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The Louisiana Judicial System and the Fusion of Cultures

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The title of the Journees of the Henri Capitant Society for the spring of 2003 was "A Fusion of Cultures." The symposium dealt with the transition of legal systems in those events in which a region and its people are transferred from one sovereign to another. The purpose of this paper is to examine the Louisiana experience as it relates to how such a transfer impacts the structure of the existing judicial system.

Louisiana's history in this regard offers a rich source of study because there have been two notable occasions when such transfers took place.¹ On both occasions, unanticipated difficulties developed. This paper will attempt to recount those events as well as the problems encountered and the ultimate remedies.

THE TERRITORY UNDER FRANCE

At the beginning of the 18th Century, France's holdings in the New World included Canada and the Louisiana Territory. Most of the French and English settlements on the North American continent were on the eastern seaboard; the interior of the continent had little need for a judicial system. Along the Mississippi River, the European powers were represented by military outposts, and any law administered in the wilderness would be under the control of the local military commander. Not until 1712 was the Louisiana territory placed under a separate administration from the rest of France's holdings in this hemisphere.²

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1. In modern times, the term "Louisiana" refers to one of the fifty states of the United States of America. Originally, however, the term was used to apply to the area of the North American continent which was drained by the Mississippi River, an expanse extending from the mouth of that river on the Gulf of Mexico to the Canadian border comprising some eight hundred thousand square miles. This study limits its focus to the lower reaches of that territory, an area which roughly comprises the present boundaries of the state of Louisiana, for the simple reason that it was the first area to contain a settled population which was large enough to require a judicial system.

2. Francois-Xavier Martin, *The History of Louisiana from the Earliest Period* 115 (James A. Gresham 1882) (reprinted Pelican Publishing Co. 1963); Ben R. Miller, *The Louisiana Judiciary* 1 (Louisiana State University Press 1932); Alain A. Levasseur, Louis Casimir Moreau-Lislet, foster father of Louisiana Civil Law 1 (Paul M. Hebert Law Center Publications Institute).

In order to develop this property commercially, the French king decided to turn over the control of the Mississippi River basin to a private company. On September 26, 1712, the king made a grant to a private investor, Anthony Crozat, of "all the territory possessed by the crown, between old and new Mexico and Caroline." This was recognized to be the whole of the Louisiana territory under French control. In reference to the administration of justice, the charter to Crozat provided that the edicts and ordinances of France and the Custom of Paris were to be in effect in the territory.

The edicts, which relate to a court system, are those of December 18th and 23rd of 1712 in which it was decreed that a conciliar form of government was to be created. Under that plan, the judicial power for the territory was vested in a Superior Council. Initially, the council was composed of the Governor General, the Intendant of New France, the Governor of the territory of Louisiana, a crown representative called the King's Lieutenant, an appointed attorney called Senior Councilor, two puisne councilors, a procurer-general, and a clerk. One of the practical adjustments was that, although the Intendant of New France was the honorary president of the council, the Senior Councilor was the president-in-fact. This individual sat as a court of first instance (general trial court) in all provisional matters.³

In cases that were to be heard by the council sitting as a court, the members sat en banc. The number required for a quorum differed between criminal and civil proceedings. The quorum was three in all criminal cases while it was five in civil matters. In the event of temporary vacancies in the council, members ad hoc were chosen by the remaining members from respected citizens of the territory. By royal edicts, the makeup of the Superior Council experienced occasional changes. Although Crozat's charter was later surrendered, and the administration of the territory rechartered to a new company, sometimes called the Western Company or the Mississippi Company, the basic form of the judicial system under these private companies remained unchanged during this period of French rule. By contrast, the territory in the 18th Century was undergoing dynamic changes. By the time the subsequent enterprise was chartered to administer the territory, the population had grown considerably, and settlements had sprung up in areas distant from the seat of administration in New Orleans. Consequently, the appointment of inferior judges and courts was authorized. Edicts provided that courts in the scattered parts of the territory would be composed of an agent of the company, some local notable, and, in some instances, the local military commander.

