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## THE CIVIL CODE IN FRANCE TO-DAY\*

René David\*\*

*Droit civil* has been regarded in France, throughout the 19th century, as the hard core, the true heart of the law. A lawyer was brought to master the principles of the law mainly through the study of the Code Napoleon, since other branches of the law — with the possible exception of criminal law — appeared either as ancillary to *droit civil* (civil procedure) or as concerned with particular topics only (commercial law), or as developing slowly under the shadow of the principles of civil law (administrative law).

One of the reasons for such preeminence of *droit civil* was to be found in the existence of a civil code, in which a successful attempt had been made for a conciliation between the legal tradition of France and the generous spirit of the French Revolution. The Civil Code which gave effect to a conception of order favored by bourgeois society, and which was enhanced by the prestige of Napoleon, was a Bible for lawyers and the true Constitution of France; it was the foundation of all legal science, and provided the basis for all teaching of the law. Its merits were above any discussion in France as well as in the other countries of continental Europe.

It is true that a surge of nationalism after the fall of Napoleon had caused Germany to stay aloof of codification as a whole, but the Code Napoleon did remain in force, not only in France but also in the various provinces or States (Rhineland, Grand Duchy of Baden) where it had been introduced at the time of the French Empire. Code Napoleon was operative in Belgium and Luxembourg, and in the part of Poland annexed by Russia; it had provided a model for the drafting of new codes in the Netherlands, Italy, Portugal and Spain; and the same had happened outside Europe in Latin America, Egypt, Siam, Mauritius, Quebec and Louisiana.

The French civil code is more than 150 years old now, and the society for which it was moulded has undergone a thorough transformation in the course of these years. In spite of this, it is still at present the law in France. Attempts have been made twice to work out a new code or at least a revision of the civil code: first, at the turn of the century when its centenary was celebrated; and then again, after the second world war when a vigorous trend manifested itself towards the building of a new type of society. Both attempts were defeated. The

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conservative spirit of the French people, and more particularly of French lawyers by whom the civil code was regarded nearly as sacred, have raised an insuperable obstacle in the way of such sacrilegious abandon of a much revered civil code.

What is nevertheless the true state of things? What is the place occupied in fact by the civil code: to what extent is the life of the French governed by its provisions, and to what extent does it remain the essential factor in the teaching of the law and in the shaping of legal science? Such are the questions on which I shall venture to make a number of observations before this distinguished audience, and deal with them in relation to (a) *code civil* and *droit civil*, and (b) *droit civil* and French law.

#### A. CODE CIVIL AND DROIT CIVIL

The Civil Code is still in force in France, with its 2,281 articles numbered in a continuous sequence. No modification has been made in its plan, although it has been subject to heavy criticism from the start. Our Code is still divided into three parts (I. Of Persons; II. Of Things; III. Of the Various Ways in which Ownership May be Acquired); and Book III, divided into 20 "titles," is still twice as long as Books I and II put together.

Within the separate titles or chapters, however, or outside those divisions, many changes have occurred. Some of these changes, the most obvious, have been the product of legislation; some others are due to the courts. As a result of both, a new spirit has come to dominate our Code.

Intervention by the legislator has occurred formally in two ways. In some cases, the wording of some articles has been modified, in order to adapt the rules provided by the code to ideas prevalent in our time. In some other cases, new rules have been promulgated but have been left outside the code, of which only some articles have then been modified or repealed. The choice between the two methods may have been, but has not always been, a product of chance.

A number of statutory provisions have been left outside the code because it would have been difficult to incorporate them into the code, which did not regulate the matter or which did regulate it too briefly. To modify a whole series of articles of the code, and to renumber most of them, would have meant a great inconvenience for practitioners, and could not seriously be envisaged. In order to incorporate the new provisions into the code it would have been necessary, therefore, either to develop some articles into an inordinate length, or to introduce into the code new sections or even new chapters bearing an

