned, pertain to the nation.⁵⁷

The walls and fortifications of cities under the nation's care and useful to her defense, are part of the national domain; likewise, old walls, fosses, and ramparts of cities which are not fortresses; but the cities and towns having present possession thereof shall retain it provided they have title or can demonstrate that possession dates back more than ten years.⁵⁸

54. *Id.* Preamble, no. 3.

55. *Id.* sec. I, art. 1.

56. *Id.* sec. I, art. 2.

57. *Id.* sec. I, art. 3.

58. *Id.* sec. I, art. 5. It is not difficult to note that some of the provisions reproduced in the text, particularly sec. I, arts. 2, 3 and 5, show traces of the classification of property adopted in Justinian's Institutes: e.g., things of common use, public things, and sacred things.

The Declaration of the Rights of Man and Citizen⁵⁹ stated in its preamble that the representatives of the French people, constituted as a National Assembly, considered ignorance, forgetfulness and contempt of the rights of man as the only causes of public unhappiness and government corruption. The representatives, therefore, resolved to state by solemn declaration the natural, inalienable, and sacred rights of man, so that members of society would never forget their rights and duties.⁶⁰ After due invocation of the Supreme Being, the National Assembly recognized and declared the following rights of man and citizen:

Art. 1. Men are born and remain free and equal in rights. Social distinctions may only be based on the common good.

Art. 2. The purpose of all political associations is the maintenance of the natural and imprescriptible rights of man. These rights are liberty, ownership, security and resistance to oppression.

Art. 4. Liberty consists in being able to do everything that does not harm another: thus, the exercise of the natural rights of each man has no limits other than those which assure other members of society the enjoyment of the same rights. Such limits may only be determined by law.

Art. 17. Because ownership is an inviolable and sacred right, no one may be deprived of it except when public necessity, legally demonstrated, evidently so requires, and on condition of a just and prior compensation.⁶¹

The Constitution of September 3-14, 1791, declared in its preamble:

The National Assembly, desiring to establish the French Constitution on the principles which it has come to recognize, decrees the irrevocable abolition of institutions which injure the liberty and equality of rights. There shall be no nobility, nor hereditary distinctions, nor distinction of orders, nor feudal regime, nor patrimonial justices, nor any of the titles, denominations and prerogatives deriving therefrom, nor knights'

59. The Declaration was inserted at the beginning of the Constitution of Sept. 3-14, 1791, [1791] Duv., *supra* note 23, vol. 3, at 239-55.

60. *Id.* Preamble, at 240.

61. *Id.*

orders, nor any of the corporations or decorations which required proof of nobility or presupposed distinction of birth, nor any other superiority except that of public officers in the exercise of their functions.⁶²

Title I of the Constitution expressed some of the practical consequences of the new principles. The following will serve as an illustration:

The Constitution guarantees as natural and civil rights: 1. That all citizens be admitted to the same jobs and employment with no other requirements than virtue and talent; 2. That all taxes be levied among the citizens equally in proportion to their capacity; 3. That the same offenses be punished with the same penalties, without distinction among persons.⁶³

By decree of September 28, 1791, the National Assembly declared that any individual would become free upon entering France, and that all men, irrespective of color, enjoyed in France all the rights of a citizen, provided they satisfied the requirements set forth in the Constitution.⁶⁴

The decree of September 28-October 6, 1791, on rural property and usage and rural police (the Rural Code) provided:

The territory of France, in all its extension, is as free as the people who inhabit it: thus, no territorial property may be subject, vis-à-vis individuals, to the rents and charges the stipulation of which had not been prohibited by law; and, vis-à-vis the nation, only to the taxes established by the Legislative body and to the sacrifices that the common good may require, on condition of just and prior compensation.⁶⁵

This decree comprised ninety-two provisions distributed into two main headings: Title I. Of rural property and usage; Section I. Of general principles concerning national ownership; Section II. Of leases relating to rural property; Section III. Of various kinds of rural property; Section IV. Of herds, fences, and free transit and pastures; Section V. Of crops; Section VI. Of roads; Title II. Of rural police.

62. *Id.* at 240-41. This, it has been remarked, implied the suppression of nobility not only in signifying privileges for noblemen, but also in representing a different civil status recognized by law. See Esmein, *supra* note 29, at 183.

63. Const. of Sept. 3-14, 1791, [1791], Duv., *supra* note 23, vol. 3, at 41.

64. Decree of Sept. 28-Oct. 16, 1791, [1791] Duv., *supra* note 23, vol. 3 at 398.

65. Decree of Sept. 28-Oct. 6, 1791, tit. I, sec. I, art. 1, [1791] Duv., *supra* note 23, vol. 3, at 376.

By an earlier decree of March 2, 1791, the National Assembly had abolished the ancient guilds and had proclaimed the freedom of work, commerce and industry. Article 7 provided that, beginning the following April 1, it would be lawful for every person to undertake any business, practice, profession, art or craft he deemed convenient, with only the obligation of obtaining a license.⁶⁶

The decree of October 3, 1789, had already abolished another remnant of the *Ancien Régime*, namely the rule taken from the canon law that forbade loans with interest in most provinces. The decree provided that "all individuals, associations, communities or corporations may in the future lend money at a fixed term with a stipulation of interest, according to the rates set forth by law, without intending here to innovate in regard to commercial usage."⁶⁷

Additionally, the Constitution recognized marriage as a civil contract only, and stipulated the manner of recordation and proof of births, marriages and deaths.⁶⁸ The directive was carried out by the Legislative Assembly; the two statutes it enacted to that effect were of great importance.⁶⁹

One of the decrees of September 20-25, 1792, determined the manner of proving the civil status of citizens. It comprised 103 provisions distributed among six headings: I. Of the public officers who shall keep the registries of births, marriages and deaths; II. Of the keeping in deposit of those registries; III. Births; IV. Marriages (further subdivided into five sections addressing the qualities and conditions required to contract marriage, publications, oppositions, intrinsic formalities of marriage

66. Decree of Mar. 2-17, 1791, art. 7, [1791] Duv., *supra* note 23, vol. 2, at 231. Only a few professions were to be regulated, either because of their importance, or because neither private interests nor public opinion sufficed to supervise their operation. Pharmacy and manufacture of silver and gold articles fell into this category. See Esmein, *supra* note 29, at 185.

67. Decree of Oct. 3-12, 1789, [1789] Duv., *supra* note 23, vol. 1, at 44-45. See note 131 *infra* and accompanying text.

68. Const. of Sept. 3-14, 1791, [1791] Duv., *supra* note 23, vol. 3, at 242.

69. Although there was no statute enacted to deal exclusively with marriage, the two decrees of September 20-25, 1792, regulated several aspects of marriage. Decrees of Sept. 20-25, 1792, [1792] Duv., *supra* note 23, vol. 4, at 477-88. It has been said that, like the canon law from which some rules had been taken, the new legislation encouraged and facilitated the celebration of marriages in allowing men aged 15 and women at 13 to marry, and authorizing them to do so freely upon reaching majority without the permission of anyone. See Esmein, *supra* note 29, at 224-25.

and divorce in relation to the functions of civil registry); V. Deaths; and VI. General provisions. Forms of certificates were appended to the decree.⁷⁰

The decree imposed upon municipalities the responsibility to keep the certificates proving births, marriages and deaths.⁷¹ The general board of each commune had to appoint, according to size and population, one or more persons to take charge of these functions.⁷² Each municipality was required to maintain separate registries for births,⁷³ marriages, and deaths.⁷⁴

The decree of September 20-25, 1792, which set forth the grounds, procedure and effects of divorce, was prefaced by some considerations in which the National Assembly expressed the importance of granting the right of divorce to Frenchmen. Above all, that right was a consequence of individual liberty. An indissoluble bond would represent the loss of that liberty. And as a practical matter, divorce legislation was needed because several

70. Decree of Sept. 20-25, 1792 (civil status), [1792] Duv., *supra* note 23, vol. 4, at 482-88. Civil status and the authentic proof of facts and acts of fundamental interest affecting the capacity of persons and family rights, namely, births, marriages and deaths, existed of course under the *Ancien Régime*, but the registries were in the care of priests of parishes and churches. The government had faced that situation when in the sixteenth century it decided to regulate the system and give probative force to the certificates issued by priests. By reason of the close connection existing between church and state, the keeping of the respective registries was left in the hands of the clergy. Later on, however, some problems arose when Protestantism was prohibited and pastors persecuted in accordance with the Edict of Fontainebleau. Protestants did not have any authorized persons to authenticate their acts concerning civil status. See Esmein, *supra* note 29, at 223.

71. Decree of Sept. 20-25, 1792 (civil status), tit. I, art. 1, [1792] Duv., *supra* note 23, vol. 4, at 482.

72. *Id.* art. 2.

73. *Id.* tit. II, art. 1. The Decree of Aug. 23, 1794 (6 fructidor, year II), art. 1, [1794] Duv., *supra* note 23, vol. 7, at 252, provided that no citizen could use names or surnames other than those indicated in the birth certificate, and imposed a duty to use them. The decree also prohibited the addition of more names, unless they had already served to identify members of the same family, but without alluding to feudal or noble qualities. Art. 2, [1794] Duv., *supra* note 23, vol. 7, at 252. The decree imposed a penalty of imprisonment for six months and a fine of one-fourth of their income to violators, and recidivists were punished with civil degradation. Art. 3, [1794] Duv., *supra* note 23, vol. 7, at 252-53.

