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# An Introduction to "The Romanist Tradition in Louisiana": One Day in the Life of Louisiana Law

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## An Introduction to "The Romanist Tradition in Louisiana": One Day in the Life of Louisiana Law\*

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The subject of this issue of the *Louisiana Law Review* is "The Romanist Tradition in Louisiana." Included in this issue are papers delivered at a Colloquium on the same subject held under the able stewardship of Professor A.N. Yiannopoulos at the Eason-Weinman Center for Comparative Law of the Tulane University School of Law. Written by some of the world's most notable Romanists and some of Louisiana's best civilian scholars, these papers address various aspects of the Romanist tradition in Louisiana, in its remote or recent past and its precarious present. In reading these papers, the reader may be surprised to discover the degree to which Roman laws and institutions have been imported to Louisiana, how much they have flourished in its fertile soil, and how much they have survived against all odds in this small island-like state that is surrounded by the sea of the Anglo-American common law.

This brief introduction will not attempt to summarize the content of these scholarly papers nor attempt to draw conclusions from them. The reader is perfectly capable of doing both. Nor will this introduction attempt to restate the story of the Romanist tradition in Louisiana. This story has been told repeatedly and much more extensively elsewhere.<sup>1</sup> Rather, this introduction will focus on

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1. From the vast literature on the subject, see Rodolfo Batiza, *The Verbatim and Almost Verbatim Sources of the Louisiana Civil Codes of 1808, 1825, and 1870: The Original Texts* (1973); George Dargo, *Jefferson's Louisiana: Politics and the Clash of Legal Traditions* (1975); *Louisiana's Legal Heritage* (Edward F. Haas & Robert R. MacDonald eds., 1983); Shael Herman et al., *The Louisiana Civil Code: A Humanistic Appraisal* (1981); Shael Herman, *The Louisiana Civil Code: A European Legacy for the United States* (1993); Richard H. Kilbourne, *A History of the Louisiana Civil Code: The Formative Years, 1803-1839* (1987); Richard H. Kilbourne, *Louisiana Commercial Law: The Antebellum Period* (1980); Symeon C. Symeonides, *An Introduction to the Louisiana Civil Law System* 61-167 (6th ed. 1991); A.N. Yiannopoulos, *Louisiana Civil Law System* (1977); Hans W. Baade, *Marriage Contracts in French and Spanish Louisiana: A Study in "Notarial" Jurisprudence*, 53 Tul. L. Rev. 3 (1978); Hans W. Baade, *The Law of Slavery in Spanish Louisiana, 1769-1803 in Louisiana's Legal Heritage* 43 (Edward F. Haas & Robert R. MacDonald eds., 1983); Mack E. Barham, *A Renaissance of the Civilian Tradition in Louisiana*, 33 La. L. Rev. 357 (1973); Rodolfo Batiza, *Origins of Modern Codification of the Civil Law: The French Experience and Its Implications for Louisiana Law*, 56 Tul. L. Rev. 477 (1982) [hereinafter *Origins of Modern Codification*]; Rodolfo Batiza, *The Actual Sources of the Marriage Contract Provisions of the Louisiana Civil Code of 1808: The Textual Evidence*, 54 Tul. L. Rev. 77 (1979); Rodolfo Batiza, *Sources of the Civil Code of 1808, Facts and Speculation: A Rejoinder*, 46 Tul. L. Rev. 628 (1972) [hereinafter *Sources of the Civil Code of 1808*]; Rodolfo Batiza, *The Louisiana Civil Code of 1808:*

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one particular day in the life of Louisiana law, MAY 26, 1806, a day that, perhaps more than any other day, exemplifies Louisiana's attachment to the civil law and its resistance to the common law.