exponent number. Both techniques have been used. Thus, in 1939, article 389 came to number 18 subdivisions. Also, there are today in the code some new articles bearing an exponential designation: 832-1, 832-2 and 832-3, developing article 832; we have even had since 1971, in Book III of the code, a new title added (*8 bis*) in connection with a new type of contract concerning building development (arts. 1831-1 to 1831-5). However, until recent times, the general practice has been not to incorporate into the code newly adopted provisions, when they could not easily replace existing articles, and thus the new statutes have generally been left outside the code. Such has been the situation especially with new statutes which dealt with matters not contemplated by the code; this happened with the contract of insurance in 1930, with the law of copyright in 1957, with co-ownership of buildings in 1965. Other statutes have been left outside the code also because they introduced elaborate rules in lieu of a most restricted number of articles in the civil code; such was the case for example when a "code of nationality," numbering 156 sections with the complement of statutory instruments, was promulgated in 1945 to replace only five articles (arts. 17 to 21) of the Civil Code.

The circumstance that a number of statutes, important in the field of *droit civil*, were left outside the civil code, is not a matter of indifference. Two dangers indeed are thereby created: the first is, that it may become difficult to have a view of *droit civil* as a whole and to discover some provisions pertaining to that branch, the second is, that the provisions left outside the code may be regarded as having the character of exceptions to a "*jus commune*" embodied in the articles of the code.

The first of these dangers has never had much reality. The statutes which have remained outside the code are in fact easily found, because in the private editions of the code they are usually reproduced and printed at the place where they normally belong. Thus, statutory provisions relating to insurance law will be found immediately after the articles of the code dealing with contracts in which chance plays a role (*contrats aléatoires*, including gaming and betting contracts). No serious inconvenience derives therefore from the fact that such statutes have remained outside the code; from a purely technical and formal point of view this circumstance may be, and is occasionally, regretted.

The second danger was that substantial importance might be attached to the fact that some statutes were left outside the code. Some lawyers and judges might be inclined to consider that this had been done on purpose, because it was the intent to confer a special

character to such statutes, that the statutes left outside the code ought to be regarded as derogatory to the *jus commune* constituted by the code and would therefore call for a strict interpretation. In some cases, this tendency has found encouragement in the fact that the legislator himself has specified that the rules which he enacted were not to be kept permanently in our law and that they were adopted only for a temporary period, to deal with an emergency or special circumstances. Such has been the case in the law of landlord and tenant where a number of statutes, called to apply for a limited time only, succeeded each other from 1914 to 1948, when a new law was eventually enacted on a permanent basis. The new statutes infringed and reduced considerably the rights of the landlords, as they were viewed at the time of the Civil Code. The reason for leaving these statutes outside the code was not only to avoid the difficulty of inserting them into the code, but it was also an expression of the will to abandon them as soon as possible in order to return to the true principles of justice and to reinstate landowners in their full rights. Our ideas have changed however with the passing of years, and the restrictions brought to the rights of landowners for the benefit of tenants or farmers are regarded nowadays as fully consonant with principle and as a permanent feature of the law. Therefore, at present nobody will consider the statutes dealing with this matter as having the nature of exceptions requiring the application of a rule of strict interpretation.

New statutes have been enacted in all provinces of the law, but the extent to which the Civil Code has suffered change cannot be realized by counting the number of articles that have been amended or repealed. Revolutionary changes may indeed have been worked out by a modification of some fundamental articles, whilst many other provisions have been left untouched because their import was only of a technical character and hardly affected the substance of the law.

From a formal point of view, statutory changes have occurred more frequently in the divisions of civil law concerning the law of persons (status of minors, married women, insane persons, and protection of their patrimonial and extrapatrimonial rights), family law (marriage, divorce, filiation), and also the laws of matrimonial regimes and successions which are closely linked to family law. Deep substantial changes have also been made in the law of real property, with a view to ensure a better publicity of rights over immovables on the one hand, and to increase the rights of tenants and farmers on the other hand.

Legal rules affecting other contracts have been less affected; in

the title "Of Contracts and Duties Arising from Agreements in General" (arts. 1101-1369), only fourteen articles have been amended, of which four were due to changes made in the law of persons and four were made in order to modify figures as a consequence of the depreciation of the franc. Similarly, the title "Of Duties Arising Independently of any Agreement" (arts. 1370-1386) has undergone only few changes which concern mainly the responsibility of teachers, in spite of the fact that in this field — the law of torts — a total upheaval has taken place since 1804.

