



OBJECTIVES AND CRISES OF CODIFICATION OF PRIVATE LAW IN FRANCE

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ABSTRACT

Modern French codification of private law is, above all, the written expression of a doctrinal work, a sort of official legal science petrified in state law. As an approach to the creation of legal rules, this codification stands out for its aim to create a well-ordered legal framework, composed of logically consistent and accessible rules. Its guiding principles were and remain constituted by the dual objectives of creating a political nation under unified rules and maintaining this legal system as an attractive option for legal transplants and model rules worldwide as a method of integrating it into the international legal order. This chapter presents the methods by which the political project of codification was achieved, the theoretical foundations of the norms considered during the initial phase of the 19th-century codification, as well as the effects of this codification, which manifested in a veritable model-code of the following two centuries, internationally. Next, the shortcomings of the current status of the code are examined, such as the process of ‘decodification’, by which significant rules are recast as special norms (e.g., regulating economic life) outside the body of the code and the associated trend of recodification whereby various segments in the body of the code

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are constantly modified. Finally, experimental legislation is mentioned as a risk to the stability of codified rules of statutory law.

Keywords: *Code civil, codification of civil law, codification of commercial law, model for international codification efforts, legislative inflation, experimental legislation, France.*

1. INTRODUCTION

French codification of private law¹ is formally marked by the impetus for diversification and classification of legislative rules, characteristic of the French spirit, *‘which is accustomed to organizing all knowledge in a logical manner’*.² A highly specialised codification has resulted from this perspective since the time of Napoleon to the present day. On the substance, modern French codification of private law is, above all, the written expression of a doctrinal work, an official revelation of the attempts to formulate natural law accumulated by modern authors over several centuries, a sort of official legal science petrified in state law.³ Also, it is influenced, like many others, by historical and contextual factors,⁴ which serve as keys to understanding the objectives and limitations of codification in each period under consideration. Indeed, codification as

- 1 The bibliography on French codification is too extensive to be included in this contribution. The reader may find it useful to consult, e.g. Fenet, 1827–1828; Loqué, 1827–1832; Portalis, 1844; Halpérin, 1992; 1996; p. 200; Beignier, 1996a; Oppetit, 1998; Cabrillac, 2002; Pouvoirs, 2003; Lequette, Leveneur, 2004; L’esprit du Code civil, 2005; Université Panthéon-Assas, 2007; Cour de cassation, Institut André Tunc de l’université Paris 1, 2007; Université Panthéon-Assas, 2010. More recently, in the English language: Cannarsa, 2023, pp. 65–87.
- 2 Jauffret-Spinosi, 2002, pp. 265–275. To realize this, one only needs to consider the title of Jean Domat’s monumental work: *Les lois civiles dans leur ordre naturel*, published in 1689. Foreshadowing the codification of 1804, this foundational treatise offers a structured and Cartesian systematization of civil laws (that is, Roman law), written in clear, precise, and exact language.
- 3 F. Zenati-Castaing, 2021, pp. 54–55.
- 4 Cartuyvels, 1993, pp. 85–107; Lefebvre-Teillard, 2004, pp. 77–85. Paradoxically, when it carries ‘an intention of political renewal’, codification also reflects ‘a hope to halt the course of history’ (Carbonnier, 2004, p. 199). See also: Carbasse, 2003, pp. 276 et seq.; Halpérin, 1992; Wijffels, 2010, p. 245 et seq. and 293 et seq.

a phenomenon⁵ occurs episodically.⁶ Codifying periods in France were from 1804 to 1810 and from 1949 onwards, while from 1810 to 1948, no codification took place.⁷ Therefore, it is difficult to assume the existence of an equivalence of significance – and hence objectives – between the Napoleonic codifications and more recent ones unless we consider, from a historical perspective, that since the French Revolution, codification has always been associated with the cult of the *Loi*.⁸

Although striving to achieve completeness, systematisation, and logical coherence, any codifying work, whether innovative or compilatory, is always subject to improvement. Portalis was aware of this: ‘*a code, however complete it may seem, is no sooner finished than a thousand unexpected questions arise for the judges*’.⁹ Indeed, regardless of the time of their promulgation, codes are immediately or shortly after subjected to criticism,¹⁰ mainly from professors, practitioners, politicians, and even public administration bodies. Sometimes, the criticisms reveal a genuine crisis in the codification process itself. Regarding the objectives,

5 Halpérin, 2004, p. 60 *et seq.*

6 On the episodic nature of codification, see: Oppetit, 1998, p. 7 *et seq.*

7 However, it is worth noting the adoption of three codes during the interwar period: the Maritime Labor Code and the Disciplinary and Penal Code of the Merchant Marine in 1926 (still in force today), the Wheat Code in 1936 (repealed in 2006), and the Tax Procedure Book in 1938 (still in force today).

8 Halpérin, 2004, p. 63; Carbasse, 2003, p. 276; Wijffels, 2010, p. 293. However, it is important to emphasise that Portalis positioned himself in opposition to revolutionary legal positivism by advocating legislative minimalism (Portalis, 1844, pp. 7–8):

‘We have also guarded against the dangerous ambition of wanting to regulate everything and foresee everything. [...] The role of the law is to establish, through broad principles, the general maxims of the law, to establish fruitful principles and not to delve into the details of questions that arise in each matter.’

Consequently, the judge is granted significant leeway in their role of interpreting the law, as stated in art. 4 of the Civil Code: ‘*A judge who refuses to judge, on the grounds of the silence, obscurity, or inadequacy of the law, may be prosecuted for denial of justice*’. See more broadly: Rémy, 2003, pp. 22–36.

9 Portalis, 1844, p. 8.

10 For a concise presentation in civil matters, see: Halperin, 1996; in commercial matters, see sections 2 and 3.1.

certain factors help us in understanding the crises affecting the codification of private law in France.

At the heart of this dual problematic lies a fact of paramount importance: the method of codification. Indeed, *'what is codification if not the spirit of method applied to legislation?'*¹¹ Since the Revolution, two methods have coexisted.¹² On the one hand, is *codification-innovation*,¹³ which involves reforming existing laws by creating new laws.¹⁴ At the core of this method is *codification-constitution*, which aims to establish the *tissu juridique* of civil society by adopting a code. This ambition is particularly embodied by civil codification: *'there is no true civil code that does not bear the founding principles of a society'*.¹⁵ For example, Portalis defines the Civil Code as *'a body of laws intended to govern and define the relationships of sociability, family, and interests among individuals belonging to the same city'*.¹⁶ The conceiving of a *'Code of Civil Laws'* was actually planned by the Constitution of 1791,¹⁷ with the Civil Code becoming the constitution of private relations.¹⁸ Innovative or even constitutional, its preparation

11 Portalis 1844, p. IV.

12 See Oppetit, 1998, pp. 17 *et seq.*; Souriaux, 1989, pp. 145.

13 Souriaux, 1999, p. 145. Other classifications are proposed by legal scholars, such as, for example: *'codification-modification'* (Cabrillac, 2002, *passim*); *'codification-qualitative'* (Cartuyvels, 1993, *passim*); *'real codification'* (Carbasse, 2003, p. 297); *'modern codification'* (Zenati, 1998, pp. 217–253).

14 In the case of recodification, codification-innovation can lead to the replacement of one code with another, as seen in the 1994 Penal Code codification, or to the gradual overhaul of a specific area within a code, as exemplified by the reforms that the Civil Code underwent starting in the 1960s. For instance, Cabrillac, 2009, p. 60.

15 Grimaldi, 2005, p. 24.

16 Portalis, 1844, p. 92.

17 The first title of the 1791 Constitution – Fundamental Provisions Guaranteed by the Constitution – indeed stipulated that *'a Code of civil laws common to the entire Kingdom shall be established'*.

