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## De Revolutionibus: The Place of the Civil Code in Louisiana and in the Legal Universe

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# ***DE REVOLUTIONIBUS: THE PLACE OF THE CIVIL CODE IN LOUISIANA AND IN THE LEGAL UNIVERSE***<sup>†</sup>

Olivier Moréteau\*

## I. OF CENTER AND REVOLUTION: CIRCLING WITHIN AND AROUND COPERNICUS' SKULL

In May 2010, the Polish astronomer Nicolaus Copernicus (1473-1543) was buried at the Frombork Cathedral, in Poland, 467 years after his death. His remains had rested in this cathedral, along with those of many others, since 1543, the year of his death. Modern technologies helped identify his remains (some hair found in a book that he had used matched the DNA of a skull found under the marble floor of the church)<sup>1</sup> and he was buried again on May 22, at a ceremony in which the Catholic Church, represented by the papal Nuncio and the Archbishop of Lublin, solemnly acknowledged a prominent scientist who had been declared a heretic because of his revolutionary ideas.

In 1543, just before his death, Copernicus had published *De Revolutionibus Orbium Celestium* (On the Revolutions of the

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<sup>†</sup> This paper was published as the first chapter of LE DROIT CIVIL ET SES CODES: PARCOURS À TRAVERS LES AMÉRIQUES 1-34 (Jimena Andino Dorato, Jean-Frédéric Ménard & Lionel Smith eds., Thémis, Montreal, 2011). The author thanks the editors and the publishers for authorizing this second publication.

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1. In the DIGITAL JOURNAL of May 24, 2010, Igor I. Solar wrote: “Göran Henriksson, astronomer at the University of Uppsala in Sweden, searching in a book, MAGNUM ROMANUM CALENDARIUM by Johannes Stoeffler, dated 1518, found several hairs inside the book. This is a manual that Copernicus had used during his life in Poland and which was taken by the Swedes during the Polish-Swedish wars in the first quarter of the seventeenth century.” *Polish astronomer Nicolaus Copernicus buried, again*, online: <<http://www.digitaljournal.com/article/292435>> (last visited on May 29, 2010).

Celestial Spheres), a book where he explained that the sun, and not the earth, is the center of the universe. He is alleged to have first expressed this view five hundred years ago, around 1510.<sup>2</sup> Little did I know that Copernicus would be buried again between my oral presentation, given in Montreal in November 2009, and my writing this text for publication, in May 2010. But I knew that one year before Copernicus's first funeral Hernando de Soto, the Spanish explorer and conquistador, had died on the banks of the Mississippi River near the mouth of the Red River,<sup>3</sup> north of the future Baton Rouge. He was the first documented European to discover the region, yet he did not claim it for Spain. The vast territory was later named Louisiana by Robert Cavelier de la Salle, who solemnly took possession in the name of King Louis XIV of France in 1682.

Did a geocentric or heliocentric vision of the universe mean anything to the great explorers who mapped remote and unknown areas of the Earth? Their concern was to find an alternative route to India and discover new resources; at least they knew that their planet was spherical. If a center existed, they were physically and mentally far from it, charting the fringes of the known world. After all, Copernicus himself had understood that our universe has no center.

Many legal scholars, even the most sophisticated, believe that their legal universe has a center. When comparatists describe modern civil law systems, they place the civil code at its center. True, this does not always reflect the way civil law jurisdictions view themselves. Scotland and South Africa cannot view themselves as civil code centric, since they do not have civil codes.

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2. It appeared in his *Commentariolus* or "little commentary" circulated between 1510 and 1514: *Nicolai Copernici de hypothesibus motuum coelestium a se constitutis commentariolus*, known from later transcripts. 3 THE NEW ENCYCLOPAEDIA BRITANNICA, MICROPAEDIA (15th ed., Encyclopaedia Britannica, Chicago, 2007), s.v. "Copernicus, Nicolaus".

3. FRANÇOIS-XAVIER MARTIN, THE HISTORY OF LOUISIANA 36 (Pelican 3d ed., Gretna LA, 2000) (1827).

France views itself as legicentric,<sup>4</sup> rather than civil code centric, but perceives its Civil Code as a civil constitution.<sup>5</sup> Inside a given legal system, the paradigm is rather pyramidal, reflecting the hierarchy of norms, especially for those espousing a positivistic vision of the law.

Turning to Louisiana and Quebec, the two North American jurisdictions having kept the civil law tradition, there is a clear perception, at least among lawyers trained in the civil law, that the civil code occupies some central position. Together with the French language, courageously maintained in Quebec and sadly undermined in Louisiana, the civil code and civil law are markers of identity. The civil code is a powerful symbol of the survival of the civil law tradition on a continent dominated by the common law.

Yet, to focus now on Louisiana, which will be at the core of the following paragraphs, the civil code appears as a weakened celestial body, with a rather low gravitational force. In addition, the position of the code is less and less central to the legal order. As will be seen in this paper, Louisiana scholars and lawyers are very much aware of the phenomenon and may have a tendency to see things as even worse than they are: civilians feel like a minority and have developed an inferiority complex, preventing them from being aware of the remarkable skills they have developed, such as on the one hand exercising a highly valuable ability to express the civil law in English, somehow resisting the linguistic contamination of common law phraseology, and on the other hand demonstrating a unique ability to revise the civil code, making it more compatible with the common law system whilst somehow keeping it in the realm of the civil law. These two skills are greatly needed in the present global world and they should be

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4. Stéphane Rials, *Sieyès ou la délibération sans la prudence, Éléments pour une interprétation de la philosophie de la Révolution et de l'esprit du légicentrisme*, 13 DROITS 123, at 137 (1991).

5. PAUL DUBOUCHET, *LA PENSÉE JURIDIQUE AVANT ET APRÈS LE CODE CIVIL* 92 (L'Hermès, Lyon, 1991).

marketed actively and exported, a mission that the author of this paper has placed at the core of the agenda of the Louisiana State University Center of Civil Law Studies, together with the promotion of an active Louisiana civil law doctrine.

Louisiana is not the only civil law jurisdiction feeling that its civil law tradition is threatened by a conquering common law. It is true that in less mixed jurisdictions where the civil law does not have a strong competitor – systems that some may be tempted to describe as pure civil law – the civil code may have a much higher gravitational force. However, other legal bodies exert a very strong attractive force, such as constitutions, charters, conventions protecting human rights, and international agreements. Even in the countries that cradled the ancient and modern civil law tradition, extrinsic pressure comes via many channels, including European integration and global commercial practice. In addition, intrinsic forces are also at work: decodification is endemic; codes are hastily revised or are oftentimes weakened by a multiplication of satellite codes or ancillary statutes that may be compared to errant meteors.<sup>6</sup>

Whatever the situation may be in mixed or less mixed civil law jurisdictions, the civil code remains the port of entry for any exploration of the legal universe, even if that point is less and less central or more and more peripheral.

Does this mean that the center has been lost? Copernicus' intuition may be revived in our legal context. This paper suggests that the center may be retrieved, as everything is a matter of perception or representation. It may be retrieved if one agrees to place the citizen at the center of the legal order. A Copernician revolution may be proposed:<sup>7</sup> legal bodies must gravitate around the citizen rather than the other way around. Based on this idea or

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6. See generally, Olivier Moréteau & Agustín Parise, *Recodification in Louisiana and Latin America*, 83 TUL. L. REV. 1103 (2009).

7. For a prior use of the Copernician metaphor, see LÉONTIN-JEAN CONSTANTINESCO, *TRAITÉ DE DROIT COMPARÉ*, t. 1 at 8 (Librairie générale de droit et de jurisprudence, Paris, 1972).

renewed perspective,<sup>8</sup> which echoes the work of those turning the pyramid of norms upside down,<sup>9</sup> I propose to revisit what may be the essence of the civil law tradition.

This journey in the form of a revolution will start in Louisiana, with a brief survey of the Louisiana Civil Code experience and a study of the perception of the code in judicial practice. We will then look for the lost center, to watch phenomena such as the decomposition and recomposition of codified law, and comment on the constitutionalisation and internationalization of private law. Finally, the revolution will take us back to the perspective of a legal order recentered around the citizen, taking us to the core of the civil law tradition. A revolution is a circular motion. We must identify what we are turning around to understand the future of civil codes in the Americas and in other parts of the world. But let us start where we are, in Louisiana.

## II. WHY WE LOST THE CENTER: *QUO VADIS CODEX CIVILIS LOUISIANENSIS?*

Where is the Louisiana Civil Code heading to? Well, no question as to the future may be answered without looking at the past and the present. My first visit to Louisiana was from Boston where I used to admire Gauguin's masterpiece "*D'où venons nous, que sommes nous, où allons nous.*" Let us explore the code and check where it stands in classroom and court practice.

