

## Changing Codes and Changing Constitutions

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Article abstract

In this article, the author addresses a neglected area of study, namely codal amendment in Canada. The author argues that the theoretical justifications for the *Civil Code of Québec* and its distinctive design features raise concerns about how the Code is currently amended. In response to these concerns, the author draws on the rich literature concerning law reform in Canada to propose a reform institute that is charged with overseeing the process of codal amendment. Moreover, the author contends that when Canadian courts and Parliament respond to and the Quebec legislature effects changes to codal text they should be closely attentive to the purposes underlying the constitutional division of powers. To illustrate this last contention, the author critiques the *Federal Law — Civil Law Harmonization Act, No. 1* and recent legislative and judicial developments respecting marriage and the civil union.

# Changing Codes and Changing Constitutions

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Hoi KONG\*

*In this article, the author addresses a neglected area of study, namely codal amendment in Canada. The author argues that the theoretical justifications for the Civil Code of Québec and its distinctive design features raise concerns about how the Code is currently amended. In response to these concerns, the author draws on the rich literature concerning law reform in Canada to propose a reform institute that is charged with overseeing the process of codal amendment. Moreover, the author contends that when Canadian courts and Parliament respond to and the Quebec legislature effects changes to codal text they should be closely attentive to the purposes underlying the constitutional division of powers. To illustrate this last contention, the author critiques the Federal Law—Civil Law Harmonization Act, No. 1 and recent legislative and judicial developments respecting marriage and the civil union.*

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*L'auteur s'intéresse à une question peu étudiée, soit celle des modifications apportées à un code civil. La façon dont le Code civil du*

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\* Associate-in-Law, JSD candidate, Columbia University School of Law. My foremost thanks go to Rod Macdonald, who supervised two earlier iterations of this essay as, respectively, a term paper and a summer research project, and generously provided time and advice through subsequent drafts. I gratefully acknowledge the JSD Tory's Foundation for funding research on an earlier draft, and the Department of Justice for funding the research and writing of this final version and providing editorial oversight. I am grateful to Ben Berger, Alana Klein, Robert Leckey, Ryan Rabinovitch, Ramona Rothschild, Meg Stephens, Peter Strauss, and Pierre-Hugues Verdier for incisive written comments, to Suzanne Vadboncœur J. and George Fletcher for helpful conversations, and to the participants in a workshop at the Columbia Law School for a lively discussion that sharpened my ideas. I also thank two anonymous readers for extraordinarily helpful suggestions. Finally, I would like to thank Camilla Rothschild for excellent research assistance. All errors are my own.

Québec est actuellement modifié soulève des inquiétudes tant au regard de motifs théoriques qu'en raison de la spécificité de ce qu'est un code. Aussi, l'auteur attire l'attention sur l'abondante littérature qui traite de la réforme du droit au Canada et propose la création d'un institut qui serait chargé de surveiller le processus de modification du Code. De plus, il souligne l'importance pour les juges, le Parlement du Canada et l'Assemblée nationale de respecter la finalité qui sous-tend le partage des pouvoirs établi par la constitution. Pour illustrer ses propos, l'auteur prend en considération la Loi d'harmonisation n° 1 du droit fédéral avec le droit civil, de même que les récentes décisions judiciaires et lois qui ont porté sur le mariage et l'union civile.

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In 2001 and 2002, the Barreau du Québec published two memoranda that raised issues relevant to the present paper. The first<sup>1</sup> critiqued the proposed Bill 50, *An Act to Amend the Civil Code and other legislative*

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1. *Mémoire sur la Loi modifiant le Code civil (p. l. 50)*, online: [<http://www.barreau.qc.ca/opinions/memoires/2001/pl50.pdf>] (date accessed: 27 February, 2005).

*provisions*<sup>2</sup> for failing to pay sufficient attention to the Civil Code of Québec's<sup>3</sup> internal structure, and advocated in passing the creation of a law reform institute that could superintend the process of amending the C.C.Q. A second memorandum<sup>4</sup> concerning the proposed Bill 84, *An Act instituting civil unions and establishing new rules of filiation*<sup>5</sup> expressed concern that extending eligibility for civil unions to heterosexual couples might result in the Bill's being found to be ultra vires.

With these interventions, the Barreau addressed a neglected topic of study, namely codal amendment in Canada. There is an extensive literature on the related question of recodification that was produced in anticipation of and in response to the coming into force of the C.C.Q.<sup>6</sup> And there is a growing literature addressing the question of how to harmonize federal statutes with the C.C.Q.<sup>7</sup> By contrast, the academy has been silent on the theory and process of codal amendment and the potential federalism concerns raised by codal amendments<sup>8</sup>. The present paper begins to fill this gap in the literature and its concerns mirror the three aspects of the Barreau's interventions.

In each of the first two sections, I will situate the particular issue under consideration—amending the C.C.Q. and designing a codal reform

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2. S.Q. 2002, c. 19.

3. [hereinafter C.C.Q.].

4. *Mémoire sur la Loi instituant l'union civile des personnes de même sexe et établissant des nouvelles règles de filiation*, online: [[http://www.barreau.qc.ca/opinions/memoires/2002/pl\\_84.pdf](http://www.barreau.qc.ca/opinions/memoires/2002/pl_84.pdf)] (date accessed: 27 February, 2005).

5. S.Q. 2002, c. 6.

6. See e.g. J.E.C. BRIERLEY, "Quebec's Civil Law Codification: Viewed and Reviewed", (1968) 14 *McGill L.J.* 521 [hereinafter "Codification"]; P.-A. CRÉPEAU, "Les enjeux de la révision du Code civil", in A. POUPART (ed.), *Les enjeux de la révision du Code civil*, Montréal, Faculté d'éducation permanente, Université de Montréal, 1979, 11; J.-L. BAUDOIN, "Codification: méthode législative", in *Codification: valeurs et langage*, Papers presented at the International Conference on Comparative Civil Law, 1-3 October 1981, Montreal, Conseil de la langue française, 1985; J.E.C. BRIERLEY, "The Renewal of Quebec's Distinct Legal Culture: The New Civil Code of Quebec", (1992) 42 *U.T.L.J.* 484; J.-F. NIORT, "Le Nouveau Code civil du Québec et la théorie de la codification: une perspective française", (1996) 24 *Droits: revue française de théorie juridique* 135; J.-F. Niort, "Le Code civil face aux défis de la société moderne: une perspective comparative entre la révision de 1904 et le nouveau *Code civil du Québec* de 1994", (1994) 39 *McGill L.J.* 845 [hereinafter "Moderne"].

7. See Section III below, and accompanying notes.

8. For an analysis of the federalism concerns implicated in the relationship between Québec's civilian private law system and judicial and legislative regulation with a federal scope, see C. VALCKE, "Quebec's Civil Law and Canadian Federalism", (1996) 21 *Yale J. Int'l L.* 67.

agency—in wider debates about codal and law reform. I will argue that the process of codal amendment raises particular concerns about expertise and legitimacy, and I will argue that a well-designed codal reform agency can meet these. In the third section, I will argue that in addition to these theoretical and design-related issues, the logic and structure of codal change raise particular division of powers questions. From my analysis of two issues, marriage and civil unions, I will conclude that when Canadian legislatures and courts effect or respond to codal change, they should be especially attentive to positive law and principle-driven constraints imposed by division of powers doctrine. Each section of my paper presupposes an understanding of the nature of a civil code, and it is this understanding that I will begin by setting out.

## 1 Codal Theory and Codal Change

A civil code is unique among legislative texts. A civil code aims to state exhaustively the *jus commune* of a jurisdiction<sup>9</sup>, and therefore presents the default conceptual apparatus of a jurisdiction's private law system<sup>10</sup>. A civil code encapsulates the essential features of its society by regulating behaviour<sup>11</sup> and aspires to be “a civil constitution.”<sup>12</sup> It seeks to represent

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9. This feature is explicitly stated in the preamble to the C.C.Q.: “The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication.” Given the reach of the C.C.Q.'s coverage, I take this to be a statement about the exhaustive ambitions of the Code. These ambitions are not fully realized, as the preamble itself acknowledges when it alludes to the Quebec Charter and general principles of law. Some statutes and some unwritten principles share foundational status with the C.C.Q.

10. This ambition is evident when the preamble states: “In these matters, the Code is the foundation of all other laws ...” The point in the above text about default vocabularies is one that Professor Macdonald has explored in general in R.A. MACDONALD, “Legal Bilingualism”, (1997) 42 *McGill L.J.* 119 and in the particular context of the Code. R.A. MACDONALD, “Harmonizing the Concepts and Vocabulary of Federal and Provincial Law: The Unique Situation of Quebec Civil Law”, in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism*, Ottawa, Department of Justice, 1997, 27 [hereinafter “Harmonizing”].

11. For a comparison of the different distributional logics present in the C.C.Q. and Civil Code of Lower Canada, and the divergent social values they encapsulate, see C. VALCKE, “The Unhappy Marriage of Corrective and Distributive Justice in the New Civil Code of Quebec”, (1996) 46 *U.T.L.J.* 539.

12. J. CARBONNIER, “Le Code civil”, in P. NORA (ed.), *Les lieux de mémoire*, vol. 2, *La Nation*, Paris, Gallimard, 1986.

the normative character of the society in which it is found<sup>13</sup> and in the exercise of this vocation, it is both a symbol and an instrument<sup>14</sup>. Through the operation of synecdoche, a single codal provision, governing a fragment of social life, can capture a society's character.

For example, the differences between the regimes of responsibility for the act of a thing in the Civil Code of Lower Canada<sup>15</sup> and the C.C.Q. reflect a fundamental shift from a rural to an industrial society<sup>16</sup>. Art. 1465 of the C.C.Q. regulates behavior; it imposes a presumption of fault on a custodian for the autonomous act of a thing. But at the same time, Art. 1465 evidences a change in historical circumstances and conceptions of fairness. As Professors Baudouin and Deslauriers have noted, the clear codal statement of this presumption reflects a legislative acknowledgment of the growing danger that inanimate objects pose in an industrial society<sup>17</sup>. By lessening the onus of proof for injured parties seeking recovery, the article places the costs of this greater risk onto the custodian and thus expresses a particular notion of distributive justice.

In addition to these symbolic and regulative functions, a code, as a civil constitution, has several distinctive design features. Like all constitutions, a civil code pitches many of its rules at a high level of generality<sup>18</sup>. The reason for this is two-fold. First, a code sets the framework within which parties structure their relations. Unlike the archetypal statute, a code generally does not envision a particular fact situation, or seek a particular outcome<sup>19</sup>. The second point relates to form. Like a common law rule,

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13. *Ibid.* See generally J.E.C. BRIERLEY & R.A. MACDONALD, *Quebec Civil Law: An Introduction to Quebec Private Law*, Toronto, Edward Montgomery, 1993, at paras. 32, 36-41, 85-90. See also P. LEGRAND, "Antiqui Juris Civilis Fabulas", (1995) 45 *U.T.L.J.* 311 for both an exposition and deconstruction of the following attributes of a civil code.
  14. On these two functions of legal rules in general, see F. SCHAUER, *Playing by the Rules*, Oxford, Clarendon Press, 1991. On the symbolic function of civil codes and the semiotic stakes implicated by codal change, see M. MCAULEY, "Proposal for a Theory and a Method of Recodification", (2003) 49 *Loy. L. Rev.* 261.
  15. [hereinafter C.C.L.C.].
  16. J.-L. BAUDOUIN & P. DESLAURIERS, *La Responsabilité civile*, 5th ed., Cowansville, Yvon Blais, 1998 at 467-71.
  17. *Ibid.*
  18. J.-E.-M. PORTALIS, "Qu'est-ce qu'un Code civil: discours préliminaire sur le projet de code civil français prononcé par Portalis", in P.A. FENET (ed.), *Naissance du Code Civil: La raison du législateur*, Paris, Flammarion, 1989, 35 at 39-42. On how constitutional and codal text resemble one another in ambition and scope, see K.N. LLEWELLYN, "The Constitution as an Institution", (1934) 34 *Colum. L. Rev.* 1 at 11.
  19. For the idea of an archetypal statute, see R.A. MACDONALD, "The Fridge-Door Statute", (2001) 47 *McGill L.J.* 11 at 13. For an analysis of the appeal of civil codes in jurisdictions where statutes are the dominant legislative form, and for a comparison of statutes and

a codal provision generally applies to a wide variety of circumstances. But like a statutory rule and unlike a common law rule, a codal provision has a fixed canonical rendering<sup>20</sup>. Taken together, these features of a code ensure its capacity to adapt to societal change, without having to be constantly amended<sup>21</sup>. This is significant because any constitutional text, civil or otherwise, whose form can be constantly changed loses its status as the repository of its society's values<sup>22</sup>.