18 According to legal scholars, the Civil Code is often referred to as the *'constitution of French civil society'* (Demolombe as quoted in Mazeaud, 2004, p. 155) or even as *'the true constitution of France'* (Carbonnier, 1986, p. 309:

'The true constitution of France is the Civil Code [...] sociologically, it has the significance of a constitution because it encapsulates the ideas around which French society was formed after the Revolution and continues to be formed to this day, developing these ideas, perhaps transforming them, but never disavowing them).'

See also Mazeaud, 2004, pp. 152–159; Cabrillac, 2005a, pp. 245–259.

is often entrusted to legal scholars due to the complexity of the reform needed both in substance and in form. On the other hand is *codification-compilation*, which involves organising existing and scattered statutes without creating new rules. Of an administrative nature, this codification has been conducted since 1989 by the Superior Codification Commission.¹⁹ The codified provisions then completely replace the previous statutes.²⁰ This codification is known as ‘*à droit constant*’. The codification of consumer law in 1993, the recodification of commercial law in 2000, and the labour code in 2008 are the most notable examples of codification-compilation, while the Civil Code of 1804 and the penal codes of 1791 and 1810 are the best examples of codification-innovation.²¹

Although opposed, these methods each contain an element of the other. The compilation work always includes an element of innovation, while the innovative work cannot disregard the past.²² Thus, when codifying *à droit constant*, the French parliament authorises the government to make modifications

*that may be necessary to ensure respect for the hierarchy of norms, the drafting consistency of the texts thus assembled, harmonize the state of the law, remedy any errors, and repeal provisions, codified or not, that have become obsolete [...]*²³

The same applies when codifying for innovation: like the 1807 Commercial Code, the Civil Code of 1804 was also ‘more a work of compilation at its origin than truly original work’.²⁴ Indeed, except for a few rare solutions – such as the conception of property exclusively in its

19 Established by Decree No. 89-647 of September 12, 1989, and placed under the authority of the Prime Minister.

20 Suel, 1993.

21 On criminal codification, see Carbasse, Vielfaure, 2014, pp. 211 et seq. and 459 et seq.

22 Dunand, 2003, pp. 195–226.

23 Art. 84, II of Law no. 2004-1343 of 9 December 2004, on the simplification of the law. These exceptions, for the most part, were already provided for in art. 1 of Law no. 99-1071 of 16 December 1999, authorising the government to proceed, by ordinances, with the adoption of the Legislative Part of certain codes. See Molfessis, 2000, pp. 186–194.

24 Beignier, 1996b, p. 3.

individual/State dialectic (art. 544) or the absolute equality of legitimate children inheriting from their parents (art. 745) – the Civil Code is based on unifying choices among different but all legitimate legal solutions.²⁵ Thus,

*contrary to what has sometimes been claimed, neither the binding force of contracts nor the general obligation to compensate for damage caused by one's own fault are the result of an individualistic philosophy embraced by the drafters of the Code under the influence of the Enlightenment.*²⁶

Whether innovative or compilatory, French codification embodies several ideas: those of prestige, power, culture, and identity, as well as of rationality and, of course, coherence and simplicity.²⁷ In short, it is 'a symbol of modernity',²⁸ of legal rationality. In the French experience, this modernising perspective of the law through codification is met with clearly discernible objectives (2). However, the codifying vocation of France can play many tricks. Indeed, the vicissitudes affecting codification reveal more than the imperfections of one code or another: they expose the limits of the codification policy itself to the point of revealing its crises (3).

2. OBJECTIVES

The history of codification teaches us that any codifying work can succeed only with strong political will.²⁹ Otherwise, it is doomed to fail.³⁰ Adhering to the idea of codification – and its rise – responds to various

25 Sériaux, 1997, p. 101.

26 *Ibid.* In the 'transaction' carried out by the drafters of the Civil Code, the definitions and legal effects of contracts and civil liability can trace their origins back to the works of Domat and later to those of Pothier.

27 Compare with Malaurie, 1996, p. 200.

28 Oppetit, 1998, p. 8.

29 Cartuyvels, 1993, pp. 85–107.

30 Cabrillac, 2004, pp. 74–75.

requirements, which are not mutually exclusive.³¹ These requirements are either political (expressing power combined, most often, with a philosophical or ideological orientation), social, or technical in nature. These requirements can all be encompassed in each political project.

The French codification of private law is no exception to this, and in fact, it is the modern archetype of codification. Considering its emergence in the 19th century and its more recent revival, French codification seems to have a dual ambition, which ultimately constitutes its justification. On the one hand, the Napoleonic codification was aimed at implementing a political project for the nation (2.1); on the other hand, the strategy followed in post-war codification to integrate itself into the international legal market was to make the French legal system attractive (2.2).

2.1. IMPLEMENTATION OF A POLITICAL PROJECT

The codification of French private law at the beginning of the 19th century aimed to establish a national law³² to shape the identity of the new political order in post-revolutionary France.³³ It emerged from the grievances presented in the *cahiers de doléances* addressed to the *États*

31 Oppetit, 1998, pp. 8 et seq.; Jean and Royer, pp. 127–142.

32 At the beginning of the 19th century, the legal system was neither uniform nor stable nor simple. On the one hand, there was Roman law, revitalised by the interpretations given to Justinian's compilations, and it was often referred to as *jus commune* to describe its empire beyond borders (Halpérin, 2004, p. 18). On the other hand, there were customs and statutes, which were initially regional or local before becoming national. This latter set of sources constituted the *jura propria*, including a few royal ordinances applicable throughout the empire (Carbasse, 2003, p. 85). In 1789, France still had 65 general customs and 300 local customary variations in the northern part of the kingdom, while the south followed Roman law as 'ratio scripta', albeit with variations according to parliamentary jurisdictions (Bouineau, Rux, 2004, p. 35).

33 Wijffels, 2010, pp. 245–246.

Généraux in 1789³⁴ and was realised under the leadership of Napoleon Bonaparte,³⁵ in the spirit of a nation in the process of unification.³⁶

However, French codification was not ‘self-established’.³⁷ A genealogical perspective on the codification process reveals that the principle of a systematic and reform-oriented code, which emerged from 1750 onwards in Europe, resulted from the dynamic introduced by the state consolidation of law in the modern era. These projects found their basis in a legal ideal of an orderly compilation of sources that was already present in Roman times.³⁸ However, codification was also seen as a political expression of power. Indeed, codification ‘*played a significant role in the actions of Bonaparte, who saw in the Civil Code not only an instrument for restoring civil peace but also, above all, a major component of his government and reform work*’.³⁹ From this perspective, French codification perhaps symbolically embodies more than any other the trend towards political centralisation observed in Europe since the 16th century, with the code becoming the instrument for consolidating royal or princely legislation ‘*to the detriment of other sources of law relegated to a subsidiary role to ensure a centralized redistribution of power relations over a given territory*’.⁴⁰ In its social dimension, French codification aimed to ‘*promote a new social order in a spirit of reconciliation between the old order society and the new aspirations for freedom and equality*’,⁴¹ thus revealing the predominant philosophical and ideological approaches following the extreme conflicts of the revolutionary period.

34 Oppetit, 1998, p. 10.

35 Regarding the connections between codification and the Napoleonic regime, you may want to refer to Halpérin, 2003, pp. 11–21. Regarding the role of Napoleon in the preparation of the Civil Code, consult Souriaux, 2004, pp. 107–121.

36 Lefebvre-Teillard, 2004, p. 83; Fourré, 1985, p. 14.

37 Cartuyvels, 1993, pp. 85–107.

38 *Idem*. The goal was to enhance understanding of the law and address legal uncertainty, thereby improving the lengthy, costly, and uncertain litigation that came before the magistrates. Even though ‘the political function of the code as a factor of political unification and centralization is probably not entirely absent from the Roman emperor’s thinking, it is not evoked’ (*ibid.*, 87 *et seq.*).

