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).

II. THE ELEMENTARY PRINCIPLE OF LEGISLATION

One of the most ancient and basic principles known to the civil law holds that all legislation, whether it be a statute or a code, continues in force until it is repealed. With the possible exception of the doctrine of desuetude,[3] there is no other means by which legislation loses its force. Whenever Professor Cueto-Rua maintains that the old code legislation is no longer in force (no matter what synonyms he may choose to express the concept of invalidity), he should be maintaining that the legislation has been repealed by the legislature and should be analyzing the question under the laws about repeal set forth in the Code and the Revised Statutes. There is no other way that legislation ceases to have validity. I shall refer to this as the elementary principle of legislation. It is a universal principle that Louisiana, all other civilian jurisdictions, and all common-law jurisdictions have lived by over the centuries. Its roots are deep in the Roman law,[4] and modern civil codes have set forth the principle in their preliminary title.[5] The principle is clearly stated in Louisiana's Code of 1870:

> Art. 22. Laws may be repealed either entirely or partially, by other laws.
>
> Art. 23. The repeal is either express or implied: It is express, when it is literally declared by a subsequent law; It is implied, when the new law contains provisions contrary to, or irreconcilable with those of the former law.[6]

The principle is also found in the Louisiana Revised Statutes.[7]

One of the most interesting aspects of Professor Cueto-Rua's rebuttal is his attempt to avoid the elementary principle and to sidestep the Louisiana code provisions. He apparently does not accept the proposition that legislation must be either in force, or repealed and not in force, with no third possibility in between. Instead he says that the old code articles "cease to be valid" (is this not a synonym or a euphemism for "repeal"?) by virtue of the fact that they have been excluded from the new set

3. An exception at Roman law, desuetude was never recognized by the English common law and is no longer recognized by modern civil codes.

4. DIG. 1.3.32.

5. *See, e.g.*, C.C.D.F., art. 9 (Mex.); CODIGO CIVIL arts. 52, 53 (Chile); CODIGO CIVIL art. 2(1) (Spain).

6. LA. CIV. CODE ANN. arts. 22, 23 (comp. ed. West 1973). After revision and renumbering in 1987, these provisions have become art. 8 of the Preliminary Title. LA. CIV. CODE ANN. art. 8 (West Supp. 1989).

7. *See* LA. REV. STAT. ANN. § 24:176 (West Supp. 1988).

of code articles. He does not explain exactly how their legal efficacy was lost, but he states that it was not a repeal but a different sort of invalidity.[8] By using the language "cease to be valid," I suspect that Cueto-Rua's aim may be to have the effects of repeal without following the procedural requirements of repeal.

The word "repeal" is suppressed in his argument because code repeal imposes the restraints and requirements set forth in articles 22 and 23.[9] The code's notion of repeal is binary—only express and implied repeals exist—and the enacting legislation of the Revision does not consistently use language producing express repeals (except in about fifteen percent of the cases), nor does it contain many incompatible provisions that will produce implied repeals. Hence under the analysis required by the Civil Code and the Revised Statutes, this is a Revision without full repeal. Under Professor Cueto-Rua's analysis, however, the old code articles, whether compatible or not, simply cease to be valid without any repeal. If he is right, then he has found a way around the elementary principle and around the binary structure of articles 22 and 23.[10] Let me examine the merits of his argument more closely.

His chief argument is that when old articles are excluded from the revised code, they automatically lose their validity ipso facto. He explains that when articles cease to belong to the particular framework (the title or chapter) of which they formerly were a part, they cease to be valid. This argument is repeated more than a dozen times, but no supporting authority is noted. At times the reasoning is that the excluded code articles are invalid because they are "homeless" provisions that have no "niche" in the systematic numerical scheme of the revision.[11] At other times the reasoning is that the excluded articles are invalid because this must be the presumed intent of the legislature. These two justifications will not withstand scrutiny.

The first argument assumes a priori that the schematic structure of a code makes it legally impossible to have more than

8. "The issue is thus," he writes, "whether there may be revision of the Civil Code without repeal. Professor Palmer says no. I say yes." Cueto-Rua, *supra* note 1, at 158-59.

9. LA. CIV. CODE ANN. arts. 22, 23 (comp. ed. West 1973) (current version at LA. CIV. CODE ANN. art. 8 (West Supp. 1989)).

