

Louisiana Law Review

Volume 54 | Number 3

January 1994

The Louisiana Civil Code: A European Legacy for the United States. By Shael Herman. New Orleans: Louisiana Bar Foundation, 1993. Pp. vi, 80.

Robert A. Pascal

Repository Citation

Robert A. Pascal, *The Louisiana Civil Code: A European Legacy for the United States*. By Shael Herman. New Orleans: Louisiana Bar Foundation, 1993. Pp. vi, 80., 54 La. L. Rev. (1994)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol54/iss3/17>

This Book Review is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

BOOK REVIEW

The Louisiana Civil Code: A European Legacy for the United States. By Shael Herman. New Orleans: Louisiana Bar Foundation, 1993. Pp. vi, 80.

*Robert A. Pascal**

This is a misleading booklet. That it is so is especially serious, for it seems to have been intended for wide distribution to persons, including high school students, few of whom can be expected to have knowledge sufficient to challenge its accuracy. Many of its readers, therefore, will receive a false perspective on Louisiana's Civil Code, legal history, and legal culture.

The booklet is in actuality a second edition of the elaborate 1981 pamphlet, *The Louisiana Civil Code: A Humanistic Appraisal*, "prepared by the Tulane Law School in conjunction with the Tulane Office of University Relations," and authored by Professors Herman and Thomas E. Carbonneau and Law Librarian David Combe, all of the Tulane Law School. Professor Herman probably was the principal author of that pamphlet, for much of the text relating to the French Civil Code seems based on a 1980 article of his in the *Tulane Law Review*.¹ Professor Herman has provided footnotes for the new booklet, a feature the original pamphlet did not have, and has updated it in parts. The booklet's abandonment of the pamphlet's subtitle, "A Humanistic Appraisal," and its elimination of the adjective "humanistic" in other places, may indicate a sensitivity to political correctness. The original subtitle, nevertheless, probably was more indicative of the character and evident purpose of both pamphlet and booklet, that to have their readers view the Louisiana Civil Code as a basically French humanistic document, in substance as well as form, in spite of the historical record that it was meant to reflect, and did reflect, Spanish substantive civil law.

Professor Herman would have his readers believe that the codification of Louisiana's substantive civil law, begun in 1808, signalled "a commitment to a French perspective on law and society" (p.11). He tells his readers that the Louisiana Civil Code has the French Civil Code as its "ancestor" (p.11) and "shares with [it] the spirit of the Enlightenment" (p.12). This spirit, he explains, is essentially secularistic, rationalistic, individualistic, democratic, and economically liberal (pp.12-17). He regards the French Civil Code, and the Louisiana Civil Code as well, as embodying these notions, but nevertheless manifesting a spirit of community and patriarchy in a strong family structure (p.38) and reflecting secular natural law principles throughout the whole (pp.14, 38-44). Professor Herman is careful to affirm that the Louisiana Civil Code is

Copyright 1994, by LOUISIANA LAW REVIEW.

* Professor of Law Emeritus, Paul M. Hebert Law Center, Louisiana State University.

1. Shael Herman & David Hoskins, *Perspectives on Code Structure: Historical Experience, Modern Formats, and Policy Considerations*, 54 Tul. L. Rev. 987 (1980).

not a copy of the French Civil Code (p.32), admitting substantial influence from Spanish Law, Roman Law, and even Common Law (p.75), but he does leave his readers with the impression that the whole has been given a French stamp.

Professor Herman seems to base his wish to view our civil law as primarily French on two factors. The Louisiana drafters of the 1808 *Digest of the Civil Laws in Force in the Territory of Orleans* certainly used the French Civil Code of 1804 and its preliminary draft, or *Projet of 1800*, as models of form and style. In addition they used the very texts of these documents in many articles of the Digest, as was detailed by Professor Rodolfo Batiza of Tulane in 1971.² But what Professor Herman ignores is that these French texts were used only where they were understood to reflect the substance of Spanish law as well as French or could be modified to reflect the Spanish rule. There is no evidence of an attempt to substitute French law for Spanish law. It would have been strange indeed for a people passing from Spanish to American rule to urge the adoption of French Law.