39 Oppetit, 1998, pp. 8–9.

40 Cartuyvels, 1993, p. 94.

41 Oppetit, 1998, p. 10.

Codification thus constitutes an important aspect of the history of French legal sources and civil order. By proposing rationalisation of the law through a systematic organisation of laws, codification strengthened the very authority of the law. This was Napoleon's political project: to promote a social order based on the rule of law under which all citizens are equal. The authority of the law was shaped by an authoritarian ideology that prioritized collective interests over individual ones – such as the concept of freedom – by placing them under surveillance, particularly in contract law and family regulation, all in the image of and in service to the nation.⁴²

This authority of the law was further reinforced by the fact that Napoleonic codification aimed to be a comprehensive and totalitarian work. The codification of civil law excelled in this double objective: it aimed to bring together, exclusively, the entire law that governed various aspects of social life. In contractual matters, for example, it left only one provision regarding the proof of commercial acts in the Commercial Code (the former art. 109). The general abrogation of the old law governing the subjects covered by the Civil Code by art. 7 of the Statute of 30 Ventôse Year XII attests to the totalitarian aspect of civil codification, as does Napoleon's desire for his Civil Code to become eternal⁴³ and his fear of seeing it transfigured by its interpreters.⁴⁴ This dimension is also expressed through the standardisation achieved by codification. According to Portalis, *'the mere existence of a uniform Civil Code is a monument that guarantees the permanent return of the state's internal peace'*.⁴⁵ This peace would be guaranteed more specially as the Civil Code aimed to unify the nation by mediating between written law and customs and between old law and revolutionary legislation, erasing the humiliating

42 Halpérin, 1996a, p. 23.

43 At Saint Helena, Napoleon is said to have stated: 'My true glory is not to have won forty battles: Waterloo will erase the memory of so many victories. What will never be erased, what will live eternally, is my Civil Code' (Tristan de Montholon, 1847, p. 401, as quoted in Halpérin, 2003, p. 11).

44 It is a famous phrase attributed to Napoleon: 'Mon code est perdu', regarding the publication of the early commentaries, an idea found in Las Cases, 1956, p. 153, as quoted in Halpérin, 2003, p. 19.

45 Portalis, 1844, p. 302.

distinctions introduced by political law between individuals and infiltrating civil law.⁴⁶ In conclusion, Napoleonic codification was linked to a historical process of centralising political power, which was incompatible with the pluralism of sources.⁴⁷ From this perspective, the Civil Code of 1804, the Civil Procedure Code of 1806, the Commercial Code of 1807, the Code of Criminal Procedure of 1808, and the Penal Code of 1810, each in its own way, contributed to the affirmation of this power.⁴⁸

Although codification was intended to implement a political project, it gradually proved incapable of fully ensuring it. Drafted to provide access to the people, the Napoleonic codes quickly revealed the limits of their sobriety. The polysemy of the texts, like many provisions of the Civil Code, gave rise to controversies leading to interpretation, recourse to the judiciary, uncertainty, and often unpredictable evolution.⁴⁹ Then, sobriety justified the emergence of a normative jurisprudence. The legislator had foreseen this by requiring judges to decide despite the obscurity or inadequacy of the law.⁵⁰ Finally, designed to govern the future, the Napoleonic codes may have too deeply embodied the spirit of compromise with the past, which gradually made them anachronistic in the light of the significant transformations that French society and the economy would undergo from the second half of the 19th century onwards.⁵¹ Consequently, as soon as they were completed, civil and commercial codification faced competition from numerous special

46 Fenet, 1827–1828, as quoted in Niort, 2009, pp. 121–160.

47 However, it should be noted that, unlike the Law of 30 Ventôse Year XII on the consolidation of civil laws into a single body under the title of the Civil Code of the French (art. 7), the Law of 15 September 1807, implementing the Commercial Code, did not repeal the old commercial usages. Furthermore, the Civil Code repeatedly instructs compliance with these usages. For example, it anchors contractual relationships in the practice of trade by providing in its former art. 1135 (current art. 1194) that contracts bind not only to what is expressly stated but also to all the consequences, especially those arising from usages. The same applied to partnership contracts, as the former art. 1873 reserved for them the application ‘of the laws and usages of commerce’.

48 Leyte, 2004, pp. 123–130.

49 Malaurie, 2004, p. 4.

50 Civil Code, art. 4.

51 Jean and Royer, 2003, pp. 127–142.

legislations in areas such as rural law, housing, urban planning, specific contracts, and labour. However, the destinies of the two codes were not identical. Despite failed attempts at its comprehensive revision in 1904 and 1945,⁵² and the rise of special legislation in the areas it covered,⁵³ the survival of the Civil Code of 1804 was ensured thanks to the revival of both its spirit by jurisprudence⁵⁴ and its letter by the legislator (reforms initiated between 1964 and 1977 in the fields of personal status and family law and, from 2006 onwards, in the fields of obligations and security interests).⁵⁵ It is true that the symbolic strength acquired by the Civil Code in the 19th century has since constituted a psychological obstacle to the prospect of comprehensive recodification.⁵⁶ By contrast, the survival of the Commercial Code was compromised. Indeed, the subject matter underwent a true process of ‘*decodification*’ from 1838 onwards with the adoption of special legislation on bankruptcy and insolvency.⁵⁷

Over the years, legislative appetite has only grown, leading to a revival of codification since the *Libération* with the creation of the Higher Commission in 1948 responsible for studying the codification

52 In modern times, some still advocate for the advent of a new civil code, see Atias, 1999, p. 200.

53 Rémy, 1998.

54 *Ibid.*

55 Cabrillac, 2004, pp. 73–82.

56 Cabrillac, 1999, pp. 211–220; Cabrillac, 2009, p. 53; Rémy, p. 5.

57 See section 3.1.

and simplification of legislative and regulatory texts.⁵⁸ However, this time, codification responds to different challenges.

2.2. INTEGRATION INTO THE INTERNATIONAL LEGAL MARKET

In contemporary times, French codification does not seem to respond to either the desire of the head of state to assert his authority or a political project for the nation, even though political issues – such as geographical

58 The Decree 48-800 of 10 May 1948, for which the report justifies its adoption states as follows: *‘In recent years, laws and regulations have multiplied due to the expansion of state interventions in the economic and social domain, as well as financial difficulties and necessities resulting from war or liberation. These new texts, sometimes hastily crafted under the pressure of urgent needs, have generally been superimposed in a fragmentary manner on the old fundamental laws. These texts, multiple, scattered, difficult to gather, and not always appearing to be consistent, often lack the convenience and clarity that legislation and regulations should possess. As a result, citizens find it extremely challenging not to be ignorant of the law, and they are frequently compelled either to seek the assistance of business agents orbiting around legal professionals whose professional activity can no longer meet all demands or to establish specialized legal services within their enterprises. In this way, they are excluded from the production process of new elements, the often-high remuneration of which increases the cost of productive elements. Even specialized officials themselves, despite their specialization, have difficulty recognizing themselves in this labyrinth of legislation and waste precious time searching for applicable texts and determining their scope. Finally, judges in the judicial or administrative order are increasingly called upon to rule on disputes. To remedy this situation, it is essential to undertake a comprehensive codification effort that will encompass the entirety of existing legislation and regulations.’*

cohesion and the defence of legal tradition⁵⁹ – are not entirely absent. Instead, it pursues a legal objective, coupled with an economic and international perspective to address contemporary challenges.