10. *Id.*

11. "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." Cueto-Rua, *supra* note 1, at 162.

one civil code in effect concurrently. Louisiana history, however, has already shown that code concurrency has existed on several occasions. Indeed the Great Repealing Statute of 1828 was enacted in order to end the concurrency between the 1808 Digest and the 1825 Civil Code, a situation that would have been impossible if Professor Cueto-Rua's argument about "niches" were correct, for surely no niches were provided in the 1825 Civil Code for provisions of the 1808 Digest. Additionally, we know that many laws dealing with code subjects and topics are found outside of the Civil Code, and these are valid laws whether or not they have a niche in the code. Indeed, whether a niche for a provision has been provided is immaterial to legal validity, for if the provision has been repealed, it is invalid though it may occupy what Professor Cueto-Rua would consider to be a proper niche within the code. If, on the other hand, the provision has not been repealed, it is valid though no niche for it can be found.

According to Professor Cueto-Rua's second line of reasoning, the resulting invalidity is due to the presumed intent of the legislature.[12] We are told that this intent is implied from the circumstances.[13] Again the word "repeal" is excluded from the reasoning for it would complicate, if not totally undermine, the argument concerning legislative intent. Articles 22 and 23 are premised upon the view that the legislature's intent to repeal legislation must be based upon what the legislature has in fact said and not what a judge may think a collection of 300 or 400 legislators had on their individual minds.[14] If the legislature says literally that the old code is repealed, then the repeal is express. On the other hand, if the legislature enacts later legislation which is irreconcilable with the old code, then the legislature through that later provision implicitly declares the repeal of the earlier provision. Now we know from an examination of what the legislature has in fact said in enacting the Revision that there has been no express declaration or implied declaration that all the old code articles are repealed. Indeed, the contrary is true. Merely fifteen percent of the old articles were expressly repealed and the remaining eighty-five percent, as amended and reenacted, are compatible and reconcilable provisions. A sizable

12. *Id.* at 152.

13. *Id.* at 153.

14. LA. CIV. CODE ANN. arts. 22, 23 (comp. ed. West 1973) (current version at LA. CIV. CODE ANN. art. 8 (West Supp. 1989)).

proportion of that eighty-five percent was simply untouched. It received neither amendment, re-enactment, nor repeal. Furthermore, if the words of the legislature reflect its intent, then the recurring declaration in many enacting statutes that only prior provisions in conflict with the revision are repealed is important. Professor Cueto-Rua ignores this legislative declaration, but it shows that the legislature limited itself to a repeal based solely on incompatible provisions. In these circumstances, Professor Cueto-Rua's claim to know the intent of the legislature contradicts the legislature's own words. His claim seems to be based instead upon political conjecture and his own appreciation of the political atmosphere. These untrustworthy guides are the very reason for articles 22 and 23 (now article 8) of the Louisiana Civil Code of 1870.[15]

Professor Cueto-Rua's claim that, in code revision, the exclusion of old articles causes their invalidity is a well-known doctrine in the common-law states, as I pointed out in my article. What he fails to acknowledge and dismisses without refutation is that Louisiana has had a separate history and tradition and has specifically rejected his theory. This is shown not only by the wealth of precedents from the nineteenth century which my article discusses in detail, but also by later codification efforts in the twentieth century. In 1910, the code revisors officially proposed to add a third form of repeal—repeal by substitution—which would have meant that old code articles would be repealed simply by virtue of their replacement. The *projet* provision read, "The repeal is either express, implied, *or by substitution*. . . . It is by substitution when the new law covers the whole subject of the former law, and is intended to supplant it."[16] Professor Cueto-Rua's theory agrees exactly with this proposed "repeal by substitution" and should suffer the same fate as the *projet*, which was wholly rejected.

Professor Cueto-Rua's theory is also rejected by the entire history and practice of all successful revisions in Louisiana during the twentieth century. Our present Code Revision represents the only example of codification in this century where the Louisiana Legislature has not expressly repealed the prior law. Consider what the legislature and the Louisiana Law Institute did on the prior occasions when they gave us new codes. In 1942, when

15. *Id.*

16. THE REVISED CIVIL CODE OF THE STATE OF LOUISIANA art. 23, at 4 (R. Milling, W. Hart & W. Potts, Comm'rs 1910) (emphasis in original).

the Criminal Code was enacted, the legislature published a specific and lengthy list of every prior criminal law that it wanted to repeal expressly, and it simultaneously published a list of those laws it wished to expressly preserve in force.[17] In the case of the Revised Statutes of 1950, we find elaborate schedules and appendices indicating a global repeal of the prior laws.[18] When the legislature enacted the new Code of Procedure in 1960, it declared that every article of the old Code of Practice was repealed.[19] So the relevant query today is this: "Why the present deviation from this historical pattern?" What a contrast we now have between those past meticulous repeals and the haphazard approach of the current civil code revision. Professor Cueto-Rua has neither addressed nor refuted the engrained practice of express global repeal, nor has he addressed the historic Louisiana decisions responsible for this engrained practice. His terse comment on these cases is to say that the situation giving rise to them was different. With sincerest respect, this answer does not dispose of or distinguish the legal authorities offered in my article.

