

Louisiana Law Review

Volume 11 | Number 2

The Work of the Louisiana Supreme Court for the

1949-1950 Term

January 1951

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Repository Citation

Robert A. Pascal, *A Report on the French Civil Code Revision Project*, 11 La. L. Rev. (1951)

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A Report on the French Civil Code Revision Project

Robert A. Pascal*

The French Civil Code of 1804, the model for the Louisiana Civil Code and many others, has been in the process of revision since June 1945. Now that the Louisiana Civil Code itself is about to be revised,¹ local interest in the French project should be especially high. The work of the French Revision Commission may well serve to lighten the task of the Louisiana redactors by suggesting methods of procedure to be imitated or avoided here, and should also provide a rich source of information on the advisability of retaining or altering the formal statement or substantive content of the existing code. It is principally to demonstrate this possible usefulness of the French Revision Commission's experience that the following review of their published reports is presented.²

The Revision Commission consists of twelve persons appointed by the Minister of Justice: three professors from the law faculties, one of whom is president, three members of the *Conseil d'Etat*, three judges, and three others, either lawyers practicing before the *Conseil d'Etat* and the Court of Cassation or Appellate Courts, or ministerial officers. Assisting the Commission is a permanent full-time General Secretariat consisting of a Secretary General, chosen from the law faculties, and three other Secretaries, all of whom must be doctors of law, and two of whom must be judicial magistrates.³ Thus while the Commission itself, in whom the ultimate authority and responsibility rests, is representative of all branches of the legal profession, the General Secretariat, to which is entrusted most of the preparatory work, is weighted with highly trained legal scientists.

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1. Act 335 of 1948 instructs the Louisiana State Law Institute to prepare a draft or projet of a revised Civil Code for the legislature's consideration.

2. *Travaux de la Commission de Réforme du Code Civil*, Volumes for 1945-46, 1946-47 and 1947-48. These reports are hereinafter cited as *Travaux* with indication of date of volume and page. A fourth volume of the reports, for 1948-49, appeared after the writing of this paper and therefore was not considered in any way in the preparation of the body thereof.

3. Decree No. 45-1194, June 7, 1945, of the Provisional Government of the French Republic. *Travaux* (1945-46) 11.

The Commission as established is three times as large as that charged with the redaction of the Code of 1804, but much smaller than that of 1904, which proved unwieldy and inefficient. Its twelve members have been divided into four subcommissions, each charged with the preliminary work on four phases of the revision: the General Part, Persons and the Family, Obligations, and Property and Successions. The tentative drafts are prepared by the members of the subcommissions or by the secretaries, fully discussed by the proper subcommission, redrafted as often as necessary, and then presented to the full Commission for discussion and action.

In the three years from the appointment of the Commission to the middle of 1948, the latest date for which we have published reports, the Commission finished the very substantial and important, but to the French less controversial, drafts on absentees,⁴ legal administration of the estates of minors during the marriage of their parents,⁵ tutorship,⁶ emancipation,⁷ adoption,⁸ marriage,⁹ divorce and separation,¹⁰ the classification of things,¹¹ and possession.¹² In addition, the Commission succeeded in completing the most difficult and controversial draft on juridical acts.¹³

The writer has been given to understand that since the summer of 1948 the Commission has finished a rather lengthy title on the conflict of laws and has advanced far toward the completion of drafts on marriage regimes and the rights and obligations of married persons toward each other, this latter not having been treated in the chapter on marriage. Indications are that the community property regime will be much modified if not abandoned, and it seems that the authority of the husband and father will be much reduced and that of the wife and mother increased. The Commission is believed to be preparing drafts on obligations, contracts in general, and particular contracts, but proceeding very slowly on these subjects.¹⁴

4. *Travaux* (1945-46) 533.

5. *Travaux* (1945-46) 401.

6. *Travaux* (1945-46) 403.

7. *Travaux* (1945-46) 414.