#### I. BACKGROUND: THE RECEPTION OF THE ROMANIST TRADITION

First, a brief background. How was the Roman-based civil law received in Louisiana? Of course, it was brought here by the European colonists who, in this part of the country, were the French, and then the Spaniards. As early as 1712, several years after the French took possession of Louisiana, King Louis XIV of France, by means of *Lettres Patentes*, authorized Sieur Crozat<sup>2</sup> to "undertake exclusive trade" in Louisiana and provided that the King's "Edicts, Ordinances & Customs and the Usages of the Provostry and Viscounty of Paris shall be observed as Laws & Customs in the said Region of Louisiana."<sup>3</sup> It is well known that, while the Custom of Paris was of Romano-Germanic origin, the French edicts and ordinances referred to in the Letters, such as the *Code Louis ou Ordonnance Civile*,<sup>4</sup> were based on the Roman law as "received" in France from Northern Italy. By that time, the study of the Glossators and later the Commentators had demonstrated that the "rediscovered" Digest of Justinian was capable of providing the core of contemporary law in other western European countries.<sup>5</sup>

French Romano-Germanic law was replaced, in whole or in part,<sup>6</sup> by Spanish-Roman law when the Spaniards took over Louisiana in 1769. An Ordinance issued that year by the Spanish Governor, Don Alexander O'Reilly, provided that judges in Louisiana should "pronounc[e] judgments . . . in conformity with the laws of the *Nueva Recopilación de Castilla*, and the

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*Louisiana*, 25 La. B.J. 29 (1977); John H. Tucker, *Source Books of the Louisiana Law*, 6 Tul. L. Rev. 280 (1932); John H. Tucker, *Source Books of the Louisiana Law*, 8 Tul. L. Rev. 396 (1932); John H. Tucker, Jr., *The Code and the Common Law in Louisiana*, 29 Tul. L. Rev. 739 (1955); R.L. Tullis, *Louisiana's Legal System Reappraised*, 12 Tul. L. Rev. 113 (1937); Robert L. Tullis, *The Louisiana Civil Law, in the Light of Its Origin and Development*, 2 U. Toronto L.J. 298 (1938); John H. Wigmore, *Louisiana, The Story of Its Jurisprudence*, 22 Am. L. Rev. 890 (1888); John H. Wigmore, *Louisiana: The Story of Its Legal System*, 1 So. L. Q. 1 (1916); A.N. Yiannopoulos, *The Early Sources of Louisiana Law: Critical Appraisal of a Controversy*, in *Louisiana's Legal Heritage* 87 (Edward F. Haas & Robert R. MacDonald eds., 1983) [hereinafter *Early Sources*]; A.N. Yiannopoulos, *Louisiana Civil Law: A Lost Cause?*, 54 Tul. L. Rev. 830 (1980); A.N. Yiannopoulos, *Two Critical Years in the Life of the Louisiana Civil Code: 1870 and 1913*, 53 La. L. Rev. 5 (1992).

2. *Lettres Patentes du Roy, qui permet au Sieur Crozat Secrétaire du Roy, de fair seul le Commerce dans toutes les Terres possédées par le Roy & bornées par le nouveau Mexique & autres, sous les nom de Gouvernement de la Louïsiane. Donné à Fontenebleau le 14 Septembre 1712.*

3. *Id.* art. VII.

4. *Ordonnance Civile touchant la Réformation de la Justice* (April 20, 1667).

5. See Symeonides, *supra* note 1, at 24-59.

6. The extent to which Spanish law displaced French law after the 1762 session of Louisiana to Spain is disputed. For a review of this dispute and the pertinent citations, see Yiannopoulos, *Early Sources*, *supra* note 1, at 91-96.

*Recopilación de las Indias.*"<sup>7</sup> Again, it is a well established fact that these two compilations, as well as other Spanish enactments, most notably the *Siete Partidas*, which were eventually observed as laws in Louisiana, were based on the rediscovered Roman law as received in Spain.

Spanish-Castilian-Roman law remained in force during the few months in which the French regained nominal control of Louisiana in the year 1803, at which time they transferred control to the United States following the Louisiana Purchase.<sup>8</sup> That same law also remained in force after the United States took over. An Act of Congress passed in 1804 provided that "the laws in force . . . shall continue in Force, until altered, modified or repealed by the Legislature of [Louisiana]."<sup>9</sup>

In 1806, the Louisiana Legislature or, as it was then called, the "Legislative Council of the Territory of Orleans," passed "An Act Declaring the Laws Which Continue to be enforce,"<sup>10</sup> which declared that:

the laws which remain in force, and those which can be recurred to as authorities in the tribunals of this Territory . . . are the laws and authorities following, to wit:

