MINOR RISKS AND MAJOR REWARDS: CIVILIAN CODIFICATION IN NORTH AMERICA ON THE EVE OF THE TWENTY-FIRST CENTURY*

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I. MINOR RISKS

The imminent passage of the new Quebec Civil Code calls for us, as North America's civilians, to celebrate our shared heritage. Garrisoned in outposts in a vast common-law territory, we recall proudly our ancestral law that, by the time of the Norman Conquest in 1066, was already fourteen centuries old. Despite our isolation and separation from each other and from civilian territories in Europe as well as Latin America, we have withstood Anglo-Saxon onslaughts much more bravely than the Anglo-Saxons withstood their Norman attackers. If our civilian fortresses are not impregnable, they have at least proven sturdy; and their sturdiness testifies to the continuing vitality of our shared traditions.

Eloquence about our distinctive traditions implies certain risks: our common-law brethren may regard us as mildly arrogant elitists who claim an intellectual pedigree superior to theirs. Even as we protest that we desire from our Anglo-American neighbors only respect and understanding, the very outlook and vocabulary of our Roman heritage render us suspect in their eyes. We cannot change the historical fact that the Romans established in Western consciousness a linguistic and conceptual link between "civilization" and "civil" law. Even a casual brush with Roman law teaches us that the earliest civilizing law, the *ius civile*, was a special regime reserved for Roman citizens as a privileged in-group.[1] For noncitizen outsiders such as conquered foreigners and barbarians, the *peregrine praetor* developed a *ius gentium*, a universal law of nations generally applicable to everyone, including Roman

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1. On the *ius civile* and its role for Roman citizens, see HANS J. WOLFF, ROMAN LAW: AN HISTORICAL INTRODUCTION 61-70. "*[I]us civile* was that set of rights of the individual citizen which the community was prepared to protect through its constitutionally established organs, because they resulted from legal institutions and principles rooted in the collective conscience of the Roman people and sanctioned by ancestral usage, common recognition, or legislative fiat of the political community." *Id.* at 62.

citizens.[2] Even today diplomatic discourse may refer to uncivilized outsiders as, for example, in the remark that Sadaam Hussein's diabolical conduct put Iraq outside the family of civilized nations.

Honesty and sound political judgment dictate that we cannot be smug or self-satisfied about our heritage, for we North American civilians, even more than our civilian counterparts elsewhere, owe the English tradition an enormous debt. The dialectic between the traditions has made us what we uniquely are. Our enterprise here is to assess the process of cross-fertilization between these traditions of equal dignity and stature, not to denigrate either system. By viewing our task in terms of "cross-fertilization," we dispense with fault-finding and invidious comparisons that ought to form no part of our inquiry.

To be secure about our definitions, we should remember that "civilian" here refers to a continental tradition inherited by Louisiana, Quebec, and Puerto Rico as colonial outposts. No matter how our jurisdictions may differ on public law, a centerpiece of our private law is a Romanesque civil code patterned noticeably, though not fully, upon the French model. Quebec, Louisiana, and Puerto Rico are "mixed" or "hybrid" laboratories of applied comparative law in which two venerable traditions interpenetrate in the way that two great rivers merge at a confluence. This interpenetration is especially fascinating when tenets of our civilian garrisons collide with those of larger federal systems of common-law inspiration.[3] To clarify the scope of the present inquiry, we must distinguish our codified systems, on one hand, from uncodified ones like those of Scotland[4] and South Africa,[5] both of which depend upon the venerable corpus of Roman law unmediated by a modern unifying codification. Fascinating as those uncodified hybrids are, this presentation does not feature them.

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2. On the *ius gentium* and its role for non-Romans and Romans, see BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 54-59 (1962), WOLFF, *supra* note 1, at 82-90, and citations therein.

3. There is a rich and burgeoning literature on mixed jurisdictions. For Louisiana, the key contribution is THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND IN MIXED JURISDICTIONS (Joseph Dainow ed., 1974) [hereinafter THE ROLE OF JUDICIAL DECISIONS]. For the Canadian account, see Jean-Louis Baudouin, *The Impact of the Common Law on the Civilian Systems of Louisiana and Quebec*, *in id.* at 1, and the other Canadian articles mentioned hereinafter. THE ROLE OF JUDICIAL DECISIONS also contains several pieces devoted exclusively to Louisiana law as a mixed jurisdiction.