8. *Travaux* (1945-46) 645.

9. *Travaux* (1946-47) 593.

10. *Travaux* (1947-48) 664.

11. *Travaux* (1946-47) 998.

12. *Travaux* (1946-47) 1001.

13. *Travaux* (1947-48) 339.

14. An examination of the fourth volume of the reports, *Travaux* (1948-49), reveals that during that year the Commission adopted in final form three new drafts, one on the plan or outline of the Civil Code (p. 88), another on the preliminary title on law in general (p. 322), and the third on formal

The decree of the provisional government authorizing the revision¹⁵ gave the Commission absolute discretion in the execution of its assignment. It was simply "directed to prepare a general revision of the Civil Code." What would be its form and content was not really decided until the end of the second year of deliberations, a factor which explains why all drafts adopted in the meantime were on subjects certain to be included in the new code and as to the statement of which there was no serious controversy. The new regime would require considerable modification of the principal of individual freedom in dealing with one's fellow man, the fundamental policy of the Code of 1804, and greater accentuation of the responsibility of the individual and the integration of his activity with society. Much which was private law in 1804 had become public law. Moreover, the Commission felt charged with the obligation to draft such a code as would permit French legal science to regain the preeminence which it had lost in the twentieth century to the German and Swiss codifications. There were the serious questions whether the new code should or could be a scientific statement of the law as well as a practical code for lawyers, whether it should include commercial as well as non-commercial private law, and whether any of the public law, so prominent in labor and social legislation, should be incorporated in the new code.

On these questions there was little unanimity of opinion among the members of the Commission and open disagreement between the Commission and the original members of the General Secretariat. M. Coste-Floret, the first Secretary General, proposed that the new code be a radical departure from any existing code and recommended that it be divided into four parts on the family, the professions, direct relations between the State and the individual, and matters in which individuals are free from direct State control.¹⁶ The Commission was not ready to go this far. It admitted the need for taking into account the changes in French life, but (after discussions said to be lengthy, but not reported) refused so to alter the traditional content of the Civil Code.

To assist it in making these major policy decisions, the Commission requested of the Secretariat two major reports. The first was on the influence of the French Civil Code outside France

sources of voluntarily assumed obligations and the formation of contracts (p. 704). Other drafts considered included those on matrimonial regimes and private international law.

15. *Supra*, note 3.

16. *Travaux* (1945-46) 27.

before 1900 and the influence of the German and Swiss codes since that date.¹⁷ The second was a survey of the doctrinal appraisals of the Civil Code both from a technical point of view and from that of its adequacy or inadequacy in the light of the changes in the economic and social order.¹⁸ Shortly after the submission of these reports, M. Coste-Floret, the Secretary-General, resigned. The reason for his resignation is not given in the reports, but it is difficult to see how he could have continued to serve in this most important capacity while in substantial disagreement with the Commission on the form and content of the new code.

After the summer vacation of 1945 the Commission seems to have been in accord as to the substantive content of the new code. In general it was to contain the same subject matter included in the French Civil Code of 1804. It was not to include public law or commercial law, though the integration of public and private law would be essential, and the principles of the Civil Code would remain the basic statement of legal theory to which administrative and commercial law would in the large conform. The discussion now centered about the technical or formal aspects of the code, the manner in which it would be developed and written.

The principal issue of this kind was whether there should be a book or title on law in general, and especially whether that book or title should contain a chapter on juridical acts in general.¹⁹ The "General Part" and the chapter on juridical acts are triumphs of the German Civil Code of 1896²⁰ and perhaps major reasons for the popularity of German legal science since that date. In the French Civil Code, as in that of Louisiana, there is no "General Part" and the rules on conventional obligations are applied to other juridical acts by analogy. The adoption of what is in effect the essence of the plan of the German Civil Code

