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Private Laws of Western Civilization†

Ernst Rabel*

PART II. THE FRENCH CIVIL CODE¹

I. The Code Napoléon

At the eve of the French Revolution in 1789, France had the most centralized government of all large countries, but its law was divided. Voltaire has said that a traveler through France had to change law more often than horses. There were royal ordinances, canon law, statutes of big and small counties and towns and the bulk of Roman law tradition. Roman law was so important in the Southern provinces that they were called the *pays de droit écrit*—regions of written, namely Roman, law. In the North sixty “great coutumes,” like that of Paris and Orléans, and three hundred local coutumes (books of usages) obtained. By a stormy but expert work, the revolutionary assemblies, inspired by the ideals of the philosophy of rationalism, swept the entire maze away. Significant was the famous night of August 4, 1789 when in the National Assembly the nobles, the bishops, the representatives of the privileged cities and corporations solemnly declared that they renounced all their rights arising out of feudal tenure or socage rights in peasant land, a system settled for centuries. Liberty and equality were not only proclaimed but the principles were imbued into a rapid sequence of laws which you may see cited frequently today with their picturesque dates of *nivôse* or *ventôse*.

When Napoleon became first Consul, on December 15, 1799,

† This is the second in a series of six papers by the author.

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1. Recommended reading:

Amos and Walton, *Introduction to French Law* (Oxford, 1935)

Brissaud, *A History of French Private Law*, translated by E. Howell from the second French edition, with introduction by Holdsworth and Wigmore (Boston, 1912)

1 Colin et Capitant, *Cours élémentaire du droit civil*, refondue par L. Julliot de la Morandière (11 ed. 1947)

3 *La vie juridique des peuples* (La France, Paris, 1933) (excellent introduction with select bibliography)

Le Code Civil, livre du Centenaire (Paris, 1904)

10 *The Continental Legal History Series, The Progress of Continental Law in the Nineteenth Century*, by various authors (Boston, 1918)

he at once interested himself in the revision of the law, urged it and participated in it; out of the one hundred and two committee meetings from 1801 to 1804 in which the civil code was deliberated, Bonaparte presided at twenty-seven meetings. The codifiers were great jurists, and Napoleon gave them the certainty of their hundred years' task. He told them: we have finished the romance of the revolution, there is history to be started. Govern and do not philosophize. He used to ask them: how was that once, how is it today, how is it ahead? Is it just, is it useful? In short, a realist. From 1801 to 1811, almost the entire field of law was covered by legislation, mainly in the *Cinq Codes*.

All these codes brought epochal progress to half the world. But the civil code has been the center piece and the mother ground of the various branches of administrative law which have since achieved independent existence.

In effect, the prerevolutionary law—*Ancien Droit*—was radically changed and unified by the Intermediate Law of the storm period, and finally the *Droit Intermédiaire* was replaced by the codes. The codes brought conciliation between the old coutumes and the new postulates; they returned consciously to the French traditions; but they maintained unification of the law for all persons and for the whole territory, and, in this one law, established individual freedom, equality of the citizens, and emancipation of the law from the Church. Law is compromise. The golden mean was most often observed—which explains that the codes dominate still the law of 1949. Often, not always.

A few examples. The feudal elements of the judicial organization and legislative systems remained abolished; no privilege was allowed to any individual. No property should be tied up with future interests, as had been done in the noble families; hence, a good part of the testamentary trusts, usual in this country, are prohibited. Peasant estates too are not reserved for the eldest son. Great domains seemed to cause a greater danger than the partitioning of small estates.

Marriage and family law was taken out of the hands of the Catholic Church and made a purely temporal matter (September 3, 1791). Divorce was permitted, Bonaparte being personally interested. (When the Bourbons came back, divorce was abolished in 1816; after a long and bitter fight, in which novels and stage participated, divorce was re-introduced by the *loi Naquet*, 1884). Napoleon insisted that the wife owed obedience to the husband, and her legal acts needed the latter's consent. But by the legal

community property system the wife shares in the acquets and gains resulting during the marital life. The state took over the registration of the civil status which has become a great institution in the Latin countries.

