

# THE UNIQUENESS OF LOUISIANA'S LEGAL HERITAGE: A Historical Perspective

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*On Behalf of the New Orleans Bar Association*

**H**ow many times have you heard Louisianians say, “Our law is different. It’s the Napoleonic Code.” While it is true that the “civil” law in our state differs from the common law in other sister states, it would be inaccurate to refer to it as “the Napoleonic Code” or as the law derived (solely) therefrom.<sup>1</sup> Even numerous attorneys today erroneously believe that civil law is simply the law embodied in civil codes, originating in Europe on the eve of the 19th century. In fact, civil law had already been highly developed throughout most of Europe before the enactment of the renowned Napoleonic Code, or any civil code for that matter. Indeed, civil law can be traced all the way back to the middle of the 5th century B.C. and “The Twelve Tables,”<sup>2</sup> the first-ever written expression of law in Roman tradition. As such, civil law has been shaped over a period of almost 1,000 years, beginning with the rediscovery of the Justinian’s Digest in 1076. In order to fully understand the uniqueness of Louisiana’s legal heritage, it is pivotal to offer an insight into the evolution of Louisiana law from the rise of the codification movement to most recent years. What better moment to do it than for New Orleans’ Tricentennial!

## The International Trend of Codification

The intellectual freedom put in motion by humanists<sup>3</sup> coupled with the industrial and technological breakthroughs, such as printing, led to an exponential sophistication and self-consciousness. For the first time, people across the world had access to books, became educated, and began to apply their logical analysis and reasoning to everything that surrounded them. Of course, one of the first subjects of people's skepticism and mistrust was the legal system. People at the time viewed law as a complex and mystical phenomenon and did not understand it.<sup>4</sup> They believed that legal scholars had no incentive to simplify such law because their expertise was desirable and in high demand. Even the judges, in people's eyes, exploited the intricate nature of law because they could use it to justify any decision they wanted to reach. Thus, people demanded a *plain and laymen-friendly* compilation of the laws that they could understand because they wanted to shield themselves from the abuse of judicial discretion. This is why, led by the French in 1804, the codification movement was born.<sup>5</sup>

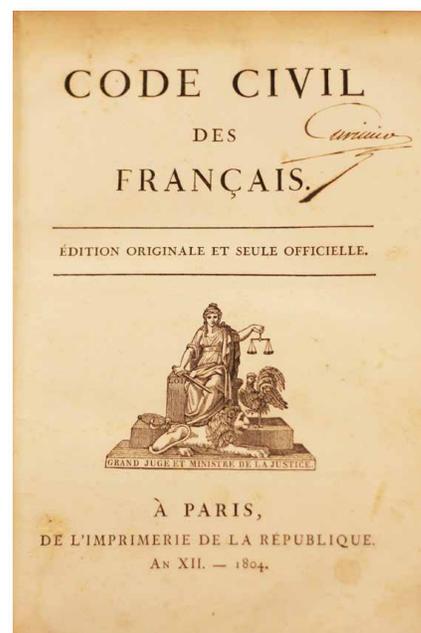
After illegally ceasing power through coup d'état in 1799, Napoleon proclaimed the French Republic and named himself an emperor. Immediately thereafter, Napoleon appointed a committee of four lawyers and tasked them with drafting a civil code.<sup>6</sup> In only four months, these four lawyers finalized the first draft of the French Civil Code from scratch.<sup>7</sup> However, contrary to what the French population expected and hoped for, the codification replaced one extreme with another and did not resolve the issue of unfettered judicial discretion. That is, the superabundance of legal sources that initially led to complex laws gave way to oversimplification and generalization which, once again, required wide judicial discretion. Therefore, following the codification, both judges and jurists happily resumed the roles they enjoyed during the pre-codification period.<sup>8</sup>

