

THE CIVIL CODES OF LOUISIANA

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LOUISIANA AND COMPARATIVE LAW**

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THE CIVIL CODES OF LOUISIANA

1. HISTORICAL, POLITICAL, AND LEGAL BACKGROUND OF THE CODIFICATION

See, in general, RICHARD H. KILBOURNE, JR., *A HISTORY OF THE LOUISIANA CIVIL CODE; THE FORMATIVE YEARS, 1803-1839* (1987); Brown, *Law and Government in the "Louisiana Purchase": 1803-1804*, 2 *Wayne L. Rev.* 169 (1956); *id.*, *Legal Systems in Conflict: Orleans Territory 1804-1812*, 1 *Am. J. Legal Hist.* 35 (1957); Dart, *Courts and Law in Colonial Louisiana*, 22 *Rep. La. B.A.* 17 (1921); Groner, *Louisiana Law: Its Development in the First Quarter-Century of American Rule*, 8 *La. L. Rev.* 350 (1948); Hood, *A Crossroad in Louisiana History*, 22 *La. L. Rev.* 709, 710-720 (1962); Schmidt, *Ordinances and Instructions of Don Alexander O'Reilly*, 1 *La. L.J.* 1 (1841); *id.*, *Edward Livingston and the Louisiana Codes*, 2 *Colum. L. Rev.* 24 (1902); Stone, *The Reception of Law in Louisiana*, in *LEGAL THOUGHT IN THE UNITED STATES OF AMERICA* (Hazard and Wagner eds. 1970).

French Colony. The discovery of Louisiana belongs to the romance of American history. It has been suggested that the mouth of the Mississippi River was discovered by Alonso Alvarez de Pineda in 1519 or by the expedition of Panfilo de Narvaéz, but neither suggestion rests on conclusive evidence. It seems that Hernando de Soto entered the borders of the present state of Louisiana and was buried near the point where Red River empties into the Mississippi, but again there is lack of conclusive proof. Survivors of the de Soto expedition, however, did descend to the mouth of the Mississippi in 1543. Spain set up no claim to the region by right of discovery. Therefore, Robert Cavalier, Sieur de la Salle, who came down the river in 1682 from the French possessions to the north, was able to take possession of the territory in the name of France. The new possession was given the name of Louisiana, in honor of King Louis XIV. La Salle sought to establish a colony in 1684, but missed the mouth of the Mississippi and landed in Texas, where he was murdered a few years later by some of his followers. A second attempt to establish a colony was undertaken by D'Iberville, who reached the Gulf Coast in 1699 and established a fort about 40 miles above the mouth of the Mississippi. This was the earliest settlement within the boundaries of the present state of Louisiana.

The legal history of Louisiana began in 1712 when Louis XIV granted a Charter to Antoine Crozat for the development, administration, and exploitation of the possession. This Charter provided that the territory was to be governed by Edicts, Ordinances, and the Custom of Paris, namely a collection of customary rules prevailing in the city of Paris and its surrounding areas that had been reduced to writing in the sixteenth century. Louisiana proved a great burden on the purse of Crozat. In 1717 Crozat surrendered his Charter, and a new one was issued to John Law's Company of the West, which provided for application of the same French laws. The Company of the West accomplished much for Louisiana. DeBienville, a brother of D'Iberville, was sent out as a governor, and New Orleans was established by him in 1717. However, the company failed to realize profits, and eventually came to an end fatal to its creditors. It surrendered its Charter in 1731, and Louisiana became a crown colony, still governed by

Edicts, Ordinances, and the Custom of Paris.

Spanish Rule. France ceded the Louisiana Territory to Spain in 1762 by the Treaty of Fountainebleau. However, French laws continued to apply until November 25, 1769, when a newly appointed Spanish Governor, Don Alexander O'Reilly, determined to wipe out remaining vestiges of French law issued an Ordinance that was designed to organize an efficient government and administration of justice in accordance with the Spanish laws. Governor O'Reilly was a young Irishman who had risen to distinction in the Spanish Army.

On November 25, 1769, Governor O'Reilly promulgated a second Ordinance containing: that is known as *O'Reilly's Code*. This was a brief code of practice that influenced substantially the development of the Louisiana procedural system. The text of the Ordinance contains provisions of public and private law dealing with civil judgment in general, executory proceedings, judgments in criminal cases, appeals, punishments and testaments. The substance of these provisions was taken from Spanish sources. .

