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THE CIVIL CODE OF LOUISIANA IS ALIVE AND WELL

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I. INTRODUCTION 147
II. THE BASIC CONCLUSIONS REACHED BY PROFESSOR PALMER 148
III. THE IMPLICATIONS OF PROFESSOR PALMER'S THESIS 150
IV. AMENDMENT AND RE-ENACTMENT OF ENTIRE CHAPTERS AND TITLES 152
V. AMENDMENT AND RE-ENACTMENT OF INDIVIDUAL LEGAL RULES 153
A. *Redundancy* 154
B. *Revision and Classification* 155
C. *Revision and Redundancies* 156
D. *Revision Versus Repeal* 157
1. The Exalted Status of the Civil Code 158
2. Principles of Repeal 159
E. *"Homeless" Articles* 162
F. *Repeal by Omission* 163
VI. CODE OR DIGEST? 166
VII. CODE REVISION AND CASE LAW 169
VIII. CONCLUSION 171
APPENDIX 173

I. INTRODUCTION

Professor Vernon V. Palmer recently published a challenging article on the Revision of the Civil Code of Louisiana. For some years, the Revision has been an ongoing project of the Louisiana Legislature and the Louisiana State Law Institute. The title of Palmer's article is very significant: *The Death of a Code—The Birth of a Digest.*[1] It raises some complex problems

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1. Palmer, *The Death of a Code—The Birth of a Digest*, 63 TUL. L. REV. 221 (1988).

concerning codification, revision, compilation, and repeal. The conclusions reached by Professor Palmer should not be ignored or set aside without serious consideration. Otherwise they may generate some degree of uncertainty and confusion about the Louisiana law governing civil and commercial matters.

This Article analyzes Professor Palmer's theoretical contribution regarding the present status of Civil Code revision in Louisiana by examining his article's argumentation and its foundations. As will be shown, his main theses are counter to prevailing theory in civil-law countries and are especially problematical in a mixed-jurisdiction state like Louisiana. To facilitate analysis, the attached appendix lists all of the modern Civil Code revision acts passed by the Louisiana Legislature.[2]

II. The Basic Conclusions Reached by Professor Palmer

Professor Palmer states in the last pages of his paper the main conclusions of his research. According to Palmer, the "old" Civil Code "has not been legislatively repealed;"[3] it still interrelates with the "new," that is, the "revised" Code, "sometimes producing contradictions, more often producing a synthesis of rules, and other times producing supplementary rules. . . . The Code is no longer a self-contained entity. . . . [T]he revised Code has been drafted in a manner that, at the very least, *supposes* the existence of the old Code";[4] the revised Code fills gaps and sometimes even provides counterrules; thus, even if "the old Code were to be considered technically abolished, its existence will be supposed, for the old jurisprudence does not exist *in vacuo*."[5] Professor Palmer graphically adds: "Without the old Code as its base, the jurisprudence would be an orphan without a home."[6]

The basic grounds for these two conclusions are stated in the very first pages of Professor Palmer's article:

> [T]he Revision is predominantly a revision without repeal. The old Code articles [*i.e.*, the articles as they read prior to revision] have not been superseded by the Revision because they have not been expressly repealed. Instead about 85% of the articles undergoing revision have been simply amended and re-enacted, which means that these old Code articles have been kept alive provided that they are not contrary to or irreconcilable with the Revision.[7]

The core of Professor Palmer's argument is his concept of the necessity of repeal. His thesis may be summarized in the following terms: Every article of the Civil Code which has not been repealed in the revision process by the legislature, either expressly or by implication, continues to be valid law; it is still a part of the Civil Code. The conclusion drawn from this thesis is that not only the "new" Code, but the "old" Code as well, ought to be applied by the judges and other officers of the state, and should be taken into account by Louisiana lawyers in the preparation of their cases.

Professor Palmer begins his argument thus: "[T]he Louisiana Civil Code's principles of repeal are based on legislation. . . . They are the *exclusive criteria* to be used by the judiciary in deciding the extent to which the Code of 1870 has been repealed by the Revision legislation."[8] The principles referred to by Professor Palmer are those established by articles 22 and 23 of the 1870 Code: laws are repealed entirely or partially by other laws; the repeal is either express or implied. The repeal is express when the new law literally declares that the old law is repealed. It is implied when the new law contains provisions contrary to or irreconcilable with the old law.[9]

Therefore, says Professor Palmer, because eighty-five percent of the articles of the revised Code were merely amended and re-enacted, and because these words "amend and re-enact" do not constitute a repeal of the old laws, the inescapable conclusion is that the acts of revision[10] whereby certain articles of the Civil Code were amended and re-enacted, have not repealed the corresponding old articles of the Code. According to Palmer, the old articles "will continue in force unless their content is irreconcilable with the new articles."[11] He says there has

2. *See* Appendix. The titles of each act have been shortened by elimination of references to other normative materials, *e.g.*, Revised Statutes and Code of Civil Procedure.

3. Palmer, *supra* note 1, at 262.

4. *Id.* at 262-63 (emphasis in original).

5. *Id.* at 263.

6. *Id.*

7. *Id.* at 224.

8. *Id.* at 237 (emphasis added).

9. *Id.* (citing LA. CIV. CODE ANN. arts. 22, 23 (comp. ed. West 1973)). Article 8 of the 1987 Civil Code unifies articles 22 and 23 of the 1870 Civil Code and introduces syntactic and semantic changes without altering the substance of those articles. LA. CIV. CODE ANN. art. 8 (West Supp. 1989).

10. *See* Appendix.

11. *See* Palmer, *supra* note 1, at 230.

been no repeal by implication because "the analysis ultimately would reveal that the great bulk of the prior articles is consistent with the new articles and has not been repealed by implication."[12]

Professor Palmer adds that repeal by omission in revising statutory materials is inapplicable in revision of a civil code, particularly in the case of the 1870 Civil Code of Louisiana, for five reasons.[13] First, the Civil Code only recognizes a binary classification, express and implied repeals; a third type based purely on omission is impossible. Second, the doctrine of repeal by omission runs counter to the historic decisions of the Louisiana Supreme Court. Third, the legislature did not adopt repeal by omission; it followed an active approach: the old rules were either repealed, or amended and re-enacted, or redesignated. The legislature did not intend to repeal any article by negative implication. "In an affirmative scheme of revision, omissions are not extinct black holes but rather continuing sources of law."[14] Fourth, "repeal by omission has never been practiced before by the Louisiana Legislature in the revision of any Code. . . . The history of twentieth-century code revision in Louisiana is a history of express repeal."[15] Fifth, even if repeal by omission were to be admitted in a civil code revision, it could not be applied to the current Revision because "the piecemeal approach [of the Revision] lacks the preemptive focus of an all encompassing statutory revision. The premise of the doctrine of omission is that the legislature intends to preempt earlier laws through complete revision enacted at a single stroke. This premise falters in the present case."[16] After stating these five reasons to justify his rejection of repeal by omission, Professor Palmer declares his personal belief that "no case exists for the view that prior compatible articles have been repealed by the legislature."[17]

III. The Implications of Professor Palmer's Thesis

If Professor Palmer is right, then the articles of the old Code, which were amended and re-enacted but not repealed by express repeal or by implication, that is, the old articles as writ-

12. *Id.* at 240.
13. *Id.* at 241-43.
14. *Id.* at 242.
15. *Id.*
16. *Id.* at 243.
17. *Id.*

ten prior to their amendment, are valid law in Louisiana and as such ought to be applied. Validity means that a legal norm ought to be applied. An article of the Civil Code is a legal norm.[18] If it is valid, then its terms are binding. The old articles of the Civil Code, which have not been expressly or implicitly repealed in their original version, are still valid and so ought to be applied in their original version, notwithstanding their amendment and re-enactment by the legislature. This appears to be the essence of the thesis developed by Professor Palmer.