74. Tit. II, art. 1, [1792] Duv., *supra* note 23, vol. 4, at 382. See notes 285-86 *infra* and accompanying text. The new government promised to be thorough. "The three registries shall be kept in duplicate, using stamped paper furnished by each district and sent to the municipalities within the first fifteen days of December in every year; they shall be numbered from beginning to end and signed on each page, all of this without any charge, by the president of the district administration, or, in his default, by one member of the board, following the order set in the respective list." *Id.* tit. II, art. 2.

spouses had already taken advantage of the constitutional provision according to which marriage was deemed no more than a civil contract.

The decree comprised forty-seven articles distributed under four headings: I. Grounds for divorce; II. Modes of divorce: mutual consent, petition based on simple reason of incompatibility, petition based on a specific ground; III. Effects of divorce in relation to the spouses; and IV. Effects of divorce in relation to the children.

The following provisions will give an idea of the system adopted:

Marriage is dissolved by divorce.⁷⁵ Divorce is obtained by the mutual consent of the spouses.⁷⁶ One of the spouses may obtain a divorce by a mere allegation of incompatibility of humor or character.⁷⁷ Each one of the spouses may likewise obtain a divorce on specific grounds, namely: 1. Dementia, insanity or madness of one of the spouses; 2. Condemnation of one of the spouses to penalties for serious or infamous offenses; 3. Crimes, cruelty, or grave insults of one spouse to the other; 4. Notorious disorderly conduct; 5. Desertion of the wife by the husband, or of the husband by the wife, for at least two years; 6. Absence of one of the spouses, without news, for at least five years; 7. Migration in cases contemplated by law, especially by decree of April 8, 1792.⁷⁸

One of the effects of divorce was to restore to the former spouses complete independence, including the power to contract a new marriage.⁷⁹ In case of divorce by mutual consent, or by petition of one of the spouses based on simple incompatibility of humor or character, without any other indication as to motives, children less than seven years old would be entrusted to the mother, and the older ones to the father, but the former spouses could make any arrangements they deemed convenient.⁸⁰ Children would retain the right to inherit from their divorced par-

75. Decree of Sept. 20-25, 1792 (on divorce), sec. I, art. 1, [1792] Duv., *supra* note 23, vol. 4, at 477.

76. *Id.* sec. I, art. 2.

77. *Id.* sec. I, art. 3.

78. *Id.* sec. I, art. 4.

79. *Id.* sec. III, art. 1, at 480. As a strong reaction against the past, the decree abolished mere separation.

80. *Id.* sec. IV, art. 1, at 481.

ents, and in case of other children from subsequent marriages, all of them would share in equal portions.⁸¹

Shortly before enacting the decrees on civil status and divorce, the Legislative Assembly abolished perpetual paternal power when it decreed on August 28, 1792, that only minors would be subjected to paternal power.⁸² Also, the Assembly favored an institution which appealed especially to the men of that period, namely adoption.⁸³ The decree of January 18, 1792, provided that the legislative committee of the Assembly should include a law of adoption in its general plan of civil laws.⁸⁴

The status of children born out of wedlock also concerned the lawmakers. Under the old customary law, an illegitimate child (*bâtard*) was legally an individual without a family, although it was admitted that either the father or the mother could recognize him in a *de facto* manner. Investigation of paternity was allowed in order to force the father to help both the child and the mother. Such *de facto* recognition did not pose any legal danger since it did not alter the juridical structure of families. Nonetheless, the law of illegitimacy offended the most elementary justice by penalizing innocent persons. The decree of 12 brumaire of the year II⁸⁵ (November 2, 1793), changed the

81. *Id.* sec. IV, art. 7, at 481-82.

82. Decree of Aug. 28, 1792, [1792] Duv., *supra* note 23, vol. 4, at 375-76. This, like other drastic aspects of revolutionary legislation, would be rejected later.

83. See Esmein, *supra* note 29, at 230. He also stated that the value of this institution, to begin with, derived from the important role it had under the Roman Republic, which men of the Revolution, however, did not understand very well. According to Sagnac, the Conventionists thought that adoption should be a useful institution for a republican government, and it was for this reason that it was established. All were in agreement in making it an instrument for the division of estates, but the members of the Committee on Legislation did not agree with regard to the provisions to be enacted. On June 4, 1793, the Committee submitted to the Convention, through Azéma, a draft which contained the following principles: only a person with no children could adopt; he had a right to adopt a person of age, provided there was a fifteen-year difference between them; and the person to be adopted had to come from a poor family, such as workers, artisans, or others from indigent classes. Adoption was conceived as a means of distributing among the poor the wealth of the rich who had no children and wished to have them. Two months later, when the Committee submitted to the Convention a draft of a civil code, the principles just enumerated had been limited in accordance with the ideas of Berlier and Oudot. See Sagnac, *supra* note 24, at 315.

84. Decree of Jan. 18, 1792, [1792] Duv., *supra* note 23, vol. 4, at 48.

85. The Decree of Nov. 24, 1793 (14 frimaire, year II), [1793] Duv., *supra* note 23, vol. 6, at 294-301 dealt with the new era, the commencement and division of the year, and the names of the days and months. Its more important provisions are as follows: The era of the French is reckoned from the foundation of the Republic, which took place on

situation drastically, some said excessively.⁸⁶ It granted legal filiation to illegitimate children, and provided in article 2 that "[t]heir inheritance rights are the same as those of the other children." To be allowed the exercise of such rights in the succession of the deceased father, an illegitimate child had to prove filiation by possession of status.⁸⁷ Such proof could only result from the submission of public or private documents emanating from the father, or by showing continuous care for support and education on the basis of paternity.⁸⁸

The old succession law, like the *Ancien Régime*, was aristocratic. The Revolution first abolished those privileges tending to concentrate large fortunes in a few families. Inequality of those rights precluded the division of estates not only among the nobility, but also among the high bourgeoisie. To that end, as late as the eighteenth century, the devices used were the right of primogeniture (*droit d'aînesse*), the exclusion of females from successions, either legally or contractually, and substitutions. Such inequalities were generally linked to the juridical structure of feudalism which, once abolished, rendered completely useless some of the principles and rules applicable to successions.⁸⁹ The

September 22, 1792, of the vulgar era. *Id.* art. 1, at 294. The vulgar era is abolished for civil usage. *Id.* art. 2. The first year of the French Republic commenced on the midnight of September 22 and ended on the midnight which divided the 21 and 22 of September, 1793. *Id.* art. 4. The year is divided into twelve equal months of thirty days each; after the twelve months follow five days to complete the ordinary year; these five days do not pertain to any month. *Id.* art. 7. Each month is divided into three equal parts, of ten days each, called *decades*. *Id.* art. 8, at 295. The names of the days of a decade are: *primidi, duodi, tridi, quartidi, quintidi, sextidi, septidi, octidi, nonidi, decadi*. The names of the months are, for the fall: *vendémiaire, brumaire, frimaire*; for the winter: *nivose, pluviôse, ventose*; for the spring: *germinal, floreal, prairial*; for the summer: *mesidor, thermidor, fructidor*. The last five days are called *sans-culottides*. *Id.* art. 9. The Republican calendar was in force a little more than twelve years. On January 1, 1806, France returned to the Gregorian calendar.

86. See Esmein, *supra* note 29, at 236-37.

87. Since the *Code civil* (First *Projet Cambacérès* of 1793), after being decreed, had been suspended, and since it was necessary to regulate without delay the status of illegitimate children whose parents had died, the provisions in the appendix were detached from the Code and, after some changes, became the Decree of 12 brumaire, year II (Nov. 2, 1793). Sagnac, *supra* note 24, at 321.

88. Decree of Nov. 2, 1793 (12 brumaire, year II) art. 8, [1793] Duv., *supra* note 23, vol. 6, at 272. Not all of the consequences of the accepted principles were recognized. The provisions of the decree applied only to *simple* illegitimate children (*enfants naturels simples*), that is, those born from persons who could have contracted a marriage, not those born of adulterous unions. Esmein, *supra* note 29, at 238.

89. *Id.* at 218-19.

decree of April 8-15, 1791,⁹⁰ governed the partition of successions *ab intestato*. Among other things, it provided:

All inequalities resulting heretofore among heirs *ab intestato* by reason of the qualities of being the eldest son [*ainé*] or younger son [*puîné*], or the distinction between the sexes, or customary law exclusions, whether in direct or collateral line, are abolished. All heirs of the same degree shall inherit the property that the law grants to them in equal parts; partition shall also be made in equal parts in each branch when representation is admitted.⁹¹

The preceding article repealed provisions from customary law or statutes excluding daughters or their descendants from the right to inherit in concurrence with males or their descendants. Also repealed were provisions from customary law which established distinctions among children from different marriages in regard to the partition of property, both movable or immovable, from the same father or the same mother, or from the same grandfather or the same grandmother.⁹²

Another provision of interest dealt with representation. "Representation shall take place *ad infinitum* in the direct descending line, in all customs, namely: in those which reject it generally, starting with publication of the present decree, and in those which reject it only in regard to persons and property heretofore considered noble, starting with the day of publication of the decree of March 15, 1790."⁹³

With respect to foreigners, the decree provided that even if residing outside France, they were capable of receiving successions from their relatives, including French citizens, and of receiving and disposing by all other means authorized by law.⁹⁴

The decree of November 14-15, 1792, provided that all substitutions were henceforth prohibited;⁹⁵ that substitutions made prior to the publication of this decree, by means of any acts whatsoever and not yet open at the time of publication, remained abolished and were without any effect;⁹⁶ and that substi-

90. Decree of Apr. 8-15, 1791, [1791] Duv., *supra* note 23, vol. 2, at 287-88.

91. *Id.* art. 1, sec. 1, at 287.