This capacity to adapt can be fulfilled through means other than generalized rules. A code achieves flexibility through bivocality<sup>23</sup>. That is, it contains within itself creative tensions which invite the judiciary to draw upon opposing possibilities as societal values shift in one direction or another. The classic example in the C.C.L.C. is the tension between fault- and risk-based regimes of liability<sup>24</sup>. Over time, judicial interpretations found textual support in the code for one regime or the other<sup>25</sup>.

A code is not, however, infinitely extensible, and the regulatory function of a codal regime becomes most evident at precisely the moment when its symbolic function fails. For example, the symbolic affirmations of

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civil codes, see G.A. WEISS, "The Enchantment of Codification in the Common Law World", (2000) 25 *Yale J. of Int'l L.* 435.

20. On this comparison between common law and statutory rules, see L.L. FULLER, *Anatomy of the Law*, Westport, Conn., Greenwood, 1968, at 89-99. On the comparison between civil code provisions and common law rules, see F. STONE, "A Primer on Codification" (1955) 29 *Tulane L. Rev.* 303.
21. See BRIERLEY & MACDONALD, *supra*, note 13 at paras. 117, 118.
22. Professors Fletcher and Sheppard note that this concern for stability of form is particularly evident in the U.S. Constitution: when it is amended to render provisions null, those provisions are not excised from the Constitutional text. G. FLETCHER & S. SHEPPARD, *American Law in a Global Context*, New York, Oxford University Press, 2005, at 135. See e.g. the infamous 3/5ths clause of art. I, § 2, cl. 3. The same impulse is present in the tendency of civil code amenders to introduce sub-sections to retain the numerical sequence of codal provisions, rather than amending in a way that would disrupt this ordering through, for instance, appendices. See e.g. Art. 587.1, 587.2 and 587.3 of the C.C.Q.
23. For the idea of bivocality, and its significance generally in systems of legal thought, see MACDONALD, *infra*, note 77 at 876.
24. For an analysis of this quality of ambiguity in the C.C.Q. see J. PINEAU, *Le nouveau Code civil et les intentions du législateur*, Montreal, Thémis, 2000, at 10. On the point in the context of extra-contractual liability, see D. JUTRAS, "Louis and the Mechanical Beast or Josserand's Contribution to Objective Liability in France", in K. COOPER-STEPHENSON & E. GIBSON (eds.), *Tort Theory*, North York, Capital Press, 1994, 317.
25. See the discussion of this debate in *Lapierre v. Quebec*, [1985] 1 S.C.R. 241. For a discussion of the unresolved tension between provisions promoting and limiting individual autonomy in the C.C.Q., see J. PINEAU, D. BURMAN & S. GAUDET, *Théorie des obligations*, 3d ed., Montreal, Thémis, 1996, at 23-29.

patriarchy within the C.C.L.C. constituted material limits on the capacity of women to act independently. By the time of the 1980 reform, these regulatory limits had become vividly noticeable as the symbolic content of the rules in the book on marriage failed to capture the social mores of the context<sup>26</sup>. Arguably, the absence of articles expressly governing same sex relationships constituted a similar symbolic and regulatory gap in the C.C.Q.

Finally, any analysis of the idea of a code must address the aesthetics of a code. Codal substance is inseparable from codal form<sup>27</sup>. The C.C.Q.'s pretension to forming an elegant and coherent whole<sup>28</sup> is evidenced in the sequential ordering of its provisions<sup>29</sup>, in the preliminary disposition<sup>30</sup>, and in explicit cross-references<sup>31</sup>.

### 1.1 Debating Codal Change

The above defining features of a civil code have given rise to debates over whether and how to alter codal text. The normative vocation of a code, the pitch and creative possibilities of its text and the inter-relatedness of its articles and regimes, have all raised concerns about the capacity of a legislature to alter a code's form. I present two polar positions on the question of codal reform, and then turn to an analysis of how these positions bear on the current state of codal amendment in Quebec. I acknowledge that the authors whom I invoke as representatives of the poles of the debate wrote in their particular socio-legal and historical contexts and I do not

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26. For this history see Part Two, Title Four of BRIERLEY & MACDONALD, *supra*, note 13.
  27. In a forthcoming article, Macdonald and I flesh out the significance of different forms of codal rules, as we set out a typology of codal reform measures and argue that different kinds of provisions and amendments give rise to different institutional and substantive effects. R.A. MACDONALD & H. KONG, "Patchwork Law Reform: your idea is good in practice, but it won't work in theory" (forthcoming) *Osgoode Hall L.J.*
  28. Cornu has described this quality of a civil code using the apt phrase "internal harmony." G. CORNU, "Codification contemporaine: valeurs et langage", in *L'art du droit en quête de sagesse*, Paris, P.U.F., 1998, 357 at 367. See also *supra*, note 13.
  29. On the relationship between the organization of statutory texts and their meaning generally, see D. MANDERSON, "Statuta v. Acts: Interpretation, Music and Early English Legislation", (1995) *Yale J. of L. & Human* 317. On this relationship in the specific context of civil codes, see MCAULEY, *supra*, note 14.
  30. Professor Bisson reads this quality in the phrase "ensemble des règles." A.-F. BISSON, "La disposition préliminaire du Code Civil du Québec", (1999) 44 *McGill L.J.* 539 at 557.
  31. See e.g. Arts. 521.6, 521.11, 930, 1109, 1222, 1258, 1262, 1263, 1484, 1671, 1709, and 1743. The scope of Articles 1-9 reaches all relevant provisions of the Code.



deny the specificity of the C.C.Q.'s context<sup>32</sup>. Vast temporal, geographical and cultural differences separate the writings of the authors invoked and the Quebec experience with codal amendment. But these writings are here deployed for a limited purpose. I offer them as ideal types through which to frame the question of codal reform, and by contrasting them, I hope to bring to light the philosophical and institutional stakes that underlie serious discussions of the means and ends of C.C.Q. amendment.

Perhaps the most eloquent opponent of codal reform was Planiol, and his objections moved along several lines<sup>33</sup>. First, for Planiol the French Civil Code was *the* civil constitution; more than capturing the character of a particular civil society, codal provisions were abstract formulations of fundamental and unchanging concepts of private law<sup>34</sup>. Because the Code articulated these fundamental concepts, it should not be altered.

Second, the Civil Code deserved deference as a repository of accumulated social wisdom<sup>35</sup>. For Planiol, codal provisions expressed the moral experience of a society, and could generally be relied on to determine outcomes. Only in exceptional circumstances, when that accumulated wisdom could by broad consensus be unmistakably shown to be folly, should an established rule be amended. The Code should not be altered since the weight of its accumulated wisdom placed an almost insurmountable burden of proof upon the reformer.

Planiol's third objection to codal reform was institutional in nature. There were for Planiol three institutional players to be taken into account when considering codal reform. First was the legislature<sup>36</sup>. As noted above, a legislature creating an archetypal statute responds to a particular problem. Such a legislature, noted Planiol, inevitably operates in an experimental and tentative mood. It proceeds by trial and error, and its very composition shifts according to prevailing political attitudes. Faced with the task

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32. On the significance of sensitivity to culture when undertaking legal scholarship that has a comparative dimension, see generally V. GROSSWALD CURRAN, "Cultural Immersion, Difference and Categories in U.S. Comparative Law", (1998) 46 *Am. J. of Comp. Law* 43; P. LEGRAND, "The Impossibility of Legal Transplants", (1997) 4 *Maastricht J. Eur. & Comp. Law* 123; W. EWALD, "Comparative Jurisprudence I: What Was It Like to Try a Rat?", (1995) 143 *U. Pa. L. Rev.* 1889.

33. M. PLANIOL, "L'inutilité d'une révision générale du Code civil", in *Le Code civil, 1804-1904: livre du centenaire*, vol. 2, Paris, Rousseau, 1904, 953.

34. *Ibid.* at 960.

35. *Ibid.*

36. *Ibid.* at 959.

of altering the fundamental principles evinced by the code, the legislature, for Planiol, was incapable by nature of undertaking codal revision<sup>37</sup>.

Whereas the legislature was by nature and function unable to change the content of a code, the judiciary, through its interpretations, makes such change superfluous. Planiol argued that it was the proper role of judicial interpretation to enable a code to meet changed circumstances<sup>38</sup>. As Wittgenstein noted, no rule can anticipate all of its possible applications and the content of any rule arises from the practices of its community; for Wittgenstein, the practice *is* the rule<sup>39</sup>. Similarly, for Planiol, the practice of judicial interpretation of the Civil Code *was* the codal rule. As a consequence, the “literal” meaning of a rule could be the precise opposite of the “actual” meaning that it was given by the judiciary<sup>40</sup>.

Finally, if the judiciary gave the codal rule its content, the third institutional actor in the codal universe, the doctrinal writer, gave a rule its justification. Although for Planiol judicial interpretation was the primary practice that gave a rule content, given the form of the French civilian judgment, such interpretation could not invest a rule with the full plenitude of its content<sup>41</sup>. The full reason for a codal rule could emerge only with doctrinal interpretation. Acting together, the civil law judge and doctrinal writer could adapt a code to changing times<sup>42</sup>, and when their interpretive acts are considered in light of legislative incapacity to amend a code, argued Planiol, one should conclude that they make legislative changes to codal text unnecessary.

The arguments against codal reform mirror the arguments for codal reform. If Planiol conceived a code to be *the* civil constitution, the proponents of reform, most notably de la Morandière, presented a code as *a* civil

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37. This is not to say that such temporary measures are unnecessary. The legislature can, through ordinary statutes, create regimes that complement the Code. In fact, given Planiol’s understanding of the Code as a permanent repository of social wisdom, and his recognition that normal legislative practice reflects transitory interests, a division of labor between a code and a statute is a reasonable proposition. The experimentation that emerges from transient moments of social consensus can properly be kept out of the Code and displaced into a statute.

38. *Supra*, note 33 at 958.

39. L. WITTEGENSTEIN, *Philosophical Investigations*, trans. G.E.M. Anscombe, Oxford, Blackwell, 1999, at paras. 85-86. A similar point is made in the context of constitutional interpretation by LLEWELLYN, *supra*, note 18. Llewellyn locates much of a constitution’s meaning in institutional practices, rather than constitutional text.

40. *Supra*, note 33 at 959.

41. But see VALCKE, *supra*, note 8 for the distinctive features of judgments in Quebec civil law.

42. *Supra*, note 33 at 959.

constitution<sup>43</sup>. Since a code's rules represent and constitute the character of its society, and do not form the foundations of private law itself, when society changes, so too must the rules<sup>44</sup>. Whereas Planiol saw in the provisions of the French Civil Code eternal verities, de la Morandière saw in them contingent expressions of social norms<sup>45</sup>.

Two additional differences lie between the opponent and proponent of codal reform. First, even if one were to accept the claim that a code represents the accumulated wisdom of its society, and that therefore one should *presume* that a code ought not be altered, one could still, in the face of dramatic social changes, argue that the presumption can be decisively rebutted. For example, at the time of Planiol's writing it was unclear whether mass democracy would represent a permanent change, rather than an anomalous historical moment, and whether the Code should respond to this change. By contrast, when de la Morandière was writing in 1948, the question was decided. He noted the change in the state's role from a passive observer of the free market's activities to an active distributor of economic goods and social resources. In light of these changes, and even if one were to accept Planiol's conservative moral vision, the wisdom accumulated in the Code, and therefore the Code itself, could be legitimately questioned<sup>46</sup>.

The contemporary example would be the civil union. To the extent that neither the federal nor provincial legislative regimes governing conjugal relationships accommodated the perceived needs of same sex partnerships, the C.C.Q., as a civil constitution, arguably correctly filled the gap. Again, a decisive shift in social consensus required a recasting of the conventional wisdom as captured in the Code.

Second, reformers, and Quebec reformers in particular, can respond to each of Planiol's institutional arguments. The claim concerning the inability of the legislature to undertake codal reform at all can be challenged at several points. To begin, the legislature, whether in France or Quebec, already has amended the code a number of times. Consequently, the argument that a legislature is ill-equipped to reform a code today no

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43. L.J. DE LA MORANDIÈRE, "The Reform of the French Civil Code", (1948) 97 *U. Penn. L. Rev.* 1.

44. *Ibid.* at 8-10.

45. *Ibid.* at 5.

46. On the influence of this progressive, modernity-influenced theory on Quebec and French jurisprudence, see "Moderne", *supra*, note 6.

longer refutes the possibility of codal reform but calls for a better process of reform<sup>47</sup>.

In addition, examination of the Quebec experience with codal reform can turn Planiol's arguments about the proper roles of the judiciary and doctrinal writers on their head. Even if we accept that the code requires the activity of the judiciary and commentators to make its provisions meaningful, we can still argue that judicial and doctrinal writing can contribute to alterations in the codal text. This is what happened in Quebec. As Professor Jobin has noted, judicial and doctrinal concepts which filled in perceived gaps in the C.C.L.C. became themselves provisions in the C.C.Q. Among the clearest examples of this is the introduction of a concept of unjust enrichment into the C.C.Q.<sup>48</sup>.

