L'Hôpital's Laws

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The thoughtful and enlightening commentaries by Sarah Hanley and Amalia Kessler are especially instructive because they approach L'Hôpital's legal policy from different perspectives—different both from each other's and also from my own. Hanley reckons allowing L'Hôpital central stage in the sixteenth-century French legal development a historical usurpation, unjustly ignoring many brilliant legal minds who made much more significant contributions than the chancellor. On the other hand, Kessler views with alarm L'Hôpital's drive to augment sovereign wealth and power by means of legal reform and warns us to take his self-serving rhetoric with a grain of salt.

This reply is not an attempt for reputational redemption of some sort of the chancellor, but I muse in particular over Hanley's portrayal of L'Hôpital as an intellectual lightweight incapable of leading a serious reform of French law, let alone its unification. Failing to complete even a single book on civil law may indeed be fatal for an aspiring legal scholar, but quibbling over his intellectual credibility loses sight of a far more significant aspect of L'Hôpital, that is, his unique role in sixteenth-century French legal history. As chancellor of France—the highest judicial official and the "*plume*" of the king—L'Hôpital had the authority to draft legal provisions, drawing from the achievements of the legal humanists, and recommend that the Crown issue them as "law." The lawmaking process at the French chancellery was a collective work, so normally an individual chancellor's personal role would not be easily known. In L'Hôpital's case, however, many authors, including Etienne Pasquier, confirmed L'Hôpital's authorship of all the major edicts and ordinances issued in the 1560s. I am inclined to believe that François Hotman meant what he said when

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he called L'Hôpital "our Solon," instead of suspecting Hotman of disingenuous political inveiglement.[1]

My article focuses on the two parallel legal reform campaigns that took place in the late 1550s and the 1560s: reformation of custom and royal legislation. It discusses how L'Hôpital attempted to explore the proper relationship of custom—and jurisprudence that centered on customary interpretation—to the body of royal legislation that poured forth, and also forge a logical relationship between Roman law and customary law, all for the goal of reducing diversity of law that he considered to be a main obstacle to national unity. Yet Hanley prefers rather to talk about legal reform projects before and after the 1560s, based on her own research of these periods that she discusses at length in her comments. Incidentally, Hanley misread my interpretation of L'Hôpital's statement of Roman law as "poison." Although L'Hôpital believed that the compilations of Justinian would have been "a great treasure" if well utilized, he deplored the fact that Gallican pettifogging (*Gallia causidica*) rendered them into a "*domage*," "*ruyne*," and "*poison*." L'Hôpital never regarded Roman law as "poison." What Hanley says the phrase meant is what I already said it meant. L'Hôpital ascribed to rampant glosses and the lack of historicity of commentators (corrupting the youth at the universities) the multiplication of laws, which he viewed as responsible for the multiplication of lawsuits. It was this overwhelming concern regarding the confused state of the sources of law on which his legislative reform and effort for legal unification were grounded.

Hanley does mention the redactions of French customs, but she apparently refers only to the custom of Paris because she states that "French customs were redacted in 1510" and that "a second major redaction took place

1. Loris Petris (2002) provides us a list of the works either dedicated to the chancellor or in which the authors acknowledged L'Hôpital's influence. The list is a who's who in sixteenth-century French legal science: Jean de Coras, François Bauduin, François Hotman, Barnabé Brisson, Louis Le Caron, Jacques Bongard, Etienne Pasquier, Jean Bodin, and Charles Dumoulin. To this list should be added Jacques Cujas, according to Anne Rousselet-Pimont (2005). Hanley claims that, if some authors dedicated their works to the chancellor, it was only a routine gesture to curry political favor, not to be taken as acknowledgement of intellectual debt. I am less than convinced that all these authors were simply dropping L'Hôpital's name when they had little or no respect for him. For L'Hôpital's humanist scholarship, see also Denis Crouzet (1998) and Thierry Wanegffelen (2002). Jean de Coras is highlighted in Hanley's commentary as an example of a truly accomplished legal mind worthy of genuine fame, not the "overinflated" kind of the chancellor. Interestingly, Jacques-Auguste de Thou, the author of the *Histoire universelle*, tells us about an incident in which Coras, suspended from his judgeship in 1562 due to his Protestant belief, personally petitioned L'Hôpital for protection; the latter obtained a royal order to reinstate him and his colleagues.