After World War II, France, like the rest of the world, had to face the globalisation of the economy, which consolidated with China's opening up to the market economy in 1978 and the definitive fall of the Soviet Empire in 1991. Globalisation of the economy was accompanied by significant legal reforms in many countries to create a legal and economic environment favourable to both domestic and international investments. Besides modernising various branches of substantive law directly or indirectly related to business, these reforms also targeted rules relating to the international jurisdiction of state courts, to arbitration (both domestic and international), and to conflict of laws. The latter were liberalised to allow economic actors the freedom to choose the court (state or arbitral) and the applicable law for their relationships. Over time, the conditions were gradually met for states to engage in international legal competition.⁶⁰ In other words, this com-

59 Cabrillac (2005b, pp. 533–545) emphasises that, presently, French codification appears to be imbued with the function of cohesion and resistance. On the one hand, while the geographical cohesion of French populations does not seem to be a major concern of codification [...] the authorization law of December 16, 1999, allowing the government to adopt nine codes by ordinance, expressly provides in its Article 2 that the government can extend the application of codified provisions to New Caledonia, overseas territories, as well as the territorial communities of Mayotte and Saint-Pierre-et-Miquelon with the necessary adaptations.

Likewise, 'the adoption of the Commercial Code has led to a significant extension of applicable rules in some territories, contributing to the standardization of law within the territory of the Republic' (*ibid.*, p. 542). On the other hand, the survival of the Civil Code becomes a fundamental issue in the face of the somewhat distant threat currently of the adoption of a European Civil Code. From this perspective, 'The challenge of codification is then to defend a threatened legal and cultural tradition' (*ibid.*, p. 543). For a highly critical approach to the economic, cultural, and political feasibility of a European codification of civil law, see Lequette, 2003, pp. 97–126.

60 In France, the phenomenon of normative competition has already been extensively analysed: see especially Watt, 2005, pp. 615–633. Regarding the concepts of competition used in the legal field, see, among others: Harnay, Bergé 2009, pp. 15–25; Harnay, Bergé, 2011, pp. 165–192. More broadly, du Bois Gaudusson, Ferrand, 2008; Sefton-Green, Usunier, 2013.

petition is achievable only through the existence of *regulatory arbitration* on the one hand, and *regulatory competition* on the other. Indeed, both courts and legislations are subject to the arbitration of private actors (*regulatory arbitration*) who can choose a court and a law because they are allowed to do so, to minimise the costs of their disputes, both procedurally and substantively. Subsequently, because they have something to gain or lose, states invest in a legislative policy to attract businesses and attract business disputes (*regulatory competition*).⁶¹ The legal order thus becomes a ‘*merchant order*’.⁶²

Responding to this competitive scheme, for years, France has been pursuing a policy of making both substantive⁶³ and judicial law⁶⁴ attractive. However, competitive motivations do not have unanimous support.⁶⁵ Some consider the idea of making the law more attractive as meaningless, a false idea:

*a reform is not justified solely by the desire for modernity but more precisely because it meets needs. The objective is not to make inherently austere statutes attractive. [...] If legal reform is necessary, it is because it contributes to ensuring justice and balance of interests at stake.*⁶⁶

Notwithstanding these criticisms, the government has recently displayed a strategy of international influence through law, particularly by strengthening its legal attractiveness.⁶⁷

To establish itself in the international legal market, codification seemed an adequate lever according to the political authorities. Although

61 Armour, 2005, pp. 17–19.

62 Grimaldi, 2005, p. 24. See also *Les marchés du droit*, 2017.

63 For an example in corporate law, see: Cerqueira, pp. 7–38.

64 See Cerqueira, 2023, pp. 345–380.

65 Delebecque, 2019, pp. 185–191; Larroumet, 2019, pp. 365–370; Usunier, 2021, pp. 171–189; Cerqueira, 2021, pp. 129–151.

66 Delebecque, 2019, p. 191.

67 *Influence par le droit. Stratégie de la France 2023–2028*.

previously somewhat veiled,⁶⁸ codification has appeared to clearly integrate into France's strategy to compete with other legal orders or legal hubs in recent years.⁶⁹

There are several reasons for this. First, a legal *prêt-à-porter* seems more relevant than ever in contemporary societies '*as the only method suited [as opposed to common law methods] to the data of modernity and the constraints of developing law that meets the requirements of precision and speed*'.⁷⁰ Furthermore, codification is a manifestation of the very idea of a developed country, whose law is necessarily codified. This idea led, for example, China to establish a civil code that came into effect in 2021. The logic is simple: it is essential to ensure that all economic actors have access to a set of rules related to a particular area and whose authority is beyond doubt. Faced with the proliferation of laws⁷¹ covering increasingly extensive, complex, and specialised areas, codification seemed the best way to the authorities mitigate the negative effects,

68 Gelard, 1999, p. 5089: The French codification enjoys a great international prestige, observable not only in Europe but also far beyond, in Latin America, Africa, or Asia. Even some common law countries also resort to codification for the most modern branches of law. However, if the government program is completed, we will be the only country in the world to have a total codification of the entire legal system. This means that from now on, no legislator in any country will make any reform without referring to what the French have done. This is a source of comfort for me, knowing that the common law is making increasing advances in our European institutions or in international courts. Thus, through codification, French law continues to play an exemplary role.

69 The recent reforms of the Civil Code in the areas of contract law and security interests, as well as those upcoming in the field of civil liability or special contracts, are all motivated by the desire to make French law more attractive (see, e.g., Rapport au Président de la République relatif à l'ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations, *JORF*, 11 févr. 2016, texte 25).

70 Oppetit, 1998, p. 23.

71 Flis-Trèves, Mehl, Pisier, 1991, pp. 121–134; Éoche-Duva, Boccara 2023; Carbonnier, 1995, pp. 157–160; Éoche-Duval, 2022, p. 421; Secrétariat général du gouvernement, 2022; Conseil d'État, 2016; Conseil d'État, 2018; Rapport d'information n° 2268, 2014; Rapport d'information n° 743, 2023; Boulard and Lambert, 2013; Circulaire du 26 juillet 2017; Proposition de loi constitutionnelle, 2019; Outin-Adam and Reita-Tran, 2006, pp. 2919–2922; Hispalis, 2005, pp. 101–115; Piastra, 2006, pp. 1060–1061; Pontier, 2007, p. 769; Zarka, 2005, pp. 660–661.

particularly those related to accessibility to legal rules, intelligibility of the legislation, and legal certainty.⁷² Finally, the attractiveness policy cannot ignore the modernisation of sources, of which codification is one technique. In this perspective, two processes coexist. The first aims to carry out a genuine reform of the existing law either by modernising existing codes, such as the recent reforms of the Civil Code in the fields of obligations and security interests, or by replacing old codes, such as the Civil Procedure Code in 1975. The second aims to codify, without reform, sectoral legislation that is too scattered. Widely used since 1989,⁷³ this process leads to either the recodification of certain subjects, such as commercial law (in 2000) or labour law (in 2008), or the adoption of a new code, often very comprehensive and cross-cutting. This was the case, for example, with the Consumer Code of 1993, which regulates issues related to civil law, commercial law, economic law, criminal law, administrative law, and procedure. This was also the case with the Intellectual Property Code of 1992, the Monetary and Financial Code of 2001, and the Transport Code of 2010, among others.