## 1.2 Codal Amendment Today

The counter-arguments detailed above answer the charge that change to codal text per se is normatively suspect, but they do not establish a case for unfettered legislative discretion when amending a civil code. Even if we moderns reject Planiol's arguments about the foundational nature of a civil code, his concerns about legislative capacity to undertake codal change taken together with the above statement of codal theory counsel caution when one considers altering codal text. Since there is no movement for wholesale codal reform in Quebec today, the live question that emerges from the traditional debate is: how should codal amendment be undertaken? The Barreau's intervention concerning the proposed Bill 50 and the Justice Minister's response provide us an entry point into this question.

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47. Moreover, even if we accept that the proper role of the legislature is to introduce legislation that regulates in parallel to a code, there are limits to which this activity can be undertaken before it undermines the legitimacy of the code itself. For instance, the construction of an extensive extra-codal regime of consumer law can threaten a code; insofar as such a regime regulates the majority of transactions involving private citizens, it undercuts the claim that a code encapsulates the entire private law of its society. On the relative paucity of codal provisions seeking to protect consumers in the C.C.L.C., as compared to the extensive extra-codal regime, see J.-L. BAUDOIN & P.-G. JOBIN, *La Responsabilité civile*, 5th ed., Cowansville, Yvon Blais, 1998, at 165-68. In addition, when such an influential extra-codal regime's basic postulates diverge from those of the code, the legitimacy of the code's postulates can be put into question. *Ibid.* If the majority of contracts which private individuals enter into are governed by a regime of protection, rather than autonomy, then the codal claim that autonomy of the will is the foundation of contract law is made risible.

48. P.-G. JOBIN, "La cour suprême et la réforme du Code Civil", (2000) 79 *Can. Bar. Rev.* 27 at 31.

When representatives of the Barreau initially appeared before the Commission Permanente des Institutions and presented the memorandum concerning the proposed Bill 50, they were met with some skepticism by the Justice Minister<sup>49</sup>. He understood the Barreau to be arguing simply that the C.C.Q. should not be altered<sup>50</sup>. He replied that for the C.C.Q. to respond to social change, its text would have to change, and that the legislative process was sufficient to achieve this end<sup>51</sup>. With his comments, the Minister simultaneously evinced de la Morandière's position about the mutability of codal text and imputed Planiol's conservative vision to the Barreau. In the following, I will outline several means of codal amendment and demonstrate how the traditional debate over codal change can inform an intelligent contemporary discussion about codal amendment.

Contemporary codal reforms can be explicit or implicit. In explicit codal reform, the legislature alters the codal text. By contrast, implicit codal reform shapes or alters the substance of codal text while leaving its form untouched. Judges, acting solely or relying upon doctrinal writers, are the primary agents of this mode of reform as they interpret and apply the code<sup>52</sup>.

The legislature can alter the explicit content of a code for symbolic ends. A textual amendment can target the code directly and primarily, with the aim of effecting a social policy and symbolic change. For instance, *An act to amend the Civil Code as regards the obligation of support*<sup>53</sup> eliminated the support obligation between grandparents and grandchildren. This textual change sought to protect the elderly from being financially burdened by claims from their grandchildren. Like pension plans and tax deductions, it is a policy instrument that targets regulation directly at a particular segment of the population. Textual amendments can effect symbolic change, while reflecting broad societal change. For example, with

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49. QUÉBEC, ASSEMBLÉE NATIONALE, *Index du Journal des débats – Participants*, 36<sup>e</sup> lég., 2<sup>e</sup> sess., Commission permanente des institutions, 27 mars 2002, online: [<http://www.assnat.qc.ca/fra/Publications/debats/journal/ci/020327.htm>] (date accessed: 27 February 2005).

50. *Ibid.*

51. *Ibid.*

52. I describe implicit codal reform measures in more detail in section II. I do not intend to argue that statements of judicial principle do not take a discernible form. When a court enunciates a principle in the context of codal interpretation, that principle becomes an explicit part of codal discourse. I label this mode of reform "implicit" because it does not alter the code's express wording and cannot be discerned by simply reading the text, and to distinguish it from reform through legislative amendment.

53. S.Q. 1996, c. 28, s. 1.

the addition of the second paragraph to Art. 108, the C.C.Q. acknowledged the increasing presence of populations that use linguistic symbols other than those found in French or English<sup>54</sup>. These populations are made the explicit objects of regulation, and one of the dividing lines between them and the majority groups is officially drawn on linguistic grounds. More than this, it is significant that the provision regulates only those who would name their children using the symbols of their own language. Insofar as the act of naming a child, like any culturally specific child-rearing practice, is an act of cultural affirmation the provision only affects those who would define themselves on linguistic grounds<sup>55</sup>. With this small change in the C.C.Q., language and naming are symbolically cognized as relevant grounds of cultural definition for both majority and minority cultures.

The underlying rationale for these two cases of codal change was to adapt the code to meet either existing concerns that were not recognized at the time of the C.C.Q.'s drafting or concerns arising with subsequent social changes. These measures are consistent with the tenor of de la Morandière's arguments in favor of codal reform, and the example of the civil union, which I will consider in Part III, is arguably another instance of codal change motivated by this rationale. The process of explicit codal amendment can, however, also give rise to the legitimate concerns expressed by traditional opponents of codal reform about the capacity of the legislature to undertake such reform.

Legislation can amend the code in response to discrete problems. For example, the proposed Bill 50 introduced a measure to alter the responsibility of a vendor of an immovable (Art. 1726). This legislative change was not responsive to a general shift in social mores. Rather, the proposed amendment aimed to address a specific problem in the real estate industry and unlike for the above-cited examples the symbolic stakes in the area of law in question were relatively low<sup>56</sup>. The proposed amendment would have

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54. See also Art. 58. For an excellent discussion of the means by which the state deploys regulation of naming as an instrument of exclusion and assimilation, see T. SCASSA, "National Identity, Ethnic Surnames and the State", (1996) 11 *C.J.L.S.* 167. For a strong critique of how language, and by extension linguistic affiliation, are made objects of regulation by the C.C.Q., see P. LEGRAND, "Codification and the Politics of Exclusion: A Challenge for Comparativists", (1998) 31 *U.C.D.L. Rev.* 199.

55. On the relevance of child-rearing practices to the cultural identity of a community, see S. VAN PRAAGH, "Faith, Belonging and the Protection of 'Our' Children", (1999) 17 *Windsor Y.B. Access Just.* 154.

56. In the late 1990's, homeowners became aware of problems caused by backfill that included pyrite as one of its ingredients. This defect in construction was latent, and therefore regulated under Art. 1726. In addition, the defect was widespread, and the Barreau

imposed a five year limit on the capacity of a buyer to sue for latent defects in an immovable. In the Barreau's memorandum, there were echoes of Planiol's arguments concerning the inability of the legislature to adequately undertake codal reform. The Barreau du Québec's memorandum argued that there was no compelling reason to alter the C.C.Q. when extra-codal legislation could and already had adequately regulated the problem<sup>57</sup>. This critique spoke to the inappropriateness of importing statutory measures into a code. The Barreau also argued that the amendment would confuse a regime of warranty with one of liability without attention to the logic of either. The memorandum argued that in so doing, the legislature demonstrated its institutional incapacity with respect to codal amendment<sup>58</sup>. The legislative product evidenced insufficient expert attention, and by implication, the necessity of intervention by a body that could appreciate the internal logic and over-arching rationales for a code.

The Minister of Justice responded to these critiques by affirming the adequacy of the legislative process and suggesting his openness to a more responsive process<sup>59</sup>. In subsequent remarks before the Commission Permanente des Institutions, he acknowledged the force of the Barreau's critique and withdrew the amendment<sup>60</sup>. He thereby defused the institutional critique. To the extent that the criticism conflated arguments against the institutional capacity of the legislature with the substantive failings of the proposed bill, the Minister's withdrawal of that bill defeated the former kind of argument. The legislative process was responsive to both the internal logic of the civil code and the opinions of experts. The Minister went further. He asserted that he was willing to consider a long-term consultative process with the Barreau, to ensure that the process of codal amendment would approach the level of considered attention that the Barreau requested<sup>61</sup>.

The examples of codal amendment responsive to social change described above and the exchange between the Barreau and the Minister

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argued that this was the particular motivating factor for the proposed amendment, which would limit vendors' liability (*supra*, note 1). For background and legislative responses to the problem, see online: [http://www.consommateur.qc.ca/acqc] (date accessed: 27 February, 2005).

57. *Supra*, note 1.

58. *Ibid.*

59. QUÉBEC, ASSEMBLÉE NATIONALE, *Index du Journal des débats – Participants*, 36<sup>e</sup> lég., 2<sup>e</sup> sess., Commission permanente des institutions, 7 juin 2002, online: [http://www.assnat.qc.ca/fra/Publications/debats/journal/ci/020607.htm] (date accessed: 27 February 2005).

60. *Ibid.*

61. *Ibid.*

highlight the stakes of codal reform and the limits of legislative capacity: the codal reformer should be sensitive to the progressivist logic of de la Morandière while acknowledging Planiol's cautionary notes about institutional competences. In his response to the Barreau's concerns, the Minister did not openly consider the possibility of creating a law reform institute whose function would be to superintend codal change. Before considering the need for and design exigencies of such an institute, I insert two qualifications to the analysis thus far advanced.

First, the above debate provides a framework for understanding codal amendment and is not intended to have uniform universal application: the salience of the overall framework and its components will vary according to historical and cultural context<sup>62</sup>. Second, although I have treated the above arguments as if they can be considered in abstraction from the individuals and institutions making them, it should be noted that the participants in this debate have very different political agendas. The Barreau's interests are not identical to the Minister of Justice's and both differ from the scholar's. A concern about this variety of interests has motivated law reform in Canada generally, and as we shall see now, is relevant to the question of the necessity for and design of a codal reform institute.

## 2 Instituting Codal Reform

We have seen above that the traditional debates over codal change were directed primarily at explicit legislative reform of the codal text and we have considered the difficulties that attend the legislative process. Yet even if the arguments against exclusive reliance upon the legislative process were irrefutable, they would not decisively establish the case for a law reform body. For that argument to succeed, it must be shown that the agents of implicit codal reform are either unable to fill the gaps in the legislative process or suffer from additional flaws. I begin by considering the activities of the two institutions that effect this mode of reform, namely the judiciary and the university.

### 2.1 Implicit Law Reform, Its Agencies and Shortcomings

The reform efforts of the judiciary and academia can vest the codal text with meanings that are unduly restrictive, unduly expansive, or within the reasonable range between these extremes. In perhaps the most striking

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62. For the importance of considering variations in civilian discourse and practice across time and place, see R.A. MACDONALD, "Understanding Quebec Civil Law Scholarship", (1985) 23 *U.T.L.J.* 573. See also "Codification" *supra*, note 6.



example of an interpretation of the C.C.Q. that unduly constrained the text's meaning, the Quebec Court of Appeal in *Banque Nationale du Canada v. Bitar*<sup>63</sup> relied on academic commentary and refused to acknowledge what the legislature manifestly stated to be the law. The Court held that despite the use of explicit language ("deemed") which raises an irrebuttable presumption of fraud in Art. 1632 in circumstances where a contracting party knew the debtor to be insolvent, this article is incoherent because it denies the contracting party a defense of good faith. The incoherence arises not because of conflicting textual evidence within the C.C.Q., but rather because of a perceived failure of the article to cohere with previous jurisprudence or academic opinion. The Court of Appeal, like Planiol's judge, read against the text and effectively adopted a legislative role.

More common are interpretive acts in which the judiciary, relying on academic commentary, legitimately fills in the content of a codal provision. A recent and somewhat banal example of this phenomenon is the case of *St-Jean v. Mercier*<sup>64</sup>, where the Supreme Court of Canada resolved the question of whether causation in an analysis of delictual responsibility is a question of fact. The text of the code is unclear, and after weighing its own previous holdings and scholarly opinions, the Court affirmed that the determination of causation raises questions of fact and that, by contrast, the determination of fault raises a mixed question of fact and law. The academic commentary played a decisive role in the Court's decision, as it did in *Bitar*. The reasoning and outcome in *Bitar* are as controversial as the reasoning and outcome in *Mercier* are uncontroversial. In the latter, the Court was faced with an unresolved textual ambiguity and resolved it by appeal to academic commentary.

A third case presents an instance that is similar to *Mercier* but importantly distinguishable, as it purports to invest the judiciary with over-broad interpretive powers. In *Epiciers Unis Métro-Richelieu Inc., division "Econ-gros" v. Collin*<sup>65</sup> the Court was again faced with an unresolved debate about the meaning and scope of a provision. Again the Court resolved it in part by invoking academic commentators. The significant difference between this case and *Mercier* lies in the reasons advanced for the Court's conclusion. The Court explicitly adopted an expansive interpretation of the C.C.Q., and of particular interest to this paper, invoked the logic and structure of the Code to do so. For the Court, LeBel J. wrote:

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63. [2000] R.J.Q. 658 (C.A.) [hereinafter *Bitar*].