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8. Robert A. Pascal, *Of the Civil Code and Us*, 59 LA. L. REV. 301 (1998); Olivier Moréteau, *A Summary Reflection on the Future of Civil Codes in Europe*, in FESTSCHRIFT FÜR HELMUT KOZIOL 1449 (Peter Apathy, Raimund Bollenberger et al. eds., Sramek, Vienna, 2010); and Olivier Moréteau, *Libres propos sur l'avenir des Codes civils en Europe*, in MÉLANGES EN L'HONNEUR DE SERGE GUINCHARD 1049 (Dalloz, Paris, 2010),.

9. Jacques Vanderlinden, *Réseaux, pyramide et pluralisme ou Regards sur la rencontre de deux aspirants-paradigmes de la science juridique*, 49 REV. INTERDISCIPL. ET. JUR. 11 (2002).

A. *The Louisiana Civil Code: between ius and lex*

The Louisiana Civil Code is often described as a clone of the French Civil Code.<sup>10</sup> This is not true, not even on the surface, a study of the evidence and of historical literature<sup>11</sup> revealing a complex and subtle reality.

1. *The Digest of 1808*

The ancestor to the current code is the *Digest of the Civil Laws now in force in the territory of Orleans* enacted five years after the United States purchased Louisiana from the French.<sup>12</sup> The Digest of 1808 may have the format of a code, but strictly speaking it is a digest and not a code for the very reason that it does not replace the preexisting law. The laws of Spain in force in the Territory of Orleans at the time of the Louisiana Purchase remained in force after the enactment of the Digest. The French did not reestablish French law during the few weeks in which they took control of the territory retro-ceded to them by Spain in the Treaty of St. Ildefonso. Spanish laws remained in force and they were abrogated only to the extent that they were contradicted by the provisions of the Digest.<sup>13</sup> The Digest of 1808 was meant to encapsulate the basic civil laws in force in Louisiana at the time of the purchase, namely Spanish laws.

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10. BÉNEDICTE FAUVARQUE-COSSON & SARA PATRIS-GODECHOT, *LE CODE CIVIL FACE À SON DESTIN* 31-32 (Documentation française, Paris, 2006); GÁBOR HAMZA, *LE DÉVELOPPEMENT DU DROIT PRIVÉ EUROPÉEN* 176 (Faculty of Law, Eötvös Loránd University, Budapest, 2005); GILLES CUNIBERTI, *GRANDS SYSTÈMES DE DROIT CONTEMPORAINS* 122 (L.G.D.J., Paris, 2007); ÉRIC CARPANO & EMMANUELLE MAZUYER, *LES GRANDS SYSTÈMES JURIDIQUES ÉTRANGERS* 141-142 (Gualino, Paris, 2009).

11. GEORGE DARGO, *JEFFERSON'S LOUISIANA: POLITICS AND THE CLASH OF LEGAL TRADITIONS* (Revised ed., The Law Book Exchange, 2009); and RICHARD HOLCOMBE KILBOURNE, *A HISTORY OF THE LOUISIANA CIVIL CODE: THE FORMATIVE YEARS, 1803-1839* (Reprint, Claitors Publishing Division, Baton Rouge LA, 2008).

12. This part of the article borrows part of its exposition from Moréteau & Parise, *supra* note 6, at 1112-1121, sometimes drawing from it verbatim, with the coauthor's kind permission.

13. Act of March 31, 1808, No. 120, 1808 La. Acts XXX, at 126.

A Louisiana scholar once contended that the Digest was to a large extent a replica of the *Code Napoléon*, with 85% of the articles derived from or influenced by French sources.<sup>14</sup> The resemblance to the French Civil Code, and even greater resemblance to France's more Roman *Projet* of 1800, is not surprising. Spanish law and French law were alike on a large number of issues, primarily wherever they derived from Roman law or the Law Merchant.<sup>15</sup> It was therefore legitimate and expedient for James Brown and Louis Moreau Lislet to borrow from the French texts wherever they encapsulated the substance of both French and Spanish laws. The substance of the Digest differs wherever the two laws were different.<sup>16</sup> Examples may be found, among others, in the law that pertains to marriage, community of gains, successions, and alimony.<sup>17</sup>

The fact that we are not dealing with a code in the French sense is evidenced to by the response of judges to the Digest, which also proves the Spanish ancestry of the Digest. Wherever they did not find the precise solution to a problem by looking at the letter of the Digest, judges looked back to the texts on which it was founded and followed the solutions of antique Roman law and Spanish law, since these were still in force.<sup>18</sup> Though resembling the French Civil Code like a brother rather than a distant cousin, the Digest is different in its essence. It is not a new law but a digest of ancient laws. What makes the difference is the abrogation clause.

The Act of March 31<sup>st</sup>, 1808, by the Territorial Legislature, approving and putting in effect the Digest of 1808 reads:

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14. Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 4, 12 (1971). The author made a minute check of the wording of the articles.

15. Robert A. Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 TUL. L. REV. 603, 606 (1972); and THOMAS J. SEMMES, HISTORY OF THE LAWS OF LOUISIANA AND OF THE CIVIL LAW (Clark & Hofeline, New Orleans LA, 1873; reprinted in the present volume of the J. CIV. L. STUD.).

16. *Id.*

17. *Id.* and Pascal, *supra* note 8.

18. *E.g.*, *Cottin v. Cottin*, 5 Martin (O.S.) 93 (1817).



§2. *And be it further enacted*, That whatever in the ancient civil laws of this territory, or in the territorial statute, is contrary to the dispositions contained in the said digest, or irreconcilable within them, is hereby abrogated.<sup>19</sup>

The French law of March 21<sup>st</sup>, 1804, promulgating the *Code civil des français* as a whole reads:

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.<sup>20</sup>

## 2. *The Civil Code of 1825*

In 1825, the legislature of the State of Louisiana (the territory of Orleans had been granted statehood in 1812) enacted a Civil Code. The need for a new enactment was felt because of the confusion generated by the fact that judges kept citing sources that were not easily accessible and written in a foreign language. The

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19. Other relevant sections of the Act read:

Whereas, in the confused state in which the civil laws of this territory were plunged by the effect of the changes which happened in its government, it had become indispensable to make known the laws which have been preserved after the abrogation of those which were contrary to the constitution of the United States, or irreconcilable with its principles, and to collect them in a single work, which might serve as a guide for the decision of the courts and juries, 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.

§1. *BE it enacted by the Legislative Council and House of Representatives of the Territory of Orleans, in General Assembly convened*, That the work, entitled “Digest of the Civil Laws now in force in the territory of Orleans, with alterations and amendments, adapted to its present system of government,” which work is divided into three books, entitled “Of persons, of things, and of the different modifications of property, and of the different manners of acquiring the property of things;” and containing, to wit; [follows the complete structure of the Digest] Is hereby declared and proclaimed to be in force in this territory, and shall therein have full execution.

Act of March 31, 1808, No. 120, 1808 La. Acts XXX.

20. RUDOLF B. SCHLESINGER ET AL., *COMPARATIVE LAW: CASES TEXT MATERIALS* 246 (Foundation Press 6th ed., New York, 1998).

Digest was meant to clarify and simplify the laws, making them more accessible, in the French language and also in English, since the original French was translated into English, though rather poorly.<sup>21</sup> The fact that judges felt bound to rely on the ancient Spanish law and antique Roman law sources, available in Spanish and Latin only, defeated the central purpose of the Digest: there was no simplification.

One may note that the situation had been completely different in France where, with an energetic abrogation clause, judges understood that there was a break with the past and a fresh start. This does not mean that judges never looked back to Roman law and custom, but when they so did it was in an attempt to clarify the solutions in the Code, not to have the ancient laws survive.

The text of the Code of 1825 very much resembles that of the Digest. Some rewording was done here and there, and entire chapters were added. As Rodolfo Batiza proved, many of these additions are borrowed from the French Civil Code or from Toullier, and therefore are of French origin.<sup>22</sup> It may be true to say that the Code of 1825 is more French than the Digest, as Batiza contended.<sup>23</sup>

In sum, the texts of 1808 and 1825 are largely similar except for a number of additions, deletions, and modifications.<sup>24</sup> The first one is a digest and the second one a code, because it contains an abrogation clause. Indeed, Article 3521 reads:

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

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21. See Edward B. Dubuisson, *The Codes of Louisiana (Originals Written in French; Errors of Translation)*, 25 LA. BAR ASSN. REP. 143 (1924); O. Moréteau & Didier Lamèthe, *L'interprétation des textes juridiques rédigés dans plus d'une langue*, 48-2 R.I.D.C. 327, 340 (2006); and John M. Shuey, *Civil Codes - Control of the French Text of the Code of 1825*, 3 LA. L. REV. 452, 453 (1941).