This conclusion, if applied to the old Code articles as Professor Palmer wishes, would raise some serious difficulties of codal consistency, coherence, and interpretation. If the old articles of the Civil Code, in their original language, remain valid and in force, and if the new articles of the Civil Code and the amended and re-enacted articles are valid as well (as they presumably are since they were created or amended and re-enacted by the Louisiana Legislature), the State of Louisiana apparently has several sets of valid codal norms: (a) articles as amended and re-enacted by the acts of revision;[19] (b) new articles created by the acts of revision;[20] (c) the old text of articles which were amended and re-enacted but not repealed; and (d) old articles which have not yet been revised, amended, or repealed, for example, the articles on sales. Under Professor Palmer's thesis these four different codal norms are valid and, therefore, ought to be applied. The only codal norms which have lost their validity are those which were expressly repealed or repealed by implication.

The code articles mentioned above under letters (a), (b), and (d) are unquestionably valid. Conversely, no reason exists

18. "Norm," "juridical norm," and "legal norm" are technical terms in the Kelsenian Theory of Law. Their equivalents in prevailing Louisiana (and American) legal terminology are "rule," "juridical rule," "legal rule," and "rule of law." I decided not to use the expression "rule" or "rule of law" to avoid confusing those who are familiar with Kelsen's terminology, particularly his distinction between legal norm and rule of law. The theory of validity of norms is well summarized by Kelsen as follows:

> By the word "validity" we designate the specific existence of a norm. When we describe the meaning or significance of a norm-creating act, we say: By this act some human behavior is ordered, commanded, prescribed, forbidden or permitted, allowed, authorized. If we use the word *ought* to comprise all these meanings . . . we can describe the validity of a norm by saying: Something ought to, or ought not to, be done.

H. Kelsen, Pure Theory of Law 10 (M. Knight transl. 2d rev. & enlarged Ger. ed. 1967 & 1978 photo. reprint).

19. *See* Appendix.
20. *Id.*

why the code articles listed above under letter (c) ought to be applied. These articles have ceased to belong to the Code. They have been either omitted from the Code by the revision acts or replaced in the Code by the code articles as amended and re-enacted.

IV. Amendment and Re-enactment of Entire Chapters and Titles

The accuracy of the conclusions reached at the end of the preceding section is supported by virtue of the language used in the Revision acts, which amended and re-enacted whole Chapters or Titles of the Louisiana Civil Code.[21] For example, Act 103 of 1976 revised, amended, and re-enacted all of Title III of Book II, which deals with personal servitudes. The old articles of that title which were thus amended and re-enacted, that is, those articles in their original versions, were thereby excluded from the Civil Code and replaced by the new ones. Therefore, the old articles lost their validity.[22] A slightly different case is Act 169 of 1977, which revised Book II by repealing all of Title VI, new works, and substituting a new Title VI on boundaries. The old articles of Title VI of Book II that were thus excluded, that is, did not become part of the new Title VI, ceased to belong to the Civil Code. They lost their validity.

In summary, the amendment and re-enactment of whole chapters and titles of the Civil Code in the revisory acts means that only those articles that were included in the new versions of the chapters or titles of the Civil Code are valid and enforceable. The old legal norms not included in the new chapters or titles have ceased to be valid law. They no longer belong to the Civil Code. This is the only reasonable conclusion, considering the intent of the Legislature of Louisiana to update the Code by making it adequate to meet the needs of modern urban life of a state in a highly developed country. The amendment and re-enactment of whole chapters and titles constitute unmistakable

21. For complete citation and enactment language of the acts discussed *infra*, see Appendix accompanying this article.

22. Likewise, Act 514 of 1977 revised, amended, and re-enacted all of Title IV, predial servitudes, of Book II, except for articles 665, 667, 668, 669, and 707. The old articles on predial servitudes which were thereby revised, amended, and re-enacted, *i.e.*, those articles in their original versions, ceased to belong to the Civil Code. They lost their validity. Other examples abound. *See generally* Appendix.

evidence of a legislative design to supplant, and thus render invalid, the old rules.

Professor Palmer postulates the presence in the Civil Code of two separate sets of rules: (a) the old ones, with their original texts, and (b) the new ones with their revised and amended text as enacted by the acts of revision. There is no ground in legal theory to hold that both the old codal norms and the new ones are valid and ought to be obeyed. The old rules, dislodged from the Code by the new rules, can no longer operate as codal rules. They became isolated, lacking normative context. They cannot be applied. Since the legislature has clearly decided to amend old codal rules and to re-enact them as amended, what reason could be invoked by judges, jurists, and lawyers to justify the application of the old rules? As will be shown, it is not enough to say that the old rules were not repealed.

The revision, amendment, and re-enactment of whole chapters and titles of the Civil Code imply the rejection of the old rules. Those original texts have been revised, amended, and incorporated into the revised chapter or title of the Civil Code. The old rules were excluded from the Civil Code. They ceased to be valid; they are no longer binding.

V. Amendment and Re-enactment of Individual Legal Rules

Many of the acts of revision not only revised, amended, and re-enacted whole chapters and titles of the Civil Code, but amended and re-enacted separate, individual articles of the Civil Code. These articles, so amended and re-enacted, are legal norms which have become parts of the Civil Code, that is, parts of a section, a chapter, a title, or a book. Professor Palmer, however, would hold that where an old Civil Code article has been amended and re-enacted and not repealed, the following normative consequences follow: First, the old codal rule remains valid and in force, with its original text, because it has not been repealed; and second, the amended and re-enacted codal rule is the new article of the Code, valid and in force because of its re-enactment by the legislature.

Professor Palmer arrives at this conclusion in part via an "implied repeal analysis" which he believes is appropriate in about half of the revisory acts.[23] He quotes these acts, as saying,

23. Palmer, *supra* note 1, at 230.

" 'All laws or parts of laws in conflict with this Act are repealed.' "[24] He says that this statement implies conversely that "when the prior articles are not in conflict with 'this Act,' they *remain* in force."[25] As the bulk of the amended and re-enacted articles are not in contradiction with the prior articles, the old and the new amended and re-enacted articles are valid law.[26]

A. *Redundancy*

Undoubtedly, when an old and a new article are in contradiction, repeal of the old article takes place either expressly or implicitly. Professor Palmer would agree that contradiction implies derogation of the old Code article and validity of the new one (*lex posterior derogat priori*). The problem which arrested Professor Palmer's attention was the one raised by the compatibility between the old Code article and the new one. According to Professor Palmer, in this case two legal norms of similar content would apply to the same subject matter. This situation, if it existed as Professor Palmer argues, would present what is known in the civil law as the problem of redundancy. Says Professor Alf Ross:

> Redundancy occurs when a norm lays down a legal effect which in the same factual conditions is authorised [*sic*] in another norm. One norm is then to that extent redundant. . . . The presupposition exists that a statute does not contain redundancies, and an apparent coincidence of two norms therefore is an inducement to interpret one of them in such a way that the apparent redundancy disappears. But it is not possible to acknowledge an unconditional principle of interpretation that redundancies must not be recognised [*sic*]. The possibility must be faced that the draftsman was not aware of the coincidence (particularly in a redundancy relative to an earlier norm); or that on historical grounds it was desired to emphasise [*sic*] a particular view; or that to provide a general survey (for the benefit, in particular, of the inexperienced reader) it was deemed necessary to bring in under one context something that would otherwise have to be looked for elsewhere (*ex tuto* statements).[27]

24. *Id.* (citing the following statutes: Act No. 103 § 3, 1976 La. Acts 321; Act No. 169 § 4, 1977 La. Acts 612; Act No. 170 § 3, 1977 La. Acts 629; Act No. 728 § 3, 1978 La. Acts 1900; Act No. 150 § 3, 1980 La. Acts 346; Act No. 919 § 8, 1981 La. Acts 2066; Act No. 187 § 5, 1982 La. Acts 518).

