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## Public Law: Louisiana Constitutional Law

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## LOUISIANA CONSTITUTIONAL LAW

*Lee Hargrave\**

## POWER TO INITIATE PROSECUTIONS

*Guidry v. Roberts*<sup>1</sup> held unconstitutional a requirement of the Louisiana campaign practices law that criminal prosecutions for violation of the act be instituted by a district attorney "only on the basis of information forwarded to him by a supervisory committee."<sup>2</sup> The supreme court thought the provision to be inconsistent with the requirement of article V, section 26(B) that the district attorney "shall have charge of every criminal prosecution by the state in his district . . . ."

The decision may be correct because of the inartfully drawn statute; however, the court's language goes further:

The power of the district attorney to initiate criminal prosecutions for such offenses in his district (or not to) appears to be limited only by the provision of Article 4, Section 8, that, for cause when judicially authorized, the attorney general may institute, prosecute, or intervene in a criminal action or proceeding.<sup>3</sup>

The quoted statement of the district attorney's powers over institution of prosecutions is not supported by the text or the background of section 26. The section refers to "having charge" of prosecutions and does not address itself to "initiation of prosecutions." The provisions that do concern commencement of criminal actions indicate the district attorney has no absolute right over whether to prosecute a case or not. Article V, section 34 recognizes the existence of grand juries and article I, section 15 requires a grand jury indictment for prosecution of capital offenses and crimes punishable by life imprisonment. The language of section 15 which requires that prosecution of felonies be initiated by indictment *or* information leaves open to the legislature the matter of deciding which of the two devices might be required in instances where the constitution does not

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1. 335 So. 2d 438 (La. 1976).

2. LA. R.S. 18:1492(B)(1) (Supp. 1975). The committee is composed of the secretary of the Senate, the clerk of the House, the legislative auditor and the executive director of the legislative council.

3. 335 So. 2d at 446-47.

require a grand jury indictment. It also allows commencement by a citizen's affidavit in misdemeanor cases.

The provisions of section 26 were adopted as part of a debate over the relationship between the attorney general and the district attorney.<sup>4</sup> Concern was expressed over checks and balances between those two officials, and little debate was devoted to legislative power over commencement of a prosecution. It would be consistent with that legislative history to construe the section in light of its referee function and not as a constraint on the legislature in deciding how prosecutions ought to be begun.

The language of section 26 comes from article 61 of the Code of Criminal Procedure, which states that "the district attorney has entire charge and control of every criminal prosecution instituted or pending in his district" and from the language that he "is the representative of the state before the grand jury and is its legal advisor . . . ." in article 64 of the same Code. Conspicuously missing from the constitution's language, however, is the phrase of article 61 that a district attorney "determines whom, when, and how he shall prosecute."

#### OPINIONS

The supreme court has been deciding some cases within its appellate jurisdiction without issuing the customary full-length opinion. Particularly in routine criminal cases, the court is simply announcing its judgment by per curiam statements indicating: "Affirmed." In *State v. Hills*,<sup>5</sup> Justice Summers objected to such a procedure and argued that it was unconstitutional. The procedure may be questioned in terms of policy, but it is not in violation of the constitution. While the 1921 constitution did contain the provision, "The judges of all courts shall refer to the law and adduce the reasons on which every definitive judgment is founded,"<sup>6</sup> the 1974 constitution deleted that provision and contains no such injunction. It would be contrary to that clear change in text to infer from other provisions a constitutional requirement that opinions be issued in every case.

#### JURY EXEMPTIONS

Under prior practice a large number of legislative exemptions from jury service produced a system in which those persons best able to serve as

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4. See Hargrave, *The Judiciary Article of the Louisiana Constitution of 1974*, 37 LA. L. REV. 765, 831 (1977).

5. 337 So. 2d 512 (La. 1976). See footnote 1 of the dissenting opinion for a listing of recent cases in which per curiam affirmances were used.

