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Résumé de l'article

L'auteur analyse l'expérience louisianaise. Il s'en sert pour montrer que la codification du droit, préconisée par le professeur Tancelin, implique le respect du droit en tant que science et art de l'ordre en vue du bien commun. Ce respect décroît dès lors qu'on fait abstraction des bases ontologiques de la collectivité humaine et qu'on considère la société comme une simple association d'individus aux intérêts égoïstes.

Louisiana's Mixed Legal System

by
**ROBERT A.
PASCAL***

ABSTRACT

The author analyses the Louisiana experience as a basis for suggesting that the codified law methodology which Professor Tancelin favors presupposes a respect for law as the science and art of order for the common good, a respect that decreases as men ignore the ontological bases of human community and regard society as an association of individuals for selfish concerns.

RÉSUMÉ

L'auteur analyse l'expérience louisianaise. Il s'en sert pour montrer que la codification du droit, préconisée par le professeur Tancelin, implique le respect du droit en tant que science et art de l'ordre en vue du bien commun. Ce respect décroît dès lors qu'on fait abstraction des bases ontologiques de la collectivité humaine et qu'on considère la société comme une simple association d'individus aux intérêts égoïstes.

ESSENTIAL HISTORY OF LOUISIANA PRIVATE LAW

Louisiana is in its third juridical period. In the first, completed in 1769, the order was French and the *Custom of Paris* and various edicts and ordinances of the king were the basis of the private law.¹ In the

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1. The charter granted Antoine Crozat in 1712 for the development, administration, and exploitation of Louisiana provided it was to be governed by the *Edicts and Ordinances* of the king and by the *Custom of Paris*. The subsequent charter to the Company of the West, in 1717, contained a similar provision. The same laws continued in force after Louisiana became a crown colony in 1731. See Athanassios N. Yiannopoulos, "The early sources of Louisiana law: Critical Appraisal of a Controversy", in Haas, editor, *Louisiana's Legal Heritage*, 1983, 87-106, at 87, 88.

second, from 1769 to 1803, Spanish law (then uncodified) was in force.² The third period, the American, began in 1803.³ The Territory of Orleans, roughly the area of the present State of Louisiana, was carved out of the vast Louisiana Territory in 1804⁴ and became the State of Louisiana in 1812.⁵ With United States domination Louisiana's public law became American, but its private law remained Spanish.⁶ The Congress of the United States, though it possessed legislative authority to do so until 1812,⁷ never imposed the common law on Louisiana; and since 1812 the Louisiana Constitution has contained a provision rendering impossible the legislative adoption of unwritten law.⁸

The preservation of the Spanish *derecho civil* (private substantive non-commercial law, hereinafter referred to as "civil law") was accomplished through the draft of *A Digest of the Civil Law(s) now in force in the Territory of Orleans*, promulgated in 1808.⁹ This *Digest*, in the form of a civil code, was promulgated as law, but it was not given the effect of repealing the Spanish civil law not incompatible with its provisions.¹⁰ After the *Digest*, then, it yet was necessary to consult the ancient laws to discover the rules of order in their fullness.¹¹ In the effort

2. Spain acquired Louisiana in 1762, by the *Treaty of San Idelfonso*, but Spanish law was not imposed until 1769, under the administration of Governor Alejandro O'Reilly. See Yiannopoulos, *op. cit.* note 1, at 88, 89.

3. Spain retroceded Louisiana to France in 1800, but France did not assume sovereignty until November 30, 1803, and then only in preparation for transferring sovereignty to the United States on December 20, 1803, pursuant to the Louisiana Purchase.

4. *Act of 26 March 1804*, c. 38, 2 U.S. Stat. 283.

5. *Act of 8 April 1812*, c. 50, 2 U.S. Stat. 701.

6. Except for matters irrelevant here, France did not abrogate Spanish law during its twenty-day exercise of sovereignty in December 1803. The *Acts of the United States Congress of 26 March, 1804*, c. 38, sec. 11, 2 U.S. Stat. 283, and of *3 March 1805*, c. 31, sec. 9, 2 U.S. Stat. 331, confirmed the "civil laws" in force except in minor detail.

7. *U.S. Constitution*, Art. IV, Sec. 3, gives the Congress legislative jurisdiction over territories and possessions of the United States. When the Orleans Territory became the State of Louisiana in 1812, Congress ceased to have legislative jurisdiction over Louisiana's private law.

8. The earliest provision was that of the *Louisiana Constitution of 1812*, Art. IV, Sec. 11. The provision now in force is that of the *Louisiana Constitution of 1974*, Art. III, Sec. 15(B): "A bill enacting, amending, or reviving a law shall set forth completely the provisions of the law enacted, amended, or revived. No system or code of laws shall be adopted by general reference to it."

9. *Orleans Territory, Act of March 31, 1808*. The title page of the *Digest* uses "A Digest of the Civil Laws"; the title used at the beginning of the text of the *Digest* is "A Digest of the Civil Law".