In order to ascertain to which extent the Civil Code has been transformed, it is not enough to consider the new statutory provisions which have been enacted. The fact is well-known: although textbooks in France will always state that the decisions of the courts do not, properly speaking, make the law — they are not a source of legal rules — it is common knowledge that such decisions play a considerable part in the evolution of French law. How the courts have developed tort liability in the case of damages caused by a thing, starting from the fragile basis of article 1384 (1) of the Civil Code, is a well-known story which need not be retold here. However, attention should not be concentrated on this most extraordinary development. Not only these, but also other rules concerning tort liability have been interpreted in such a way that everything has been changed in this area of the law: the concept of fault is no longer today what it used to be in 1804, neither is damage giving rise to liability in tort, and causation is also interpreted differently, because our ideas are not the ideas of 1804 and also because the practice of insurance, which has been developed since that time, has totally modified all data in the problem of tort liability.

Transformations operating in this field are assuredly important and spectacular; it is nevertheless appropriate to rise above that level in order duly to appreciate the role played by the courts in France since 1804. It is essential to visualize how such courts, continuing a traditional practice established for the interpretation of Roman law, have endeavored in all branches of the law (apart from some occasional false steps) to modernize our Civil Code and to penetrate it with a new "spirit," in order to make it work justice in a society which had undergone substantial changes. "By means of the Civil Code, but beyond the Civil Code": this formula devised by Saleilles, from a model used by Jhering *à propos* Roman law, provides a key to French case-law, and explains how French courts, through a transformation of its very contents, have allowed the Civil Code to survive.

Developments which have taken place in one or other branch of

the law deserve, of course, our attention. But the most important thing is to be conscious of the supereminent philosophical trend from which they are derived. To be sure, many reasons have contributed to cause the courts to interpret our Civil Code in a new fashion, but one factor especially must be singled out and stressed: it is the development in French law of a doctrine of abuse of rights which is significant of a deep change in our ideas concerning the elementary notion of a subjective right and the function assigned to the law.

The Civil Code was made at a time when, as a reaction against the unequal status of citizens and other injustices of the *ancien régime*, a strict individualism and the *laissez-faire* of liberalism appeared as the best means of guaranteeing both the dignity of man and the progress of society. Experience has taught us other lessons since that time, and regard must be had also to the fact that conditions of life have changed, due in particular to the development of urban life and of big industry. We are deeply shocked at present by the conceptions of the last century, when subjective rights belonging to a person were regarded as pure prerogatives of their holders and could be fully exercised disregarding the interests of other people, be it in the field of property or in the field of extrapatrimonial relations. Even the die-hard amongst French lawyers nowadays accept the idea that rights are there to serve some social purposes; being no more than "legally protected interests," they are subject to limitations arising from considerations of social utility and of morality. Legal rules are not devised primarily for the benefit of individuals, considered in their singularity; their purpose is to regulate *relations* between man and man. There are therefore no *rights*, which might be exercised by their holders as they think fit and in a purely egoistic fashion, since the function of the law and of legal rights is to ensure an order of society which will be consonant to our idea of justice.

Considered in that light, the Civil Code has undergone deep changes, because our minds are not centered any more on the individuals who are the subject holders of rights, but they are centered on the factual element of legal relations, the regulation of which is the object of the law. It is true that in spite of this fundamental change we still speak of "subjective rights" but this expression is, truly speaking, improper at a time when such rights have ceased to represent absolute prerogative attached to the person of their holder. Rights are allocated to individuals because they are regarded as a useful technique to serve the interests of society and of justice. They are phenomena of a social character; they are not considered at present, as they were in the time of the School of Natural Law, as des-

tined primarily to ensure the well-being and to allow the full blossoming of individuals, the "subjects" of rights.

The evolution which has taken place is a revolutionary one, but it is in the line of the continental law tradition. The law cannot survive independently of a technique, aiming at a continuous adaptation between the rules which it states and our sense of justice. Every new "interpretation," given to our Civil Code, has been a matter for discussion and has usually been criticized. There is, however, a general consensus that such interpretations, as a matter of principle, are a necessary thing. Only in this way is it possible to avoid the eventuality that law should call for a complementary body of rules, founded on equity, as has happened in England.