That the Spanish civil law, or Roman-Spanish civil law, if one prefers, had prevailed during the Spanish domination is a fact no one disputes. Professor Herman, however, perhaps in the effort to appease those who would like to believe French law had more influence in Louisiana than it has had, suggests "there is a disagreement over the extent to which [the French governor] Laussat, during his twenty days in power, replaced Spanish law with French law," citing a high school history text (p.28), even though Laussat's papers show he refrained from imposing French law on the population because of the impending transfer of Louisiana to the United States.³ After the transfer—all as Professor Herman himself details—the Congress of the United States retained in force the civil laws in effect in the Territory until the territorial legislature changed them; in 1806 the legislature of the Territory of Orleans declared that the Roman civil laws as modified by the Spanish civil laws in effect at the time of the Louisiana Purchase were the civil laws of the territory (but Professor Herman's language leaves one with the impression that the legislature sought to restore the Roman and Spanish laws, rather than recognize their being in force); and in the same year the Orleans territorial legislature ordered the drafting of a "code" with the civil laws in force as its base (pp.28-31). The drafters then produced and the legislature enacted, *not a civil code* to replace the civil laws in effect, but a *digest* of those very same civil laws in codified form, the Digest of 1808, leaving intact the whole of those civil laws to the extent they were not incompatible with the provisions of the Digest. The population and the legal profession regarded it as a digest and not as a French type civil code meant to stand as the sole statement of the law. The *Projet of the Civil Code of 1825* was drafted as and entitled

2. Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 Tul. L. Rev. 4 (1971).

3. Alain Levasseur, *Les Codifications en Louisiane*, 1986 Revue de la Recherche Juridique: Droit Prospectif 171, 184-87. Professor Herman did not mention this article.

"Additions and Amendments" to the Digest of 1808. Comments of its drafters imply that the base law yet was understood to be Spanish, not French.⁴ All this has been detailed in a 1987 book that Professor Herman failed to mention in text, footnotes, or bibliography, Richard Kilbourne's *A History of the Louisiana Civil Code: The Formative Years, 1803-1839*.⁵

There is also the testimony of Louis Moreau-Lislet, one of the two drafters of the Digest of 1808. In 1814 he prepared two sets of notes to the "Roman and Spanish" laws having "some rapport" with those of Louisiana, which notes he inscribed on interleaves bound with the pages of certain copies of the Digest volume.⁶ One list, on the interleaves opposite the English texts of the Digest, contained references to Roman and Spanish laws "relating to matters treated in each chapter of the Digest." The second list, on interleaves opposite the French text, listed "article by article, the citation of the principal laws of the various codes from [the substance of] which were drawn the dispositions" of the Digest.⁷ Nowhere is any reference made to the French *Projet* of 1800 or to the French Civil Code. There are some references throughout to the works of Domat, a French jurist, but Moreau-Lislet himself states that he cites Domat as a way of referring to the Roman texts so fully cited by him.⁸ Moreau-Lislet evidently did not consider the Digest of 1808 to be French in substance. (There are also references to Pothier, another French jurist, particularly as to articles on contracts, but at this time contract law was not very different in France and Spain and Pothier even was in use in England and in America).

The uninformed indeed might ask why jurists charged with drafting a "code" based on Spanish law should have chosen the French *Projet* of 1800 and the French Civil Code as models of form and style and even as sources of texts. The reasons are not difficult to surmise. The Spanish law in force at the time had not yet been codified in the manner of the French law. The *Projet* of 1800 and the French Civil Code were in form and style marvels of succinctness, clarity, integration, and completeness. The legal institutions of Spain and southern France, the latter much reflected in the *Projet* of 1800, were similar, both influenced heavily by Roman law and Visigothic law. The French and Spanish laws of obligations were very similar, as has been mentioned. To attempt a codification of the Spanish law without a model or guide would have

4. [Proposed] *Additions and Amendments To The Civil Code of The State of Louisiana* (1823), reprinted in 1 *Louisiana Legal Archives* (1937) [hereinafter *Additions and Amendments*]. See, for example, the comments under proposed articles on the effects of putative marriage on the status of the children. The proposed articles are declared "conformable to" the law in *Las Siete Partidas*, but to incorporate an amelioration "taken from the French Code" because of its evident equity. *Id.* at 10.