3. Miller, *supra* note 2.

In criminal matters and in civil matters of a certain magnitude, one had rights of appeal to the Superior Council.

THE TERRITORY UNDER SPAIN

The Louisiana Territory and the city of New Orleans were ceded by France to Spain by the Treaty of Fountainbleau, November 3, 1762. This arrangement was so secret that the colonists did not learn of the occurrence until October, 1764. The Governor of the territory at that time was Jean Jacques Blaise D'Abbadie, while the head of the military was Charles Philippe Aubry, who was to play an important part in the events surrounding the transfer of the colony. On February 5, 1765, Governor D'Abbadie died of natural causes, leaving Aubry in sole control.

It was not until 1766 that a Spanish representative made an appearance in the territory, some four years after the transfer of ownership. During that time, the administration of the colony, including the judicial system, remained vested in the Superior Council. The inferior courts also continued to function without change.

Prior to his death, D'Abbadie received detailed instructions from France on the transfer of the colony's administration in a document dated April 11, 1764. The document expressed hope that the Superior Council and the inferior courts would be allowed to continue in the same capacity in providing justice for the territory. In a letter from Etienne Francois Duc de Choiseul to acting Governor D'Abbadie, the colony was assured "that the regular judges, such as the Superior Council, [would] continue to render justice according to the laws, forms and usages of the colony, [and] that the inhabitants [would] be confirmed in the possession of their property."⁴

The arrival of the Spanish representative initiated a period of cultural and political conflict and a very controversial episode in the early history of the state. Appointed governor by Charles III of Spain was Don Antonio De Ulloa. For reasons that remain unclear to this day, Ulloa did not take the usual diplomatic steps in establishing the authority of Spain in its new possession. For instance, he never arranged a formal ceremony to announce that the territory was thereafter under Spanish control. One reason offered by historians is

4. John Preston Moore, *Revolt in Louisiana: The Spanish Occupation, 1766-1770* 43 (Louisiana State University Press 1976).

that he had not been accorded sufficient military personnel to enforce any change. An early indication of the difficulties which Ulloa would face was his discovery that the French soldiers under Aubry would not serve under Spanish command. Consequently, the new governor agreed to rule jointly with Aubry, a situation which could only lead to more instability.

Initially, Ulloa attempted to fulfill Choiseul's promise and cooperated with the existing French administration. As part of that cooperation, a code was compiled in 1766 for the benefit of the colony. It incorporated all previous regulations and the Custom of Paris, while at the same time reciting Spanish theory and practice. It was drafted in the French language for the benefit of the inhabitants, most of whom were francophones.

As a result of events that go beyond the scope of this study, friction developed between the Spanish Governor and the inhabitants of the colony. Matters reached a crisis in January 1767 when Ulloa, recognizing that his authority was being ignored, issued a royal decree attempting to dissolve the Superior Council and vest all judicial powers in himself. This incident sparked open defiance and resulted in a series of events referred to as the Revolt of 1767. Although this so-called revolt produced no real violence, the great dissatisfaction of the populace under the administration of Ulloa generated open signs of agitation such as public gatherings and demonstrations against Spanish rule. Whether his fears were well-founded or not, Ulloa worried for his safety and for the safety of his family. Knowing that his authority was deteriorating, he abandoned the colony and sailed to Cuba. The inhabitants of Louisiana rejoiced, hoping that the Spanish King would show no further interest in the territory. Their optimism proved to be unrealistic.

King Charles III of Spain turned to one of his military officers, Don Alexander O'Reilly, an Irish mercenary who had served the Spanish sovereign well on earlier occasions, to rectify this affront to the crown. He directed O'Reilly to proceed to Louisiana with a military force, take control, and impose Spanish rule.⁵ The assertive actions of O'Reilly after his arrival in Louisiana were in stark contrast to those of Ulloa and, in the estimation of some historians, brutal.⁶

5. Mark F. Fernandez, *From Chaos to Continuity: The Evolution of Louisiana's Judicial System, 1712-1862* (Louisiana State University Press 2001).