6. LA. CONST. of 1921, art. VII, § 1.

jurors seldom did. To avoid the log-rolling effect of interest groups obtaining exemptions through legislative acts, the constitution removed the power to grant exemptions from the legislature and granted it to the supreme court.<sup>7</sup> The court has adopted rules granting some exemptions, but provided that the exemption must be claimed by the person entitled to it.<sup>8</sup> It would be a violation of that rule for jury commissioners to exclude from the jury venire the names of persons they believed to be exempt; it is necessary for those exempt persons to be notified of their selection and then they must claim their exemption. In *State v. Procell*<sup>9</sup> the court recognized that a jury selected in violation of this rule cannot validly convict a person, and reversed a conviction returned by such an improperly selected jury.

#### ATTORNEY GENERAL AND DISTRICT ATTORNEY

*State v. Neyrey*,<sup>10</sup> on rehearing, recognizes the validity of a criminal prosecution instituted by the attorney general at the request of a district attorney even though court approval of the attorney general's action was not obtained. In *Neyrey*, because the prospective defendant had been a former client of the district attorney, the district attorney requested in writing that the attorney general handle the case, stating that "you are hereby given full authority to make any and all decisions necessary and proper in accordance with your oath."<sup>11</sup>

The case is consistent with article IV, section 8 even though that section appears to require court approval based on cause before the attorney general can "institute, prosecute, or intervene in any criminal action or proceeding."<sup>12</sup> Judicial intervention is designed to introduce an umpire to settle disagreements between a district attorney and the attorney general over the handling of a criminal matter. In the absence of a dispute, the cumbersome court approval procedure is unnecessary.<sup>13</sup> The provision was not designed "to hinder cooperative efforts between a district attorney and our state's chief legal officer . . ."<sup>14</sup> In such instances, it is consistent with that purpose to include within the power "to advise and

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7. LA. CONST. art. V, § 33: "The supreme court shall provide by rule for exemption of jurors." See Hargrave, *supra* note 4, at 845.

8. LA. SUP. CT. R. XXV, § 3.

9. 332 So. 2d 814 (La. 1976).

10. 341 So. 2d 319 (La. 1976).

11. *Id.* at 327.

12. LA. CONST. art. IV, § 8.

13. Hargrave, *supra* note 4, at 831.

14. 341 So. 2d at 324.

assist”<sup>15</sup> on written request the power to institute a prosecution and to try the case.

CONSTITUTIONAL CONSTRUCTION: MANDATES, PREAMBLES AND  
“AS PROVIDED BY LAW”

An ideal constitution would contain only self-executing provisions that are judicially enforceable and that have a clear effect without the necessity for legislation to implement them. Real-life constitutions, however, are drafted by political persons working through a political process that often demands provisions which sound impressive but which have little effect. At times, the political process results in vague provisions that put off to another day the decision about the exact contours of a rule simply because the votes for the clear rule were not there. A large part of constitutional construction is understanding the nature of non-self-executing provisions which result from this kind of process and construing them in the sense in which they were adopted.

A high-sounding preamble, for example, is *de rigueur* in a constitution though delegates realize it has virtually no legal effect.<sup>16</sup> The Louisiana Constitution even goes so far as to have two preambles—Article VIII on education has its own separate preamble redounding with the jargon of “learning environments and experiences” and one’s opportunity to “develop to his full potential.”<sup>17</sup>

The Louisiana Constitution contains a number of mandates to the legislature even though it was known by the delegates that such provisions are not self-enforcing and that no mechanism exists to force the legislature to comply with a mandate. Often, such mandates resulted when proponents of some policy were unable to garner the votes necessary to adopt an enforceable rule; they compromised on a mandate which they saw as a psychological aid for their position or which might be of political aid to their view in the future. Such was the background of the provision, “The legislature shall provide for a uniform system for securing and compensating qualified counsel for indigents.”<sup>18</sup> The provision has no practical effect, as the supreme court has recognized, in terms of judicial enforce-

15. LA. CONST. art. IV, § 8.

16. STATE OF LOUISIANA CONSTITUTIONAL CONVENTION OF 1973 VERBATIM TRANSCRIPTS, Aug. 28, 1973, at 52 [hereinafter cited as PROCEEDINGS]; Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 2 (1974).

