The Role of Civil Codes in France and Louisiana

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Quebec: civil law in French

Acadia: common law in French

Louisiana: civil law in English
A French Colony (1682-1762)

• 1682 Cavelier de la Salle names the region ‘Louisiane’
• 1699 Pierre Le Moyne d’Iberville founds Fort Maurepas (near Biloxi)
• 1718 Bienville founds New Orleans
• French period 1699-1762
  – Custom of Paris (King’s Letter Patent 1712)
  – 300+ years of civil law in Louisiana!
A Spanish Colony (1769-1800)

- France abandons Louisiana to Spain in 1762
- O’Reilly Code, 1769: Spanish law
- Complexity:
  - > 20,000 laws
  - Las Siete Partidas
    - a Castilian code compiled during the reign of Alfonso X of Castile (1252-1284).
    - Recompilations of the laws
Louisiana had a civil law system but no civil code, and certainly not the Napoleonic Code, adopted in 1804.
Codification in France & Louisiana

• To say that Louisiana has the Napoleonic Code is more than confusing: it is dead wrong!
• France adopted its Civil Code in 1804, after the Louisiana Purchase
• Louisiana (then Territory of Orleans) codified its private law in 1808 (Digest of the Civil Laws)
• Experience of the civil code: not the same in France and in Louisiana, for historical reasons
• These differences still matter to this day!
French law during the *Ancien Régime*

North: Customary law

South: Written law (Roman law)
Confusion of powers: the ancient *Parlements*
Montesquieu (1689-1755)

Separation of powers

‘So long as citizens obey the law it need not be the same law’
"Is it not an absurd and terrible thing that what is true in one village is false in another? What kind of barbarism is it that citizens must live under different laws?

When you travel in this kingdom you change legal systems as often as you change horses"
1789 Declaration of the Rights of Man and the Citizen
The Napoleonic Code

“My true glory is not that I have won forty battles; Waterloo will blow away the memory of these victories. What nothing can blow away, what will live eternally, is my Civil Code.”
The Civil Code Draftsmen

Bigot de Préameneu (Rennes)

Maleville (Bordeaux)

Tronchet (Paris)

Portalis (Aix)
The French Civil Code

• A double compromise
  – Between customary law and Roman law
  – Between Ancien Regime and Revolution

• A systematic and comprehensive code
  – Short Preliminary Title
  – Book 1. Of Persons
  – Book 2. Of Things
  – Book 3. Of the different modes of acquiring the ownership of things
Abrogation Clause:
French Law of March 21, 1804

• Art. 7: From the day when these laws [constituting the Code] become effective, the Roman laws, the ordinances, the general and local customs, the charters and the regulations all cease to have the force either of general or of special law concerning the subjects covered by the present Code.

• >> Break with the Past
• >> From now on, judges must apply the code based on interpretation
• >> They cannot apply old laws
The style of the Civil Code

• Plain and simple
• Avoids technicality
• Short provisions
General clauses

Art. 1382

Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it.

Art. 1383

Everyone is liable for the damage he causes not only by his intentional act, but also by his negligent conduct or by his imprudence.
Principle & Exception

Art. 544

• Ownership is the right to enjoy and dispose of things in the most absolute manner,
• provided they are not used in a way prohibited by statutes or regulations.
The obligation which results from a loan of money is always for the numerical sum stated in the contract. [General rule]

Where there is a rise or a fall in currency before the time of payment, the debtor must return the numerical sum loaned, and must do so only in the currency having legal tender at the time of the payment. [Special rule]
Back to the Louisiana Purchase 1803
Territory of Orleans

• Sparse population:
  – 1803: 43,000 total, 8,000 in New Orleans
  – 1810: 76,000 total, 17,000 in New Orleans

• Ancienne population (ancient inhabitants)
  – Mostly French (Creoles, Acadians, newcomers)
  – German, Spanish

• Anglo-American newcomers: 1 out of 7

• 1807: 26,000 white + 4,000 free people of color + 23,500 slaves
Tensions & Conflicts

• Different cultures
  – European, Anglo-American
  – Native American, African, Caribbean

• Different legal traditions
  – Ancient inhabitants: French, and later Spanish law, both rooted in Roman law (Civil Law)
  – Anglo-Americans: Common Law

• Strong difference in legal traditions = a threat to a still fragile Union
Differences: (1) Marriage

- **France & Spain: community of gains**
- >>> Property acquired during marriage forms a community
- >>> Surviving spouse gets ½ community
- **Common Law: separation**
- >>> H + W = one person
- >>> *Feme covert* > W’s property vested to H and gets life interest when a widow
Differences: (2) Family Relations

• **Civil Law**: a child born out of wedlock can be legitimated by subsequent marriage
• >> Such child will inherit
• **Common Law**:  
• >> legitimation is immoral  
• >> “Bastards” can never inherit
Differences: (3) Successions

- Civil Law
- >> Testamentary freedom is limited
- >> Forced heirship
- Common Law
- >> Full testamentary freedom
- >> Children can be disinherited
Differences: (4) Property

- **Civil Law**
- >> Property is controlled by the living
- >> Substitutions are prohibited (*fideicommissum*)
- >> Ownership is simple (*usus* + *fructus* + *abusus*) and identifies with the thing owned

- **Common Law**
- >> Testator may dispose of property for generations to come
- >> Different ways of controlling property: estate, interests, trust
Different views of what the law is

• **Civil Law**: Book based
  – Twelve Tables, Corpus Juris Civilis
  – Commentaries of legal scholars
  – Civil Codes

• **Common Law**: Court-decision driven
  – Judge-made law
  – Law & Equity
  – Jury trial
A big deal, people cared!

