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## PRINCIPAL FEATURES AND METHODS OF CODIFICATION

Jean Louis Bergel\*

In its broadest sense, a code is a compendium of laws, a body or corpus of legal provisions relating to a particular matter. It is, more specifically, "a collection of laws or regulations gathered under one whole corpus, containing a more or less complete system of rules on one of several legal matters. It is the product of the 'esprit de methode' applied to legislation."<sup>1</sup>

A code is then characterized by two fundamental functions: it gathers together written rules of law and it regulates different fields of law.<sup>2</sup> As a result, codification is both the action which consists of putting together legal dispositions, whether statutory or regulatory, into one organized system and the by-product of that same action. The phenomenon of codification began in ancient times. Hammurabi's Code, in Babylon, dates back to about 1700 B.C. and takes its inspiration from the Sumerian and Accadian Codes. However, these were actually compendiums derived from previous cases destined to supplement custom rather than true codes. We also find in Roman law official or private "Codes" which consisted of compilations of texts and doctrinal writings, such as the Gregorian Code (promulgated in 291), the Theodosian Code (published in 438) and above all, the Justinian Code (promulgated in 529 and grouping together a wide variety of subject matters).

There were also ancient codes in Russia. The Russkaja Pravda, a judicial code from Novgorod published near the end of the eleventh century, was a compilation of customs, apparently the first of its kind. There were many other ancient Russian codes, among which the code promulgated in 1649 by the Tzar Alexis Mikhailovitch remained in force until the nineteenth century. In the Nordic countries, the laws were gathered together from 1683 to 1687 in the Code Christian; in Norway, Denmark, Sweden and Finland, the General Code of 1734, constantly renewed since then, is still effective.<sup>3</sup>

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1. M. Vanel, Rep. Civ. Dalloz. V° Code Civil n.2; J. C. Groshens, La codification par décret des lois et règlements, D. 1958, Chronique, 157.
2. R.D. Encyclopaedia Universalis V° Codification.
3. Id.

Under the "old law" of France, codes were merely collections of royal ordinances dealing with various legal matters. The *Ordinance of Blois*, in 1579, had prescribed the codification of ordinances whose methodical classification led, in 1603, to the publication of a private work, the "Code du roy Henry III." However, beginning in the seventeenth century, the term "code" meant any compendium of dispositions relating to "one source matter and presuming to cover it in its entirety,"<sup>4</sup> such as the ordinance of 1667 on procedure (Code Louis), that of 1670 on criminal procedure (Code criminel), that of 1669 on bodies of waters and forests or that of 1673 on trade.

On the other hand, one may point out that these old codes usually amounted to mere compilations of texts where many different sources of law were intermingled: dispositions of legislative origin, pretorian solutions, customary rules, doctrinal essays, etc.

It was only since the Napoleonic Codification in France at the beginning of the nineteenth century that a genuine codification, "substantial in nature," appeared. The codification was a systematic presentation, synthetically and methodically organizing a body of general and permanent rules governing one or several specific fields of law in a given country.

One of the main objectives of the French Revolution was to carry out a vast codification, in particular that of the civil law. This task was carried out through the labor of a moderate and well balanced commission appointed under the Consulate by Bonaparte on August 13, 1800.<sup>5</sup> That commission drafted the "projet of the year VIII" which was voted upon in thirty-six separate statutes and gathered together in one single code by the Act of Ventose 30 in March 21, 1804. Article 7 of the Napoleonic Code expressly repealed all the dispositions of the old legal system (laws, ordinances or customs) that were dealt with specifically in the new civil code.

Thus the Napoleonic Code was the answer to the general aspirations of jurists of the European continent. Based on the postulate of the school of natural law according to which there existed "a legal system of permanent and universal value, founded on human reason and whose principles" were to be proclaimed by the legislator, the civil code represented an essential legislative monument which was to have a great influence in the world.

4. M. Vanel, supra note 1, at no. 4.

5. This commission was comprised of Tronchet, President of the Tribunal of Cassation and member of the bar in the Parliament of Paris, Bigot de Preameneu, member of the bar in the Parliament of Paris and Commissaire du gouvernement at the Tribunal of Cassation, Malleville, judge at the Tribunal of Cassation and Portalis, member of the bar in the Parliament of Aix and who was the true father of the Civil Code.

It was first authoritatively imposed in those countries which were then under the French rule, some of which (Belgium and Luxemburg) have preserved it. It was the inspiration for much European legislation: in particular the Dutch Civil Code of 1836, the Italian Civil Codes of 1866 and 1942, the Rumanian Code of 1864, the Portuguese Code of 1867 and the Spanish Code of 1889. In the Middle East of the 1930's the Lebanese Code on obligations and contracts, the Iranian Civil Code and Egyptian law relied heavily on the French Civil Code. The same observation can be made about the French speaking countries of Africa. In South America, the Brazilian Code of 1831, the Chilean Code of 1835, and the codes of Venezuela, Uruguay and Argentina in 1869 were inspired from the Napoleon Code. The same is true of the Code of Haiti in 1826. Finally, in North America, the influence of the French Code also played an important role. In Quebec, the Napoleonic Code, through its general outlay, structure and divisions, served as the main model for the elaboration of the Civil Code of 1866. In Louisiana, the Civil Codes of 1808, 1825 and 1870 were largely inspired by the French Civil Code and, to a lesser extent, by Spanish law. The Louisiana Civil Code has been called "the most perfect child of the civil law."<sup>6</sup> "The modern Louisiana legal system is fundamentally a derivative common law system, albeit with a civil law thicket . . . [but] the one area of Louisiana law where the civil law is firmly entrenched is substantive private law."<sup>7</sup>

Although the influence of the French Civil Code has declined somewhat in the twentieth century, its technique and method, and even its ideology, are still the basis for a great number of Codes in Eastern Europe. The model offered by the German B.G.B. (Bürgerliches Gesetzbuch), which came into force in 1900 and which, at the time, seemed more modern, more scientific and more detailed than the French Civil Code, had a great influence on the private legal systems of Greece, Switzerland, Japan, and also on those of the U.S.S.R. and the Scandinavian countries. Similarly, the Swiss Code of Obligations of 1881 and 1911, and the Swiss Civil Code of 1907, drafted under the leadership of Eugene Huber, were well received in the world. All of these codifications are true substantive codifications, that is, systematic and innovative constructions of a body of written rules relating to one or

6. Louisiana Civil Code and ancillaries (R. Slovenko 4th ed. 1986); Levasseur, Les codifications en Louisiane, Rev. Rech. Jur. 1986-1 (on the history of codification in Louisiana); Tucker, Tradition et technique de la codification dans le monde moderne: L'expérience de la Louisiane in Etudes juridiques offertes à Leon Julliot de la Morandière par ses élèves et ses amis 593, 601-02 (1964); more generally, see L'influence du Code Civil dans le monde in Travaux de la semaine internationale de Droit (1954).

