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ORIGINS OF THE DIVISION OF SERVITUDES INTO NATURAL, LEGAL AND CONTRACTUAL

Carlos Felipe Amunátegui Perelló*

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I. INTRODUCTION

Most civil codes, following the *Code Napoléon*, have defined servitudes as “a charge on a servient estate for the benefit of a dominant estate” (art. 646, Louisiana Civil Code).¹ A bit further, after considering some legal rules on servitudes, the Louisiana Civil Code divides them into natural, legal, and voluntary or conventional (art. 654, Louisiana Civil Code).² The whole systematic treatment of servitudes is based on this division. The definition is, in the context of real rights, quite unusual. It defines servitudes as a charge—that is to say, in a negative way—and not as a right, in positive terms. It is also exceptional in a historical context, for it does not follow the traditional medieval definition

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1. Compare this with the definition of art. 637 of the *Code Napoléon*: “*Une servitude est une charge imposée sur un héritage pour l’usage et l’utilité d’un héritage appartenant à un autre propriétaire.*” On the matter, see A.N. Yiannopoulos, *Predial Servitudes; General Principles: Louisiana and Comparative Law*, 29 LA. L. REV. 1, 2 (1968) [hereinafter Yiannopoulos, *Predial Servitudes*].

2. See art. 639, *Code Napoléon*: “*Elle dérive ou de la situation naturelle des lieux, ou des obligations imposées par la loi, ou des conventions entre les propriétaires.*” Again, see Yiannopoulos, *Predial Servitudes*, *supra* note 1, at 43.

already present in the *Siete Partidas*³ and popularized by Bartolus,⁴ nor the humanist versions of the 16th century,⁵ nor the definitions of the rationalist schools of the 17th and 18th centuries.⁶

3. “Properly the wise said that servitude is the right one has to use the buildings or the estates of another man and to profit from them in the benefit of those that one owns” (author’s translation); (*Propiamente dixeron los sabios que tal servidumbre como esta es derecho e uso que ome ha en los edificios, o en las heredades ajenas para servirse dellas a pro de las suyas.*) LAS SIETE PARTIDAS, pt. 3, tit. XXXI, law I.

4. The usual definition from the Middle Ages is due to Bartolus, who defined real servitudes as “a certain right inherent in a estate, that looks for its benefit and diminishes the liberty of the other estate” (author’s translation); (*quoddam ius praedio inherens, et ipsius utilitatem re spiciens, et alterius praedius ius sive libertatem diminuens*). BARTOLI A SAXOFERRATO, IN PRIMAM DIGESTI VETERIS PERTEM COMMENTARIA 182v (1574 ed.), 364 (2004 ed.) (Nicolau Bevilacqua 1574; Elec. ed., A.J. Sirks 2004).

5. For instance, Donellus says: “It is [a servitude] the one that is imposed on a alien estate, for the use of a neighboring estate, constituted in perpetuity” (author’s translation); (*Ea est [servitus] quae alieno praedio imposita ad vicini alicujus praedii solius usum, eumque perpetuum constituta est*). HUGONIS DONELLI, 3 OPERA OMNIA, COMENTARIORUM DE IURE CIVILI 226 (Osuoldi Hilligeri ed., Maceratae 1839).

6. Pothier says on the matter: “*Le droit de servitude est le droit de se servir de la chose d’autrui à quelque usage, ou d’en interdire quelque usage au propriétaire ou possesseur. Jus faciendi aut prohibendi aliquid in alieno.*” ROBERT-JOSEPH POTHIER, *Coutume d’Orléans* in 1 ŒUVRES DE POTHIER 312 (Videcoq 1845).