64. [2002] 1 S.C.R. 491.

65. [2004] 3 S.C.R. 257 [hereinafter *Epiciers*].

The Civil Code of Québec, which sets out the *jus commune* of that civil law province, must be interpreted liberally. In *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, Gonthier J. addressed this point, saying that “unlike statutory law, the *Civil Code* is not a law of exception, and this must be taken into account in interpreting it. It must be interpreted broadly so as to favour its spirit over its letter and enable the purpose of its provisions to be achieved.” (para. 20)

LeBel J. purported to adopt such an expansive approach in interpreting Art. 2363 to apply to any suretyship attached to the performance of special duties, rather than restricting it to a limited set of classes of suretyships. Here again, the Court relied heavily on academic commentary<sup>66</sup> and exhaustively canvassed arguments about legislative intent<sup>67</sup>.

Yet it is unclear what precise role the appeal to an expansive approach to codal interpretation played in the Court’s determination of this case. The strategy of a large and liberal interpretation<sup>68</sup> is often invoked in cases involving rights provisions, where the clear legislative purpose is to give citizens the “full measure” of rights guarantees<sup>69</sup>, or where the context that gives meaning to a particular, usually constitutional textual term, has decisively shifted over time<sup>70</sup>. In each of these situations, courts adopt an expansive interpretive approach to protect the underlying values of the text. In the case of rights provisions, the judiciary adopts an expansive interpretive stance to enable it to act as a counterweight to majoritarian measures threatening to the interests of vulnerable individuals. This judicial role has been understood to be mandated by the logic of rights discourse<sup>71</sup>.

66. *Ibid.* at para. 32-35.

67. *Ibid.* at para. 24-27, 43.

68. One might interpret LeBel J. to be adopting a purposive, rather than expansive interpretation (see BISSON, *supra*, note 30 for the distinction). Such an interpretation is unconvincing. First, the ambiguity in the text and in the doctrinal literature implicated the question of what the purpose of the article was. A simple appeal to purposes in such a situation is an exercise in question-begging. Second, the quotation from Gonthier J. and the conclusion that LeBel J. arrived at concerned, respectively, the scope of interpretation and the scope of the term “suretyship”: both go to the extent of textual meaning, not its purpose.

69. *Hunter v. Southam*, [1984] 2 S.C.R. 145 at 156. See also *R. v. Big M. Drug Mart*, [1985] 1 S.C.R. 295 at 344; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 509; *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469 at 1480; *Re Provincial Boundaries (Sask.)*, [1991] 2 S.C.R. 158 at 179.

70. *Edwards v. A.G. Canada*, [1930] A.C. 124 at 136. See also *infra*, note 127 and accompanying text.

71. For this understanding of the underlying, democracy promoting purposes of rights protection in the American context, see the analysis of the Carolene Products footnote in J.H. ELY, *Democracy and Distrust*, Cambridge, Mass., Harvard University Press, 1980. For an argument in favour of judicial protection of constitutional principles in the face

In cases implicating shifting meanings, the judiciary adopts a large and liberal interpretation to ensure the continued relevance of texts that cannot or should not be easily altered<sup>72</sup>.

In *Epiciers* no question of constitutionally protected rights was at issue and there has been no historical change in the social role or meaning of a surety. In the absence of either of these justificatory conditions, and in the presence of strong doctrinal, textual and legislative intent arguments to support the conclusion, an expansive interpretative approach does little to advance the Court's reasoning. What adoption of the general interpretive principle unconstrained by justificatory conditions does accomplish is the arrogation of substantial institutional power to the judiciary<sup>73</sup>. In cases where the judiciary wishes to interpret provisions against unambiguous legislative language, it appeals to an expansive approach to justify its actions<sup>74</sup>.

We saw above that explicit, legislative codal amendment raised problems of institutional competence: legislative provisions typically seek to resolve discrete problems, whereas codal articles do not; legislators are not as sensitive to the exigencies of codal logic and structure as are experts; and legislators are subject to political pressures, whereas experts typically are not<sup>75</sup>. By contrast, implicit amendment raises problems of democratic legitimacy, understood in two senses.

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of legislative measures that depart from them, see R. DWORKIN, *Freedom's Law: The Moral Reading of the American Constitution*, Cambridge, Mass., Harvard University Press, 1996, at 30-31. This approach to rights interpretation in the Canadian context is evident in the Court's justifications for a substantive approach to s. 15 interpretation. See e.g. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. L'Heureux Dubé J. was perhaps the most insistent proponent of such an approach. See e.g. her reasons in *Gosselin v. Québec (Attorney General)*, [2002] 4 S.C.R. 429.

72. *Supra*, note 22 and accompanying text.

73. See P.W. HOGG, *Constitutional Law of Canada*, looseleaf, Toronto, Carswell, 1997, at 33-18 for this effect of a large and liberal interpretative approach.

74. See for an example of such an approach the majority reasons in *Caisse populaire Desjardins de Val Brillant v. Blouin*, [2003] 1 S.C.R. 666. See the majority reasons in *National Trust Co. v. H & R Block Inc.*, [2003] 3 S.C.R. 160 for a common law example of such an approach to statutory interpretation.

75. There is a vast literature on the problem of agency capture, wherein expert opinion is co-opted for political ends. See in the law reform context R. E. SCOTT, "The Politics of Article 9", (1994) 80 *Va. L. Rev.* 1783 at 1804. This problem is beyond the scope of the present paper, but I suggest that the risk of capture can be reduced through consultation processes that elicit a wide range of opinions, public participation in the reform institute's activities, and carefully designed appointment and management practices.

First, the explicit and clear meaning of codal text should not be overridden because the judiciary, resorting to an expansive interpretive approach or relying on academic commentary or both, feels it prudent to do so. This constraint is particularly important in cases where the justificatory conditions for adopting an expansive interpretation are not present, but applies even in cases involving individual rights or shifting textual meanings. The scope of legitimate appeal to these conditions is limited by the text itself: absent an explicit legislative provision permitting judicial review of the C.C.Q., interpretations against the express, unambiguous and determinate meaning of the codal text are democratically illegitimate. The significance of this constraint on the judiciary emerges when we recall that the C.C.Q.'s legislative and intellectual world is closer to de la Morandière's than Planiol's. Because the codal text can be and is altered by legislative means, the judiciary should not override the democratic will as it is expressed in the legislative choice to amend or not amend that text.

Second, because a civil code is a civil constitution and repository of social norms, citizens should be actively engaged in its reform. Participation can take two forms. Affected citizens should be consulted about any prospective changes. But opportunities for consultation, without more, may simply give more voice to parties who are already interested and exclude those who do not recognize their stake in codal reform. The legislative process may be captured by interests groups, and the agency I propose should seek to widen the circle of participants in codal reform. Therefore, participation in the context of codal reform should also have an educative aspect. Citizens should be assisted in understanding their interest in codal change and its significance. Neither the judiciary nor the academy is obviously competent to facilitate either form of participation.

In brief, any codal oversight body will have to overcome the weaknesses inherent in the above-discussed institutions. It will involve expert input that is sensitive to the internal logic and normative purposes of the code, while ensuring citizen participation and overcoming the concerns about partiality that the normal legislative process gives rise to. These concerns about expertise and representation have been the focus of law reform debate in Canada. I turn now to a consideration of that debate both to highlight the general stakes underlying law reform agency proposals, and to introduce my proposals for codal reform agency design.

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On this last point, see R.A. MACDONALD, "The Acoustics of Accountability – Towards Well-Tempered Tribunals", in A. SAJÓ (ed.), *Judicial Integrity*, Leiden, Martinus Nijhoff Publishers, 2004, 141.

## 2.2 Law Reform in Canada

In the mid nineteen-nineties, the Federal Department of Justice convened several conferences and commissioned study-papers and consultations that addressed the need for a new federal law reform body and its potential design. These contributions raised issues that had been the subject of sporadic academic attention since Allen Linden's 1966 article "The Challenge of Law Reform."<sup>76</sup> That discussion culminated in an exchange between Professors Macdonald and Hurlburt in the *Alberta Law Review*<sup>77</sup>, on the eve of the creation of the Law Commission of Canada<sup>78</sup>.

This debate centered on several issues. The first, threshold question in a discussion about a law reform agency is whether it is necessary. Necessity is understood in two senses. On the one hand, the necessity or even utility of such an institute can be measured against direct political engagement; where monetary and personal resources are tightly limited, this dichotomy often presents an either/or choice for potential participants in law reform efforts<sup>79</sup>. On the other hand, the degree to which a law reform institute is

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76. (1966) 9 *Can. Bar J.* 268. For other notable contributions to the literature, see G. SAWER, "The Legal Theory of Law Reform", (1970) 20 *U.T.L.J.* 183; L.C.B. GOWER, "Reflections on Law Reform", (1973) 23 *U.T.L.J.* 256; A. MACKLIN, "Law Reform Error: Retry or Abort", (1993) 16 *Dal. L.J.* 395; J. BEETZ, "Reflections on Continuity and Change in Law Reform", (1972) 22 *U.T.L.J.* 129; H.W. HURLBURT, *Law Reform Commissions in the United Kingdom, Australia and Canada*, Edmonton, Juriliber, 1986; J.N. LYON, "Law Reform Needs Law Reform", (1974) 12 *Osgoode Hall L.J.* 421; R. SAMEK, "A Case for Social Law Reform", (1977) 55 *Can. Bar Rev.* 409.
77. R.A. MACDONALD, "Recommissioning Law Reform", (1997) 35 *Alta. L. Rev.* 831; W.H. HURLBURT, "The Origins and Nature of Law Reform Commissions in the Canadian Provinces: A Reply to 'Recommissioning Law Reform' by Professor R.A. Macdonald", (1997) 35 *Alta. L. Rev.* 880.
78. For a description of the Law Commission's mandate and organization, see R.A. MACDONALD, "Law Reform and its Agencies", (2000) 79 *Can. Bar Rev.* 99. See also its enabling legislation, *An Act Respecting the Law Commission of Canada*, S.C. 1996, c. 9.
79. FEDERAL LAW REFORM CONFERENCE, ATLANTIC INSTITUTE OF CRIMINOLOGY, *Final Report*, 1993 (unpublished); see also K.E. ASBURY & R.G. HANN, *Prairie Consultation on Law Reform*, 1993 (unpublished); LAW REFORM DIVISION, *Creating a New Law Reform Commission of Canada: A Consultation Paper*, 1994; CANADIAN INSTITUTE FOR THE ADMINISTRATION OF JUSTICE, *Creating a New Law Reform Commission: The Judicial Perspective*, 1994; K. ASHBURY & R. HANN, *Department of Justice Law Reform Consultation: University of Toronto*, 1994; LAW REFORM DIVISION, *Proposal for the Creation of the Law Commission of Canada*, 1995.

necessary can be measured against either the adequacy of existing institutional processes of legal change or incremental improvements on them<sup>80</sup>.

Assuming that a law reform agency is necessary, the related questions of composition and outputs arise. The question of who participates in a law reform agency's operations can be subdivided into two questions. The first goes to the issue of the kind of expertise that is required<sup>81</sup>. What should be the proportion of legal and other experts in a law reform agency's operations, or put another way, how multidisciplinary should a law reform agency be? The second sub-question under the general question of agency composition raises a concern about the extent of lay participation: how expert should a law reform agency be? Questions related to outputs track those that are subsumed within the composition inquiry. Should a law reform agency's products be primarily doctrinal or multi-disciplinary in nature? Should its products be primarily directed to expert or popular audiences?

Operational issues are related to these two sets of questions but remain distinct. These concerns include funding and costs<sup>82</sup>, degree of institutional independence<sup>83</sup> and questions about how consultation and outputs are generated. These last kinds of questions touch on the underlying purposes

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80. J. O'REILLY, *Toward a New National Law Reform Body: Consultation Paper for the Department of Justice*, 1994 (unpublished).

81. Each of the questions in the paragraphs that follow was duplicated in most, if not all of the consultations and proposals cited in note 79.

82. In Canada today, there are a variety of models of law reform agency funding. Some, like the B.C. Law Reform Institute, have diverse sources of funding, including professional associations, government departments, and private firms: online: [<http://www.bcli.org/>] (date accessed: 27 February, 2005). The Law Commission of Canada's enabling statute envisages diverse sources of funding (s. 4(e), (f) and (g)) but its annual report suggests that virtually all of its funding comes from Parliamentary appropriations: online: [[http://www.lcc.gc.ca/en/about/rapports/2002/ra2002/pdf/Report\\_LCC\\_en.pdf](http://www.lcc.gc.ca/en/about/rapports/2002/ra2002/pdf/Report_LCC_en.pdf)](date accessed: 27 February, 2005). The Alberta Law Reform Institute is primarily funded by the Department of Justice and Alberta Law Foundation, and is provided institutional facilities, and small funding by the University of Alberta. The Manitoba, Saskatchewan and Nova Scotia law reform commissions are all jointly funded by their respective provincial Departments of Justice and Law Foundations.