7. Ch. Osawke *Louisiana legal system: A confluence of two legal traditions* in "Law in the U.S.A. faces social and scientific change," 34 Am. J. Comp. L. 29 (1986).

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several defined matters, founded on a logical coherence and constituting a basis for the growth of law in a given domain.

This technique, however, was not received in the "common law" countries, although the problem of codification had been raised. A code does not exist in England. The codification enforced in the United States at an earlier time did, however, lead to the adoption of civil codes in California, North Dakota, South Dakota, Georgia and Montana. There are also criminal codes in the United States, and twenty-five states have adopted codes of civil procedure. Some states have even enacted codes of criminal procedure. However, in the United States, Canada, India and, more generally, in the English speaking countries, the compilations labeled as "codes," the "revised laws" or the "consolidated laws" are not true codes in the European sense.

In the common law systems codes are considered as simple techniques of "consolidation" or "restatement." The assumption is that the legislator simply meant to reformulate rules drawn from the jurisprudence. Codes do not do away with the principles of "common law" or "equity" and their interpretation is based on the pre-existing law rather than on the proper legislative purpose that they express or the policy that they reflect. Thus, they have as their main objective the identification and classification of preexisting rules, not the construction of a new and coherent system. They amount to a purely formal codification.

Usually, this will translate into an alphabetical classification of subject matters which, though significant, is not a systematic and rational plan, as is typical of the traditional codes found in civil law countries.

One must therefore acknowledge a fundamental difference between the traditional substantive codification, the European style, and the purely "formal codification" which is prevalent in common law countries. However, one should not oversimplify by opposing common law countries with civil law countries. Common law countries also exhibit some works which closely resemble a codification of substantive law. Such is the case, for example, of the United States' Uniform Commercial Code,<sup>8</sup> or even India's nineteenth century codes and statutes, which are not the works of mere "consolidation."<sup>9</sup>

Conversely, we are presently witnessing in Europe, and particularly in France, a multiplication of new codes, many of which are only compilations of existing texts. They gather together a variety of legislative

8. Herman, Llewellyn the Civilian: Speculations on the Contribution of Continental experience to the Uniform Commercial Code, 56 Tul. L. Rev. 1125 (1982).

9. On Indian Law, see R. David, Les grands systèmes de droit contemporains, no. 469, 472 (8th ed. 1982).

texts and regulations for the mere purpose of clarity, without pretending to be general or permanent and without claiming to identify with the fundamental features of traditional codes. One is then dealing with a formal and simple<sup>10</sup> administrative codification.

Beyond the traditional division between the major legal systems, there exist two principal methods and two kinds of codifications. They differ greatly and therefore must be studied separately. We will look at both types of codification, starting with (I) the "substantive codification" to be followed by (II) an analysis of "formal codification."

### I. SUBSTANTIVE CODIFICATION

Substantive codification, or, true codification, consists of devising and shaping "a coherent body of new or renovated rules" within a whole aimed at "instituting or reviewing a legal order."<sup>11</sup> Thus, this codification is made up of (A) substantive requirements and (B) formal requirements.

#### A. Requirements of Substance

Codification constitutes "the culminating point in the elaboration of legal norms and implies a definite structuring of these norms within a coherent subset."<sup>12</sup>

One can observe that the greatest codifications responded to important political, social or technical changes, usually occurring after revolutions or following a country's accession to independence. New political, philosophical and religious ideologies were then put forth and implemented by the new authorities. In France, for example, the great codification movement occurred after the Revolution of 1789. In Germany, codification followed the founding of the German Empire. In Italy, it came after the political unity of the country. In Louisiana, the Civil Code of 1808 came about shortly after the acquisition of the Louisiana territory by the United States, and following the promulgation of an act by the legislature of the territory of Orleans outlining the sources of law in Louisiana.

Thus, codification is one way of reviewing the law, unifying it and adjusting it to the evolution of society. A political and ideological impulse is therefore indispensable. But codification presupposes a rather elab-

10. Olivier, La Codification administrative (1985) (L.L.D. Thesis, not published); Groshens, supra note 1.

11. I G. Cornu, Droit Civil, Introduction—les personnes—les biens, no. 222 (2d ed. 1985).

12. P. Oriante, Introduction au Système Juridique 98 (1982).

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orate, clear, precise and definite written law to be codified. Thus, codification is the elaboration of a particular spirit, and, as a broad structure, it creates a system.

### 1. *The Spirit of Codification*

A new code stems from the will of its authors to consecrate a doctrine and to translate a specific inspiration into positive law. Even though the innovative forces vary according to the circumstances, a true codification aims at instituting a coherent body of new or renewed legal rules destined to either establish a new legal order or to restore the preexisting order. It occurs only after a thorough research, a general reflection, and a creative effort through which choices have been made, guidelines laid down and, lastly, decisions taken.<sup>13</sup> Thus, in France, the 1804 Civil Code was based on fundamental ideas which were quite new at the time: the uniformity of the law throughout the whole territory; the acknowledgement of legislation as the only real source of law; the comprehensiveness of the law regulating all social relations; the separation of law from morals, religion, and politics.<sup>14</sup>

The Napoleonic Code constituted, in all respects, a law of compromises: ideological compromise between the individualism of the eighteenth century philosophers and the Christian moralism of the Jansenists, political compromise between the principles of the Revolution and the legacy of the Ancien Regime, technical compromise between customary law and Roman law. "Neither reaction, nor revolution," according to Planiol's formula.<sup>15</sup>

The drafting of a code is entrusted to a commission, as it happened with the Napoleonic Code or the civil code of the province of Quebec, or assigned to only one single drafter, such as E. Huber, author of Switzerland's civil code and code of obligations, or Dean J. Carbonnier, in France, who wrote the drafts of the texts which gave a new light to family law. One influential personality always emerges. Portalis was most prominent in the writing of the Code Napoleon. Llewellyn was the main inspiration and the principal drafter of the American Uniform Commercial Code. Thus, the spirit of any true codification consists in instilling principles and ideas into the law in a durable fashion.