This high level of codification in French law⁷⁴ reveals the persistence of postulates from the first modern codifications: the monopoly of state legality, the rationality of the system, and the permanence of the code. Undeniably, these postulates still seem to be well-received in the market of money and legal services, despite the allure of soft law.⁷⁵ However, some argue that codification is incompatible with globalisation.⁷⁶ This incompatibility results from challenges to the sustainability of increasingly detailed and meticulous norms by a society resistant to state monopoly on norm production, as well as to the stability and rigidity that codification entails.⁷⁷ In addition, the weaknesses of the method, revealed by the illusions and negative effects of excessive codification, add to this. This is particularly the case with codification à *droit constant*. Take, for example,

72 Gelard, 1999, p. 5089.

73 Braibant, 1999, p. 3.

74 See section 3.1.2.

75 Doganis, 2023, p. 4.

76 Kessedjan, 2004, pp. 920–921.

77 *Ibid.*

the recodification of the Commercial Code in 2000.⁷⁸ Recodifying the subject matter meant more the consolidation of commercial law provisions into a Commercial Code than the creation of a code *for commerce*⁷⁹ or a code for economic activities.⁸⁰ It was thus not a codification-innovation but a compilation of laws that were previously in force made without considering jurisprudence.⁸¹ While the government emphasised speed⁸² and improving the existing law, especially in terms of form, to justify the choice of compilation, authors often disqualified these arguments as fallacious. Regarding speed, it was noted that it prevented the gradual maturation of proposals, which is necessary to achieve quality. Moreover, speed does not promote democratic discussions of texts.⁸³ As for the improvement of the law, the quality of codification depends on the quality of the texts to be codified. In this regard, texts of private law (consumer law, commerce, labour) are of a much lower quality than many texts of public law, which are better thought out and better drafted.⁸⁴ Furthermore, the compilation '*is never truly à droit constant, which undoubtedly harms the coherence of the methodological approach*'.⁸⁵ In this regard, the recodification of the labour law is an illustrative example.⁸⁶ The effects of text accumulation, lack of clarity and coherence, deficiencies, and incompleteness are thus the most criticised aspects by authors. Codification, therefore, does not mean simplification.⁸⁷ Despite the efforts to bring order to a legal order in disorder, the desire to display the rationality and permanence of the codes seems to be challenged.

78 *Ibid.*

79 de Casanova, 2001, p. 286 *et seq.*

80 *Ibid.*

81 Monéger, 2004, p. 182.

82 Circulaire du 30 mai 1996 relative à la codification des textes législatifs et réglementaires, art. 2.1.1 (*JORF* 5 juin 1996, 8263 *et seq.*): '*Codification à droit constant [is the] only one [that] allows for the development of codes without slowing them down or getting lost in the examination and debates of any substantive reform*'.

83 Cabrillac, 2009, p. 61.

84 Oppetit, 1998, p. 20–21.

85 *Ibid.*

86 Ferrier, 2008, pp. 2011–2014.

87 Zaradny, 2007, p. 9; Viguier, 2010, pp. 81–91.

When considering the number and importance of codes adopted in recent decades, these weaknesses reveal much more than the flaws of one code or another: they expose the weaknesses of the codification policy itself. They could, therefore, reveal a certain crisis within codification in France.

3. CRISES

Current inquiries into the renewal of legal sources⁸⁸ and the metamorphosis of the *Loi*,⁸⁹ as well as the tendency to seek normativity everywhere,⁹⁰ might not have occurred – at least not with the cohort of denunciations and fears accompanying them⁹¹ – if codification were not in a crisis. According to one author, the overarching concept of crisis helps account for a multitude of phenomena negatively impacting the French legal order, such as

*legislative inflation, the profusion of laws, fragmentation, periodization, destabilization of the law, dispersion, proliferation, disintegration of the law, globalization, ‘denationalization’, the judicialization of the law, the multiplication of instances for the production and gestation of law, regulations of all kinds, complexity, specialization, the technicalization of norms, the professionalization of law, disinformation of citizens, and the decodification of major codes.*⁹²

To the above list, we would willingly add the trend toward legislative experimentation. However, chosen as the method to structure the French legal order in the aftermath of the Revolution and Liberation, codification was supposed to prevent most of these destabilising phenomena. Yet, many of them are closely related to codification to a greater

88 Hachez, *et al.*, 2012; Bonneau, Mazeaud, 2022; Barraud, 2018; Lasserre-Kiesow, 2006, pp. 2279–2287.

89 Tessy , 2022.

90 Thibierge, 2014; Thibierge, 2009.

91 Beauthier, de Broux, 2012, p. 716.

92 Lasserre-Kiesow, 2006, pp. 2279–2287.

or lesser extent. For instance, consider the decodification of major codes, of course, and also of legislative inflation, complexity, specialisation, technicalisation of norms, and periodicisation, globalisation, and so on.⁹³ The crisis of the French legal order thus largely indicates a crisis of codification.

This crisis can be apprehended through two of its phenomena: legislative inflation (3.1) and, in a more unconventional manner, legislative experimentation (3.2).

3.1. LEGISLATIVE INFLATION

Although recodification is considered ‘undoubtedly one of the most striking legislative phenomena of recent decades’,⁹⁴ France experienced a significant period of decodification. This period was caused by legislative developments outside the code in several fields. French decodification (3.1.1) can thus be seen as an inflationary decodification. Nonetheless, the disorder caused by this movement led to a new policy of recodification. The prolific recodification that followed is not, strictly speaking, Cartesian (3.1.2).

3.1.1. INFLATIONARY DECODIFICATION

Following the Napoleonic work, the idea of codification experienced a *reflux*.⁹⁵ This was the era of decodification, a trend widespread and particularly pronounced in commercial matters.⁹⁶ In fact, the Commercial Code of 1807 became the ‘most blatant victim of the decodification process’.⁹⁷ The process was characterised by the development of extensive

93 See section 2.2.

94 Cabrillac, 2009, p. 61.

95 Oppetit, 1998, p. 12 *et seq.*

96 Oppetit, 1982, p. 197 *et seq.* For an illustration of the trend in Latin America, where the influence of the French Commercial Code of 1807 was particularly significant, see: de Aguilar Vieira, Cerqueira, 2007, pp. 27–77.

97 Cabrillac, 2009, p. 56.

regulation outside of the code. Why? This code was soon described as paralysing and incomplete. It came into effect on 1 January 1808, aiming to replace the old royal legislation; the Commercial Code was supposed to 'correct the abuses introduced into commercial relations by a regime of excessive freedom' and 'conform to the progress already made in public economy'.⁹⁸ However, the 1807 codification was limited to simply updating the repealed legislation, with a surprising ignorance of the social and economic changes of the time. This was surprising because the code drafters were experienced merchants or bankers well aware of the social and economic changes in Great Britain, and they should have recognised the signs of the imminent industrial revolution in France.⁹⁹ Based primarily on Louis XIV's Ordinances of 1673 on trade and 1681 on the Navy, the content of the 1807 code was divorced from the economic reality of the time,¹⁰⁰ even though it was recognised that '*the time had not yet come when commerce, having moved beyond its old boundaries, would reveal all the needs of its legislation*'.¹⁰¹ Thus, the Commercial Code was criticised for being a law that did not encourage merchant creativity¹⁰² and established overly strict control over commercial actors,¹⁰³ portraying them as suspects. This is evident in the heavy penalties for bankruptcies, lengthy developments on commercial jurisdictions, the rigour that merchants were required employ in maintaining their commercial books, and the required authorisation for the formation of joint-stock companies.¹⁰⁴

98 de Saint-Joseph, 1851, p. XII.