The O'Reilly enactments of November 25, 1769, transformed Louisiana into a Spanish ultramarine province, governed by the same laws as the other Spanish possessions in America and subject to the same system of judicial administration. However, despite fairly clear indications that French law was replaced in 1769 by the complicated system of Spanish private and public law, there has been much disagreement in Louisiana as to whether this actually happened. There are indications demonstrating an unusual attachment by the French population to their own laws and customs. Rather than resorting to the official Spanish judicial system, the French population frequently settled affairs among themselves extrajudicially on the basis of French laws, customs, and usages.

Retrocession and the Louisiana Purchase. Louisiana was retroceded to France on October 1, 1800, by the Treaty of San Idelfonso, but France assumed sovereignty only on November 30, 1803, for a period of twenty days. During the brief period of French control, Laussat, as Colonial Prefect representing Napoleon, abolished the Spanish authorities and created a municipal government for Louisiana. He organized a militia composed of Americans and Creoles, and, bearing grudge for his treatment by the Spaniards, made himself as obnoxious to them as he could.

However, Laussat did not have the time to organize a judiciary, and his only change to the laws governing Louisiana was the abrogation of Spanish slave legislation and the reintroduction of the French *Code Noir*. Thus, the bulk of the pre-existing laws remained in force until the United States took possession of the territory on December 20, 1803, by virtue of the Louisiana Purchase.

The 1803 Act of Congress which authorized the President to take possession of the territories ceded by France provided a method of interim government and the basis for the protection of the inhabitants. In accordance with this Act, President Jefferson appointed W. C. C. Claiborne to exercise all the powers and authorities heretofore exercised by the Colonial Governor and Intendant. The first official act of Claiborne was to affirm the application of laws then in force.

Claiborne's affirmation of the pre-existing laws in Louisiana was intended to be a temporary measure. Claiborne was a native of Virginia and a lawyer trained in the

common law system. He was convinced that the common law should be introduced in the territory, and he shared this conviction with President Jefferson and with most of the American lawyers who had newly arrived in New Orleans. Both Jefferson and Claiborne anticipated difficulties in establishing the authority of the United States because they had been advised by Spanish officials that the people of Louisiana “are only kept in order by the Hand of Power” and that “there will be the greatest necessity of being prepared for any event whatever.” They thought, however, that once order was firmly established it would be an easy matter to introduce the common law system. In reality, the transfer of authority was effected without incident, but there was much reaction against the introduction of the common law system.

The introduction of the common law system was opposed by the native population, but the leader of the opposition was Edward Livingston, a New York lawyer who immigrated to Louisiana in 1803. Livingston, the statesman and jurist, was a convert to the cause of the civil law. He studied Roman and Spanish law after his arrival in New Orleans and became convinced that the civil laws system was by far superior to the common law that prevailed in all other sister states. He devoted his time and energy, therefore, to the preservation of the civil law system in his new home state. In this he was successful, and, moreover, he contributed greatly to the formation of the Louisiana tradition of codified laws.

The Territory of Orleans. By an 1804 Act of Congress, the areas ceded to the United States were divided into distinct territories, one of which, the Territory of Orleans, comprised substantially the present state of Louisiana. The Act provided that this territory was to be governed by the Governor and a Legislative Council consisting of thirteen members appointed by the President. Edward Livingston, having reasons to fear that the appointees of the President, nominated by Claiborne, would favor adoption of the common law system, undertook to prevent the appointment of the Council. He prepared a memorial urging Congress to grant statehood to the territory at once, so that it could be governed by a body of elected rather than appointed representatives.

Statehood was not granted immediately. But, after consideration of Livingston's memorial, Congress abolished the Legislative Council early in 1805 and established a Legislature composed of an elected House of Representatives and an appointed Legislative Council. The Legislature convened in 1806 and declared that the Territory of Orleans should be governed by Roman and Spanish civil law and by the ordinances and decrees that previously applied in Louisiana. Governor Claiborne vetoed this Act, pointing out that it was the prerogative of Congress to determine whether the civil law should or should not apply in the territory.

2. THE DIGEST OF THE LAWS IN FORCE (1808)

Following Claiborne's veto of the 1806 Act of the Territorial Legislature, the Legislature adjourned in protest, claiming that their best acts were rejected by the Governor. Within a few days, a manifesto signed by a number of representatives was published in New Orleans newspapers, which purported to be a resolution for the dissolution of the legislature on account of the Governor's veto. Nevertheless, the legislature convened on June 7, 1806, and adopted a resolution for the preparation of a

civil code for the territory. James Brown and Moreau-Lislet were charged with this task, and were specifically directed to base codification on the civil law by which the territory was governed. Governor Claiborne acceded to this resolution.