Any codification aims at vesting a certain durability to the system thus created. While in exile in Saint Helena, Napoleon said, "My true glory is not that I have won forty battles. Waterloo will blow away

13. G. Cornu, *supra* note 11.

14. A.T. See Code Napoléon, *Encyclopaedia Universalis*.

15. J. Carbonnier, *Droit Civil—Introduction, les personnes*, no. 15 (11th ed. 1979).

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the memory of these victories. What nothing can blow away, what will live eternally is my Civil Code."<sup>16</sup>

Further, a codification has for its object the creation of a permanent framework and direction of the evolution of the law. It has a prospective life, and it is not limited to a short-lived or cyclical legislation. R. Demogue confronted, in the field of legislative technique, "the principles of security and those of social transformation." According to Demogue, the pursuit of security leads to creating sources of law capable of prescribing the applicable law and "to giving a preference to codified legislation over special statutes": "the former . . . being systematized is easier to understand and to grasp and one can find in it, in general, the seeds of a regulation of the whole legal subject matter." But Demogue also wrote that "if, on the contrary, we were to be concerned with social transformations, special statutes would be preferred to codes," so as not to hamper the development of the law, and "temporary statutes," or statutes which would require "a periodical revision," would be adopted in preference to statutes of an indeterminate duration.<sup>17</sup>

Thus, codification is to be contrasted with simple legislation tailored to the circumstances. The French Civil Code was hardly modified until the end of the nineteenth century. If, since the 60's, the patrimonial and extrapatrimonial family law has been almost completely revised, and if other subject matters have been thoroughly amended, entire sections of the code, in the fields of property and the general theory of obligations, remain intact. In West Germany, the fundamental institutions of the B.G.B. withstood the turmoils of history. As to the Civil Code of Lower Canada, it has only been subjected to very minor modifications from 1866 to the adoption, in 1980, of Book II of the Civil Code of Quebec relating to family law.

Codification is sometimes blamed for hindering the evolution of the law, causing its stagnation, and constituting an obstacle to its progress. Thus, codification would provoke either a gap between the law on the one hand, and the facts or mentalities on the other, or would trigger a flow of texts outside of the codes. These texts would then ruin the usefulness of the codes and lead to a legislative muddle precisely what codification was meant to prevent.

16. Cited by I H. Mazeaud & L. Mazeaud & J. Mazeaud & F. Chabas, *Leçons de droit civil*, no. 45 (8th ed. 1986).

17. R. Demogue, *Les notions fondamentales de droit privé*, 207 (1911). See more generally, *La codification et l'évolution du droit*, XVIIIth Congress of IDEF, Louisiana 1985, *Revue Jur. et Politique* 1986. See R. Sacco "Codificare: modo supezzato di legiferare?" *Rivista di Diritto Civile* 1983, 117 et. seq.

However, one should not stretch the point. Although they are destined to last, codes are not unbending. And even if they include technical rules of durable validity, experience has shown that traditional codes have been greatly updated, reformed or replaced, despite enormous technical difficulties, in order to take into account the evolution of ideas, mores, facts, and techniques. Admittedly, the range of these modifications has varied greatly.

In France, for instance, the attempts undertaken to reform the entire Civil Code in 1904 and the efforts of the Reform Commission established in 1945 failed for lack of a sufficiently innovating impetus. But family law in general went through a substantial reform in the last thirty years, without disturbing either the overall structure or the plan of the code.<sup>18</sup> The revision of the 1810 Criminal Code which was instigated as early as 1893 is not yet completed despite the fact that it had been undertaken numerous times, and had reached advance levels on occasions. However, it has gone through many slight alterations. On the other hand, the Code of Criminal investigation of 1808 was repealed in 1958 and replaced by the Code of Criminal Procedure, which came into effect on March 2, 1959 and has been amended often since, although it did not actually bring about substantive changes. The 1806 Code of Civil Procedure, after a number of developments, was, on the contrary, replaced in 1975 by a new Code of Civil Procedure truly innovative and of a high standard.

Similarly, in Quebec, if the essence of the Civil Code of Lower Canada remains, Book II of the new Civil Code of Quebec relating to family law, passed in 1980, represents an important reform. The other bills submitted for the reform of the code give rise to more difficulties.

The Louisiana Civil Code, which has already gone through two revisions in 1825 and 1870, was also the object of major modifications from 1976 to 1984, particularly in the fields of property, marriage contracts and matrimonial regimes, corporations, occupation, possession and prescription, as well as obligations.

The Civil Code of Switzerland has also been the object of frequent changes since 1930, in the law of inheritance for farmers, laws of immovable property and, more recently, in family law. The Code of Obligations has also been greatly modified with respect to the law of sales, leases, and labor contracts.

Thorough revisions of a code are possible despite the difficulties of integrating new legislative solutions without disrupting the code's har-

18. Cornu, *La refonte dans le Code Civil français du droit des personnes et de la famille*, 1986 *Revue Jur. et Politique* 674.

mony, coherence or fundamental logic, and without shattering its general principles into a myriad of derogations.

But any true codification must be and must remain a coherent body, endowed with a sufficient durability. This presupposes a systematic conception and a certain content.

## 2. *The Systematic Conception of the Codification*

According to the conception of the Roman-Germanic notion, "a code should not attempt to provide rules that are immediately applicable to every conceivable concrete case, but rather an organized system of general rules which will be easy to discover so that from these rules, through an easy process, judges and citizens may deduce the manner in which this or that practical difficulty must be solved."<sup>19</sup> In this sense a code is characterized by a specific content and a particular systematization.

As to the content, Portalis had stressed in his "Preliminary discourse" that codes of a people are made through time, "but, properly speaking, one does not make them."<sup>20</sup> In the Roman and civil sense, "a Code is not the arbitrary and spontaneous product of a legislative thought . . . [it] sums up in its provisions the results achieved by the labor of reason in the past centuries."<sup>21</sup> And yet, if any true codification is to a large extent "given," dictated by the historical, sociological, cultural, and economic legacy . . . of a people, it is also "shaped," in the sense that it is a new legislative product, a creation of new principles, new rules,<sup>22</sup> and an organized and deliberate normative order born of the will of its authors.

As it correctly has been remarked, "Codification cannot be a compilation. Codification is an art that obeys some stringent rules. These rules concern the methods of expression, taken in a large sense, and the intellectual mechanism that permits one to find his way through the code."<sup>23</sup>

Concerning the type of rules which must appear in a code, Portalis formulated fundamental ideas in his "discours préliminaire" to the Civil Code. According to him,

19. R. David, *supra* note 9, at no. 70.

20. I. P. Fenet, *Recueil complet des travaux préparatoires du code civil* 463.

21. T. Huc, *Commentaire théorique et pratique du code civil* 37 (1892). Translation in Levasseur, *On the Structure of a Civil Code*, 44 *Tul. L. Rev.* 693, 697 (1970).

22. 4 F. Gény, *Science et technique en droit privé positif*, Paris T.1 no. 33 and 34 (1924).

23. Levasseur, *supra* note 21, at 697.

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[T]he role of legislation is to set, by taking a broad approach, the general propositions of the law, to establish principles which will be fertile in application, and not to get down the details of questions which may arise in particular instances.

