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Is There a Law Commission in France?

About the Commission Supérieure de Codification

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Abstract

The 'Commission Supérieure de Codification ('High Commission on Codification') is a body that was created with the aim of providing support for the process of codifying the texts of positive law. Analysis of both its place in France's institutional architecture and its working methods highlights certain particularities in the body's functioning and raises questions as to its degree of proximity to the Law Commissions.

Keywords: High Commission on Codification, France, Law Commission, codification, law reform.

The *Commission Supérieure de Codification* (High Commission on Codification) is a body that was created in 1989 with the aim of providing support for the process of codifying the texts of positive law. Analysis of both its place in France's institutional architecture and its working methods highlights certain particularities in the body's functioning and raises questions as to its degree of proximity to the Law Commissions.[1]

In order to understand the specific features of the functioning of the High Commission on Codification, and to what extent it resembles a law commission, it is necessary to return to the sources of the creation of these two types of structure. The Law Commissions are bodies that are mainly found in common-law countries. Originally, they were created further to the realization that a legislative assembly is not able on its own to ensure that laws that have been adopted by a vote are kept up to date. The Law Commissions are bodies that are independent of the political power. These are tasked with ensuring a watch on existing legislation. They are meant to detect any dysfunctions in the law, propose reforms and – in certain cases – prepare drafts of large-scale codes.[2] In the United Kingdom, a number of legal reform bodies were set up during the interwar period, with the

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1 Thanks should go to Marine Méthivier, who agreed to discuss the subject with me, and to Fabio Pacini, with whom I was associated in the Law Reform Project run by the Institute of Advanced Legal Studies at the University of London.

2 Law Commission, Annual Report 2016-2017, 2017, Law Com 378, p. 8.

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Law Revision Committee in 1934,[3] and then from the 1950s onwards, with, for example, the creation of a Commission for England and Wales and another for Scotland. In the United States, the first legal reform body was created in 1925, in the State of New Jersey.[4] These new bodies inspired the establishment of legal reform bodies in other countries, for example, in certain provinces in Canada.[5] However, these bodies had only limited resources and concentrated on the technical aspects of the law. Starting in the 1960s, they were, therefore, gradually replaced by commissions with guarantees of independence and more extensive areas of competence. The Law Commission for England and Wales, for example, created by the Law Commissions Act of 15 June 1965, is an independent body tasked with ensuring that the law is "fair, modern, simple, and cost-effective".[6] The Law Commissions are generally granted a number of advantages. Most frequently, they carry out consultations of the parties involved in each sector of activity, which enables them to gain a precise knowledge of the expectations of the people at whom the texts are directed. The commissions' members are legal experts who are not under the authority of the political power, which enables them to advocate legal reforms on a completely impartial basis.

Recourse to Law Commissions in order to reform the law is less frequent in countries with a Romano-Germanic tradition. In France, traditionally, legal reform and the codification of texts are undertaken on the initiative and under the control of the political power. In 1804, the Civil Code of the French People (*Code Civil des Français*) was drawn up by four leading jurists (Portalis, Maleville, Bigot de Préameneu and Tronchet) under the authority of Napoleon Bonaparte. At that time, it was a matter of grouping together and unifying the law applicable throughout the territory of France. These days, there is still a strong tendency for administrative, geographical and political power to be centralized. From the point of view of constitutional law, France is a parliamentary regime that is still significantly centralized, in which the government occupies a central position in terms of drawing up and amending legislation. The mechanisms of rationalized parliamentarism, such as the limitation of the field of intervention open to the parliament (Arts. 34 and 37), the government's accountability for a text (Art. 49(3)), block voting (Art. 44(3)) and the system of regulatory and financial inadmissibilities (Arts. 40 and 41) ensure the government's ascendency over the parliament in the legislative process. The Constitutional Council (*Conseil Constitutionnel*) is tasked with ensuring observance of these provisions, which are particularly restrictive for the assemblies. These legal mechanisms are coupled with majority rule, a political phenomenon by which the government always has the support of

3 P. Mitchell, 'The Impact of Institutions and Professions on Fault Liability in England', *in* P. Mitchell (Ed.), *The Impact of Institutions and Professions on Legal Development*, Cambridge, Cambridge University Press, 2012, p. 28.

4 Commonwealth Secretariat, *Commonwealth Law Bulletin*, 2004, Vol. 30, p. 903.

5 W.H. Hurlburt, *Law Reform Commissions in the United Kingdom, Australia and Canada*, Juriliber, 1986, p. 173.

6 Law Commission, *Annual report 2009-10. The forty-fourth annual report of the Law Commission*, 2010, p. 3. www.lawcom.gov.uk.

