THE GREAT DEBATE OVER THE LOUISIANA CIVIL CODE'S REVISION

-- PANELISTS --

Hon. James Dennis
Julio Cueto-Rua
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Shael Herman
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Introduction By Melvin Dugas, Managing Editor

In his recent law review article, *The Death of a Code--The Birth of a Digest,*[1] Professor Vernon Palmer of Tulane University shook the foundations underlying the modern ongoing revision of the Louisiana Civil Code. Predictably, the article stimulated heated debates, both in the halls of the law schools and in the offices of the downtown law firms. The questions in both circles were the same: did Professor Palmer's article portend the fourth great crisis of the Louisiana Civil Code? Would the nonrepealed code articles of 1870 be exhumed and walk in equal rank with their newly enacted progeny? If the old articles are concurrently in force, would this fact destroy the coherence and completeness necessary to a code? Furthermore, if the intricate caselaw surrounding the 1870 articles was enshrined in the new articles, would this also have the effect of transforming the Code into a digest?

In an effort to answer these weighty questions, the Tulane Civil Law Society sponsored a discussion between Professor Palmer and a panel of some of the most distinguished experts on Louisiana civil law: Professor A.N. Yiannopoulos of Tulane Law School; Professor Julio Cueto-Rua of the Paul M. Hebert Law Center at the Louisiana State

1. 63 Tul. L. Rev. 221 (1988). Briefly stated, the thesis of Professor Palmer's article is that by "amending and reenacting" new articles of the revision, the legislature did not expressly repeal the earlier Code articles. If these old articles do not substantively conflict with the new articles, they may still be good law even though they are no longer in the Code. Further, the Revision incorporates the Louisiana jurisprudence into the scheme of the Code and radically changes the context in which the new articles function. For a variety of reasons the author concludes that a civil code, as defined in the French tradition, has been lost and has been replaced by a civil law digest.

University; Mr. Shael Herman of the New Orleans law firm of Sessions, Fishman, Boisfontaine, Nathan, Winn, Butler and Barkley; Associate Justice James L. Dennis of the Louisiana Supreme Court; and Professor David Gruning of the Loyola University School of Law. Professor Cynthia Samuel of the Tulane Law School served as moderator. The lively discussion of this panel took place on April 7, 1989 and was transcribed for publication in the Tulane Civil Law Forum. Each speaker was given an opportunity to edit and annotate his section for purposes of clarity; however, it was the intent of the Forum to retain the format of a dialogue. For this reason, the following piece lacks the voluminous footnotes typical of law review articles. Nonetheless, the editors of the Forum hope this symposium will shed some much needed light on whether we really have witnessed the death of a code and the birth of a digest.

The Panel Discussion

Professor Samuel:

I'm delighted to see such a good audience today, both civil law students and common law students, common law faculty, civil law faculty, practitioners. It's a wonderful response to the program the Civil Law Society has set up for today. I want to give you a little background into the kind of discussion you are likely to hear today because those of you who are young may be a bit surprised to see how lively the debate may be.

For almost 200 years, the people of Louisiana have been trying to create their own breed of that civil law animal known as a "civil code" and secure for it a habitat in which it could flourish. Recently, the breeding stock of laws has come from an increasing number of sources, European, South American, even the common law, with the expert breeders differing over the merits of each. As with any breeding program, if you know anything about animals, there are risks: the appearance of new but unwanted characteristics, regression to old undesirable characteristics, failure to thrive, unacceptable expense,

unanticipated delay, and even sudden death. Because this enterprise is so perilous, we keep the evolving animal under constant observation.

Those who observe the animal and its habitat have not always agreed on their conclusions, and on at least two prior occasions the disagreement has been quite lively. Both times an article in the Tulane Law Review set off a great debate. In 1937, LSU Professor Gordon Ireland came to the conclusion that "Louisiana is today a common law state." (11 TLR 585,598). This was like bombing Pearl Harbor, and his own colleagues, Dean Hebert and Professors Daggett, Dainow, and McMahon, went to war against him in the following issue of the TLR.