5. Publications Institute, Paul M. Hebert Law Center, Louisiana State University (1987).

6. The copy of the Digest with interleaves believed to have been Moreau-Lislet's, now in the possession of Louis V. de la Vergne, was reproduced in 1968 with the subtitle "The de la Vergne Volume" by the Law Schools of the Louisiana State University and the Tulane University. This reprint was published again by Claitor's Publishing Company in 1971.

7. *Id.* in the *Avant-Propos*, at 1 and 2. Translation from the French by the author.

8. *Id.*

represented folly, given the short time the Louisiana drafters had to finish their work. The organizational plans of the *Projet* of 1800 and of the French Civil Code could be used to advantage, and the actual provisions could be used to the extent they reflected Spanish law as well as French, or modified to do so, or new provisions drafted to that end in instances in which the Spanish law varied from the French.⁹

Professor Herman's failure to see the Digest of 1808 and the Civil Codes of 1825, and therefore the Revised Civil Code of 1870, as primarily Spanish law documents may be attributable to his evident passion for French Enlightenment thought, particularly its secularism, its rationalism, and its individualism, and the desire to have the Louisiana codifications envisioned in that light. It may very well be that without their rationalist spirit the French would not have attempted, much less succeeded, in stating their civil law so simply, so beautifully, and in such magnificently organized form as they did in the French *Projet* and in the French Civil Code. But that form could be utilized by Louisianians seeking to state the basically Spanish law as simply, as beautifully, and with as much organization, without in any way subscribing to French secularism and French legislative positivism. And the drafters in 1808 and 1825 did just that.

Thus whereas the French restricted law (in the sense of the legal order) to legislation enacted by the French Assembly, not even recognizing custom, and refused to allow judges to resort to philosophical notions of just order even in the absence of legislation, in the Louisiana Digest of 1808 and the Civil Codes of 1825 and 1870 the view of the legal order is quite different. Both legislation and custom (which Professor Herman does not mention) are recognized as positive law to this day and, in the absence of legislation and custom, judges are directed to decide according to *equity*, defined in 1808, 1825, and 1870 as resort to received usages, natural law, and reason. Strangely Professor Herman not only ignores this difference, but gives the reader the impression that Article 1 of the Digest and Codes as originally enacted, reading "Law is the solemn expression of legislative will," means not simply that *legislation* (statute) is the solemn expression of legislative will—which it does mean—but also that *legislation alone* is law (pp.17, 18). Certainly he must have known that Article 1 appears in the same chapter as Article 3, defining custom, and that both are in the chapter listing the sources of positive law. He states correctly that the words of Article 1 were taken from the French *Projet* of 1800 and this too would indicate that he must have known that that *Projet* listed the three sources of the law (*droit*, the legal order) of any nation as natural reason, legislation (*loi*, statute), and custom, and referred judges to equity in the absence of positive law.¹⁰ The French Assembly adopted none of these articles, such was the

9. The reviewer explained this in his *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 Tul. L. Rev. 603 (1972). Confirmation of this view is contained in the book by Richard H. Kilbourne, *A History of the Louisiana Civil Code: The Formative Years 1803-39* (1987).

10. *Projet de l'An VIII*, Liv. Prel., Title 1, Arts. 1, 4-6; Title V, Art. 11.

determination to restrict the legal order to the expression of legislative will; but this was not the Louisiana attitude. It is true that the three commissioners appointed to draft the additions and amendments to the Digest of 1808, which, with the Digest, became the Civil Code of 1825, did recommend the removal of custom as a source of positive law, but they recommended strongly the reference to equity in the absence of legislation.¹¹ The legislature, however, refused to abolish the reference to custom and of course retained the directive as to equity. Professor Herman's exposition is misleading, to say the least.