22. See in general, Rudolfo Batiza, *The Actual Sources of the Louisiana Projet of 1823: A General Analytical Survey*, 47 TUL. L. REV. 1 (1972).

23. See Batiza, *id.* at 24.

24. See the results of a study by Batiza, *id.* at 5.

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.<sup>25</sup>

Otherwise, if one compares the text of the Digest to that of the Code of 1825, there are no structural differences and the substance of articles remains much the same. The text is partly rewritten and augmented. However, purists will rightfully contend that this is not a revision but a first codification, since the 1808 text was not a code but a digest.

Nothing is simple and clear-cut in Louisiana, where trees are mirrored in the swamps. What appears to be a tree may be the reflection of a tree in water, and you are never sure where the roots are.

What made a remarkable difference, however, was the judicial resistance to positivism. Louisiana judges of the first half of the 19<sup>th</sup> century did not accept that legislation (*lex*) could do away with or abrogate what Professor Pascal calls right order<sup>26</sup> and may simply be called law in its broadest sense, meaning *droit* or *ius*. François-Xavier Martin, who sat on the Louisiana Supreme Court between 1812 and 1846, had been in favor of a clean abrogation clause in the Digest,<sup>27</sup> and yet at the same time believed that such a clause could only repeal the positive laws adopted by a legislature. In *Reynolds v. Swain*, a case decided in 1839 when Martin was

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25. LA. CIV. CODE ANN. art 1112 (1825).

26. See generally ROBERT ANTHONY PASCAL: A PRIEST OF RIGHT ORDER (Olivier Moréteau ed., Center of Civil Law Studies, Paul M. Hebert Law Center, Louisiana State University, Baton Rouge LA, 2010), online: <<http://www.law.lsu.edu/index.cfm?geaux=ccls.publications>> (last visited on October 8, 2012).

27. Commenting on the work of Moreau Lislet and Brown, he wrote: "Their labor would have been much more beneficial to the people, than it has proved, if the legislature to whom it was submitted, had given it their sanction as a system, intended to stand by itself, and be construed by its own context, by repealing all former laws on matters acted upon in this digest." MARTIN, *supra* note 2, at 344.

Chief Justice (at that time called Chief Judge),<sup>28</sup> he said that the legislature cannot abrogate unwritten law such as natural law or the law of nations,<sup>29</sup> proving that Louisiana law was much more than mere positive law. The Civil Code is *lex*, not *ius*,<sup>30</sup> and therefore has a lower density than it may have in a positivistic system.

For approximately half a century, the Code of 1825 was able to survive without significant alterations. The abolition of slavery after the Civil War led to a major change. In 1868, the Louisiana Legislature ordered the revision of the code.<sup>31</sup>

### 3. *The Civil Code of 1870*

John Ray was appointed to draft the revision, and he submitted his finished work on December 27<sup>th</sup>, 1869. In his report he mentioned his thorough acquaintance with the Louisiana Civil Code, statutes, and court decisions.<sup>32</sup>

Scholars of the 19<sup>th</sup> century say that the revision of 1870 was a work of clerical compilation<sup>33</sup> which had become necessary at that moment for the growing state. The text of 1870 is in fact a revision of the Code of 1825. Ray introduced several changes to the text. Articles were renumbered and the quality of the English text was improved: the Code of 1825 had been drafted in French and the translation was not that good: the ability to develop a civil law in

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28. *Reynolds v. Swain*, 13 La. 193 (1839).

29. "The repeal spoken of in the code, and the act of 1828, cannot extend beyond the laws which the legislature itself had enacted.... It cannot be extended to those unwritten laws which do not derive their authority from the positive institution of any people, as the revealed law, the natural law, the law of nations, the laws of peace and war, and those laws which are founded in those relations of justice that existed in the nature of things, antecedent to any positive precept." *Id.*

30. For further discussion, see Pascal, *supra* note 8.

31. See Act of August 17, 1868, No. 31, 1868 La. Acts 39. See also the Joint Resolution of October 21, 1868, No. 182, 1868 La. Acts 237.

32. JOHN RAY, *THE CIVIL CODE OF THE STATE OF LOUISIANA: REVISED, ARRANGED AND AMENDED* vii (Printed at the Office of the Louisiana Intelligencer, Monroe, 1869).

33. *E.g.*, CHARLES E. FENNER, *THE GENESIS AND DESCENT OF THE SYSTEM OF CIVIL LAW PREVAILING IN LOUISIANA* 20 (Graham, New Orleans, 1886).

English was still in the making.<sup>34</sup> New articles included the legislative enactments since 1825.<sup>35</sup> The revised text was approved by the Louisiana Legislature on March 14<sup>th</sup>, 1870.<sup>36</sup> The text was written and published in English, without a French version, and it had 3,556 articles divided into a Preliminary Title and three books, following the structure of the original code, borrowed in turn from the French Civil Code and the *Institutes* of Gaius.<sup>37</sup>

#### 4. *The Revision of the Civil Code*

With the dawn of a new century, the need for a new civil code or for revision was reborn. Conditions had changed, and the conceptual framework of the revision of 1870 had proved to be analytically deficient in certain instances.<sup>38</sup> Therefore, in 1908 the Louisiana Legislature created a commission in order to revise and re-enact the civil code.<sup>39</sup> Very few changes were suggested by the commission; finally, the draft code was never adopted by the Louisiana Legislature.<sup>40</sup>

In 1948, pressed by the need to update the existing civil law, the Louisiana Legislature instructed the Louisiana State Law Institute (LSLI) to prepare comprehensive drafts for the revision of the Civil Code of Louisiana.<sup>41</sup> In order to fulfill its duty, the LSLI—which was created in 1938<sup>42</sup>—faced a choice among three

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34. See *supra* note 32, at vii-viii.

35. *Id.*

36. THE REVISED CIVIL CODE OF THE STATE OF LOUISIANA 428 (Office of the Republican, New Orleans, 1870).

37. *Id.*, Preliminary Title “Of the general definitions of law and of the promulgation of the laws”; Book I “Of persons”; Book II “Of things, and of different modifications of ownership”; and Book III “Of the different modes of acquiring the ownership of things”.

38. A. N. YIANNOPOULOS, CIVIL LAW SYSTEM: LOUISIANA AND COMPARATIVE LAW 76 (Claitor's Publishing Division 2d ed., Baton Rouge LA, 1999).

39. See Act of July 2, 1908, No. 160, 1908 La. Acts 216.

40. John H. Tucker, *Source Books of Louisiana Law*, 6 TUL. L. REV. 280, 298 (1931).

41. See Act of July 6, 1948, No. 335, 1948 La. Acts 810; and Fred Zengel, *Civil Code Revision in Louisiana*, 54 TUL. L. REV. 942, 943 (1980).

42. See Act of July 2, 1938, No. 166, 1938 La. Acts 429.

possible ways to carry-out the work: i) purify the linguistic aspects, eliminate the obsolete provisions, and update the norms; ii) undertake a structural revision that would start by a deep analysis of the grounds for each institution, followed by a study of the existing case law, and provide on this basis a new wording for the articles; and iii) perform partial revisions of the text of 1870.<sup>43</sup>

The LSLI finally opted for the third possible way, that is to say, partial revisions.<sup>44</sup> In the 1970s, the LSLI began the revision of the Louisiana Civil Code on a title-by-title basis.<sup>45</sup> In the decades that followed, dozens of reporters and hundreds of people participated in the revisions,<sup>46</sup> and the different titles and chapters were subjected to analysis.<sup>47</sup>

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For additional information regarding the LSLI, see William E. Crawford, *The Louisiana State Law Institute—History and Progress*, 45 LA. L. REV. 1077 (1985); and William E. Crawford & Cordell H. Haymon, *Louisiana State Law Institute Recognizes 70-Year Milestone: Origin, History and Accomplishments*, 56 LA. B.J. 85 (2008).

43. Saúl Litvinoff, *Codificación en Louisiana*, in 2 LA CODIFICACIÓN: RAÍCES Y PROSPECTIVAS 135 (El Derecho, Buenos Aires, 2004).