92. *Id.* art. 1, sec. 2 & 3.

93. *Id.* art. 2.

94. *Id.* art. 3, at 287-88.

95. Decree of Nov. 14-15, 1792, art. 1, [1792] Duv., *supra* note 23, vol. 5, at 44.

tutions open at the time of said publication would only have effect in favor of those who had already received substituted property or the right to claim it.⁹⁷

A decree of March 7-11, 1793, stated that the National Convention had resolved that the power to dispose of property, whether *mortis causa*, by an *inter vivos* act, or by contractual donation in the direct line, was abolished; that, consequently, all descendants would have the same rights in the partition of property of their ascendants.⁹⁸ This resolution, however, like the other more radical ones during the revolutionary period, such as the suppression of paternal power and the establishment of unilateral divorce, was later rejected.⁹⁹

In the law of contracts, except in those situations relating to the feudal system, such as the preemptive right to buy ancestral estates (*retrait lignager*)¹⁰⁰ and perpetual leases, the legislation enacted by the Revolution was relatively limited in volume. In addition to the decree of October 3, 1789, on loans with interest,¹⁰¹ the more significant were the following:

Decrees of May 3 and December 18, 1790, concerning the manner and rate of redemption of joint and several perpetual leases;¹⁰² decree of August 20, 1792, which abolished joint and several liability in the reimbursement of perpetual leases that until then had been irredeemable;¹⁰³ decree of 9 frimaire of the year II (November 29, 1793), dealing with the right of all joint debtors of feudal rights or perpetual leases against their codebt-

96. *Id.* art. 2, at 45.

97. *Id.* art. 3.

98. Decree of Mar. 7-11, 1793, [1793] Duv., *supra* note 23, vol. 5, at 185. Testaments in particular were disapproved of by those who subscribed to the view of some ancient jurists. This doctrine held that, in contrast with donations *inter vivos*, which originated in natural law, testaments merely resulted from the civil law as artificial devices which allowed a disposition of property by someone who no longer existed. Esmein, *supra* note 29, at 220.

99. C. civ. arts. 371-387 (*De la puissance paternelle*); 229-233 (*Du divorce*); 756-766 (*Des droits des enfants naturels*).

100. According to Pothier, it is a right granted to the relatives of the seller of an hereditament which has been sold to a stranger. That they may be buyers in his place, they may force him to desist in their favor by means of a reimbursement and compensation of the price and anything else that the purchase cost him. See R. Pothier, *Traité des retraits*, First Part, no. 3 (1821).

101. See note 67 *supra* and accompanying text.

102. Decree of May 3-9, 1790, [1790] Duv., *supra* note 23, vol. 1, at 163-68. Decree of Dec. 18-29, 1790, [1790] Duv., *supra* note 23, vol. 2, at 105-11.

103. Decree of Aug. 20, 1792, [1792] Duv., *supra* note 23, vol. 4, at 341-45.

ors to obtain reimbursement of sums paid on their behalf;¹⁰⁴ decree of December 18, 1790, which provided that leases, perpetual or not, could be entered into in the future for ninety-nine years or less;¹⁰⁵ decree of September 12, 1790, concerning restitution of deposits in kind; decree of 3 fructidor of the year III (August 20, 1795), which provided that depositaries who had disposed of deposits were obliged to return them in the same kind of effects and of the same value;¹⁰⁶ decrees of 11 ventose and 16 fructidor of the year II (March 1 and September 2, 1794), relating to powers of attorney granted by defenders of the fatherland, sanitation officers, prisoners of war, and army employees, when successions are received during their absence.¹⁰⁷

The enactments of the Revolution described in the preceding pages were of decisive importance in the following areas: civil registry, marriage, divorce, ownership, property, successions and contracts. The influence exercised by those enactments not only prepared the ground for codifying the civil law; but beginning with the *Plan Durand-Maillane* and the Third Cambacérès *Projet*, the enactments were substantially incorporated (save for the more radical aspects) in the *projets* and in the Code of 1804.

It is of interest to note that the revolutionary legislation resorted to ancient sources of inspiration such as Justinian's Institutes, as well as some royal edicts and doctrinal texts from commentators of the *Ancien Régime*, but above all, it was permeated by the libertarian and egalitarian spirit of the Revolution.

THE PROJETS OF THE CIVIL CODE

1. *Projet d'Olivier* (1789)

A "New Civil Code Proposed to the French Nation and Submitted to the National Assembly"¹⁰⁸ was sent to the Assem-

104. Decree of Nov. 29-Dec. 1, 1793 (9-11 frimaire, year II), [1793] Duv., *supra* note 23, vol. 6, at 308.

105. Decree of Dec. 18-29, 1790, [1790] Duv., *supra* note 23, vol. 2, at 105-11.

106. Decree of Sept. 12-18, 1790, [1790] Duv., *supra* note 23, vol. 1, at 367. Decree of Aug. 20, 1795 (3 fructidor, year III), [1795] Duv., *supra* note 23, vol. 8, at 222-23.

107. Decree of Mar. 1-5, 1794 (11-15 ventose, year II), [1794] Duv., *supra* note 23, vol. 7 at 88. Decree of Sept. 2, 1794 (16 fructidor, year II), [1794] Duv., *supra* note 23, vol. 7, at 265.

108. *Nouveau CODE CIVIL proposé à la Nation Française et soumis à l'Assemblée Nationale par M. d'Olivier*, 1789 [hereinafter cited as *Projet d'Olivier* (1789)], found in *Suppléments au procès-verbal de l'Assemblée Nationale. Mémoires sur la législation*, AD XVIII c. 165 (Document no. 1), National Archives, Paris [hereinafter cited as *Suppléments*].

équité.⁴⁶⁶

Celui qui cause un dommage est tenu à le réparer, quel que soit le fait qui y donne lieu.⁴⁶⁷

faute duquel il est arrivé, à le réparer, encore que la faute ne soit point de la nature de celles qui exposent à des peines de police simple ou correctionnelle.⁴⁶⁸

Code Civil des Français:

Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer.⁴⁶⁹

The preceding illustrations (and many others which could be offered) clearly show the long gestation period of the Civil Code of 1804, from the *Projet* d'Olivier of 1789, through five or six intermediate *projets*.

THE CODIFICATION OF THE CIVIL LAW IN LOUISIANA

The external history of the Louisiana legal system, especially that of the civil law, has often been told,⁴⁷⁰ and there is not much need to offer another version. A brief outline will be given, however, mostly for the purpose of presenting, at a later stage, the relationship between the Louisiana Civil Code presently in force and its various components.

The legal history of Louisiana may be divided into the following successive periods:

1. French period (1699-1762);
2. Spanish period (1769-1800);

466. Third *Projet* Cambacérès, *supra* note 318, bk. III, tit. I, art. 738. "There are acts which obligate without agreement and by equity alone."

467. *Id.* at art. 745. "He who causes damage is obligated to repair it, whatever the act which originated it."

468. *Projet* of the Year VIII, *supra* note 379, bk. III, tit. III, art. XVI. "Every act whatever of man which causes damage to another obligates him by whose fault it happened to repair it, even though the fault is not in the nature of those deserving penalties, either police or correctional ones."

469. C. civ. art. 1382 (1804). "Every act whatever of man which causes damage to another obligates him by whose fault it happened to repair it."

470. Bibliographies are found in R. Slovenko, *Civil Code of Louisiana and Ancillaries* 851-53 (1981); J. Dainow, *Civil Code of Louisiana xxxv-xl* (2d ed. 1960).

3. Transitional period (November 30, 1803-December 20, 1803);
4. Territorial period (1803-1812);
5. Statehood period (1812-present).

1. French Period (1699-1762)

From the point of view of the legal history of private law,⁴⁷¹ this period begins on September 14, 1712, with the "King's Letters Patent which permit *Sieur Crozat*, the King's Secretary, to undertake exclusive trade in all lands possessed by the King and bound by New Mexico & others, under the government of Louisiana."⁴⁷² Article VII of this document provided that, "Our Edicts, Ordinances & Customs and the Usages of the Provostry and Viscounty of Paris shall be observed as Laws & Customs in the said Region of Louisiana."⁴⁷³

Almost five years later, in August, 1717, the "Letters Patent in the form of an Edict providing for the establishment of a Trade Company under the name of Company of the West,"⁴⁷⁴ both confirmed and broadened the legal basis set forth in the Letters Patent of September 14, 1712, as follows:

Art. XIII. The said Company may, as Lords High-Justices of the Region of its concession, appoint Judges & Officials for everything that may be necessary or found to be pertinent, and depose and discharge them as it may seem advisable, said Judges and Officials to take cognizance of all affairs of Justice, Police & trade, both civil and criminal. . . .