In support of his own theory, Professor Cueto-Rua presents a handful of Louisiana cases.[20] Rather than sustaining his theory, however, these cases seem to derogate from it for the following reasons.

First, none of these cases discussed the requirements of repeal stated by the Civil Code. Instead each relied upon common-law authorities on the question[21] and came to a dubious conclusion. Second, none of the cases dealt with a code revision project and only one involved the repeal of a code provision. Third, each case was treated by the court as a case of implied repeal, whereas Professor Cueto-Rua maintains that his theory does not deal with repeal.

I would therefore respectfully submit that cases in which courts applied common-law repeal analysis to ordinary statutes can hardly sustain the theory that code revision is exempt from the laws of repeal. Indeed, cases which adopt and apply common-law authorities and do not cite, examine, or follow civil code articles in point should not be considered as properly decided or as persuasive authorities. That they have been emphasized in Professor Cueto-Rua's article, while relevant cases dealing with the application of code principles to code revision problems are ignored, has not strengthened his position.

17. *See* Act No. 43 §§ 2, 3, 4, 1942 La. Acts 147; *see also* Schimpf v. Thomas, 204 La. 541, 549, 15 So. 2d 880, 882-83 (1943).

18. *See* 5 LA. REV. STAT. ANN. at 870 (West 1950).

19. *See* Act No. 15 § 5, 1960 La. Acts 748.

20. Cueto-Rua, *supra* note 1, at 161.

21. *See, e.g.*, 36 Cyc. 1077 *cited with approval in* Robertshaw Controls Co. v. Pre-Engineered Products Co., 669 F.2d 298, 299 (5th Cir. 1982).

III. A NONCONVENTIONAL CONCEPT OF A "CODE" AND LEGAL "SOURCES"

One of the chief reasons why Professor Cueto-Rua does not truly join issue with my thesis that the code has become a digest is that he begins from a fundamentally different starting point. I do not intend to criticize his philosophic outlook or his civilian orientation, but in my opinion he does not share the conventional assumptions about the nature of a civil code and the legitimate sources of law under a code.

For example, he states that no code, whether in France, Germany, or Louisiana, is ever "self-contained" or complete in its field.[22] This quality, however, is conventionally regarded as a salient trait of a true code. The point made in my previous article was that the revised code is no longer, textually, a closed system. It is built upon a threefold combination of new articles, old articles, and entrenched jurisprudence. Therefore, the revised text itself is not self-sufficient in the sense that a true code ought to be. Professor Cueto-Rua, however, does not perceive that this threefold combination constitutes any assault upon the code concept because he has in mind a different concept. Apparently his concept of a code approaches what most civilians mean by a digest. Given this difference in opinion, he is understandably not dismayed or seriously concerned by the changes wrought by the Revision. Where I have seen the degeneration of a code into a digest, he is able to picture it still as a code. Where I have seen revision as regression to a digest, he speaks of progress and law reform.

He also begins with the assumption that the jurisprudence is a source of law that ranks alongside of legislation and custom.[23] His view may reflect a certain strain of civilian thinking, but it is not mainstream thinking.[24] Understandably, given his

22. Cueto-Rua, *supra* note 1, at 166.

23. *Id.* at 169-71.

24. Traditionally, civilian authors reject jurisprudence as a formal or primary source of law. *See, e.g.*, G. CORNU, DROIT CIVIL, 36 (1988); M. PLANIOL, 1 Traité Elémentaire

personal view about the status of jurisprudence, Professor Cueto-Rua does not take a critical attitude toward the systematic bonding of the old jurisprudence to the revised code, nor does he criticize the Revision when the old jurisprudence, which is bonded to the code, sometimes contradicts the letter of the code. More generally, he does not seem fazed by the inner contradiction between theory and fact within the Revised Code—between the code's ringing declaration that jurisprudence is not an authoritative source by law,[25] and that a wealth of Louisiana precedents have been woven into the very fabric of the revised articles. In my view, Professor Cueto-Rua's own concept of sources is consistent with the fact but not the theory of the Revised Code. Unfortunately this contradiction is alive and well within the Code and its redactors' thinking.