Along the same lines, we can quote other less influential 18th century French authors who also define servitudes in a positive way. For instance, Astruc, at the beginning of the 18th century, says that a servitude is “*un droit établi dans la chose d’autrui, contre le droit naturel, à l’utilité des fonds des personnes.*” LOUIS ASTRUC, TRAITÉ DES SERVITUDES RÉELLES. NOUVELLE ÉDITION MISE EN RAPPORT AVEC LE CODE CIVIL, PAR H. SOLON 10 (Gallica 1841). What is particularly striking is that, according to him, real servitudes are against natural law, which he explains a bit further stating that ownership should be free. *Id.* at 11.

Later, Desgodets, who wrote an important work on servitudes in the mid-18th century, defines them simply as “*l’Assujettissement d’une chose à une autre.*” ANTOINE BABUTY DESGODETS, LES LOIX DES BÂTIMENS, SUIVANT LA COUTUME DE PARIS: TRAITANT DE CE QUI CONCERNE LES SERVITUDES RÉELLES, LES RAPPORTS DES JURÉS-EXPERTS, LES RÉPARATIONS LOCATIVES, DOUAIRIÈRES, USUFRUITIÈRES, BÉNÉFICIALES, ETC. 1 (1748).

Gabriel François d’Olivier, who wrote the first Civil Code Project for revolutionary France, also uses a positive definition: “*droit particulier attribué à une personne contre une autre personne, pour obliger celle-ci à supporter quelque chose ou l’empêcher de faire quelque chose.*” GABRIEL FRANÇOIS D’OLIVIER, 1 PRINCIPES DU DROIT CIVIL ROMAIN 207 (Merigot 1776), although in his project he does not include any definition.

The definition is a creation of the French codification process that appeared for the first time in the Cambacèrés project of 1793. Following Falcone, it seems to have been taken from the Latin translation of Theophilus' *Paraphrasis*, a somewhat awkward source that eventually extended globally due to the influence of the French codification.⁷

Something similar happens with the division of servitudes into natural, legal and conventional, a classification that structures the systematic approach of most 19th century civil codes and was taken from the French codification. This was an innovation regarding the Hispanic tradition⁸ that underlies the Louisiana Civil Code, and it has been subject to harsh criticism.⁹ In fact, many of the so-called legal servitudes do not fit well into the category. For instance, the common wall servitude (art. 673, Louisiana Civil Code) can hardly be a servitude at all, for there is no dominant nor servient estate. In fact, both estates are liable to the same rights and duties. This type of servitude seems to regulate the legal limits of

7. As one might expect, it was a legal humanist—Janus a Costa—who brought this concept into the Western legal tradition. While addressing servitudes, he quoted Theophilus and said: “It is therefore a servitude, as rightly our Theophilus said, a right constituted in a certain way, that makes the neighbor stand a charge” (author’s translation); (*Est igitur servitus, ut recte Theophilus noster, jus quoddam certis modis constitutum, quod efficit, ut vicinus vicini onera sustineat*). JANI A COSTA, PRAELECTIONES AD ILLUSTRIORES QUOSDAM TÍTULOS LOCAQUE SELECTA JURIS CIVILIS 22 (Bavius Voorda 1773). For a detailed study, see Giuseppe Falcone, *Note historique sur la définition législative de la servitude (article 637 Code Napoléon – article 1027 Code Civil Italien)*, 79:1 REVUE HISTORIQUE DE DROIT FRANÇAIS ET ÉTRANGER 13-30 (2001) [hereinafter Falcone, *Note historique*].

8. For instance, García Goyena, when he proposes this division for the Spanish Civil Code Project, says that neither Roman law nor Hispanic law included property limits among servitudes: “*El Derecho romano y patrio no comprendieron estos gravámenes entre las servidumbres, y les dedicaron títulos separados, como se ve en los tres primeros del libro 39, y en casi todos del 43 del Digesto, y en el título 32, Partida 3, sobre las labores nuevas.*” See FLORENCIO GARCÍA GOYENA, 1 CONCORDANCIAS MOTIVOS Y COMENTARIOS DEL CÓDIGO CIVIL ESPAÑOL 420 (Sociedad Tipográfico-Editorial 1852).