But a few rules drove the pendulum from the extreme left far to the right. After a law of 12 brumaire an II (April 8, 1791) had assured to illegitimate children equality with the legitimate issue, particularly in inheritance—few laws go so far even at present—the Civil Code, Article 340, outlawed the natural children by its ill-famed declaration: *La recherche de la paternité est interdite*, paternity actions are prohibited. Foreigners were treated with excessive generosity in revolutionary times; yet the Code Napoléon, Article 8, confined the “civil rights” to French citizens, depriving foreigners even of the right to inherit or to receive gifts.

As a whole, however, the flaming spirit that had created the Rights of Man filled the codes, moderated by a clear consciousness of the collective needs such as they could be understood at the time.

Since Emperor Justinian’s compilation of 534 A. D., only the Prussian Code of 1794 could be called a comprehensive codification. The Codes of Napoleon were enormously superior to both.

Measured with the standards of its own period, and of at least half a century afterwards, the civil code has been justly praised with respect to modern thought, somewhat improved systematic order and elaborate rules. The language, crystalline and beautiful, has not had its equal before or afterward; there have been celebrated French poets who liked to read some chapters for encouragement in prose. The Austrian Code of 1811 has been loved for similar reasons. It seems that at that time legislators knew how to write for the pleasure of the people. The law schools were profoundly reorganized. The courts took another aspect. The literature, for more than half a century, devoted itself prevalingly to commentaries on the codes, although in a dialectic interpretation directly continuing the exegetic methods by which the Digest and the code had been treated in the long file of the “Legists.”

These codes have acquired not only the respect but also the affection of the French people. More than once in this almost a century and a half, a discussion has flared up about a totally new codification. However, it was never seriously contemplated, until a move was made and not pursued at the occasion of the centenary of the civil code and now after the second world war

revision came into full swing. To this date, with innumerable modifications and amendments, a gigantic patchwork of reform, the codes survive and are, today as formerly, an object of the highest national pride.

The civil code was promulgated in annexed Belgian, Rhenish and other countries, and thanks to its innate qualities the code remained in force in most of them, after Napoleon's fall. Many countries have voluntarily adopted it, as it stood, or with changes. During the nineteenth century the French codes vigorously influenced the law of the whole world outside of the Anglo-American orbit. Even at present, after many events which have paralyzed the French predominance, the family of laws centering around the French codes still exists, including Belgium, Netherlands, Luxemburg, Italy, Rumania, Spain, Portugal, and all of the Latin-American countries. Those latter have formed their own codes either after the pattern of the Spanish or the Italian laws, and hence indirectly under French inspiration, or by direct loans from France. Louisiana and, in Canada, Quebec have belonged to the center of this group; at present one speaks of the interpenetration of French and common law in Louisiana, and of their co-existence in Quebec.

Only at the end of the nineteenth century, a mighty competitor to the French Civil Code has sprung from the massive and highly refined German Civil Code. There, for a time, the German legal theory which had received a multitude of ideas and suggestions from its Western neighbors, at its turn, vastly influenced and inspired the French legal literature.

II. CHARACTER OF FRENCH PRIVATE LAW

If you consider that the Codes of Napoleon, aside from certain laws of brumaire and ventôse memory, are in force, and that courts, *ministère public*, *avocats*, *avoués* and *huissiers*, seem to work not very much differently from what they did at the time of Balzac, that greatest novelist, you guess that the outstanding trait of French legal habits is conservatism, although you will be aware of the danger of exaggeration inherent in any such generalization, and although, undoubtedly, French traditionalism is entirely different from the English tenacious perserverance.

In fact, when the core of the French codifications, the civil code, has been briefly characterized, [—at the centenary of the code in 1904, or as it was done in 1933 by my late friend Henri Capitant, the finest of all interpreters—] the main topics are per-

sonal liberty, family, and property including inheritance. Family and property had been the cornerstones of the upper classes in the ancient regime, and were carefully protected by the code as the bulwark of the Third Order, the ordinary citizen of the middle class.