In accordance with the legislative mandate, Brown and Moreau-Lislet prepared a code and submitted it to the legislature. On March 31, 1808, the legislature adopted their work under the title of “A Digest of the Civil Laws now in Force in the Territory of Orleans, with Alterations and Amendments Adapted to its Present Form of Government.” The Digest, known as the Louisiana Civil Code of 1808, gained Claiborne's approval. It was published in both French and English, but the English version was merely a translation from the French original. The 1808 Code was revised in 1825, and again in 1870. As revised and amended by special legislation, it is still the fountainhead of our private law.

The redactors of the Louisiana Civil Code of 1808 based codification on a variety of sources. They followed as a model preparatory works of the French Civil Code as well as the finished text of that code. The 1808 Digest contained 2,160 articles. 1,516 of these articles, about seventy per cent of the whole, corresponded with, and were based upon, provisions of the French *projet du gouvernement* of 1800 or of the Napoleonic Code. Three hundred and twenty-one articles, about fifteen per cent of the whole, were based upon other French statutes or upon French doctrinal works. Most of the remaining articles were based directly on Spanish materials.

The Civil Code of 1808 did not repeal all prior laws. The enabling statute provided that “whatever in the ancient laws of this territory, or in the territorial statute, is contrary to the dispositions contained in said digest, or irreconcilable with them, is hereby abrogated.” This provision was compatible with the notion of a digest or compilation rather than a true civil code. Civil codes are conceived as comprehensive enactments, designed to be complete within their area of application, and intended to break with the past.

3. THE CIVIL CODE OF 1825

On March 24, 1822, three well known jurists, Derbigny, Moreau-Lislet, and Livingston, were commissioned by the Legislature “to revise the civil code by amending the same in such a manner as they will deem it advisable, and by adding under each book, title, and chapter of said work, such of the laws as are still in force and not included therein.” The three jurists were also charged with the duty to prepare a complete system of the commercial laws in force and a system of the practice to be observed before the courts. The committee completed its work speedily, and on March 22, 1823, presented to the legislature drafts of a Civil Code, a Code of Practice, and a Code of Commerce. After elaborate consideration and discussion, the Civil Code and the Code of Practice were adopted by the legislature on April 12, 1824. The Commercial Code was rejected, apparently on the theory that commercial law ought to be uniform for the entire United States.

The redactors of the 1825 Code followed the French Civil Code closely and relied heavily on French doctrine and jurisprudence. In their *projet*, which was reprinted by the legislature in 1937 and is readily available, the redactors took care to identify the sources of most proposed amendments, deletions, and additions, and commented on the reasons

that prompted them to act. They drew freely from the treatises of Domat, Pothier, and Toullier, but, at the same time, paid attention to the Digest of Justinian, the Siete Partidas, Febrero, and other Spanish materials. Even so, the Code of 1825 contains for the most part provisions that have an exact equivalent in the French Civil Code.

Deviations from the French model occurred frequently with respect to definitions and didactic materials in general which were kept to a minimum in France. While according to the better view these materials have no place in a legal text, their inclusion in the Louisiana Civil Code of 1825 was, perhaps, a practical necessity due to the scarcity of coherent doctrinal works.

The Civil Code of 1825 was printed in both French and English and acquired the force of law on June 20 of that year (June 15 in West Feliciana Parish). The new Civil Code was not merely an amendment of the 1808 Digest. It was an all-inclusive piece of legislation, intended to break definitively with the past. The 1808 and 1825 Louisiana Civil Codes were drawn up in French and translated into English. They were subsequently published in French and English, both versions being official. Since, however, the translation into English was made hastily, and a number of errors crept in, question arose as to which of the two versions should prevail in case of conflict.

The enabling statute of the 1808 Code had provided that in the event of "obscurity or ambiguity, fault, or omission, both the English and French texts shall be consulted, and shall mutually serve to the interpretation of one and the other." The enabling statute of the 1825 Code, however, merely instructed printing in French and English on facing pages; it made no provision for the resolution of conflicts between the two texts. Under the circumstances, courts taking cognizance of the fact that the French text was the original version, and being aware of the poor quality of the translation, developed the view that the French text was controlling. This almost dictated that the Louisiana legal profession be familiar with French legislation, jurisprudence, and doctrine. As a result, the French legal culture enriched the Louisiana civilian tradition, especially in the half century after the 1825 revision.

4. THE CIVIL CODE OF 1870

Changes brought about by the Civil War, the adoption of a new constitution, and the accumulation of civil law legislation that remained outside the 1825 Code, made revision imperative. Sensitive to this demand, the Louisiana legislature appointed in 1868 a committee to revise the general statutes of the state and the Code of Practice. In the same year, the legislature authorized this committee to select one or more commissioners to revise the Civil Code of 1825, and John Ray of the Monroe Bar was charged with this task. Ray employed three attorneys to assist him, and within a year submitted his report to the legislature along with a proposed text. This work was adopted by the legislature in 1870 under the title of "The Revised Civil Code of the State of Louisiana."