In 1971, Professor Batiza of Tulane traced the literal sources of the Louisiana Digest of 1808, that Digest being the first systematic legislative rendering of Louisiana civil law. His conclusion, that the sources of the Digest were essentially French, was challenged by Professor Pascal of LSU, who said they were essentially Spanish. This controversy was not just of historical interest, for the Digest of 1808 was in large part incorporated into the Code of 1825, which is the basis for the 1870 codification, which, with revisions, is our present codification. So the controversy had a direct impact on the origin of parts of our present codification and suggested the tools we could use for interpreting it. Dean Sweeney termed this controversy a tournament of scholars in recognition of the dedication and élan with which each opponent put forth his case.

And now we have another provocative article from the TLR in the December 1988 issue, this time by Professor Vernon Palmer of Tulane, entitled *The Death of a Code, the Birth of a Digest*, in which he examines the latest generation of Louisiana Civil Code and has spotted some characteristics that may not be desirable.

The procedure I propose, if the panelists will agree, is to give Professor Palmer a few minutes to synopsize his article in case there are a few people who haven't read it and all the footnotes, and then I'd like to divide Professor Palmer's position into its two major issues. Then I will ask each of the professors on the panel, including our practitioner-professor, to comment on the first issue. After the

professors have argued back and forth, I'm going to ask the judge to decide the case. Then we'll do the same thing with the second issue.

Professor Yiannopoulos:

We can have a jury, too !

Professor Samuel:

O.K. Professor Palmer, will you begin?

Professor Palmer:

I, too, wish to thank the Civil Law Society and its energetic president, A.J. Herbert, for this gathering which allows us the opportunity to have this discussion and to present all points of view. I also want to thank my students who turned out in numbers for this gathering, and I beg the indulgence of others in the audience as I address immediately their only intellectual concern in these proceedings - Yes: it will be on the final exam, which will be closed book. [Laughter] No: you don't have to remember the Code articles by number. [Laughter]

Let me begin with just a few words of background information that may not be familiar to everyone of you. There has been no true revision of the Louisiana Civil Code since its adoption in 1825. A technical revision took place in 1870, but this was a verbatim reenactment, merely intended to drop the unconstitutional slavery provisions of the original Code and to add certain amendments that had been passed by the legislature in the interim between 1825 and 1870. Then, in 1948, recognizing that the Code was becoming anachronistic and very old, the Legislature entrusted the task of Code revision to the Louisiana Law Institute. Since 1938, the Louisiana Law Institute has been the official law revision commission and official law reform agency of the state of Louisiana. The Institute has already given us a number of highly successful codifications in this century, including the Criminal Code of 1942, the Revised Statutes of 1950, the Code of

Procedure of 1960, and others. As to the Civil Code's revision, this preparatory work began in 1968, and the first fruits of the revision came about 10 years later when the revised property articles were first enacted into law between the years 1976 and 1979. Now from the beginning, a political decision was made, or a strategic decision was made, to revise the Civil Code incrementally, piece by piece, so it is often called by those in the field "a piece-meal revision" - one set of articles at a time. It is a book-by-book, title-by-title revision of the Civil Code, so that the Legislature could more easily enact, and more palatably digest it.

After property, there was enacted the following revised Code Articles:

(1) The Matrimonial Regime (1979),
(2) Partnership (1980),
(3) Successions (1981),
(4) Occupancy, Possession, and Prescription (1982-83),
(5) The Law of Obligations (1984),
(6) The Preliminary Titles (Articles 1 - 24 or 25) in 1987,
(7) The Law of Natural and Juridical Persons (1987),
(8) Suretyship (1987) which is at the other end of the Code; and
(9) Marriage (1987).

Thus, we have seen book-by-book, title-by-title, incremental revision of the Civil Code in no particular sequence or logical order. And the result as we sit here today is that after more than 20 years of this process, about 40% of the Code articles of the 1870 Code have been revised.