As a matter of fact, the small farmers still make up more than a third of the French population, fifteen millions out of forty-two in 1940, and the average farm has not more than twenty-four acres. The other part of the bulk of the population are professionals, craftsmen and workers. Formerly, it was said a Frenchman's dream was to retire in his fifties to a small country house and cultivate roses. These hard working people, living without much luxury, modest in all respects, do not resemble the smart heroes of the yellow-bound Parisian novels, although they know art and they get inexpensive but very well prepared meals. By the way, an opulent dinner in the province is called a *diner d'avocat*—it is not the judge who has it. The middle class men and housewives are the types for which French legislation has cared all the time. Their property is what has been named in the *Déclaration de droits des hommes* inviolable and sacred—with all the beauty of superlatives. Indemnification—carefully regulated for the exercise of eminent domain such as expropriation for public use, for railway construction—has been accompanied by remedies in other cases of public encroachments on private property more conscientiously than elsewhere.

However, that the code should stand up through the age of industrialism, the predominance of shares and bonds over land, the overwhelming importance of social problems, has been made possible by the continuous minute work of the courts and writers. Also writers! Theorists in continental Europe have traditionally had a role superior by far to the attention given to learned books and opinions in common law countries, and that they know it helps to increase their feeling of responsibility.

The modern questions of labor, for instance, were of course not foreseen in the codes. But the Court of Cassation granted damage for arbitrary termination of employment in 1859, thirty years before the result was sanctioned by a law. Exemption of wages and pensions from attachment or garnishment, enforcement of specific performance, workmen's compensation, the entire doctrine of unfair competition were developed by the courts, to the envy of German observers during the nineteenth century.

The contract of life insurance considered by great jurists, in-

cluding Pothier, as an immoral gamble, was recognized by the Conseil d'Etat in 1818.² The harsh treatment of illegitimate children has been mitigated by a court practice granting the mother support for herself and the child by an action against the father in the nature of a tort action. The old practice of the magistrature, enforcement by "astreintes" was reestablished. The most daring recent judicial innovation used the harmless text of Article 1384 to state liability for inanimated things such as automobiles, directly contradicting the principle of Article 1382.³

Enacted laws have followed in many such instances, but late and hesitatingly. For instance, a law to improve the status of illegitimate children was enacted as late as 1912 and has considerably limited the cases admitted to litigation. The numerous amendments to the antiquated family law very lately accelerated their pace.

The provision of Article 151 prescribing "*actes respectueux*," by which parents or grandparents had to be given notice of a marriage, if the bridegroom or the bride, though of full age, had not completed the twenty-fifth year, was modified in 1896, 1907, 1919 and 1924, until it disappeared in 1933. Article 214 regulating the marital duty of support was amended in 1938 and 1942; Article 331 on the legitimation of natural children was modified in 1907, 1915 and 1924, and later was changed by Vichy legislation in 1941 and (with many other Vichy acts) reestablished in 1945.

Certain problems of marriage and divorce were at last approached in 1937, when, as the most important modernization, married women were finally declared capable of contracting with third persons without the consent of their husbands. Such women's emancipation was started in the United States in 1844, and in 1870 an American judge sadly stated that the husband's legal supremacy is gone and the scepter has departed from him.

So deep rooted is the patriarchal conception of the family in France that Pétain shrewdly chose the slogan: *Patrie, famille, travail*. Similar has been the slowness to change the old-fashioned character, say, of the rules concerning the subscription of shares in creating a business corporation. In 1937 and 1938 a huge flood of small decrees was rushed through on the basis of emergency powers to modernize the law by many piecemeal reforms which have continued since.