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a majority in the National Assembly for the entire duration of its term of office.[7] The government's primacy can also be seen in its relations with the administration. Under the terms of Article 20, the government is the head of the administration. In France, however, the administration is particularly centralized and participates in the process of creating and codifying the law. Two institutions are closely associated with the legislative process. The first is the government's General Secretariat (*Secrétariat Général*), an administrative body directly under the authority of the prime minister. The second is the *Conseil d'Etat*, which has the benefit of guarantees of independence in relation to the government; it is mainly composed of officials who have passed the competitive examination at the *Ecole Nationale d'Administration*, the main centre for training senior civil servants in France. The constitutional and political organization of France has important implications for the conditions of creating and codifying the law. It is in fact under the authority of the government, headed by the prime minister (Art. 21 of the Constitution), that texts are codified by members of the ministerial administrations.

In the context of such administrative functioning that is particularly concentrated in the hands of the government, one French body attracts particular attention: the High Commission on Codification. This body dates back to a decree of 10 May 1948, which created a commission (*Commission Supérieure*) tasked with studying the codification and simplification of the legislative and regulatory texts.[8] The work of this body was initially fruitful but gradually became less effective.[9] That is why the Decree of 12 September 1989 replaced it with the High Commission on Codification, tasked with contributing to the simplification and clarification of the law by providing assistance in codifying the texts.[10] The decree was supplemented by further decrees on 27 February 2008[11] and 11 January 2010.[12] In addition, circulars from the prime minister on 30 May 1996[13] and

7 B. François, *Le régime politique de la Ve République*, 2011, 5th edn., p. 63 *et seq*.; J. Benetti, 'L'impact du fait majoritaire sur la nature du régime (Réflexions sur le régime parlementaire de la Ve République)', Petites Affiches, No. 138, 2008, p. 20. It should also be added that the primacy of the government overshadows that of the president of the Republic. While the Constitution makes the president first and foremost an arbiter above political contingencies, his or her election by direct universal suffrage (Art. 6 of the Constitution) gives him or her the legitimacy to violate the constitutional texts, in the capacity of the head of the government.

8 Decree No. 48-800 of 10 May 1948, instituting a high commission tasked with studying the codification and simplification of the legislative and regulatory texts, *JORF* [official gazette] of 14 May 1948, p. 4688.

9 J.-M. Sauvé, 'Introduction', *in* M. Guyomar (Ed.), *Les 25 ans de la relance de la codification*, LGDJ, 2017, p. 2.

10 Decree No. 89-647 of 12 September 1989 on the composition and functioning of the High Commission on Codification, JORF, 13 September 1989, p. 11560.

11 Decree No. 2008-188 of 27 February 2008 amending Decree No. 89-647 of 12 September 1989 on the composition and functioning of the High Commission on Codification, JORF No. 0051, 29 February 2008.

12 Decree No. 2010-31 of 11 January 2010 on a directorate for legal and administrative information, JORF No. 0009, 12 January 2010.

13 Circular of 30 May 1996 on the codification of legislative and regulatory texts, JORF No. 129, 5 June 1996, p. 8263.

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27 March 2013[14] gave further details of the functioning of the new institution. According to Guy Braibrant, who was vice-chair of the commission from 1989 to 2005, there was at the outset a desire to combat the "proliferation of texts", the "instability of the rules", an "over-abundance of legislation" and "opaque legislation".[15] The need to counter defective legislation was formalized by the Constitutional Council. The decision issued on 16 December 1999 established the accessibility and the intelligibility of the law as an objective of constitutional value.[16] At the time of this decision, it was felt that codification "constituted a means of achieving this objective".[17] Historically, the codification of texts has probably attracted more attention from legal experts in countries with a Romano-Germanic tradition because of the importance they attach to the rules of written law. The process of codification was defined by Article 3 of the Act of 12 April 2000 on the rights of citizens in their relations with administrations as the act of "bringing together and categorising in themed codes all the legislation in force on the date such codes are adopted".[18] By allowing an organized, consistent presentation of all the legal provisions on any one subject, codification makes it easier for the ordinary citizen to grasp and understand the law. It may also constitute a significant factor in a country's power to attract businesses and other investors.[19] The aim of codification is, therefore, to simplify the law and make it more accessible. The close association of the High Commission on Codification in the codification process in France invites questions as to the exact conditions for the body's participation in the process. What role does it play in this task of rationalizing the formal presentation of laws, and is it possible to consider that it bears any relation to the Law Commissions? Analysis of the rules and practices followed by the High Commission on Codification reveals that, despite certain elements of similarity in the functioning of this body and the Law Commissions, it has a number of major specific features that prevent it from being qualified a 'French-style Law Commission'. This is the only way the situation can be read, firstly because of the place the High Commission on Codification occupies in France's administrative architecture (**A**) and secondly because of the methods used in the codification process (**B**).