## The Codification Movement in Louisiana

The French Civil Code was drafted in the spirit of the French Revolution, following bloody military and political turmoil. Despite the fact that the break from the past in the eyes of the law was more of a line in the sand than a radical shift, the Code was presented to the world as a "new beginning."<sup>9</sup> However, while the French fought hard for, *inter alia*, a legal transformation, the recently colonial Louisiana was not looking for a change; rather, the goal was simply to maintain the status quo.<sup>10</sup>

The first point in understanding Louisiana's legal system is to recall how Louisiana, *alone* among the 50 states, came to even have a civil code modeled on a European civil code. A 2004 article published by Loyola University College of Law Professor David W. Gruning provides a perfect synopsis of this complicated and fascinating story:

French explorers arrived on the American coast of the Gulf of Mexico in 1682. In 1712, the Crown decreed that the Custom of Parish would govern the colony, and placed the colony effectively in the hands both of private interests and of a Superior Council. After failure of the private interests, the Crown assumed full control in 1731. In 1762, France transferred Louisiana to Spain. The latter, however, did not achieve effective control until 1769. Thereafter Spain administered Louisiana, perhaps more effectively than had France. Spain established its own system of government, replacing the Superior Council with a Cabildo or city council, and applying Spanish colonial law. Later, in 1800, Napoleon engineered the return of Louisiana to France, but his intentions in the Caribbean having been frustrated, he sold Louisiana to the United States in April 1803. The French flag went up over Louisiana for a few weeks in the fall of that year, being replaced definitively



Code Civil Français (also known as the "Napoleonic Code"), 1804. Provided by the Law Library of Louisiana.

by the American flag by the end of the year. Louisiana had become an American territory. Now a part of the United States, Louisiana (then the Territory of Orleans) faced the question of what law would be applicable.<sup>11</sup>

As evidenced by the discussion below, this question perplexed the Louisiana legal community in the years to come.

Louisiana's first code, "A Digest of the Laws in Force in the Territory of Orleans," was enacted in 1808.<sup>12</sup> The 1808 Digest stylistically resembled the French Civil Code, but it incorporated certain Roman law provisions that could not be found in the French Code but were considered relevant for Louisiana, such as the rules of public rights on the river banks (Articles 452 and 456), the sale of a hope (Article 2451), and the action for things thrown onto the street (Article 177).<sup>13</sup> The 1808 Digest remained in effect when Louisiana became a state in 1812.<sup>14</sup>

In 1817, the Louisiana Supreme Court restricted the Digest's applicability by holding that prior Spanish, Roman and French law which was not in conflict with the Digest was *still valid* and in force.<sup>15</sup> This caused great confusion in Louisiana and had to be changed. But, there was no

one to effectuate the change because attorneys in 19th century Louisiana were dedicated to drafting legislation and could not devote their time to supervise the application of the law and keep it on track.<sup>16</sup> Hence, due to the lack of sufficient legal expertise, the confusion of legal sources created by the 1808 Digest was only partially remedied by the Civil Code of 1825.

The 1825 Civil Code “expressly repealed the Spanish, Roman, and French laws in force at the time of the Louisiana Purchase.”<sup>17</sup> However, the Code only repealed those laws that were specifically enumerated therein, meaning that a substantial part of the old law still survived.<sup>18</sup> A novelty that came with the 1825 Code was that its articles included explanation and reasoning.<sup>19</sup> Notwithstanding this change, the Code was written in a technical fashion and was not meant to be used by ordinary citizens.<sup>20</sup>

## Recodification of Louisiana’s Civil Code

As cleverly illustrated by Professor Gruning in his 2004 article, because the rules of a society change, a civil code that attempts to represent these rules must follow and adapt so as to remain connected to the changes and properly reflect them.<sup>21</sup> Unlike France, Quebec or Haiti which re-codified their civil codes pragmatically and deliberately, with one piece of legislation, Louisiana decided to take a different approach.<sup>22</sup> And it did so for a reason. Namely, after researching the law and its history, Louisiana’s legal experts realized that it may be in the state’s best interest to add or avoid adding certain legal provisions. Hence, instead of a single-handed recodification, Louisiana opted to revise its civil law “not as a whole, but in distinct blocks.”<sup>23</sup> This piecemeal recodification made Louisiana’s Civil Code one of the *most eclectic* in the world.