83. Typically, law reform bodies in Canada have had some degree of independence from the executive and the legislature. Their research agendas may arise in consultation with the Justice Minister, they may receive references from him or her, and they are ultimately accountable to the legislature. However, they typically have considerable latitude in setting their research agendas and pursuing individual projects. See e.g. the enabling legislation of the LAW COMMISSION OF CANADA, *supra*, note 78. See also the discussion of design measures that safeguard law reform agency independence in HURLBURT, *supra*, note 76 at 360-62, 450-60.

of a law reform agency. If the objectives of and audiences for such an agency are primarily professional, then the agency will consult only with members of the professional legal community and will create proposals that will speak to that community. If, however, a law reform agency's purposes are broader and include a desire to facilitate citizen engagement in law reform, then the consultations will be different in form. Under such a vision of law reform, the output is necessarily as varied as the kinds of audiences that are engaged<sup>84</sup>.

### 2.3 A Menu of Options for Codal Reform

The above considerations are relevant to a discussion of the codal reform agency design<sup>85</sup>. In Part I, I argued that given shortcomings in the existing modes of codal reform, a codal reform institute is necessary. And the concerns about expertise and popular participation in the law reform context find resonances in my account of the codal reform debate. In the following, I suggest a variety of means of incorporating legal, expert and lay representation, whether through staffing choices or consultation devices, but before I discuss these issues in more detail, I address a preliminary question of funding.

On the coming into force of the C.C.Q., the Quebec legislature presented a bill that sought to create a law reform institute<sup>86</sup>. Commentators have noted that this institute never managed to attract a sufficient governmental commitment of resources to come into being<sup>87</sup>, but they have also noted that the inconsistencies generated within the C.C.Q. by the current practice

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84. The debates about agency composition, modes of consultation, and types of outputs reflect a deeper debate about purposes of law reform. The proponent of an exclusively or predominately expert-driven law reform process will tend to evince a rationalizing and progressive theory of law: law reform makes rational and improves upon formal legal artifacts and institutions (see e.g. HURLBURT, *supra*, note 76). By contrast, the proponents of more populist modes of law reform (also) emphasize opening this rationalizing and progressive enterprise to previously excluded voices (see e.g. MACKLIN, *supra*, note 76), or expanding the scope of the very idea of law and law reform (see e.g. MACDONALD, *supra*, note 77). For a fuller treatment of this debate see Macdonald & Kong, *supra*, note 27.

85. I have not explicitly dealt with the question of interdisciplinary approaches to codal reform, but it seems evident that the task of discerning the codal text's values and effects is not only a task for lawyers, and would benefit from interdisciplinary contributions. On the value of such contributions to civil law discourse generally, see P. LEGRAND, *Fragments on Law-As-Culture*, Kluwer, Deventer, 1999.

86. *An Act respecting the Institut québécois de réforme du droit*, S.Q. 1992, c. 43.

87. J.-M. BRISSON & N. KASIRER, "Preface" in J.-M. BRISSON & N. KASIRER (eds.), *Civil Code of Québec: A Critical Edition*, 11th ed., Cowansville, Yvon Blais, 2003.

of ad hoc amendments may result in litigation costs greater than the cost of maintaining and creating a codal reform institute<sup>88</sup>. Hence, the legislature has an incentive to create such an institute, and given the interest expressed by both the Barreau and the Minister in reforming the current system, some form of cost-sharing between these two bodies seems plausible<sup>89</sup>.

I begin the presentation of reform institute design options by considering the question of who should constitute a codal reform agency's staff. There are three models. The first is drawn from the research and legislative branch of the Barreau du Québec. On that model, the agency would have permanent legal staff who are responsible for coordinating research and producing reports in particular areas of law<sup>90</sup>, and a barebones administrative staff<sup>91</sup>.

A second possibility is modeled on the now defunct Ontario Law Reform Commission<sup>92</sup>. In that model, the staff would consist of three or more appointed commissioners, who may or may not have legal experience and whose remuneration (and full- or part-time status) would be determined by the Lieutenant Governor in Council. There would also be an administrative staff<sup>93</sup>. Much of the research would be undertaken by project teams, under the direction of project supervisors, retained by the

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88. *Ibid.*

89. See the various cost-sharing devices enumerated in note 82.

90. From conversation with Vadboncoeur J., former head of the research and legislative branch of the Barreau du Québec and participant in the Civil Code Revision Office [hereinafter C.C.R.O.]. The Barreau's organization, particularly the structure of its consultative bodies, is modeled on that of the C.C.R.O. The C.C.R.O. was organized into over 40 committees under Professor Crépeau's chairmanship. Each of these committees prepared reports on discrete areas of laws, and engaged in wide-ranging consultations, and drafts of these were circulated among interested parties, and the final report was also circulated and submitted to a committee charged with harmonizing the reports of the various committees. This description comes from the *C.C.R.O. Archives*, available online: [<http://www.law.library.mcgill.ca/ccro/ccropref.html>] (date accessed: 27 February, 2005). For a general history and analysis of the C.C.R.O.'s operations, see BRIERLEY & MACDONALD, *supra*, note 13 at paras. 71-83.

91. The Alberta Law Reform Institute's structure is essentially a more elaborate version of the Barreau's research and legislative branch. See the descriptions online: [[http://www.law.ualberta.ca/alri/history\\_c.html#board](http://www.law.ualberta.ca/alri/history_c.html#board)] and [<http://www.law.ualberta.ca/alri/orgchart.html>] (date accessed: 27 February, 2005).

92. *Ontario Law Reform Commission Act*, R.S.O. 1990, c.-O.24. The commission was sunset in 1996.

93. Enabling legislation could contain a specific requirement that a non-lawyer be a commissioner. See e.g. *The Manitoba Law Reform Commission Act*, C.C.S.M. c. L95, s. 3(1)(d) and *Law Reform Commission Act*, S.N.S. 1990, c. 17, s. 5(1)(d).



Commission, and those project teams would primarily consist of legal academics<sup>94</sup>.

The third model is drawn from the Law Commission of Canada<sup>95</sup>. The law reform agency would consist of commissioners who are charged with formulating and overseeing the research of the agency, only one of whom, the president, would work on a full-time basis<sup>96</sup>. These commissioners need not be legally trained, but would have some expertise in a relevant subject area. Aside from these individuals, and a skeletal support staff, all participants in the agency's work would work on an ad hoc, contractual basis.

These three models evince varying degrees of interdisciplinary and popular reach. The Barreau model is the most jurist-centric and expert-driven, while the L.C.C. model has the most potential to be interdisciplinary and populist. This continuum is also evident in the kinds of consultations available to a codal reform agency. For the reasons given above, a codal reform institute bears a high burden of interaction with the general public. Such interactions can be consultative, in the manner of physical or virtual town-hall meetings, where interested parties may come to express their opinions. In addition, a codal reform agency could undertake a pedagogical role. It could issue vignettes on its web-site illustrating the overlay of everyday normative intuitions with those expressed by the C.C.Q.'s regimes<sup>97</sup>. Particularly where a codal amendment reflects or effects the kind of social change described above, the president of a codal reform agency could host website discussions. And the codal reform agency might have a presence in the media, intervening in print, television and radio media.

But there are limits to a codal reform agency's populist reach. Because it is moored to a particular artifact of positive law, its activities are constrained by the limits of that artifact. A code requires for its composition authors who are alive to the logic of the positive law. Therefore, a

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94. This description comes from HURLBURT, *supra*, note 76 at 204-14.

95. [hereinafter L.C.C.].

96. The commissioner's roles are described on the Commission web-site, online: [<http://www.lcc.gc.ca>] (date accessed: 27 February, 2005).

97. See President's Messages, online: [<http://www.lcc.gc.ca>] (date accessed: 27 February, 2005). In a similar spirit of engagement, the Australian Law Reform Commission and the Alberta Law Reform Institute, both invite email submissions to their websites on matters of concern to those bodies, online: [<http://www.alrc.gov.au/howsub.htm>] and [<http://www.law.ualberta.ca/alri/consult.html>] (date accessed: 27 February, 2005)). For an analysis of the complex relationship between the normative commitments expressed in everyday life and those expressed in formal legal texts, see D. JUTRAS, "Legal Dimensions of Everyday Life", (2001) 16 *Can. J. of Law & Soc.* 45.

codal reform agency should provide mechanisms for expert consultation. I suggest two kinds of consultation.

The first would be retrospective. As does the Barreau du Québec, a codal reform agency could have standing committees of experts whom it would consult, and who would assist in drafting reports on proposed bills. The second form of consultation would be prospective. A codal reform agency could hold competitions for research papers or colloquia in a broad range of highly generalized topics, as does the L.C.C. This process would permit the agency to publish reports on areas of potential importance, and would assist the agency in framing the debate around or possibly precluding, subsequent legislative or judicial interventions.

The form of the agency's products would be attentive to the nature of the various loci of codal reform. Draft codal provisions are particularly appropriate if the agency is responding to legislative action. In response to judicial interpretations, the codal reform agency might issue draft reasons or case comments to show how courts might better approach a given problem of codal interpretation. Finally, the codal reform agency might issue guidelines setting out the implications of codal amendments or novel judicial interpretations for lawyers, notaries and their clients.

Although these institutional arrangements and responses directly address the problems of expertise and participation raised above, they neglect the problem of legislative rent-seeking. Legislatures, even when presented with uniform expert and broad popular opinion on a given matter may, to placate particularly powerful interest groups, reject such opinion.

The above-described interaction between the Barreau and the Minister of Justice before the Commission Permanente des Institutions suggests that public scrutiny of and debate over proposals may lead a government occasionally to reverse itself. But I suggest a mechanism that would be more public and therefore more subject to popular control. I propose a requirement that where the executive intends to present a bill containing provisions contrary to the advice of the codal reform agency, the Department of Justice would be obligated to justify in writing the executive's rejection of the agency recommendations<sup>98</sup>. In addition, a legislature faced with an unfavorable report from the codal reform body might choose to

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98. See QUÉBEC, *La procédure parlementaire du Québec*, 2d ed., Québec, Assemblée Nationale, 2003, c. 10 for a general description of the legislative process. The requirement I envision could apply at the moment when a bill is presented to the National Assembly: see *ibid.* at para. 10.1, 10.1.1. Alternatively, the requirement could apply at the moment when the bill is presented for the approval of the Lieutenant Governor: see *ibid.* at para. 10.3.3.

enact legislation that affects the C.C.Q., but is not integrated into it. After every five years, all such legislation would under my proposal be subject to review by the agency which would make recommendations about how or whether to integrate it into the Code<sup>99</sup>. These measures would, I suggest, provide disincentives to unprincipled rent-seeking behaviour that erodes the structure and manifest purposes of the Code and are preferable to judicial review which is not authorized or anticipated by the legislature.

### 3 Harmonization and Constitutional Challenges

To this point, I have examined codal amendment as a particular civilian response to the general problem of legal change<sup>100</sup>, and I have analyzed the idea of a codal reform agency in light of a long national discussion about the form and substance of Canadian law reform. The first analysis primarily addressed the normative requirements governing codal change, which flow from design features of a civil code, while the second primarily directed attention towards designing an institution that can adequately respond to concerns about efficacy and legitimacy in the processes of codal amendment.

The critiques and solutions advanced to this point could apply to a civil code in any jurisdiction where codal amendment is undertaken through normal legislative means. I turn now to those particular features of the Canadian constitutional landscape that counsel a high degree of care in the process of codal amendment, and suggest additional functions for a codal reform agency. In particular, I argue that the specific features of Canadian federalism demand close attention from codal amenders and I take as an example recent legislative and judicial developments concerning marriage and civil unions. In my view, there can be no true federal harmonization

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The Canadian Senate and the checks on delegated legislative powers set out in the *Statutory Instruments Act*, R.S.C. 1985, c. S-22, aim to serve a publicity-generating control on rule-making similar to the one envisioned here. For a discussion of this function of the Senate, see C.E.S. FRANKS, "The Senate and Its Reform", (1987) 12 *Queen's L.J.* 454 at 457-64. For this function in the *Statutory Instruments Act*, see s. 3, 4.

99. The process of periodic review I describe here is similar to that which Professor Arthurs has proposed, in the context of legislation and regulations. H.W. ARTHURS, "Regulation-making: The Creative Opportunities of the Inevitable", (1970) 8 *Alta. L. Rev.* 315 at 320.

100. I do not intend to suggest that analogous concerns and proposals are absent from the common law. See e.g. the account of Bentham's proposed responses to the haphazard nature of common law development in G.J. POSTEMA, *Bentham and the Common Law Tradition*, Oxford, Clarendon, 1989. I only argue that the distinctive features of civil codes yield a particular set of concerns to which the careful design of a codal reform agency and its outputs should respond.

unless legislators take care not to draft amendments, and courts take care not to interpret federal and provincial competence, in a manner that is out of constitutional key<sup>101</sup>. I begin with a brief survey of legislative situations that can give rise to harmonization concerns.