25. *Id.* (emphasis in original).

26. *Id.*

Thus redundancy presents a problem of interpretation when concededly valid legal norms overlap. One must then determine if their overlap was intentional on the part of the draftsman. The concept of redundancy is not an invitation to resurrect old law simply because law enacted to replace it does not contradict the old law. It is not an issue of normative logic, but rather one that requires an adequate interpretation of existing legal norms.[28]

B. *Revision and Classification*

The revision of any civil code is a lengthy, difficult task. Codes are the systematic expression of a highly integrated set of legal rules, by means of which certain areas of human activity are subject to consistent normative treatment. A civil code provides the basis for judgments concerning human behavior. Any human action may be classified as the exercise of a right, the performance of a duty, the breach of an obligation, or the sufferance of a sanction.[29] Therefore, the revision of a code demands considerable expertise in legal theory, masterly command of language, clear understanding of reality, comprehension of values, and a realistic perception of the means available to enforce the norms of the code. There are different techniques for the revision of a code: derogation (repeal) of obsolete articles, amendment of legal norms, introduction of new norms, gradual revision of the various legal institutions contained in the code, and redistribution of codified materials (producing, *e.g.*, codes of obligations, agrarian codes, family codes, and minors' codes). Repeal is thus only one of several methods of revision and, as will be seen, is certainly not the best.

Revision of a code in the civil law would imply, normally, a conscious effort to consolidate, to generalize, to seek unity in plurality, and to organize materials following certain criteria of classification. The most elaborate scheme of classification of civil-law materials is in the contributions of Arnold Heise. His *Grundriss eines Systems des Gemeinen Civilrechts Zum Behuf*

27. A. ROSS, ON LAW AND JUSTICE 132-33 (reprint series ed. 1974).

28. *Cf.* Kelsen, *Derogation*, in ESSAYS IN JURISPRUDENCE IN HONOR OF ROSCOE POUND 355 (R. Newman ed. 1962).

29. C. COSSIO, LA TEORIA EGOLÓGICA DEL DERECHO 660-702 (2a ed. 1964).

von Pandecten-Vorlesungen[30] was greatly influential in the process of codification in Europe and was both coherent and comprehensive in its coverage of social reality. The French codification did not reach the level of excellence that is easy to identify in Heise or Thibaut, who was the moving force behind the process of codification in Prussia and other German-speaking regions in central Europe.[31] The scheme of classification followed by Heise was far superior to the one followed by the French. Heise included a general part and five special parts, the first devoted to real rights, the second to obligations, the third to family law, the fourth to successions, and the fifth to the doctrine *in integrum restitutio*.[32] Thus we have the classical structure of the modern civil code: a general part, where all materials not directly related to specific civil-law matters are included; and parts devoted to real rights, personal rights, family law, and successions. On the other hand, the Code Napoleon has a preliminary title (*Titre Préliminaire*) and only three books: the first devoted to persons, the second to things and the different modifications of ownership, and the third to the different modes of acquiring the ownership of things.

Whether under the German or the French scheme, revision requires the development of logical links among the articles of the code; the identification of the several criteria employed for the distribution of the materials; the elaboration of doctrines and institutions susceptible of flexible growth and capable of providing answers to hard and unheard-of cases; and the introduction of principles of justice and fairness in the social distribution of goods, risks, losses, and gains.

C. *Revision and Redundancies*

The process of revision of a civil code requires much more than the repeal of obsolete or unjust laws. It requires the incorporation of new norms, the enactment of new articles, and the amendment and re-enactment of old rules, bringing them up to

30. A. HEISE, GRUNDRISS EINES SYSTEMS DES GEMEINEN CIVILRECHTS ZUM BEHUF VON PANDECTEN-VORLESUNGEN (1807).

31. The first edition of Heise's *Grundriss* was dated 1807, *see id.*, three years after the publication of the French Civil Code in 1804. The French legislature, therefore, was unable to consider Heise's contributions.

32. This last part was very brief, and it was virtually disregarded. *See* 2 G. SOLARI, FILOSOFÍA DEL DERECHO PRIVADO 46 (O. Caletti trans. 1940 & photo. reprint 1950) (recalling the lack of success of Heise with his fifth part).

date. In revision some redundancies may appear or may occur.[33] Drafter's oversight, a wish to emphasize a rule for historical reasons, or a willingness to provide guidance to the inexperienced may lead to the duplication of a rule. But this is not the case raised by Professor Palmer. He says:

> [T]he Revision legislation must be taken at face value and interpreted according to the appropriate principles. Today, after twelve years of sustained effort, nearly one-half of the Civil Code of 1870 has been revised, yet only 15% of the old Code articles in point have been expressly repealed. The other 85% still lives as good law unless a certain percentage of them cannot stand side by side with the new articles.[34]

How could there be consistency, coherence, order, and organization in a civil code, be it of the German or the French type, if the legislature were interpreted to be engaged in producing redundancies? There would be no way to achieve a systematic development of the Civil Code, nor to properly classify all of the normative materials if one were to identify as legal norms, interpret, and put, each in its systematic place, all of the following types of code articles: (1) the new rules of the Civil Code, those created de novo by the legislature for their incorporation into the Civil Code as part of its revision; (2) the amended and re-enacted rules of the Civil Code, that is, those rules which are the product of the process of amending the old rules of the Civil Code; (3) the old rules of the Civil Code which have been amended, but keeping their original texts; and (4) the rules of the Civil Code which have not been revised up to now. It is difficult to accept that the Legislature of Louisiana has undertaken a task bound to bring about results so contrary to the distinctive characteristics of the civil law—clarity, synthesis, logical consistency, unification, and consolidation.

D. *Revision Versus Repeal*

Professor Palmer's basic thesis that the old rules that were amended and re-enacted but not repealed are still valid law as written prior to amendment is ultimately grounded on both the "exalted status" attributed to a civil code and on the codal principles of repeal. These two grounds will be examined separately.

33. Ross, *supra* note 27, at 132-33.

34. Palmer, *supra* note 1, at 235.

1. The Exalted Status of the Civil Code

According to Professor Palmer:

> It is a commonplace that a civil code enjoys a more exalted status than an ordinary statute. The higher dignity accorded to a code is traditional in the civil law world. This respect is due originally to the special qualities of the legislation—its relative permanence, imposing structure, and inner coherence. Statutes may be ad hoc, scattered, and temporary, but the civil code in our tradition has attained something close to the stature enjoyed by a constitution or a Magna Carta in the common-law world.[35]

Setting aside feelings and emotional preferences, a code is a special kind of statute, but a statute nevertheless. It is enacted by the same organ (the legislature), may be amended by the same means (*lex posterior derogat priori*), and has a normative level that, like that of a statute, is lower than that of the state constitution in Louisiana. The civil code, in any civil-law jurisdiction, may be amended by statute; its articles may be repealed by any subsequent statute. Articles like those relative to repeal may be amended or repealed by subsequent statutes. The organ entitled by the Louisiana Constitution to enact the Civil Code, to amend it, or to repeal it, totally or partially, is the same organ empowered by the state constitution to enact, to amend, and to re-enact statutes.[36] Therefore, the Civil Code may be amended by revision of its content just as may any other statute.[37] The repeal contemplated in articles 22 and 23 of the 1870 Civil Code[38] (and in article 8 of the revised Code of 1987)[39] is not required by the constitution for the revision of the Civil Code. Professor Palmer would presumably agree since he acknowledges the power of the legislature to revoke or revise repeal procedures: "A code's repeal procedures, however, are not limitations upon the power of the legislature, for surely the legislature may revoke or revise the procedures if it chooses to, without a special majority."[40]

35. *Id.*

36. LA. CONST. art. III, §§ 1, 14, 15.

37. *See id.* § 15(A).