9. We quote here the very important comments of Professor Yiannopoulos: “[C]ritics have observed that, from the viewpoint of accurate analysis, natural and legal servitudes involve limitations on the content of ownership rather than veritable servitudes. Indeed, it is often impossible to determine which is the dominant estate” Yiannopoulos, *Predial Servitudes*, *supra* note 1, at 44.

property, for its primary function is to establish the legal atmosphere of ownership.¹⁰ Therefore, the formal equality of both estates seems necessary, because property limits compel both owners. This is something unthinkable in regular servitudes, for these have an asymmetric structure, where one estate beholds the rights and the other the duties.¹¹ In this sense, legal servitudes are intended to protect the estates' freedom and the equality between neighboring real estates, because they configure the normal frame of property, while true servitudes tend to restrain the exercise of ownership in one estate to the benefit of another estate.¹² As Professor Yiannopoulos said, "In modern civil codes, the concepts of natural and legal [servitudes] have thus given way to the idea of limitations on the content of ownership."¹³

Although its reform was under discussion in 1976,¹⁴ the division was, at that time, unfortunately left unchanged, as an odd legal transplant in the heart of Louisiana's Civil Code. As Watson explains, "law is often adopted because of the reputation and authority of its model or promulgator; hence, in part, [this implies] the reception of even less than adequate rules."¹⁵

II. SERVITUDES IN THE ROMAN SYSTEMATIC

The origin of the inclusion of these limits to property into the category of servitudes is quite curious. Romans did not face the problem of ownership limits this way. In Roman law, the different

10. RUDOLF VON JHERING, 6 JAHRBÜCHER FÜR DIE DOGMATIK DES HEUTIGEN RÖMISCHEN UND DEUTSCHEN PRIVATRECHTS 91 (F. Mauke 1863).

11. BIONDO BIONDI, LA CATEGORIA ROMANA DELLE "SERVITUDES" 19 (Vita e Pensiero 1938) [hereinafter BIONDI, LA CATEGORIA ROMANA].

12. In this sense, see ESTHER ALGARRA PRATS, LA DEFENSA JURÍDICO-CIVIL FRENTE A HUMOS, OLORES, RUIDOS Y OTRAS AGRESIONES A LA PROPIEDAD Y A LA PERSONA 16 (McGraw-Hill 1995).

13. Yiannopoulos, *Predial Servitudes*, *supra* note 1, at 44.

14. See Katherine A. Manning, Malcom S. Murchison, Judy F. Pierce, Randall C. Songy & James C. Wear, *The Work of the Louisiana Legislature for the 1976 Regular Session: A Student Symposium*, 37 LA. L. REV. 89-202 (1976).

15. ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 90 (2d ed., Univ. of Georgia Press 1993).

property limits had a very heterogeneous nature.¹⁶ They were sometimes structured as *interdictae possessoria*, in other cases as negative actions, or other different legal figures. Therefore, what we now call property limits were treated in an unsystematic fashion and included into different institutions.

Originally in Rome, real estates should have been separated from each other by a physical space that did not belong to any of the neighbors. For urban real estates, it was called *ambitus*. As time went by and Rome grew into an overpopulated metropolis, the system became untenable. To allow the use of all the land in the city for construction, the *ambitus* system was replaced and in its place the wall that separated two estates started to be considered common for both owners (*paries communis*)¹⁷ and a new regulation established many different sorts of obligations regarding it. The wall was not considered to be under a servitude, but, on the contrary, there was a whole set of things that the owners could not do regarding the wall unless they had a servitude over the neighboring estate.

