

1976-01-05: [METHODOLOGY] Changing Perceptions of the Problem.

In the work which I did on the problem of inheritance during the ancien régime, I took my stance in the 16th century and limited my depth of vision to the year 1788. The logic of this is clear: almost all the coutumiers of northern France achieved their final codification in the 16th century, and that was also the great age of French jurisprudence; at the other end, the Revolution and the Code swept away all the earlier law. My problem was to see how jurisprudential interpretation molded the laws of succession in conjunction with actual family strategy of inheritance.

In the second stage of my study, which I am reporting upon in this paper, my problem was to see what changes were wrought by the Revolution and the Code Civil, in terms of the law, and see how they then worked out in the strategies of family inheritance during the 19th century. I found myself, however, not starting with the Revolutionary legislation in 1790 and marching forward, but instead positioning myself around the year 1900 and looking backwards. The logic for this is not so clear. It was more or less by happenstance: in the two decades before and after 1900 there was a great ferment over the question of the laws of succession, which led to basic revisions in the Code, and consequently a large body of literature, legal and polemical, which reviewed the course of the succession laws in France before, during and after the revolution as the context for arguments to uphold or to overthrow current practice.

As a result, I began to get pat interpretations of pre-revolutionary law, seen from the year 1900, which I had to make jibe with my earlier conceived interpretation of the ancien régime studied in its own right. It was quite unsettling at times, for the lost world of the ancien régime which I believed I had recovered was constantly being obscured again by the present-mindedness of my 1900s authors. Indeed, in the manner of the Heisenberg principle, the thing did change when observed by these writers. Better put, it was an instance of the kind of paradigm shift, following a revolution in the perception of the basic order of things. To use Tom Kuhn's words to describe "Revolutions as Changes of World View", "It is rather as if the professional community had been suddenly transported to another planet where familiar objects are seen in a different light and are joined by unfamiliar things as well." (2nd ed., p.111)

Were we to apply Kuhn's theory to the legal community, we would find many analogues and some clear identities between it and the community of scientists; the formal immersion in a paradigmatic structure, the law as written and practiced, propagated in text-book fashion in the schools and at the bar; normal jurisprudence as the articulation of the paradigm, with the absolute necessity to make the law fit the case; given such devices as fictions of the law, any paradigm can be quite flexible in dealing with anomalies. Anomalies themselves would chiefly arise from the changing social conditions; the old paradigm can be adjusted by bits and pieces, and by the process of legislation can reshape itself gradually without ever going through a violent revolution in the basic structure of its civil law. (England, for example; violent constitutional change, i.e., public law, can take place without great alteration in the civil law.) In France, however, such a violent revolution did take place, which makes paradigm shift in the legal structure dramatically visible.

Most of the elements of the new paradigm of the laws of succession are manifest in Mirabeau's famous speech, read for him posthumously before the Assembly a few days after his death in April 1791; and they are systematically enshrined in the Civil Code of 1804. In just a dozen years the paradigm shift is accomplished on paper, and the story is fully documented. "On paper" does not mean in the mind of everyone by any means. The change in mentality well

precedes the Revolution in the minds of some, and the old paradigm fingered on well after the Revolution in the minds of others.

I am not going to concern myself just now, however, with the revolution by which the shift of paradigms took place. On the schematic form of the paper which I have distributed the two paradigms are connected by the narrow neck of the hourglass labeled Revolution and Code. I shall make a few remarks about what specifically was changed, and about what is said to have changed in the spirit of the laws during that period, but I am not going to try here to describe how that took place. Instead, I would like to make a series of comparisons and contrasts between the two articulated paradigms, in 1700 and 1900, particularly about the theory of property and the structure of the family which are the main components of the law of succession.