in 1580." The years 1510 and 1580 were respectively when the *coutume* de Paris was first recorded and subsequently reformed. The redaction of the Parisian *coutume* was of course the highlight of the campaigns, but there were many other redactions of provincial customs. After the Ordinance of Montilz-lez-Tours of 1454 prescribing that the customs throughout the kingdom be recorded, the first serious campaign for customary redaction started in 1497 under the leadership of Thibault Bailler, the *président* of the Parlement of Paris, and a number of *coutumes* were put into writing including the Parisian *coutume*. The second wave of redacting and reforming customs started in 1555, this time led by Christophe de Thou, the *président*—the *premier président* from 1562—of the Parlement of Paris. The campaign continued throughout the second half of the 1550s and 1560s. The reformation of the Parisian *coutume* was the peak of a campaign that had been in full swing for twenty-five years.

Legal disunity in the sixteenth century was *not* "tolerable." Many royal pronouncements and writings of legal scholars repeated how terrible it was. The collection and reformation of customs marked the dramatic assertion of the Crown's legislative power. Redaction of customs took place under the supervision of royal officials dispatched by the Crown; the drafts of codified custom were officially sanctioned in the name of the king; and they were registered at the parlements to take effect as were royal edicts. Many modifications introduced into different customs were formulated in identical language, suggested and written by the royal commissioners. This is how the codification and reformation of *coutumes* moved toward unifying law in France. Once codified, legal scholars tried to find common solutions by reconciling diverse customs, and the ideal of a common customary law (*le droit commun coutumier*) emerged. Along with royal legislation, they marked an important step in systematizing French law and bringing it closer to unification. The *cahiers* submitted in the Estates General of Orleans (1560) voiced a popular clamor for a unified and simplified law. The spirit of legal unification was widespread in the sixteenth century. For an analogy, a complete European civil code is not close to realization today, but that does not deter us from discussing—incessantly—the "unification of European law." The ideal of legal unification in sixteenth-century France was no more a pipe dream than a European legal unification in the twenty-first century.

It is beyond dispute that in the history of law jurists played an important role on the road to unification of law. In France, the uncertainty of oral customary rules had been favorable to jurisprudentialization, leaving the interpretation of norms to the judges. But legal uniformity could not be expected from the parlements, which, by definition, were the guarantors of provincial liberty. Charles Dumoulin regarded the king's authority as

the major factor of unity. The reinforcement of royal legislative power led to a certain redefinition of the role of judges in the creation and interpretation of law. L'Hôpital's legal thought amply acknowledged the changing notion of the relations between the judge, the king, and the law.

Studies by Jacques Krynen, M.-F. Renoux-Zagamé, and Robert Jacob have shown that a general theory of law was not established in the Renaissance and that the hierarchy of legal norms was not clearly ordered. In this uncertain situation, L'Hôpital tried to place the state law (*la loi du roi*) at the top of the hierarchy of sources of law and make it the law of reference among conflicting norms. For L'Hôpital, legal unification was to be achieved through royal legislation. François Gény relates that Napoleon allegedly exclaimed when he saw the first commentary on the Civil Code of 1804: "My Code has been lost."[2] L'Hôpital did not seem to have the emperor's ego, but his public actions and statements in numerous speeches, discourses, and Latin poems clearly displayed the chancellor's tendency, in line with his predecessors in the sixteenth century, to place less confidence in other instruments for achieving legal uniformity such as doctrine or jurisprudence. Hanley clearly has reservations about L'Hôpital's preference for legislation by decree ("top down"), as does Kessler to some extent. But history reveals that political power is essential to bring the work of scholars to fruition. As Raoul van Caenegem stated, the development of the modern civil law was based on general rules laid down by the legislator and not on particular forms of action; it was "not case-law but book-law."[3] The Code Napoleon did not emerge from a vacuum.