#### B. DROIT CIVIL AND FRENCH LAW

The Civil Code, imbued with a new spirit, is still in force to-day. The question remains, however, whether it has not lost the pre-eminence which it had in the last century when, without any doubt, it was the main legal instrument governing the citizens' lives in France.

Attention should be paid in this respect to two special developments. In the first place, notice must be taken of the fusion realized between civil law and commercial law, and also the appearance of a new branch of law, labor law. In the second place, we shall have to consider the impact on civil law of another branch of the law, *droit administratif*, the very name of which was still unknown in 1804.

Many lawyers in France will disagree with our affirmation about the fusion of civil law and commercial law. We still have a commercial code separate from our civil code, and commercial courts distinct from courts for civil matters. Unification of civil and commercial law, which is advocated by some, has not been fully realized, and the very principle is rejected by some. Nevertheless, the fact that it is an open question provides evidence that the relation between civil law and commercial law has not remained in our days what it used to be in the past. The ways of life of merchants and of other citizens — who were for the most part the peasantry — were greatly different in the early nineteenth century; their contrast is much less to-day. In connection with the spreading of education, with the development of new types of property and with the growing importance of towns, those who are not merchants are no longer peasants of the old type who lived on their land and from the products of their land. As early as the 17th century a far-reaching reform was made when an Ordinance of Colbert "nationalized" mercantile law and transformed

commercial courts into royal courts in France; the original character of commercial law suffered another stroke when it was decided by our commercial code in 1807 that commercial law would be applied henceforward to all commercial operations (*actes de commerce*), and not exclusively to relations between merchants. The changes which have taken place in our society since that time have not destroyed, perhaps, the peculiar nature of commercial law, but it is clear at any rate that its original character has been considerably reduced if we compare commercial with civil law. *Droit civil* and commercial law have come closer together, and this may convey the impression that in this respect the domain of *droit civil* has become wider to-day than it used to be in 1804.

Another distinction has emerged however, and is today more important and more clear-cut than the traditional difference between civil and commercial law: this is the distinction between civil law and labor law. The Civil Code, in 1804, did not stick to the line of the Prussian Code of 1794, where hired people were regarded as members of the household and therefore had their status fixed by family law. Hiring of services (*louage de services*) was treated as a special type of contract, but it was regulated in a most summary fashion; only two articles of the Civil Code (arts. 1780, 1781) were considered enough to dispose of the matter. Our ideas on the subject have changed; the development of industry and trade, and the growing importance of trade unions (*syndicats*) has had the effect of producing an abundant mass of legal rules which constitute today a special branch of the law, under the name of labor law.

Labor law calls for a special approach and requires concepts, rules and principles of its own, distinct from those of civil law, since it has to deal with a type of social relation which is entirely distinct from relations contemplated by traditional civil law. There are still, of course, relations of an individual character intervening between "master and servant," but these words already bear by themselves witness of a state of things which belongs to the past. Relations in the field of labor law have lost the personal character which they had of old, and no appropriate rules concerning them can now be devised without due regard to circumstances of the present time, where individual contracts of labor are integrated in a comprehensive plan which unites all people working in the same concern or even in the same branch of a trade or industry. The civil code provisions, regarding legal relations of an individual character, are ill-adapted to deal with these new types of collective or group relations. A new branch of the law had to be developed, and it bears less and less resemblance

to the principles and rules obtaining in *droit civil*.

Another threat to the primacy of the Civil Code is due to the importance developed in our time by relations between private persons and public administrations. Relations of a private nature, between man and man, are still no doubt of paramount importance; these are the only ones to be found in the provinces of the law of persons and of family law; they are most of the time involved also in the law of property and in the law of obligations in our countries which are based on a "market economy" of a liberal or semi-liberal type.

Relations between citizens and public administrations, and relations between public corporations, have nevertheless acquired in our time a considerable importance. Citizens are constantly involved, in their daily life, in relations with administrative services or public bodies in the domain of communications or of public utilities; these may expropriate land or impose servitudes on land, supervise the exercise of a number of industries, trades or professions, establish taxes or impose duties, employ a considerable number of workers or servants, pay old age or other pensions to a great number of persons, and so forth. Public services, in their various aspects are an everyday occurrence in the citizens' lives: the State (or other public bodies) not only imposes rules pertaining to relations of a private nature (this is still a field of private law), but more and more frequently direct relations are established between it and the citizens.