The Civil Code of 1870 is substantially the Code of 1825. The changes made relate merely to the elimination of provisions concerning slavery, the incorporation of amendments made since 1825, and the integration of acts passed since 1825, which dealt with matters regulated in the Code without officially amending it. These changes necessitated renumbering the articles of the Code, but they did not affect its structure, underlying theory, or the substance of most of its provisions.

Unlike the 1808 and 1825 Codes that had been published in both French and English, the 1870 Code was published in English only. Argument could thus be made that the old question concerning the resolution of conflicts between the French and English versions has become moot. Indeed, if the 1870 Code were to be regarded as a piece of legislation complete unto itself, and without any relation to the prior French version, the English text alone should be regarded as controlling. But this argument, attributing to the legislature the intent to break definitely with the past despite the verbatim re-enactment of most of the provisions of the 1825 Code, cannot be accepted. It is unrealistic and likely to lead to unintended consequences.

After the end of the war between the states, the use of the English language had become almost universal in Louisiana political, legal, and governmental circles, and the judicial reliance on legal materials deriving from French or Spanish sources was diminished. The development of Louisiana law took a new turn, common law influence was expanded, and by the turn of the century, the Louisiana Civil Code came to be regarded as just another statute suitable for literal application only.

After the 1868-1869 revision, the Louisiana Civil Code emerged as the primary depository of private law in the state and as a charter for justice, equality, and liberty in the private relations of all persons. The Louisiana Civil Code was greatly influenced by, and was modeled after, the Code Napoleon. However, lay beliefs and expressions that the Napoleonic Code has been in force in Louisiana are totally unfounded. The Louisiana Civil Code of 1870 resembled the Code Napoleon in its structure, style, and substance, but had its own unique identity as a product of Louisiana legal and cultural history. The Louisiana Civil Code of 1870 contained 1,275 more articles than the Code Napoleon. The provisions that had no equivalent in the Napoleonic Code had been drawn from the Justinian legislation, Spanish sources, French doctrinal works, and the Louisiana statutes enacted since 1808. Some of these statutes had introduced into the fabric of the civil law ingenious solutions, such as the usufruct of the surviving spouse in community. Quite apart from these textual variations, however, the Louisiana Civil Code differed from the Napoleonic Code in its approach to the fundamental matter of sources of law. The extreme legal positivism of the Code Napoleon that has elevated legislation to the status of the single source of law may be contrasted with the genius of the Louisiana Civil Code that has always recognized custom as an authoritative source of law and equity as a source for the resolution of disputes in the absence of a positive law or custom .

5. THE CULTURAL INFLUENCE OF THE LOUISIANA CIVIL CODE

The Louisiana Civil Code has exerted a profound cultural influence in the United States and abroad. Being, perhaps, the most Romanist civil code ever enacted anywhere, it was a natural model for the drafting, style, and substance of civil codes in Latin America, including the Argentine Civil Code which itself became a model for other civil codes. More than one hundred articles of the Louisiana Civil Code of 1870 became part of the Puerto Rico Civil Code. In the Caribbean Basin, the Civil Code of St. Lucia was influenced by the Louisiana Civil Code and the influence of the Preliminary Title of the Louisiana Civil Code on the corresponding title of the Civil Code of Spain is apparent.

The cultural influence of the Louisiana Civil Code on the common law of sister states and on federal law has not been systematically studied, but scattered information

suggests that the influence is real and significant. Mitchell Franklin wrote in 1932:

The Civil Code of Louisiana is the most important contribution of Louisiana to an American culture. It possibly is the most important accomplishment in the history of American law in the sense of the relation it bears to the future direction of American law... It is a rather grim commentary on our historians that the significance of the Louisiana Civil Code has been completely overlooked... As a cultural document, the Civil Code has its own merit. It is beautifully written, so carries the best tradition of civilian aesthetics.

It has been pointed out that the decision of the United States Supreme Court in *Bender v. Pfaff*, 282 U.S. 127, 51 S. Ct. 64 (1930), grounded on Louisiana community property law, led the federal government to the adoption of the joint return as the mode for the income taxation of spouses. As late as 1990, a spouse argued before the United States Tax Court that New Mexico had adopted as part of its law the Louisiana law of usufruct, and, therefore, a surviving spouse is entitled to QTIP marital deduction. The court denied the claim, but remedial state legislation may be forthcoming to secure the QTIP for citizens of New Mexico.