Art. XV. The Judges appointed in all of the said places, shall judge according to the Laws & Ordinances of the Kingdom, & conform themselves to the Custom of the Provostry and Viscounty of Paris, following which the Inhabitants may contract, without being able to introduce any other Custom, in

471. Robert Cavalier, *Sieur de la Salle*, took possession of Louisiana in the name of Louis XIV in 1682. The first French settlement was at Fort Maurepas, near Biloxi, in 1699. See 1 C. Gayarré, *History of Louisiana* 25-26 (2d ed. 1879) [hereinafter cited as *Gayarré*].

472. *Lettres Patentes du Roy*, qui permet au *Sieur Crozat* Secrétaire du Roy, de fair seul le Commerce dans toutes les Terres possédées par le Roy, & bornées par le nouveau Mexique & autres, sous le nom de Gouvernement de la Louisiane. Donné à Fontainebleau le 14 Septembre 1712. The monopoly granted was for fifteen years. *Id.* at art. II.

473. *Id.* art. VII.

474. *Lettres Patentes en forme d'Edit* portant établissement d'une Compagnie de Commerce sous le nom de Compagnie d'Occident. Donné à Paris au mois d'Août 1717.

order to prevent diversity.⁴⁷⁵

Louisiana returned to the status of a Royal Colony in 1732.⁴⁷⁶ The Ordinance of 1667 on civil procedure⁴⁷⁷ and the *Code noir* of 1724,⁴⁷⁸ were also observed in Louisiana.

2. Spanish Period (1769-1800)

As part of the "Family Compact," by the secret Treaty of Fontainebleau of November 3, 1762, France made cession to Spain "in full ownership and simply and without any exception to his Catholic Majesty and his successors in perpetuity of all the country known under the name of Louisiana, as well as New Orleans and the island on which this city is situated."⁴⁷⁹

Actual possession, however, was delayed until 1769.⁴⁸⁰ The Spanish period in Louisiana, from a legal standpoint,⁴⁸¹ begins with O'Reilly's proclamation of November 25, 1769, which provided:

For these reasons, and with a view to prevent hereafter evils of such magnitude, it is indispensable to abolish the said council, and to establish in their stead that form of political Government and administration of justice prescribed by our wise laws, and by which all the states of His Majesty in America have been maintained in the most perfect tranquility, content, and subordination. For these causes, in pursuance of the power which our Lord the King (whom God preserve) has been pleased to confide to us by his patent, issued at Aranjuez,

475. *Id.* arts. XIII & XV.

476. This return to colony status occurred after the financial failures suffered by John Law, head of the Company of the Indies. See Gayarré, *supra* note 471, at 221.

477. Ordonnance Civile pour la Réformation de la Justice, promulgated on April 20, 1667.

478. Le Code noir ou edit du Roi, servant de règlement pour le gouvernement de l'administration de la justice, police, discipline & le commerce des esclaves nègres, dans la province ou colonie de la Louisiane. Donné à Versailles au mois de mars 1724, published in Le Code noir ou recueil de réglemens (1767).

479. The original of this quotation is found in a document in which Charles III accepted or ratified the act of cession since the Marquis of Grimaldi, Special Ambassador to the King of France, had accepted it "only *sub spe rati*" (subject to ratification). Found in Bundle no. 2542, Archives of the Indies, Seville, Spain. See Batiza, *The Unity of Private Law in Louisiana Under the Spanish Rule*, 4 Inter-Am. L. Rev. 139 n.1 (1962).

480. The mission entrusted for that purpose to Antonio de Ulloa had failed as a result of the opposition of the French Louisiana population. See F. Martin, *The History of Louisiana*, From the Earliest Period 201 (3d ed. 1882).

481. Strictly speaking, however, the period begins with the Treaty of 3d November, 1762.

the 16th of April of the present year, to establish in the military police, and in the *administration of justice* and of his finances that form of government, dependence and subordination, which should accord with the good of his service and the happiness of his subjects in this colony: *We establish, in his royal name, a city council or cabildo, for the administration of Justice and preservation of order in this city, with the number of six perpetual regidores, conformably to the second law, title 10, book 5, of the Recopilacion de las Indias.* . . . And as the want of advocates in this country, and the little knowledge which his new subjects possess of the Spanish laws might render a strict observance of them difficult, and as every abuse is contrary to the intentions of His Majesty, *we have thought it useful, and even necessary to form an abstract or regulation drawn from the said laws, which may serve for instruction and elementary formulary in the administration of justice* and in the economical government of this city, until a more general knowledge of the Spanish language may enable every one, by the perusal of the aforesaid laws, to extend his information to every point thereof.⁴⁸²

Spanish sovereignty over Louisiana ended by the retrocession to the French Republic exacted by Napoleon, which was given legal sanction in the Treaty of St. Ildephonso signed on October 1, 1800.⁴⁸³

3. Transitional Period (Nov. 30, 1803—Dec. 20, 1803)

In his capacity as Colonial Prefect, and in the name of the French Republic, Pierre Clement de Laussat addressed a proclamation to the people of Louisiana on 6 germinal, year XI (March 27, 1803).⁴⁸⁴ After a preamble in which the unfor-

482. Translation in 2 La. L.J. 1 (1841) (emphasis added). The proclamation opened with the following words:

The prosecutions which have been had in consequence of the insurrection which has taken place in this colony, having fully demonstrated the part and influence which the council have taken in those proceedings, countenancing, contrary to duty, the most criminal actions, when their whole care should have been directed to the people in the fidelity and subordination which are due to the Sovereign. . . .

It had been strongly denied in Louisiana in the nineteenth century that O'Reilly had powers to establish the Spanish legal system. The discovery of an official copy of the royal order of April 16, 1769, in the Archives of the Indies, Seville, Spain, proved that denial to be without basis. See Batiza, *The Unity of Private Law in Louisiana under the Spanish Rule*, 4 Inter-Am. L. Rev. (1962).

483. See Gayarré, *supra* note 471, at 445.

484. Proclamation. Au nom de la Republique Française. Laussat, Prefet Colonial, aux Louisianais. A la Nouvelle Orleans, le 6 Germinal, An XI de la Republique Française.

tunate circumstances that had led to the cession of Louisiana to Spain were recalled, he referred to the intentions of the French government in regard to the colony just recovered:

To live in peace and friendship with all your neighbors, protect your commerce, encourage your culture, populate your deserts, welcome and favor work and industry, respect the property, mores and opinions, pay homage to Church [*Culte*], put probity in a place of honor, conserve the authority of the Laws and not reform them, save with measure and in the light of experience. . . .⁴⁸⁵

In harmony with the preceding purposes, even more so since the nature of his assignment had drastically changed as a result of the Louisiana Purchase, during his brief administration Laussat made only a few changes: he replaced the cabildo with a mayor, two adjuncts, and a municipal council⁴⁸⁶ and he reenacted the *Code noir*⁴⁸⁷ except for those provisions especially concerning the slave trade which were inconsistent with the Constitution of the United States.

4. Territorial Period (1803-1812)

Congress, on March 26, 1804, divided Louisiana into two territories, the lower portion of which was the Territory of Orleans. It gave a Legislative Council, acting jointly with the Governor, the authority to alter, modify, or repeal the laws then in force.

A number of statutes on civil matters were enacted prior to codification in 1808, among them the following: Act of May 20, 1806, establishing the age of majority at twenty-one years;⁴⁸⁸ Act of May 21, 1806, for the regulation of the rights and duties of apprentices and indented [sic] [*les engagés*] servants;⁴⁸⁹ Act of May 22, 1806, to establish a mode of promulgation both of the laws which may be enacted by Congress for the Territory of Orleans, and of those which may be enacted by the Legislature of this Territory;⁴⁹⁰ Act of May 26, 1806, to regulate leases;⁴⁹¹ Act

485. *Id.* (emphasis added).

486. 3 C. Gayarré, *History of Louisiana* 605 (1879).

487. Order dated 24 frimaire, year XII (Dec. 17, 1803).

488. 1806 La. Acts, ch. VII.

489. *Id.* ch. XI.

490. *Id.* ch. XII. This statute was not limited to civil law matters, but it had primary importance in that area. It provided, among other things, that acts of Congress and the Legislature would be printed in a double column in the two languages, as well as in the newspapers printed in English and French. *Id.* sec. 1.

491. *Id.* ch. XIV.

of March 9, 1807, to regulate the conditions and forms of the emancipation of slaves;⁴⁹² Act of April 6, 1807, concerning the celebration of marriages.⁴⁹³

On June 7, 1806, the following resolution was approved:

RESOLVED by the Legislative Council and House of Representatives of the Territory of Orleans, in General Assembly convened, That both branches of the Legislature shall appoint James Brown, and Moreau Lislet, lawyers, whose duty it shall be to compile and prepare, jointly, a Civil Code for the use of this territory.