10. *Idem.*, note 9, sec. 2: "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 with them is hereby abrogated."

11. The most cited decision upholding the ancient laws not incompatible with the *Digest* of 1808 is *Cottin v. Cottin*, 5 Martin (O.S.) 93 (La. 1817).

to minimize this inconvenience, a great number of "additions and amendments" to the *Digest*¹² were adopted in 1824 to take effect one month after printing, which was in 1825.¹³ The whole, the *Digest* and the additions and amendments, was known as the *Civil Code of 1825*. Even this Code, however, replaced the Spanish civil law for only those matters on which the Code had provided specially or particularly.¹⁴ It was not until 1828 that the pre-American-era Romanist laws yet in force in 1825 were repealed.¹⁵

The *Civil Code of 1825* was brought up to date in 1870 and named the *Revised Civil Code of 1870*.¹⁶ This is the civil code now in force. It was amended relatively little before 1960. Since that date it has been amended frequently, and presently the Louisiana State Law Institute is preparing a complete revision of it.¹⁷ It is because of this *Civil Code*, fundamentally Spanish¹⁸ with some other influences, largely French in 1825 and the years immediately following that date,¹⁹ and more recently

12. These "Additions and Amendments", published in 1823, are more commonly known as the "Project of the Civil Code of 1825". They were republished in (1937) 1 *Louisiana Legal Archives*.

13. La. Acts 1824, p. 172.

14. La. *Civil Code of 1825*, art. 3521: "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 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."

15. La. Acts 1828, No. 83, sec. 25: "... and that all the civil laws which were in force before the promulgation of the civil code lately promulgated, be and are hereby abrogated"

16. La. Acts 1870, No. 97.

17. Substantial portions of the *Civil Code* already have been revised, most pursuant to Louisiana State Law Institute recommendations. Book II, on Things, was revised completely by the cumulative effect of La. Acts 1976, No. 103 (Personal Servitudes); La. Acts 1977, No. 415 (Predial Servitudes); La. Acts 1977, No. 170 (Building Restrictions); La. Acts 1977, No. 169 (Boundaries); La. Acts 1978, No. 728 (Things); and La. Acts 1979, No. 180 (Ownership). In addition, La. Acts 1979, No. 709, revised that portion of Book III of the *Civil Code* dealing with the Marriage Contract and renamed it Matrimonial Regimes. This particular revision was prepared by the Louisiana State Law Institute pursuant to principles dictated by the Louisiana Legislature, after the latter refused to enact the revision recommended by the Louisiana State Law Institute.

18. There is much opinion that, to the contrary, the *Digest* of 1808 replaced Louisiana's Spanish law with French law except in certain particulars, and that accordingly the *Civil Codes of 1825* and *1870* also are predominantly French in character. This matter is discussed further in that portion of the text to which footnotes 56-58 are appended.

19. Perhaps the principal changes in the *Civil Code of 1825* from Spanish to French thought were the adoption of the principle of *le mort saisit le vif* in succession matters, an increase in the amount of the disposable portion, and the extension of the effects of putative marriage to instances in which one spouse only was in good faith. Four years

Anglo-American, that Louisiana can be said to have a "mixed" or a "bi-legal" system.

FORMAL SOURCES OF LOUISIANA CIVIL LAW

According to the *Louisiana Civil Code*, the formal sources of positive law are two: legislation and custom.²⁰ If there is neither legislation nor custom applicable to a situation, the judge is to decide according to "equity", defined in the *Civil Code* itself as a recourse to the natural law (French text: *loi naturelle*), reason (*raison*), i.e., *droit naturel*, or usages received in the silence of legislation and custom.²¹ Louisiana's juridical order (*droit, derecho, jus*), therefore, is not limited to positive elements. It includes a legislated recognition of philosophical sources, though not of theological sources as in the Spanish era.²²

The recognized customs are few.²³ Judicial precedents do not have juridically authorized force,²⁴ but in practice they usually are followed unless demonstrated to be in error or inappropriate.

later La. Acts 1828, No. 36, abolished the curatorship of *puberes* and extended tutorship to the age of majority. In the same period, however, the *Civil Code of 1825* itself introduced "joint obligations" resembling the Spanish and La. Acts 1829, No. 17, and reintroduced the Roman-Spanish institution of *venia aetatis*, thus manifesting there was no tendency simply to imitate French law. Indeed, the *Civil Code of 1825* itself had introduced rules of offer and acceptance inspired by the Prussian *Landrecht* and changed the rules on the vicarious responsibility of parents, tutors, teachers, and employers to conform more closely to Germanic notions. On these last two points see the present articles 1797-1810 and 2317-2320.

20. *La. Civil Code* (1870), Preliminary Title, Chapter 1, now entitled simply "Of Law", but entitled "Of Law and Customs" in both the French and the English texts of the *Digest of 1808* and in the French text of the *Civil Code of 1825*, contains two articles defining "law" and describing how customs arise. In this context the reference to "law" undoubtedly is to legislation, and not to all rules of the legal order.