6. REVISION OF THE LOUISIANA CIVIL CODE OF 1870

The conditions of life have changed since 1825 and 1870. In the light of changed conditions, the conceptual framework of the Louisiana Civil Code of 1870 has proved analytically deficient in certain instances. Moreover, a gloss of jurisprudence has grown around the provisions of the Code and legislation has been enacted repealing or amending a substantial number of articles. Other statutes bearing on civil law matters have been left outside the Civil Code and have become part of Title 9 of the Louisiana Revised Statutes. In the light of these circumstances, the revision of the Civil Code is desirable not only for systematic purposes but also in order to establish a clear correspondence between the legal precepts in the Code and in actual practice.

In 1948, the Louisiana State Law Institute, an official law reform agency for the state, was specifically instructed by the legislature to prepare a projet for the revision of the Civil Code. In due course, the Institute implemented the legislative mandate by the creation of a Civil Law Section and by the appointment of Reporters and Advisory Committees. The selective revision of the Louisiana Civil Code has resulted in alterations of form and substance. Gone is the tripartite division of the subject matter of the civil law that derived from the Institutes of Gaius and reflected the model of the Code Napoleon. It may be hoped, however, that the new legislation will be the product of evolution resting on tested values and on the accumulated wisdom of the past. The new Civil Code of Louisiana may, indeed, be an authoritative statement of the civilian tradition of the state within the scheme of a modern, scientific, comprehensive, and comprehensible organization of the subject matter.

Revision of the Civil Code by the Louisiana State Institute continues in most fields, including obligations, successions, leases, and family law, but one may be pessimistic as to the result. Even if revision in these fields is completed, Louisiana would

probably come to have a series of mini-codes or glorified statutes rather than an integrated Civil Code with inner consistency in form and substance. There is minimal coordination of projects and each revision is bound to reflect the style and predilection of the individual reporter. Conflicts of policies, and at times of rules, are bound to occur. These dangers are inherent in any such piecemeal revision undertaken by a host of academicians and practitioners whose work has to pass through the gauntlet of the Louisiana State Law Institute and the vagaries of an ever-changing Council membership.

The tale continues to unfold. The Louisiana Civil Code reflects the contemporary realities of life in the United States and particularly in the state of Louisiana, with its antinomies and fascinating but competing legal traditions. Colonel John H. Tucker Jr's foreword to the pamphlet edition of the Louisiana Civil Code underscores the function of the Civil Code as a social blueprint that regulates the life of citizens from birth to grave. Addressing the legal profession of Louisiana, he wrote:

The "Civil Code"... is your most important book because it ushers you into society as a member of your parents' family and regulates your life until you reach maturity. It then prescribes the rules for the establishment of your own family by marriage and having children, and for the disposition of your estate when you die, either by law or by testament subject to law. It tells how you can acquire, own, use, and dispose of property...It provides the rules for most of the special contracts necessary for the conduct of nearly all of your relations with you fellowman...and finally, all of the rights and obligations governing your relations with your neighbor and fellowman generally.

CIVIL LAW AND COMMON LAW CONTRASTED

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See, in general, WATSON, *THE MAKING OF THE CIVIL LAW* (1981); Baudoin, *The Impact of the Common Law on the Civilian Systems of Louisiana and Quebec*, in *THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE* (Dainow ed. 1974); Burdick, *The Influence of Roman Law upon English and American Law*, 3 *Kan. B.A.J.* 181, 306 (1935); Parker, *The Criteria of the Civil Law*, 7 *The Jurist* 140, 152 (1947); Pringsheim, *The Inner Relationship between English and Roman Law*, 5 *Cambridge L.J.* 347 (1935); Rheinstein, *Common Law and Civil Law: An Elementary Comparison*, 22 *Rev. Jur. U.P.R.* 90 (1952); Rudden, *Courts and Codes in England, France and Soviet Russia*, 48 *Tul. L. Rev.* 1010 (1974); SCHLESINGER, BAADE, DAMASKA, AND HERZOG, *COMPARATIVE LAW* 229-336 (1988).

1. CLASSIFICATION OF LEGAL SYSTEMS

Meaning of *Civil Law*. Contemporary legal systems may be classified according to a variety of criteria such as culture, structure, race or language. The legal systems in the western world are ordinarily classified into four groups: civil law, common law, socialist law, and Scandinavian law. At this point, however, we are only concerned with a comparison between civil law and common law.

The meaning of the words *civil law* has not been the same in all historical periods. In the framework of early and classical Roman law, *jus civile* was the law governing the relations of Roman citizens. In that regard, it was contrasted to the law of nations and the natural law. From a different point of view, the *jus civile* was contrasted to the Praetorian law and to the public law. In the middle ages and up to the era of reception the term civil law referred mostly to the Justinian legislation and the accumulated doctrine of the commentators; it was contrasted to Canon law.