Generally speaking, in Rome, the main issue regarding the neighborhood was the power that an owner had to exclude non-owners from his estate, and especially, of course, his neighbors.¹⁸

16. BIONDI, LA CATEGORIA ROMANA, *supra* note 11.
On the matter, Paricio says:

En el Derecho romano, dada la particular naturaleza del dominium con su carácter absoluto e independiente (salvo que hubiese sido limitado voluntariamente, p.ej. con una servidumbre), las relaciones entre los titulares de los diversos fundos vecinos se nos presenta bajo la forma de un régimen negativo, es decir, de una respectiva libertad tutelada y defendida por diferentes recursos procesales Lo que existen son medios jurídicos de defensa y no limitaciones a la propiedad; por ello los recursos procesales que se concedían para resolver problemas surgidos en las relaciones de vecindad no pueden ser considerados estrictamente como limitaciones sobre la propiedad.

JAVIER PARICIO, LA DENUNCIA DE OBRA NUEVA EN EL DERECHO ROMANO CLÁSICO 1 (Bosch, 1982). *See also* BIONDI, LA CATEGORIA ROMANA, *supra* note 11, at 20.

17. BIONDI, LA CATEGORIA ROMANA, *supra* note 11, at 46.

18. *Id.* at 20.

The “legal atmosphere” of each estate should be protected.¹⁹ To do something on someone else’s property (*facere in alieno*) was prohibited. In order to act on another man’s property, one must have had a servitude, for its function was to alter the normal regime of the exclusion of non-owners. Therefore, the whole system of servitudes was designed to authorize acts in alien estates, whether they were directly done in their physical limits or the owner just had to suffer the negative consequences of acts performed on another estate (direct and indirect immissions). Therefore, the function of servitudes was to change the normal regime of third parties’ exclusion that was implied in property, and many times, when one of these immissive acts was performed, the existence of a servitude was under discussion. The *interdictae possessoria* were a typical tool to determine the legal position of each part in the possible legal action that was to be summoned.²⁰ The one that claimed the existence of a servitude had a real action to assert its existence, while the one that denied its existence had a real action, called a negative action, that aimed to defend the freedom of the estate.²¹

19. VON JHERING, *supra* note 10, at 91.

20. On the relation between *interdictae possessoria* and actions we follow Falcone’s thesis. See Giuseppe Falcone, *Ricerche sull’origine dell’interdetto uti possidetis* in 44 ANNALI DEL SEMINARIO GIURIDICO DELLA UNIVERSITÀ DI PALERMO 5-360 (1996).

21. On the matter, the jurist Gaius gives the following division:

A real action is one in which we either claim some corporeal property to be ours, or that we are entitled to some particular right in the property, for instance, the right of use and enjoyment; or the right to walk or drive through the land of another; or to conduct water from his land; or to raise the height of a building, or to have the view unobstructed; or when a negative action is brought by the adverse party; (translation by Francis de Zulueta, Oxford Univ.). (*In rem actio est, cum aut corporalem rem intendimus nostram esse aut ius aliquod nobis competere, uelut utendi aut utendi fruendi, eundi, agendi aquamue ducendi uel altius tollendi prospiciendiue, aut cum actio ex diuerso aduersario est negatiua.*)

THE INSTITUTES OF GAIUS at bk. 4.3 [hereinafter GAIUS].

Although in Classical times, servitudes were treated in an unsystematic fashion,²² Justinian's *Corpus* made a systematic effort to put them altogether and bring some order to their treatment.²³ This effort tended to obscure its dogmatism in the centuries to come. Justinian puts them in a separate book in the *Digest*, where he starts by elaborating general aspects of servitudes (*Digest* 8.1), to continue with urban servitudes (*Digest* 8.2), followed by rustic ones (*Digest* 8.3) and then their common rules (*Digest* 8.4). Having done this, he then continues with the actions that can be put forward (*Digest* 8.5) and, finally, the rules that regard the liberation of the estates. That the main systematic depends on their being rural or urban makes sense in Classical Roman law, for the first are *res Mancipi*, and therefore they can only be transferred following certain formalities, while the others are not. Nevertheless, in Justinian's law—which did not contemplate this division of *res Mancipi* and *nec Mancipi*—the reasons for keeping this kind of systematic approach are obscure. Regardless, the main issue in servitudes was the exclusion of the neighbor's acts from an estate and, therefore, *Digest* 8.5 (on vindication and denial of servitudes) was mainly concerned with problems of neighboring estates, which could also be treated as problems of *interdictae possessoria*. Some problems were even addressed in both places.