14 Prime Minister, Circular No. 5643/SG of 27 March 2013 on the programme for codifying legislative and regulatory texts and reworking the codes.

15 G. Braibant & A. Zaradny, 'L'action de the *Commission Supérieure de Codification*', *Actualité Juridique en Droit Administratif*, 2004, p. 1858.

16 Constitutional Council, Decision No. 99-421 DC of 16 December 1999, *Loi portant habilitation du Gouvernement à procéder, par ordonnances, à l'adoption de la partie législative de certains codes*, Rec., p. 136, cons. 13. Objectives of constitutional value are principles expressed by the Constitutional Council on its own initiative. They are binding on the legislator but disregard of them may not be invoked directly by a litigant in the event of a dispute.

17 High Commission on Codification, *Nineteenth Annual Report – 2008*, 2009, p. 94.

18 JORF No. 0088, 13 April 2000, p. 5646.

19 *Ibid.*

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A Specific Institutional Positioning

From an institutional point of view, the High Commission on Codification occupies a very specific position in relation to the political power and the central administration. Firstly, it maintains close relations with the government and its administration (I – A Close Link with the Political Authority). Secondly, it merely provides technical support for the process of codifying the texts, which is carried out under the authority of the political power (II – An Essentially Consultative Role).

I A Close Link with the Political Authority

The main originality of the Law Commissions lies in their positioning in relation to the political power. They have the benefit of certain guarantees of independence from both the government and the parliament.[20] This independence allows them a great deal of freedom, both in their choices of areas of the law to examine and in their proposals for reforms, which are not necessarily fully in line with the programme of the political majority in power. The members of the High Commission on Codification do not have the same guarantees of independence, although the autonomy they do have is far from negligible.

Under the terms of Article 2 of the Decree of 12 September 1989 as amended by the Decree of 11 January 2010, the High Commission on Codification is chaired by the prime minister.[21] The principle of the commission being chaired by the head of the government indicates a very clear determination to keep the body's activities under the close control of the political power. It should also be emphasized that, in terms of logistics, it is the government's structures that are used.[22] In practice, however, it is the vice-chair, a member of the *Conseil d'Etat* and not a political authority, who chairs the commission's work. On a proposal from this vice-chair, the prime minister appoints one general rapporteur and two assistant rapporteurs. In addition to these four persons, the High Commission on Codification has two categories of members, who are appointed by the prime minister for a four-year period on a proposal from the institutions represented within the commission. From this point of view, the relatively comparable situation of most of the Law Commissions and the High Commission on Codification and the method for appointing commission members should be stressed. In the United Kingdom, for example, the members of the Law Commission for England and Wales are appointed by the secretary of state for justice.[23] Regarding the High Commission on Codification, Article 3 of the Decree of 12 September 1989 provides that the members are appointed. Firstly, there are thirteen standing

20 L. Hale, 'Fifty Years of the Law Commissions: The Dynamics of Law Reform Now, Then and Next', *in* M. Dyson, J. Lee & S. W. Stark (Ed.), *Fifty Years of the Law Commissions. The Dynamics of Law Reform*, Oxford and Portland, Oregon, 2016, p. 18.

21 *Ibid.*

22 B.G. Mattarella, 'La codification du droit: réflexions sur l'expérience française contemporaine', *Revue Française de Droit Administratif*, 1994, p. 772.

23 Law Commission, Annual report 2017-18. The Fifty Second Annual Report of the Law Commission, 2018, p. 5. Available at: https://www.lawcom.gov.uk/about/who-we-are.