38. LA. CIV. CODE ANN. arts. 22, 23 (comp. ed. West 1973).

39. LA. CIV. CODE ANN. art. 8 (West Supp. 1989).

40. Palmer, *supra* note 1, at 236.

2. Principles of Repeal

Professor Palmer also says that "the Louisiana Civil Code's principles of repeal are based on legislation. . . . They are the exclusive criteria to be used by the judiciary in deciding the extent to which the Code of 1870 has been repealed by the Revision legislation."[41] The issue is thus whether there may be revision of the Civil Code without repeal. Professor Palmer says no. I say yes. Professor Palmer holds that to amend and re-enact an article of the Civil Code without repealing the old article is to keep the old article with its original text, alive as good law.

Here, the real question is whether the old article of the Civil Code, which has been amended and re-enacted, continues to be valid and in force as it was written prior to the amendment. The answer ought to be negative. Each and every article of the Civil Code of Louisiana which has been amended and re-enacted is valid law, as amended. Each of those articles as written prior to its amendment has ceased to be valid law. The article in that form does not belong to the Civil Code and ought not be applied.

First, the Constitution of Louisiana expressly contemplates acts of revision, such as are here at issue: section 15 of article 3 of the Louisiana Constitution of 1974 provides that the constitutional requirement that each act be confined to one object does not apply to acts for the "enactment, rearrangement, codification, or revision of a system of laws."[42] Thus, the revisory acts here at issue satisfy the fundamental requirement for the validity of the legal norms. According to Kelsen:

> The norm which confers upon an act the meaning of legality or illegality is itself created by an act, which, in turn receives its legal character from yet another norm. . . . That an assembly of people is a parliament, and that the meaning of their act is a statute, results from the conformity of all these facts with the norms laid down in the constitution.[43]

Thus, the constitution and the legal norms embraced by it are the foundation for the validity of a legal norm, including the

41. *Id.* at 237. Act 728 of 1978 revised, amended, and re-enacted all of Title I of Book II, relative to things, and containing articles 448 through 487, and substituted therefor new articles 448 through 476. The old articles were replaced by the new ones. The old articles thus excluded from Title I of Book II ceased to belong to the Civil Code. Therefore, they lost their validity. Other acts having an analogous effect include 180 and 709 of 1979; 150 of 1980; 919 of 1981; 173 of 1983; 331 of 1984; 124, 125, 409, and 886 of 1987. *See* Appendix.

42. LA. CONST. art. III, § 15.

43. H. KELSEN, *supra* note 18, at 4.

validity of an article of the Civil Code. The validity of a legal norm, therefore, requires that its content and method of creation conform to the constitution of the state. Validity of legal norms implies necessary reference to other legal norms found in the constitution.

The revision of a code requires many acts other than repeal, including reclassification, generalization, unification, consolidation, amendment, repeal, and transfer.

(i) *Reclassification of normative materials.* Articles of the code may have been improperly classified at the time of enactment of the code and placed under inadequate headings. Revision may require transfer of material from certain chapters or titles of the code to others. Here, the need is not to repeal but to reclassify.

(ii) *Generalization.* Articles of the code may have been drafted in particular or specific terms, or covering only one instance of a class of cases, ignoring their common nature. Here, revision may require more general language, covering the "genus" as well as the "species." Here, the need is not to repeal but to generalize.

(iii) *Unification of normative materials.* Several articles of the code, placed under different chapters or titles, may all be linked to a common codal institution. Here, revision may require their unification under a single article, not their repeal.

(iv) *Consolidation of normative materials.* Articles of the code, comments, case law, and doctrinal concepts may be scattered in the text of the whole code. Here, revision may require consolidation rather than repeal.

(v) *Amendment of codal articles.* Social, political, cultural, and economic changes may call for new normative solutions which require the amendment of articles. Here, revision requires amendment rather than repeal.

(vi) *Repeal.* Indeed, revision may require repeal.

(vii) *Transfer to other bodies of laws.* The contents and functions of code articles may require that they be placed in a different normative context, that is, articles of the Civil Code may need to be transferred to the Code of Civil Procedure or to the Revised Statutes. Here, redistribution of legal norms is needed, not repeal.

By virtue of these various necessary acts of revision other than repeal, provisions of the code under revision may cease to

belong to the code. Their validity is terminated; they ought not be applied. In particular, the revision of the Civil Code of Louisiana terminated the validity of the old articles of the Civil Code as written prior to their amendment and re-enactment. The amended text binds by virtue of its legislative enactment in conformance with the constitution. The old articles with their original text have ceased to be law by virtue of the revision. Similarly, articles which have been omitted in a comprehensive revision, whether they have disappeared in reclassification, generalization, unification, or consolidation, have ceased to belong to the code and ceased to be valid law. There are jurisprudential precedents in Louisiana to this effect. In *Hymel v. Central Farms & Shipping Co.*, for example, the Louisiana Supreme Court said:

> Act No. 2 of the Second Extraordinary Session of 1934 is a complete moratorium law, covering the whole subject-matter, and superseding Act No. 159 of 1934. Although repeals by implication are, as a rule, not favored or presumed, if it is obvious that the purpose of a law is to cover the whole subject-matter that is dealt with, it supersedes all previous legislation on the subject, and that which is not repeated or retained is in effect repealed.[44]

In *Moncla v. City of Lafayette*,[45] the Third Circuit of the Louisiana Court of Appeal held that a city ordinance had sufficiently repealed and replaced a prior ordinance on the same subject to render moot a claim of invalidity of the prior ordinance due to "procedural irregularities" in its enactment, where there was "no substantive difference" between the new and old ordinances.

The United States Fifth Circuit Court of Appeals, in *Robertshaw Controls Co. v. Pre-Engineered Products Co.*,[46] held that the 1926 Private Works Act implicitly had repealed article 2772 of the 1870 Civil Code by omitting the "stop payment" provision contained in the Code article. The *Robertshaw* court explained:

> The Private Works Act is not inherently inconsistent with article 2772. The two provisions might be construed together, so as to give a subcontractor a right to invoke the stop-monies

44. 183 La. 991, 994, 165 So. 177, 177-78 (1935). The supreme court of Louisiana decided St. Tammany Homestead Ass'n v. Bowers, 183 La. 987, 165 So. 176 (1935), and State *ex rel.* Porterie v. Smith, 184 La. 263, 284-86, 166 So. 72, 79 (1935), the same way.

45. 226 So. 2d 572, 572-73 (La. Ct. App. 3d Cir. 1969) (citing *Hymel*).

46. 669 F.2d 298 (5th Cir. 1982).

> remedy provided in the Civil Code in addition to the later-provided lien, available by proceeding in a different fashion. The issue is not whether the two provisions are wholly incompatible but whether the Private Works Act was intended as a complete substitute for the earlier remedy.[47]

How could it possibly be asserted in light of the preceding judicial holdings that an article of the Code which has been amended and as amended, has been re-enacted, nevertheless remains alive, valid, and enforceable as written prior to its amendment, merely because there is no repeal clause? Nothing more is needed to show that the legislature, in the process of code revision, terminated the validity of those articles that were omitted from the revised codal text by the techniques of revision previously discussed: reclassification, generalization, unification, consolidation, amendment, and transfer!

E. *"Homeless" Articles*

There is an additional difficulty with Professor Palmer's thesis. The old articles of the Civil Code, which he asserts are still good law and ought to be applied as per their original text, that is, prior to their amendment, were articles forming part of a code. Therefore, their meaning was essentially related to the meaning of the normative context in which they had been inserted. Where are they now going to be placed? In which section, chapter, title, and book? Keep in mind that one must first find places for the new articles of the Revision and for the amended and re-enacted articles. What niches will be available for the old articles with their original text? The acts of revision listed above and in the appendix have found a proper systematic place (section, chapter, title, and book) for each new code article and for each amended and re-enacted code article. No such place has been provided for the old articles in their original text. This exclusion is not an oversight. It is both an indication and a necessary consequence of their having ceased to belong to the Civil Code, of their having lost their validity. The old articles of the Civil Code do not have a place to go. They cannot be inserted in the Civil Code because their place has been occupied by the new articles and the amended and re-enacted articles. Deprived for good of their niches, they can no longer be applied.