6. Moore, *supra* note 4, at 208-09.

The contemporaneous account of O'Reilly's arrival on July 24, 1769, indicated that he was cordially received by D'Abbadie, the members of the Superior Council, and by other persons in authority. However, upon the later arrival of a military force, he unexpectedly had several members of the Superior Council and other outspoken critics of Ulloa arrested; several of them were either executed or imprisoned. Some historians justify O'Reilly's behavior as being necessary to quell any of the germs of civil unrest and to make a clear statement that French rule had finally come to an end.

More substantially, the new governor took steps to terminate the system of justice which had been in effect in the colonies for a half century and to substitute a totally new system. His first act in this regard was to dissolve the Superior Council. The new institutions which O'Reilly introduced were to have administrative and judicial authority and required the inhabitants of the colony to develop a new vocabulary. The center of government established by O'Reilly was called the "Cabildo,"⁷ and it was a form of government that had been utilized by Spain in its other American colonies. O'Reilly's proclamation establishing the new form of government provided that the Cabildo would be composed of six perpetual regidores,⁸ two ordinary alcaides,⁹ an Attorney General Syndic,¹⁰ and a clerk. Governor O'Reilly himself would preside over the Cabildo.

Of special interest are the various methods provided for the selection of posts on the cabildo. The positions of perpetual regidor and clerk were to be offered at auction. Following that, a purchaser could re-sell his position. The ordinary alcaides and the Attorney General Syndic were chosen by vote of the other members of the cabildo. One break with the past was the practice of single judge courts for the purpose of hearing disputes. It was the ordinary alcaides who sat as individual judges, and they had both criminal and civil jurisdiction. The proclamation also contained a concept which was a radical departure from anything that had been seen under the French system, and that was the establishment of a difference in the

7. The headquarters of municipal government in Spanish law. The municipal council was the "Ayuntamiento." *Strother v. Lucas*, 37 U.S. 410 (1838).

8. A tenured member of the ayuntamiento whose position was usually purchased. *Id.* at 442.

9. A judicial officer under Spanish law whose duties resemble a justice of the peace in the English system. *U.S. v. Castellero*, 67 U.S. 17 (1862).

10. An advocate or procurator representing an authority, here the Governor or the ayuntamiento. *Field v. U.S.*, 34 U.S. 182 (1835).

status of litigants. Following Spanish practice elsewhere, O'Reilly's plan divided litigants into two categories, those with privileges and those without. Persons with certain privileges were given "fuero"¹¹ status and persons without any privileges were referred to as "ordinarios." Examples: a soldier could ask to be tried by a special judge known as a fuero militarico, or members of the clergy could be asked to be tried by a fuero ecclesiastico. In 1780, a special fuero court was created to hear treasury matters.

Initially, the governor's court remained as the tribunal of last resort from the fuero courts. However, in 1771 a superior court was created in Havana, Cuba, which served as a court of appeals from the governor's court in Louisiana. Very few civil matters were ever appealed simply because of the expense involved. Usually, the only criminal cases which were appealed to Havana were those in which the death penalty was imposed.

Meanwhile, the growth of the population in the more remote areas of Louisiana required that there be some administration of justice beyond New Orleans. This was accomplished by the use of military outposts. In each district, an officer of the army served as a civil and military commandant. He had authority to hear all civil cases under a certain sum of money. If a greater sum was involved, he received the petition and the opposition, made some record of the testimony supporting the claims, and then transmitted the whole to the Cabildo, where the matter would be routed to the proper tribunal. In criminal matters, the commandant had the authority to arrest and imprison persons charged with an offense. At that point, he would report the nature of the offense to the Cabildo and would await instructions to either release the defendant or to transport the accused to the city for further proceedings.

An integral part of O'Reilly's Cabildo plan was that all public records were to be maintained in the Spanish language. However, the use of French was tolerated in juridical acts for practical reasons. The first reason was that most of the population was not conversant in Spanish. The second is that, in contrast to the resistance that Governor Ulloa had encountered, a number of French soldiers had enlisted in the Spanish service under O'Reilly.