My essay, *The Death of a Code*, consists of my reflections upon that revision and the effects that it is having upon the civil law in Louisiana. What has led me to the rather lugubrious conclusion that the Code is dead and that the Code is now a Digest? Briefly, my conclusion is based upon two very different but complementary analyses: first, I've analyzed closely the legislation enacting the revision, the 16 separate pieces of legislation. This reveals that the

legislature has neither expressly nor impliedly repealed the old Code articles that were under revision. The result is that the old Code articles, despite the revision continue to live and continue to be law in force. This conclusion disagrees with all conventional assumptions, but no one was looking at the legislature's enactments; no one was really analyzing what the legislature had in fact done or said, and no one was reading this legislation in light of Code principles about repeal, nor in light of historic crises of the 19th Century in Louisiana where courts applied these Code principles, sometimes to the amazement of the legal community, and held that old, prior law was still in force concurrently with a new Code or Digest that was subsequently enacted.

The second part of my analysis starts from the fact of non-repeal and then goes on to look at the new Code articles themselves in their substance and structure. My study of the revision's structure and substance leads to the conclusion that the Code has adopted now the architecture and the methodology of a digest rather than that of a code. Most new articles come pre-glossed, pre-annotated by old jurisprudence. Many new articles are caught in the contradiction of a rule/counter-rule methodology which pits the text against the comment, or pits text and comment versus old jurisprudence. Such new provisions cannot stand on their own two feet, so heavily reliant are they upon non-legislative sources of law. I haven't enough time in my introductory remarks to lay the foundation which supports the second conclusion. I am sure it will come out in later discussion. For the moment I will only address the first question - the analysis of the legislation and the effect of non-repeal.

Before turning to this analysis, however, let me define two terms: code and digest. In the civil law, a digest may refer to a less scientific kind of codification that preceded the modern European codes. A civil law digest does not break with the past sources but simply summarizes and synthesizes them. Such were the general characteristics of Justinian's Digest, the first kind of code ever possessed by the Romans. A civil law digest may also refer to a partial and incomplete form of codification that is supplemented by non-codified, pre-existing law and does not break with its legal antecedents.

This was apparently the reason why in 1808 the Louisiana redactors chose to call that codification a digest, rather than a code.

Let me now turn to an analysis of the enacting legislation. The enacting legislation of 1976 - 1987 consists of 16 separate pieces of legislation, which may be summarized as follows:

Of 1535 articles that were revised, only 236 (about 15%) were expressly repealed. The remainder, 1271 articles (minus 28 that were redesignated) were amended and reenacted. The distribution of repeals among these 16 pieces of legislation is fascinating. It has a haphazard, aleatory quality to it. With matrimonial regimes, all 135 of the prior Code articles were repealed. However, when we turn to property, only 51 out of 376 prior articles were repealed. The rest were amended and reenacted. Turning to the obligations articles, on the other hand, 514 articles were amended and reenacted, and only one article was repealed. Consequently, we have almost an indecipherable policy with respect to why or when repeals occur.

And what does this mean? Well, as to the 236 Articles that have been expressly repealed, they will undoubtedly cease to exist, and nothing further need be said about that. It is as though they had never existed. But as to the remaining 1271 Articles (or 85% of the total), their "amendment and reenactment" did not produce their repeal, for we know from the Code itself exactly what is required. An express repeal means "literally" repealed, and the word "repealed" is a sacrosanct word used throughout our history to accomplish that literal declaration. The words "amended and reenacted" do not announce a repeal and have never been construed to mean a literal repeal. And the legislature knows the difference, because in 15% of the cases, it does use the word "repeal"; whereas in the other 85%, it does not. So to say that amended and reenacted is a way of creating an express repeal is putting words in the legislature's mouth, indeed putting the wrong words in the legislature's mouth.