17. By Paul Coste-Floret, Secretary General of the Commission. *Travaux* (1945-46) 34-67.

18. By Louis Mallet, Secretary of the Commission. *Travaux* (1945-46) 68-93.

19. A brief explanation may be in order here. A juridical act is any voluntary act undertaken for the purpose of producing consequences in law. An offer to contract, the acceptance of such an offer, the protesting of a note, the making of a will, the filing of a petition, the renewal of an inscription, are all juridical acts. The juridical act differs from a juridical fact, in that whereas the former is primarily an act of the will, the latter is a situation (a material fact, as it were) which itself gives rise to legal consequences. Marriage, filiation, neighborhood, tort, and unjustified enrichment are all situations, facts rather than acts, giving rise to legal relations, and therefore juridical facts.

20. German Civil Code, Articles 1-240. The section on juridical acts consists of Articles 104-185.

would not have introduced strange concepts and ideas into French law, however, for twentieth century French doctrine has made it a part of French legal science.²¹ Nevertheless this plan was regarded with skepticism by some and opposed by other members of the Commission. M. Mazeaud, of the faculty of law at Paris, for example, doubted that any purpose would be served, believing that all of the articles would have to be repeated in the title on obligations; and M. Latournerie, a member of the *Conseil d'Etat*, was afraid that any general treatment of juridical acts would be pure theory, not susceptible of application as such.

Fortunately all members of the Commission were determined that the new Code must be an instrument for lawyers, usable by lawyers and not only by legal scientists, and agreed that the decision to have a separate title or chapter on juridical acts in general should be reached only after a demonstration of its workability. Accordingly the subcommissions on the General Part and on Obligations prepared drafts of chapters representative of the opposing approaches, the one on juridical acts,²² the other on the formal sources of obligations.²³ When the two were compared it became clear that the drafts were much of the same order and that it would be better to approach the subject more generally as juridical acts. To the subcommission on Obligations, however, headed by M. Mazeaud, went the honors for the draft, for their texts were used as the basis of the chapter.²⁴

The chapter on juridical acts²⁵ is divided into two sections, one on the conditions for the validity of juridical acts, the other on the nullity of such acts and their confirmation. The section on the conditions for their validity is subdivided into seven subsections, on volition, capacity, representation (whether as tutor, administrator, mandatary, or gestor), the object of juridical acts, cause, motive, and finally the requirements as to the form of such acts. The similarity between this draft on juridical acts and the corresponding section of the German Civil Code is obvious, but, as was mentioned before, the treatment will not be new to French legal science or to the French bar. Nor must this rap-

21. This fact may be confirmed by the examination of almost any modern standard treatise on French Civil Law. The familiar student textbook treatise by Planiol, *Traité élémentaire de droit civil*, any edition, is a good example.

22. *Travaux* (1946-47) 65-68, 104-107.

23. *Travaux* (1946-47) 217-228.

24. *Travaux* (1947-48) 11, 12.

25. The texts first adopted as final appear in *Travaux* (1947-48) 339-347. The paragraph on the *object* of juridical acts, however, was later amended and appears in *Travaux* (1948-49) 707.

prochement between the German and French legislations be taken as an indication that the French texts are in any way so pedantic and mechanical as are the German. While making the new code a reflection of the legal science, the Commission has succeeded in preserving the brevity, clarity, and simple style of the Code of 1804.