Nevertheless, Justinian did something more than merely systematizing, for he also included some property limits under the title of servitudes in his *Codex*.²⁴ In the western part of the former

22. This appears quite clearly in the treatment that Gaius gives to servitudes in his *INSTITUTES*. They are mentioned among incorporeal things (GAIUS 2.14), the *res Mancipi* (GAIUS 2.17) and the acquisition of property (GAIUS 2.29), *supra* note 21. See BIONDO BIONDI, *LE SERVITÙ* 4 (Giuffrè 1967; published as Vol. 12 *TRATTATO DI DIRITTO CIVILE E COMMERCIALE*).

23. They are contained in Justinian's *INSTITUTES* (bk. 2, tit. 3), in the 8th book of the *DIGEST* and in the 34th title of the 3rd book of the *CODEX*.

24. This tendency would have expanded during Late Antiquity as a simplification of the complex classical legal system. It is mentioned in the *CODEX THEODOSIANUS* [hereinafter C.TH.] in an Imperial Constitution on the distance that two buildings should keep: C.TH. 4.24 *De servitute luminis vel*

Empire, legal simplification meant the disappearance of the whole dogmatic category of servitudes.²⁵

III. RECEPTION OF SERVITUDES IN THE WEST AND THE DEVELOPMENT OF THE DIVISION

When the *Corpus* was received in the West (c.1100 AD), the institution of servitudes was resurrected, and it is through Justinian's text that they again came to rule in European law. Some

aeris similiter constitutum est, ut inter privatorum fabricas decem pedes, inter publicas quindecim dimittantur.

For the eastern part of the Empire, Emperor Zeno repeats the statute and gives a new Imperial Constitution, this time in Greek, that expressly calls this legal limit to property a servitude. Justinian also repeats this Constitution and adds some interpretation, for there were, apparently, some uncertainties about its application.

CODEX 8.10.13 *Imperator Justinianus. Cum dubitabatur, utrum constitutio Zenonis divinae memoriae ad Adamantium praefectum urbis scripta, quae de servitutibus loquitur, localis est et huic florentissimae urbi dedicata et debent illius quidem iura in hac observari, antiqua vero, quae contraria sunt, locum habere in provinciis: indignum esse nostro tempore putantes aliud ius in hac regia civitate de huiusmodi observari, aliud apud nostros esse provinciales, sancimus eandem constitutionem in omnibus urbibus Romani imperii obtinere et secundum eius definitionem omnia procedere et, si quid ius ex ea lege innovatum est a vetere dispositione, et hoc in provinciis a praesidibus earum observari: ceteris videlicet omnibus, quae non per Zenonianam legem innovata sunt, sed veteribus legibus comprehensa, in sua firmitate in omni loco manentibus. * iust. a. iohanni pp. * <a 531 d. k. sept. Constantinopoli post consulatum lampadii et orestis vv. cc.>*

See BIONDO BIONDI, *LE SERVITÙ PREDIALI NEL DIRITTO ROMANO 67-73* (Giuffrè 1969) [hereinafter BIONDI, *LE SERVITÙ PREDIALI*]; BIONDI, *LA CATEGORIA ROMANA*, *supra* note 11, at 23-40; and M^a CARMEN JIMÉNEZ SALCEDO, *EL RÉGIMEN JURÍDICO DE LAS RELACIONES DE VECINDAD EN DERECHO ROMANO 25* (Universidad de Córdoba 1999).