It is for the judge and the jurist, imbued with the general spirit of the laws, to direct their application. [T]he legislator's science consists in finding in each subject the principles most favorable to common good; the judge's science is to put these principles into effect, diversify them, and to extend them, by means of a wise and reasoned application to "private causes."<sup>24</sup>

Thus, in the traditional French conception, a code must be both general and practical. It must avoid two stumbling blocks: the abuse of casuistry and excessive generality. A code must state rules sufficiently broad to regulate all the situations of a certain type which may arise from social life and must not lay down specific solutions relating to particular circumstances. The legislator cannot anticipate everything. Human life and social events are of an infinite diversity. It would be unreasonable to think that every situation can be foreseen and regulated in detail. It is because the French Civil Code found a way to embody principles broad enough to address the many facets of civil liability that it was able to provide the means to solve problems, at the time unforeseeable, created by the industrial world and contemporary road traffic.

The Napoleonic Codes have been considered to be good models because they have achieved a proper degree of abstraction and have avoided a mere casuistry which would not have withstood the test of time and the reality of life.

It is because the German Civil Code (BGB), beyond its high level of technical abstraction and conceptualization, strove to solve too many minute difficulties in some of its parts that it grew older faster than its French counterpart. Too often, modern legislations are nothing but a mere administrative regulation fitting a certain set of circumstances. Consequently, they lack coherence, unity, and are very short-lived.

Conversely, codes must avoid formulating philosophical principles which would be too imprecise and whose interpretation and actual application would be impossible or too uncertain. "A Code must be a collection of statutes and not philosophical maxims."<sup>25</sup> Otherwise, a code would not be a practical tool necessary to the organization and

24. 1 P. Fenet, *supra* note 20; Levasseur, *Code Napoleon or Code Portalis*, 43 *Tul. L. Rev.* 762, 769-72 (1969). See also Diamond, 1973 *Rev. Internationale de droit comparé* 704, raising the question as to whether codification should only deal with general principles.

25. 1 H. Mazeaud & L. Mazeaud & J. Mazeaud & F. Chabas, *supra* note 16, at no. 43.

regulation of social relations. The first projets of the Civil Code, during the French Revolution, failed because they only included general principles. Even the projet of the year VIII included "a preliminary book" entitled "Du droit et des lois" (of law and legislation) and it was deleted by the Council of State because it contained philosophical assertions inspired from natural law.

Thus, a good code must lay down dispositions broad enough to be able to regulate various real situations, without thereby wandering away from the realities that it must govern and venturing into purely theoretical statements. A good code is thus characterized mainly by its systematization.

The systematization which is inherent in a code lies in its "overall structure" which reflects, with respect to substantive law, the coherence, unity and interdependence of its dispositions, and exhibits the harmony of its component parts.

To say that every code is a system means that it corresponds to an organized whole made of diverse elements, instruments, rules and institutions bound together by relations of logical solidarity. A systematized codification allows one, starting from general principles, through the classical means of logical reasoning and, particularly, successive deductions, to go from the general to the particular until the appropriate solutions to the issues in question are discovered. The same general principles apply to different institutions; thus, for example, the creative role of the will governs the law of marriage, the general theory of contract, the particular special contracts, the institution and functioning of corporations, the majority rule. Classifications by categories and successive sub-categories make it possible to apply, by way of successive specifications, the rules regulating a wide range of situations analogous to all the particular situations which fall under those rules. Similar instruments, looked upon as models, are then used consistently in various matters. Thus, for example, the law creates presumptions of powers in the law of matrimonial regimes or parental authority, in the law of indivision, and the law of business associations.

It follows that each code article has a meaning only because of its relationship to a cluster of articles to which it is linked; each institution has a meaning only because of its relationship with the whole system to which it belongs. There lies the difference between a true code and a mere compilation of disparate statutes, even dealing with the same subject matter. A code is "a coherent body of rules, a whole built around a thought, rules and institutions which make up its framework."<sup>26</sup>

26. G. Cornu, *supra* note 11, at no. 287; see also J. Ray, *Essai sur la structure logique du Code Civil Français* (1926).

It is a fact, for example, that the Civil Code of 1804 was "the systematization of the Civil law of its time." It was "the fruit of a progressive conquest of the rationality of the law." The diversity of its elements does not make it "a heterogeneous mixture" because their melting together had been prepared by centuries of legal existence.<sup>27</sup>

Thus, any true codification is characterized, in its substance, by a general spirit, an inspiration drawn for its elaboration and which rules its contents. It identifies itself also with a particular legal technique and legislative method.

It is in this sense that true codes are bodies of coherent and organized rules and not a mere "mosaic without unity."<sup>28</sup> Their systematization does not seem to tone down the realities of life in favor of a perfectly logical and abstract construction. The Roman-Germanic legal systems were carved on the observation of realities, and also in the light of "considerations of justice, good morals, politics, harmony of the system, which might have escaped a judge."<sup>29</sup> Such a unity is reflected in a certain architecture and a particular organization.

#### B. Formal Features of a Substantive Codification

Beyond its substantive elaboration, a code is also "an act of expression," which presupposes "a work of formulation." Its "fashioning" includes two very distinct operations: (1) its "structuring" consists particularly of laying out a plan, defining its divisions, selecting its titles and (2) its *expression* consists of a certain style based on a certain terminology and a certain phraseology.

##### 1. The Structure

The formal presentation of a code is the mere expression of its substantive coherence. Thus, its plan can only be the expression of its material and logical internal organization. The divisions made must correspond to clear and authentic distinctions. Their sequence must express the logical coherence which is imposed by the classification of subject matters and the interdependence of the many elements of the legal system. Consequently, any true codification requires a rational plan leading to a methodical presentation of the subject matter within a body of rules both systematic and coherent.<sup>30</sup>

27. G. Cornu, *supra* note 11, at no. 287; see also Arnaud, *Les origines doctrinales du Code Civil français IX* *Bibl. de philo. du Droit* (1969); *Essai d'analyse structurale du Code civil français XVI* *Bibl. de philo. du Droit* (1973).

28. G. Cornu, *supra* note 11, at no. 287.

29. R. David, *supra* note 9, at no. 70.

30. I. C. Larroumet, *Droit Civil—Introduction a l'étude du droit privé*, no. 158 (1984).

The French Civil Code and, like it, despite certain fundamental differences, the Civil Code of Louisiana, the Civil Code of Lower Canada or still, the Civil Code of the Principality of Monaco, after a very brief preliminary title on the law in general, contain three successive books dealing respectively with persons, things and the different modifications of their ownership, and the different modes of acquiring the ownership of things. In the Civil Code of Lower Canada, a fourth book was added on commercial law. It is correctly noted that this tripartite division is inspired by Roman Law and the divisions of the institutes of Gaius and Justinian. A logical explanation was also proposed:

Natural sense and logic command that persons be considered before the things they will own, or benefit from, or suffer from. And things should be dealt with before the modes of acquiring them. . . . Lastly, things becoming the objects of transactions between men, the third book should logically define these various transactions and enumerate the rights they generate.<sup>31</sup>

We can obviously point out that "all the law that we use belongs either to persons or to things, or to actions" and that this classification between persons, things, and actions is also adopted in Pothier's treatise.<sup>32</sup> One might observe that this division was certainly not the best that one could find.