Such relations were mainly governed, at the time of the civil code, by administrative practice. According to legal theory there was to be, parallel to the body of rules of private law, another body of rules, called "public law"; but public law was never developed like private law. Litigation in which the State was involved was outside the jurisdiction of the courts, and no remedy was available to oblige public officers to abide by the law. Only private law constituted a steady and solid body of rules, taught in the universities, applied by the courts, and enforced by a system of remedies. Before the French Revolution, even criminal law was underdeveloped, being regarded as a matter for police administration rather than a genuine branch of the law.

All this is changed in our times. *Droit administratif* has not acquired the strictness of private law, but it has been developed seriously enough to curtail the arbitrary action of public officers; in many situations detailed rules do govern their relations with citizens. There was in France, in 1804, no other law than *droit civil*; we have now, supplementing private law, a public law the main branch of

which is constituted by *droit administratif*. Civil law, due to this fact, has in no way lost its importance; but it cannot be said at present that it represents the whole of French law. A French lawyer is bound to study, in addition to civil law, the public law developed in the course of the last century, which has come to fill a vacuum and to occupy the place reserved for it since the ancient time of classical Roman law.

A French public law does exist nowadays, and it is equal in importance to private law. Legal science cannot therefore be concentrated on civil law at present, as it was at the time of the Civil Code. It has taken time to become aware of this new fact or at least to take due account of it, and for a long period of years civil law has retained in the teaching of universities a pre-eminence which was perhaps unjustified in fact. Until 1955, when a reform occurred in the programs of the Law Schools in France, it has been admitted, and regarded nearly as a matter of course, that a lawyer had to be educated by means of a study of *droit civil* above all. The course of study for the *licence-en-droit* lasted three years, and in each of these years civil law was not only a compulsory subject, but students were also led to consider that this was the main item in the curriculum for it was given in the examination much greater than any other subject. At the end of each academic year there would be two examinations on *droit civil*, one of them an essay and the other *viva voce*, whilst in other subjects there would be one examination only, either written or oral. The professor who taught civil law was the only one to follow the students from year to year, so that students were induced to consider him rather than any other, throughout their lives, as having been the master, under whose guidance they had become lawyers.

An important change was made in 1955, inspired by the will to allow more place for the study of branches other than *droit civil*. It was felt necessary not to curtail the study of *droit civil*, and the duration of law study was therefore increased from three to four years. In spite of this fact, the importance of *droit civil* is nevertheless, in some respects, less than it used to be. After a first cycle of two years, students are invited to exercise an option between various sections, where the emphasis will be put either on private law or on public law or on business law, with variations in the different law schools. If a student chooses to specialize in a branch other than private law, further study in *droit civil* will be optional for him, and it may happen and does frequently happen that a *licencié-en-droit* has had civil law as a subject for two years only and that he does ignore some titles

of the Civil Code, matrimonial regimes and successions in particular. Even for those who choose to specialize in private law, another system has been introduced for examinations, and in the new system civil law has not retained the position of privilege which it occupied formerly. Anybody aware of the importance attached by students to the matter of examinations will realize that this also is an important factor tending to reduce the pre-eminence of civil law.

It would appear therefore that the position of civil law—which was in older days unique—has now to be shared with other branches (criminal law or labor law or administrative law) more or less on an equal basis. However, the conclusion should not be drawn that civil law is no more than any of those various branches. Indeed, it must be kept in mind that the new branches of the law, which appear at present as competitors of civil law, have been developed at a later stage and by lawyers who had received their legal education through the study of civil law. This circumstance is significant because the rules in the new areas of the law have been framed by civilian minds and these new branches still bear the imprint of civil law ideas.

This is particularly noticeable in labor law. The Civil Code has been applicable in France, to regulate relations between master and servant, until other statutory provisions—ill-coordinated today in a Labor Code (*Code du travail*)—have been promulgated to modify them. Lawyers specialized in labor law, today, vindicate the full autonomy of their discipline, and they would like to see recognized as a principle that civil law rules may be deprived of their authority, in this field, if they are not suitable to operate justice in the circumstances. However, it will be most difficult to persuade the courts to adopt such an attitude. Judges will not be prepared to say that the rules of civil law are not strictly binding in the field of labor relations; rather will they resort, without saying so much, to a “progressive” interpretation which will allow them to do justice in apparent conformity with the rules of civil law.