44. *Id.*

45. Crawford & Haymon, *supra* note 42, at 91.

46. *Id.*

47. **Preliminary Title:** Chapters 1 and 2 (1987), Chapter 3 (1987 and 1991); **Book I:** *Title I*-Natural and Juridical Personas (1987), *Title III*-Absent Persons (1990), *Title IV*-Husband and Wife (1987), *Title V*-Divorce (1990, 1993, and 1997), *Title VI*-Of Master and Servant (repealed in part in 1993), *Title VII*-Parent and Child (1993), Chapters 1-3 (1976, 2005), *Title IX*-Persons Unable to Care for Their Persons or Property (2000), *Title X*-Of Corporations (repealed in part in 1993); **Book II:** *Title I*-Things, *Title II*-Ownership, *Title III*-Personal Servitudes, *Title IV*-Predial Servitudes, *Title V*-Building Restrictions, *Title VI*-Boundaries (all revised by a series of legislative acts from 1976 to 1979), *Title VII*-Ownership in indivision (added in 1990); **Book III:** *Preliminary Title* (1981), *Title I*-Of Successions, Chapters 1-3 (1981), Chapters 4-6 and 13 (1997), *Title II*-Of Donations *Inter Vivos* and *Mortis Causa*, Chapter 2 (1991), Chapter 3 (1996), Chapter 4 (2001), Chapter 6 (1997 and 2001), Chapters 8 and 9 (2004), *Title III*-Obligations in General (1984), *Title IV*-Conventional Obligations or Contracts (1984); *Title V*-Obligations arising Without Agreement, Chapters 1 and 2 (1995), *Title VI*-Matrimonial Regimes (1979), *Title VII*-Sale (1993), *Title IX*-Of Lease, Chapters 1-4 (2004), *Title XI*-Partnership (1980), *Title XII*-Of Loan (2004), *Title XIII*-Deposit and Sequestration (2003), *Title XV*-Representation and Mandate (1997), *Title XVI*-Suretyship (1987), *Title XXII*-Mortgages (1991 and 1992), *Title XXII-A*-Of Registry (2005), *Title XXIII*-Occupancy and Possession (1982), *Title XXIV*-Prescription, Chapters 1-3 (1982), Chapter 4 (1983), *Title XXV*-Of the Signification of the Sundry Terms (1999); and **Book**

It has been estimated that so far approximately 72% of the text of 1870 has been fully revised. Hence only 28% remains still in force, with many old provisions still coexisting and interacting with the new wording.<sup>48</sup> The current text of the Louisiana Civil Code is divided into a Preliminary Title and four books.<sup>49</sup>

It has been argued that the revision did not repeal the old Code, which survives wherever it is not contradicted: “these old Code articles have been kept alive provided that they are not contrary to or irreconcilable with the Revision.”<sup>50</sup> A new Digest then? To those who fear that they do not see the boundaries between the swamp, the bayous, and a wet sky, a firm and reassuring response was given: “The modern Revision of the Civil Code of Louisiana is a continuing process. [...] it is a better instrument than before [...]. The Civil Code is not an uncertain body of law. Those who must use it have used it since 1976 without any problem other than those common to any practice of the law.”<sup>51</sup>

Louisiana’s Civil Code has had substantial revisions. May we talk in terms of an ongoing recodification process? The structure of the code is largely unchanged, but civilians may contend that the introduction of a significant number of rules borrowed from common law states or uniform laws, such as the Uniform Commercial Code (UCC), may have changed the spirit of the

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IV (added in 1991). A. N. Yiannopoulos, *The Civil Codes of Louisiana*, in LOUISIANA CIVIL CODE 2011, Vol. I, XVI (Thomson/West, 2011); and W. E. Crawford & C. H. Haymon, *supra* note 42, at 91-92.

48. Vernon V. Palmer, *The French Connection and The Spanish Perception: Historical Debates and Contemporary Evaluation of French Influence on Louisiana Civil Law*, 63 LA. L. REV. 1067, 1112 (2003). Complete references to the revisions to the civil code are available at Crawford & Haymon, *supra* note 42, at 91-92.

49. Preliminary Title; Book I “Of persons”; Book II “Things and the different modifications of ownership”; Book III “Of the different modes of acquiring the ownership of things”; and Book IV “Conflict of Laws”.

50. V. V. Palmer, *The Death of a Code—The Birth of a Digest*, 63 TUL. L. REV. 221, 224 (1988).

51. Julio C. Cueto-Rua, *The Civil Code of Louisiana is Alive and Well*, 64 TUL. L. REV. 147, 171-172 (1989).

Code. This may be true, but only in part. Louisiana civilians should remember that the UCC, and particularly Article 2 on sales, has received a substantial civil law influence, cleverly instilled by Karl Llewellyn: the good faith principle, the irrevocability of an offer, are by no means common law doctrines! Civilians find themselves at home in the Louisiana Civil Code. Even the addition of detrimental reliance is not that much of a sign of common law contamination. Its presence in the article on cause makes it seem of mixed stamp. However, the term “promissory estoppel” is not used in article 1967, and it has been demonstrated that detrimental reliance is an underlying principle of the civil law of obligations as much as it is of the common law.<sup>52</sup>

The genius of the civil law is its ability to absorb doctrines from foreign and sometimes distant origins. This is nothing new. Legal ideas have circulated at all times.<sup>53</sup> Common law influence in judicial practice should therefore be no surprise in an environment where many lawyers and judges have received common law training and are at best self-educated in the civil law.

### *B. Contemporary Classroom and Court Practice*

For a civilian trained in France, the study of Louisiana cases, even on matters governed by the Civil Code, can be something of a challenge. The following paragraphs are largely based on my experience teaching the Law of Obligations at the LSU Law

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52. Olivier Moréteau, *Revisiting the Grey Zone between Contract and Tort: The Role of Estoppel and Reliance*, in EUROPEAN TORT LAW 2004 at 60 (H. Koziol & B.C. Steininger eds., Springer, Vienna & New York, 2005). See also OLIVIER MORÉTEAU, *L'ESTOPPEL ET LA PROTECTION DE LA CONFIANCE LÉGITIME* (Université Jean Moulin Lyon III, 1990).

53. See ALAN WATSON, *LEGAL TRANSPLANTS, AN APPROACH TO COMPARATIVE LAW* (1st ed., University Press of Virginia Charlottesville, 1974 & 2d ed., University of Georgia Press, Athens, 1993); Rodolfo Sacco, *La circulation des modèles juridiques, Rapport général*, in ACADÉMIE INTERNATIONALE DE DROIT COMPARÉ, *RAPPORTS GÉNÉRAUX : XIIIÈME CONGRÈS INTERNATIONAL DE DROIT COMPARÉ*, MONTREAL 1990 at 1 et seq. (Éditions Yvon Blais, Cowansville, 1992); and W. Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489 (1995).



School over the past five years. Louisiana judgments are written like judgments in other American States and reflect a common law methodology. The majority opinion may be accompanied by a dissent and judges give their own analysis and personal opinion, citing a significant number of cases, doctrinal sources, and the Civil Code. Codal citations are sometimes hidden amidst jurisprudential and doctrinal citations. When reading cases, students do not get a strong impression that the law is to be found in the code. Few cases offer a clear and full analysis and interpretation of code provisions. Lip service is paid to the code, with the judgments sometimes checking that the code's solution is not contradicted by the cases.<sup>54</sup>

In such a context, it is hard to develop in the students a strong confidence that the code can respond to the needs of social and business life. They trust the case rather than the enacted provision. At the same time, they are fascinated by the logical organization of the code and its ability to solve countless disputes, also reflecting powerful principles that underlie the law of obligations, such as the duty of good faith and the prevalence of a cooperation principle over an approach promoting purely individualistic and selfish deals and strategies. Yet they have a hard time to accept the idea that they can win a case by an argument based on a code article or code interpretation. They tend to trust the individual case more than the use of the code and logic. Louisiana students are after all American and grow up in a fundamentally pragmatic culture.

It comes as no surprise that, in the first half of the 20<sup>th</sup> century, a scholar declared that Louisiana law was no longer civil law but common law, Louisiana judges having adopted the system of *stare decisis*.<sup>55</sup> This triggered a salutary reaction that generated a revival

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54. Examples of well drafted and poorly drafted opinions may be found in S. LITVINOFF & RONALD J. SCALISE JR., *THE LAW OF OBLIGATIONS IN THE LOUISIANA JURISPRUDENCE* (Paul M. Hebert Law Center 6th ed., Louisiana State University, Baton Rouge LA, 2008), the coursebook I use in class.

55. Gordon Ireland, *Louisiana's Legal System Reappraised*, 11 TUL. L. REV. 585 (1937).

of the civil law tradition. Dean Hebert and a few others pointed out the misunderstanding experienced by Professor Ireland<sup>56</sup>; they explained that cases had at all times had a crucial importance in the civil law tradition and explained that Louisiana judges tend to follow *jurisprudence constante* much as those in other civil law jurisdictions.<sup>57</sup>

Here is a brief account of how I am teaching the civil law of obligations to my first year law students, in the spring semester. They have received, during the fall semester, a course on the common law of contract, and another one called Western Legal traditions in which they have been introduced to the history and the method of the civil law, the common law, and the Louisiana experience. Teaching at LSU is bi-jural rather than trans-systemic. It tends to follow the old McGill approach rather than the new trans-systemic model, though the latter is in a sense applied to the study of torts, with a real mix of civil law and common law.