17. LA. CONST. art. VIII; see PROCEEDINGS, *supra* note 16, Nov. 9, at 18, 24, 36, 122.

18. LA. CONST. art. I, § 13.

ment without legislation.<sup>19</sup> Similarly, when the environmentalist forces were unable to pass a strong, enforceable right to a healthy environment, they compromised on a general statement of policy followed by a mandate, "The legislature shall enact laws to implement this policy."<sup>20</sup> Until the laws are adopted, the policy statement remains unimplementable directly by the courts, and no mechanism exists to force the legislature to adopt any particular laws on the subject.

Another common drafting technique used in the Louisiana Constitution was to qualify a rule or a prohibition with the phrase "as provided by law." Often, the effect of such a provision is the same as if nothing about the matter were contained in the constitution, for the legislature can do anything not prohibited. (E.g., "per diem and expenses may be provided by law."<sup>21</sup>) However, the use of the "as provided by law" formula to modify a provision can have different effects depending on the context used, and such a rule can often be effective without implementing legislation, as the provision continuing in existence the justice of the peace courts, "subject to change by law."<sup>22</sup> Similarly, the commissioner of insurance is a constitutional officer who must be elected statewide, but he has no constitutional powers; "the commissioner shall have powers and perform duties authorized by this constitution or provided by law."<sup>23</sup>

Consistent and correct application of such provisions hinges on strict attention to the wording of such provisions, for the Committee on Style and Drafting was quite careful to be as explicit as possible in using the as-provided-by-law formula. Justice Tate, who was chairman of the Committee on Style and Drafting, is accurate in pointing out the understanding of the delegates that:

When used in this context, as it was in 103 other instances in the 1974 constitution, the term "provided by law" means "provided by legislation." "Law is the solemn expression of legislative will." Louisiana Civil Code, Art. 1.<sup>24</sup>

In the absence of other limiting provisions, the formula allows the legislature to provide by law as it chooses. Indeed, in solving many of the close

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19. See *State v. Campbell*, 324 So. 2d 395 (La. 1975); *State v. Bryant*, 324 So. 2d 389 (La. 1975).

20. LA. CONST. art. IX, § 1. PROCEEDINGS, *supra* note 16, Dec. 18, at 6-9; *id.*, Sept. 14, at 2-6.

21. LA. CONST. art. VIII, § 8.

22. *Id.* art. V, § 20.

23. *Id.* art. IV, § 11.

24. *Board of Elem. & Sec. Ed. v. Nix*, 347 So. 2d 147, 151 (La. 1977).

questions that arose during the constitutional convention, the outcome was to establish a rule, but to allow the legislature freedom to change it as it would in the future, sometimes by majority vote, sometimes by supermajorities.<sup>25</sup>

The supreme court in *South Central Bell v. Louisiana Public Service Commission*<sup>26</sup> recognized the nature of the as-provided-by-law formula in applying article IV, section 2(D) which provides that the Public Service Commission must rule on rate applications within one year of filing and that failure so to rule allows the increased rate to be put into effect as provided by law. The court held that the automatic increase procedure was not established by the constitution and required legislative action. Since the legislature had enacted no such law, no constitutional requirement allowing the automatic increase existed. The court was clearly correct in applying the text exactly as it reads. The lower court in the instant case had depended on inferences from structure to allow the applicant to implement the rate increase; however, those inferences are inconsistent with the text and the history of the text.