Civil Law Jurisdictions. In modern times, the term civil law refers to those legal systems which, especially in their methodology and terminology, were shaped decisively by the Roman law scholars from the Middle Ages to the nineteenth century. But within the framework of a civil law system, as defined, the term civil law is ordinarily reserved to designate the sum total of rules governing relations of private individuals as such, with the exception of commercial acts and relations that are subject to commercial law.

The geographical boundaries of the civil law in the world are extensive. In Europe, all countries in the west, center, south, and east of the continent belong to the civil law family. Most eastern continental countries belonged to the same family before World War II. In post-war years, under the U.S.S.R. domination, the legal systems of those satellite countries were classified within the sphere of socialist law. However, after the dissolution of the U.S.S.R., the former satellite countries rushed to revise their private laws and either revised their civil codes or enacted new ones to reflect the political, economic, and social change.

In the Near East, civil law prevails in Lebanon, Syria, Egypt, and Turkey; in the Far East, in China, Japan, Thailand, Sri Lanka, and the Philippines; in North America, in Quebec and in Louisiana; in South America, in all countries; and in Africa, in the Union of South Africa.

Mixed Jurisdictions. In certain parts of the world today civil law and common law are in geographical conflict. Certain territories that were in the past governed by the civil law exclusively should be designated now, more accurately, as *mixed jurisdictions*. This, for example, is the case of Louisiana, Quebec, Puerto Rico, Scotland, Sri Lanka, Union of South Africa, and Guyana (British Guiana).

In the Union of South Africa, in Sri Lanka, and Guyana, the Roman-Dutch version of the civil law prevails. This law is quite different from contemporary Dutch law that is based on the Napoleonic Code. The Roman-Dutch law derives from Roman sources, the accumulated doctrine of Dutch commentators, and, local jurisprudence. In the territories of the Roman-Dutch legal tradition, common law rules and methods of

reasoning have been successfully combined with civilian counterparts.

In Scotland, the Roman law has not been formally received; thus, Roman sources are persuasive rather than authoritative. But there has been a gradual infiltration of civilian doctrine and the Romanist spirit is still apparent. Since the union of Scotland and England, Scottish law has been subject to continuous common law influence, particularly through the decisions of the House of Lords. The Custom of Paris originally applied in Quebec but it was replaced by the Quebec Civil Code of 1866, which in turn was replaced in 1994 by the new Quebec Civil Code. A version of the Spanish Civil Code of 1889, with certain amendments, prevails in Puerto Rico.

2. USUAL BUT ERRONEOUS DISTINCTIONS

Roman Law Derivation. It has been said that the civil law is characterized by a direct derivation from, or wholesale adoption of, Roman law. On the contrary, common law is supposedly free from Roman law influences. The truth is that no civil law country has ever received the entire body of Roman law; modern codes have discarded obsolete doctrines, rules, and institutions and have introduced new rules based on indigenous ideas.

The common law has not been immune to the infiltration of Romanist thinking. A certain spiritual affinity between Roman law and common law is noticeable. In contrast to modern civil law, common law is basically case law, as Roman law was; the development of equity jurisdiction in England had a counterpart in Rome; and both common law and Roman law are characterized by adherence to tradition, strong individualism, the practical approach, and by the absence of a separate body of commercial law.

Documentary evidence tending to show the extent of Roman influence on common law may be missing, but a glance at a number of historical facts may be suggestive. Julius Caesar conquered Britain in 54 B.C. and the land remained under Roman control for about five hundred years. Javolenus and Ulpian discussed cases arising in Britain, and Papinian, as chief justice, with Ulpian and Paul, as associate justices, held court in York! It is disputed whether Roman law survived the invasion of Britain by Teutonic tribes. However, Pope Gregory sent Augustine to Britain in 596, and four years later a Criminal Code was promulgated by King Eathelbert of Kent in the Roman style. The promulgation of another code by King Alfred the Great (871-901) was preceded by a visit to Rome. Feudalism, as established in England by William the Conqueror (1066), was an amalgamation of Roman law and Germanic customs and traditions. Lafranc, William's Minister of State and subsequently Archbishop of Canterbury, was an Italian educated in the law school of Pavia. Also, the newly instituted Ecclesiastical Courts applied largely Roman law.

In about 1143, Vacarius of Bologna, became the first professor of law at Oxford and soon thereafter published an abbreviation of the Digest. King Henry II (1154-1189), who centralized the administration of justice, was French-born and French-educated. Glanville's "Treatise on the Laws and Customs of England" was written in Latin and displayed a thorough acquaintance with Roman law. Bracton's Treatise on the "Laws and

Customs of England” was also written in Latin, appears to be arranged according to Roman ways of thinking, and displays familiarity with Roman sources. According to Maine, one-third of Bracton's book is derived from Roman law.