According to Hanley, the "French Marital Law Compact" constituted the most important legal reform project in early modern France. Does not what she describes as "the innovative first marital edict of 1557—which changed French custom" evince the importance of royal legislation? After all, Hanley's examples of jurisprudence involve interpreting royal laws and custom, consistent with the pattern in the 1560s. Besides, the coverage of royal legislation far exceeded the scope of family law or marital law. My article examined the sixteenth-century reform movement not from the angle of "marital regime governance" but from the perspective of reform-minded statecraft. James Scott described early modern European state efforts to standardize and control local custom (and its interpretation) as state "simplifications" and "standardizations." Legislating uniformity was essentially an effort to create a uniform and standardized system of

2. François Gény, *Méthode d'interprétation et sources en droit privé positif*, 2nd ed. (Paris: Librairie Générale de Droit & de Jurisprudence, 1932), 1:23 (no. 9).

3. R. C. van Caenegem, *European Law in the Past and the Future: Unity and Diversity over Two Millennia* (Cambridge: Cambridge University Press, 2002), 39.

property relations. Regulating property law demanded as much, if not more, concern than regulating marriage. Many of the reforms were motivated to increase tax revenue. Kessler expresses uneasiness with my statist view of royal legislative efforts, but state "simplifications" were a universal process. From the Chinese empire to the Ottoman empire to the European kingdoms, creating a uniform property regime was a predominant concern of the state. If we were to fault the state in the early modern period for trying to simplify property law in order to bring increased and more stable state revenue, might we not end up having to look at the process of state building, and entire state action, with disapproval?

Kessler cites the law limiting substitution as an example of the Crown's "drive for power," geared to encroach upon the interest of the noble landowners. But if we view the contest between the king and the dominant social class as the main consideration in royal legislation during this period, we encounter difficulty in explaining other laws, such as the Edict of Saint-Maur of 1567 (with the result of preserving the *propres* within the family) and even the "family state compact" regime suggested by Hanley. The better explanation in my opinion is that L'Hôpital's laws were intended mainly for what the laws said, that is, "to avoid useless and onerous judicial contestation." The judges in the sixteenth century no more welcomed rampant lawsuits than their counterparts in the twenty-first century. There were inevitably some who tried to profit from collecting *épices*—fees (originally in the form of free gifts) charged to the parties for expediting proceedings—but it was clearly an illegal practice in which no self-respecting judge would engage. In short, both the judges and the chancellor were in agreement about the need to reduce lawsuits. Finally, it is necessary to distinguish between what L'Hôpital's motives were on one hand and what the historical significance of action by the Crown he represented was on the other. The question of personal motivation is not always the most important question for the historians.

The two commentators in this forum appear to share somewhat similar views that it is imperative to consider "the reality of politics and interests" (Kessler) and to attend to "the way power or authority is always 'negotiated'" (Hanley). These are certainly important issues. But surely the historical process of state-building is too important to be reduced to what Talcott Parsons or Robert Merton might call its "latent functions." We may or may not agree with the thesis that "law is politics." It seems at least that the historical significance of action by the Crown cannot be captured either by studying the works of jurists or by second-guessing the motives of the state, the king, or the bureaucrats.

L'Hôpital's religious policy granting limited toleration to the Protestants was so unorthodox at the time that his contemporaries, suspecting him of

being a closet Protestant, murmured: "May the Lord protect us from the chancellor's mass." It is not surprising that L'Hôpital's legal policy, marked by unusual boldness and sweep in the heat of civil war, is subject to mixed reviews by historians. Being a reformer—or even a would-be reformer—is a tough business.

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