2. Avis du Conseil d'Etat, Mars 23, 1818. See 1 Hémard, *Théorie et Pratique des Assurances Terrestres* (1924) 430.

3. Cass., Chambres Réunies (Feb. 13, 1930) *Dall. Pér.* 1930.157.

A foreign observer may also state certain characteristic remainders of old organization and of bureaucratic supervision amidst the present French law. For instance, the *conseil de famille*, including the famous uncles and aunts of the older novels, still appears in the appointment of guardians and interdiction of lunatics and spendthrifts, not only on paper as in Louisiana. A party to a contract wishing to be freed from his own obligation because of breach of contract by the other party, where a contract does not grant him rescission by an appropriate clause, has to sue in court, and the court has discretion in admitting the "*résolution*" and according days of grace (Article 1184). The normal way for a buyer to ascertain defectiveness of goods is an examination by court order. Resale and cover, as remedies of a seller or buyer respectively, are also ordered by the tribunal, although commercial law makes important exceptions. An assignment of debts as a rule must be notified by *huissier* to the debtor (Article 1690); the practice allows other "precise and authentic" communication, but this means judicial proceedings. Notaries, and *huissiers*, play a much bigger role than in this country. And generally, I think, we may state that the civil code determines the mentality of legislators and judges much more than the code of commerce and its development have done, in contrast to the English emphasis on the commercial life.

At the same time, original reformatory ideas have time and again come from France. The extraordinary richness of the French mind, its vast culture, deep intelligence and clear reasoning, its sensitiveness, tact and moderation, have always found expression in the legal literature, whether the scholars were exegetes of the old school, "*arrétistes*" of the style of Labbé, or modern systematic workers. The French lawyer disposes of an abundant mass of commentaries on the codes, learned and informative annotations of the court decisions, which are almost as apparent as in this country, great systematic treatises and smaller textbooks, dictionaries, encyclopedias, repertories and a never ceasing stream of monographs—in the average a less technically disciplined and profound production than the German was until 1933, but highly attractive by clarity and brilliance. Codes, courts and writers participate in the glory of the very old and permanent French legal culture.

III. THE PRINCIPLE OF LEGALITY

However sketchy our picture of the French private law may be allowed to remain, it has to hint at a fundamental conception

giving meaning and color to a great deal of particulars, namely, the principle of legality.

The ten first amendments to the American Constitution forming the famous Bill of Rights have been contemporary and closely related to the *Déclaration des droits de l'homme et du citoyen*, and both breathe the same spirit. But there has developed in the repeated French constitutions a marked difference from the American basic institutions. If any individual in the United States is requested to obey some law enacted by Congress or by a state legislature, he may challenge, in an ordinary court, the validity of that law by the contention that it illicitly restricts his personal liberty, or his freedom of opinion, or freedom of religion, and so forth, guaranteed by the constitutions. The court examines whether the restriction imposed upon the individual is a reasonable exercise of police power or violates the free sphere guaranteed to the person. Such judicial review of the acts of legislature is absolutely alien to French thought. The Conseil d'Etat frankly declared that France did not want a "*gouvernement des juges*," a government by judges, as in America. The revolutionary leaders were keen followers of Montesquieu's celebrated principle of division of powers; the legislative, executive and judicial branches of government must be sharply separated from each other. Large parts of the doctrine have survived up to the present time in France. Hence, a law enacted by the French parliament and promulgated by the President of the Republic must be applied by any court without asking questions.

In the course of the constitutional revision of 1946, however, an important qualification was added. Under Articles 91 through 93 of the new constitution, the unconstitutionality of a law may be stated within the time for its promulgation by the newly established Comité Constitutionnel whose thirteen members, including the President of the Republic, are not members of the parliament but prevailingly elected by it. Otherwise, the action of the legislature remains not-reviewable.

The principle, however, does include control over the executive branch. As in the United States, all administrative agencies must strictly confine their activities within the powers conferred upon them by law. An administrative act exceeding this power is *excès de pouvoir*, and a wrong exercise of power is *détournement de pouvoir*, and is annulled. Not by an ordinary court! The judges, in view of their traditional training, are not

considered competent in matters of administration. The French administrative courts with the Conseil d'Etat at their head, their structure and their practice, have been a precious model for the world of civil law. This principle of legality has been particularly expounded in the French doctrine and has attracted a wide following.