Book III is disproportionate in comparison with the others. It is a sort of a mixed bag where we can find, pell-mell, successions, donations, the general theory of contracts, delicts and quasi-delicts, matrimonial regimes, special contracts, suretyship, prescription and possession. Furthermore, its title is not even correct. In most instances, the provisions of Book III have nothing to do with the acquisition of ownership. The plan of the German B.G.B. is divided into five books which first define the concepts relating to persons and legal personality and then deal with obligations, immovables and movables, family relationships and successions. Even more judicious is the distinction made in Switzerland between, on the one hand, a civil code which includes four books relating to persons, family law, successions and real rights and, on the other hand, a code of civil and commercial obligations dealing in its five parts with general provisions, various types of contracts, commercial companies and cooperatives, trade register, firm-names and commercial accounting, and lastly, securities.

Currently, family law and obligations are usually dealt with separately either in the same code or in different codes.<sup>33</sup> This is done in

31. Levasseur, *supra* note 21, at 697.

32. *Id.* at 695; Pothier, *Introduction à la coutume D'Orléans* (1670).

33. G. Cornu, *La lettre du Code à l'épreuve du temps. Mélanges Savatier* 175 (1965).

many countries, especially those with a socialist legal system: Czechoslovakia, Yugoslavia, and Rumania. In Poland, where there was at one time a code of obligations, there exists, since 1964, a civil code which includes the law of obligations, contracts and liability, after having dealt with general problems and the law of things, and next to it a code of family law and guardianship.

It appears intellectually proper to group together in a first book the common provisions and to deal thereafter specifically with the provisions relating to the different categories of concepts. We can point to the French Criminal Code of 1810 which, after preliminary provisions, put first emphasis on felonies and misdemeanors according to the penalties, punishable persons and violations themselves, and then dealt with petty offenses. Similarly, one can refer to the plan of the new French Code of Civil Procedure of 1975 whose five books are successively assigned to provisions common to all jurisdictions, provisions specific to each jurisdiction, provisions specific to certain subject matters and, lastly, arbitration and means of enforcement.<sup>34</sup>

Beyond the general outlay, the internal partitioning of a code rests upon divisions and sub-divisions which follow a certain hierarchy. According to the French or even European model, which can be found in the Louisiana Civil Code, and in Quebec, Monaco, and even Switzerland, the different books of the codes are divided into titles, which themselves include chapters, divided in turn into several sections, which may contain several paragraphs and a certain number of articles. This partitioning illustrates both the constant approach from the general to the particular as well as the coherence of the system, subject matter or institution in question which typifies the classical intellectual process of the Roman-German legal systems. A manifestation of this structure is emphasized by the titles given to the different internal divisions of the codes, titles which must be as clear and as precise as possible to make the contents more accessible.

But, within the codes, the provisions themselves are stated in articles numbered and listed in a logical order. Very often, the articles include several numbered paragraphs or even alphabetical divisions derived either from the original texts or from subsequent amendments. Their multiplication and modification cannot be limitless because they can lead to an obliteration of the meaning of the legal provisions.

Thus, the undeniable advantages of codification, as long as it is recent, run the risk, with time, of turning into disadvantages. The very rigid structure of codes may hinder their own evolution or lead to an

34. Cornu, *La Codification de la procédure civile en France*. 1986 *Rev. Jur. et Politique*, 689. Book V is still in progress.

abundance of texts external to the codes or to praetorian solutions which would ruin the unity and the coherence of the legal system. Barring a true recodification endowed with a new life and involving a number of changes touching on the structure and content of the codes, broad rearrangements of existing codes would be difficult without putting the coherence, practicability, references and internal cross-references of the texts in jeopardy.<sup>35</sup> Yet the necessary updating of codified texts is not impossible. In almost every civilian jurisdiction, important reforms of the codes have been successfully undertaken. In this respect, the French Civil Code is a quite significant example. Certain titles have been completely reformed by the substitution of new articles for old ones. The old articles on corporations (articles 1832-1873) were replaced and multiplied by adding indices to the numbers (articles 1843, 1843-1, 1843-2). In other instances, the repeal of certain texts created available space. Certain titles, chapters or sections were thoroughly reorganized on the occasion of the reforms (Act of July 11, 1975 on divorce and articles 229-310 of the Civil Code for example: Title 6 of Book I). New divisions identified with a distinctive number have been inserted in the initial plan (e.g., Title 8 of the contract of real estate development, instituted by Act No. 71-579 of July 16, 1971). The use of such methods shows that the updating and adaptation of codes, even by way of great scale reforms, are quite possible. This is well illustrated by the contemporary recodification of family law in France. Thus, codification does not promote the stagnation of the law, as has been sometimes argued. But the unity and coherence of a code also implies that the harmony of its expression be preserved.

## 2. *The Expression of the Code*

The rule of law, a proposition destined to impose a certain behavior under social constraint, must be stated in a definite, concise, clear and precise manner. This presupposes a certain style. The style of the civil code has often been praised. To be in the proper mood while he was working on "la Chartreuse," Stendhal boasted that each morning he would read two or three pages of the civil code,<sup>36</sup> whereas Jules Romains, in "Knock," advises one to read a little bit of the civil code each evening to fight off insomnia. It is agreed that there exist "canons of legislative drafting." The legislative style must, by its clarity and brevity, express norms adapted to the goals, needs and the implementation of the law, by making them as accessible as possible despite the requirements

35. Cornu, *supra* note 33, at 169; M. Vanel, *supra* note 1, at no. 165.

36. Letter to Balzac, from Civita Vecchia (October 30, 1840).

of the legal technique.<sup>37</sup> Thus, the legislative style and the quality of a code, like any other normative text, presupposes a certain terminology and phraseology. The importance and the necessary unity of a code make these requirements of good expression even more imperative.