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members, including two parliamentarians, two law professors, one member of the *Conseil d'Etat*, one member of the Court of Cassation (*Cour de Cassation*), one member of the Court of Auditors (*Cour des Comptes*) and six civil servants attached to the central administration.[24] There are also a number of members involved in the commission's work on an ad-hoc basis, depending on the nature of the texts being examined. Like the members of the Law Commissions, the members of the High Commission on Codification are legal experts.[25] It should be added that Article 6 of the Decree of 12 September 1989, amended by the Decree of 27 February 2008, provides that "specific rapporteurs and individuals qualified for drawing up codes may be designated by the Vice-Chair to take part in the working groups tasked with codification".[26] Article 2 of the Decree adds that "the Commission draws on the work of a group of experts [...], the composition of which is laid down by a decree issued by the Prime Minister". The participation of experts has been particularly significant in the drawing up of two major codes: the general code on local authorities (*Code Général des Collectivités Territoriales*) in 1996 and 2000, and the code on relations between the public and the administration (*Code des Relations entre le Public et l'Administration*) in 2015. Regarding the first of these codes, involving academics and specialists on the subject made it possible to provide the ministerial administrations with particularly useful logistic support. In addition, the High Commission on Codification also called on both politicians at the local level and the social partners, and this made it possible to achieve a result qualified by the commission as "exceptional": "the Code, deemed a priori a source of political conflicts, has in the end been widely accepted".[27] The second of these codes was drawn up under similar conditions. Following on from the "simplification shock" instituted by François Hollande as president of the Republic in 2012, Prime Minister Jean-Marc Ayrault coordinated the process of codifying the rules of non-contentious administrative procedure.[28] To achieve this, a "circle of experts" was set up, comprising administrative magistrates, academics and practitioners.[29] These experts were able to give their opinion on the draft of the code and propose changes. According to the 2014 Annual Report of the High Commission on Codification, participation of this kind "substantially enriched the thinking process of the members of the Commission tasked with

24 The presence of two parliamentarians (one member of the National Assembly's Committee on Laws, one member of the Senate's Committee on Laws) appears to be explained by the desire expressed by Parliament at the outset to be kept closely informed of the state of progress on the codification of texts.

25 Hale, 2016, p. 18.

26 *Ibid.*

27 High Commission on Codification, *Seventeenth Annual Report – 2006*, 2007, p. 16.

28 Prime Minister, Interministerial committee to modernise public action (*Comité Interministériel de Modernisation de l'Action Publique* – CIMAP), 18 December 2012, 48 p.; Circular No. 5643/SG of 27 March 2013.

29 M. Vialettes & C. Barrois de Sarigny, 'La fabrique d'un code', *Revue Française de Droit Administratif*, 2016, p. 4.

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drawing up the code".[30] It should, however, be noted that, to date, calling in outside experts remains relatively exceptional. At any event, such participation cannot be compared to the wide-ranging consultations the Law Commissions are able to carry out. In France, there is no formal provision for consulting the parties concerned by the creation or amendment of a code.

This analysis of the institutional positioning of the members of the High Commission on Codification highlights their proximity to the government's political apparatus; it needs to be supplemented by studying the place occupied by these members in the context of the codification process.

II An Essentially Consultative Role

There are substantial differences between the role attributed to the Law Commissions and that of the High Commission on Codification. From the point of view of their areas of competence, the Law Commissions have much more latitude than the High Commission on Codification. The situation of the Law Commission for England and Wales is significant in this respect. In theory, the secretary of state for justice is able to prevent the Law Commission working on certain reform programmes. In practice, however, this does not happen and, at any event, any refusal by the secretary of state for justice could be mentioned in the Law Commission's Annual Report, which is distributed to the parliament.[31] The Law Commission for England and Wales is, therefore, free to work on whatever legal reform programmes it considers to be pertinent and provides the government with such proposals for reforming those branches of the law it considers necessary.[32]

In France, the High Commission on Codification is in a different position. Under the terms of Article 1(4) of the 1989 Decree (amended by a further decree in 2010), and in the light of actual practice, it is not the High Commission on Codification that takes the initiative for codification projects. Its role is essentially consultative: the circular of 30 May 1996 stresses that the preparation of codification is in the hands of a working group mainly comprising members of the ministries concerned by the code in question. The decision to produce a new code or to rework a code already in force is made at an interministerial meeting convened by the prime minister.[33] Responsibility for the codification procedure is then attributed to a "codification mission", whose members come from the ministerial administrations concerned by the reform.[34] The High Commission on Codification, for its part, provides, above all, logistic support for the work. This takes several forms. Firstly, a specific rapporteur, who is a member of the commission, participates in the work of the codification mission. Secondly, on completion of

30 High Commission on Codification, *Annual Report – 2014. Twenty-fifth Annual Report* – 2015, p. 8; M.-A. Levêque & C. Verot, 'Comment réussir à simplifier? Un témoignage à propos du code', *Revue Française de Droit Administratif*, 2016, p. 12.