Therefore the conclusion follows that there has been no express repeal of the 1271 articles that were only "amended and reenacted." Secondly, and even clearer, there has been no implied repeal of these 1271 articles because an implied repeal is defined this way: the

subsequent revising law must substantively conflict with the earlier law. The test of an implied repeal is one of substantive conflict. There is very little, or not a great deal, of substantive conflict between the revised articles and the old articles, and to claim that all of these 1271 articles are in substantive conflict, and hence impliedly repealed, will not do the trick. They are not.

Upon analysis, which has yet to be completely or systematically done, very few of the articles will be found to be substantively incompatible. For example, if a later law says that certain close relatives may enter into matrimony but an earlier law says that they may not, then you have a substantive conflict between the provisions and an implied repeal of the earlier law has occurred. If a later law says that a person 18 years old may enter into contract, but an earlier law says that such a person is a minor who may not contract, again there is a substantive conflict.

Now the Code only permits these two forms of repeal, and no third alternative exists. Hence the conclusion must be that the bulk of the old Code articles remain in force, for they have not been expressly repealed by literal declaration, nor impliedly repealed due to a substantive conflict with the new articles.

Now this situation must wreak havoc on the Revision's noble attempt (with which I totally agree) to modernize and clarify the law. It also wreaks havoc on the concept of a Code that is supposed to be logical, coherent, complete, self-sufficient, and a clean break with the past.

The anomaly of having a revision without complete express repeal is clearly reflected in our own legal history. Historically, our present Code revision represents the only example of codification in the 20th Century where the Louisiana Legislature has not expressly repealed the prior law. Look what the Legislature did on the prior occasions when it gave us new Codes. In 1942, when 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. Look what it did in the case of the Revised Statutes

of 1950, where we find elaborate schedules and appendices of the expressly repealed laws. Look what the Legislature did in the case of the old Code of Practice when it enacted the new Code of Procedure in 1960. It declared that every article of the old Code of Practice was repealed. Hence, the relevant query today is: "Why the present deviation from this historical pattern?" What a contrast we now have between those meticulous repeals of the past and the haphazard approach of the current civil code revision.

The early history of the 19th Century shows that the present deviation constitutes a very real danger. In the turbulent legal history of this state, we have witnessed two or three prior occasions where grave situations arose that were remarkably similar to the one before us now. I'm referring in passing to the famous crisis of 1817 and to the decision in *Cottin v. Cottin*,[2] where it was ruled that our 1808 Digest failed to expressly repeal the Spanish law. This therefore meant that the Spanish law continued to be in force in Louisiana into the statehood period, to the extent that these Spanish laws were compatible with the new provisions of the Digest.

A second crisis occurred soon after the enactment of the 1825 Code, and was once again due to insufficient attention to the repeal of prior law. The courts found that certain parts of the old Digest were still in effect and, by extension, there had not even been a clean break with the old Spanish laws. In 1828, three years later, the Legislature recognized the problem and passed the Great Repeal, an express repeal of the 1808 Digest and all the Spanish law which had gone before.[3] The historical lesson is clear: a Code in its true sense cannot function, cannot merit the name of a code, without an express repeal of all prior law.

Today this lesson has been forgotten, but only temporarily I hope. It had been remembered and observed throughout the 20th Century when we had other code and statutory revisions. It seems logical now to recognize that a new crisis over sources is on the

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2. 5 Mart. (O.S.) 93 (La. 1817).

3. This statute, Act 83 of 1828, expressly abrogated the Digest of 1808 and "all the civil laws which were in force before the promulgation of the civil code lately promulgated."

horizon and may soon arrive. If it should come, the crisis could be heralded by a decision similar to *Cottin v. Cottin* in 1817 in which our present Louisiana Supreme Court, or some other court, would give effect to an article of the 1870 Code that had been revised, thereby exploding the conventional belief that those articles had been repealed. At that point some legal historian may suggest that what we need is another Great Repeal, just as we had in 1828. On the other hand, some legal pragmatist might stand up and say that a general repeal would not really be advisable because the new articles he had studied, both structurally and substantively, depend upon the old articles and old jurisprudence. Indeed, the next crisis may start with some famous case and then end with a study showing which articles of the 1870 Code have survived an implied repeal, and which have not. For what has emerged out of the revision is not a coherent, self-contained code, as defined in French tradition. That kind of code is dead. The revision has spawned a digest in which there are two layers of code provisions concurrently in force. There is also a wealth of the old Code's jurisprudence and a new set of revision comments struggling to regulate the interplay between these rival sources. So the roots of the problem, in my judgment, begin with the legislature's failure to repeal the old Code, but then they sink deeper. The revised Code now has the architecture of a digest. Its articles have been designed to synthesize the pre-revision jurisprudence and they presuppose the continued existence of the old Code.