4. *See, e.g.*, David M. Walker, *Judicial Decisions and Doctrine in Scots Law*, *in* THE ROLE OF JUDICIAL DECISIONS, *supra* note 3, at 202.

5. *See, e.g.*, Ellison Kahn, *The Role of Doctrine and Judicial Decisions in South African Law*, *in* THE ROLE OF JUDICIAL DECISIONS, *supra* note 3, at 224.

II. MISSION IMPOSSIBLE?

Though challenging and complex, the redaction and application of a civil code in a state whose surrounding federal system is of English provenance constitute no "mission impossible." Without these intellectual missions, which we have all performed for over 150 years, our lives as lawyers would be decidedly simpler and probably more banal than they are. These missions, however, demand sensitivity to certain issues properly characterized as philosophical, political, aesthetic, and technical. Properly to discharge our mandate by means of an analysis of new Quebec Civil Code provisions, let us be clear about these four issues, for they are indispensable for the subsequent discussion.

III. PHILOSOPHICAL AND POLITICAL QUESTIONS

The process of imagining, planning, and drafting a civil code presupposes a certain vision of the way in which history unfolds. For a vast number of daily human affairs, a civil code proclaims general principles as fundamental guideposts. Properly understood, these guideposts should have high predictive value in both litigated and unlitigated matters. Like the prerevolutionary French jurist, Jean Domat, who dedicated his career to divining the civil laws in their natural order,[6] contemporary civilian drafters share a common vision of the coherence of human conduct; and the interlocking articles of their legislation ideally reflect this coherence. Lawyers and clients who take their bearings by the legislation, if it is sound and artfully drafted, should be equipped wisely to navigate their course of conduct. Civilians presuppose as a fundamental tenet that the fountainhead of stability is their legislation. Whenever possible, civilian judges, neither wholly law creators nor mindless automatons, must use this legislation as the springboard for their analysis. The civil code is their conceptual frame of reference moving in time and adapting to new circumstances.[7]

Not everyone shares the civilian vision of historic predictability; it competes for acceptance with a common law vision, widely shared here and in Canada, which I would call "historical aleatoriness." According to this aleatory view, history, because it is eccentric,

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6. A sketch of DOMAT'S LES LOIX CIVILES DAND LEUR ORDER NATUREL (Chez Durand, Neveu Libraire, rue Galande, Paris 1777) and his contribution to the French codification enterprise appears in Shael Herman & David Hoskins, *Perspectives on Code Structure: Historical Experience, Modern Formats, and Policy Considerations*, 54 TUL. L. REV. 987, 1007-09 (1980).

7. This characterization of a civil code is elaborated in Shael Herman, *Legislative Management of History: Notes on the Philosophical Foundations of the Civil Code*, 53 TUL. L. REV. 380, 385 (1979) and in Herman & Hoskins, *supra* note 6, at 1033-51.

recalcitrant, and just plain tricky, will inevitably outstrip the human imagination. Of course, on the question how dramatically and how often history will surprise us, reasonable people can differ. Sincerely committed American lawyers have chided Louisiana civilians for wasting precious time with a grand legislative design that concededly cannot account for all the twists and curves in human experience. These colleagues subscribe to the maxim *solvitur ambulando*,[8] a Latin expression rather like the popular maxim "if it ain't broke, don't fix it." In the view of traditional common lawyers, not every circumstance has to fit into a coherent scheme. If a dispute arises, let the judge solve it. But let us not waste time speculating about all the permutations and combinations of hypothetical problems and the consistency of their even more hypothetical solutions.

These contrasting philosophical visions of historical flux imply different assumptions about an appropriate intellectual method for achieving legal order where chaos threatens to invade, but each system derives order from a different source. For a civilian, the code is that source for it is more than a law; the code is a *source* of law and a fertile ground of analogies for unprovided cases. A civilian in search of what his Roman ancestors called the *actio utilis*[9] scours his code and the writings of learned interpreters. By contrast, the common lawyer derives his sense of order and coherence from precedents. In quest of a solution to an unanticipated case, an English lawyer will scour his own sources of law, the case reporters and their modern analogues, the burgeoning computerized data banks.

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8. The Latin maxim appears in a quotation that merits repeating:

> A civilian system differs from a common law system much as rationalism differs from empiricism or deduction from induction. The civilian naturally reasons from principles to instances, the common lawyer from instances to principles. The civilian puts his faith in syllogisms, the common lawyer in precedents; the first silently asking himself as each new problem arises, 'What should we do this time?' . . . The instinct of the civilian is to systematize. The working rule of the common lawyer is *solvitur ambulando*.