The other portions of the Code already prepared very largely retain the form of the present Civil Code and the changes reflect corrections and improvements in the substance and statement of the law rather than complete restatement. Simplification without radical change seems to be a guiding principle. A good example of what has been done is to be found in the Commission's version of the title on minors.²⁶ Juridical acts affecting the minor's patrimony are divided into two types, those requiring no more than the act of the unemancipated minor's representative or of the emancipated minor himself, and those requiring the act of such person plus the authorization of another. Whatever the father can do alone without authorization, the tutor and the emancipated minor also may do without authorization. Whatever the father may not do without authorization of the mother, the tutor may not do without authorization of the family meeting, and the emancipated minor may not do without that of a curator. This is indeed an improvement over the present law, which resembles our own. It provides for a check on the father's representation of the minor in important matters during marriage. It gives a single standard for acts possible with or without authorization or assistance, totally replacing the several conflicting enumerations of acts possible by the father, tutor, and emancipated minor with or without authorization or assistance, and it makes unnecessary the family meeting whenever the minor is emancipated. Another example is the classification of all married persons as majors,²⁷ totally avoiding the conflicting claims of husbands and the curators of emancipated minor women, and resolving once and for all the anomaly of the administrator of the community being under the authority of a tutor. Of course, over-simplification can result in the loss of refinement, and the writer has the impression that the French Commission has been willing to sacrifice some refinement for this simplicity. Much can be said for such a position, however, for excessive refinement can frustrate one of the prime purposes of codification, the ascertainability of the rule of law.

26 *Travaux* (1945-46) 401 et seq.

27. *Travaux* (1945-46) 414.

On the whole, the Commission has been quite conservative in doctrinal approach. The division of things, or *biens*, into corporeals and incorporeals, movables and immovables, though clarified in particulars, is retained.²⁸ The family meeting remains an agency of the tutorship.²⁹ The necessity of parental or ancestral consent for the validity of a marriage is in the new draft, though the age up to which that consent is required is reduced from twenty-five to twenty-one years.³⁰ Separate treatment of object, motive, and cause as essential conditions for the validity of juridical acts is retained.³¹ Separation and divorce are allowed for proven causes only, and only if these render the conjugal life intolerable.³²

It may be well to note two qualities of the method of redaction. First, much of the procedure one finds in the present French Civil Code, as in our own, is being shifted to the Code of Civil Procedure. Often when the Commission has completed a draft for the Civil Code projet, it prepares a draft of articles on the procedure required so that the Code of Civil Procedure might be amended at the proper time. This is true, for instance, of the drafts on divorce,³³ tutorship,³⁴ and absentees.³⁵ It may very well be, if complete consistency is desired, that a proper revision of a Code of Practice cannot be made until the Civil Code revision is completed. Secondly, the drafts contain many articles defining and classifying the concepts. The new Civil Code will be an instrument for French lawyers, but it will be, no less than is our own, a textbook and a code. This neither can or should be avoided in a jurisdiction which wants to live by the written law, for otherwise judges or doctrinal writers must so far develop the legal science that it in turn may replace the legislation as the law in fact.

Whether the new projet will ever be completed, and whether if completed it will ever be adopted as the law of France, is difficult to predict. But whether or not the French projet is ever adopted, the work of the Commission is nevertheless an experience from which profit can be derived. The Commission has demonstrated that it is still possible to write a systematic code of laws in clear, concise, readable, and intelligible language. The

28. *Travaux* (1946-47) 998-1000.

29. *Travaux* (1945-46) 403, 404.

30. *Travaux* (1946-47) 594-596.

31. *Travaux* (1947-48) 343-344.

32. *Travaux* (1947-48) 664.

33. *Travaux* (1947-48) 668-673.

34. *Travaux* (1945-46) 417-419.

35. *Travaux* (1945-46) 540.

French Code of 1804 remains one of the gems of French prose style. The new draft promises to be as much. English, with all its richness, need not be less pleasing. Secondly, a true revision of the Code, as distinguished from a revision of particular parts of it, will require a very considerable portion of the time of a number of experts for a good number of years. The revision work in France has been in progress a full five years and is far from completion. Yet the Commission is composed of some of the ablest French legal scientists and it is assisted by an expert full-time staff. The meetings of Commission and subcommissions of necessity are numerous. The chapter on juridical acts, for example, was adopted after sixty-two meetings of the Commission and sub-commission over a period of three years and twenty-one days. Of course, this was the most difficult chapter. But the simple title on marriage required sixteen meetings over a period of thirteen and one-half months. The revision of the Louisiana Civil Code may involve even more time if a thorough work is attempted. In addition to the ordinary vicissitudes of redaction, the revisors will have a problem far more difficult than any presented to the French Commission, that of integrating the civil law and common law elements of our juridical system. This task may even involve the development of a juridical system which will synthesize both elements. In any event, it will require time for original thought.