There are other equally untenable assertions by Professor Herman on the influence of French Enlightenment thought on the substantive law in the Louisiana Civil Code. Thus he states that the French Civil Code abolished feudal estates, and that the Louisiana drafters, "inspired by their French counterparts" rejected the feudal system (p.46). Actually feudal estates never prevailed in Louisiana. The French kings had refused to grant feudal domains, though repeatedly requested to do so,¹² and no feudal landholdings existed during the Spanish domination. Again, he asserts that "like the French Civil Code, the Louisiana Civil Code outlawed" the sale of land for a perpetual rent or annuity (p.49); but even today the Louisiana Civil Code has a chapter on the subject entitled "Of Rent of Lands," consisting of Articles 2779-2792. Similarly Professor Herman would have his readers believe that the Louisiana Civil Code, following the French in the spirit of democracy and individualism, promoted economic liberalism (p.12). But this point is overstated. Whereas the French Civil Code restricted labor agreements to a leasing of services, the Louisiana Civil Code originally allowed slavery and only in 1990 were the articles on indentured service and bound apprenticeship repealed. Again whereas the French Civil Code made all movables negotiable, thus protecting the good faith buyer in his transaction, the Louisiana Civil Code gave the good faith purchaser title only after he had possessed the thing for three years. And, finally, it may be observed that the Digest of 1808 and the Civil Code of 1825 gave very little security to creditors of a deceased person and even the Civil Code of 1870 failed to contain articles on voluntary bankruptcy. Thus the Louisiana Civil Code hardly can be said to have as much spirit of economic liberalism as Professor Herman claims.

There are many other facets of Professor Herman's exposition with which one may take issue. They cannot be discussed adequately in the space of a review, but mention may be made of some. Thus he uses the phrase "legislative supremacy" when he means "legislative positivism" (p.17); wrongly reads Civil Code Article 4, requiring promulgation of legislation, as requiring that all law be positive, that is to say, consist of legislation (p.17); apparently treating the Civil Code's reduction of the number of impediments to marriage as evidence of a

11. *Additions and Amendments*, supra note 4, at 1, and *Preliminary Report of the Code Commissioners*, February 13, 1823, reprinted in 1 Louisiana Legal Archives lxxxv, at xcii.

12. Marcel Giraud, *A History of French Louisiana* 287-88 (LSU Press 1974).

secularist move similar to the French Civil Code's sanctioning of divorce by consent (pp.16, 17), even though the law of marriage in the Digest of 1808 and the Civil Code of 1825 as enacted reflected closely the Spanish civil laws on marriage, themselves reflecting the canon law of the Catholic Church. So too, more generally, one might object that he fails to note the significant differences between the Louisiana substantive law on persons and family property and that of the French, thus leaving his readers to assume that he regards them as French. And so on.

There can be no doubt that after the enactment of Act 40 of 1828, by which "all the civil laws in force" before the promulgation of the Civil Code of 1825 were repealed, Louisiana lawyers and judges turned increasingly to the commentaries on the French Civil Code to seek enlightenment on the interpretation and application of our own, thereby often giving ours meanings it was not intended to have. In time popular, uninformed thought mistakenly did come to regard the Louisiana Civil Code as French. This may have been inevitable, given the absence of commentaries on Spanish law as convenient to use as those on the French Civil Code, the decreasing popular knowledge of the Spanish language, and the tendency of persons of French ancestry to wish to consider themselves and all aspects of their culture to be French. But Professor Herman does not mention this, giving the impression instead that the intent from 1808 was to convert to French law and French social thought. This position is untenable.

One must assume that Professor Herman's view of the Louisiana Civil Code is one given in good faith. But, assuming that, it nevertheless remains that the booklet is a serious misrepresentation of historical fact, one that will ill serve both good scholarship and a people's right to be given a true account of their legal heritage.