Thomas M. Cooper, *The Common Law and the Civil Law—A Scot's View*, 63 HARV. L. REV. 468, 470-71 (1950); *see also* Roscoe Pound, *What is the Common Law?*, *in* THE FUTURE OF THE COMMON LAW 3, 18 (1937).

> For behind the characteristic doctrines and ideas and techniques of the common-law lawyer there is a significant frame of mind. It is a frame of mind which habitually looks at things in the concrete, not in the abstract. . . . It is a frame of mind which is not ambitious to deduce the decision for the case in hand from a proposition formulated universally . . . . It is the frame of mind behind the sure-footed Anglo-Saxon habit of dealing with things as they arise instead of anticipating them by abstract universal formulas.

Id. at 18-19.

9. *See* NICHOLAS, *supra* note 2, at 219. *Actio utilis* became a rubric for the Roman jurists' analogical expansion of pre-existing actions.

IV. AESTHETIC ISSUES: CASES, LEGISLATION, AND VERTIGO

Like politics and law, aesthetics, an appreciation of symmetry and unity, was a branch of traditional philosophical inquiry. Though we sometimes neglect this point, aesthetics plays a role in the way that civilian and common lawyers approach their laws. For example, the civilian, confident of the code's power to regulate private affairs, rejoices upon finding a terse and lapidary formulation of a principle that captures the essence of a particular problem; he suffers vertigo when, despite careful study of the interaction of code articles, he finds no handy analogy. Despondent over this technical breakdown, our civilian may occasionally suffer from a *rage de tout dire*.[10] He must always remember Portalis' injunction against legislating on every conceivable matter. *Jurisprudence constante* may inform his analysis, but precedents do not dictate results to the extent that they would in a system inspired by English law.

An Anglo-American lawyer, by contrast, distrusts the claim that statutes can regulate human conduct. Dedicated to the image of a common law working itself pure, he will say that judges must construe statutes strictly, not liberally, because they are in derogation of the lovely and harmonious common law. Unlike his civilian counterpart, who believes in the permanent fertility of his code as a predictable source of law,[11] the common lawyer regards precedent as a soil from which predictability is mined, and *stare decisis* as its visible sign. Hence, a common lawyer will develop intellectual vertigo when the precedents, his traditional source of stability, yield no helpful guidelines, or when the judges have dealt clumsily with doctrinal evolution. For the common lawyer, in contrast with his civilian counterpart, the failure of a statute is no tragedy. Occasional statutory failure, to the contrary, is practically foreordained by the intellectual predisposition readily to detach himself from a statutory scheme in order to investigate prior decisions for guidance in current cases.[12]

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10. JEAN CARBONNIER, ESSAIS SUR LES LOIS 277 (1979), *cited in* Pierre LeGrand, Jr. *Consolidation et rupture: les ambiguités de la réforme des contrats nommés.* 30 LES CAHIERS DROIT 867, 889 n. 127 (1989).

11. By contrast, the civilian "reasons from the social and legal perspective embodied in the code, projecting the plasma of the code's organic harmony onto a situation not precisely covered by the legislative scheme." Herman & Hoskins, *supra* note 6, at 1038 (footnotes omitted).

12. *See id.* at 1046. The Quebec bar is surely skeptical of the utility of the English tradition of statute drafting and the "Anglo" side of Canada's bar seems to reciprocate with its own doubts about civilian drafting. On this issue of distrust, see generally LeGrand, *supra* note 10, and David Howes, *From Polyjurality to Monojurality: The Transformation of Quebec Law, 1875-1929*, 32 MCGILL L.J. 523 (1987).

V. TECHNICAL ISSUES RESULTING FROM INDIVIDUALISTIC LAWMAKING

To the common lawyer's argument that civil legislation cannot govern everything, and is thus needlessly detailed in its regulatory reach, civilians can respond that precedents are under-inclusive and that they are less predictive today than they were yesterday. Viewing our respective legal systems, both civilians and common lawyers may find apt William Butler Yeats' memorable phrase, "the center cannot hold." In the United States, a growing chorus of court watchers bemoans the erosion of predictive value in precedents.[13] This erosion is seen as resulting from the United States Supreme Court Justices' seeming inability to subordinate their own pet peeves to achieve a majority consensus in important judgments. One increasingly finds unhelpful decisions in which no individual justice carries a majority. Instead, he (or she) files a ruling that colleagues refuse wholeheartedly to adopt. For equally unclear reasons, justices file dissents to various parts of a colleague's opinion or concurrence. The judicial result, because it inspires no confidence, results in a public outcry that the precedential value of the ruling, and thus the stability of the system that depends on a harmonious chorus, have been sacrificed for the artistic integrity of each soloist. In a sense, the judges have melodious voices, but they are prima donnas unable to sing in unison. For a sample of this musical performance, here is a headnote from a recent United States Supreme Court case, *Arizona v. Fulminante*.[14]