I start the class with an analysis of the problem of the day, for instance acceptance of an offer, contractual damages, or solidarity. I develop a typology of possible solutions, and try to have students identify the possible responses. This is the trans-systemic part of my teaching. I may show, in discussion of contract formation or contract interpretation, that the focus may be on interpreting unilateral communications by the parties or on the search for a consensus. The former approach may lead to a battle of forms when the parties exchange contradictory printed documents, favoring the private interest of the one having the last shot, and the

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56. Harriet Spiller Daggett, Joseph Dainow, Paul M. Hébert & Henry George McMahon, *A Reappraisal Appraised: A Brief for the Civil Law of Louisiana*, 12 TUL. L. REV. 12 (1937). For a full discussion, see David Gruning, *Bayou State Bijuralism: Common Law and Civil Law in Louisiana*, 81 U. DET. MERCY L. REV. 437, especially at 446-449.

57. See *State of Louisiana v. Justin Malone*, 25 So. 3d 113, at 126 (La. 2009) where, in her dissent, Justice Knoll notes that “one of the fundamental rules of [the civil law tradition] is that a tribunal is never bound by the decisions which it formerly rendered, it can always change its mind...” citing *PLANIOL’S TREATISE ON THE CIVIL LAW* § 123... and further noting that “prior holdings of this court are persuasive, not authoritative, expressions of the law.”

latter approach, by focusing on the consensus, may leave matters of disagreement on one side and complement the contract with the suppletive provisions provided by the code. I bring a fair amount of comparative law into that part of the discussion, presenting some foreign and transnational solutions. I make sure students envision the full spectrum of possible solutions and identify the various types of responses. Students can relate this to their experience of having studied the common law of contract and western legal traditions.

I then turn to the code. All students must at all times have in front of them a paper edition of the Louisiana Civil Code and I urge them to use the “pocket” edition compiled by my colleague Alain Levasseur,<sup>58</sup> which contains nothing but the text of the code. We read the code’s articles and it happens time and time again that I read a given article or have it read aloud by a student several times during one and the same class. From the code articles or their combination, we derive the answer of Louisiana law to the problem at hand.

Then and only then, we engage in the reading and discussion of cases, covering two, sometimes three cases in one hour, adjusting the length of the discussion accordingly. The facts of the case give us a context to better understand the problem as it may appear in real life, and I occasionally use the facts of the case at the beginning of the class. The case serves as an illustration. It permits noting the good or poor application of the code by the judge. The case opens debate and discussion that may lead students to think of what could be done to improve the law when the latter is not found fully satisfactory. Of course the class is very interactive, but the Civil Code serves as the Ariadne’s thread, that the students must never lose if they are to find their way out of the labyrinth.

It is crucial, in my opinion, to make students aware of the existence of different models and to make them understand which

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58. LOUISIANA POCKET CIVIL CODE 2011 EDITION, (Alain Levasseur ed., LexisNexis, Charlottesville, 2011).

ones fit or do not fit the higher purpose of the law, identified in the general discussion. They can then understand and assess the choices made by the Louisiana legislature, and develop a critical approach. For instance, study of the cases may prove that subjecting conventional subrogation by the creditor to the rules governing the assignment of rights<sup>59</sup> may have detrimental effects, for instance in cases of first-party insurance where the insured grants subrogation to the insurer after having been paid partial compensation.<sup>60</sup> Oftentimes it shows the wisdom of some solutions that bridge apparently fundamental differences between the civil law and the common law, like the elimination of the need to put the deficient obligor in default when there is a contractual term or there is prior evidence that there will be no performance once the term is reached.<sup>61</sup> The relative abandonment of the distinction between obligations to give, to do, or not to do in the context of specific performance is another good example of a wise and highly practicable solution, one that may be providing inspiration for other jurisdictions, particularly France.<sup>62</sup>

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59. LA. CIV. CODE art. 1827: "An obligee who receives performance from a third person may subrogate that person to the rights of the obligee, even without the obligor's consent. That subrogation is subject to the rules governing the assignment of rights."

60. All rights are indeed transferred to the insurer and the insured is deprived of the benefit of LA. CIV. CODE art. 1826B: "An original obligee who has been paid only in part may exercise his right for the balance of the debt in preference to the new obligee. This right shall not be waived or altered if the original obligation arose from injuries sustained or loss occasioned by the original obligee as a result of the negligence or intentional conduct of the original obligor."

61. This is the way Louisiana law has introduced something comparable to anticipatory breach, while staying within the logic of the civil law, where failure to perform does not per se terminate a contract that remains, in principle, enforceable. LA. CIV. CODE art. 2016 provides: "When a delayed performance would no longer be of value to the obligee or when it is evident that the obligor will not perform, the obligee may regard the contract as dissolved without any notice to the obligor."

62. LA. CIV. CODE art. 1986: "Upon an obligor's failure to perform an obligation to deliver a thing, or not to do an act, or to execute an instrument, the court shall grant specific performance plus damages for delay if the obligee so demands. If specific performance is impracticable, the court may allow damages to the obligee."

Students may be impressed at the time of a class, and the bright ones may develop good civil law skills, but I know they will not stay on firm ground for too long.

Legal practice places the case before the code. When appealing to the Supreme Court of Louisiana, attorneys must submit a brief, prepared and presented according to the Rules of the Supreme Court of Louisiana. In the appellant's brief, a list of cases must appear prior to the statement of the facts of the case and a specification of the alleged errors.<sup>63</sup> The brief of the respondent must be arranged the same way.<sup>64</sup> This is a clear incentive to focus on cases rather than on the code or legislation.

In addition, a number of norms external to the Civil Code must be taken into account. The Federal and State Constitutions take priority over any other norm. And it cannot be forgotten that the big bulk of legislation in Louisiana is to be found in the Revised Statutes.<sup>65</sup> Revised Statutes are arranged in Titles running in alphabetic order, with *General Provisions* in a Title 1, and running from *Aeronautics* (Title 2) to *Wildlife and Fisheries* (Title 56). The *General Provisions* of Title 1 start with a Chapter 1, *Interpretation of Revised Statutes*, which contains interpretative provisions that differ from the traditional civilian rules to be found in the Civil Code<sup>66</sup> and are of a common law stamp. For instance, R.S. 1:7 and

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Upon a failure to perform an obligation that has another object, such as an obligation to do, the granting of specific performance is at the discretion of the court."

63. Rules of the Supreme Court of Louisiana, Rule VII, Section 4: "The brief of the appellant, applicant or relator, as the case may be, shall set forth (1) an index of the authorities cited; (2) a concise statement of the case; (3) a specification of the alleged errors complained of; and (4) an argument free from unnecessary repetition and confined strictly to the issue or issues of the case."

64. Rule VII, Section 5; "The brief of the appellee, or respondent, as the case may be, shall contain an index of the authorities cited and such statement of the case and such argument as may be deemed necessary."

65. R.S. 1:1 reads: "This Act shall be known as the Louisiana Revised Statutes of 1950 and shall be cited as R.S. followed by the number of the Title and the number of the Section in the Title, separated by a colon. Example: Section 1 of Title 20 shall be cited as R.S. 20:1."

66. LA. CIV. CODE, arts. 9-13.

8, providing that the singular may also denote the plural and one gender may also denote the other, sound pretty much like Section 6 of the British Interpretation Act 1978 or similar provisions of other states' codes.

It is hard to claim that the law of Louisiana is Civil Code centered. Apart from matters dealt with in the Civil Code – they are many and of significant importance in people's daily personal and business life – almost everything else is dealt with in much detail in legislation of common law stamp.

Even at LSU, the only one, out of the four law schools in the State, to impose a bi-jural curriculum, civil law trained professors, reduced to not even a fifth of the faculty these days, feel disheartened and tend to react like a threatened minority, viewing themselves as scarce specimens of an endangered species. It is quite a job in that context, especially in times of recession and severe budget cuts, to lead the Center of Civil Law Studies, and yet it is a fascinating challenge. At the same time, traditionalist civilians need to be reassured and Louisiana law needs to be encouraged towards a future that does not after all appear to be that frightening. Yes, there is a venerable civil law heritage, which is part of the local culture and identity. No, the civil law is not the reason why corruption exists and the economy lags behind that of other States. What is perceived as a threatened local identity is shared by many other peoples and may be changed into a powerful asset.

Many legal systems belonging to the civil law tradition are in search of a lost center.