The convention was willing to require decisions within a year of the filing of an application for an increase, but that alone accomplishes little, for no effective sanction exists. A mandamus suit is slow and costly; a malfeasance action against commission members is a cumbersome and unlikely remedy. An early proposal was that "[i]f a decision is not rendered within six months from the filing date of any proposed rate schedule, it shall be deemed to be tentatively approved."<sup>27</sup> This self-executing provision was not adopted and was replaced with the formula that the increase could be put into effect as provided by law.<sup>28</sup> In consistent convention language, that meant the provision was not self-executing. Subsequent word changes made the result clearer and the constitution explicitly says that the "increase may be put into effect, but only if and as provided by law . . . ."<sup>29</sup>

The legislature also has great leeway in dealing with the powers of the State Board of Elementary and Secondary Education (BESE). The constitution establishes BESE as a corporate body and specifies the composition of the board, but it gives the board no powers free of legislative

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25. See Hargrave, *supra* note 4, at 772.

26. 334 So. 2d 189 (La. 1976).

27. *Committee Proposal 34*, § 14(D)(2) in OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1973 OF THE STATE OF LOUISIANA, Dec. 20, 1973, at 9.

28. *Id.*, Dec. 20, at 16 (Roy amendment).

29. LA. CONST. art. IV, § 21(D)(3).

control.<sup>30</sup> The power to "supervise and control the public elementary and secondary schools" and the "budgetary responsibility for all funds appropriated or allocated by the state for those schools" are qualified by the explicit language, "all as provided by law."<sup>31</sup> The language seems as clear as it could be, especially the use of "all" to indicate that every power mentioned is so qualified and not just the last of the series. Such broad legislative power is consistent with the need to order the relationship between a board composed of both elected and appointed members and an elected superintendent of education. The only constitutional statement of supremacy here is that if the superintendent is made an appointive officer, BESE must make the appointment.<sup>32</sup>

That BESE is subject to almost total legislative control over its powers is confirmed by comparison with the language used to enumerate the powers of the higher education boards. The "as-provided-by-law" formula is conspicuously absent from sections 5(D), 5(E), 6 and 7 which grant powers to the Board of Regents and the education management boards.

*BESE v. Nix*<sup>33</sup> represents supreme court recognition of the legislative authority over BESE just discussed. The case correctly upholds most of the provisions of Act 455 of 1976 against an attack that they interfere with BESE's constitutional powers.

However, the opinion by Justice Tate seems to recognize the existence of some powers in the board which the legislature cannot take away. He says:

However, the constitutional provision cannot be interpreted to mean that the legislature can regulate and limit the constitutional power of the board to supervise, control, and budget elementary and secondary education.<sup>34</sup>

It is accurate to say the legislature cannot abolish the board or change its method of composition and selection, for those matters are fixed by constitutional provision. But the constitution enumerates no powers unqualified by the as-provided-by-law formula. Any constitutional powers in the board would have to be developed by some argument based on inference and structure and cannot rest on text, for the text only grants powers that are "all as provided by law."

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30. *Id.* art. VIII, § 3.

31. *Id.* art. VIII, § 3(A).

32. *Id.* art. VIII, § 3.

33. 347 So. 2d 147 (La. 1977).

34. *Id.* at 153.

Even if one focuses on the provisions of section 2 that the superintendent shall implement the policies of BESE, that still leaves the question of what policies BESE has the power to establish, a question whose answer takes us back to section 3 and the fact that the powers there are as provided by law.

It is no solution to invoke the rule that the legislature cannot deprive a constitutional agency of the ability to perform its constitutional functions by withholding the means to perform. This again raises the question of defining BESE's constitutional function, a question that again, by the text of section 3, is answered by "all as provided by law."

Admittedly, this approach can result in a constitutional board stripped of all powers—an impotent formal group with no authority. But that is what the constitutional convention did in recognizing legislative power ultimately to decide the difficult political question that the convention itself did not resolve.<sup>35</sup>

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35. It was also correct to say that the provisions of article VIII, section 11 that the "legislature shall appropriate funds *for* the operating and administrative" expenses of BESE could properly be made *to* the department of education. This contrasts with section 12 which requires that appropriations for "institutions of higher education shall be made *to* their managing boards." (emphasis added). See 347 So. 2d at 156 n.19.