99 Richard, 2005, p. 102.

100 Licari, Bauerreis, 2004, p. 135.

101 Horson, 1829, p. 29.

102 Richard, 2005, p. 106.

103 Licari, Bauerreis, 2004, p. 134.

104 Richard, 2005, pp. 102–103; Monéger, 2004, p. 180.

Furthermore, in addition to its subjective approach,¹⁰⁵ it was criticised for its various deficiencies: nothing on banking, land insurance, credit, and checks. These gaps were immediately filled by numerous special statutes,¹⁰⁶ recourse to the Civil Code,¹⁰⁷ and commercial usages,¹⁰⁸ as well as doctrine. Jurisprudence played a rather limited role¹⁰⁹ because arbitration was often preferred in this matter.¹¹⁰ The French Commercial Code quickly became useless for business people and the target of strong criticism from legal scholars.¹¹¹

As a failed codification,¹¹² the Commercial Code did not meet the requirement of a great codification: to represent both a rupture with

105 Indeed, the Commercial Code became that of the merchant, endowed with a special jurisdiction, in total contradiction with the principles of the Revolution, especially the idea of a single law and a single court for all. The subjective approach was one of the legacies inherited from the slavish imitation of the “Savary Code”; the objective approach was once again favoured by the jurisprudence of the 19th century. (See J. Monéger, 2004, p. 180). The choice of an objective system also seems to have been a way to justify a subjective jurisdiction, the maintenance of which after the Revolution largely motivated the publication of the Commercial Code.

106 For example: the laws of 1838, 1867, and 1889 on bankruptcies and judicial liquidation; the laws of 1903 and 1908, which mitigated the severity of bankruptcy; the laws of 1856, 1863, and 1866 on joint-stock companies; the law of 1865 on cheques; the law of 1894 on promissory notes; the laws of 1898 and 1913 on pledges and business goodwill; the laws of 1844 and 1902 on patents; the law of 1858 on warehouses and warrants; the law of 1919 on the commercial register; and the law of 1925 on limited liability companies (SARL), among others. Many of these laws are the result of foreign influences, especially English (cheques, warrants, companies) and German (SARL, commercial register).

107 According to Richard (2005, p. 103), it is indeed the failure of the Commercial Code as a potential source that will, as a pendulum effect, highlight the other sources of commercial law at that time, especially the Civil Code, which imposed its models despite its inadequacy for commerce.

108 See *supra* note 47.

109 For example, the Court of Cassation, on 11 March 1914, in the case of *Caisse rurale de la Commune de Manigod*, established the economic purpose as the criterion for distinguishing between a company and an association.

110 Richard, 2005, p. 106.

111 Vincens, 1821.

112 Richard, 2005, p. 103.

the past and its continuation.¹¹³ It did not take long for the vast majority of articles resulting from Napoleon's drafting to be modified, or even transformed, with entire books being reworked, starting with Book III on bankruptcies and insolvencies, which was replaced by a special law in 1838.¹¹⁴ Thus, a long phase of decodification marked commercial matters for two centuries.¹¹⁵

However, it must be acknowledged that codifying commercial matters is not easy. The difficulty has been perfectly summarised by Bruno Oppetit:

The codification of commercial matters has always encountered many obstacles and questions in France, up to the present day, primarily due to the very particular conditions of legal development in this area. Indeed, the legislative or regulatory power has always had to negotiate here with professional, national, or international circles, whose considerable influence has been expressed either through organized representation of their interests, through the influence of consular or arbitration courts, or through the formation of customs and practices: now, this creative force of the law leads to both innovation and inertia, to the solicitation of the protective care of the State, as a dispenser of order and unification, as well as to deliberate opposition to the law when it deems the requirements of business life contrary to it; moreover, in contemporary times, the multiplication of legislative and regulatory interventions, the result of increasing statism and an omnipresent technocracy both in Paris and Brussels [...], has placed commercial law in a state of permanent reform, accentuating the mobility and diversification of its rules. These data, a mixture of corporatism,

113 Malaurie, 2004, p. 6.

114 Within the new code, only the former arts. 1, 632, and 633 (currently arts. L 121-1, L 110-1, and L 110-2) remain. This permanence, as noted by Richard (2005, p. 101), 'carries significant weight, as these articles address the question of the quality of a merchant, a question that remains just as ambiguous today'.

115 Indeed, this process began as early as 1830, with the succession of laws on commercial courts (1830), the conditions of sale of goods (1837–1841), and maritime transportation (1835–1841). According to some scholars (Didier, Didier, 2005, p. 87), the term 'decodification' is 'probably unfortunate because it reflects a sense of sadness in the face of a phenomenon that is, in reality, an expression of the vitality and expansion of this branch of our law'.

*technocracy, and cosmopolitanism, appear a priori completely contrary to the values of legal stability, rationalization, and nationalism that underlie the very idea of codification: they dictate the understanding of the problem.*¹¹⁶

While decodification is particularly evident in every aspect of economic life, it has not spared civil matters either. As mentioned earlier, the Civil Code faced competition in the 19th and 20th centuries from numerous special laws in areas such as rural law, housing, urban planning, special contracts, and labour. Thus, several special laws coexist with the Civil Code despite their common subject matter. This includes the 1985 Statute on civil liability resulting from traffic accidents. The regime established by the 1985 Statute was not integrated into the Civil Code and is not expected to be according to the Senate's July 2020 bill for the reform of the civil liability law.¹¹⁷ The same applies to the 1965 Statute on co-ownership or the 1975 Statute on subcontracting.¹¹⁸ Even though significant reforms have been made within the Civil Code,¹¹⁹ the general trend is to legislate outside the code.

This legislative pluralism not only causes difficulties in articulating sources but also affects the role of codes. In many areas, codes increasingly play a subsidiary role rather than being the main player, as with the Civil Code in relation to special contract law.¹²⁰

The decodification movement has thus generated a great legislative and regulatory disorder, as it has led to a considerable increase in legislative and regulatory production.¹²¹ In this regard, it has generated a codification crisis.

116 Oppetit, 1998, p. 25.

117 Regarding this project, see: Monteillet, Cerqueira, 2021.

118 The preliminary draft reform of special contract law from July 2022 aims to introduce this regime into the Civil Code while reforming it. For more information on this upcoming reform, see Monteillet and Cerqueira, 2023.

119 It should be noted that it was even enriched with a fourth Book during the reform of security law in 2006.

120 See, for example Aubert, 2004, p. 127; Lardeux, 2005, p. 3; Rémy-Corlay, 2005, p. 4.

121 Oppetit, 1998, pp. 12–13.

Given the temporal scale of the movement, some have ruled out the possibility 'of a temporary malfunction of the legal system' to admit the decline of the codification concept as 'a natural and, in any case, lasting transformation of the Western legal world'.¹²² The French doctrine¹²³ has thus embraced the analysis of the phenomenon made by Italian authors, according to whom contemporary law consists of a myriad of special and categorical laws that claim to establish countless autonomous microsystems independent of each other, without the constraint of obeying a global rationality, and whose stability is fragile as it depends on the convergence of antagonistic interests of social or economic groups. As Natalino Irti asserts, such fragmentation of sources is fundamentally contrary to what codification inherently postulates.¹²⁴ The result is a residual function for codes in the contemporary legal order.¹²⁵

In France, disorder was also denounced by the *Conseil d'État*.¹²⁶ The purely formal maintenance of codes emptied of their substance by the uncontrolled proliferation of texts outside the code could not continue, especially as France had to establish itself in the international market.¹²⁷ The recodification of the law became a post-war policy. However, the approach to overcome one crisis ended up leading to another.

3.1.2. PROLIFIC RECODIFICATION

The other face of legislative inflation is the proliferation of codes resulting from the recodification policy, one of the objectives of which is to simplify the law. Indeed, 'simplification's statutes' empower the government to codify aspects of the law,¹²⁸ while the Constitutional

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ Irti, 1986, pp. 22 et seq., as cited in Oppetit, 1998, p. 13.

¹²⁵ Sacco, 1983, pp. 117 et seq., as cited in Oppetit, 1998, p. 13.

¹²⁶ Rapport, 1991.

¹²⁷ See section 2.2.

¹²⁸ See, for example, Law 2007-1787 of 20 December 2007, regarding the simplification of the law, arts. 28 and 29; Law 2004-1343 of 9 December 2004, on the simplification of the law and its series of authorisations, art. 84. See Deumier, 2010, pp. 53–66.