### 3.1 Federalism and the Occasions for Harmonization

Professors Brisson and Morel have developed a typology of federal and provincial legislative interactions<sup>102</sup>. These interactions can take explicit or implicit forms. Federal legislation may explicitly refer to provincial law with the aim of ensuring or precluding the latter's application<sup>103</sup>. An example of the former is criminal law that regulates private activity, but explicitly provides that the application of relevant private law is not thereby precluded<sup>104</sup>. An example of the latter is any federal legislation that purports to occupy a field of regulation<sup>105</sup>. In addition to these explicit references to provincial law, Parliament may have recourse to two kinds of implicit reference. First, federal legislation may adopt, without citation, private law terminology that derives from provincial legislative or judicial sources<sup>106</sup>. Second, federal legislation may presuppose the existence of, but not explicitly refer to, provincial statutory or regulatory regimes<sup>107</sup>. This is the case most notably with federal legislation creating government agencies, whose operation is then governed by the applicable private law<sup>108</sup>.

Morel and Brisson's typology reflects the focus of harmonization efforts on the effects of federal legislation on provincial law, particularly

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101. By "being in constitutional key", I mean both formal compliance with division of powers doctrine and consistency with the functional aims of regulation within a federation.

102. J.-M. BRISSON & A. MOREL, "Droit fédéral et droit civil: complémentarité, dissociation", in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism*, Ottawa, Department of Justice, 1997, 215.

103. J.-M. BRISSON, "L'impact du Code civil du Québec sur le droit fédéral: une problématique", (1992) 52 *R. du B.* 345 at 353.

104. See *ibid.* and citations therein.

105. See *General Motors v. City National Leasing*, [1989] 1 S.C.R. 641 [hereinafter *General Motors*], in which the Court set out a variable standard for assessing the constitutionality of federal legislation that trenches upon provincial jurisdiction. For particular examples of federal legislation that explicitly excludes the application of provincial law, see s. 427 of the *Bank Act*, S.C. 1991 c. 46 and s. 13 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. 3, both cited in BRISSON & MOREL, *supra*, note 102.

106. BRISSON, *supra*, note 103 at 352.

107. *Ibid.*

108. *Ibid.* See *Lymburn v. Mayland*, [1932] A.C. 318; *Can. Indemnity Co. v. A.-G. B.C.*, [1977] 2 S.C.R. 504; *Re Upper Churchill Water Rights*, [1984] 1 S.C.R. 297.

the C.C.Q.<sup>109</sup>. However, the concerns that motivate harmonization are reciprocal<sup>110</sup>, and the dependence of the C.C.Q. on federal legislation takes explicit and implicit forms. The influence from provincial to federal law is evident where the C.C.Q. makes explicit reference to federal law<sup>111</sup>. The C.C.Q. articles purporting to regulate the incidents of marriage implicitly depend upon federal legislation that regulates the conditions of capacity for marriage<sup>112</sup>. Finally, a codal amendment, like any provincial legislative change, can affect federal legislation that implicitly or explicitly depends on it, if four conditions are fulfilled: 1) the amendment in pith and substance falls within a provincial head of power, 2) its effects do not affect the core of federal jurisdiction such that the amendment violates interjurisdictional immunity, 3) if it has more than incidental effects on an area of federal competence, they are sufficiently related to a valid provincial purpose to satisfy ancillary purpose doctrine and 4) its subject matter does not have a double aspect, and is not operationally incompatible with *intra vires* federal legislation such that paramountcy doctrine is triggered<sup>113</sup>.

This reciprocal influence gives rise to problems that flow from the unique features of a civil code, specifically division of powers questions. Three features of a civil code noted in Part I bear on the present discussion. First, a civil code's statements of principle have a fixed, canonical form. Second, a civil code aims to state exhaustively the *jus commune* of a jurisdiction. Third, and as a corollary of the preceding point, a civil code presents the default conceptual apparatus of a private law system.

Macdonald has addressed the ways in which these features of a civil code raise federal harmonization concerns that are absent from discussions of the relationship between common law provincial legislatures and Parlia-

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109. The legislative product of these efforts is the *Federal Law-Civil Law Harmonization Act, No. 1*, S.C. 2001, c. 4 [hereinafter the *Harmonization Act*].

110. MACDONALD has argued that provincial legislatures should exercise care in drafting legislation to ensure that its assumptions cohere with relevant federal legislation, to the extent that coherence is desired. "Harmonizing", *supra*, note 10, at 66-67. For a more nuanced analysis than the present one of the multiple objectives and spheres of regulation that harmonization should take into consideration, see R. LECKEY, "Harmonizing Family Law's Identities", (2002) 28 *Queens L.J.* 221.

111. Arts. 517 and 2714 make explicit reference to federal law, cited in Brisson & Morel, *supra*, note 102.

112. Case law has arguably eroded this federal power: see *Kerr v. Kerr*, [1934] S.C.R. 72 and *A.G. Alta. v. Underwood*, [1934] S.C.R. 635. For a critique of these decisions, see L. KATZ, "The Scope of the Federal Legislative Authority in Relation to Marriage", (1975) 7 *Ottawa L. Rev.* 384.

113. For a general discussion of division of powers doctrine, see HOGG, *supra*, note 73 at c. 15 & 16.

ment. He has also argued that due to the disproportion in number between common and civil law jurisdictions in Canada, these distinguishing features of a code have given rise to greater dissonance between federal legislation and Quebec private law than exists between federal legislation and the private law of any common law jurisdiction<sup>114</sup>. Historically, common law categories formed the template for much federal law governing matters with private law dimensions<sup>115</sup>. To Macdonald's analysis I add a point about harmonization that reflects the codal theory set out above and I present two division of powers arguments that critique harmonization efforts in the area of marriage.

### 3.2 Harmonization and Codal Theory

Harmonization became an area of explicit concern for the federal Department of Justice with the coming into force of the C.C.Q.<sup>116</sup> This is no mere coincidence. Provincial legislatures and courts in common law jurisdictions changed the private law in the period between Confederation and the coming into force of the C.C.Q. in 1994, yet unlike recodification, these changes did not trigger a movement for federal harmonization. Some explanations for this difference touch on the unique features of a civil code and of codal change. Because a civil code aims to state exhaustively the *jus commune* of a jurisdiction, the wholesale legislative change effected by recodification necessarily and radically alters the relationship between federal law and the law of Quebec. It is inconceivable that the legislature and courts of any common law province could cause as vast and discrete a change across all areas of private law as did the enactment of the C.C.Q. Since no analogous scale of change is institutionally possible in any uncodified jurisdiction, no analogous response from the federal government is required.

Furthermore, as noted, the civil code expresses the basic normative commitments of Quebec society and such commitments are reflected in the default private law vocabulary that provides the conceptual structure upon which significant areas of federal legislation depend for their application in the province of Quebec. Recodification is necessary when a code ceases to reflect the fundamental commitments of its society, and recodification

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114. See "Harmonizing", *supra*, note 10 at 105.

115. VALCKE, *supra*, note 8; BRISSON & MOREL, *supra*, note 102; GERVAIS, *infra*, note 116.

116. For a brief history of harmonization efforts in Canada, see M.-C. GERVAIS, "Harmonization and Dissonance: Language and Law in Canada and Europe", in *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism*, vol. 1, Ottawa, Department of Justice Canada, 2001.

necessarily shifts the content and expression of basic norms. No equivalent change in a common law jurisdiction is possible because common law institutions, as a matter of theory and method, express normative change in a very different and more modest way. Theorists from Mansfield to Postema have understood that common law courts adjudicating private law disputes express normative principles in a dialogue conducted across time, and they do so by gradually altering the form and substance of legal concepts<sup>117</sup>. Civilian systems tend to mark radical new beginnings with new codes<sup>118</sup>, whereas common law systems are characterized by an incrementalist ethos. The entering into force of the C.C.Q. attracted federal harmonization attention in part because it was a new beginning. Legal innovations in the common law provinces did not attract similar attention, in part because such beginnings are precluded by common law theory and methodology.

### 3.3 Codal Change and the Division of Powers: A Less Than Federal Response

I turn now to the federalism issues raised by codal change. Recodification, as a civilian mode of expressing and effecting legal change, can give rise to unique challenges in a federal state. Me Pourbaix of the Federal Department of Justice has summarized one problem and offered an explanation

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117. Mansfield's dictum that the common law works itself pure across time in *Omychund v. Barker* (1744), 1 Atk. 21, 26 E.R. 15 at 23, and the title and content of Professor POSTEMA's article, "On the Moral Presence of Our Past", (1991) 36 *McGill L. J.* 1154 express this point. The existence of extensive statutory regimes in common law jurisdictions changes this dynamic (see G. CALABRESI, *The Common Law in the Age of Statutes*, Cambridge, Mass., Harvard University Press, 1982), but not fundamentally. Whether the responsibility for principled change in a common law jurisdiction falls on courts or legislatures, the resulting change will tend to be incremental, since both institutions typically and paradigmatically respond to particular, rather than universal concerns.

118. For a discussion of this feature of civil codes, see "Codification", *supra*, note 6 and for an examination of the scope of change triggered by recodification, see VALCKE, *supra*, note 11. Radical constitutional changes can create a similar sense of new beginnings. For a discussion of such change in the American context, see the analysis of the Reconstruction Amendments in B. ACKERMAN, *We the People: Foundations*, Cambridge Mass., Harvard University Press, 1991. In the Canadian context, the Charter effected a similar "revolution." See B. McLACHLIN, "Freedom of Religion and the Rule of Law: A Canadian Perspective", in D. FARROW (ed.), *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy*, Montreal, McGill-Queens University Press, 2004, 12.

for the federal legislative response<sup>119</sup>. The C.C.L.C. predated Confederation, and several of its articles regulated areas that were to become matters of exclusive federal concern under the *Constitution Act, 1867*. When the Quebec legislature brought the C.C.Q. into force, it could not validly purport to amend those articles because their subject matter fell outside its competence. The provincial legislature's comprehensive revision of the Code ran up against limits imposed by division of powers doctrine.

In response to this state of affairs, s. 3 of the *Federal Law-Civil Law Harmonization Act, No. 1* repeals all pre-confederation C.C.L.C. articles within exclusive federal legislative competence. The articles relating to capacity for marriage receive special treatment<sup>120</sup>; according to s. 4 of the *Harmonization Act*, Parliament intends the legislation to regulate only the province of Quebec<sup>121</sup>.

As Pourbaix notes, Parliament's motivation for regulating in this area is clear. Common law principles in provinces other than Quebec regulate capacity for marriage, where the federal government has not legislated in the area. By contrast, in Quebec, absent the *Harmonization Act* there would be a reversion to pre-C.C.L.C. federal common law or super-eminent federal principles if Parliament were simply to have revoked the applicable articles of the C.C.L.C.,<sup>122</sup> or anachronistic regulation if the C.C.L.C. provisions were to have continued in force. But it is unclear why Parliament should act only to avoid these problems rather than to legislate uniformly across the country. Since the underlying purpose of vesting jurisdiction over marriage in the federal government seems to have been to ensure

119. M.-N. POURBAIX, "S-4: A First Harmonization Bill", in *The Harmonization of Federal Legislation with the Civil Law of Quebec and Canadian Bijuralism*, vol. 6, Ottawa, Department of Justice Canada, 2001.

120. Section 3(1) reads:

The provisions of the *Civil Code of Lower Canada*, adopted by chapter 41 of the Acts of 1865 of the legislature of the Province of Canada, entitled *An Act respecting the Civil Code of Lower Canada*, are repealed in so far as they relate to subjects that fall within the exclusive competence of the Parliament and have not been expressly repealed.

121. Section 4 reads: "Sections 5 to 7, which apply solely to the Province of Quebec, are to be interpreted as though they formed part of the *Civil Code of Quebec*." Section 5 reads: "Marriage requires the free and enlightened consent of a man and a woman to be the spouse of the other"; s. 6: "No person who is under the age of sixteen years may contract marriage"; and s. 7: "No person may contract a new marriage until every previous marriage has been dissolved by death or by divorce or declared null."

122. On the federal common law, see S. SCOTT, "Canadian Federal Courts and the Constitutional Limits of Their Jurisdiction", (1982) 27 *McGill L. J.* 137 at 144.



national uniformity<sup>123</sup>, Parliament should have chosen to pass legislation of national application to achieve this purpose. Note that this is what it achieves with its proposed same sex marriage legislation<sup>124</sup>.

Instead, the federal government chose to regulate differently in Quebec and the common law provinces and in so doing potentially frustrated the interest in uniformity that seems to underwrite federal regulation in the area of marriage<sup>125</sup>. With the *Act* Parliament has chosen to regulate the federal common law through the traditional institutions for regulating the *jus commune* in common and civil law jurisdictions: the *Act* defers to common law judgments in the common law jurisdictions and inscribes regulation in the C.C.Q. Although this resolution has a certain elegance when viewed through a bijuridical lens, the real and constant potential for diversity it creates, as between the common law provinces and Quebec, undercuts the federal interest in this area in national uniformity. In the absence of federal legislation that has nation-wide application, even if there is uniformity among all common law courts, there is always the possibility of divergence between those provinces' substantive rules on capacity for marriage, and Quebec's<sup>126</sup>.