1°. The [R]oman Civil code, as being the foundation of the [S]panish law, by which this country was governed before its cession to France and to the United States, which is composed of the institutes, digest and code of the emperor Justinian, aided by the authority of the commentators of the civil law, and particularly of Domat in his treat[ise] of the Civil laws; the whole so far as it has not been derogated from by the [S]panish law; [and]

2°. The Spanish law, consisting of . . . the [R]ecopilation de Castilla . . . ; the seven parts or partidas of the king Don Alphonse the learned, and . . . the royal statute (fueroreal) of Castilla; the [R]ecopilation de Indias, . . . the laws de Toro, and finally the ordinances and royal orders and decrees, which have been formally applied to the colony of Louisiana . . ."<sup>11</sup>

7. Gustavus Schmidt, *Ordinances and Instructions of Don Alexander O'Reilly*, 1 La. L.J., No. 2, p. 1, 27 (1841).

8. See Batiza, *Origins of Modern Codification*, *supra* note 1, at 581-82.

9. An Act Erecting Louisiana Into Two Territories, and Providing for the Temporary Government Thereof, ch. 38, 2 Stat. 283, 286 (1804).

10. Territory of Orleans Legislative Council, An Act Declaring the Laws Which Continue to be enforce in the Territory of Orleans, and Authors Which may be Recurred to as Authorities Within the Same (May 26, 1806), *reprinted in* Symeonides, *supra* note 1, at 72-73; Franklin, *The Place of Thomas Jefferson*, *supra* note 1, at 323-26.

11. *Id.* § 1.

## II. THE DAY

For those knowledgeable about Louisiana law, this Act did not contain anything new, for it simply declared that which was a well known fact, namely, that the Roman-Spanish laws were in force in Louisiana.<sup>12</sup> However, for someone like the then Governor of Louisiana, William Claiborne, a common-law lawyer who never concealed his desire to import the common law and to "assimilate" Louisiana with the rest of the Union,<sup>13</sup> this Act was a solemn reaffirmation of a fact he would rather suppress. This may have been the reason for which, on MAY 26, 1806, the Governor vetoed the above Act. What the Governor did not anticipate was that the members of the Legislature would feel so strongly about the subject as to resign in protest over his veto. He apparently underestimated either their integrity or their commitment to the preservation of the civil law, or both.

Indeed, the legislators did something which by today's standards is simply unimaginable: they resigned *en mass* and dissolved the Legislative Council. This fact alone would be sufficient to make this an important and unique day in Louisiana *political* history, not just legal history. Perhaps more important, however, was what the members of the Council had to say with regard to the reasons for their resignation. In a Resolution they published in a New Orleans newspaper on June 3, 1806, they explained the reasons.<sup>14</sup> In this, one of the most important documents in Louisiana legal history, they demonstrated an unusual attachment to, and high pride in, their ancient institutions:

The most inestimable benefit for a people is the preservation of its laws, usages, and habits. It is only such preservation that can soften the sudden transition from one government to another and it is by having consideration for that natural attachment that even the heaviest yoke becomes endurable. . . .

Now, what are the laws which Congress intended to preserve to us? . . . It is evident that they are the old laws which were in use in this country before its cession to the United States of America. . . .

. . . [E]very one knows that those old laws are nothing but the civil or Roman law . . . . If the title of the books in which those laws are contained is unknown, if those titles appear barbarous or ridiculous, those very circumstances are the most to their credit because they prove, by the ignorance of those who have obeyed them until now without

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12. Again, the extent to which these laws were Spanish-Roman as opposed to French-Roman is disputed. See *supra* note 1. However, the important fact remains that these laws had their origin in the continental Roman civil law rather than the Anglo-American common law.

13. See Letter from Governor Claiborne to James Madison, Secretary of State (April 5, 1808), in 4 Claiborne Letters 168-69 (1972) ("[I]t has with me been a favorite policy to assimilate as much as possible the Laws & usages of this Territory, to those of the states generally.")

14. See *Le Telegraphe*, June 3, 1806, reprinted in 9 The Territorial Papers of the United States 643-57 (Clarence Edwin Carter ed. 1940); Symeonides, *supra* note 1, at 73-75.

knowing that they were doing so, how great is their mildness and their wisdom and how small is the number of disadvantages resulting from their execution. . . . [T]he Roman law which formed the basis of the civil and political laws of all the civilized nations of Europe presents an ensemble of greatness and prudence which is above all criticism. What purity there is in those decisions based on natural equity; what clearness there is in the wording which is the work of the greatest jurists, encouraged by the wisest emperors; what simplicity there is in the form of those contracts and what sure and quick means there are for obtaining the remedies prescribed by the law, for the reparation of all kinds of civil wrongs.