31 French Senate, *L'évaluation de la législation*, No. 7, 1 October 1995. Available at: www.senat.fr./notice-rapport/1994/lc7-notice.html.

32 Hale, 2016, p. 19.

33 Circular of 30 May 1996.

34 *Ibid.*

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this process of preparing the code, the High Commission on Codification may be asked for its opinion. If this consultation takes place, it takes the form of two types of meeting: firstly, at meetings of a restricted group, attended by the members of a ministry responsible for preparing a code and members of the High Commission on Codification. In the event of any technical disagreements arising during these meetings, particularly with regard to the perimeter of a code, the points of view of all the members of the commission may be asked for.[35] Referral is then made to the High Commission on Codification at a plenary meeting attended by all the members of the ministries concerned, representatives of the parliamentary assemblies, the *Conseil d'Etat* and all the members of the commission.[36] In practice, the decision of whether or not to ask the High Commission on Codification for its opinion depends on the scope of the modifications under consideration. If the proposed amendments affect the organization of a code divided into sections, books, headings or chapters, the High Commission on Codification is systematically asked for its opinion. Thus, for example, the commission was asked to give its opinion on the method for implementing the plan to reform and codify the ordinance of 2 February 1945 on juvenile delinquents.[37] Nevertheless, analysis of actual practice indicates cases for which the High Commission on Codification was not asked for its opinion even though the amendments to be made to a code were substantial. This was the case, for example, when the ordinance amending the legislative part of the code on financial jurisdictions was being drawn up in 2016.[38] If the amendments under consideration do not significantly alter the structure of the code in question, it is not considered necessary to refer to the High Commission on Codification.[39] If it is asked for its opinion, the commission may then amend the draft, but it is for the government, to which the amended version is referred when the process is complete, to decide what follow-up to give to the opinion issued.

In conclusion, the High Commission on Codification provides technical support for the codification process, which remains driven and broadly controlled by the government and its administrations. The commission's inability to act on its own initiative substantially reduces its power to influence the codification process. The exact nature of the work it carries out and the methods it applies are yet to be determined.

B Limited Field of Competence

In General, the Law Commissions have extensive competence with regard to legal reform. In the United Kingdom and in Canada, for example, the Law Commissions have two main functions. The first is to adapt the law from a formal point

35 *Ibid.*

36 G. Braibant, 'L'action de la Commission Supérieure de Codification', *Actualité Juridique en Droit Administratif*, 2004, p. 1858.

37 High Commission on Codification, *Twenty-sixth Annual Report – 2015,* 2006, p. 7.

38 High Commission on Codification, *Twenty-seventh Annual Report – 2016*, 2017, p. 8.

39 High Commission on Codification, *Nineteenth Annual Report – 2008*, 2009, p. 21.

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of view, by contributing to its codification, in order to eliminate any anomalies and any provisions that have become obsolete.[40] The second is to assess the legal advisability and the performance of the laws. According to the chair of the Law Commission for England and Wales, the commission "aim[s] to ensure that the law is as fair, [...] simple, and as cost-effective as possible".[41] In France, the decision to draw up a code is, in principle, conditional on the parliament voting to adopt enabling legislation. Under the terms of Article 38 of the Constitution, the government may be authorized, for a limited amount of time and in a specific field, to intervene in the area of competence of the parliamentary assemblies by using ordinances (*ordonnances*).

The High Commission on Codification occupies a not insubstantial position in advance of this vote inasmuch as it is its vice-chair who proposes that the prime minister convene an interministerial meeting, after which the decision to submit draft authorization to the government may be made.[42] In this respect, the competence of the vice-chair of the High Commission on Codification is in keeping with Article 1 of the Decree, which refers to the "task of [...] scheduling the codification work" attributed to the body.[43] Parliament's vote of authorization enables the ministerial administrations, with the support of the High Commission on Codification, to draw up or rework the legislative parts (for which parliament is competent) and the regulatory parts (for which government is competent) of a new or existing code simultaneously. The result of this codification is then incorporated in a text called an ordinance (*ordonnance*), which must be ratified as part of an act of parliament. The High Commission on Codification is called on during the time between the drawing up of a draft-enabling act and the presentation of the bill to parliament for ratification. During this period, the government has the task of drafting the ordinance on the codification or recodification of the texts. Compared with most of the Law Commissions, the High Commission on Codification has a much more limited field of competence. Its main function consists of providing support for the process to codify texts of 'established law', that is, without altering the content of the texts (I – A Principle: Codification of 'Established Law'). It is only in a limited number of cases that the commission has the possibility of proposing substantial legal amendments (II – An Exception: Codification of 'Non-Established Law').