A different situation arises in the case of *droit administratif*. Although there is no statutory injunction, it has always been recognized that the “*Code Civil des Français*” was restricted in its application to relations between private persons and that it was not applicable in the case of relations where the State or some public body was involved. *Droit administratif* however, in the first half of the 19th century, was little more than a dream, and in the process of its elaboration resort has been had, as a general rule, to the provisions of the Civil Code which was regarded as the embodiment of reason (*ratio scripta*). Administrative law has thus been developed in many fields

—especially in the matter of administrative contracts (*contrats administratifs*)—in the shadow of the Civil Code, as a series of exceptions to the principles of civil law, justified by peculiarities of public law. In contrast to France, the courts in Belgium went so far as to decide that the Civil Code was applicable here as a matter of principle, and that some special reasons had to be produced if it were held desirable, in an administrative case, to abandon the rule of civil law. It is easy to understand how, under such circumstances, it has remained necessary for public lawyers to devote themselves to the study of private law; and this remains true at present, in spite of the fact that *droit administratif* is highly developed and that many principles of its own have been established.

At present, two factors seem to perpetuate the situation as it was in older days. The first is that in many cases, according to statute, governmental departments and public bodies are bound to act in conformity with the rules of *private* law. Such is the case in particular if we consider the status of a number of industries or of commercial enterprises which have been taken over by the State in a process of “nationalization” (railways, banking and insurance companies, automobile industry, and others), or if we consider a number of circumstances where the jurisdiction of ordinary courts has been admitted by statute as an exception to principle (accidents caused by automobiles owned by the State, liability of communes in the case of public disturbances of the peace, and others). No public lawyer can ignore such cases, and they must therefore be familiar with the principles of civil and commercial law.

Another factor is that *droit administratif* is more closely linked with politics than private law, and the developments happening in the field of politics may result from time to time in challenging the existing rules and oblige public lawyers to review their attitudes. The rules and doctrines of administrative law, compared with those of civil law, lack stability, and for this reason also public lawyers may find useful, if not necessary, to feel under their feet the solid ground offered by civil law. No voice among them has ever been raised to suggest that public law was self-sufficient and that its doctrine might be established without the support of the civil law.

#### CONCLUSION

In view of the present status of civil law and of the civil code, what kind of reforms would appear desirable?

There is hardly a doubt that our code might be improved in many ways. It is well recognized that its plan is defective, many

articles are useless, many new developments call for a work of consolidation, many provisions are outdated and do not respond to what we now consider as just in our society.

To effect appropriate changes, would it be desirable to make a thorough revision of the Civil Code or even, in a more radical way, to enact a new Civil Code in France? We have much doubt concerning a solution of this kind.

Regarding the structure of the code, little damage has resulted from the faulty division which has been unanimously criticized. Also the reforms, made in foreign countries in this respect, have not always constituted progress. The "General Part" (*Allgemeiner Teil*) of the German Bürgerliches Gesetzbuch, which has been heralded in its time as a splendid achievement of the science of the Pandectists, has come under criticism in many circles, not least in Germany itself. The unification of the civil and commercial codes, made in Italy in 1942 and contemplated in the Netherlands, does not serve much interest in practice; and it is equally doubtful whether much would be gained if we had, following the Swedish and Finnish example, one general code instead of several codes.

Among the various structural reforms which have been made, only one would seem to us to be of value for the future: this is the reform which has been made in Switzerland (as a result of constitutional difficulties) and also, in a more systematic way, in Marxist-Leninist countries, where family law and the law of property have been separated from the law of obligations and commercial law. One reason which may induce us to follow the same path is that some measure of unification of the law will no doubt have to intervene in the near future within the European Economic Community, and the efforts towards such unification will most probably be made primarily in the domains which are of principal interest for economic life. In this prospect only, lie at present the possibility and desirability of a reform of our Civil Code for, apart from this, legislation and the courts seem to have already done most of the reform work which was needed, and there is no major reason to induce us to abandon our Civil Code which has been in the past such a factor for the influence and glory of French legal thinking in the world.