In conclusion, may I recall what the Irish poet, William Butler Yeats, once wrote in his famous poem, "The Second Coming." He said,

> "Turning and turning in the widening gyre,
> the falcon cannot hear the falconer.
> Things fall apart. The centre cannot hold."

I wonder if we, as we extend the ambit of the revision, can we still hear the call of our original traditions and our revered jurisconsults? Must things fall apart? Can the center hold? The answers depend upon other questions. Is a digest a more realistic expression of the system we have and know, rather than the Livingstonian conception that we always revered but imperfectly followed? Will the profession recognize the crisis or perceive the shift of paradigm from code to

digest? Should revision of this kind be continued? Should corrective measures be made to resuscitate the Code?

I'm sorry to end with so many questions, but I believe that to bury the Code without examining these issues would cast dishonor upon the law and upon ourselves as well.

Thank you.

Professor Samuel:

Thank you, Professor Palmer. We look at the first issue you raised and that is, has there been an express or implied repeal of the old Code articles, and something tells me Professor Yiannopoulos is dying to have his say on this. Shall I call you first, Professor Yiannopoulos?

Professor Yiannopoulos:

Shall I have you call time?

Professor Samuel:

Well, you can take as much time as you need.

Professor Yiannopoulos:

Well, I would like to take the time to make a few assertions, too. The thesis of Professor Palmer that I will address is the question of whether there has been an express repeal of the provisions of the Louisiana Civil Code of 1870. I will not address the questions of whether we have created a digest or whether there are faults in the revision. These may be addressed later by others. I am responsible for a part of the revision and if there are faults, well, we can debate the matter at another forum. Here, I need only state that what I read in the article of Professor Palmer is mostly assertions that do not rest on facts and are confused with opinion.

I'm not certain when Professor Palmer states a fact, states an assumption, or states an opinion. He writes, "the old Code articles have not been expressly repealed"[4] on page 224. Is this a fact, Professor Palmer, or is this your opinion? He continues, "they have been simply amended and reenacted,--" Now, is this a fact? "--which means that these old articles have been kept alive provided that they are not contrary to or irreconcilable with the revision." Again, is this a fact or an opinion? I continue: "the result is that two Codes coexist and govern the same subject matter concurrently." Is that a fact or an opinion? "And that," on the same page, "transactions entered into before the effective date of particular revisions will be governed by the old law subject, of course, to the retroactivity provisions of the Louisiana Civil Code Article 6." Now here, this is an illustration of a fact, an opinion, and an assumption all in one. It is not true that transactions entered into before the effective date of particular revisions will be governed by the old law. This is not a fact. Why? Because at least throughout the whole revision of property, the Institute has taken care to have a provision in the title being revised to state that, "Things," in this title "Of Things" shall apply to existing things. The same as to usufruct, limited personal servitudes: "this title shall apply to existing limited personal servitudes." Further, as to predial servitudes, "this title shall apply to existing predial servitudes." Of course, the proviso is there: "unless application of the law retroactively would conflict with the Louisiana Constitution or with the United States Constitution." Article 6 of the Louisiana Civil Code that is being cited has no application and no relevance in that respect.