The 12th and 13th centuries have been designated as the Roman epoch of English legal history. Although the influence of Roman law declined in the 14th century, it did not completely disappear. Subsequent developments include the shaping of maritime law according to civilian prototypes and the reception of the Law Merchant into the body of common law, particularly through the decisions of Lord Mansfield (1756-1788). Coke (1552-1633), Chief Justice and author of the “Institutes, “sought to check civilian influences. Bacon (1561-1626), however, trained in Roman law, urged Queen Elizabeth to codify the common law as Justinian did the Roman law. Finally, Blackstone, appointed in 1753 as first Professor of English Law at Oxford, was first to admit Roman law influences in the formative era of common law.

Codes and Precedents. Secondly, it has been suggested that civil law and common law differ because civil law is codified while common law is based on precedents. However, there have been civil law countries without a civil code: Germany before 1900, France before 1804, and Greece until 1946. On the other hand, codes have been enacted in several common law jurisdictions: in Massachusetts (1648), Virginia, Georgia, Bermuda, and in a number of western states in the United States after the model prepared by David Dudley Field last century. Accordingly, the criterion of codification cannot be accepted.

It has also been said that the difference between the civil law and the common law relates to the function of judicial precedents within each system: precedents are not binding in civil law while they are binding in common law. Yet, in all civil law countries deviation from settled judicial practice needs special justification; and in most civil law countries a *jurisprudence constante* is binding on all courts. On the other hand, the doctrine of *stare decisis* has been tempered in the United States and what may be called an American theory of precedents permits a great measure of flexibility. Characteristically, it has been suggested that the increase of precedents in the United States will eventually lead to an eclipse of the *stare decisis* doctrine. The function of precedents, therefore, cannot be an acceptable criterion for the differentiation between civil law and common law.

Inductive and Deductive Reasoning. Thirdly, the observation has been made that the technique of reasoning in civil law is deductive while in common law is inductive. Indeed, the civil law is largely university made law, has been influenced by broad principles of natural law, and tends to be abstract; thus, the deductive approach seems to fit it best. But the inductive approach is not unknown in civil law; according to civilian theory gaps in the law are to be filled by analogy from settled rules of law or by a free creative jurisprudence. The common law is a practical judge-made law; thus the inductive approach is best suited for it. The deductive reasoning is also known to the common law; however, it is quite frequently applied in constitutional and statutory interpretation as well as in the application of broadly formulated principles of case law.

Underlying Philosophy. Finally, it has been suggested that the difference

between civil law and common law is to be found in the legal philosophy underlying each system. Thus, it has been suggested that the civil law favors positivism, as a result of its preference for legislation, while common law favors the achievement of justice in concrete cases. Similar statements are, at best, questionable assertions.

3. WHAT IS THE DIFFERENCE?

Historical Evolution. The difference between the civil law and the common law is not to be found in the content of specific rules or in results reached in litigation. Nor is it to be found in the criteria of Romanist influence, type of reasoning, structure, and legal philosophy. Perhaps, technique and methodology, the relative position of the legislator and the judge, and the nature of the judicial process may furnish a tentatively acceptable answer. However, it should be noted that differences between two systems of law are fewer than similarities: both systems are products of the western civilization.

It is an ascertainable fact that the common law is basically a product of judicial legislation. Judge-made law tends to be practical, unsystematic, and casuistic. Modern civil law is the product of professorial elaboration in universities; as such it tends to be doctrinaire, abstract, and conceptualistic. In the United States today the common law is taught in universities along the lines of early continental ways. The private law, therefore, exhibits the tendency to become professorial. The constitutional law is still dominated by the names of great judges.

Common law has grown in a slow process and has absorbed new doctrines and elements without breaking with the past; this may be regarded as an incident of judicial legislation. Civil law, on the other hand, has been drastically overhauled in recent times in almost all countries and the new codes have done away with most of the law of the past. Today, a legal bureaucracy settled in the several ministries of justice continuously drafts new statutes to meet new demands. This may be regarded as a consequence of a rigid separation of powers. An historical excursus tracing parallel developments during the 18th and 19th centuries in civil law and in common law may be illustrative.

In civil law jurisdictions Roman law during this period became unpopular; it was a foreign law, reduced in Latin, doctrinaire, and a ready tool for absolutist claims. Its logical perfection tended to stifle the spirit of innovation. Gradually, the growth of rationalism and of natural law philosophy led to the recognition of the importance of direct legislation and to the quest for national codification. The enactment of civil codes resulted in nationally uniform, comprehensive, reform legislation. It should be noticed, however, that the emphasis on legislation may be consistent with both despotism and the doctrine of separation of powers.