A legal terminology must be, above all, precise and exact. Certain concepts are identified by technical terms; common terms have generally acquired a proper legal meaning. But, each word should be a label through which one can identify with certainty one single concept. Polysemies must be avoided because they generate serious uncertainties and ambiguities. With time, the terminology of codes builds in certain archaisms so well known that their meaning does not disturb anyone (e.g., articles 524, 676, 1782, 1966 of the French Civil code). This, however, will not prevent the insertion of modern language in older codes on the occasion of their reforms. Lastly, legal definitions and precisions on the meaning of words, recurrent in common law statutes, are often necessary.<sup>38</sup>

The phraseology of codes, despite a great number of variations, shows certain common traits. The expression of the rules of law is generally direct and impersonal. It essentially entails obligations, prohibitions, permissions, and descriptions. It often proceeds by references to texts or subject matters dealt with elsewhere and uses therefore expressions such as "ci-dessus" (as above, supra) or "ci-apres" (below, infra), which give expression to the coherence of the whole legislation. The timeless and permanent character of the texts is marked by the use of verbs in the present or future tenses. If they are found, subject to the peculiarities of every language in every legislative work, these common traits of legal expression take on a significant importance in codes because of the breadth of their scope, the coherence of their structure, and the durability of their provisions. But the consistency of the drafting methods guarantees a certain unity of expression and style beyond eras, fashions and the personalities of the drafters.

It is the same consistency of expression which helps to achieve a certain unity in drafting, despite the similarity of the texts collected under another type of codification, referred to as formal codification.

## II. FORMAL CODIFICATION

Formal codification, contrary to true or substantive codification, does not involve a construction of a coherent body of texts, new or

37. I G. Cornu, *supra* note 11, at no. 223; see more generally on the legal language, J. Bergel, *Théorie générale du droit*, no. 108 (1985); J. Souriaux & P. Lerat, *Le langage du droit* (1975).

38. *Les définitions dans la loi et les textes réglementaires*, Cahiers de Méthodologie juridique. No. 1, R.R.J. Ed. P.U. Aix-Marseille 1986-4.

renewed, which have for their object the establishment or the renewal of a legal order. Rather, it is an administrative undertaking aimed only at grouping together preexisting and scattered rules without modifying their content.<sup>39</sup> It is nothing but a compilation for the purpose of facilitating, through their gathering, the knowledge of numerous rules, from varied and scattered sources. In other words, it is a purely formal gathering and unification of texts. This form of "administrative"<sup>40</sup> codification is inspired from the process of "consolidation" or "restatement" which is well known in the United States.<sup>41</sup>

Geny observed that a great many of contemporary codifications "are devoid of any creative inspiration" and restrict themselves to "a systematic outlay which tends to organize written law according to a general plan, in order to rid it of obscurities, uncertainties and inconsistencies, to purge it of unnecessary details and useless redundancies, to reduce its dimensions, make its study more popular, and facilitate its application."<sup>42</sup> Although this purely formal codification more naturally related to common law systems, it is becoming more and more frequent in modern day France.

### A. Formal Codification in Common Law Systems

Common law systems remain attached to case law which is based on decisions handed down by judges in particular cases and spread by the rules of precedent and *stare decisis*. Case law may be referred to by means of analogy or dismissed by way of distinction. The rule of law at common law, less abstract in comparison with that of Roman-Germanic types of legal systems, aims at giving a solution in a case and not to establish a general rule of conduct for the future.<sup>43</sup>

Despite its contemporary development, statutory law is still looked upon as an exception to or a deviation from the common law and by and large it is interpreted only in light of common law or equity. It is mainly through its jurisprudential applications that it becomes truly effective. Thus, common law systems do not resort to a deductive reasoning imposed by the civil law systems on the basis of legislative principles, so much so that in common law countries it is hardly con-

39. G. Cornu, *supra* note 11.

40. Olivier, *supra* note 10.

41. I A. Weill & F. Terré, *Droit Civil—Introduction générale*, no. 142 (4th ed. 1979), which cite Tallon, *Codification and Consolidation of the Law at the Present Time*, 14 *Israel L. Rev.* 1 (1979).

42. I F. Geny, *Méthode d'interprétation et sources en droit privé positif*, no. 52 (1954); see also Hahlo, *Codifying the common law, protracted gestation*, 38 *Modern L. Rev.* 23 (1975).

43. R. David, *supra* note 9, at no. 18.

ceivable to fix, through codes, the principles according to which the development of the law must be continued. Besides, such codes do not aim to abrogate either the common law or equity.

In these legal systems, the function of the statute is to list given solutions or to correct the common law. A statute does not have as its object the formulation of the principles of the common law or the substitution of itself for such principles.

The English jurist, then, has a conception of law that rank[s] experience above logic. A solution is considered acceptable if it settles a dispute fairly, even if it should prove difficult to integrate with the whole body of law. Procedure and evidence, thus, are much more important in England than in continental Europe, because common law philosophy considers them the main safeguards against an inequitable application of substantive law rules. It must not be forgotten that, in England, the fight for individual liberties was won in the courts, not in parliament and was a victory attributable to procedure. The legislator was seen as a threat to freedom, the judge as its defender. This traditional view nurtured the esteem in which "judge made law" has been held.<sup>44</sup>

These conceptions have withstood the impulses of an important codification movement initiated in India with the Charter Act of 1833. A monumental legislative effort was then accomplished during the second half of the nineteenth century. Codes of criminal and civil procedure and a criminal code were then drafted, as well as important statutes relating to contracts (Contract Act, 1872) and evidence (Evidence Act, 1872). Even though these texts do not restrict themselves to a mere "consolidation" of preexisting law and even though they show a definite creativity, they remain codes of common law, which are used, like the statutory law of Anglo-Saxon countries, against the background of the rule of precedent.<sup>45</sup> "Thus, by a self-denying practice which impliedly recognizes the existence of the all-pervading customary law, [English] Parliament does not codify."<sup>46</sup>

The problem of codification was raised in common law countries, in particular by Bentham in England, and gave rise to important debates in the United States in the mid nineteenth century. However, the problem of codification never led these countries to an authentic movement of true codification.

44. Law Reform Commission of Canada, *Towards a Codification of Canadian Criminal Law*, 1.36, p. 14 (1976).

45. R. David, *supra* note 9.

46. L. Scarman, *English Law, the New Dimension* 4 (1974).

There are a great number of codes in the United States but they are mostly devised as mere compilations. Their main goal is to list written rules, put them in order and make them easy to find. American codes bring together the rules of law in force in a specific field, but generally do not have the goals of establishing a basis for the development of the law or regulating an entire subject matter, since the common law remains in existence and all statutes must be interpreted in light of its principles.

The phenomenon of codification in the United States is old. The first compilations date back to 1822, in Georgia, and to 1823, in Alabama. Often, initially undertaken as private works, they then became official codes, decided by an act of legislature of the state concerned, and elaborated by a special commission whose final draft was then adopted by the legislature and signed by the governor. Their publication was generally left to a private publisher in application of a contract with the authorities of the state in question. Many revisions are carried out through this procedure. As an example, the Code of Alabama of 1977 is the thirteenth Code (the ninth officially) of that state. The Code of Georgia of 1822 was successively revised in 1837, 1851, 1863, 1868, 1873, 1882, 1895, 1970, 1933, and 1981.