> WHITE, J., delivered an opinion, Parts I, II and IV of which are for the Court, and filed a dissenting opinion in Part III. MARSHALL, BLACKMUN AND STEVENS, J.J., joined Parts I,II, III and IV of that opinion; SCALIA, J., joined Parts I and II; and KENNEDY, J., joined Parts I and IV. REHNQUIST, C.J., delivered an opinion, Part II of which is for the Court, and filed a dissenting opinion in Parts I and III. O'CONNOR, J., joined Parts I, II and III of that opinion; KENNEDY and SOUTER, J.J., joined Parts I and II; and SCALIA, J., joined Parts II and III. KENNEDY, J., filed an opinion concurring in the judgment.

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13. *See, e.g.*, L. Gordon Crovitz, *How Law Destroys Order*, NAT'L REV., Feb. 11, 1991, at 28. I am grateful to Martin Lahm, III, for bringing to my attention this article and the *Fulminante* headnote reproduced below.

14. Arizona v. Fulminante, 111 S.Ct. 1246, 1249 (1991). The Supreme Court's recent and anticipated antics have evoked both high and low humor. For a sardonic anti-heroic depiction of the Supreme Court's decisional process, see Russell Baker, *Roe, Wade, and Mayo*, N.Y. TIMES, April 25, 1992, at 23 (mock colloquy recorded on cassette shows the justices far more preoccupied by their appetites than their legal opinions).

Increasingly symptomatic of the atrophy of precedential authority, the justices' highly individualistic approaches to what must finally be a collegial exercise surely inspire little confidence among lawyers called upon to represent clients whose life and liberty are in jeopardy.

Heirs to both traditions, Louisiana lawyers depend heavily on precedents for guidance, even in matters regulated by our Civil Code. Our courts are not immune to the pathology resulting from lack of consensus among judges. Our center does not always hold either. A civil code reader may celebrate the coherence of the code titles on special contracts. When he cannot fit an agreement into a particular title, he will try another; only as a last resort will he admit, alas, that the agreement is innominate; because it fits into no special category, he must be especially courageous in defining its contours and remedies. A judicial cacophony, rather like the one already quoted, can result from a civilian court's inability to classify a transaction. Consider the following passage from a recent Louisiana decision:

> A majority of the court is of the opinion that the agreement confected by the parties is a valid contract. We have considered the arguments made, including lack of serious consideration, prescription against the action in nullity, and the classification of the contract as a loan for use. We have also considered the applicability of the theory of improvision, the judicial revision of contracts. However, *a majority of the court is unable to reach agreement upon which ground* to uphold the validity of the contract.[15]

VI. UNITY OR DISUNITY OF COMMON-LAW CONTRACT DOCTRINE

Unlike their civilian counterparts, common lawyers, uninfluenced by the Roman legacy of individual contracts, believe in a unified law of contract; irrespective of an agreement's particular characteristics, offer, acceptance, and consideration will generally make it valid and enforceable. Unfortunately, the overarching definition of contract itself makes problems, for the common lawyer, wedded to bargain consideration, encounters trouble explaining gifts and gift promises. Even gratuitous contracts like mandate, deposit (or bailment), surety, and loan for use can cause him an identity crisis. Lest we engage in invidious and pointless comparisons, what we must

15. Armour v. Shongaloo Lodge No. 352, 342 So. 2d 600, 601 (La. 1977) (emphasis added).

remember is that each system needs flexibility and stability; each can produce vertigo; each has doctrinal blindspots.[16]

VII. CHAOS AND UNPREDICTABILITY INEVITABLE

In recent years, there has developed a scientific discipline known as chaos.[17] Calling themselves chaotists, a new breed of scientists contend that even precise physical laws of the universe may fail to take into account a discontinuous and erratic side of nature. This feature of nature is manifested in all sorts of unexplained, tiny deviations in observable data such as atmospheric disorder, ocean turbulence, fluctuations in wildlife, and oscillations in heart and brain. These scientists of chaos further explain that earlier scientists deceived themselves into believing in a perfect coincidence between a scientific law and the data; these earlier scientists did not vigorously scrutinize their data, and they were guilty of wishfully thinking that every occurrence fit the rule neatly though in fact incongruities abounded. Performing a new version of the old-fashioned hat trick, the chaotists have uncovered order behind randomness and have elaborated delicately nuanced new rules systematically to map data that were once dismissed as serendipity.