Resolved, that the two jurisconsults shall make the civil law by which this territory is now governed, the ground work of said code. . . .⁴⁹⁴

Despite the terms of the resolution that the two commissioners were to act "jointly," the preparation of the *Digest* was the exclusive work of Moreau Lislet. In the report of February 13, 1823, submitted to the Senate and House of Representatives of the State of Louisiana by Livingston, Moreau Lislet and Derbigny, referring to the *Digest*, it was stated that: "Sufficient time was not given for an accurate examination of the existing Law in its various sources. No decisions had then been reported to throw light on their operation, and the unaided exertions of one person were not sufficient for the completion of the task."⁴⁹⁵

In contrast to the resolution of June 7, which referred to the compilation and preparation of a "Civil Code," the Act of March 31, 1808, almost two years later, promulgated not a Civil Code but a "*Digest of the Civil Laws now in force in the Territory of Orleans.*" Perhaps it was realized that the use of the word "code" would have been anachronistic in Louisiana at that time, since the civil law to be codified was that of Spain. Unlike France, Spain had not yet codified the civil law in the modern sense of the expression, a task which the Spanish would take eighty more years to accomplish.⁴⁹⁶ Whatever the reason for the

492. 1807 La. Acts, ch. X.

493. *Id.* ch. XVII.

494. 1806 La. Acts (emphasis added).

495. E. Livingston, L. Moreau Lislet & P. Derbigny, Preliminary Report of the Code Commissioners, dated Feb. 13, 1823, reprinted in 1 La. Legal Archives xciii (1937) (emphasis added) [hereinafter cited as Report of 1823].

496. The first edition of the Spanish Civil Code was made by Royal decree of October 6, 1888; an amended edition was printed July 24, 1889. The *Digest* of 1808, neverthe-

official title, in a situation reminiscent of Cervantes' hasty revision of *Don Quixote*⁴⁹⁷ where he overlooked the fact that Sancho's donkey had been stolen, Moreau Lislet missed two provisions where the indiscreet word *code* was kept in the digest.⁴⁹⁸

While the situation has been disputed, there is no possible argument against the emphatic assertion of Carleton and Moreau Lislet:

The return of Louisiana under the dominion of France, and its transfer to the United States, *did not for a moment, weaken the Spanish laws in that province*. The French, during the short continuation of their power, from the 30th November to the 20th December 1803, made no alteration in the jurisprudence of the country; and the government of the United States, left the task of legislation to the People of Louisiana themselves, giving to them, the right to make whatever changes they might deem necessary in the existing system of their laws. . . .⁴⁹⁹

The sources of the Digest of 1808 were never officially given, for which there was good reason. Instead of following the express instructions from the Legislative Council and House of Representatives, Moreau Lislet used his own judgment in deciding the civil law to be compiled. Except for about fifty provisions out of 2160, the Digest may be reconstructed literally or almost literally, in most cases, from texts contained in the following sources:

French *Projet* of the Year VIII: 807 provisions;
French Civil Code of 1804: 709 provisions;
Domat: 175 provisions;⁵⁰⁰

less, was a true code in the same sense as the French Code. Its structure, except for additional titles dealing with slavery, communities or corporations, and some procedural matters, was basically the same. The Roman numerals it bore were like those of the *Projet* of the Year VIII.

497. In Chapter XXIII of *Don Quixote*, Ginés de Pasamonte steals Sancho's donkey. Rather absentmindedly, a few paragraphs later Cervantes mentions Sancho and the donkey together as though nothing had happened. Realizing the error afterwards, Cervantes tried to correct it in the third 1608 edition but only succeeded in catching it in two of the seven passages in which it had appeared. See R. Batiza, *Don Quijote y el Derecho*. *Cultura Jurídica de Don Miguel de Cervantes Saavedra* 165 & nn.1 & 6 (1964).

498. See La. Civ. Code of 1808, 3.5.3, arts. 3 & 4, at 324-25.

499. See 1 L. Moreau Lislet & H. Carleton, *The Laws of the Siete Partidas Which are Still in Force in the State of Louisiana* xxi (1820) [hereinafter cited as *Las Siete Partidas*].

500. See note 223 *supra*.

Pothier: 113 provisions;⁵⁰¹
Febrero Adicionado:⁵⁰² 52 provisions;
Blackstone:⁵⁰³ 25 provisions;
Louisiana Act of April 6, 1806 on marriage:⁵⁰⁴ 16 provisions;
Custom of Paris:⁵⁰⁵ 9 provisions.

The sources for the remaining 150 odd articles in the Digest are found in the following: Justinian's *Digest*⁵⁰⁶ and *Institutes*,⁵⁰⁷ the *Siete Partidas*,⁵⁰⁸ the old *Code noir*,⁵⁰⁹ the *Black Code*,⁵¹⁰ the Compilation of Castile,⁵¹¹ *Curia Philipica*,⁵¹² the Ordinance of 1667 on civil procedure,⁵¹³ the Act of 1806 on apprentices and indentured [sic] servants,⁵¹⁴ the *Fuero Real*,⁵¹⁵ the Act of 1807 on emancipation of slaves,⁵¹⁶ and the Act of 1805 on the practice of the Superior Court in civil causes.⁵¹⁷

Although it is impossible to present here the complete evidence which substantiates the foregoing (collected elsewhere by this writer),⁵¹⁸ a few samples are given in the following illustrations. The first relates to different kinds of immovables. The source was the *Projet* of the Year VIII, reproduced literally:

501. See note 222 *supra*.

502. 1, 3 J. Febrero, *Febrero Adicionado ó Librería de Escribanos* (5th ed. 1806, 1808) [hereinafter cited as *Febrero Adicionado*] (Moreau-Lislet used an earlier edition).

503. 1 W. Blackstone, *Commentaries* (9th ed. 1783) [hereinafter cited as 1 *Blackstone*].

504. 1807 La. Acts, ch. XVIII.

505. *Coutume de Paris*, printed in 1 C.-J. Ferrière, *Nouveau commentaire sur la coutume de la prévôté et vicomté de Paris* (1788).

506. See note 550 *infra*.

507. *Les institutes de l'Empereur Justinien* (C.-J. de Ferrière trans. 1773).

508. *Las Siete Partidas del Rey Don Alfonso el Sabio* (several editions).

509. See note 366 *supra*.

510. 1806 La. Acts, ch. XXXIII. Although the French version of this code is *Code noir*, it should not be confused with the one enacted at Versailles in March, 1724. This, however, was the source of many provisions of the Louisiana code.

511. *Recopilacion de las Leyes de estos Reynos* (1567).

512. 2 J. Hevia Bolaños, *Curia Philipica* (1797).

513. See note 477 *supra*.

514. See note 489 *supra*.

515. *El Fuero Real de España* (several editions).

516. 1807 La. Acts, ch. X.

517. 1805 La. Acts, ch. XXVI.

518. R. Batiza, *The Verbatim and Almost Verbatim Sources of the Louisiana Civil Codes of 1808, 1825 and 1870: The Original Texts* (private printing 1973); R. Batiza, *Sources Which Had a Substantial or Partial Influence on Provisions of the Louisiana Civil Code of 1808: The Original Texts* (private printing 1974).

<i>Digest of 1808:</i>	<i>French Civil Code:</i>	<i>Projet of the Year VIII:</i>
Il y a des biens immeubles par leur nature, d'autres par leur destination, d'autres encore par l'objet auquel ils s'appliquent. ⁵¹⁹	Les biens sont immeubles, ou par leur nature, ou par leur destination, ou par l'objet auquel ils s'appliquent. ⁵²⁰	Il y a des biens immeubles par leur nature, d'autres par leur destination, d'autres encore par l'objet auquel ils s'appliquent. ⁵²¹

The following illustration refers to nullity of obligations. The source was the French Code, reproduced literally:

<i>Digest of 1808:</i>	<i>French Civil Code:</i>	<i>Projet of the Year VIII:</i>
La nullité de l'obligation principale, entraîne celle de la clause pénale. ⁵²²	La nullité de l'obligation principale entraîne celle de la clause pénale. ⁵²³	La nullité de l'obligation principale entraîne celle de l'obligation pénale. ⁵²⁴

In the following illustration, the definition of posthumous children was taken almost literally from Domat:

<i>Digest of 1808:</i>	<i>Domat:</i>
Les enfans posthumes, sont les enfans qui naissent après la mort de leur père. ⁵²⁵	Les postumes sont ceux qui naissent après la mort de leur pere. . . . ⁵²⁶

519. La. Civ. Code of 1808, bk. I, tit. I, art. XIV. "There are things immovable by their nature, others by their destination, and others by the object to which they apply."

520. C. civ. art. 517. "Things are immovable by their nature or by their destination or by the object to which they apply." An asterisk indicates that the provision thus marked was not a direct source.

521. *Projet of the Year VIII*, *supra* note 379, bk. II, tit. I, art. III. See translation in note 519.

522. La Civ. Code of 1808, bk. III, tit. III, art. 127, para. 1. "The nullity of the principal obligation involves that of the penal clause."

523. C. civ. art. 1227, para. 1. See translation in preceding note.

524. *Projet of the Year VIII*, *supra* note 379, bk. III, tit. II, art. CXX, para. 1. "The nullity of the principal obligation involves that of the penal obligation."

525. La. Civ. Code of 1808, bk. I, tit. I, art VIII. "Posthumous children are children born after the death of their father."

526. *Les lois civiles*, *supra* note 223, prel. bk., tit. II, sec. I, n.VII. "The posthumous [children] are those who are born after the death of their father. . . ."