47. *Id.* at 299.

F. *Repeal by Omission*

An effort to prove inapplicable the concept of repeal by omission constitutes an important part of Professor Palmer's argument. He faces the issue squarely: "In fact, the reader may believe that when a state comprehensively revises its laws and deletes certain statutes from the revision, it is logical to hold that any omitted statutes have been impliedly repealed, even though they may be substantively compatible with the included laws."[48]

Professor Palmer, however, argues contrary to this common-sense idea. He says that Civil Code articles may not be repealed by omission; therefore, the omitted provisions of the 1870 Civil Code have not been repealed and are still good law. Professor Palmer advances five reasons for this conclusion. First, the Civil Code only recognizes two methods of repeal of the Code (or its articles): express repeal or implied repeal; there is no third type of repeal available.[49] Second, the Louisiana Supreme Court has rejected repeals by omission in *Cottin v. Cottin*,[50] *Reynolds v. Swain*,[51] and other cases.[52] Third, the Legislature of Louisiana did not adopt the technique of repeal by omission in the relevant acts. To the contrary, the legislature adopted an active technique of repeal as illustrated by the prevalent use of general clauses and amend and re-enact language throughout the Revision and the selective use of express repeals. Fourth, repeal by omission has never been used by the Louisiana Legislature for the revision of a code. Fifth, even if repeal by omission were possible,

> it could not be easily applied to the current Code Revision because the piecemeal approach [of that revision] lacks the pre-emptive focus of an all encompassing statutory revision. The premise of the doctrine of [repeal by] omission is that the legislature intends to pre-empt earlier laws through complete revision enacted at a single stroke.[53]

None of these reasons justifies Professor Palmer's conclusion that the old provisions of the Civil Code that have been omitted

48. Palmer, *supra* note 1, at 240-41.

49. *Id.* at 241 & n.51 (citing THE REVISED CIVIL CODE OF THE STATE OF LOUISIANA, art. 23 at 4 (R. Milling, W. Hart & W. Potts, Comm'rs 1910).

50. 5 Mart. (o.s.) 93 (La. 1817).

51. 13 La. 193 (1839).

52. *See* Palmer, *supra* note 1, at 245 nn.66-67, 249 n.84.

53. *Id.* at 243.

from the modern revision are still valid and in force as originally written.

As to the first reason, articles 22 and 23 of the 1870 Civil Code[54] (and, one may add, article 8 of the 1987 Civil Code)[55] are concerned with the repeal of laws, not with the revision of a code. In fact, an adequate revision of a code cannot be achieved by the exclusive use of repeals. How do we unify legal materials? How do we generalize codal solutions? How do we classify normative materials? How do we consolidate juridical materials? None of these basic tasks of code revision can be achieved by the exclusive employment of the technique of codal repeal. Repeal can be used in codal revision, but there can also be code revision without repeal. Even assuming that articles 22 and 23 of the 1870 Civil Code always require repeal to achieve revision—and this is not a minor assumption—articles 22 and 23 of the 1870 Civil Code are merely statutes that may be amended at any time expressly or implicitly by another statute (as was done expressly by Act No. 124 of 1987).[56] The Louisiana Constitution does not require repeals to achieve revision. It delegates to the legislature power to revise, without imposing any particular method of codal revision.[57]

As to the second reason, the problems involved in the cases decided by the supreme court of Louisiana to which Professor Palmer refers are different from those raised by the technique of code revision employed by the Louisiana Legislature from 1976 to date. But even if the problems were similar, old decisions of the Louisiana Supreme Court should not control the future of the civil law in Louisiana. The Legislature of Louisiana has been empowered by the Constitution of Louisiana to choose the technique of revision of the Civil Code that it deems fit for this purpose. It has chosen several, only one of which is repeal.

As to the third reason, the Legislature of Louisiana clearly adopted the technique of repeal by omission in the relevant acts. This is shown by the several acts that revised, amended, and re-enacted whole chapters and titles of the Civil Code.[58] All of the legal norms that were included in the various chapters and titles of the Civil Code in the process of its revision have become valid;

54. LA. CIV. CODE ANN. arts. 22, 23 (comp. ed. West 1973).

55. LA. CIV. CODE ANN. art. 8 (West Supp. 1989).

56. Act. No. 124, 1987 La. Acts 404.

57. *See* LA. CONST. art. III, § 15.

58. *See* Appendix.

and of necessity, those legal norms that had been articles of those chapters and titles of the 1870 Code and were not included in the revised, amended, and re-enacted chapters or titles of the Civil Code have ceased to exist as legal norms. Their validity was terminated by their omission from the revised title or chapter of the Code in which they previously had been included. The same reasoning applies to those separate, individual legal norms included by the Revision in the revised Civil Code. New codal norms, because of their formal enactment by the legislature, became valid parts of the Civil Code. Amendments of old rules produced amended Code articles which became valid law by virtue of their formal enactment by the legislature. The corresponding old Code articles, as written prior to their amendments, ceased to belong to the Code. There was no place for them in the Code; they lost their validity.

As to the fourth reason, that the Louisiana Legislature did not apply repeal by omission in other codes—if that is really the case—does not mean that the legislature lacks the constitutional authority needed to revise a code by this one of the diverse techniques available.[59] The Legislature of Louisiana has repealed statutes by omission on many occasions.[60]

As to the fifth reason, civil codes are seldom totally revised at a single stroke. The rule is the opposite. They are revised gradually, step by step, and cautiously, responding to the variable pressures of societies. The Code Napoleon was not enacted in a single stroke. To the contrary, thirty-six titles were approved separately and thereafter codified in 1804 as a single volume with an introduction written by Portalis. In some code revisions, there were not one, but two codes. For example, the Swiss revision produced one code devoted to obligations and a second one devoted to the remaining civil-law subjects. Social conditions in many countries have led to series of partial revisions of their civil codes. For example, the drastic changes which have taken place during the last decades concerning divorce have brought about intensive revision of the law of marriage, paternal authority, and alimonies. There is a continuous and active interest in code revision in civil-law jurisdictions, but in most cases revision does not take the form of "an all encompassing statutory revision" as Professor Palmer states but rather

59. *See* LA. CONST. art. III, § 15.

60. *See supra* text accompanying notes 44-47.

follows a "piecemeal approach."[61] A piecemeal, or progressive, approach, moreover, implies separate and systematic revision of whole sections, chapters, titles, and books as coherent parts of a civil code. Because there is this organized, orderly, graduated treatment of separate parts of a common whole, it is logically and functionally appropriate to hold that the revision, amendment, and re-enactment of a part of a code (a section, a chapter, a title, or a book) implies the derogation or termination of those code articles which have been excluded from the revised, amended, and re-enacted part.

VI. Code or Digest?

Professor Palmer argues that the Revision of the Civil Code of Louisiana under way since 1976 has failed in its task because instead of a coherent, self-contained code in the French tradition, it has spawned a digest in substance and structure. In other words, there is now not just one Civil Code in Louisiana, but two. He says, "The result is that two Codes coexist and govern the same subject matter concurrently. Moreover, the new Code's structure incorporates the jurisprudence of the old Code. The drafters have freely entwined the old jurisprudence around the new Code articles."[62] The implications of this are appalling. Probably sensing them, Professor Palmer softened his proposition, holding that the Louisiana Civil Code consists of two layers of provisions in force concurrently, together with "a wealth of the old Code's jurisprudence and a new set of Revision comments struggling to regulate the interplay between these rival sources."[63]

The detailed discussion of Professor Palmer's points would take an inordinate period of time. I shall try to summarize my main comments, showing that Louisiana has one Civil Code, without contradictory layers and rival forces, each seeking predominance.