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123. I do not mean to argue that uniformity is the only justification for federal competence. As Professor Schneiderman has noted, the exercise of federal power may be restrained to ensure the productive local exploitation of property. See D. SCHNEIDERMAN, "Constitutional Interpretation in An Age of Anxiety: A Reconsideration of the Local Prohibition Case", (1996) 41 *McGill L. J.* 411. Moreover, a "local option" has the effect of providing for significant provincial autonomy within a general federal legislative framework. See e.g. *A.-G. Ont. v. A.-G. Can. (Local Prohibition)*, [1896] A.C. 348 (P.C.). For a general discussion of the logic of subsidiarity in the Canadian federation, see *114957 v. Hudson*, [2001] 2 S.C.R. 241 at para. 3.

These other goals of a federation notwithstanding, the most compelling motivation for vesting the federal government with jurisdiction over *marriage* is national uniformity. See HOGG, *supra*, note 73 at 26-1 to 26-2; KATZ, *supra*, note 112 at 396; *Hellens v. Densmore*, [1957] S.C.R. 768 at 785 (per Rand J.); *Teagle v. Teagle*, [1952] D.L.R. 843 (B.C.S.C.).

124. *Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes*, Order in Council P.C. 2003-1055, s. 1.

125. *Supra*, note 112.

126. I do not suggest that the only relevant sub-federal units in Canada are Quebec and the common law provinces; I emphasize these entities only because in this instance, the federal government's legislative line-drawing along the civil law-common law cleavage causes a federalism problem.

Moreover, I acknowledge that prior to the introduction of the *Harmonization Act* there was precisely the diversity that I identify in the main text. The legislation did not, therefore, create greater diversity than existed previously. Nonetheless, the point remains that Parliament failed to legislate to achieve uniformity and as a consequence did not actively pursue the goal that underwrites federal competence in this area.

### 3.4 Codal Change and Division of Powers : Judicial and Provincial Missteps

In the foregoing I noted that Parliament's response to recodification did not accord with the functional objectives that underlie the federal government's competence over the capacity to marry. In what follows, I suggest that the Supreme Court of Canada and the Quebec legislature have together raised a set of thorny division of powers problems related to marriage and civil unions. In my view, careful scrutiny of the *Reference re Same Sex Marriage*<sup>127</sup> reasoning with respect to the federal competence over marriage, and of its brief analysis of the civil union, reveals problems in the conclusion that Quebec's civil union legislation is *intra vires*. I contend that on its own terms, the Court's reasoning should lead to the opposite conclusion. This section extends my reflection on the normative stakes implicated by codal amendment in the Canadian federation. In my view, when Canadian courts opine on and the Quebec legislature amends the civil code, they should not only be cognizant of the C.C.Q.'s internal harmonics, as I suggested in Part I. The courts and the Quebec legislature should also be sensitive to the effects their efforts have on the division of powers.

In order to broach what I consider to be the division of powers problems that are raised by the Court's reasoning in the *Reference* and the C.C.Q.'s regulation of civil unions, it is first necessary to set out some general background concerning the place of marriage in division of powers doctrine. Commentators have argued that absent the Constitution's allocation of powers, all aspects of marriage would naturally fall within property and civil rights<sup>128</sup>. Supreme Court reasons and federal legislative behaviour suggest that this is also the view of the courts and Parliament. *In re Marriage Laws*<sup>129</sup> holds that regulation of solemnization falls under provincial jurisdiction under s. 92(12), even when breach of a provincial regulatory regime would affect the validity of a marriage. Subsequent Supreme Court

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127. 2004 SCC 79 [hereinafter *Reference*].

128. For instance, H. BRUN & G. TREMBLAY, *Droit constitutionnel*, Cowansville, Yvon Blais, 2002 at 485 argue that whatever conflicts of laws problems that might have attended exclusive provincial control over marriage and divorce are less significant than the problems raised by making them heads of federal power. But see S.I. BUSHNELL, "Family Law and the Constitution", (1978) 1 *Can. J. Fam. L.* 202 for the claim that it was precisely the intent of the framers to exert federal control over the provinces in this matter. See also HOGG, *supra*, note 73 at 26-2 for a claim that the potential comity problems of permitting marriage and divorce to fall within provincial jurisdiction warrant federal competence in these matters.

129. (1912) 46 S.C.R. 132.

case-law has further eroded the scope of federal competence over marriage, as solemnization has been broadly interpreted to include parental consent requirements, which more obviously engage capacity concerns<sup>130</sup>. Finally, Parliament has been relatively silent in its regulation of the incidents of marriage<sup>131</sup>.

Despite this general trend towards provincial control over marriage, regulation of the conditions of capacity for marriage remains a matter of federal competence. The Court in the *Reference* affirmed this proposition, and seemed to expand the federal competence, via its analysis of the meaning of marriage under s. 91(26). The Court adopted a large and liberal interpretation, and held that proponents of a fixed definition, which excluded same-sex couples, could not identify an “objective core” for marriage—beyond the condition limiting marriage to two people—which is supported by a uniform social consensus (para. 27). The Court concluded that in the presence of contrary opinions (para. 25), it could not adopt a definition of marriage that excluded same-sex couples. In effect, the Court placed the onus for reading an exclusion into the constitutional definition of marriage on those who wanted to institute the exclusion: where there is uncertainty about the scope of marriage under s. 91(26), exclusion is impermissible<sup>132</sup>.

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130. KATZ, *supra*, note 112.

131. The federal legislative silence is especially striking when compared to Parliament’s more expansive efforts under the *Divorce Act* to regulate the consequences of divorce in a manner that arguably reaches into property and civil rights matters. For a discussion of the problem of drawing principled distinctions between the federal divorce power and the provinces’ property and civil rights jurisdiction, see BRUN & TREMBLAY, *supra*, note 128 at 486-87. *Zacks v. Zacks*, [1973] S.C.R. 891 upheld the corollary support provisions of the *Divorce Act*.

132. It is unclear why the burden should lie in this way. The Court’s embrace of large and liberal interpretative principles most obviously entails the rejection of approaches that view either custom (para. 25) or legislative intention (para. 30) as absolute limits to novel constitutional interpretation. The Court’s reasoning does not, however, clearly indicate what level of social consensus should be required for a court to entrench a social consensus in a constitutional definition, nor does it suggest how this consensus should be discerned. By contrast, where there is virtual social unanimity, as there is, for instance, on the condition that marriage consist of only two individuals, exclusion of conjugal relationships consisting of more than two individuals from the constitutional definition of marriage is permissible. The same reasoning would apply to restrictions on consanguinity and the number of marriages that individuals can be party to at a given moment. The Court does note that interveners were unanimous in their opinion that marriage should be restricted to two persons (para. 27), but it would be unreasonable to infer from this statement that the degree of consensus among interveners should determine the meaning of constitutional language.

The following is, I suggest, a reasonable interpretation of how the reasons bear on the scope of federal power over marriage. The Court should be understood to be saying that where there is sufficient social consensus to generate federal legislation, which rests on a given definition of marriage, the Court will not find the definition to fall outside the ambit of s. 91(26). The result of such an interpretation is that the Court's discussion of social consensus and core meanings is superfluous. The opinion reduces to a statement about Parliamentary supremacy vis-à-vis the scope of the constitutional meaning of marriage: Parliament can define marriage for the purposes of s. 91(26).

Such a holding is normatively untenable as it permits one level of the federation to define the scope of its own competence. The Court held that "[t]he dominant characteristic ... is apparent from its plain text: marriage as a civil institution" (para. 16). Yet as colourability doctrine suggests, legislative characterization should not be determinative of the question of competence<sup>133</sup>. Under the Court's reasoning, it is unclear how legislation that Parliament labeled marriage could ever be found to be ultra vires<sup>134</sup>.

Moreover, in undertaking such a line of reasoning, the Court avoids identifying the exclusive core of the federal competence over marriage, although it offers several unhelpful hints throughout the reasons<sup>135</sup>. The

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It may be that s. 15 concerns motivated the Court's definition of the scope of competence over marriage, and that these concerns constrain the otherwise unmanageably broad definitional approach described in the text above. These motivations are not, however, evident in the division of powers analysis. For a discussion of the interaction between s.15 and the definitional question, see S. LOOSEMORE, "EGALE v. Canada: The Case for Same-Sex Marriage", (2002) 60:1 *U.T. Fac. L. Rev.* 43 and J.-A. PICKEL "Judicial Analysis Frozen in Time: EGALE Canada Inc. v. Canada (Attorney General)", (2002) 65 *Sask. L. Rev.* 243.

133. A.S. ABEL, "The Neglected Logic of 91 and 92", (1969) 19 *U.T.L.J.* 487 at 494.

134. It may be that the Court simply accepts the legislative characterization, in the absence of a convincing contrary indication that the legislation improperly reaches into provincial competence. However, on its face, the reasoning is over-broad.

135. I am aware of the debate between formalist and functionalist approaches to Canadian federalism. The former, it is said, understand the division of powers in terms of exclusive fields of competence, while the latter favour federalism doctrines that admit overlapping fields of competence. For excellent accounts of this debate, see B. RYDER, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations", (1990-1991) 36 *McGill L.J.* 308 and J. LECLAIR, "The Supreme Court of Canada's Understanding of Federalism: Efficiency at the Expense of Diversity", (2003) 28 *Queen's L. J.* 411.

In this paper, I do not intend to stake out a position in the debate, but rather advance the modest claim that even under a functionalist approach to federalism, it is necessary to circumscribe the limits of the heads of competence, and thereby to define their cores. It is

Court suggests that marriage entails conjugal relationships, cannot currently extend to multiple partners, and is at the present time and from the perspective of the state, neither a religious nor exclusively heterosexual institution. But since each of these characteristics could apply equally to the civil union and the Court reasons that no vices problems arise between the two regimes, these suggestions do not assist in identifying the exclusive core of the federal jurisdiction over marriage. The Court does not offer the kinds of guidelines that it has for identifying the core of federal competence over criminal law<sup>136</sup> or trade and commerce<sup>137</sup>. Taken together with the priority the Court gives to federal legislative characterization, such reasoning does not permit substantive judicial review of legislation and simply defers to the legislative choice of form<sup>138</sup>.

The Court further complicates matters when it comments on the Quebec legislature's inclusion of the civil union regime within the C.C.Q. In so commenting, the Court directly engages this Part's concern with how

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in my view futile to for instance characterize a subject matter as having a double aspect, unless one has some idea of the substantive contours of the two heads of constitutional competence that are at issue. By failing to define adequately what marriage is, for the purposes of the division of powers analysis, the Court has failed to provide even this minimum level of guidance.

136. *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1

137. *Supra*, note 105. The Court in the banking context has undertaken an analysis analogous to its *Reference* reasoning when it determined the scope of federal competence over banking. The Court's resolution of that question, like its reasoning in the *Reference* is unsatisfactory as it seems to make legislative self-characterization determinative of the vices question. The Court in *Canadian Pioneer Management v. Labour Relations Board of Saskatchewan*, [1980] 1 S.C.R. 433 rejected a functional test for determining whether an institution is a bank and adopted an "institutional test": an institution is a bank only if it is identified as such in the *Bank Act*. Like the Court's reasoning in the *Reference*, this holding is, in my view, unduly deferential to federal legislative self-characterization.

138. *Supra*, note 133. The desirability of judicial review in federalism matters has been the subject of scrutiny and debate. For example, in Canada, Professor Weiler has urged a policy of judicial restraint. P.C. WEILER, "The Supreme Court and the Law of Canadian Federalism", (1973) 23 *U.T.L.J.* 307. In the U.S., Wechsler famously argued that the American federal system's political processes and institutional structures are adequate to the task of regulating federalism. H. WECHSLER, "The Political Safeguards of Federalism", (1954) 54 *Colum. L. Rev.* 543.

I assume that Constitutional text governing division of powers requires reasoned articulation of its underlying principles, and I advocate judicial oversight to the extent required to achieve this end. I consider this view to be in the mainstream of Canadian Constitutional thought, as it is articulated, in for e.g. W.R. LEDERMAN, "The Classification of Laws and the British North America Act", in W.R. LEDERMAN (ed.), *The Courts and the Canadian Constitution*, Toronto, McClellan & Stewart, 1964, 177 at 177-78 and J. LECLAIR, "Canada's Unfathomable Unwritten Constitutional Principles", (2001-2002) 27 *Queen's L.J.* 389 at 427-29.

division powers doctrine may bear on the process of codal amendment. The Court reasons that because civil unions are a relationship short of marriage they are valid (para. 33). This language suggests that the Court makes the degree of resemblance between the civil union and marriage determinative of whether Quebec's legislation over civil unions is *intra vires*. It is, however, unclear in what way civil unions are a relationship short of marriage. One might argue, as do Professors Brun and Tremblay, that simple resemblance between federal and provincial regimes does not generate a division of powers problem<sup>139</sup>. But marriages and civil unions do not simply resemble one another. The civil union regime, unlike provincial regulation of common law relationships or the effects of marriage, reproduces all aspects of the marriage regime from capacity to dissolution. Indeed, Art. 521.6 incorporates the civil effects of marriage into the civil union by reference, and the civil union regime diverges from the marriage regime only in minor details<sup>140</sup>. It is not obvious how civil unions differ from marriages, if the relationships create virtually identical rights and obligations<sup>141</sup>.