Council recognises the requirement of legal certainty ‘in the context of the “re-reliance” of the codification’s [process], in the normative form that was supposed to ensure its success, the ordinance’.¹²⁹ The term ‘recodification’ encompasses several codification methods. It may involve a complete or partial (even progressive) modification of an existing code or an administrative compilation of laws and regulations in a particular field.¹³⁰

In France, the policy of codification *à droit constant* is responsible for the proliferation of codes. Led by the Higher Codification Commission, this policy – which nonetheless excludes the Civil Code¹³¹ – has led to the codification of over 60% of legislative texts and nearly 40% of regulatory texts, despite repeated claims of comprehensiveness.¹³² In total, there are currently 78 official codes,¹³³ with no less than 40 relating to private law, and most of them resulting from codification *à droit constant*.

Paradoxically, the multiplication of codes makes the law less accessible in many areas. Coupled with *à droit constant* codification, which does not allow for the definition of codification guidelines – a codification without a soul¹³⁴ – the plurality of codes often prompts French legal professionals to consult several codes to fully grasp the issue at hand. For example, despite the recodification of commercial law in 2000, a number of rules applied to commerce must be sought in the monetary and financial code, the intellectual property code, and the consumer code, not to mention the Civil Code. This is in addition to a prolific and often uncertain jurisprudence that complements the scattered provisions in multiple codes.¹³⁵ The result is unsatisfactory. While codifica-

129 Ibid., pp. 53–66.

130 Cabrillac, 2009, p. 60.

131 Commission supérieure de codification, 1994, p. 21.

132 See *supra*, note 58. See also Circulaire 30 mai 1996 du Premier ministre relative à la codification des textes législatifs et réglementaires, art. 2.1.1 (JORF5 juin 1996, p. 8263 et seq.); Gelard, 1999, p. 5089.

133 <https://www.legifrance.gouv.fr/liste/code?etatTexte=VIGUEUR> (Accessed: 31 August 2023).

134 Deumier, 2010, pp. 53–66. For a similar position, see Terré, 2012, pp. 366–367.

135 Codification *à droit constant* is incomplete in this regard because the Higher Codification Commission is not authorised to codify jurisprudence.

tion is supposed to rationalise the sources of rules governing a subject matter and facilitate access, contemporary codification of French private law has achieved the opposite.

This crisis worsens when it comes to understanding the content of the codes. Indeed, administrative codification – from which the Civil Code is fortunately exempt, and to some extent, the code of civil procedure – produces codes with structures and contents that are difficult to read, despite intelligibility being an objective of constitutional value of the law. Sometimes, the very rationality of the code is in question. For example, the 2000 recodification of commercial law introduced some consumer and distribution law into Book III of the legislative part of the commercial code concerning certain forms of sales and exclusivity clauses.¹³⁶

The lack of readability is even greater because many codes consist of a legislative part and a regulatory part depending on the legislative or regulatory origin of the codified provisions. Provisions are preceded by ‘L.’ if they come from an old law, or ‘R.’ or ‘D.’ if they come from a decree. Articles identified with R. correspond to provisions subject to a decree that was submitted to the *Conseil d’État* for consultation during its drafting, while those identified with D. correspond to provisions subject to a simple decree. Some codes even have an ‘A.’ section for ministerial orders. Additionally, the numbering of articles is not uniform. While it is continuous in the Civil Code, it is decimal in almost all codes resulting from administrative codification, and the drafting style is anything but clear and simple.

Above all, it is difficult to navigate within the codes. Provisions essential to understanding an issue are often scattered in different parts of the code, making their combination and interpretation akin to solving a Chinese puzzle. Furthermore, articles in the regulatory part, R. and D., are often mixed. Versions frequently change as well, making it difficult to determine which one is applicable to a specific case. In this regard, the Labour Code is a caricature. In addition to the bewildering quantity of legislative and regulatory provisions, the code is difficult to read due to the dispersion and fragmentation of solutions. The result is a

136 Ripert, Roblot, 2001, p. 22.

real problem of accessibility and, therefore, knowledge of the applicable law. This is detrimental to employers and even more so to employees, who are supposed to be protected by this code but will have a hard time understanding the extent of such protection on their own.

In summary, one must be an expert to handle French private law codes. This falls far short of Napoleon's ambition to offer citizens an organised, systemic, and coherent set of few, general, clear, and simple rules, even though, according to the Vice-President of the Higher Codification Commission, Mr. Bernard Stirn, administrative codification has made French law 'more respectful of the hierarchy of norms, more coherent, and more orderly'.¹³⁷

Despite these efforts and the optimism of decision-makers, the codification policy initiated in 1948 and relaunched in 1989 has not succeeded in curbing legislative inflation.¹³⁸ French codification, suffering from the *à droit constant* codification method, is thus challenged by the 'inebriety of laws'¹³⁹ deliberately indulged in by the French government. Although voices were raised in the late 2000s to signal that the objective of codifying the entire law was no longer relevant because, for complex matters, codification was on the verge of completion,¹⁴⁰ recodification persists. This intoxication is all the more persistent because of the difficulties posed by recodification, especially for areas that have gained legislative autonomy.¹⁴¹ The situation is even less satisfactory as another

137 Stirn, 2023, p. 13.

138 According to one author, *à droit constant* codification promotes the inflation of the law instead of containing it and becomes a formidable accelerator of the problems plaguing the French legislative and regulatory corpus: inflation and even more so instability; a considerable increase in the volume of texts, even if it is mainly formal: for example, by splitting long articles into shorter ones, the legislative part of the Labor Code has gone from 1891 to 3652 articles; hyper-specialization and fragmentation of the law to the detriment of common law (Moysan, 2006, no. 8).

139 'Sobriety is the twin sister of modesty because it is simplicity, moderation, temperance, restraint, and even common sense [...]. Not a word too many, no pursuit of effect: the opposite of inebriety [...], of self-inebriety, of the inebriety of thought, of the inebriety of laws' (Maurie, 2012, p. 599).

140 Deumier, 2010, pp. 53–66.

141 Terré, Outin-Adam, 1994, p. 99; Bénabent, 2004, p. 245 *et seq.*; Cabrillac, 2009, pp. 53–63.

crisis threatens French codification: a new trend towards experimental legislation.

3.2. LEGISLATIVE EXPERIMENTATION

Since 2003, the French Constitution, in its art. 37-1, provides that ‘*statutes and regulations may contain provisions enacted on an experimental basis for limited purposes and duration*’. This legal framework, which was lacking in legislative experimentation in France,¹⁴² now grants the legislator the right to experiment. Legislative experimentation therefore requires that a fixed term be set forth in the text from the outset, that an evaluation of the effects be planned, and that the possible perpetuation of the measure be subject to the adoption of a subsequent law, making necessary adaptations based on observed effects.¹⁴³

In the past, while the use of experimental laws was limited, in 2016, the government decided to create an entity within the Ministry of the Economy tasked with collecting – and even prompting – legislative requests from economic circles. This mission of this entity, known as ‘France Expérimentation’, is to seek out ‘innovative and ambitious projects’ requiring derogations from legislative or regulatory rules, and even European rules.¹⁴⁴ For the government, it is a struggle to adapt legal rules and administrative processes to the same pace as innovations by economic actors, thus hindering the deployment of new solutions. By promoting legislative experimentation¹⁴⁵ to boost France’s economic and industrial development, the government is poised to develop legislation fundamentally aimed at addressing very specific and sector-specific economic interests.

¹⁴² Chevallier, 1996, pp. 167–203.

¹⁴³ *Ibid.*

¹⁴⁴ Expérimenter pour innover, 2023.

¹⁴⁵ Daigre, 2023, p. 1401.