I A Principle: Codification of 'Established Law'

In France, bringing texts together in codes arouses more interest on the part of the public powers than does simplification of the content of these texts. The French legislator is particularly attached to the formal consistency of the legal order. Codification expresses the desire to come closer to an idealized theoretical

40 lawcom.gov.uk/about/.

41 *Ibid.*

42 Circular of 30 May 1996.

43 Decree No. 89-647 of 12 September 1989.

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model: unity, order, precision, clarity.[44] To achieve this ambitious aim, codification mainly involves 'established law'. That means that the legal rules are inserted and categorized in codes without the content of the rules being altered. As the vice-chair of the High Commission on Codification has emphasized, "codifiers cannot reform a law at the same time as they codify it, as they do not have sufficient legitimacy to do so".[45] In other words, in France, competency to make proposals to amend the content of the law with a view to its simplification operates at the political level, as this is the only level with democratic legitimacy. The 1949 General Instruction on codification, published further to the adoption of the decree of 10 May 1948, is revealing in this respect. As already pointed out, the purpose of codification

> is above all to facilitate the task of the Administration and the lives of users by making knowledge of the rules applicable to all parties concerned easier. *It is therefore not a matter of carrying out work to reform existing legislation and regulations*.[46]

Analysis of actual practice confirms that concerns of a formal nature occupy a predominant place in the thinking process of the members of the High Commission on Codification. Their priority is to ensure the logic of the distribution of the provisions among the various extant or future codes and the clarity of the plan adopted for each code.[47] From the methodological point of view, the High Commission on Codification ensures that the grouping of the provisions of the laws and regulations is based on consistent choices that make the law more readily accessible for the public.[48] Once a code has been produced, it also ensures that the grouping of the provisions will not be subject to constant change.

It is possible to distinguish between two types of codification of established law. Firstly, the elaboration of new codes, which consists of collecting a number of provisions scattered throughout various laws and regulations together into a new code. About 20 new codes[49] were created between 1989 and 2014, including

44 F. Gény, 'La technique législative dans la codification civile moderne', *in* Société d'études législatives (Ed.), *Le Code civil. 1804-1904. Le livre du centenaire,* t. II, Paris, Rousseau, 1904, p. 996. *See also* M. Philip-Gay, 'L'obligation de joindre des études d'impact aux projets de loi. Une illustration des évolutions récentes du droit issu de la Constitution du 4 octobre 1958', *in* M. Philip-Gay (Ed.), *Les études d'impact accompagnant les projets de loi*, LGDJ, Lextenso Édn., 2012, p. 156; B.-L. Combrade, *L'obligation d'étude d'impact des projets de loi,* Dalloz, 2017, p. 217.

45 Braibant & Zaradny, 2004, p. 1857.

46 Presidency of the *Conseil*, Secretariat of State for the civil service and administrative reform, General Instruction on codification, *in* High Commission on Codification, *Eighteenth Annual Report – 2007,* 2008, p. 96.

47 H. Moysan, 'Le changement dans la continuité. À propos du rapport annuel 2007 de la Commission Supérieure de Codification', *La Semaine Juridique Edition Générale*, No. 26, 25 June 2008, Act. 442.

48 Prime Minister, Government General Secretariat, *Conseil d'Etat, Guide de légistique*, La Documentation Française, 3rd edn., 2017, p. 111.

49 M. Guyomar, 'Les perspectives de la codification contemporaine', *Actualité Juridique en Droit Administratif,* 2014, p. 400.