First, no civil code, whether in the French, German, or any other country's tradition, is self-contained. The civil code is a part of the state juridical system, subject to the constitution of the state. It is also linked to the rules of procedure which provide the means to enforce rights and obligations. Every civil

61. Palmer, *supra* note 1, at 243.
62. *Id.* at 224.
63. *Id.* at 225.

code expresses to some extent the traditions, mores, and aspirations of the people who live under it. Even a revolutionary civil code like the Code Napoleon keeps its ties with the past. The full understanding of the French Civil Code requires good knowledge of the natural-law tradition of the seventeenth and eighteenth centuries, including the contributions of Domat, Pothier, and Portalis.[64] Similarly, knowledge of the German Civil Code of 1900 demands keen understanding of the philosophical, cultural, political, and historical grounds on which its rules were drafted and enacted. It requires perception of the contributions of such figures as Savigny, Puchta, and Stahl.[65]

The Civil Code of Louisiana is the product of a historical process. Its revision also is a stage in its process of development, as are the contributions of the judiciary, the teachings of the legal scholars, and the custom of the people. It is a process still under way.

Second, the present process of revision of the 1870 Civil Code began, formally, with Act No. 103 of 1976.[66] That act revised, amended, and re-enacted Title III of Book II of the Civil Code, relative to personal servitudes. Since 1976, forty-four additional acts of revision have been passed by the Louisiana Legislature. No one in the legislature, no one in the courts, and no one in the law schools (other than Professor Palmer) has alleged that Louisiana now has two Civil Codes, or one Code with contradictory layers and sources. If this position were tenable, sufficient empirical evidence in the form of doctrine or jurisprudence should have become available to support it in the almost fourteen years since the first act was passed.

Of course, Professor Palmer realizes that in actual and present legal experience since the beginning of the process of revision no sign whatsoever has indicated the presence of two Civil Codes operating simultaneously, or of one with two layers of different rules, subject to the contradictory interpretation in jurisprudence and doctrinal comments. Nevertheless, Professor Palmer considers it logical to predict

> that a new crisis over sources is on the horizon and may soon

64. *See* 1 G. Solari, *supra* note 32, at 85-191.
65. *See* 2 G. Solari, *supra* note 32, at 220-63. John Philip Dawson's examination of French and German law illuminates the complex historical process which led to French and German codification during the nineteenth century. J. Dawson, The Oracles of the Law (1968).
66. 1976 La. Acts 321.

arrive. If it should come, the crisis could be heralded by a *Cottin*-type decision by the Louisiana Supreme Court in which an article of the 1870 Code is given effect, thereby exploding the conventional belief that the old Code has been entirely repealed.[67]

While such a crisis over sources is a distant possibility, its occurrence is not impossible. However, even if it does occur, Louisiana will still be governed by one Civil Code, with one layer of codal provisions, coherent and non-contradictory, whose interpretation may be made by the use of diverse juridical methods[68] and the objective contributions of traditional civilian sources of the law.[69]

Professor Palmer's argument ignores the distinction between the validity of a legal norm, that is, a code article, and the availability of sources of the law. Validity is a concept belonging to the logic of the law, meaning that a juridical norm ought to be applied. Such a norm is valid if it has been created by a person or organ empowered to do so by a rule of law and according to the procedure prescribed by another legal norm of a higher level. Sources of law, on the other hand, are objective elements called into play by judges, lawyers, and officers of the state to prove that the case is decided objectively, that the interpretation made is rational and founded upon something other than the needs, preferences, or opinions of the litigant or decision-making authority.

The Louisiana Supreme Court and the United States Supreme Court may decide in the future, as they have in the past, that rediscovered sources, which had been ignored, forgotten, or disregarded, are available to justify a judgment. An obscure case may be unearthed by the Supreme Court of the United States and become influential; an irrelevant or inconsequential statute buried in the law books may be recovered and given new life by the supreme court of Louisiana. The law in force in any community is never static, rigid, unchangeable. To the contrary, codal articles gain new meaning when exposed to new realities. Developments in legislation, in customary behavior, in judicial practices, and in doctrinal contributions may give

67. Palmer, *supra* note 1, at 250.

68. *See generally* J. CUETO-RUA, JUDICIAL METHODS OF INTERPRETATION OF THE LAW 117-91 (1981).

69. *See* J. CUETO-RUA, FUENTES DEL DERECHO 15-33 (1971).

new life, greater energy, and unexpected possibilities to the articles of the Civil Code.

Nevertheless, as a matter of norms, there is only one Civil Code in Louisiana. There has been only one Civil Code in force in Louisiana since 1825, first the Civil Code of 1825, then the Code as revised and re-enacted in 1870, and finally, (for now) the Code as further revised and re-enacted in subsequent years. There may be growth and augmentation of the sources of the law in Louisiana, and these changes may lead to different interpretations of the articles of the Civil Code of Louisiana, but there is only one set of legislatively enacted articles.

VII. CODE REVISION AND CASE LAW

In his article, Professor Palmer also examines the relationship between code texts and case law. Professor Palmer argues that the Code—he calls it the "new Digest"—has lost harmony because "interior analogies" must relinquish ground to "extrinsic sources," particularly the case law that is cited in the official comments to the revision articles.[70] This proposition is ill founded. A civil code is a system of legal rules which, operating as an organized whole, provides answers to the questions and problems of the people. The Civil Code in force in the State of Louisiana has not lost, after its revision, its systematic character nor the virtues of codified law. To the contrary, better organization of normative materials and subsumption of prior legal norms under rules of a higher level of generality, among other qualities, has brought about the development of concepts and institutions and a better normative treatment of human conflicts.

Likewise, nothing in the Revision prevents the appeal to equity to take care of the unprovided-for case; in fact, revised article 4 anticipates such an approch.[71] Not one act of revision, nor a single comment, may be cited to buttress Professor Palmer's opinion that "[t]he extrinsic sources have hegemony over interior analogies."[72] Moreover, this comparison is inaccurate because the two elements, "extrinsic sources" and "interior analogies," do not belong to the same genus. "Sources," as mentioned before, are grounds to be used in the interpretive process.

70. Palmer, *supra* note 1, at 252-53.

71. LA. CIV. CODE ANN. art. 4 (West Supp. 1989).

72. Palmer, *supra* note 1, at 253.

"Interior analogies" are logical features which make possible the expansion of legal concepts in a given legal system.

Every civil code has its interpretative jurisprudence; the two complement each other. There is room for both the code and the jurisprudence, as has been shown by the long experience of the French with their Civil Code and the decisions of the Cour de cassation. The code articles provide the general rules. The decided cases provide specific instances of the general rules. The abstract meaning of the codal norms becomes specific and concrete in the hands of the judges. The illustrations of case law provide guidance for the decision of future cases. Why should the wisdom, the experience, and the insight of past cases be abandoned as if they were irrelevant? Case law in civil matters in Louisiana has nothing to do with what Professor Palmer calls "Louisiana common law severed from any legislative base."[73] As in France, Spain, Portugal, Italy, Germany, every Latin American country, and other civil-law countries as well, living case law in civil matters is a source of law. In the hands of civil-law judges it provides objective justification for their judicial interpretations of Civil Code rules.