Professor Cueto-Rua further maintains that the old code articles may also serve as sources of law, even though elsewhere he asserts that these old articles are no longer valid legal norms and have ceased to have legal effect. This may strike the reader as another contradiction. One would have thought that true sources of law have to be valid norms admitted by the legal order, not invalid superseded norms. It is not easy to understand how nonlaw can be admitted as a source of law in the sense in which "sources" is used in article 1 of the Civil Code.[26] Furthermore, this contradiction undermines his original argument about the fate of the old code articles. What is the point of insisting that the old articles are nonlaw if they actually remain good sources for future law? It will be recalled that the prospect of having two codes concurrently in effect was termed appalling, yet is it any less appalling when both the old and new codes are viewed as sources of law? Both routes lead to the same destination.

Professor Cueto-Rua has argued that to distinguish between the jurisprudence surrounding or emanating from the old code regime and the jurisprudence surrounding the new code regime

de Droit Civil, Pt. 1, Nos. 9-14 (La. St. L. Inst. trans. 1959); A.N. YIANNOPOULOS, LOUISIANA CIVIL LAW SYSTEM 31, 35 (1971).

25. LA. CIV. CODE ANN. art. 1 (West Supp. 1989) states: "The sources of law are legislation and custom." The official comment to this article explains that legislation and custom are authoritative or primary sources, as contrasted with persuasive or secondary sources which guide the court in reaching a decision in the absence of legislation and custom.

26. *Id.*

is an artificial distinction.[27] I have written that the pre-Revision jurisprudence severed from its proper legislative base (the 1870 Code), cannot be attached to a wholly different legislative base without creating a digest. Professor Cueto-Rua, however, does not admit that a significant distinction exists between the pre-Revision and post-Revision jurisprudence. Instead he writes:

> 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 . . . . This distinction is artificial and serves no useful function.[28]

Yet surely without such a distinction, Louisiana's civilian jurisprudence becomes a body of binding law unattached to any code, a kind of *jurisprudence permanente* in the sky.

Professor Cueto-Rua emphasizes that the references to judicial precedents in the official comments are only nonbinding suggestions to the bench and bar. Unless I am completely mistaken, however, judicial precedents are regarded as binding in Louisiana. No practitioner or sitting jurist would maintain that the cases are nonbinding suggestions. True, the comments themselves are nonbinding (because they are specifically nonenacted), but the precedents referred to by the comments are binding in their own right. The important question should be whether pre-Revision precedents which involve the application or extension of the earlier code have binding effect in the future. I gather that Professor Cueto-Rua perceives no serious problem with future application of the old jurisprudence because he makes no distinction between the pre-Revision and post-Revision jurisprudence and he is disposed to treat jurisprudence as a source of law. Ironically, my conclusion was that the old jurisprudence still has much vitality and produces a digest, but only because the legislature has not repealed the earlier code on which it is based. In contrast, Professor Cueto-Rua thinks that the old code has ceased to be valid, but the old jurisprudence lives on anyway. His approach seems to be that the legislature's revision of the code does not touch the jurisprudence to which it is connected. I do not think that his approach is consistent with the fundamental tenet of a true code—the supremacy of the written law.

27. Cueto-Rua, *supra* note 1, at 171.

28. *Id.* at 170-71.

IV. CONCLUSION

In my article, *The Death of a Code*, I concluded with the following grim assessment of the efforts to revise the Civil Code:

> In this Article, I have argued that the present Revision of the Civil Code is a crucial turning point in the development of Louisiana's legal system. The penumbral existence of the old Code and the structural design of the new digest mark the twilight of the tradition to which we aspired. This results from the peculiar nature of the ongoing Revision. First, it is a Revision in which, generally speaking, the old Code has not been legislatively repealed. That Code and its jurisprudence still interrelate with the new Code, sometimes producing contradictions, more often producing a synthesis of rules, and other times producing supplementary rules. The price of the Revision's refusal to break with the past is high—the civil law has become more complex and more uncertain than it was before the Revision. The Code is no longer a self-contained entity; rather, it uses the jurisprudence of its predecessor to fill gaps and even to provide counterrules. Second, the revised Code has been drafted in a manner that, at the very least, *supposes* the existence of the old Code. It is structured to synthesize with the derivative product of that Code—its jurisprudence. Even if, contrary to my argument, the old Code were considered technically abolished, its existence will be supposed, for the old jurisprudence does not exist *in vacuo*. Without the old Code as its base, the jurisprudence would be an orphan without a home.[29]

I do not believe that Professor Cueto-Rua's critique has undermined or weakened this assessment. His optimistic statement that the code is alive and well seems attenuated by his own nonconventional view of a code and proper sources of law. His theory as to the invalidity of the old code provisions is inconsistent with the Civil Code itself and has been specifically rejected in Louisiana. There are, however, many insights in his article with which I agree, and I appreciate the scholarship, collegiality, and interest that he has brought to this important subject.

29. Palmer, *supra* note 1, at 262-63 (footnote omitted) (emphasis in original).