Finally, it may be in order to state a word of warning against the too close imitation of the new French projet in Louisiana. Louisiana is simply not a civil law state in the same sense that France is, and the training of the Louisiana bench and bar does not equip it properly to use and apply a code such as the new French projet promises to be. This observation is directed to the form of the projet and to the juridical method it expresses and requires, not to the substance of the law. Louisianians do not have the same legal method as the continentals, have never had it, and are not likely to have it for some time, if ever at all, new code or no new code.

The French approach attributes the law-making function to the legislature alone. Nothing else is cognizable as positive law. When necessary to determine the policy behind the law it must be ascertained from the implication of the texts. The texts, the statutes, are never an expression of a part of the law which exists without expression. They are the law. Hence the French rule

denying to judges the right expressly to interpret the law.³⁶ Trial judges apply the law to the facts, and judges in cassation determine whether the decision rendered below conforms or does not conform to the law. Each decision amounts to an announcement that a certain result is indicated by the law, but no more. The judge is absolutely forbidden to state the general meaning of a law.

This has important consequences. The decisions have much less significance than they do in Anglo-American countries precisely because they do not explain the meaning of the law. In such a jurisdiction legal theory and interpretation must either be expressed by the legislature or deduced from the legislation. The latter is the task of doctrine. As the doctrinal writers are usually more concerned with the exposition of the scheme of the law as a whole than with reaching a decision in a particular case, doctrine is usually a guide in keeping with the legislation. Because judges cannot easily depart from accepted doctrine on which lawyers and laymen have relied, their decisions tend to maintain the doctrine and to support the legislation. Thus the codes and the statutes remain supreme. But wherever judges may interpret law as well as apply it, the interpretations quite naturally loom more important than the texts to lawyers and clients; and because the lawyers feel compelled to advise their clients on the basis of the interpretations, the judges then feel compelled to follow their own interpretations, rather than the texts, wherever possible. Hence a code will never mean to Louisianians what it can and does mean to continentals. Here every decision amends or repeals or at least supersedes in part the written law. Under such conditions doctrine is of relatively little importance and therefore not likely to prosper. Law instruction itself, being forced to cope with the realities, can make little more than a pretense at being scientific.

This poses the question whether the revision of the Civil Code will be worth more serious effort than that required to state some clear, consistent, and concise fact-situation-solving rules. The Louisiana Civil Code has not been treated as a scientific statement of the law, though that it is. The doctrines of consideration, "quantum meruit," and contributory negligence

36. Art. 5, French Civil Code. Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises.

Author's translation: Judges deciding cases submitted to them are forbidden to render opinions interpreting the law in general terms or to declare their opinions binding in the future.

are without textual justification. The absolute liability of employers for the acts of their employees has been upheld in spite of an article proscribing it.³⁷ The whole of the law of non-representative agency has been constructed on a title of the Code providing for representative agency alone and derived from continental systems which even to this day do not recognize non-representative agency.³⁸

Louisianians must face the facts. The principal law-making body in the state is the judiciary. Perhaps this method is better than the continental, but if it is, it is useless to labor for the production of an instrument expressive of a highly developed science of law, for it cannot long endure as the law in fact.

37. See Art. 2320, La. Civil Code of 1870, and the case of *Nelson v. Crescent City R. Co.*, 49 La. Ann. 491, 21 So. 635 (1897).

38. See La. Civil Code of 1870, Book III, Title XV, "Of Mandate," Articles 2985-3034, particularly Article 2985, which recognizes only representative agency; see also *Sentell v. Richardson*, 211 La. 288, 29 So. 852 (1947).