Judgments of courts may be attacked on the ground that the court has exceeded its judicial power or jurisdiction. The Court of Cassation, as has been repeated time and again, is not a court of appeals; it has merely to reverse a judgment when it violates *the law*, that is, in this case, a written law enacted by the parliament—not customary law, not foreign law, which is a narrow interpretation. The idea is clearly that a decision contrary to such law ought to be declared null. The suit then goes back to a lower court.

The attorney general, at the cassation court, has the right and duty of bringing to this august tribunal any case decided in any instance against the law—an extraordinary revision “in the interest of the law,” without regard to the profit of the parties, just to maintain the pure and uniform law in the country—an admirable institution. The state's attorneys, all over the country, have to watch continuously all penal as well as civil cases, and to intervene spontaneously or on instruction by their superior in the *ministère public*, whenever they think that a public interest is in question, to save the law. In criminal proceedings, the magistrate, who is called the *juge d'instruction* and who dominates the preliminary investigation, has to observe the interest of the defendant quite as much as that of the state.

Still along this line, only learned lawyers are sitting on the bench, except the old commercial tribunals and the *prud'hommes* and the recent mixed tribunals for rural leases (Law of April 13, 1945). The justices of the peace who were only distinguished gentlemen with intimate knowledge of their boroughs, were subjected to juristic standards in 1926. Nowhere is a jury called in private matters.

Finally, France wants to entrust justice, the application of law in substantial regard, merely to collegial courts—the principle of plurality of judges. A single judge is not believed to enjoy the perfect confidence of the people. An emergency law after the last war allowed such judges, but most have quickly disappeared.

The judges, in fact, are sometimes outstanding scholars.

Nevertheless it is not the individuality of a presiding or reporting judge—or attorney of the Republic—that fascinates the popular imagination: scarcely any names of the high-placed magistrates are so well known to the public as the personalities of the *membres de l'Institut*.

It is rather the spiritual and professional level of the average judges and the glorious and unbroken tradition of independence which make the French as also the Belgian magistrature so fine and the nation so proud of its courts. Already in the royal epoch the *Garde des sceaux* (Lord of the Privy Seal) refused to mix with the courtiers of Versailles and held office in Paris. The German occupation authorities had full opportunity in 1918 in Belgium to grow aware of the uncompromising attitude of the courts which until then had been functioning; when the courts thought the Germans were interfering, they went on strike. We have read what happened in the court of *Riom*, a high tribunal especially composed by the Vichy Government in order to condemn publicly republican ministers for having gone to war against Germany, and which turned out to furnish a powerful accusation against Marshal Pétain.

IV. PREPARATION FOR A NEW CIVIL CODE

On the occasion of the centenary jubilee of the Civil Code in 1904, the dispute was renewed with force whether the obsolete or inadequate ideas of the Civil Code should be remedied by substituting an entirely new codification, or whether the palliatives used through a century should suffice: ever again new constructions of the old text by writers and courts; borrowing by comparative methods from specific foreign models; ingenious inventions by judicial and extrajudicial practice; and the unceasing modernization of individual sections by legislative amendments. Almost all leading scholars expressed their opinions; they were equally divided. The result was no new code. After the last war, however, the controversy returned with reinforced emphasis on the harm done to social life by a superannuated law, the enormous changes that have occurred from Napoleon's height to Pétain's fall (and now the Marshall Plan), and the fact that French prestige in the world so long supported by the Code, was now gradually lessened by the superiority of foreign codes. Although adversaries still insisted that ancient palaces are rendered more venerable by the additions and alterations worked through many generations, all signs indicate that this time there

may really originate a new, elaborate, though conservative, legislation.

Immediately after the birth of the Fourth Republic, a Committee for the Reform of the Civil Code was appointed. Although its members, well-known professors, judges, and lawyers under the admirable chairmanship of Dean Julliot de la Morandière, have not been relieved from their manifold other occupations—a fact widely regretted—they have advanced a good deal and already published the first two volumes of minutes and partial drafts.⁴

It is the ambition of the committee to give the French people a code perfectly suitable to its present life and at the same time a code which would reestablish French international leadership such as it once was manifest. No known defect of the old text should be continued. If I understand well, practicality and modernity seem not to suffice; although the new rules ought not to be didactic, they should respond to the postulates of contemporary legal science.