We certainly do not attempt to draw any parallel between the civil law and the common law; but, in short, the wisdom of the civil law is recognized by all Europe; and this law is the one which nineteenth-twentieths of the population of Louisiana know and are accustomed to from childhood, of which law they would not see themselves deprived without falling into despair. . . . [O]verthrowing received and generally known usages . . . would be as unjust as disheartening. Every one knows today . . . how successions are transferred, what is the power of parents over their children and the amount of property of which they can dispose to their prejudice, what are the rights which result from marriages . . . , the manner in which one can dispose by will, the manner of selling, of exchanging or alienating one's properties with sureness and the remedies which the law accords in the case of default of payment. Each of the inhabitants dispersed over the vast expanse of this Territory, however little educated he may be, has a tincture of this general and familiar jurisprudence, necessary to the conduct of the smallest affairs, which assures the tranquility of families; he has sucked this knowledge at his mother's breast, he has received it by the tradition of his forefathers and he has perfected it by the experience of a long and laborious life. Overthrow this system all at once. Substitute new laws for the old laws; what a tremendous upset you cause!<sup>15</sup>

### III. ITS AFTERMATH

Indeed, "what a tremendous upset!" Perhaps fearing a different upset of his own, Governor William Claiborne decided to yield. Only twelve days later, he signed an Act authorizing James Brown and Moreau Lislet "to compile and prepare jointly a Civil Code for the use of this territory."<sup>16</sup> The Act instructed

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15. See *Le Telegraphe*, *supra* note 14 (reprinted in 9 *The Territorial Papers of the United States* 650-53); Symeonides, *supra* note 1, at 73-75.

16. 1806 La. Acts at 214 (Act of June 7, 1806).

the redactors to "make the civil law by which this Territory is now governed, the ground work of said code."<sup>17</sup>

THEY DID. In less than two years, the two redactors produced the first compilation of civil law in Louisiana, which was enacted under the title "The Digest of the Civil Laws Now in Force in the Territory of Orleans."<sup>18</sup> Again, the extent to which the 1808 Digest was based on French-Roman or Spanish-Roman law is the subject of intense scholarly debates.<sup>19</sup> What is not disputed however, is that whether the immediate sources upon which the redactors relied were French or Spanish, the Digest was ultimately based on Roman civil law as expounded upon, recast, and systematized by the great continental scholars. These otherwise useful debates often tend to overshadow the most significant development of that period, namely, the fact that the real competition was between the civil law and the common law and that the drafting of the Digest represents the victory of the former over the latter. Four years later, this victory was solidified with a special clause in the first Louisiana Constitution of 1812 which circumscribed the power of the legislature, and thus of the Governor, to "adopt any system or code of laws, by general reference to the said system or code."<sup>20</sup> This not so subtle proscription was a specifically designed constitutional dam against the wholesale importation of the common law.

Thus, the civil law was protected in those early critical years in which the river of the common law was inundating all the new territories. Since then, the Louisiana civil law not only survived, but flourished as well. It is still alive today. The usual expression, of course, is "alive *and well*." The omission of the last two words is not accidental. But that is another story, for another day. The fact remains, however, that if the civil law is alive today, a great deal is due to that fateful day, MAY 26, 1806, and a great deal is due to those heroic lawyer-legislators who had the courage of their conviction. This may be one additional reason for which we can feel nostalgic about that date.

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17. *Id.* at 214.

18. This Digest is the precursor of the present Louisiana Civil Code, after having undergone a major revision in 1825 and a less drastic revision in 1870.

19. See Batiza, *The Louisiana Civil Code of 1808*, *supra* note 1; Pascal, *Sources of the Digest of 1808*, *supra* note 1; Batiza, *Sources of the Civil Code of 1808*, *supra* note 1; Yiannopoulos, *Early Sources*, *supra* note 1.

20. "The Legislature shall never adopt any system or code of laws, by general reference to the said system or code." La. Const. Art. IV, § 11 (1812).