In the realm of human conduct, lawyers tolerate daily many aberrational events and counterinstances. Yet we cling steadfastly to basic assumptions about legal regulation of human affairs even when experience seems to mirror William James' "blooming, buzzing confusion." Our steadfast adherence probably originates in the sense that vertigo is a small price compared with worse maladies that might befall us if we abandoned our assumptions. It is as difficult to change someone's fundamental assumptions about law and lawmaking as it is to convert him to a new religious view. What is worse, such an effort is pointless, because any legal system, like a religion, promises salvation and redemption. Approached doctrinairely, either system can take us down the path to perdition. The issue for us is not to transform a system; the trick is to celebrate each tradition's virtues, to understand its drawbacks, and to tolerate their commendable differences. On the border between the common and civil law where historical accident has deposited us, we must be both common lawyers and civilians. If we cannot be both, then we would be advised to be agnostics.

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16. For a current indictment of the chronic intellectual deficits in contract doctrine, see generally JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE (1991).

17. This discussion of "chaos" is based upon J. GLEICK, CHAOS (1990).

VIII. CIVIL CODE MECHANISMS FOR STABILITY AND FLEXIBILITY: OF FORM AND FORMAL REALIZABILITY[18]

In his monumental work, the *Spirit of the Roman Law*,[19] the great nineteenth-century German jurist, Rudolph von Jhering, originated the rather metaphysical idea that form and freedom were twin sisters. Where one flourished, he argued, so would the other; where one was under siege, the other would suffer. Parties, by means of a form or a formality, marked off from their casual and purely social interaction those events that entailed legal consequences. By dressing the amorphous content of an agreement in a formality, for example, one could distinguish a social invitation to coffee from a legally binding offer to contract. Forms and formalities, Jhering argued, permitted parties to impress upon their own memories and upon a court's analysis the seriousness of their engagements and consciously to exclude the state's interference from their realm of free play. Jhering's connection of freedom with form was surely correct: a hallmark of Roman law was the way it clothed with public formalities significant legal conduct in order to assign it legal consequences.

IX. FORMAL REALIZABILITY AN AID TO STABILITY

Jhering, recognizing that all rules were of different calibers and performed different functions, also taught us much about the crafting of rules. According to him, a virtue of a well-articulated rule was its formal realizability;[20] this quality implied that the rule's application required minimal judicial discretion because the judge, to reach a particular result, could easily confirm a convergence of easily identified events or factors.

Our civilian tradition vindicates Jhering's insights when it teaches that an agreement, to be enforceable, needs certain essential elements; for example, Louisiana law students, and apparently their Quebec counterparts as well, learn that a sale requires a certain object and a determined price in current money.[21] Rules of prescription are also formally realizable because they normally entail a mechanical

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18. More information on the theme of formal realizability appears in Herman, *supra* note 7, at 381-83.

19. RUDOLPH VON JHERING, GEIST DES RÖMISCHEN RECHTS AUF DEN VERSCHIEDENEN STUFEN FEINER ENTWICKLUNG (Leipzig 1883) [available in French translation as RUDOLPH VON JHERING, L'ESPRIT DU DROIT ROMAIN DANS LES DIVERSES PHASES DE SON DEVELOPPEMENT (O. de Meulenaere trans., Paris 1888)].

20. On this point, see generally Herman, *supra* note 7.

21. *Compare* LA. CIV. CODE ANN. art. 2439 (West 1990) *with* QUEBEC CIV. CODE draft art. 1701. Quebec Civil Code [C. Civ.] art. 1701 provides: "Sale is a contract by which a person, the seller, transfers property to another person, the buyer, for a price in money which the latter obligates himself to pay." *Id.*

operation, the counting of days or years elapsed on a calendar. Prescription rules stabilize a legal system by drawing bright lines of demarcation. The essential goal of these rules is to put an end to disputes and thus they have a high degree of predictability.