The following illustration deals with the acceptance of successions:

<i>Digest of 1808:</i>	<i>Pothier:</i>
L'acceptation est pure et simple, lorsque l'héritier a témoigné sa volonté d'être héritier, sans avoir recours au bénéfice d'inventaire. ⁵²⁷	Elle est pure & simple lorsque l'héritier a témoigné sa volonté d'être héritier sans avoir recouru au bénéfice d'inventaire. . . . ⁵²⁸

In the following illustration the definition given is an almost verbatim translation of the one offered by *Febrero*:

<i>Digest of 1808:</i>	<i>Febrero:</i>
On appelle biens propres, ou héréditaires, tous ceux que chaque époux apporte en mariage, ou dont il hérite, ou qu'il acquiert pendant sa durée, par acte de dernière volonté ou par contrat lucratif. ⁵²⁹	Otros se llaman <i>Propios</i> , y son los que cada conyuge lleva al matrimonio, y hereda, ò adquire durante él por ultima voluntad, ò por contrato lucrativo, y à estos llaman tambien <i>hereditarios</i> . ⁵³⁰

The following illustration contains a rule of interpretation taken almost verbatim from Blackstone:

<i>Digest of 1808:</i>	<i>Blackstone:</i>
The words of a law are generally to be understood in their most known and usual signification, without so much to the niceties of grammar rules as to	Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their gen-

527. La. Civ. Code of 1808, bk. III, tit. I, art. 76. "The acceptance is simple when the heir has manifested his intention to be heir, without having recourse to the benefit of the inventory."

528. 2 Pothier, *supra* note 142, ch. III, sec. III. "[The acceptance] is pure and simple when the heir has manifested his intention to be heir without having recourse to the benefit of inventory."

529. Digest of 1808, bk. III, tit. V, art. 13. "We understand by effects *proper* or *hereditary*, all such as either husband and wife brings in marriage or which he or she inherits or acquires during the marriage by will or lucrative contract."

530. 1 Febrero Adicionado pt. I, ch. IV, no. 13.

their general and popular use.⁵³¹

The following illustration refers to some of the basic duties deriving from marriage and was taken verbatim from the Louisiana Act of April 6, 1807:

Digest of 1808:

Le mari et la femme se doivent mutuellement fidélité, secours et assistance.⁵³²

Louisiana Act on Marriages:

Le mari et la femme se doivent mutuellement fidélité, secours et assistance.⁵³³

The following illustration contains a rule relating to constructions against party walls taken almost literally from the Custom of Paris:

Digest of 1808:

Celui qui veut faire un four, une forge, ou un fourneau contre le mur mitoyen, doit laisser un demi-pied de vide et intervalle entre ledit mur et celui de son four, forge ou fourneau et ce dernier mur doit être d'un pied d'épaisseur.⁵³⁴

Custom of Paris:

Qui veut faire forge, four & fourneau contre le mur mitoyen doit laisser demi pied de vuide & intervalle entre deux du mur du four ou forge; & doit être ledit mur d'un pied d'épaisseur.⁵³⁵

It would take too long to furnish illustrations from all the other numerous sources of the Digest, but two will suffice. The first refers to peacocks and pigeons, taken almost literally from the de Ferrière translation of Justinian's Institutes:

Digest of 1808:

Les paons et les pigeons sont

Institutes:

Les paons & les pigeons sont

531. La. Civ. Code 1808, bk. I, tit. prel., art. 14.

532. Blackstone, *supra* note 503, int. 2, no. 1.

533. La. Civ. Code of 1808, bk. I, tit. IV, art. XIX. "The husband and wife owe to each other mutually, fidelity, support and assistance."

534. 1807 La. Acts, ch. XVII, sec. 60. See translation in preceding note.

535. La. Civ. Code of 1808, bk. II, tit. IV, art. XL. "He who wishes to build an oven, a forge, or a furnace against the wall held in common, is bound to leave half a foot interval and vacancy betwixt said wall and that of his oven, forge or furnace, and this last wall must be one foot thick." La. Civ. Code of 1808, 2.4.11, at 134-37.

536. 1 C. de Ferrière, Nouveau commentaire sur la coutume de la prévôté et vicomté de Paris art. CXC, at 403 (S. d'Aramon éd. 1719).

considérés comme étant aussi farouches de leur nature, farouches de leur nature, indépendamment de l'habitude qu'ils ont d'aller & de venir. . . . A l'égard de ces sortes d'animaux qui ont coutume d'aller & de revenir, la règle est, qu'ils sont censés appartenir a quelqu'un, tant qu'ils conservent l'habitude de revenir chez lui. . . .⁵³⁷

The following illustration indicates those who are not capable of compromise. The source was Guyot's *Répertoire*,⁵³⁸ from which part of the provision was reproduced almost literally:

Digest of 1808:

Ceux qui ne peuvent pas s'engager, ne peuvent pas compromettre, telle qu'une femme sous puissance de mari, si ce n'est do son autorité.⁵⁴⁰

Guyot's Répertoire:

Les personnes qui n'ont pas la liberté de s'engager ne peuvent pas compromettre. Tels sont les mineurs, les prodigues, les furieux, les femmes en puissance de mari, &c.⁵⁴¹

5. Statehood Period (1812-present)

Louisiana was admitted into the Union as the eighteenth State on April 30, 1812. Protection of the civil law system was sought to be secured by the Constitution of January 22, 1812:

The existing laws in this territory, when this constitution goes into effect, shall continue to be in force until altered or abolished by the Legislature: *Provided however, that the Legislature shall never adopt any system or code of laws, by a general reference to the said system or code, but in all cases,*

537. "Peacocks and pigeons are considered as wild beasts, though after every flight it is their custom to return; and with regard to those animals which go and return customarily, the rule to be observed is that they are understood to be yours as long as they appear to retain an inclination to return. . . ." La. Civ. Code of 1808, 3.20.6, at 474-75.

538. 2 Les Institutes de l'Empereur Justinien bk. I, tit. I, sec. 15, at 31 (C.-J. de Ferrière trans. 1773).

539. See note 130 *supra*.

540. "They who cannot bind themselves cannot compromise, such as a married woman, unless it be under her husband's authority." La. Civ. Code of 1808, 3.17.3, at 440-41.

541. 4 Guyot's *Répertoire*, *supra* note 220, at 314 (compromise).

shall specify the several provisions of the laws it may enact.⁵⁴³

The Digest of 1808 remained in force for fewer than twenty years. It did not succeed in providing a fully comprehensive and self-sufficient body of rules and from the beginning it evoked an impression of incompleteness. There were several gaps where Roman, Spanish, French and other authorities were resorted to⁵⁴³ without any reference to the Digest, giving the impression that it did not even exist. Years later, in 1817, in *Cottin v. Cottin*, where no provision in the Digest was found to characterize explicitly an abortive child, the Supreme Court of Louisiana resorted to the Compilation of Castile. It also made the following statement:

It must not be lost sight of, that our civil code is a digest of the civil laws, which were in force in this country, when it was adopted; that those laws must be considered as untouched, wherever the alterations and amendments, introduced in the digest, do not reach them; and that such parts of those laws only are repealed, as are either contrary to, or incompatible with the provision of the code.⁵⁴⁴

Such a situation made necessary the translation of the *Siete Partidas*⁵⁴⁵ and the subsequent drafting of what became known as the "Projet of 1823." A resolution approved by the Senate and House of Representatives on March 14, 1822 provided:

That three juriconsults be appointed by the joint ballot of both houses of the general assembly of this state, to *revise the civil code by amending the same in such a manner as they will deem it advisable, and by adding under each book, title and chapter of said work, such of the laws as are still in force and not included therein*, in order that the whole be submitted

542. La. Const. art. IV, § 11 (1812) (emphasis added). Subsequent constitutions retained the provision.

543. See *Marr v. Lartigue*, 2 Mart. 89 (La. 1811); *Beauregard v. Piernas*, 1 Mart. 281 (La. 1811); *Caisergues v. Dujarreau*, 1 Mart. 7 (La. 1809).

544. *Cottin v. Cottin*, 5 Mart. 93, 94 (La. 1817). In the case of *Hayes v. Berwick*, 2 Mart. 138, 140 (La. 1812), the court referred to the Digest of 1808 in a manner which partially foreshadowed the *Cottin* case: "What we call the Civil Code, is but a digest of the civil law, which regulated this country under the French and Spanish monarchs. It is true, some new principles have been intercalated and others abrogated or omitted."