For the western part of the former Empire, there was also some regulation given by the Germanic kings. For instance, in the *LEX ROMANA BURGUNDIORUM* [hereinafter L.R.B.]: *De servitute luminis vel aeris similiter constitutum: ut inter privatorum fabricas decem pedes, inter publicas quindecim dimittantur, secundum legem Theodosiani libri iv, sub titulo: de edificiis privatis et publicis.* L.R.B 17.6.

25. This explains, for instance, their absence from the *LIBER IUDICIORUM* in Visigothic times. See FRANCISCO PACHECO CABALLERO, *LAS SERVIDUMBRES PREDIALES EN EL DERECHO HISTÓRICO ESPAÑOL 125* (Pagés Editors 1991).

scholars—like Biondi and Bonfante²⁶—explicitly attest that it would have been during the Middle Ages that the category of legal and natural servitudes would have been developed, although we have not found any evidence of it. In truth, although the glossators and commentators hold the idea that some limits to property should be treated as servitudes—an idea they inherited from Justinian—their systematization follows the scheme of the *Corpus*. In fact, the main system that will encompass servitudes during the whole period between the reception of the *Corpus* and the French codification can be found in the work of Bartolus called the *arbor servitutum*, or tree of servitudes.²⁷ This is a sort of general systematization into personal, real (as the Louisiana Civil Code does in article 533) and mixed servitudes, taken from a fragment of Marcian that has been considered interpolated with which the book of servitudes starts in the *Digest*.²⁸ According to this systematization, real servitudes can be divided into urban and rural. The complex casuistry that regards the acts that may or may not be performed without the existence of a servitude are considered innominated servitudes, which can fit into the urban or the rural ones. The systematization was so successful that became the regular treatment of servitudes in the following centuries.

Legal humanism (16th century) kept this same systematization, although it put the division into a more logical place: after

26. BIONDI, LE SERVITÙ PREDIALI, *supra* note 24, at 75; PIETRO BONFANTE, 11.2 CORSO DI DIRITTO ROMANO. LA PROPRIETÀ 322 (Giuffrè 1966).

27. The systematization is a creation of Bartolus of Saxoferrato. Nevertheless, it was so successful that it was included in the later editions of the MAGNA GLOSSA as an introduction to the 8th book of the DIGEST. See BARTOLI A SAXOFERRATO, *supra* note 3, at 182v and for the MAGNA GLOSSA, 1 DIGESTUM VETUS SEU PANDECTARUM IURIS CIVILIS 1091 (Iunta 1592).

28. DIGEST 8.1.1 *Marcianus libro tertio regularum. Servitutes aut personarum sunt, ut usus et usus fructus, aut rerum, ut servitutes rusticorum praediorum et urbanorum.* (“Servitudes are personal, like use or usufruct, or real, like the servitudes on rural and urban states.” (Author’s translation.)) The quotation—strongly interpolated—comes from the jurist Marcian. He wrote a pedagogical work called *regulae*, where he probably introduced some new categories in order to systematize the *iura in re aliena* for teaching purposes. We think it is probable that the original fragment just said *iura praediorum aut personarum*.

addressing ownership, right before the other real rights, and not just before real servitudes, as the Louisiana Civil Code does. During humanism, mixed servitudes went into oblivion.²⁹ Anyway, at this historical point some new dogmatic categories came into existence in order to analyze servitudes. First, new legal definitions of servitudes appeared, which eventually led to the one adopted by the French Civil Code.³⁰ Second, some systematic elements were introduced. For instance, Donellus, when commenting on the composition of servitudes, tells us that they can be created either by nature or by non-natural elements.³¹ These non-natural elements can be due to our own action (conventions and pacts) or by an act of authority (a judge's act). This is not the proper division into natural, legal and conventional servitudes, but at least some of its elements are present.