### III. IN SEARCH OF THE LOST CENTER

All civil law systems, mixed or less mixed, are losing sight of what once was their center. Two types of forces largely contribute to a weakening or dissolution of the core. The first set of forces is endogenous and pertains to a sometimes awkward legislative

management of the code. To keep a somewhat optimistic perspective, let us describe this in terms of decomposition and recomposition of codes. The second set of forces is exogenous as it stems from the constitutionalization and internationalization of the civil law and its norms, more often than not with overall beneficial consequences.

*A. Endogenous Forces: Decomposition and Recomposition of Codified Law*

This phenomenon was described in recent papers, the most recent of which will be simply plagiarized in the next paragraph.<sup>67</sup>

Codes are sometimes decodified as a consequence of empirical legislative reform, distorting the structure of the code, or reforming significant matters by way of ancillary legislation that is no longer to be found in the code. Efforts to rewrite the codes, either partly or completely, and sometimes in a piecemeal fashion, are confusingly described as revision or recodification. Doctrinal efforts have been made to clarify the concepts of decodification, revision, and recodification.<sup>68</sup>

A redefinition of those terms was recently proposed, based on architectural metaphors, comparing codes with churches or temples.<sup>69</sup>

Codification is the construction of a homogenous building where the spirit can be felt in every single stone, window or ornament. Where the building is expanded in such a way that the connection between the different parts is lost, one gets close to what is called decodification. This may be the addition of new chapters in the code that do not connect clearly to the original text – like the addition of the regime of contracts with tour operators, full of consumer protections, making exception to the general law of

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67. Moréteau & Parise, *supra* note 6, at 1109-1112. This paragraph largely reproduces Moréteau, *A Summary Reflection*, *supra* note 8.

68. Michael McAuley, *Proposal for a Theory and a Method of Recodification*, 49 LOY. L. REV. 261 (2003); and Moréteau & Parise, *supra* note 6, at 1103 et seq.

69. Moréteau & Parise, *supra* note 6, at 1105 et seq.

obligations. Like unconnected wings of an enlarged building, they exist next to it, and the material is sometimes of a different fabric. Decodification also occurs when extensions are totally unconnected, like separate statutes or freestanding buildings.<sup>70</sup>

Codes can be revised by the reform of one or several articles, chapters, or titles. It sometimes happens that the entire code is rewritten, sometimes as the consequence of a complete revision process, as happened in the Netherlands and Quebec.

Partial revision may revitalize the code, but may also trigger a decodification process where the revision causes the code to lose its coherence. For instance, if the Louisiana revision of obligations<sup>71</sup> undoubtedly contributed towards a revitalization of the Civil Code, the revision of the Title on sale,<sup>72</sup> aiming at introducing Article 2 of the Uniform Commercial Code into Louisiana law, created discrepancies, especially in Chapter 9 on redhibition.

Decodification also typically happens as a result of the multiplication of ancillary statutes outside the code, dealing with matters that were once regulated by the code itself. In Louisiana, most provisions contained in Title 9 of the Revised Statutes<sup>73</sup> are ancillary to the articles of the code, dealing for instance with procedural details that pertain to a topic dealt with in the Civil Code, as in the case of divorce.<sup>74</sup> They also contain matters not dealt with in the Code and that could have found a place there, like the law on human embryos,<sup>75</sup> in which case we may talk about decodification. Title 9 of the Revised Statutes is nothing more than an annex to the Civil Code.

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70. *Id.* at 1106.

71. Act of July 2, 1984, effective January 1, 1985, No. 331, § 1, 1984 La. Acts 718.

72. Act of June 23, 1993, effective January 1, 1995, No. 841, § 1, 1993 La. Acts 2239.

73. On the Revised Statutes, *see* II. 2. above.

74. LA. REV. STAT. 9:301 to 376.

75. LA. REV. STAT. 9:121 to 133.



Recodification is sometimes the answer. The entire civil code may be rewritten, either on a new structure, or based on new doctrines or ideas. The new civil code regains the density and gravity the previous one had lost as a result of revision and decodification. The new civil code appears like a revitalized star in the legal system, and we may describe this as “solar recodification.”<sup>76</sup>

Recodification, however, often takes place in a far less ambitious way. Decodified matters will not be returned to the civil code. They will be amalgamated into specialized codes that may be described as satellite codes, revolving around a less dense and partly emptied civil code. These satellite codes are often little more than clerical compilations, coming close to the common law idea of consolidation. They do not have the density of the civil code. Those satellite codes are generally created because the specific areas of law started to develop in fragments outside of the civil code, thus generating decodification. This process may be described as “satellite recodification.”<sup>77</sup>

Like solar recodification, satellite recodification is meant to make legal provisions more accessible for jurists and laypersons alike. However, it often appears to be more technical, and therefore less accessible to ordinary citizens.

Recodification may generate new types of re-energized civil codes, strengthening the solar system. Examples of solar recodification are not many: they include the Netherlands and Russia, in the Old World, and Brazil and Quebec, in the New World.

Recodification more often results in the enactment of loose satellite codes, which would probably not pass the test of being called codes in the Napoleonic or Germanic sense. These satellites revolve, sometimes in a distant orbit, around a weakened solar civil code, which may undergo revisions and continued decodification.

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76. Moréteau & Parise, *supra* note 6, at 1109 et seq.

77. *Id.*

For instance, France allowed substantial matters to be moved outside the Civil Code. Legislation on insurance and consumer protection grew outside the code by way of separate statutes, causing a decodification process. The enactment of an Insurance Code and a Consumer Code were meant to consolidate dispersed legislation, and this looks like recodification in the form of satellite codes. To take the most recent of those codes (the *Code de la consommation*), it was not meant to be more than a rearranged collection of existing statutes and regulations protecting consumers in various transactions, without any change in substance. The table of contents appears more coherent, and like the *Code des assurances*, this code contains a legislative part and another part consisting of regulations. These codes are a rearranged collection of existing legislation and regulations on a given topic, to make the texts more accessible. They are a collection rather than a system, and are satellites to the Civil Code. In Louisiana, one may cite the Insurance Code,<sup>78</sup> the Mineral Code,<sup>79</sup> and the Trust Code, actually enshrined in the “Civil Code” Title of the Revised Statutes.<sup>80</sup>

To conclude on the place of the Civil Code in Louisiana, it remains the center of a solar system but, within the image of Louisiana’s legal galaxy, this solar system is now a peripheral element. Comparative analysis reveals that the situation in Louisiana is far from unique, endogenous forces pushing civil codes to the edge of the galaxy even in so called pure civil law jurisdictions.

Things are not any different regarding exogenous causes.

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78. LA. REV. STAT. tit. 22.

79. LA. REV. STAT. tit. 31.

80. LA. REV. STAT. 9:1721 to 2252; LA. REV. STAT. 9:1721 reads: “This Chapter shall be known and may be cited as the Louisiana Trust Code.”

*B. Exogenous Forces: Constitutionalization and Internationalization of Private Law*

Two sets of forces, extraneous to domestic private law, are at work, marginalizing the position of the civil code. The first one, though domestic, is linked to the development of the jurisdiction of Supreme or Constitutional Courts, extending the scope of judicial review and constitutionalizing some areas of private law. The second one is truly external, and linked to the development of different kinds of international norms, interfering with traditional fields of private law.

*1. The Constitutionalization of Private Law*

The constitutionalization of private law is a well-known phenomenon.<sup>81</sup> The American model of judicial review, based on the reading of the United States Constitution by the Supreme Court in *Marbury v. Madison*,<sup>82</sup> allows the highest court in the nation to declare any type of legislative provision unconstitutional and void, therefore imposing the supremacy of law over the will of the legislators. This model had a formidable influence all over the Americas. Not only was it adopted in Canada, but also in Latin American countries.

It impacts Louisiana as much as it does Quebec and Latin American countries. For instance, in *Loyacano v. Loyacano*,<sup>83</sup> the Louisiana Supreme Court was asked to annul an article of the Civil Code that allowed a wife who had not been at fault to claim alimony after a divorce. Art. 160,<sup>84</sup> as it then stood,<sup>85</sup> was

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81. It was described twenty years ago by MARC FRANGI, *L'APPORT DU DROIT CONSTITUTIONNEL AUX DROITS DES PERSONNES ET AUX DROITS ÉCONOMIQUES INDIVIDUELS: CONTRIBUTION À L'ÉTUDE DE LA CONSTITUTIONNALISATION DU DROIT PRIVÉ* (Université Aix-Marseille III, 1990).

82. *Marbury v. Madison*, 5 U.S. 137 (1803).

83. *Loyacano v. Loyacano*, 358 So. 2d 304 (La. 1978).