Professor Palmer comments negatively about the role of judicial precedents in our Code revision:

> The drafters' ultimate decision was to attach the Revision selectively to the jurisprudence (often by reference only, via the comments to the sections), thus producing a type of codification whereby (arguably) the *jurisprudence constante* of the past is transformed into the *jurisprudence permanente* of the future. The role of the pre-Revision jurisprudence as a primary source of law has been structurally recognized, formalized, and entrenched.
>
> This new structural role for the old jurisprudence not only produces a digest but may raise, in the process, serious doubts about the legitimacy of using old cases as a gap-filling source of law. If, as I have shown, the old Code continues concurrently in force with the new, then the pre-Revision jurisprudence, viewed as a derivative and secondary source of law, has as much legitimacy or authority for the future as it possessed in the past.[74]

Jurisprudence, however, is a valid source of law of its own, as that term is properly understood. It provides guidance, justification, and, above all, objectivity in the process of determining the meaning of the law. In Louisiana there is a body of judicial precedents which provides assistance in the interpretation of the Civil Code, with the revisions and amendments made in 1870 and during the recent Revision. The body of judicial precedents, begun in 1825, has continued to develop to the present. There is not one body of pre-Revision jurisprudence which would serve exclusively to illustrate the old 1870 Code, and another body of post-Revision jurisprudence which would serve exclusively to illustrate the new Civil Code, created by the later revisions. This distinction is artificial and serves no useful function.

The references to judicial precedents in the comments of the recent Revision are suggestions to the bench and bar. These comments provide specific instances of the individualized meaning of general rules of the law; they assist the interpreter. They indicate a way, yet they are not binding. They may be accepted and followed if they are good solutions for the conflicts awaiting judicial resolution. They probably will not be accepted if new social mores, unexpected events, or changes of attitudes and values make it convenient to seek new normative meanings. The great European jurists of the last two centuries, by imaginative use of all sources of law, were able to discover new meanings in the law. The civil codes were modernized by judicial and doctrinal interpretation. Those doctrines and that jurisprudence have been taken into account, in Europe as in Louisiana, in code revisions. Revised codes, jurisprudence, and legal theory have made the modern civil law.

VIII. Conclusion

The modern Revision of the Civil Code of Louisiana is a continuing process. It has not been completed. It is about half-done. As a whole, and for now, it has been a successful effort: modernizing legal institutions, eliminating obsolete dispositions, unifying important areas of the law, and providing better solutions for some intractable legal problems. The product obtained so far is coherent, consistent, and well balanced. The revision process has not spawned a self-contradictory creature subject to pulls and pushes from different directions. Consistency and flexibility have been achieved. The Civil Code of Louisiana as revised from 1976 onward is a better instrument than before for the solution of the conflicts and shortcomings of a modern, urban society like Louisiana. The Civil Code is not an uncertain

73. *Id.* at 254.
74. *Id.* at 253 (footnote omitted).

body of law. Those who must use it have used it since 1976 without any problem other than those common to any practice of the law.

The Civil Code of Louisiana is alive and well.

APPENDIX
ACTS OF REVISION*

Revision Legislation	Content
Act No. 103, 1976 La. Acts 321	To *revise, amend and reenact* Title III of Book II of the Louisiana Civil Code, being articles 533 through 645, relative to Personal Servitudes.
Act No. 430, 1976 La. Acts 1129	To *repeal* Articles 191 and 192 of the Louisiana Civil Code; to *amend and reenact* Articles 184, 185, 186, 187, 188, 189 and 190.
Act No. 169, 1977 La. Acts 612	To *revise* Book II of the Louisiana Civil Code by *repealing* Title VI, new works, containing Articles 856 through 869, and *substituting therefor a new* Title VI, Boundaries, containing articles 784 through 796.
Act No. 170, 1977 La. Acts 629-30	To *revise* Book II of the Louisiana Civil Code by *repealing* Title V, fixing limits and surveying lands, containing Articles 823 through 855, and by *substituting therefor a new* Title V, Building Restrictions, containing Articles 775 through 783.
Act No. 514, 1977 La. Acts 1309	To *revise, amend and reenact* Title IV of Book II of the Louisiana Civil Code [Predial Servitudes], *save and except* for Arts. 665, 667, 668, 669 and 707, presently consisting of Articles 646 through 822 and to consist of Articles 646 through 774.
Act No. 479, 1978 La. Acts 1162-63	To *amend and reenact* Articles 739 and 741 of the Louisiana Civil Code.
Act No. 728, 1978 La. Acts 1900	To *revise, amend and reenact* Title I of Book II of the Louisiana Civil Code of 1870, containing Articles 448 through and including 487, relative to Things, to *substitute therefor new* Articles 448 through 476; to provide for the division of things and rights in things; to *amend and reenact* Article 1862 of the Civil Code of 1870.
Act No. 157, 1979 La. Acts 398	To *amend and reenact* Article 577 of the Louisiana Civil Code of 1870, dealing with the responsibility of the usufructuary and the naked owner for repairs to the property subject to the usufruct.
Act No. 180, 1979 La. Acts 430	To *revise, amend and reenact* Title II of Book II of the Louisiana Civil Code of 1870, containing Articles 488 through and including Article 532, relative to Ownership, *substituting therefor a new* Title II, ownership, containing Articles 477 through Article 532; . . . to *amend and reenact* articles 468, 469, 2726, 3289, and 3454 of the Louisiana Civil Code of 1870, to *repeal* Articles 2314, 3507, 3508, and 3453 of the Louisiana Civil Code of 1870.

* The content of the Acts as described in the present list has been limited to Articles, Chapters, Titles, and Books of the Civil Code. References to other codes and to the revised statutes were omitted in most cases. The author has added emphasis.

Act. No. 709, 1979 La. Acts 1857	To *revise* Book III of the Louisiana Civil Code of 1870 by *repealing* Title VI, of the marriage contract, . . . containing Articles 2325 through and including Article 2437; to *enact a new* Title VI, matrimonial regimes, to be comprised of Articles 2325 through Article 2376; . . . to *repeal* articles 131, 150, 416, 909, 1006, 1644, 1751, 1786, 1787, 2446, 3108, 3215, 3319, 3333, 3338, 3339, 3340, 3349, 3369(6), 3524, 3525 and 3555.
Act No. 150, 1980 La. Acts 346	To *revise, amend and reenact* Title XI of Book III of the Louisiana Civil Code of 1870, containing Articles 2801 through and including 2890, relative to Of Partnership, *substituting and enacting therefor a new* Title XI, Partnership, containing Articles 2801 through 2848; . . . to provide for the *repeal* of Articles 1103, 1138 through and including 1145, and 3151 of the Louisiana Civil Code of 1870.
Act No. 310, 1980 La. Acts 659	To *amend and reenact* Article 780 of the Louisiana Civil Code of 1870 relative to building restrictions.
Act No. 565, 1980 La. Acts 1325	To *amend and reenact* Articles 2329, 2339, 2342, and 1242 of the Louisiana Civil Code of 1870; to *repeal* Article 1664 of the Louisiana Civil Code of 1870.
Act No. 125, 1981 La. Acts 351	To *repeal* Article 520 of the Louisiana Civil Code, relative to the transfer of the ownership of a movable by certain nonowners having possession with the consent of the owner.
Act No. 132, 1981 La. Acts 361	To *amend and reenact* Article 2348 of the Louisiana Civil Code, relative to the management of community property.
Act No. 797, 1981 La. Acts 1621	To *amend and reenact* Article 2826 of the Louisiana Civil Code, relative to the termination of a partnership.
Act No. 888, 1981 La. Acts 1996	To *amend and reenact* Article 2814 of the Louisiana Civil Code relative to partnership, to allow a person authorized by a partnership to execute a mortgage to confess judgment . . . without having to execute by authentic act the articles of partnership.
Act No. 919, 1981 La. Acts 2066	To *revise, amend and reenact* the Preliminary Title and Chapters 1, 2 and 3 of Title I of Book III of the Louisiana Civil Code of 1870, containing Article 870 through and including Article 933, relative to kinds of succession and intestate succession, *substituting a new* preliminary title and Chapters 1 through 3, to consist of articles 870 through 902; . . . to *amend and reenact* article 3556(8) of the Louisiana Civil Code of 1870.
Act No. 921, 1981 La. Acts 2082	To *amend and reenact* Articles 2336, 2341 and 2343 of the Louisiana Civil Code, and to amend the Louisiana Civil Code by adding thereto a new Article, to be designated as Article 2343.1, all relative to matrimonial regimes.
Act No. 187, 1982 La. Acts 518	To *amend and reenact* Civil Code Art. 3412 through 3491, to *repeal* Civil Code Art. 3492 through Art. 3527, relative to occupancy, possession, prescription, and peremption, and to make changes in the designation of the divisions of Book III of the Civil Code containing said articles and Art. 3528 through Art. 3556, and to *repeal* Civil Code Art. 1846(3), relative to errors of law and prescription.