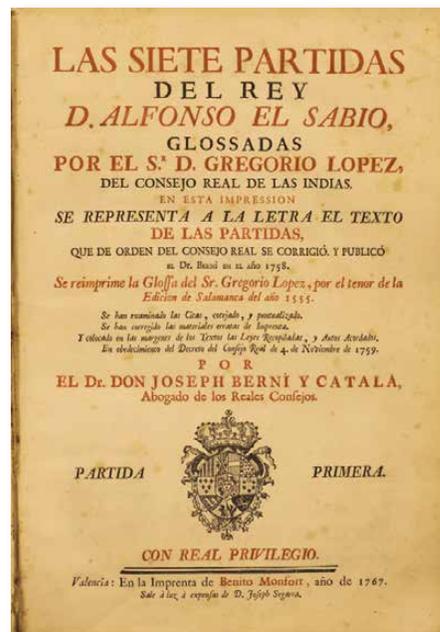
A product of this daring endeavor was the Civil Code of 1870 which replaced the 1825 Code. However, the aftermath of World War I brought significant economic and cultural changes which tested the new 1870 Code. The most eminent pressure placed on the 1870 Code was

*lingual* because the Code, unlike its predecessors, was published in English only — without any French text whatsoever.<sup>24</sup> As English became the primary language, French was slowly dying out and, with it, the French legal doctrines.<sup>25</sup> This change was also reflected in the educational system where lectures were now conducted solely in English.<sup>26</sup> Naturally, for the non-French-speaking lawyers and judges, English legal authorities were more appealing and, instead of looking to the Napoleonic Civil Code for guidance, they consulted their colleagues in sister states.<sup>27</sup> The problem, however, was that sister states used legal techniques that derived from the English common law. This is how the common law principles of equity and estoppel and the doctrine of *stare decisis* became introduced to Louisiana lawyers.<sup>28</sup>

## Louisiana: A Civil Law, Common Law or Mixed Jurisdiction?

The cumulative impact of the infiltration of the common law concepts into Louisiana’s jurisdiction led one professor in 1937 to assert that “Louisiana had become a common law state.”<sup>29</sup> This observation was not received well by Louisiana’s legal community which has, ever since, engaged in a concerted effort to defend and preserve Louisiana’s civil law roots. One way in which this was achieved was by, once again, revising the Civil Code to emphasize Louisiana’s civil law legacy.<sup>30</sup> Again, by using the piecemeal approach to codification, the 1870 Code was revised and replaced by the 2003 Code which endured several more revisions to date.<sup>31</sup>

However, contrary to popular belief, this did not turn Louisiana into a purely civil law jurisdiction. While most of Louisiana’s private law retained a civil law orientation that existed during the colonial rule of France and Spain, Louisiana’s public law, criminal law and civil procedures are modeled after Anglo-American common law norms that were brought to the United States from England, its political sovereign at the time.<sup>32</sup> This kind



Las Siete Partidas (The Seven Parts of the Law), 1767. Provided by the Law Library of Louisiana.

of jurisdiction is regarded as a “mixed jurisdiction.”<sup>33</sup> Louisiana is not the only one. Some of the others are Quebec, Puerto Rico, the Philippines, South Africa, Scotland and Israel.<sup>34</sup> With the exception of the latter two, all these countries followed the same developmental pattern and have readily apparent historical similarities with Louisiana reflected in their struggle for autonomy — their civil law nature was established during the initial period of colonial rule by a continental European power, while the common law nature was established during the subsequent Anglo-American conquest or cession.