Nevertheless, the jurists of legal rationalism (17th and 18th centuries) seemed to return to the Bartolistic scheme. In fact, Domat kept a traditional systematic approach, distinguishing between personal and real servitudes, and then focusing his treatment of the subject on the difference between urban and rural servitudes. As was traditional, the limits of property were included among the servitudes, following Justinian's model to the letter.³²

Astruc, author of an important treaty on servitudes at the beginning of the 18th century, even excludes servitudes from natural law,³³ because, according to him, they restricted ownership's natural freedom. His classification also followed the Bartolistic model. Desgodets, who wrote an important treaty on the

29. On the matter, Donellus follows this same line, passing from servitudes in general, to urban servitudes, rural ones and then the rules involved in *actiones confessoria* and *negatoria*. See DONELLI, *supra* note 5, at 3-4.

30. See *supra* note 6.

31. "On the acquisition of servitudes. They are acquired when they are rightly constituted. They are constituted by nature or by an external event" (author's translation); (*De acquirenda praedii servitute. Acquiri tunc, cum recte constituta est. Constitui Natura aut Externo facto.*) DONELLI, *supra* note 5, at 295.

32. JEAN DOMAT, 4 ŒUVRES COMPLÈTES 188 (Alex-Gobelet 1835).

33. See *supra* note 6.

matter regarding the *Coutume de Paris*, also followed the traditional model.³⁴

Pothier is more innovative on the treatment of servitudes. Although he followed the traditional Bartolistic order dividing servitudes into personal and real, to then distinguish between urban and rural,³⁵ he separated neighborhood relations and property limits from servitudes, which he conceptualized as quasi-contracts. He addresses them in a separate place, in the book of societies, in an appendix of community.

Olivier, author of the first revolutionary civil code project, also follows the traditional division of servitudes,³⁶ although he does not include any classification in his project.

The major systematic change comes only with the *Code Napoléon*. This legal body not only includes a somewhat extravagant definition of servitudes, constructed in a passive voice due to the reception of byzantine ideas from 16th century France, but it also includes an exotic systematic in the institution, which transforms a complex casuistry on property limits and *interdictae possessoria* into servitudes. Falcone points out that the definition would come from a work of the 16th century that was lucky enough to be included in a compilation of the 18th century, edited by Meerman.³⁷ Nevertheless, although the jurist under discussion—Jani a Costa—adopts the definition of Theophilus on real servitudes, he addresses the institution following the traditional systematic approach, without any mention of natural, legal and conventional servitudes. On the other hand, such a work, written in Latin and edited in Holland, would hardly have the diffusion and influence to impose itself in Napoleonic France over Pothier himself, practically without any discussion in the codifying

34. DESGODETS, *supra* note 6, at 2.

35. POTHIER, *supra* note 6, at 312-18.

36. D'OLIVIER, *supra* note 6, at 207.

37. The work would be GERARD MEERMAN, *NOVUS THESAURUS JURIS CIVILIS ET CANONICI* (Petrus de Hond 1751). See Falcone, *Note historique*, *supra* note 7, at 13-30.

commission.³⁸ It seems that the commission had already assumed the division and, therefore, another work must have the dubious honor of inspiring it on the subject. In fact, just a few years before the Cambacérés Project, a monumental work was published, written in a forensic style quite along the lines of the above-mentioned approach. It is the *Répertoire universel et raisonné de jurisprudence*, a sort of legal encyclopedia very popular in the late 18th century. In it, in volume 58, we find a systematic treatment of servitudes that can be considered as the key antecedent of the French Civil Code. In fact, we find there not only a definition of servitudes in the passive voice,³⁹ but it also takes Donellus' model of sources of servitudes, transforming it into the systematic axis of the subject by introducing the division of servitudes into natural, legal and conventional.⁴⁰ Neighborhood relations are included in legal servitudes,⁴¹ and institutions that traditionally were not included among servitudes, such as the common wall, are considered among them. In short, this work constitutes the dogmatic base of the *Code Napoléon's* treatment of servitudes. The article was written by Jean Phillip Garran de Coulon, who later participated in the French codification by presenting a proposition to the National Assembly to name a commission to codify the civil