Turning to Professor Palmer's basic thesis, that there has been no express repeal, the question to ask is "What is express repeal?". Professor Palmer tells us that there is an express repeal when the legislature expressly states that "this article has been repealed, or annulled, or destroyed, or an equivalent expression." Interestingly, no authority is cited for this position, Professor Palmer. I see none, and in my view, this is a much too narrow interpretation of Article 23 of the Louisiana Civil Code which defines express repeal and implied repeal. Besides, if Professor Palmer is correct that there has been no express

4. Palmer, *supra* note 1 at 224.

repeal, then I would suggest we should look to Article 1811 of the Louisiana Civil Code of 1870, which according to my opinion and Professor Litvinoff's opinion, was repealed in 1984. This article defined the word express - and it said "express when evinced by words either written or spoken; implied when it is manifested by actions." This article, Professor Palmer, of course pertains to the expression of intent in the interpretation of contracts. But, we have applied the rules of interpretation of law and interpretation of contracts in Louisiana for 200 years interchangeably, and we have applied Article 1811 in connection with interpretation of law. So if it is not repealed, it still tells you what is express. Express is not only when we use the words: "declared, repealed, or destroyed." Any words used by the legislature can constitute an express repeal.

Am I dreaming? No, I submit that I am not, because there is authority of the Louisiana Supreme Court in the case of *City of New Orleans v. Doll*,[5]. There, Act 237 of 1924 repealed "all laws or part of laws, general or special, inconsistent with or contrary to this Act." The issue before the Louisiana Supreme Court was whether this Act repealed specific provisions of the Charter of the City of New Orleans that were inconsistent with the Act. The Louisiana Supreme Court held, "There is no question here of an implied repeal of the important provisions of the city charter; the repeal is express and clearly signifies the intent of the legislature that the provisions of the statute were to be paramount."[6] This is not an isolated decision. As a matter of fact, Louisiana legal history of 200 years will bear me out that the question of express repeal or implied repeal of laws, is essentially a question of the intent of the legislature.

The intent of the legislature to expressly repeal a statute exists when words are used which lead to no other implication except the intent to repeal the particular legislation. There is an implied repeal when an express intent to repeal is not there and yet the intent of the legislature to repeal can be gathered from its action, from its declarations, and from its language in other provisions. Then, of course, this is what Professor Palmer has described as implied repeal:

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5. 224 La 1046, 71 So.2d 562 (1954).
6. 71 So.2d at 564.

when there is conflict and it is impossible to reconcile the new law with the old. Well, simply, this is one of the facts. It is not a criterion. The criterion is, I submit, the intent of the legislature to repeal.

We can now go to specifics and the formula "amend and reenact" to see whether this formula shows an intent to expressly repeal. I have no doubt whatsoever because every year I'm revising, every year I'm editing the Louisiana Civil Code. I have a new edition, and I go to the Acts of the Legislature, and I see at least 30 to 40 acts that are affecting articles of the Louisiana Civil Code of 1870. Now, "repeal" is used only when an article number is taken out. When the legislature, for example, repealed an article that we enacted in the field of property revision (Article 520 dealing with bona fide purchase), it used the word "repeal." Obviously, the Legislature could do nothing else but say, "We repeal this Article," and they did repeal it. But when practically every year the amendments to existing articles are enacted, then the Legislature uses the formula, "We amend and reenact."

In 1988, the Legislature amended and reenacted Article 157 of the Louisiana Civil Code, dealing with rights of children and custody of children. Also, it amended and reenacted Article 1548 dealing with acceptance of donations by deaf and dumb people (they dropped the word dumb). It now only concerns the acceptance of such donations by deaf people. With respect especially to the custody of children, until this year, Article 157 had two paragraphs, Paragraph A and Paragraph B. The 1988 amendment and reenactment dropped Paragraph B, and I'm going to ask Professor Palmer, "Do you mean to say that because the legislature used the form 'amend and reenact,' that Paragraph B is still there although it is reconcilable with the new provisions?" I think no Louisiana court has ever held so with respect to literally thousands of amendments and reenactments of provisions of the Louisiana Civil Code and other laws. So, this is the main problem. With respect to more specifics and especially with respect to the question of the doom that may be upon us, well we may stop here and we can pick up the topic later.