## Conclusion

While it is true that Louisiana differs from its sister states in many respects, it would be wrong to only praise the French for its legal contribution. The Roman, Spanish and English influences also played a major role in forming Louisiana’s eclectic legal history, which still lives today. As the only state that can pride itself with having such unique legal heritage, we should continue to proudly and stubbornly safeguard it.

## FOOTNOTES

1. See generally, J.T. Hood, Jr., "The History and Development of the Louisiana Civil Code," 19 La. L. Rev. (December 1958).
2. The law of "The Twelve Tables" was adopted in 450 B.C. and is regarded as one of the most important documents in the history of law. As the bedrock of European law and the western legal system, "The Twelve Tables" is not only the first memorialization of Roman law known to humankind, but also the first expression of the *preserved writing* in Roman civilization (besides, for instance, inscriptions on tombs).
3. The medieval era ended in the 1400s with the invention of the printing press and the emergence of a new intellectual current called humanism. The concept of humanism began as an esthetic movement among intellectuals in favor of purity of classic Latin. That is, humanists harshly criticized the work of prior legal scholars (glossators and commentators), claiming that their Latin was of poor quality and they did not understand and translate the legal scripts correctly.
4. See, e.g., *Bill of Right in Action* (1999). BRIA 15:2(a) — The Code Napoleon. Constitutional Rights Foundation. ("By Napoleon's time, a confusion of customary, feudal, royal, revolutionary, church, and Roman laws existed in France. Different legal systems controlled different parts of the country. The French writer Voltaire once complained that a man traveling across France would have to change laws as often as he changed horses.")
5. *Id.* ("Napoleon wanted this code to be clear, logical, and easily understood by all citizens.")
6. See, W.J. Wagner (1953), "Codification of

- Law in Europe and the Codification Movement in the Middle of the Nineteenth Century in the United States." Articles by Maurer Faculty. Paper 2324, at p. 342.
7. *Id.*
  8. P.G. Stein (1986), "Judge and Jurist in the Civil Law: A Historical Interpretation," 46 La. L. Rev. 241, 252.
  9. J.A. Lovett, et al. (2014). *Louisiana Property Law: The Civil Code, Cases and Commentary*. Carolina Academic Press, at p. 12.
  10. *Id.* See also, Cottin v. Cottin, 5 Mart. (o.s.) 93, 94 (La. 1817) (The Louisiana Supreme Court squashed any radicals who might have thought that their code should be treated as a new beginning by holding that the old law was still in force, unless it was actually inconsistent with the code.)
  11. D. Gruning (2004), "Mapping Society through Law: Louisiana, Civil Law Recodified," 19 Tul. Eur. & Civ. L. Forum 1. 1-12, 14-20, 31-34, at p. 4.
  12. Lovett, note 9 *supra*, at p. 12.
  13. *Id.*
  14. Gruning, note 11 *supra*, at p. 5.
  15. *Id.*
  16. Lovett, note 9 *supra*, at p. 12.
  17. *Id.*
  18. *Id.* This issue was finally rectified three years later with the enactment of the Great Repealing Act of 1828 which repealed "all the civil laws which were in force before the promulgation of the civil code lately promulgated."
  19. *Id.* at p. 13.
  20. *Id.*
  21. Gruning, note 11 *supra*, at p. 2.
  22. *Id.*
  23. *Id.*

24. *Id.* at p. 7.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* (internal citations omitted).
29. G. Ireland (1936-1937), "Louisiana's Legal System Reappraised," 11 Tul. L. Rev. 585.
30. F. Zengel (1979-1980), "Civil Code Revision in Louisiana," 54 Tul. L. Rev. 943, 944.
31. Gruning, note 11 *supra*, at p. 9.
32. Lovett, note 9 *supra*, at p. 24.
33. See, V. Palmer (2001), *Mixed Jurisdictions Worldwide: The Third Legal Family*.
34. Lovett, note 9 *supra*, at p. 24.

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