Act No. 273, 1982 La. Acts 752	To *amend and reenact* Civil Code Art. 2826, relative to partnerships and partnerships in commendam.
Act No. 282, 1982 La. Acts 771	To *amend and reenact* Civil Code Art. 2336, relative to the partition of community property without court approval, to provide for the recordation of such partitions.
Act No. 439, 1982 La. Acts 1030	[T]o *repeal* Civil Code Art. 2369.1, relative to community property.
Act No. 445, 1982 La. Acts 1045-46	To *amend and reenact* Civil Code Art. 890, relative to the usufruct of the surviving spouse, to certain property of the decedent.
Act No. 453, 1982 La. Acts 1057-58	To *amend and renact* [*sic*] Civil Code Article 2342, to make retroactive the prohibition against setting aside transactions on the ground of falsity of a declaration of separateness when the immovable has been alienated, encumbered, or leased by onerous title.
Act No. 129, 1983 La. Acts 377	To *amend and reenact* Civil Code Art. 780, to provide relative to termination of building restrictions in effect in excess of ten years by agreement of owners in certain areas affected.
Act No. 173, 1983 La. Acts 429	To *amend and reenact* Chapter 4 of Title XXIV of Book III of the Civil Code, to comprise articles 3492 through 3504; to *amend and reenact* Civil Code Art. 3468; to provide for the redesignations of Civil Code Art. 3543 as R.S. 9:5622 and Civil Code Art. 3532 as an undesignated paragraph of Civil Code Art. 10; all relative to liberative prescription.
Act No. 535, 1983 La. Acts 1051	To *amend and reenact* Civil Code Arts. 543 and 616, . . . relative to the partition of property in kind or by licitation, to provide for partition between those having ownership in full, naked ownership, and usufruct.
Act No. 147, 1984 La. Acts 346-47	To *amend and reenact* Civil Code Article 3494, and to enact Civil Code Article 3497.1; relative to prescription.
Act No. 331, 1984 La. Acts 718-19	To *amend and reenact* Titles III and IV of Book III of the Civil Code, to comprise Articles 1756 through 2057; to *amend and reenact* Civil Code Art. 518; to *enact* Civil Code Art. 2324.1; to *repeal* Civil Code Art. 2268; to provide for the transfer and redesignation of Civil Code Arts. 2004 through 2006 as R.S. 9:2785 through R.S. 9:2787; to provide for the transfer and redesignation of Civil Code Arts. 2251 through 2267 and Civil Code Arts. 2269 and 2270 as R.S. 9:2741 through R.S. 9:2759; to provide for the transfer and redesignation of Civil Code Art. 2286 as R.S. 13:4231; . . . all relative to obligations.
Act No. 429, 1984 La. Acts 1049	To *amend and reenact* Civil Code arts. 2839 and 2846, relative to partnerships in commendam.
Act No. 554, 1984 La. Acts 1304	To *amend* Civil Code Art. 2348, relative to a spouse's renunciation of the right to concur in the alienation, encumbrance, or lease of community immovables and renunciation of the right to participate in a community enterprise.

Act No. 622, 1984 La. Acts 1424	To *amend and reenact* Civil Code Article 2348, relative to matrimonial regimes; to provide relative to the renunciation by a spouse of the right to concur in the alienation or encumbrance of community immovables.
Act No. 933, 1984 La. Acts 2276	To *amend and reenact* Civil Code Arts. 493, 498, 2366, 2367, and 2726, and to enact Civil Code Arts. 493.1, 493.2, 2367.1, and 2367.2 relative to the rules of accession.
Act No. 137, 1985 La. Acts 360	To *amend and reenact* Civil Code Art. 2000, relative to damages for delay in performance.
Act No. 203, 1986 La. Acts 475	To *amend and reenact* Civil Code Art. 568, relative to the disposition of nonconsumable things subject to a usufruct.
Act No. 1031, 1986 La. Acts 1877	To *enact* Civil Code Art. 3494(5), to provide for a prescriptive period for an action to recover for underpayment or overpayment of mineral royalties.
Act No. 124, 1987 La. Acts 404	To *amend and reenact* the Preliminary Title of the Civil Code to comprise Chapter 1, General Principles, Articles 1 through 8; Chapter 2, Interpretation of Laws, Articles 9 through 13; to provide for the redesignation of Civil Code Articles 9 and 10 as Civil Code Articles 14 and 15, and both as Chapter 3, Conflict of Laws.
Act No. 125, 1987 La. Acts 412	To *amend and reenact* Title 1 of Book I of the Civil Code, to comprise Articles 24 through 29; to repeal Civil Code Article 3556(23); all relative to persons.
Act No. 289, 1987 La. Acts 723	To *amend and reenact* Civil Code Art. 2434, relative to the marital portion.
Act No. 409, 1987 La. Acts 985	To *amend and reenact* Title XVI of Book III of the Louisiana Civil Code, presently consisting of Articles 3035 through 3070, to redesignate Article [*sic*] 3069 and 3070 as R.S. 9:3911 and 3912 and the *new* Title XVI to consist of Articles 3035 through 3070, relative to the Nature and Extent of Suretyship.
Act No. 883, 1987 La. Acts 2398	To *amend and reenact* Civil Code Arts. 2000 and 2924(B), relative to rates of interest.
Act No. 886, 1987 La. Acts 2409	To *amend and reenact* Civil Code Book 1, Title IV, Chapters 1 through 5, formerly comprising Articles 86 through 119, to comprise Chapters 1 through 4, Articles 86 through 101; to amend Civil Code article 136.
Act No. 676, 1988 La. Acts 1761	To *enact* Civil Code article 3496.1, to *amend and reenact* Civil Code Article 3469, to provide for the suspension of prescription between caretakers and minors during minority.

REVISION OF THE CODE OR REGRESSION TO A DIGEST? A REJOINDER TO PROFESSOR CUETO-RUA

PROFESSOR VERNON V. PALMER*

I. INTRODUCTION

I am delighted that my colleague Professor Cueto-Rua has written a critique[1] of my article, *The Death of a Code—The Birth of a Digest*,[2] and I appreciate the opportunity to make a brief response. Due to time and space restrictions, it will not be possible to respond in detail to every point that Professor Cueto-Rua has discussed. My only purpose here is to consider the most important areas of disagreement.

First, Professor Cueto-Rua clearly disagrees with my conclusion that codal concurrency now exists in Louisiana and that the piecemeal revision has produced only a partial repeal of the old code provisions which have been revised. In the first part of my response, I will attempt to show that his analysis has not properly dealt with what I call *the elementary principle* of legislation and, furthermore, that Professor Cueto-Rua's own theory, by which all old code provisions undergoing revision are invalidated, has been specifically rejected in Louisiana.

Second, Professor Cueto-Rua's article rejects my general conclusion that the Civil Code has been transformed into a digest. In the second part of my response, I will attempt to point out that his dissatisfaction with my conclusion is perhaps principally due to nonconventional assumptions that he makes concerning the nature of a code and the proper relationship between codes, sources of law, and the code's jurisprudence. In the final analysis, I conclude that what the learned author means by a code is what most civilians would call a digest and to say that the digest is alive and well is in fact my own thesis.

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1. Cueto-Rua, *The Civil Code of Louisiana Is Alive and Well*, 64 TUL. L. REV. 147 (1989).

2. Palmer, *The Death of a Code—The Birth of a Digest*, 63 TUL. L. REV. 221 (1988).