American codes are "consolidation[s] and codification[s] of all the general and permanent laws . . . in force,"<sup>47</sup> be they federal rules, like in the United States Code Annotated (U.S.C.A.) or, for state codes, the legal provisions of the adopting state. Similarly, the main objective of each revision is "to comprehend the preparation of a statutory record showing the status and disposition of acts theretofore adopted, the codification, consolidation, compilation or revision of all statutes in force; and the express repeal of all statutes theretofore repealed by implication, held unconstitutional, or rendered obsolete by the revision."<sup>48</sup>

The object of these codes, as it has been sometimes defined, may be, "as near as practicable, [to] embrace, in a condensed form, the laws of [the state], whether derived from the common law, the constitutions, the statutes of the state, the decisions of the Supreme Court, or the statutes . . . in force in the state." But this objective, assigned to the Code of Georgia of 1863, turned it into "the first code in the United States giving statutory effect to common law and equitable principles."<sup>49</sup> Despite the diversity of the sources of law, if American codes include case notes, editor's notes, or draftsmen's comments, cross

47. O'Neill, *Preface to United States Code*, at VII (1982 ed.).

48. Cal. Code at v (West 1985).

49. Ga. Code Ann. at ix (1982).

references, research references, opinions, it generally is specified that they are not to be considered or interpreted as being an integral part of those codes. On the other hand, "The code section numbers, as well as [t]itle, [d]ivision, [p]art, [c]hapters and [a]rticle headings, where appropriate, are included in the laws as enacted."<sup>50</sup> Once adopted, codes "shall be received as the law in all courts and in all proceedings before any board, commission, agency or other body or any office of [the] state"; and "all the titles of the Code will be legal evidence of the general and permanent laws. . . ."<sup>51</sup>

The fundamental difference which sets apart these compilations from the true codification of the continental model is reflected in their distinctively formal presentation. Leaving aside the general preliminary provisions which can be very voluminous,<sup>52</sup> most American codes classify subject matters by titles and by alphabetical order,<sup>53</sup> starting, for instance, by "administration of the government" or "agriculture" to end with "war and national defense" or "workers compensation," as the case may be, after having mentioned "alcohol," "aviation," "banking and finance," "criminal procedure," "trade and commerce," etc. It is only within each title that one can find an intellectual outlay of the substantive rules of the subject matter. Basically only codes of Roman-Germanic tradition, such as the Louisiana Civil Code, which is exceptional, or codes drafted under the influence of European methods, such as the Uniform Commercial Code or even the Louisiana Code of Civil Procedure, are organized according to a methodical and logical plan.

Thus, with certain exceptions, American codes are merely formal consolidations of existing texts, in all subject matters, not an attempt to frame the development of the law or to constitute an innovating system of general organized rules within a solidary, logical and coherent whole. Consequently, they are different from the true substantive codification of the European tradition.

But the American style codification takes on a particular importance because it makes law accessible through its organization, its precision, and its constant updating. The formal organization of these codes is meant to make their updating easy. The best way to illustrate this point is to give, as an example, an excerpt from the "user's guide" of the Official Code of Georgia Annotated:

50. 10 Cal. Code, at vi (West 1985).

51. 1977 Ala. Acts 20, § 8; O'Neill, *supra* note 47.

52. See, e.g., the first six titles of the U.S.C., 1982 Ed.

53. See, e.g., Alabama Codes, California Codes, Official Code of Georgia Annotated, Code of Virginia, United States Code.

If a new title, chapter, article, part, or subpart is added between two existing titles, chapters, articles, parts, or subparts, it will be designated by the preceding numeral plus a capital letter. Thus, if two new chapters are to be added between Chapters 4 and 5 of a title, they will be designated as Chapters 4A and 4B.

A three-unit numbering system is used to designate Code sections. Thus, Code sections 2-5-1 is the first Code section of Chapter 5 of Title 2. . . . At the end of each article, part, and subpart, gaps are left in Code section numbers to allow for future legislation. If a new Code section is added between two existing Code sections, the new Code section will be designated with the preceding Code section number followed by a period and one or more numerals. Thus, if two new Code sections are added between Code section 2-5-38 and 2-5-39, the new code section will be designated as code sections 2-5-38-1 and 2-5-38-2.<sup>54</sup>

This process of formal codification, which is traditional in the United States, currently is used in European countries and especially in France for a number of important subject matters.

#### B. Formal Codification in Contemporary French Law

In French law, in view of the abundance of successive texts and the extension of the powers of the state, legislative and regulatory provisions relating to a specific problem had become very difficult to consult or even to find. Through extensive modifications, supplements, and numerous derogations, the texts, some of which had been abrogated implicitly or expressly, fully or partially, overlapped and conflicted with one another, and presented serious gaps. After the Second World War it was necessary to gather them together and put them in order. A decree of May 10, 1948 established a "high commission charged with the study of the codification and the simplification of statutory and regulatory texts."<sup>55</sup>

In each area which had undergone an official regulation, it was the task of the commission to make an exhaustive survey of all statutory and regulatory dispositions and to combine them in one single collection of existing rules so as to make their consultation and study easier. This undertaking was not without precedent. There had already been, in the

54. Ga. Code Ann. at xi (1982).

55. Décret No. 48-800 du 10 Mai 1948 D. 1948 III 195; Modif. Décret No. 48-1565 du 8 octobre 1948, D. 1948 III 383 et Décret No. 54-480 du 11 mai 1954, D. 1954 III 203; Groshens, *supra* note 1.

areas of taxation and labor law, similar attempts which were more or less successful. It became a great success and had a considerable impact. At the present time, there exists in France an impressive list of new codes of a purely formal nature: Code de la mutualité (Decr. August 5, 1955), Code de l'industrie cinématographique (Decr. Jan. 27, 1956), Code minier (Decr. August 15, 1956), Code des Assurances (Decr. July 16, 1976), Code de la construction et de l'habitation (Decr. May 31, 1978), Code de la santé publique (Decr. Oct. 5, 1953), Code de la famille et de l'aide sociale (Decr. Jan. 24, 1956), Code des pensions d'invalidité et des victimes de la guerre (Decr. April 24, 1951), Code des débits de boissons et des mesures contre l'alcoolisme (Decr. Feb. 8, 1955 and ord. of January 7, 1959), Code rural (Decr. April 16, 1955), Code de l'organisation judiciaire (Decr. March 16, 1978), Code de l'aviation civile (Decr. March 30, 1967), Code des communes (Decr. Jan. 27 and March 28, 1977), Code Général de impôts (Decr. April 6, 1950), Code des postes et télécommunications (revised Decr. March 12, 1962), Code de l'urbanisme (Decr. Nov. 8, 1973), Code de l'expropriation publique (Decr. March 28, 1977), Code électoral (Decr. October 27, 1964), Code des douanes (Decr. Dec. 8, 1948).<sup>56</sup> Numerous subject matters are dealt with, be they in the area of economics, social activities, traffic, transports, public law, rural law, of taxation law. However, this type of codification presumes a particular method and contends with special difficulties.