11. "Fuero" can mean a law or code of laws; or it can mean the tribunal that presides over the application of special laws. *Blacks Law Dictionary* 604 (5th ed. 1979).

Of course, there was the question as to whether the Courts were to apply French or Spanish law. Surprisingly, this did not seem to present the difficulty in transition that one would expect. O'Reilly had issued a proclamation that all proceedings in civil and in criminal matters would be according to the laws of Castille and of the Indies. By all accounts, this change of substantive law did not have a great impact because of the common origin, hence, the similarity of laws between Spain and France.¹² As a consequence, no noticeable disruption occurred when the courts began applying the new body of laws. Nevertheless, O'Reilly issued a decree in 1769 abolishing French law. It provided that thereafter the laws in effect would be a compilation referred to as the "Code O'Reilly." It was a combination which borrowed from the Laws of the Indies, the Siete Partidas, and the Code Noir. Although there were occasional adjustments of the judicial structure and of the substantive laws of Louisiana over the period of Spanish rule which lasted some forty years, the basic form of the judicial system remained unchanged until the next major event in Louisiana history.

THE TERRITORY UNDER AMERICAN ADMINISTRATION

In the year 1800, by the treaty of San Idelfonso, Spain returned to France the territory which had been received in the secret treaty of 1762, including the Mississippi River port city of New Orleans. Napoleon dispatched an emissary to Louisiana with orders to take control. He was Pierre Clement de Laussat, and his instructions were to act as governor and to re-establish French control of the territory. However, before he had even arrived in the New World, the celebrated Louisiana Purchase was accomplished. In that historical event, Napoleon sold the last of French possessions in North America to the emerging country of the United States of America. Laussat's tenure as governor over the colony of Louisiana lasted only three weeks.¹³ On December 20, 1803, pursuant to new instructions which he had received from France, Laussat made a formal delivery of the territory to representatives of the United States.

12. Martin, *supra* note 2, at 211.

13. Although Laussat arrived in Louisiana on March 26, 1803, his authority did not commence until he received formal possession of the province from Spain on November 30, 1803. Congress had accepted the cession on October 7, 1803 and Laussat made formal delivery to Claiborne and Wilkinson on December 20, 1803.

In his *History of Louisiana*, François-Xavier Martin includes a quote from a letter which Laussat sent to the French Ambassador in Washington following the transfer. Laussat clearly lamented the loss of Louisiana, and correctly predicted the cultural change which would soon occur in the colony:

The Americans have given fifteen million dollars for Louisiana; they would have given sixty rather than not possess it In a few years, the country, as far as the Rio Bravo (Mexico) will be in a state of cultivation. New Orleans will then have a population of from thirty to fifty thousand souls; and the new territory will produce sugar enough for the supply of North America and a part of Europe; let us not dissimulate; in a few years the existing prejudices will be worn off, the inhabitants will gradually become Americans, a system already begun. Should no fortunate amelioration of political events intervene, what a magnificent Nouvelle France have we lost. The Creoles and French established here unite in favor of France and cannot be persuaded that the convention for the cession of Louisiana is anything but a political trick: they think that it will return under the dominion of France.¹⁴

Despite the fact that Laussat had been in the position of control of the colony for the sole purpose of preparing its delivery to the United States, his actions in relation to the judicial system were very disruptive and had long range effect. Using the broad powers which had been invested in him, he issued an order abolishing the *Cabildo*. By doing so, he also abolished the entire court system. It appears that it was his intent to institute reforms of the judicial system, presumably in conformity with those which had existed before Spanish rule and which prevailed in various French possessions elsewhere. But, it is also evident that Laussat was fully aware, before his arrival in Louisiana, that the colony would no longer be French, and would soon be transferred to the United States. It would have accomplished little to institute a new judicial system within the short window of his administration.

14. In his "Essai Historique Sur La Louisian," 1830-31, Charles Gayarré identifies the recipient of this letter as "l'ambassadeur français à Washington." In Martin's "History of Louisiana," the author simply says that the letter was to "the minister from New Orleans." *A Law Unto Itself? Essays in the New Louisiana Legal History* 81-82 (Warren Billings, Mark F. Fernandez eds., LSU Press 2001).