As mentioned earlier, while the use of experimental laws has been fairly limited in the past,¹⁴⁶ the inclusion of a right to experimentation in the Constitution risks exacerbating the legislative inflation that France has been suffering from, paradoxically, since both the government and the parliament committed to combat it in 1948.¹⁴⁷

This risk leads to another: making codified provisions experimental and provisional, which, by nature, were designed to withstand the test of time due to their generality and stability. One recent application of this was the PACTE Statute (*Plan d'action pour la croissance et la transformation des entreprises*) of 22 May 2019, which introduced several 'trial' norms regarding codified provisions of private law. For example, art. 99 of the PACTE Statute introduces an experiment in crowdfunding within a professional community for a duration of three years, temporarily deviating from several provisions of the Monetary and Financial code and the Consumer Code.¹⁴⁸ In the field of corporate law,¹⁴⁹ art. 184 modifies art. L. 225-27-1 of the Commercial Code to mandate two employee representatives on any board composed of eight members – instead of twelve as before. This provision then triggers a debate in three years about the requirement for three employee representatives on boards of companies with more than twelve members. Indeed, no later than three years after the law's publication, the government must submit to Parliament a report evaluating the economic and managerial effects of having employee representatives on the boards of the companies concerned, the feasibility of extending this provision to three representatives when these boards exceed twelve members, and the relevance of including in this panel an employee representative from subsidiaries located outside

146 For example, before expanding it and making it permanent, a Satt of 17 January 1975 (art. 2) decided to suspend for five years the article of the Penal Code that punished abortion when voluntary termination of pregnancy occurred within a certain period (before the end of the tenth week). For other examples, see Chevallier, 1996, pp. 167–203.

147 See *supra* note 58.

148 As the three-year period was set to end in May 2023, to our knowledge, no assessment has been made of this experiment by the government.

149 Couret, 2019, pp. 565–571.

the national territory when the company conducts a significant part of its activities internationally.¹⁵⁰

Like the PACTE Statute, experimental law is a ‘*negotiated law*’, with solutions resulting from ‘*co-construction*’ in which lobbyists – supported by scholarly think tanks – play a significant role.¹⁵¹ This hallmark of postmodernity,¹⁵² where the law loses its intrinsic legitimacy in favour of procedural legitimacy,¹⁵³ is coupled with doubts about the rule’s legitimacy considering its effects, revealed by the temporary – experimental – nature of the norm.¹⁵⁴

Whatever the cause – legislative dysfunction, integration of the law into public policies, or difficulty in legislating in sensitive or complex areas¹⁵⁵ – this new conception of the law departs from the tenets of modern law embodied in the idea of codification, in which the law is no longer a general and impersonal prescription driven by common interest but is

*increasingly conditioned by the diversity of its recipients, who can no longer be apprehended as a homogeneous set of abstract citizens, and increasingly marked by its context, not only political and economic but above all social, environmental, and societal.*¹⁵⁶

Let us emphasise this point with Jean Chevallier’s analysis:

experimentation aims to replace the dominant legal rationality, which led to making the law a privileged instrument of ‘rationalization’ of social

150 Art. 184, I-C.

151 Couret, 2019, pp. 565–567.

152 Chevallier, 2014, p. 142: The power of the law no longer comes from it being expressed as a mandatory order that everyone must obey; it now depends on the consensus surrounding it. This consensus requires that the recipients are involved in its development: prior consultation, participation in defining the rule becomes the guarantee of its validity: thus, the law becomes a negotiated law, the result of collective deliberation.

153 Chevallier, 1996, pp. 167–203; Couret, 2019, pp. 565–567.

154 Chevallier, 1996, p. 167 et seq.

155 On this matter, see Chevallier, 1996, pp. 167–203.

156 Daigre, 2023, p. 1401.

life, with another type of rationality, ‘technico-economic,’ to which the law itself will be subordinated. The law is no longer assured of legitimacy *ab initio*, based on its own characteristics, the values it embodies, its intrinsic normative power: its legitimacy depends on its ability to achieve certain objectives, on the effectiveness of the results obtained. A legitimacy based on the regularity of procedures implemented, on the conformity of conduct and behavior, is replaced by a legitimacy based on the effectiveness of actions undertaken, on the ability to achieve pre-established goals. The law thus becomes nothing more than a tool, an ‘operational technique’, or even ‘a management technique’, which has no inherent value but only functions in terms of the results it allows us to obtain: efficiency becomes the condition and guarantee of its legitimacy. Therefore, the law is invested and subverted by a technico-économique rationality that is extrinsic to it.¹⁵⁷

Codification cannot escape the ongoing conceptual shift. Indeed, legal experimentation affects both non-codified legislative and regulatory provisions and those that are codified. The development of legal experimentation in codified matters could signify the emergence of a new type of code, marked by the co-existence of general, impersonal, and enduring provisions with special, personalised, and temporary provisions. Beyond hybridisation within the currently effective codes, the expansion of legal experimentation could, in the future, lead to the hybridisation of codification itself: the codification process would incorporate, *ab initio*, the experimental approach alongside the classical approach, with all that it implies in terms of the development and meaning of legal norms. Admittedly, the possible perpetuation of temporary provisions is not ruled out, as the experimental law technique requires the adoption – or rejection – of a new definitive law after an evaluation process.¹⁵⁸ However, this does not eliminate the instability of the rule, as at the end of the set period, the temporary solution may either not be perpetuated,¹⁵⁹ be renewed for a new probationary period, or undergo

157 On this matter, see: Chevallier, 1996, pp. 167–203.

158 *Ibid.*

159 According to Chevallier (1996, pp. 167–203), this risk is minimal since it is difficult to challenge legislation, even if adopted experimentally, as the natural tendency is towards its renewal or permanence.

adaptations considered desirable based on observed effects. In other words, legal experimentation undermines, throughout its entire process, the legal stability expected from any codification work. In this regard, legal experimentation becomes an unusual factor in the crisis within French codification.

It is more important than ever to re-read Portalis in order to protect the city from excess, unnecessary complexity, and disguised privatisation of laws:

*Laws are not pure acts of power; they are acts of wisdom, justice, and reason. The Lawmaker does not exert an authority so much as a secret function. He must not lose sight of the fact that laws are made for men, and not men for laws; that they must be adapted to the character, customs, and circumstances of the people for whom they are made; that one must be sparing of the new in matters of legislation, because, while one can, in a new institution, calculate the advantages that theory offers, one cannot know all the disadvantages which practice alone can reveal; that one must leave well enough alone, if betterment is uncertain; that remedying and abuse, one must imagine the dangers posed by the remedy itself; that it would be absurd to indulge notions of absolute perfection in matters susceptible only to relative goodness; that rather than changing laws, it is almost always more useful to present citizenry with new reasons to love them; that history offers us the promulgation of two or three good laws over the span of several centuries [...].*¹⁶⁰

These words should be engraved in the chambers of the National Assembly and the Senate as a daily reminder to legislators. They should be read aloud at the inauguration of the President of the Republic to persuade them to exercise their normative power with sobriety and wisdom.

In the meantime, we must return not only to legislative sobriety but also to the scholarly nature of any true codification work. Codification must become the work of scholars, not technocrats. In this perspective, which does not preclude advances in legislative drafting, we must follow the systematic method employed since 1945 for reforms to the French

160 Portalis, 1844, pp. 4–5.

Civil Code and Code of Civil Procedure and entrust scholars – law professors and practitioners – with the task of preparing codification projects. The quality of recent reforms in contract law, the general regime of obligations, and security law once again demonstrates the wise choice made by great codifiers since Justinian to entrust jurists with the task of codifying the law. This is also the choice for future reforms in the law of civil liability, private international law, and special contract law. However, this work is already advancing on the territory of my colleague and friend Lukas Rass-Masson.

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