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the code on internal security (*Code de la Sécurité Intérieure*) in 2012 and the code on expropriation on the grounds of public interest (*Code de l'Expropriation pour Cause d'Utilité Publique*) in 2014. On the other hand, because of their lack of pertinence, given the diversity of the provisions concerned, the High Commission on Codification did not consider it advisable to adopt, for example, a code on constitutional public powers, a code on communication or a code on public accounting.[50] The second type of codification consists of reworking existing codes. In view of the fact that codes have now been adopted in most areas of law, most of the activity of the High Commission on Codification consists of reworking existing codes. In this sense, the circular of 27 March 2013 requires the commission to "ensure the proper maintenance of existing codes and rework certain codes wherever this is necessary because of the scale of the amendments made to them".[51] The High Commission on Codification, nevertheless, prefers to adopt a prudent stance on any reworking of codes that results in the adoption of a new plan or a new structure. As it stressed in its 2008 report, "any reworking of a code inevitably results in practical inconveniences for users, particularly if the numbering of articles is changed".[52] Consequently, the commission only approves those reworkings that are deemed strictly necessary. On the basis of these considerations, it was deemed essential to adopt a reworked employment code (*Code du Travail*) in 2008 in the light of all the changes made to legislation and regulations in the preceding 30 years. On the other hand, drawing up a new consumer protection code (*Code de la Consommation*) was not deemed relevant because of the constant amendments that are made to the texts it contains.[53] To assess the advisability of reworking a code, the High Commission on Codification advocates carrying out an impact study at the time of drafting a text that is likely to have a significant effect on the general economy of the code in question.[54]

On several occasions in its reports, the High Commission on Codification has referred to a difficulty that has frequently arisen in the codification of established law, namely, the disconnection of the legislative authorization stage and the codification stage. Sometimes the amount of time the parliament leaves the government to draw up or rework a code is not sufficient. In other cases, the new version of a code that has been validated by the High Commission on Codification may not enter into force because the parliament has not adopted the corresponding implementing legislation, or because of an overloaded agenda.[55]

The codification procedure supervised by the High Commission on Codification, therefore, mainly involves work on established law, that is, without reforming the law itself. In specific cases, however, codification results in a change in the content of the law. Making use of such a procedure raises questions as to the methods used and the proximity of the work of the High Commission on Codification to that of a true law commission.

50 C. Kleitz, 'La codification: un chantier constant', *Gazette du Palais*, 19 August 2010, No. 231, p. 3.
51 Circular No. 5643/SG of 27 March 2013.
52 High Commission on Codification, *Nineteenth Annual Report – 2008*, 2009, p. 22.
53 *Ibid*.
54 High Commission on Codification, *Twenty-third Annual Report – 2012*, 2013, p. 10.
55 High Commission on Codification, *Twentieth Annual Report – 2009*, 2010, p. 8.

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II An Exception: Codification of 'Non-established Law'

There are a number of adaptations of the principle of the codification of established law as applied to the High Commission on Codification. In certain cases it may issue proposals for codification of 'non-established law', that is, suggest reforms not only of the form but also of the *content* of certain rules of law. The increasing use of legal reform in the codification process may reflect a relative move towards an alignment of the functioning of the High Commission on Codification and that of the Law Commissions. To appreciate this development, it is necessary to study the scope of these reforms of the content of the law.

Firstly, Article 3 of the Act of 12 April 2000 on the rights of citizens in their relations with administrations specifically provides that codification may "incorporate amendments necessary to improve the editorial consistency of the compiled texts, ensure observance of the hierarchy of standards, and harmonise the principle of the rule of law".[56] The High Commission on Codification frequently makes use of the latitude it is allowed by this provision. To ensure the editorial consistency of the codified texts, it may suggest including articles defining terms used in the code. These provisions, which have no normative effect in themselves, may clarify the interpretation that might be given to certain articles in the code in question.[57] The commission may also suggest altering terms that have fallen out of use or become incomprehensible. Braibant, for example, referred to deleting reference to the term 'wasteland in Brittany' (*les terres vaines et vagues de Bretagne*) and replacing the term "Crown Prosecutor" by the term "Public Prosecutor".[58] Regarding observance of the hierarchy of the standards, and with a view to clarifying the law, the High Commission on Codification proposes reforms intended to bring the laws in question into line with higher standards, whether they be constitutional, international or European. For example, it proposed extending the ambit of the provisions of the employment code (*Code du Travail*) on discrimination and professional equality to a category of public undertakings that had hitherto been excluded. The extension was necessary in order to comply with the objectives set out in Directives 2000/43/EC of 29 June 2000, 2000/73/EC of 27 November 2000 and 2002/73/EC of 23 September 2002, which did not allow such exclusion.[59] Lastly, the High Commission on Codification gives full scope to the provisions of Article 3 of the Act of 12 April 2000, permitting it to incorporate amendments necessary for harmonizing the principle of the rule of law. Where these amendments are likely to promote a simplification of the law, they are incorporated in the report submitted to the prime minister. Thus, as the vice-president of the *Conseil d'Etat* Jean-Marc Sauvé has pointed out, codification "makes it possible to 'tidy up' and 'upgrade' our legal order".[60] It was not limited to, he added, merely compiling scattered texts.[61] The High Commission on Codification, nevertheless, ensures compliance with the jurisprudence of the Constitu-