Common law courts during this period protected individual freedom through writs: *mandamus*, *habeas corpus*, *prohibition*, *certiorari*, and *quo warranto*. Thus the common law came to be regarded as the birthright of Englishmen. The old rules were gradually adapted to meet new needs through fiction, special writs, and the creation of new remedies. The doctrine of *stare decisis* has never been followed too rigidly. Rationalism and natural law philosophy became absorbed into the common law, but concessions were made slowly and smoothly. There have been no nationalistic claims for

the unification of law through codification.

Aspects of the Judicial Process. The statement that the judicial process in civil law systems is purely mechanical does not correspond to the truth; but differences in the method of deciding cases in civil law and in common law jurisdictions are noticeable. Perhaps, the most striking difference between the two systems of law is to be found in the psychological attitude of the judge toward legislation. In a way, this is related to the problem of the sources of law: where will a lawyer look for the law? In common law jurisdictions statutes tend to be narrowly construed, and, at times, ignored; in civil law countries judges and lawyers alike start their judicial reasoning from statutes as embodying general principles capable of covering any conceivable fact situation. It has been said: in common law statutes have the force of law because judges permit it; in civil law judges can legislate because statutes allow the practice! A comparison of doctrine surrounding codification and legislation in general may be summarized as follows:

Modern civil codes are not like early codes. The code of Hammurabi, the laws of Solon, the *Sachsenspiegel*, the *Corpus Juris Civilis*, and the *Siete Partidas* were compilations rather than codifications. Modern civil codes have their spiritual origin in Romanist doctrine and in natural law philosophy; they are the result of movements already discussed, and they are intended to break definitively with the past. The philosophical background of the various civil codes is rationalism rather than traditionalism. A code, in order to do away with the past, must be comprehensive. Earlier codes, to exclude judicial lawmaking, contained detailed provisions. Modern codes contain general clauses allowing the judges much freedom. A code, in order to break with the past, must also be systematic and logically arranged so that reasoning should furnish answers to all questions. Statutes bearing on civil law matters are not always included in civil codes. But these statutes, like the codes, are subject to logical and teleological interpretation and are capable of application by analogy.

Common law codes, on the other hand, have been described as digests of case and statutory law. These codes have their spiritual origin in Bentham's utilitarianism. They have not been intended to break definitively with the past; they have been considered as merely declaratory of the common law in force and construed narrowly. Rationalism did not replace tradition or precedents. Legislation in common law has been interstitial rather than comprehensive and has varied rather than displaced old rules; common law judges did not need the guidance of comprehensive codes. In the framework of the common law the relevant question is whether a statute applies. There is no search for underlying principles, and where a statute does not apply the common law governs.

Administration of Justice. From the viewpoint of the administration of justice, the common law is characterized by the presence of a civil jury and in the past was characterized by the separation of law and equity. This has deeply influenced both procedural and substantive rules of law. In civil law countries the administration of justice is characterized by the sharp separation of private law from public law, and by the development of independent branches of labor and commercial law.

Common law has tended to suit best the interest of the land-owning class as well as the interests of organized business. A benevolent bureaucracy in civil law countries has made the law accessible to the masses not only in form but also in actual litigation.

Summary. In civil law, modern codes have been reduced into the national language of the people. This has led to legal nationalism and, in certain cases, to sheer provincialism. The trend has been counteracted, however, by the development of a legal discipline known as comparative law. The civil law today is close to the heart of the people, is nationally uniform, is systematic, and reflects indigenous ideas. Judges, legislators, and lawyers are university trained public servants. There is a sharp division between private and public law but the soundness of the distinction between civil and commercial law has been questioned. The philosophical background in modern civil law is a jurisprudence of interests.

In common law, language has never been much of a problem; cases from any common law jurisdiction may be cited in any other jurisdiction as persuasive authorities. The case law is frequently altered by statutes. This practice has prevented rigidity of the law but it has also disrupted the quest for symmetry. In the United States, uniformity of private law is limited in vital areas of national concern. Apprenticeship is still practiced in some jurisdictions. Judges are elected or appointed; in any case, they enjoy a social prestige unknown in civil law countries.

In recent years, the professorial influence has increased in common law jurisdictions. Public law tends to become an autonomous branch as a result of the work of the courts and of administrative agencies. By the adoption of the Uniform Commercial Code in the United States, commercial law has been separated from the remaining body of private law. The philosophical background in contemporary common law is pragmatism, neo-realism, and sociological jurisprudence. Natural law philosophy, however, has recently gained ground.

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