545. The Laws of *Las Siete Partidas* Which are Still in Force in the State of Louisiana (L. Moreau Lislet & H. Carleton 1820).

to the legislature at its first session, or as soon as the said work have been completed.⁵⁴⁶

In relation to the Digest of 1808, the *Projet* contained 1,746 additions, 423 amendments, and 276 suppressions.⁵⁴⁷ The *Projet* included 340 citations to sources of its provisions found in various codes, legal enactments and doctrinal works. These references, however, only covered the *Projet* unevenly. Worse, in several instances they concealed the *Projet's* actual sources.⁵⁴⁸ Beyond these imperfect citations, the redactors — Moreau Lislet, Livingston, and Derbigny — indicated some general sources on which they purported to rely:

In the execution of the work we shall keep a reverent eye on those principles, which have received the sanction of time, and on the labors of the great Legislators, who have preceded us. *The Laws of the Partidas, and other Statutes of Spain, the existing digest of our own Laws, the abundant stores of the English Jurisprudence, the comprehensive Codes of France, are so many rich mines from which we can draw treasures of Legislation; and where they differ, and we doubt we shall apply to that oracle to which an eloquent writer asserts "All nations yet appeal, and from which all receive the answers to eternal truth;" to those inspirations of prophetic Legislation, which enabled the Roman Jurists to foresee almost every subject of civil contention, and to establish principles for the decision of Cases, which could only arise in a State of Society different from their own and maxims applicable to all nations, at all times and under every form of Government.*⁵⁴⁹

Nevertheless, the sources of about two-thirds of the additions (approximately 1050 provisions) have their sources in the following:

546. 1822 La. Acts, at 108 (emphasis added). Additions et Amendemens au Code civile de l'État de la Louisiane, Proposés, en Vertu de la Résolution de la Législature du 14 Mars 1822, par les Juristes Chargés de ce Travail (1823). Despite the cryptic indication in the Report of 1823, *supra* note 495, concerning the identity of the drafters, which would lead one to identify Livingston as the drafter of the Book on Obligations starting with Title III, this is very questionable. More likely, Moreau Lislet took sole charge of this portion also.

547. See Batiza, *The Actual Sources of the Louisiana Projet of 1823: A General Analytical Survey*, 47 Tul. L. Rev. 1, 5 (1972).

548. *Id.* at 6-8.

549. *Id.* at 3 (emphasis added).

Pothier:⁵⁵⁰ 246 provisions;
 Toullier:⁵⁵¹ 228 provisions;
 French Civil Code: 150 provisions;
 Domat:⁵⁵² 55 provisions;
 French Code of Commerce: 11 provisions;
 Merlin's *Répertoire*:⁵⁵³ 12 provisions;
 Justinian's Digest:⁵⁵⁴ 8 provisions;
Febrero Adicionado:⁵⁵⁵ 7 provisions;
 Louisiana Act of 1806 on apprentices and indentured servants:⁵⁵⁶ 5 provisions;
 Louisiana Act of 1817 on curatorship:⁵⁵⁷ 5 provisions;
 Pardessus:⁵⁵⁸ 5 provisions;
 French Code of Civil Procedure: 3 provisions;
 French *Projet* of the Year VIII: 3 provisions;
 Louisiana Act of 1817 on cancellation of mortgages:⁵⁵⁹ 3 provisions;
Las Siete Partidas:⁵⁶⁰ 2 provisions;
 Maleville:⁵⁶¹ 1 provision;
 The Laws of Toro:⁵⁶² 1 provision.

The remaining provisions, where it is not possible to identify any single influence, show various combinations of two, three or more sources.

The following illustrations will provide proof of the previous point in regard to some of the new sources, as compared to the Digest of 1808. The first deals with the action of boundary. The source is Toullier and the provision in the *Projet* is an almost verbatim reproduction:

550. See note 222 *supra*.

551. C. Toullier, *Le droit civil français suivant l'ordre du Code* (1821).

552. See note 223 *supra*.

553. *Répertoire universel et raisonné de jurisprudence*. No edition printed before 1823 was available to this writer, except for vol. 1, letters A-B, of the fourth edition (1812). A comparison of several definitions and other texts with the fifth edition (1827) shows either identical language in both editions, or only slight differences.

554. *Les cinquante livres du digest ou des pandectes de l'Empereur Justinien* (H. Hulot trans. 1803).

555. See note 502 *supra*.

556. See note 489 *supra*.

557. 1817 La. Acts, at 186-93.

558. J. Pardessus, *Traité des servitudes ou services foncières* (1829). No edition printed before 1823 was available to this writer.

559. 1817 La. Acts, at 60-63.

560. See notes 497 & 545 *supra* and accompanying text.

561. J. de Maleville, *Analyse raisonnée de la discussion du Code civile au conseil d'État* (1822).

562. *Leyes de Toro* (1505) (several editions).

Projet of 1823:

L'action de bornage dérive du même principe que l'action de partage. Personne n'étant obligé de rester dans l'indivision, personne aussi, n'est obligé de laisser indécise la ligne qui doit séparer son héritage de l'héritage de son voisin.⁵⁶³

Toullier:

Cette action derive du meme principe que l'action de partage. Personne n'étant obligé de rester dans l'indivision, personne aussi n'est obligé de laisser indécise la ligne qui doit séparer son héritage de l'héritage voisin.⁵⁶⁴

The following illustration refers to the special power needed in order to create a servitude. The source was Pardessus and the borrowing almost verbatim:

Projet of 1823:

Un fondé de procuration ne peut grever de servitude, l'héritage qui lui est confié, sans un pouvoir spécial.⁵⁶⁵

Pardessus:

Un fondé de procuration générale ne peut grever de Servitude l'héritage qui lui est confié, sans un pouvoir spécial.⁵⁶⁶

The following illustration gives a definition of "presumptive heir." The source was Merlin's *Répertoire* and the provision in the *Projet* was verbatim in part:

Projet of 1823:

On appelle héritier présomptif, celui qui se trouve dans le degré le plus apparent de successibilité, et qui, par cette

Merlin:

On appelle Héritier *présomptif* celui qui se trouve dans le degré le plus apparent de successibilité, et qui, par

563. "The action of boundary is derived from the same source as the action of partition. No one being bound to hold an estate in common, no one is bound to leave undecided the boundary lines, which separate his estate from that of his neighbor." Provisions in the *Projet* were unnumbered. As explained by the drafters in the initial note: "The proposed amendments are presented without numbers, because it will not be possible to follow with exactness the order of numbers, until the code is re-copied with the amendments." *Projet La. Civ. Code of 1823*, bk. II, tit. 5, at 96 (1823), reprinted in 1 La. Legal Archives (1937).

564. 3 C. Toullier, *Le droit civil français* no. 170, at 118 (1824).

565. "An attorney in fact cannot impose a servitude on the estate entrusted to him without a special power to that effect." *Projet La. Civ. Code of 1823*, bk. II, tit. 4, at 79 (1823).

566. J.-M. Pardessus, *Traité des servitudes* no. 246, at 374 (7^e éd. 1829).

raison, est présumé devoir être héritier.⁵⁶⁷ cette raison, est présumé devoir être Héritier, mais ne l'est pas encore.⁵⁶⁸

The following illustration refers to usufruct. The source was Hulot's translation of the Digest. The provision in the *Projet* copied it almost literally:

Projet of 1823:

L'usufruit, peut dès son origine, être accordé à plusieurs personnes par portions divisées ou indivisées.⁵⁶⁹

Hulot:

L'usufruit peut dès son origine être accordé à plusieurs par portions divisées ou indivisées. . . .⁵⁷⁰

In the following illustration privileged credits are ranked. The source was the French Code of Commerce and the borrowing almost verbatim:

Projet of 1823:

Sont privilégiées sur le prix des navires et autres embarcations et dans l'ordre ou elles sont rangées, les créances ci-après:

1. Les frais de justice et autres faits pour parvenir à la vente du navire ou autre embarcation et à la distribution du prix. . . .⁵⁷¹

French Code of Commerce:

Sont privilégiées, et dans l'ordre où elles sont rangées, les dettes ci-après désignées:

1. Les frais de justice et autres, faits pour parvenir à la vente et à la distribution du prix. . . .⁵⁷²

The merger of the Digest of 1808 and the *Projet* of 1823⁵⁷³

567. "He who is the nearest related to the deceased capable of inheriting is presumed to be heir, and is called the presumptive heir." *Projet* La. Civ. Code of 1823, bk. III, tit. 1, at 107 (1823).

568. 13 Merlin, Répertoire universel et raisonné de jurisprudence 238 (5^e éd. 1826) (Héritier, sec. III, sec. 1).

569. "Usufruct, may from its origin, be conferred on several persons in divided or undivided portions."

570. 1 Les cinquantes livres du digeste ou des pandects de l'Empereur Justinien, Dig. 7.1.5, at 477 (H. Hulot trans. 1803).

571. "The following debts are privileged on the price of ships or other vessels, in the order in which they are placed: 1. Legal and other charges incurred to obtain the sale of a ship or other vessel, and the distribution of the price. . . ." *Projet* La. Civ. Code of 1823, bk. III, tit. 20, sec. 3, at 373 (1823).

572. Code de commerce art. 191 (1807) (in part).

573. The drafters gave detailed indications as to the specific places where insertions were to be made, provisions to be deleted, amendments to be introduced, etc.

resulted in the Civil Code of 1825, which contained 3522 provisions. The Revised Code of 1870, save for the suppression of provisions relating to slavery and the incorporation of subsequent acts passed by the Legislature, was the same as the Code of 1825. Particularly after 1960, however, first because of the adoption of a revised Code of Civil Procedure, and second because of a systematic and thorough process of revision, the Louisiana Civil Code shows an increasing number of significant changes. These developments, however, are outside the scope of the present study.

Briefly, the French legal experience was utilized in Louisiana in two basic ways. First, by resorting to the finished products of a long process of gestation, the *Projet* of the Year VIII and the Code Civil of 1804 as the principal elements in the composition of the Digest of 1808, representing over two-thirds of its contents; second, by using the two most influential commentators of the *Ancien Régime*, Domat and Pothier, to supplement the two principal elements with definitions and other explanatory texts. The inclusion of a few provisions from the Custom of Paris is more difficult to justify.⁵⁷⁴ The French elements in the Digest of 1808 were reinforced in the *Projet* of 1823 by additional codal provisions (including the Code of Commerce) and new doctrinal texts from the early commentators on the Code Napoleon, principally Toullier,⁵⁷⁵ as well as legal encyclopedias⁵⁷⁶ and translations⁵⁷⁷ of Roman fragments.