Although a good civil code drafter intuits the idea of formal realizability, he cannot always achieve it. Inevitably, he must employ porous rules and must invoke hazy concepts like good faith, reasonableness, and abuse of right,[22] which cannot be stated in formally realizable ways. A good drafter also astutely distinguishes matters whose regularity permits detailed and systematic legislative regulation from matters difficult to regulate in advance of their occurrence because in the course of human affairs they cannot be predicted. By expressing specific principles through particular locutions, the drafter reveals his sensitivity to the distinction between the predictability of some actions and the amorphous, unpredictable character of others. By long tradition, certain civil code rules, as a voucher of this need for sensitivity, are flexibly worded, while others are characterized by rigidity. The balance between flexibility and predictability is a key to a good civil code. If mechanisms for predictability unrealistically dominate those that promote flexibility, then the legal system petrifies. If the reverse situation occurs, the code quickly loses legitimacy in the eyes of the public.[23]

As Professor C.J. Morrow, one of Louisiana's most distinguished civilians said, "generalization is the soul of civilian codification."[24] The drafter's trick is always to formulate a principle at a high enough level of abstraction to reach a wide variety of circumstances, while avoiding a formulation so abstract that we cannot tell if its terms really fit the many ordinary situations that we confront. To the civilian, the legal rule is designed to operate at an optimum level of abstraction. This level may be seen as a point of equilibrium between the broad generality of the ordering legal principle and the extreme particularity of the concrete resolution of an individual dispute. A rule too general is over inclusive and cannot provide practical guidance of sufficient predictability; a rule too particular is too exclusive, and leads to rigidity, and obsolescence. This point of equilibrium is not fixed. It varies according to the substantive content of the rule itself and to the position the rule occupies in the overall

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22. *Id.* art. 7.

23. On this score, some codes have been more successful than others. The Prussian Landrecht, because it was overly particularistic in outlook, was unworkable. Some writers judge the German Civil Code the best crafted to achieve a balance between flexibility and predictability. *See generally* Herman & Hoskins, *supra* note 6, at 1019-22. But Germany's twentieth-century experience eloquently testifies that even the best civil code will not correct a political system gone mad.

24. Clarence J. Morrow, *An Approach to the Revision of the Louisiana Civil Code*, 23 TUL. L. REV. 478, 487 (1949).

legislative scheme. Thus, certain branches of the law which demand a high degree of predictability, such as successions, property, and prescription, would seem to demand a relatively low level of abstraction—and the pertinent legal rules, therefore, should be relatively detailed and particularized.[25]

X. STABILITY VERSUS FLEXIBILITY IN A CIVIL CODE

I invite you to suspend your judgment long enough to engage in an intellectual flight of fancy. Imagine a continuum with the criterion of stability at one pole and the criterion of flexibility at the other. In most civil codes, rules governing prescription, property, successions, and persons tend to be stated imperatively and inflexibly because they address matters of public order. By contrast, tort or delict rules, as they are stated lapidarily and rather flexibly, seemingly allow a tribunal much discretion. Somewhere in the middle of the continuum fall the titles on obligations, though many such rules are deceptive; they seem quite hard and fast until we realize that they are gapfillers that partites can contract around. Because of their flexibility, the obligations articles are often a rich storehouse of analogy for unprovided cases. In some codes, such as the Louisiana Civil Code, these obligations principles together serve as a general part. I suspect they were intended to serve a similar function in the new Quebec draft.

By locating particular rules on our continuum, let us illustrate our general point about the equilibrium between stability and flexibility, and between abstraction and particularism. Prescription periods are stated rather strictly, and even rules that do not invoke the calendar are imperative. Thus, for example, Quebec Civil Code Article 2867, like Louisiana's cognate,[26] prohibits renunciation of prescription before its accrual. I assume that Quebec Civil Code Article 2867, like the Louisiana counterpart, is not a flexible gapfiller rule. Apparently, parties may not vary rules on marriage, emancipation, and nullity of marriage. Hence, other modalities regarding these institutions cannot be invented willy nilly in the way that parties might invent new innominate contracts, a topic to which we return below.

According to Article 1118 of the Quebec draft, "usufruct, use, servitude and emphyteusis are dismemberments of the right of ownership and are real rights." For the drafter, this formulation is no invitation to invent other property dismemberments. We civilians, fearing a bout of judicial vertigo, generally are pretty prudent about

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25. On the issues raised in this paragraph, see Herman & Hoskins, *supra* note 6, at 1039 *passim*.

26. LA. CIV. CODE ANN. art. 3449 (West 1990) provides: "Prescription may be renounced only after it has accrued." *Id.*