Since this codification is limited to a classification of texts presented in a logical order, and without modification of their substance, this codification appears to be, a priori, in the French constitutional system, susceptible of being implemented by the executive branch by way of governmental regulation. In reality, this codification concerns both legislative and regulatory texts and must obey the principles of the hierarchy of legal norms. Moreover, this collection of texts cannot consist only in a mere juxtaposition of provisions which are sometimes in conflict. It presupposes an effort in harmonizing, requires numerous interpretations, and dictates assessments on so-called abrogations, implicit or uncertain, and on the scope of application of derogations or exceptions. It seems then impossible to achieve a coherent collection of scattered and heterogeneous texts in one body without tampering with the substance of those texts. One cannot "achieve, without modifying the substance of the texts, either a coherent draft of incoherent provisions" or even "a systematic classification of texts governing a subject matter, when there is no homogeneity in their legal nature."<sup>57</sup> Thus, it is inevitable that codification implies dealing with and correcting the sub-

56. Fricero, 1 Guide Juridique Dalloz; codes no. 10-18 (1987).

57. Groshens, supra note 1, at 160.

stance of texts. And yet, one cannot possibly accept that legislative texts be altered or even subjected to any regulatory process in the slightest way. It would be contrary to the hierarchy of legal norms and even very dangerous. Codification by decree implies therefore, in French law, that the government be empowered by the legislature to embark on a codification.

At the present time, under the Fifth Republic, for every subject matter, it is an act of Parliament which stipulates that,

a codification of texts of legislative and regulatory nature concerning this subject matter shall be undertaken, by way of decree after consultation with the Council of State and after the opinion of the high commission in charge of the study of codification and the simplification of legislative and regulatory texts.<sup>58</sup>

The same act generally specifies that "these decrees will bring to the texts of a legislative nature the formal modifications made necessary by the process of codification to the exclusion of any modification to the substance of the text."<sup>59</sup> In addition, the decree instituting the legislative part of the code refers to articles 34-37 of the constitution and to the statute providing for codification.<sup>60</sup> As to the codification of regulations, the decree which carries it out refers both to the statute providing for codification and the decree undertaking the codification of the legislative part.<sup>61</sup>

With respect to the revision of the texts implemented before the Constitution of 1958, article 37 paragraph 2 of the constitution draws a distinction, on the basis of the distributions of the legislative and regulatory powers, between, first, those "texts in the legislative form" issued before 1958 in those areas which have become regulatory, which can be modified by governmental decrees after consultation with the Council of State and, second, those texts in the legislative form issued after the Constitution of 1958 which can be amended by decree only "if the Constitutional Council has declared that they are of regulatory nature."

58. See Art. 15 Loi No. 72-626 du 5 juillet 1972, D. 1972 III 362, for the Code of judicial organization.

59. Id. On the distinction between "refontes et compilations," see L. Pigeon, *Redaction et interprétation des lois* 67 (1978).

60. See Décret No. 78-329 du 16 mars 1978, D. 1978 III 191, for the Code of Judicial Organization; Décret No. 76-666 du 16 juillet 1976, D. 1976 III 328, referring to Loi No 55-1442 du 8 novembre 1955 relating to the codification of legislative texts concerning the insurance business, for the Insurance Code.

61. See for Code of Judicial Organization Décret No. 78-330 du 16 mars 1978, D. 1978 III 192; for the Insurance Code, No. 76-667 du 16 juillet 1976, D. 1976 III 330.

Thus, the fact that codification by decree is an administrative action and not a normative action gives rise to particular problems of legal technique. The codification of legislative texts, although authorized by a statute, must be confined to adaptations of form only in the existing texts, when they are necessary, but it cannot reflect any modification of the substance. Only the codification by decree of regulatory texts in force may bring about by decree abrogations, modifications or supplements to these texts. But this alone is not enough to solve the possible conflicts or remedy all the defects of logical consistency between all the codified texts.

The variety in the nature of the codified rules and the distinction made between the decrees of codification of legislative texts and the decrees which codify only regulatory texts require that a division be maintained, in this purely formal codification, between legislative texts and regulatory texts. Thus, formal codification does not lead to homogeneous codes but, within the same code, to several successive units of texts bound together according to their nature.

The listing within these codes refers then to the origin of the texts. One finds first the legislative part in which the number of each article is preceded by the letter "L." Then comes the regulatory part in which the articles are preceded by the letter "R" for those regulations of public administration taken by decree after consultation with the Council of State, or even the letter "D" for ministerial decrees and the letter "A" for "arrete" or departmental orders. In addition each part of each code is structured according to the same logical plan which includes the traditional hierarchical divisions: books, titles, chapters, sections, and paragraphs.

The way articles are numbered reflects these divisions. Their number includes, after the letter indicating the nature of the text, three figures which indicate respectively and successively the book, title and chapter. Then, after a hyphen, the last figures correspond to the actual number of the article. For instance, article L-321-15 is thus a legislative text of book III, title II, chapter 1, bearing in this chapter the number 15.

This organization makes the constant updating of the codes easier. The statutes or regulatory texts repealing, modifying or supplementing the codified provisions must refer to these provisions and blend with them. The deletion of certain texts or the insertion of new provisions in this framework can be done easily, without undermining the structure of the code in question.

Thus, the criticisms, sometimes very severe, leveled at the administrative codification<sup>62</sup> are very excessive. It is true that this technique

62. Groshens, *supra* note 1.

neither allows real innovations of the substance nor a very homogeneous and coherent presentation with respect to the form. It doesn't even succeed in parrying the dispersions of and the conflicts between the texts. Still it has the great merit of effecting a broad gathering of texts and offering a classification which facilitates the knowledge and the application of the law. Even if it is imperfect and limited, formal codification is of a great practical benefit.

#### CONCLUSION

In short, beyond the diversity of the legal systems, it can be pointed out that codification whose importance in history and throughout the world is paramount, takes two very distinct directions, both of which partake of the necessary coherence of any legal system. The main goal of substantive or true codification is to achieve a material and systematic structure of the law, whereas formal codification strives only to succeed in regrouping and classifying existing texts.

Substantive codification is a structure for the stability and a durable framework for the development of law, whereas formal codification is a receptacle for the constant mutability of texts. Substantive codification is concerned with essential principles and stable rules or institutions; formal codification deals mainly with specific or pertinent regulations.

In short, substantive codification reflects the substance of the legislative expression; formal codification is confined to the implementation of the texts.

In any case, codification constitutes one of the essential methods of nomology, or legislative drafting. Its principal methods are thus closely linked to the development of legal systems and civilizations. Haven't we too often forgotten their importance and neglected their study?