84. "When the wife has not been at fault, and she has not sufficient means for her support, the court may allow her, out of the property and earnings of the husband, alimony which shall not exceed one-third of his income."

allegedly a denial of equal protection of the laws, prohibited by both the Fourteenth Amendment to the Constitution of the United States and Article I, § 3 of the Louisiana Constitution of 1974. Rather than taking the risk of depriving all divorced women of alimony by declaring the provision null, the majority of the Louisiana Supreme Court preferred to fix the problem by way of interpretation, ruling that the *ratio legis* commanded it to be extended so as to cover the case of men who might need alimony from their ex-wife after a divorce. Justice Dennis also referred to article 21 of the Civil Code, inviting the judge, where positive law is silent, to proceed and decide according to equity, defined in the article as meaning natural law, reason, and received usages.<sup>86</sup>

Examples of interference by the constitution with the civil code can be found in many jurisdictions. A number of countries of continental Europe adopted judicial review following World War II. Not surprisingly, judicial review flourished in those moving from a totalitarian regime to democracy, such as Germany, Austria, and Italy, and later Spain and Portugal. Having denied its wartime Vichy Regime, France remained loyal to its revolutionary tradition of putting the will of the people (*demos*) above judicial rulings (rule of law), due to fear of government by judges. A Constitutional Council was created in 1958 but could only intervene by way of abstract review (without the context of a case), upon the request of politicians, during the very short period between the vote on the legislation and its promulgation by the President of the Republic. The constitutionality of promulgated

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85. It was later replaced by art. 112, which now reads: "A. When a spouse has not been at fault and is in need of support, based on the needs of that party and the ability of the other party to pay, that spouse may be awarded final periodic support in accordance with Paragraph B of this Article."

86. Act of June 18, 1987, effective January 1, 1988, No. 124, § 1, 1987 La. Acts 404, at 407, later amended and renumbered art. 21, now article 4, abandoning the reference to natural law, under the strange and false pretence that "The term 'natural law' in Article 21 of the 1870 Code has no defined meaning in Louisiana Jurisprudence." (Revision Comments (b)).

legislation could not be challenged. The Constitutional Council worked tirelessly at enlarging the scope of review, recognizing a constitutional value to all texts cited in the preamble to the Constitution, including the 1789 Declaration of the Rights of Man and the Citizen. A major step was taken with the constitutional reform of 2008, allowing a party to a case to raise an exception of unconstitutionality, to be determined by the Constitutional Council, and opening the possibility of annulment of a legislative provision in force.<sup>87</sup> The constitutionalization of private law, long identified,<sup>88</sup> is thereby intensified.

Other courts, this time supranational, may also interfere with domestic private law and therefore with civil codes.

## *2. The Internationalization of Private Law*

European civil codes are subjected to the supremacy of European Union law, enforced by the Court of Justice of the European Union. Likewise, the European Court of Human Rights sanctions violations of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed and enacted by the Members of the Council of Europe. For instance, Article 8 protecting the right to respect for private and family life and Article 14 prohibiting discrimination are likely to interfere with matters covered in civil codes, causing provisions of national codes to be placed under the scrutiny of the European Court in Strasbourg. Civil codes are double-checked or triple-checked, with the Charter of Fundamental Rights of the European Union coming into force on December 1, 2009. The situation becomes as complex in Europe as in Quebec, where the Canadian Charter of Rights and

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87. *Loi constitutionnelle n° 2008-724 du 23 juillet 2008*, adding art. 61-1 to the Constitution: “Lorsque, à l’occasion d’une instance en cours devant une juridiction, il est soutenu qu’une disposition législative porte atteinte aux droits et libertés que la Constitution garantit, le Conseil constitutionnel peut être saisi de cette question sur renvoi du Conseil d’État ou de la Cour de cassation qui se prononce dans un délai déterminé.”

88. See FRANGI, *supra* note 81.

Freedoms, forming the first part of the Constitution Act, 1982, sometimes conflicts with the Quebec Charter of Human Rights and Freedoms of 1975. Other international instruments also interfere, and increase complexity; for instance when the courts are forced to construe federal or provincial legislation in the light of the United Nations Convention on the Rights of the Child.<sup>89</sup>

In Quebec, Louisiana, and all other civil law jurisdictions, centers are many and the civil code may be influenced by constitutions, supranational or national charters of human rights, and international treaties. They are like planets revolving around several stars.

One may try to imagine a legal universe with multiple centers, with satellites revolving around several stars or planets. For instance, the French *Code de la consommation* may revolve around the *Code civil*, the Constitution, European treaties and directives. One may accept and bow to the complexity of the post-modern world (whatever the meaning of this term may be) and modelize legal reality shifting from the pyramid of norms to complex and pluralistic networks.<sup>90</sup>

Quebec has found a way to re-center private law on the Civil Code, the Preliminary provision of which provides:

“The Civil Code of Quebec (S.Q. 1991, c. 64), in harmony with the Charter of human rights and freedoms (R.S.Q., c. C-12) and the general principles of law, governs persons, relations between persons, and property.

The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions,

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89. Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), [2004] 1 S.C.R. 76, 2004 SCC 4 (Can.); See Benjamin Shmueli, *The Influence of the United Nations Convention on the Rights of the Child on Corporal Punishment – A Comparative Study*, 10 OR. REV. INT’L L. 189, 219 (2008).

90. FRANÇOIS OST & MICHEL VAN DE KERCHOVE, *DE LA PYRAMIDE AU RÉSEAU? POUR UNE THÉORIE DIALECTIQUE DU DROIT*, (Publications des Facultés universitaires Saint-Louis, Bruxelles, 2002); and Vanderlinden, *supra* note 9.

lays down the *jus commune*,<sup>91</sup> expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it.”

A strong case should be made for the adoption of a similar provision at the beginning of the Louisiana Civil Code. It would also make sense to adopt it in France and in other civil law countries, also adding a reference to the citizen. Re-centering private law around the civil code must also mean re-centering it around the *cives*, the citizen wherefrom the adjective civil derives. For the *raison-d'être* of law is not the norm, but the citizen regulated by the norm.

#### IV. BACK TO THE CENTER: A CITIZEN-CENTRIC LEGAL UNIVERSE

We reach the term of our revolution, the wheel going full circle. After all, Nicolaus Copernicus did not create a new world, but like all great scientists he taught us to see the world with a different eye, taking us closer to the truth. The truth is often simple. At all times, great developments in legal history have been centered on the citizen. The word sounds passé, but *sujet de droit* is too abstract and ambiguous, with somewhat negative overtones, and the major inconvenience of being norm-centric. Should we use “person,” or “human being?” Citizen has a different energy, and a center must be strong, energetic, and meaningful.

A citizen is an individual, a human being of course, who is ontologically a member of a community of mankind, for there is no possible survival outside a community. The present writer believes that this community is under God. He fully accepts that many a fellow human being may not believe in God and yet be solidly convinced that what makes our humanity is the full recognition of the dignity of the other, which is the cement of human rights. For, in his opinion, the recognition of the dignity of the other is the

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91. This term offers the best possible translation of the French “*droit commun*.”

acknowledgment that we share a common condition and therefore a common origin, which takes us back to the idea of God.

The citizen as member of a community has obligations and rights. I am not just a person with multiple *droits à* or entitlements. I am obliged in essence, by my very presence in this world. Obligations precede rights and legitimize rights. Because I was fed when I came into this world, I must feed those in need. This is what natural law commands.

Sadly, the citizen has become the invisible part of the legal universe, a sort of black hole. There is too much dust; there are too many laws and regulations, darkening the center. Too much focus is placed on the norm, leaving the citizen in the dark. Let us be revolutionary and place the citizen at the center.

Let us avoid the many categories of consumer, *administré*, elector, taxpayer, worker, and resident, as useful as they may be in a given context. Let us take the person as a whole and in its social essence, and we fall back to the dynamics of the civil law tradition.

The civil law placed the citizen at the center. By saying this, I do not claim that this was regardless of social status. The Twelve Tables did not change plebeians into patricians, but recognized the plebeians have the right to know their limited rights and less limited obligations. The capacity given to the plebeians to know the law applicable to them was a significant progress. This was after all the very purpose of the Louisiana Digest of 1808.<sup>92</sup>

We must not be naive; the very idea of codification or compilation is not free from ambiguity. The *Corpus juris civilis* strengthened the power of Emperor Justinian. Glossators, Post-glossators, and Commentators later confiscated the knowledge of the law, with books written in Latin and not accessible in the vernacular. Meantime, by reducing the local customs to writing, the kings of France deprived the people of their ability to create and develop the law in a spontaneous way, freezing the evolution

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92. See *supra* note 19.



of custom and placing its interpretation in the hands of judges or jurists.<sup>93</sup> The Prussian Code of 1792 (*Allgemeines Landrecht für die Preussischen Staaten*) was by no means a tool of social change or emancipation. However, the Enlightenment also produced a Civil Code centered on the citizens, meant to safeguard their rights against the arbitrary judicial abuse that was commonplace in Ancient Regime France.<sup>94</sup>

Law must be accessible to the citizen. In this respect, the civil codes of France and Louisiana, Lower Canada or Quebec, and all Latin American countries, are a great improvement, empowering the citizen by making the law more easily accessible. Of course the code does not say everything, and judges often have to make meaning out of very general and sometimes – though not often – confusing provisions. But at least the citizen can have access to the reasoning of the judge<sup>95</sup> and check for manifest errors or contradictions. By contrast, the common law is only accessible to those who master the subtle technique of distinction and are patient enough to read multiple cases that no single book may contain. When statutes exist, and there are many, they tend to be lengthy, over detailed, verbose, and confusing, and therefore not accessible to ordinary citizens.<sup>96</sup>

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93. JACQUES VANDERLINDEN, *COMPARER LES DROITS* 342, (Kluwer Éditions Juridiques Belgique & E. Story-Scientia, Bruxelles, 1995).