So it was because of the quick and unexpected double transfer of the territory, and Laussat's intervening order, that Louisiana was received by the United States without any judiciary in place, and with confusion regarding the system of laws to be applied. The American administration moved quickly to deal with this new acquisition and began by dividing Louisiana into two districts referred to initially as Upper and Lower Louisiana. The lower area was also referred to as the "Orleans Territory." The balance of the territory was still sparsely populated and did not present the same problems as the settlements in the south. The wilderness extending to the north and westward would be administered under existing laws similar to those which the United States had applied to other unpopulated regions of North America which it had acquired, notably the Northwest Territories.¹⁵ The Orleans Territory, on the other hand, presented a challenge. There was a settled population center which had acquired its own customs and practices. There was a growing and robust economy which required immediate resolution of disputes. The mixed population of French, Spanish, English, Indians, and Africans needed a system of criminal laws to preserve the peace.

President Jefferson was well aware of the rocky transition which had occurred in the 1760's. He was wary about thrusting an abrupt change upon the inhabitants of the area and thereby creating unrest and distrust of the new government. The Northwest Ordinance of 1787, by which the United States had controlled its other acquisitions, had mandated that common law be applied. Jefferson took note, however, of the fact that for almost a century, all matters in the Orleans Territory had been handled under the laws of Spain and France. He realized that the imposition of an unknown system of laws would create chaos and the very hostility that he was hoping to avoid.

With these considerations in mind, the President encouraged the Congress to act quickly. It did so by adopting a temporary system of conciliar government consisting of a governor and a thirteen-man legislative council. The power to appoint members of this temporary government was given to the President, and he designated his cousin and close friend, William C.C. Claiborne, as the governor of the newly acquired territory. Claiborne was thereby empowered with the ability to establish, by proclamation, a court system. On December 20, 1803,

15. George Dargo, *Jefferson's Louisiana: Politics and the Clash of Legal Traditions* (Harvard University Press 1975).

Claiborne issued a proclamation in which he declared that the authority of Spain and France over the colony had ceased, and its inhabitants were now under the control of the United States. Worthy of note is that, for the purposes of stability and continuity, his proclamation decreed that the laws and municipal regulations enforced at the time of the session were to remain in effect.¹⁶

Addressing the pressing need for a judicial system, on December 30th, the governor established a Court of Pleas to deal with civil matters, and he appointed members of the local populace to fill that court. The jurisdiction of the Court of Pleas was limited to civil matters of three thousand dollars or less, which was a broad range of jurisdiction in those times. More important matters would go to the governor's court or await the creation of a more permanent system.

Claiborne encountered difficulty in finding personnel for the court. The ideal judge would be a person who favored the new American administration, was bilingual, and was cognizant of both common law and French law. Candidates with all those qualifications did not exist, so Claiborne appointed a group who represented a mix of languages, political leanings, and legal training. This tribunal met for the first time on January 10, 1804 and adopted rules for its own procedures.

In addition to the court of common pleas, Claiborne also created a "governor's court" which was to be the court of first instance in major civil matters and would also hear appeals from the Court of Pleas. In criminal matters, the governor's court also operated as the court of last resort in capital cases.

The selection and compilation of the civil law of the territory is a subject which has been well-studied and need not be detailed here. In summary, in 1808 the legislative council appointed two consultants, James Brown and Louis Moreau-Lislet, to compile a digest of the civil law which had been in effect in the territory. This Digest, completed in 1808, drew its provisions from the laws which had been in effect in the colony as well as from *Las Siete Partidas*, drafts of the Code Napoleon (then being redacted), and commentaries on English and American law. The Digest was not adopted as a binding code, but operated as a guide for the courts and as a model for blending French, Spanish, and the English common law.

16. Somewhat unclear was a part of Claiborne's decree which stated that "officers charged with the execution of laws were continued in the exercise of their respective functions." I suggest that this was directed to the military commandants in the parishes to avoid a breakdown of law and order.