In addition, the civil union regime was originally intended to be a functional equivalent of marriage that filled the lacuna in federal legislation over matters of capacity, which excluded same sex couples from marrying<sup>142</sup> and which the Bill that was the object of the *Reference* aimed to fill. That the provincial regime intended to fill the gap in federal regulation over marriage can be inferred from the structure of the relationship between the civil union and marriage regimes in the C.C.Q. The general category is "marriage", and "civil union" is a variant within that category. This structure emerges from the organization of the regimes in the text (Marriage is Title One, Civil Unions Title One.1), from language that is derivative of

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139. BRUN and TREMBLAY make such an argument: *supra*, note 128 at 486.

140. *Ibid.* These minor differences lie between the capacity requirements and dissolution processes. The age of capacity is higher (compare s. 6 of the *Act* with Art. 521.1(1)) and the consanguinity requirements are seemingly less stringent under the C.C.Q. regime (compare *Marriage (Prohibited Degrees) Act*, S.C. 1990, c. 46 with Art. 521.1(2)). Dissolution under the civil union regime can be achieved through a consensual notarial act rather than exclusively through a judicial process (Arts. 521.12 and 521.13).

141. In the United States, courts have grappled with the question of when local government regulation over partnerships becomes regulation of marriage, and examined the extent of resemblance between regimes to decide the question. If local regimes do not closely resemble marriage, they do not engage in state regulation and if they do so resemble, they do regulate outside of their competence over local matters. See e.g. *City of Atlanta v. Morgan*, 492 S.E. 2d 193 (1997).

142. See A. ROY, "Partenariat civil et couples de même sexe: la réponse du Québec", (2001) 35 *R.J.T.* 663 at 673-74.

marriage within the articles governing civil unions (see e.g. Art. 521.6) and the various incorporations by reference (see e.g. Arts. 521.3, 521.8). The amendment that introduced the civil union into the C.C.Q. was intended to fill a gap in the federal regime governing capacity to marry, and as we have seen, capacity uncontroversially falls the scope of within of the federal jurisdiction over marriage. The original primary purpose of the Quebec legislature in enacting the civil union legislation was to regulate within the core of a federal competence.

One might argue, as have Brun and Tremblay, that the federal heads of power that concern private activity, including section 91(26), are exceptions to the general provincial power over property and civil rights<sup>143</sup>. Because the division of powers is exhaustive, this argument continues, at least one level of government must have competence over civil unions, and given the general structure of the Constitution in private law matters, by default, this competence should fall to the provinces. But the Court's reasons blunt the force of this argument. As we have seen, the Court seems to reason that provincial legislation over civil unions is *intra vires* only to the extent that civil unions constitute "a relationship short of marriage". Under this reasoning, provincial legislation over civil unions is valid only if civil unions and marriages are meaningfully distinguishable. I have argued above that they are not.

Moreover, even if we set aside the claim that degree of resemblance is significant in assessing the *vires* question, and accept that as a default rule, private law matters should be regulated by the provinces under their property and civil rights power, it is still necessary to examine whether a particular law falls within one of the federal exceptions to the general property and civil rights power. Since the Court does not define the exclusive core of the federal competence over marriage, it provides no analytic tools for assessing whether or not the substance of particular legislation falls within this competence. As a consequence, reflexive judicial resort to a default rule in favor of provincial jurisdiction, when assessing the civil union's constitutional validity, would yield conclusions that are unsupported by reasons<sup>144</sup>.

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143. *Supra*, note 128.

144. For the insight that such failures to give reasons when arriving at conclusions are anathema to the judicial role, see H. WECHSLER, "Toward Neutral Principles of Constitutional Law", (1959) 73 *Harv. L. Rev.* 1 and L.L. FULLER, "The Forms and Limits of Adjudication", (1978) 92 *Harv. L. Rev.* 353. It should be evident from what I have argued thus far that I am offering a normative critique of the Court's reasoning. I therefore do not simply accept as determinative of the question the Court's unanimous holding (in obiter) that the civil union regime is *intra vires*. For the importance of a normative, as

An opponent of my analysis of the Court's reasons and of the constitutionality of the civil union in light of those reasons, might concede that the two regimes are functionally identical, but contend that the difference in labels is sufficient to differentiate them, thereby vitiating any division of powers concerns. Professor Roy has made an argument to this effect<sup>145</sup>. The proponent of this position might argue that the institution called marriage necessarily contains religious and heterosexist exclusionary connotations, whereas a functional equivalent to marriage, called the civil union, does not. The proponent might further argue that these connotations are essential to the core meaning of marriage, in the same way that the relevant public purposes are essential to the core meaning of "criminal matters" under s. 91(27)<sup>146</sup>. Given that the civil union regime plausibly falls within the provincial competence over property and civil rights, the proponent of this position would conclude that the provincial regime is *intra vires*. He or she might argue that it is the difference in legislative labels that renders civil unions a relationship short of marriage.

The Court and Parliament have precluded this argument. The Court has unequivocally stated that for the state, marriage is a civil institution that carries no religious meaning<sup>147</sup>. Moreover, the Court has held that marriage under s. 91(26) does not carry exclusionary connotations based on sexual orientation<sup>148</sup>. Parliament in Bill C-38 has labeled the institution of marriage "civil marriage" and thereby effectively severed the institution from its religious antecedents. Beyond this labeling exercise, Parliament conveys the disjunction between these antecedents and marriage when it declares in the preamble and s. 3 that religious officials are not obliged to perform marriage ceremonies against their religious beliefs. Finally, the express wording of

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opposed to purely descriptive approach to federalism analysis, see J.-F. GAUDREAU-DESBIENS, "The Canadian Federal Experiment, or Legalism Without Federalism? Toward a *Legal Theory of Federalism*", in M. CALVO-GARCIA & W. FELSTINER (eds.), *Federalismo/Federalism*, Madrid, Dyckinson, 2004, 79.

145. *Supra*, note 142 at 677-78.

146. *Supra*, note 136 at 50.

147. The Court distinguishes the current meaning of marriage from the religious meaning it carried at Confederation, as expressed in *Hyde v. Hyde* (1866), L.R. 1 P. & D. 130. The Court reasons at para. 22: "*Hyde* spoke to a society of shared social values where marriage and religion were thought to be inseparable. This is no longer the case. Canada is a pluralistic society. Marriage, from the perspective of the state, is a civil institution."

148. The Court draws this conclusion when it states: "In determining whether legislation falls within a particular head of power, a progressive interpretation of the head of power must be adopted. The competing submissions before us do not permit us to conclude that 'marriage' in s. 91(26) of the *Constitution Act, 1867*, read expansively, excludes same-sex marriage" (para. 29).



the provision regulating capacity and the legislative intention articulated in the preamble remove any doubt about the inclusiveness of the institution of marriage, with respect to sexual orientation. Given these clear statements, the substantive identity of the two regimes, and the intention of the Quebec legislature in enacting the civil union legislation, it would be unreasonable to perceive a meaningful difference, grounded in either religion or sexual orientation, between marriage and civil unions.

There remains a final objection to my position. One might claim that legislative and judicial pronouncements notwithstanding, marriage retains religious, sexual orientation-related or other semantic content that is tied to the institution's historical meaning. The proponent of this argument might aver that marriage carries such meanings even if it also contains contrary connotations that are enunciated by the state. Under this argument, the core of the federal competence over marriage consists of that semantic content of "marriage" which remains outside legislative or judicial control. And again, where provincial regulation does not use this label, even if it creates a functionally identical regime, no division of powers problem arises. Civil unions would be relationships short of marriage, at least in part because those entering into them reasonably understand them to be so.

If this argument is correct, it gives rise to the possibility of legislation becoming *ultra vires* as social mores and understandings change. Imagine if over time, marriage either lost the semantic content tied to its historical meaning, or civil unions gained that content, such that the meanings of the two institutions were to converge and become identical. Under such circumstances, legislation under one or the other head of power would become *ultra vires*, not because the legislature acted improperly at the relevant time, but because the social meaning of the institutions had evolved. Civil unions would cease to be relationships short of marriage. This argument suggests that where the pith and substance analysis is driven by the social meaning of constitutional terms, and where the degree of resemblance between social institutions is determinative of the *vires* question, the branches of the Constitution's living tree can grow tangled as meanings shift<sup>149</sup>.

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149. There is another way by which civil unions might fall within the federal competence over marriage. Imagine that all or most of the provinces were to adopt civil union legislation substantially similar to Quebec's. Under such circumstances, the interest in national uniformity that justifies federal competence over marriage might likewise support federal jurisdiction over civil unions.

Moreover, I should note that the possibility of jurisdictional fluidity I envision here is not unique to marriage. The frontiers of the trade and commerce, and peace, order and good government powers can similarly shift. The contents of these heads of powers can change as activities that previously were intra-provincial and fell within the property and civil

In this Part of the paper, I have attempted to demonstrate that codal amendment within the Canadian federal state can give rise to thorny challenges posed by division of powers doctrine and principle. Two examples of codal reform were invoked for this demonstration: recodification, which yielded a federal legislative response, and the introduction of civil unions into the C.C.Q., which Court briefly analyzed in the *Reference*. Two sets of concerns were identified in these examples. First, I noted that the federal legislative response to recodification should have taken into consideration the purposes that underlie the Constitution's vesting of competence over marriage in the federal government. Second, I argued that the Court's reasoning in the *Reference* was unsatisfactory for two reasons: 1) on its own terms, the Court should have come to a conclusion concerning the constitutionality of the civil union opposite the one at which it arrived, and 2) the Court's nominalist definition of marriage did not permit it to undertake a substantive assessment of the limits of the federal competence over marriage, and *par ricochet* the Court precluded itself from undertaking a serious division of powers analysis of the civil union.

Finally, if my analyses of the federal harmonization legislation and the C.C.Q.'s civil union regime are accurate, several consequences for the codal reform institute which I proposed in Part II follow. First, a Quebec codal reform institute should make representations to the federal government when the latter is in the process of preparing legislation that has potential effects on the C.C.Q. These representations would identify division of powers objections to the potential federal legislation, grounded in either positive law or principle. Second, Canadian codal amenders should in all cases aim to harmonize in two directions: they should attempt to achieve the internal harmony of the C.C.Q., as well as federal-provincial harmonization. Third, the products of the codal reform institute would vary according to the nature of the institution addressed. The agency might write case comments on judicial reasons, produce legislative provisions which would remedy the defects in a given federal legislative regime and through colloquia in partnership with the L.C.C. challenge the academy to engage actively the kinds of federalism questions raised in this section of the paper. Fourth, where social meaning determines the content of constitutional text and shapes the contours of the division of powers, a codal reform institute should assist in clarifying that meaning to safeguard against federal

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rights power take on extra-provincial significance through the creation of externalities or coordination problems. See S. CHOUDRY, "Recasting Social Canada: A Reconsideration of Federal Jurisdiction Over Social Policy", (2002) 32 *U.T.L.J.* 163.

or provincial measures that frustrate the purposes of regulating within a federation.

## Conclusion

You must remember this,  
A kiss is just a kiss, a sigh is just a sigh.  
The fundamental things apply  
As time goes by (Herman Hupfeld)

The three ambitions of this paper are aptly captured by Mr. Hupfeld's evocative lyrics. Part I assessed the difficulties that the *passing of time* pose for the logic and structure of a civil code, elucidated the debate surrounding codal change, and set out the purposes and species of codal amendments. Part II set out the case for a codal reform agency as a response to the problems set out in Part I, presented a menu of issues and options to consider in the design of such an agency, and raised that most *fundamental* of issues for a civil code, democratic legitimacy. Finally, as do Mr. Hupfeld's lyrics, I interrogated the significance of labeling, as I set out the federalism questions that change in codal text pose to those who would undertake to fashion a federal legislative response to such change, to amend the code itself or to offer a judicial opinion about such change.

The present paper is a prologue in what I hope will be a sustained conversation about the normative stakes of codal amendment and the processes by which it is undertaken. Even if the particulars of my proposals are rejected for monetary or other reasons, I suggest that the broad outlines of my analysis may nonetheless guide decision-makers when the form or substance of codal text is altered. Ultimately, I hope that in Canada, codal theory and federalism principles will guide developments in codal amendment, as time goes by.