94. See Moréteau, *Codes as Straight-Jackets, Safeguards and Alibis: The Experience of the French Civil Code*, 20 N.C.J. INT'L L. & COM. REG. 273, 276-283 (1995).

95. Where this is expressed in an articulate manner, unlike in France where the *Cour de cassation*, by not setting-out the arguments for its rulings, confiscates the legislative power. Moréteau, *The Future of Civil Codes in France and Louisiana*, 2 J. CIV. L. STUD. 39, 49 (2009).

96. See *Connally v. General Construction Co.*, 269 U.S. 385 (1926), where Sutherland J. said, at 391, “a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.” This dictum was cited by the Supreme Court of Canada, in Reference re ss. 193 and 195.1(1)(c) of the CRIMINAL CODE (MANITOBA), [1990] 1 S.C.R. 1123.

This deals with form, but much more can be said about substance.<sup>97</sup> Civil law promotes cooperation over sheer individualism, recognizing *negotiorum gestio* and the duty to help those in urgent need. It promotes the matrimonial community of gains, forced heirship, protecting family interest rather than favoring fancy donations. It fights arrangements allowing the dead to control the resources that should be available to the living.<sup>98</sup> It is sometimes blamed for not being business friendly<sup>99</sup> but a number of civil law countries have vibrant centers for business and rank among the wealthiest in the world economy. The civil law should not be blamed for making Louisiana and less developed Latin American countries less prosperous than neighboring regions having the common law. The blame should rather be on the lack of responsibility: in neglecting the education of the young, in accepting corruption as a fatality, and in neglecting sustainable development. This has nothing to do with the nature of the legal system. After all, a number of underdeveloped countries, some very near the United States, are common law jurisdictions.

Traditional civil law is citizen-centered and its ideal form of expression is in the civil code. Civil codes are more precise than constitutions and bills of rights and leave less room to judicial discretion. They read more easily than complex statutes, detailed regulations, or multivolume compilations.

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97. See Pascal, *supra* note 8.

98. Robert A. Pascal, *Of Trusts, Human Dignity, Legal Science, and Taxes: Suggested Principles for a Louisiana Trust Estates Law*, 23 LA. L. REV. 639, *see especially* p. 649 (1963).

99. See the report of the World Bank, *Doing Business in 2004: Understanding Regulation* (The International Bank for Reconstruction and Development / The World Bank, Washington, 2004) available at: [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2003/11/04/000090341\\_20031104153559/Rendered/PDF/271470PAPER0Doing0business02004.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2003/11/04/000090341_20031104153559/Rendered/PDF/271470PAPER0Doing0business02004.pdf) (last visited on October 9, 2012).

## V. THREE RECOMMENDATIONS AS A CONCLUSION

First recommendation: one must treasure or restore the civil code's original clarity both in style and substance, and reread frequently the preliminary speech by Portalis, who was a great legislator and philosopher.<sup>100</sup>

Second recommendation: one must consult the people before modifying the code. By this, I do not necessarily mean a popular referendum. A referendum is appropriate when the question is of primary public interest and can be phrased in a simple and straightforward way, which is rarely the case with civil law reform. I mean consultation before the drafting of a bill, to identify the issues and the possible responses. In many respects, reforming a civil code is like amending a constitution. One may imagine a process comparable to a Constitutional Convention.

The French revision of the *Code civil* under the leadership of the late *Doyen* Jean Carbonnier is exemplary in many respects. For instance, the revision of matrimonial regimes in 1965 or divorce in 1975 was preceded by extensive sociological studies and consultation. Louisiana can be proud of having a very efficient State Institute preparing the revision of code titles. Regrettably, Louisiana State Law Institute committees are composed of jurists only (academics, attorneys, judges), and do not include educated laypersons such as philosophers, theologians, or other scientists.

Beware of lobbyists, since they can be a threat to the common good. Limit recourse to consultative panels or advisory committees, they tend to slow down the legislative process and lack transparency. Favor direct consultation of the people on the Internet or through social groups, to promote direct expression, spontaneous debate, and give the unheard citizen a voice.<sup>101</sup>

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100. Alain Levasseur, *Code Napoleon or Code Portalis?*, 43 Tul. L. Rev. 762, 767-774 (1969).

101. Moréteau, *A Summary Reflection*, *supra* note 8, at 1456-1457; Moréteau, *Libres propos*, *supra* note 8, at 1057; Pascal, *supra* note 8.

Information technology favors a revival of direct democracy, an aspect which is missing in highly sophisticated societies.

Third recommendation: one cannot do away with ancillary legislation, but it makes sense to organize it in compilations or specialized satellite codes. Elsewhere, I have made suggestions on how to make them more accessible to the citizen: a simplified version may be printed for the layperson and a more sophisticated one for the jurist, a process that I compared to a double-decker bus.<sup>102</sup>

However, the gist of this third recommendation is to make sure the civil code contains a Quebec style preliminary provision<sup>103</sup> that may read as follows:

The Civil Code comprises a body of rules governing basic obligations and rights of citizens regarding their person, things,

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102. The main purpose and effect of complex legislative provisions should be drafted in short two or three-line articles, couched in a simple and easily understandable style, in bold and attractive print, so as to be accessible to the layperson and attractive for reading. This constitutes the layperson-deck. Necessary technical provisions would follow, using where need be more technical language and giving the jurist the necessary details omitted from the simplified text. This constitutes the jurist-deck. Of course the layperson-deck may be printed or be available online separately. Any attempt to interpret provisions in the jurist-deck contrary to the letter or the spirit of the layperson-deck would of course be ruled out, inasmuch as it is illegal to have a regulatory text contravening the legislative provision. The upper layperson-deck will always take precedence, as commanded by traditional civilian rules of interpretation. Moréteau, *A Summary Reflection*, *supra* note 8, at 1458-1459.

103. Civil Code of Québec, Preliminary Provision:

The Civil Code of Québec, in harmony with the Charter of human rights and freedoms (chapter C-12) and the general principles of law, governs persons, relations between persons, and property.

The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it.

On this provision, see Alain-François Brisson, *La Disposition préliminaire du Code civil du Québec*, 44 MCGILL L. J. 539 (1998-1999); see also Jean-Maurice Brisson, *Le Code civil, droit commun?*, in LE NOUVEAU CODE CIVIL : INTERPRÉTATION ET APPLICATION. LES JOURNÉES MAXIMILIEN-CARON 1992, (Faculté de droit, Université de Montréal eds., Éditions Thémis, Montréal, 1993); H. Patrick Glenn, *La Disposition préliminaire du Code civil du Québec, le droit commun et les principes généraux du droit*, 46 LES CAHIERS DE DROIT 339 (2005).

and relations between persons and things which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it. It must be interpreted in harmony with the general principles of law and subject to norms having a constitutional nature.

This may be stating the obvious but may come as a salutary reminder in a jurisdiction where the civil law tradition is unknown to many and doubted by others.

The lack of response to this proposal, uttered two years ago,<sup>104</sup> indicates that it may be too late and that there may be too much common law contamination to reasonably hope for a civil law revival in Louisiana.<sup>105</sup> But as William of Orange, still a child when Copernicus died and later to be known as William the Silent, was fond of saying, “One need not hope in order to undertake, nor succeed in order to persevere.”<sup>106</sup> History proves that he achieved much in his lifetime.

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104. O. Moréteau, *An Introduction to Contamination*, 3 J. CIV. L. STUD. 9, 15 (2010).

105. O. Moréteau, *Mare Nostrum as the Cauldron of Western Legal Traditions: Stirring the Broth, Making Sense of Legal Gumbo whilst Understanding Contamination*, 4 J. CIV. L. STUD. 516, 530 (2011).

106. As quoted by EDMUND WILSON, *O CANADA: AN AMERICAN'S NOTES ON CANADIAN CULTURE* (1963).