Criminal law for the new territory was handled quite differently. President Jefferson instructed Claiborne to impose common law concepts of penal law and to reflect the mandate of the U.S. Constitution, which accorded over-arching rights to all American citizens. Therefore, Claiborne saw no need to rely upon the French and Spanish criminal laws which had been in effect beforehand. He convened the first session of the legislative council for this purpose in December, 1804, and a final "Crimes Act" was adopted and signed by Claiborne on March 4, 1805. Thus, at this point in time, the void which had been created by Laussat through his abolition of both the legal and judicial systems of the territory had been filled. Although the courts established under Claiborne were provisional in nature, there was finally a judicial system in place and a body of laws to govern the behavior of the populace.

This temporary judicial system remained in effect until 1805 when Claiborne and the legislative council created a new judiciary composed of a Superior Court of original and appellate jurisdiction and a system of county courts.¹⁷ Again, the philosophy adopted by the new American government in seeking a smooth transition was reflected in Claiborne's choice of personnel. In order to make the population of Louisiana feel comfortable with the new judicial system, he offered the positions on the Superior Court to qualified individuals who were fluent in either French or Spanish and knowledgeable of both civil law and common law.¹⁸

Also in 1805, the legislative council transferred the judicial powers of commandants and their syndics to judges and justices of the peace. The judge of the Orleans county court was vested with probate jurisdiction for the whole territory, and the Superior Court was authorized to go on circuit for a more expedient administration of justice throughout lower Louisiana.

Much has been written about the desire of President Jefferson to make the laws of Louisiana conform ultimately to those of the other states. That struggle and its results are beyond the scope of this

17. An act of congress, March 26, 1804, provided for a Legislative Council of thirteen members appointed by the President. Selecting the members of the council was Claiborne's task and he tried to balance its membership with representatives of the different cultural groups in the province. The Act vested judicial power in a Superior Court but limited judges and justices of the peace to four year terms.

18. Although Congress authorized three positions on the Superior Court, only John Provost of New York, stepson of Aaron Burr, accepted the offer and served on the court alone for many months. Miller, *supra* note 2, at 9.

presentation. Suffice it to say that Louisiana's current legal system is a mixed jurisdiction showing the influences of English, French and Spanish law. Still, it is clear that Jefferson and Claiborne were committed to using the Anglo-American pattern for the institutions of justice such as the structure of the courts and the role of the judge.¹⁹ In 1932, Ben Robertson Miller wrote: "Given anglicized names[,] the judicial tribunals under France would bear at least a faint resemblance to present day judicial organs. The influence of the Spanish structure was felt for some time as our early parish courts were strikingly similar to the *fueros military*."²⁰ With respect to Miller's wonderful scholarship, those vestiges, if ever present, can no longer be detected. The court system of Louisiana after statehood, in its basic structure and procedures, was modeled on the Anglo-American system. In that respect, it was and still is indistinguishable from the court systems of the other states of the Union.

CONCLUSION

From the beginning of the 18th Century through the first decade of the 19th Century was a period of uncertainty for the legal institutions of the Louisiana Territory. Although a wide ocean separated the Territory from the seats of power in Europe, the political intrigues of the Old World brought two instances of abrupt and dramatic change. The multiple transfers of ownership of the Territory and the subsequent clash of legal traditions and institutions made it impossible to have a seamless transition from one judicial system to another. Yet, each successive government shared the philosophy that the rapid establishment of a court system was vital for stability, and, hence, gave such establishment the highest priority. The period witnessed the courts go from a French counciliar system to a Spanish "Cabildo" system, and, finally, to the American system, which was based on the English model. In each instance, the establishment of courts to meet the needs of the government and the community was readily accepted by the general population and, by that measure, would have to be deemed successful.²¹ It is a tribute to the individuals who served as judges, lawyers, and other court officers in the administration of justice that the population was well served by their efforts.

19. Dargo, *supra* note 15, at 107.

20. Miller, *supra* note 2, at 7.

21. Fernandez, *supra* note 5, at 15, 22.