On purely legal and historical grounds, the work of codification undertaken by Moreau Lislet, both in the Digest of 1808 and in the *Projet* of 1823, is indefensible.⁵⁷⁸ The only justification is that the conditions originally imposed regarding the na-

574. In that, it was rather unnecessary. It would have been sufficient to resort to Bourjon or Pothier, for example, although the wording of the provisions reproduced could not be more concise. Still, no argument could be made that the Custom of Paris was in force in Louisiana in 1806.

575. See Batiza, *supra* note 547, at 23.

576. *Id.*

577. *Id.*

578. See notes 494-97 *supra* and accompanying text. The French Civil Code was enacted after the Louisiana Purchase. At most, it could be said that Spain and France shared, particularly in the area of obligations and contracts, a common legal tradition going back to Roman law.

ture of the codification⁵⁷⁹ made the work, if not impossible, at least extremely difficult. In any event, irrespective of his motives and intentions, his choices had a lasting effect. There are a number of provisions in the Louisiana Civil Code which can be traced back to the *Projet* d'Olivier of 1789 through the Louisiana Code of 1825, the Digest of 1808, the French Code of 1804, the *Projet* of the year VIII (1800), the *Projet* Jacqueminot (1799), the three *Projets* Cambacérès (1793, 1794, 1796) and the *Plan* Durand-Maillane (1793), and then to Pothier, Domat, and ultimately to Roman law or French customary law. This trend may be seen in the following illustration, part of which was used earlier:

Louisiana Civil Code of 1870:

Representation is a fiction of the law, the effect of which is to put the representative in the place, degree and rights of the person represented.⁵⁸⁰

Representation takes place *ad infinitum* in the direct descending line.⁵⁸¹

Louisiana Civil Code of 1825:

Representation is a fiction of the law, the effect of which is to put the representative in the

579. The *Novísima Recopilación* of 1805 (the newest compilation) was an old fashioned type of legal collection of texts of different dates arranged according to subject matter, including both public and private law. To systematize the compilation along the modern lines of the French Code was out of the question.

580. La. Civ. Code art. 894 (1870).

581. *Id.* art. 895 (1).

place, degree, and rights of the person represented.⁵⁸²

Representation takes place *ad infinitum* in the direct descending line.⁵⁸³

Louisiana Digest of 1808:

Representation is a fiction of the law, the effect of which is to put the representative in the place, degree, and rights of the person represented.⁵⁸⁴

Representation takes place *ad infinitum* in the direct descending line.⁵⁸⁵

Louisiana Digest of 1808:

La représentation est une fiction de la loi, dont l'effet est de faire entrer les représentans dans la place, dans le degré et dans les droits du représenté.⁵⁸⁶

La représentation a lieu à l'infini dans la ligne directe descendante.

French Civil Code:

La représentation est une fiction de la loi, dont l'effet est de faire entrer les représentans dans la place, dans le degré et dans les droits du représenté.⁵⁸⁷

La représentation a lieu à l'infini dans la ligne directe descendante.

Projet of the Year VIII:

La représentation est une fiction de la loi, dont l'effet est de faire entrer les représentans dans la place, dans le degré et dans les droits du repré-

582. La. Civ. Code art. 890 (1825).

583. *Id.* art. 892(1).

584. La. Civ. Code of 1808, bk. 3, tit. 1, ch. 2, sec. 1, art. 19 (trans. in original).

585. *Id.* bk. 3, tit. 1, ch. 2, sec. 1, art. 19(1).

586. C. civ. art. 739.

587. *Id.* art. 740(1).

senté.⁵⁸⁸

La représentation a lieu à l'infini dans la ligne directe descendante.⁵⁸⁹

Projet
Jacqueminot:

*La représentation est une fiction de la loi, dont l'effet est de faire entrer les représentans dans la place, dans le degré et dans les droits du représenté.*⁵⁹⁰

*La représentation a lieu à l'infini dans la ligne directe descendante.*⁵⁹¹

Third Projet
Cambacérès:

La représentation fait entrer les représentans Dans la place, Dans le degré, Et dans les droits du représenté.⁵⁹²

La représentation a lieu à l'infini en l'une et l'autre ligne.⁵⁹³

588. *Projet of the Year VIII*, *supra* note 379, bk. III, tit. I, art. XXIII.

589. *Id.* bk. III, tit. I, art. XXXIV, para. 1.

590. *Projet Jacqueminot*, *supra* note 366, tit. "Des Successions," ch. III, sec. 2, art. 35; 1 Fenet, *supra* note 17, at 400.

591. *Projet Jacqueminot*, *supra* note 366, ch. III, sec. 2, art. 36, para. 1.

592. *Third Projet Cambacérès*, *supra* note 318, bk. II, tit. VII, art. 595.

593. *Id.* art. 594(1).

Pothier:

Le droit de représentation, à l'effet de succéder, peut être défini; une fiction de la Loi, par laquelle des enfans sont rapprochés & placés dans le degré de parenté qu'occupoit leur pere ou mere, lorsqu'il se trouvoit vacant, pour succéder au défunt en leur place, avec les autres enfans du défunt.⁵⁹⁴

Second Projet
Cambacérès:

La représentation a lieu à l'infini en l'une et l'autre ligne.⁵⁹⁵

First Projet
Combacérès:

Lorsqu'il y a des petits-enfans ou des descendans des degrés ultérieurs, la représentation a lieu.⁵⁹⁶

Plan *Durand-Maillane:*

La représentation

594. *Traité des successions*, 2 Pothier, *supra* note 142, ch. II, sec. I, art. I. "The right of representation to the effect of inheriting, may be defined: a fiction of the law whereby children are brought and placed in the degree of relationship of their deceased father or mother to inherit in their place with the other children of the decedent."

595. *Second Projet Cambacérès*, *supra* note 294, bk. II, tit. VII, art. 116.

596. *First Projet Cambacérès*, *supra* note 200, bk. II, tit. III, art. 52.

aura lieu indefiniment en ligne directe & descendants. . . .⁵⁹⁷

Projet d'Olivier:

Ce droit de représentation des fils et des filles appartient aux descendants en ligne directe jusqu'à l'infini.⁵⁹⁸

Domat:

Ce droit de représentation a lieu en ligne directe de descendants jusqu'à l'infini.⁵⁹⁹

In this manner, the Louisiana Civil Code presently in force is connected, through as many as ten or eleven intermediate links to the very basic elements of the western legal tradition: Roman law⁶⁰⁰ and the customary law⁶⁰¹ that developed after the fall of the Roman empire.

CONCLUSION

Legal systems seem to develop myths that gain wide acceptance beyond the evidence supporting them. In civil law, one such myth concerns the sources of the French Civil Code of 1804. The official view has long been that these sources were customary law, Roman law, royal ordinances, and the statutes of the Revolution. In fact, identification of the true sources is more complex. They can be found in the *Projet d'Olivier* (1789), the *Projet Philippeaux* (1789), the three *Projets Cambacérès* (1793, 1794, and 1796), the *Projet Jacqueminot* (1799), and finally the

597. *Plan Durand-Maillane*, *supra* note 153, bk. III, tit. VII, sec. I, art. IV.

598. *Projet d'Olivier*, *supra* note 108, tit. III, sec. III, law 4.

599. Domat gives as source Novell. 118, ch. 5, *Les lois civiles*, *supra* note 223, at second pt., bk. II, tit. I, sec. II, no. V, n.i.

600. *Id.*

601. One, among many instances, would be that of party walls. See notes 145-46 *supra* and accompanying text.

Projet of the Year VIII (1800). In turn, these early *projets* had been inspired by Natural Law, the Custom of Paris, the revolutionary legislation, the writings of Domat, Pothier, Lamoignon, Denisart, and Guyot—with the *Projet* of the Year VIII having been influenced also by the works of Bourjon and Pocquet de Livonnière.

Codification in Louisiana also relied on an array of several sources. The first Louisiana codification in 1808, disregarding the explicit instructions of the Legislature in a manner that can nevertheless be justified on technical grounds, drew upon French rather than Spanish or Castilian sources: the French Civil Code (1804), the *Projet* of the Year VIII (1800), the Custom of Paris, and the writings of Domat and Pothier. Only exceptionally, where Spanish law differed substantially from the French, did this first codification use sources such as the *Siete Partidas*, the *Recopilación de Castilla*, the *Fuero Real*, *Febrero Adicionado*, the *Curia Philipica*, and Roman Law. This was the case with law concerning the community of gains, guardianship, curatorship, and successions. Surprisingly, the 1808 Code borrowed significantly from Blackstone's Commentaries. The revision of this first Code in 1823 reinforced the French influence in Louisiana law by employing the new commentaries on the *Code civil* of 1804, among them Toullier, Maleville, Pardessus, and Merlin. The revision also relied on the French Code of Commerce and Hulot's translation of the Digest of Justinian.

The preceding pages demonstrate that the sources of both the French and the Louisiana codifications are indeed a good deal more numerous and complex than has been previously believed.