38. In fact, when one checks the preparatory works of the codifying commission, the uncritical manner in which such a revolutionary way to systematize servitudes is taken by the Commission is striking. The whole title on servitudes is adopted with only minor observations. The project was presented by Treilhard in the session of 4th *Brumaire* of the 12th year of the Revolution (October 27, 1803). Although some discussion was generated among the commissioners that were present (Cambacérés, Treilhard, Bigot-Prémeneu Pelet, Berlier, Regnaud and Tronchet), their concerns were on other aspects of the project. In fact, both the definition (art. 637) and the division (art. 639) were immediately approved. See PIERRE ANTOINE FENET, 11 RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL 245 *et seq.* (Videdoq 1836).

39. “*L’assujettissement d’un domaine à un autre domaine, ou à une personne, en vertu duquel le possesseur est obligé d’y souffrir certaines charges ou inconvénients, au profit d’autrui, comme l’écoulement des eaux de la maison voisine, un passage, une vue, etc.*” PIERRE JEAN JACQUES GUILLAUME GUYOT, 58 RÉPERTOIRE UNIVERSEL ET RAISONNÉ DE JURISPRUDENCE CIVIL, CRIMINELLE, CANONIQUE ET BÉNÉFICIALE 232 (Panckoucke 1783).

40. GUYOT, *supra* note 39, at 238.

41. *Id.* at 240.

law.⁴² Both its diffusion and the prestige of the author of the work would explain the adoption of its systematization by the codifying commission, who aimed to depart from the medieval models that had anteceded the Code.⁴³ With a revolutionary spirit, a confused nomenclature and a weak dogmatism were adopted, which forced 19th century French jurisprudence to create a regulation of neighborhood relations outside of servitudes.

In conclusion, it is worth taking a second look at Professor Yiannopoulos' proposal to modify the Louisiana Civil Code's division of servitudes, replacing natural and legal servitudes for limitations on the content of ownership and its subsequent discussion.⁴⁴ This should involve a close examination of the treatment of servitudes and limitations of ownership established in the BGB. This legal body limits the concept of servitudes to conventional ones⁴⁵ (as in traditional Roman law), while the legal and natural servitudes are encompassed in the larger category of limitations to ownership,⁴⁶ where other important aspects, as the immissions theory, are regulated. At that time, the traditionalist opinion prevailed over pure legal dogmatism in the belief that by preserving this odd classification, the civil law tradition that characterizes Louisiana would be secured. By this historical analysis we would like to prove that this division is not only illogical, but it is not even really founded in the civil law tradition. It was invented shortly before the *Code Napoléon* and it has persisted in many civil codes because of the authority of the French codification. Like many legal transplants, it is founded on

42. See PETER VAN DEN BERG, *THE POLITICS OF EUROPEAN CODIFICATION: A HISTORY OF THE UNIFICATION OF LAW IN FRANCE, PRUSSIA, THE AUSTRIAN MONARCHY AND THE NETHERLANDS* 195 (Europa Law Publ'g 2007).

43. For instance, Pardessus, in the most popular treaty on servitudes after the codification, says that even the name of the institution should be changed in order to distinguish it from the one that existed during the Ancien Régime. JEAN-MARIE PARDESSUS, *1 TRAITÉ DES SERVITUDES, OU SERVICES FONCIERS* 4-5 (8th ed., Thorel 1838).

44. See 1976 La. Acts, No. 103.

45. See para. 1018 to 1029, Bürgerliches Gesetzbuch [BGB].

46. See para. 905 *et seq.*, BGB.

“the authority of the donor system,” but “[a]t times this respect might lead to odd results.”⁴⁷

47. WATSON, *supra* note 15, at 57.