56 *Ibid.*
57 Circular of 30 May 1996.
58 Braibant & Zaradny, 2004, p. 1857.
59 High Commission on Codification, *Twentieth Annual Report – 2006*, 2007, p. 13.
60 Sauvé, 2017, p. 3.
61 *Ibid.*

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tional Council, which considers that exceptions to the codification of established law should be interpreted in a strict fashion.[62] It therefore refuses to take it upon itself to enact any compliance with a higher law when such a procedure involves making a political choice between a number of possible options. For example, the High Commission on Codification held that it was not in a position to decide itself whether the partners bound by a civil union (*pacte civil de solidarité – PACS*) or cohabitees were in the same situation as married couples in the context of the employment code (*Code du Travail*).[63] Consequently, where codification involves legal reform on a larger scale, it is necessary to obtain specific authorization from the legislator. This was the case, for example, when the general code on public property (*Code Général de la Propriété des Personnes Publiques*) was being drawn up. In Article 48 of the Act of 26 July 2005 on confidence and modernizing the economy which refers to this code, the assemblies adopted a provision allowing the government – and the High Commission on Codification working under its authority – to reform the underlying law.

When codification of 'non-established law' involves changes that go beyond the limits laid down by Article 3 of the Act of 12 April 2000, it is necessary to obtain authorization from parliament. Parliament was for a long time averse to the idea of entrusting its legislative power to the government in order to allow changes to be made to the content of the law, but it is now more in favour of promoting such procedures. In an enabling act of 12 November 2013, for example, it authorized the government to "make the necessary amendments to the rules for non-contentious administrative procedure in order to [...] simplify procedures with the administrations and the investigation of applications, by adapting them to technological evolution". Parliament may even authorize the government to include rules established in precedent in a code being prepared or reworked. One example of this is the contribution of the High Commission on Codification to the inclusion in the code of relations between the public and the administration (*Code des Relations entre le Public et l'Administration*) of *Conseil d'Etat* jurisprudence on the rules governing the prior adversarial procedure and on the general principles of concertation.[64] In this hypothesis, it becomes possible to distinguish between two types of codification. Firstly, 'petrifying codification' when the High Commission on Codification incorporates precedent in a code without amending it and, secondly, 'reforming codification', which changes established precedent.[65]

To date, the procedure for codifying 'non-established law' cannot be compared to the procedure followed by the Law Commissions, which have more extensive competencies and the intention of contributing to a general improvement in the legal rules. The missions of the High Commission on Codification are not as wide ranging. *Conseil d'Etat* vice-president Jean-Marc Sauvé has, nevertheless, noted that attention is increasingly being paid within this body to the simpli-

62 Constitutional Council, 16 December 1999, cons. 14.

63 High Commission on Codification, *Twentieth Annual Report – 2006*, 2007, p. 12.

64 High Commission on Codification, *Twenty-sixth Annual Report – 2015*, 2006, p. 45.

65 *Ibid.*, p. 16.

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fication of the law in force.[66] More generally, analysis of the reports produced by the High Commission on Codification in recent years indicates a perceptible shift towards enriching the role of the High Commission on Codification with regard to simplifying the law.

C Concluding Remarks

The High Commission on Codification does indeed play a key role in the process of codifying texts, which may, in specific cases, be carried out with regard to 'non-established law', that is, by adapting the underlying law. To date, however, given its links with the political power and the ministerial administrations, and also in the light of its primarily consultative function, the High Commission on Codification cannot be considered on a par with the Law Commissions. There is nevertheless a relatively strong dynamic in favour of strengthening its influence in the codification process and, more broadly, in the simplification of the law. The prime minister's circular of 27 March 2013 is significant in this respect. In it, the head of the government affirms his determination to give priority to "reforming the law in force in every case where the work carried out on codification indicates the need for a simplification of the principle of the rule of law". At the same time, according to its general rapporteur, the High Commission on Codification states that it is "much in favour of a certain form of evolution in the methods for its intervention". In the light of almost three decades of activity, it seems fitting that the High Commission on Codification should be given additional areas of responsibility, particularly with regard to the codification of 'non-established' law, with a view to reinforcing the process of "ordering the law".[67] From this point of view, despite the specific features of their functioning and of the legal systems of which they are part, the Law Commissions deserve more attention from both doctrine and political leaders in France.

66 Sauvé, 2017, p. 6.
67 *Ibid.*

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