• LA population was aware of differences
• Resistance to the common law after the Purchase
• Idealism of Jefferson: one legal system for the entire United States, the common law
• Governor Claiborne tries to impose the common law (builds an “American style” court system)
• New Orleans population will resist the imposition of the common law
Resistance

- Local resistance > Claiborne: retention of the laws in force
- Congress confirms
  - Acts of March 26, 1804 and March 2, 1805
- 1806 Legislative Council adopts the civil law.
- Claiborne vetoed
- Strong reaction: Manifesto
The Manifesto

• “…the wisdom of the civil law is recognized by all Europe; and this law is the one which nineteen-twentieths of the population of Louisiana know and are accustomed to from childhood, of which law they would not see themselves deprived without falling into despair.”

• “…frightful chaos of the common law?”
Towards Codification

• Act of June 7, 1806 [CS 382]
  – Legislative Council and House of Representatives appoint James Brown and Louis Moreau-Lislet “to compile and prepare jointly a Civil Code for the use of this Territory.”

• Governor Claiborne bows to the will of the majority
  – But keeps building a U.S. style court system
Drafting the Civil Code

• Completed in less than two years
• French *Projet* of 1800 and French Civil Code served as a model or guide:
  – For the form (three books; other subdivisions)
  – For the substance wherever French law was in accord with Spanish law
• By no means a clone or a copy of the French Civil Code!
  – See the Batiza / Pascal “Tournament of Scholars”
  – Drafters made a few choices
  – Packed with definitions
Adopting the Digest

• Adopted on March 31, 1808 with a name change
• Formal recognition of the adoption of the Civil Law
• Does not mean full exclusion of the Common Law
  – Civil and criminal procedure (jury)
  – Court system
  – Constitution 1812
  – Administrative law
  – Today, Revised Statutes...
The Digest of 1808

https://www.law.lsu.edu/clo/digest-online/

Digeste des lois civiles en vigueur dans le Territoire d’Orléans
Digest of the Civil Laws Now in Force in the Territory of Orleans
Code or Digest: What difference?

• Abrogation Clause

• Code civil des Français

• >> Break with the past
  – French Revolution
  – Unification of the law
  – Legislative postivism
Code or Digest: What difference?

• Digest of 1808
• >> Continuity of the law
  – Social conservatism
  – Preexistence of a uniform law
  – Natural law approach
• Act of March 31, 1808: “Whatever in the ancient civil laws of this territory (...) is contrary to the dispositions contained in the said digest, or irreconcilable with them is hereby abrogated.”
The survival of preexisting law

• Cottin v. Cottin (1817) H dies. W pregnant, gave birth to a child who died after 8 hours. Did the child inherit?
Cottin v. Cottin (1817)

• **Digest, B. 1, T. 1, Art. 6.** “Abortive children are such as by an untimely birth, are either born dead or incapable of living.”

• Spanish law: child naturally born and not abortive if lives 24 hrs (Recopilación de Castilla)

• Question: is the old law incompatible with the Digest?
Survival of old laws causes problems

- Necessity to refer to old texts in foreign languages (Spanish, Latin)
- Defeated the purpose of the Digest ...
- “to collect [the laws] in a single work, (...) without recurring to a multiplicity of books, which, being for the most part written in foreign languages, offer in their interpretation
- inexhaustible sources of litigation.”
The Remedy:
The adoption of a true Civil Code in 1825

- Louisiana Civil Code 1825, art. 3521:
- “From and after the promulgation of this Code, the Spanish, Roman and
  French laws, which were in force in this State, when Louisiana was
  ceded to the United States, and the acts of the Legislative Council, of
  the legislature of the Territory of Orleans, and of the Legislature of the
  State of Louisiana,
- be and are hereby repealed in every case, for which it has been
  especially provided in this Code, and that they shall not be invoked as
  laws, even under the pretence that their provisions are not contrary or
  repugnant to those of this Code.”
The Future of the La. Civil Code

- Civil Code of 1825 [FR Translated into EN]
- Civil Code of 1870 [English only]
- **Ongoing Revision:**
  - Louisiana State Law Institute (1938)
  - Piecemeal revision (title after title)
  - Updates (e.g. family law; gender equality...)
  - Bridging differences with common law
  - Keeping pace with other civil law countries
Continuity and fluidity of the law


• Code revision: even when Revision Comments say ‘The text of this provision is new. It changes the law,’ courts sometimes go for continuity as if no change (e.g. Art. 466)

• Focus on cases (jurisprudence)

• Common law influence on code interpretation?
Example: dog bites

- The issue before us is: When an innocent bystander is bitten by a dog, who shall bear the damages so caused? The bystander passing on the street, who did not provoke the attack? Or the owner of the dog, who created the risk by letting the dog go loose?
- Art. 2321. The owner of an animal is answerable for the damage caused by the animal.
Civil Law v. Common Law

• Justice Tate:

• “in accordance with the intent of our Louisiana Civil Code, the owner of an animal is ordinarily responsible for the harm it does, although certain limited defenses are available to absolve him of the presumption of fault created by the animal's injuring another.” >> STRICT LIABILITY

• Overruled “common law interpretation” whereby owner liable only if knowledge that dog was vicious.
A Model & a Lab

- A model for a global world, where the Civil Law and Common Law traditions are mixing and must cohabit
  - Civil Law Jurisdictions (translations)
  - Mixed jurisdictions
  - International law
- A laboratory for the civil law in English (*civil law v. common law terminology*)
The Louisiana Civil Code at LSU

- Louisiana Civil Code Online
- Compiled Edition of Civil Codes of Louisiana
- Journal of Civil Law Studies
Le code s’offre en partage à la francophonie
The worldwide Influence of the Louisiana Civil Code