This is a big and difficult program. Obviously, of course, the present rules and formulations enjoy some presumption of correctness. For French lawyers' respect for tradition is natural. However, the discussion does not refrain from challenging the fundamental premises of any rule, if a doubt arises. Certain radical reforms are considered urgent for the reconstruction of the population—such as the facilitation of adoption⁵—or of the economy.

For comparative studies, these alert and minutious debates among expert jurists, who are able draftsmen, have a particular interest. Not that the debaters themselves would display much care for foreign laws. The commission works mainly with French materials: the code and its amendments, the court decisions, the local relations between private and public law and the distribution of judicial jurisdiction between the judiciary and other authorities, and the suggestions advanced by various state agencies. Only occasionally such texts are mentioned as the French-Italian draft of a law of obligations, the Swiss codes, some Polish or Italian provisions and a Libanian draft unknown to me. German institutions, such as the land register, and the equality of

4. France Commission de Réforme du Code Civil Travaux (1947 and 1948) 2 vols.

5. According to newspaper reports of August 25, 1949, a committee of cabinet ministers has been appointed for submitting a bill of which it is hoped that it "will increase adoptions 10,000 a year."

adulterous with other illegitimate children, are touched in their function as Alsatian local law, for the purpose of unification.⁶ Yet, with their domestic sources of law and of factual information, these subtle jurists arrive at a great number of solutions new for France but not for all other countries. It even so happens that in deciding the apparently interminable international controversy of the time and place when and where a contract by correspondence is completed, all the civil law propositions are defied and the solution of the Anglo-American common law is accepted: the contract is perfected by the dispatch of the acceptance.⁷

The common law is not even mentioned at this occasion or anywhere else so far as I could see, nor are the questions inherent in this theory considered in the published volume. Most interesting, the old problem whether there should be a general part, after having been negatived in most recent codes, has this time after very long disputes found a different answer. The first book of the German Civil Code is regarded as too heavy, but general rules on persons, property and legal acts will be inserted into separate books. The doctrine of legal acts, a broader notion than contracts, will seemingly be elaborated without using the vast German doctrine, but great difficulties are expected to arise.

If the results will often, perhaps most frequently, resemble the parallel provisions of other countries, minor differences will be a regular feature, including improvements and local conveniences as well as unnecessary particularism. I cannot suppress the observation that the great task of new codifiers should be alleviated by really effective comparative research. The clarification of problems and solutions is speedier and surer, when the foreign experiences and achievements are put to use—as materials, though, not as models. The natural filiation, even not “legally acknowledged,” must be a marriage impediment, irrespective of its characterization as a family relationship, has been perceived by the commission; but a contrary tentative draft and discussion could have been spared.⁸ And that a possessor in good faith should be liable for all damage suffered by the chattel or land during his possession, unless he proves that he has not committed any fault, is an untenable proposal by the full committee.⁹ Rom-

6. *Op. cit. supra* note 4, at Vol. I, 424 ff., 653 ff.

7. *Id.* at Vol. II, 146, Art. 21 (preliminary draft); 220, Art. 18 and 20 (sub-committee).

8. It is true that this draft (*id.* at 429, Art. 20, Par. 6) was intended to decide a controversy. Cf. *id.* at 507, 510.

9. *Id.* at 1002, Art. 29, with the justification by Mazeau at 997 that the general theory of liability requires this solution.

anistic tradition and the German code consider it justly elementary equity that who possesses a thing in "good faith" has no duty of care which the true owner would not have, and therefore cannot be in fault before suit is brought against him.

However, we shall feel the richer by seeing our research materials increased by the independent work of so privileged a group. The future work of revising the Louisiana code, this near relative of the Code Napoléon, is assured of a particularly advantageous source of inspiration.