21. *La. Civil Code*, art. 21: "In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law (Fr.: *loi naturelle*) and reason (Fr.: *raison*), or received usages, where positive law is silent (*ou aux usages reçus, dans le silence de la loi primitive*). The construction given to this article in the main text was argued in another article by the author, "The Sources of Civil Order According to the Louisiana Civil Code," (1980) 54 *Tulane Law Review* 916.

22. *Las Siete Partidas* (1348), Part. 1, Title 1, Law 6. declares that the laws in that book are based on two repositories of wisdom, the words of the saints relative to the spiritual good and those of wise men relative to worldly acts.

23. Perhaps there is only one judicially recognized custom, that of permitting the married woman and the divorced woman to use the surname of her husband or exhusband. See *Welcker v. Welcker*, 342 So. 2d 251, writ denied 343 So. 2d 1077 (1977). Other customs do exist, but these, founded on the popular acceptance of judicial constructions or interpretations of legislation, usually are thought of simply as prevailing judicial constructions. See footnote 42, below, and the text to which it is appended.

24. No legislation sanctions precedents. On the contrary, the limitation of the formal

The civil law has its principal expression in the *Civil Code*, but there is much legislation of civil law character in the compilation known as the Revised Statutes.²⁵ The bulk of this legislation is compatible with the *Civil Code*, but there is some, of Anglo-American orientation, that is not. The major example is the *Trust Code* of 1964,²⁶ the texts of which reflect the traditional Anglo-American division between "common law" and "equity",²⁷ and import powers of disposition²⁸ and restraints on alienation²⁹ not recognized in basic Louisiana civil law.

The legislation on commercial law "specialties", also in the Revised Statutes, is of Anglo-American type. Included are seven of the nine "articles" (titles) of the *Uniform Commercial Code*³⁰ that has been adopted in near entirety in every other state of the Union. In principle, the civil law must be considered to apply to commercial law matters for which there is no legislated base. This is so because, as mentioned above,³¹ there is no unwritten Anglo-American common law in force in Louisiana, only those aspects of it adopted in the form of particular legislation.

THE ORGANIZATIONAL PRINCIPLES OF LOUISIANA PRIVATE LAW

The states of the Union are not divisions of the nation with delegated competences. On the contrary, each state enjoys a sovereign jurisdiction over all matters except those for which a special competence

sources of law to legislation and custom necessarily excludes precedent as a formal source. See footnote 20, above. That this was the intent of the redactors of the additions and amendments to the *Digest* of 1808 is clear from their report to the Louisiana legislature dated February 13, 1823, and reprinted in 1 *Louisiana Legal Archives* LXXXVI-XCV, particularly that passage at pp. XCI-XCIII.

25. La. Revised Statutes (1950) as amended. Unfortunately the only current edition is that of the West Publishing Company, a portion of West's Louisiana Statutes Annotated, containing so many annotations and other items as to require at least forty-two main volumes, seven more bound volumes of tables, indices, and supplements, plus pocket parts.

26. La. Acts 1964, No. 338, as amended, La. Revised Statutes 9:1721 *et seq.* (1964).

27. La. Revised Statutes 9:1731 (1964) defines a trust as "the relationship resulting from the transfer of title to property to a person to be administered by him as a fiduciary for the benefit of another."

28. The reference is to various substitutions, otherwise forbidden, but permitted in trusts: in class dispositions, La. Revised Statutes 9:1891-1895 (1964 as amended); between interest beneficiary and principal beneficiary, *idem.*, 9:1965; and in the event a principal beneficiary dies intestate and without descendants, *idem.*, 9:1972-1978.

29. The spendthrift trust provisions are La. Revised Statutes 9:2001-2007 (1964).

30. La. Revised Statutes 10:1-101 through 8-501 (1974). This legislation consists essentially of Articles (titles) 1, 3-8 of the *Uniform Commercial Code* (1952; revised generally 1972; Articles 9 and 8 revised in 1972 and 1977). Louisiana has not adopted Article 2 (Sales) or Article 9 (Secured Transactions).

31. See text supported by footnotes 7 and 8, above.

is given to the federal government by the *United States Constitution*.³² The importance of this for the private law is that, in principle, every state determines for itself what will be its private law. Instances of particular federal private law legislation applicable in all the states, because of grants of legislative jurisdiction to the federal government under Article 1, Section 8 of the *United States Constitution*, often construed broadly, are the laws on bankruptcy, maritime matters, and various particular subjects to the extent they are connected with interstate or foreign commerce, notably labor, communications, and securities regulation. In principle, civil law exclusively in the jurisdiction of the states will not be affected by federal legislation, but sometimes it will be superseded indirectly. An example of the latter is the displacement of the Louisiana civil law by the federal laws and regulations defining the patrimonial interests of holders of some federal pensions.³³ In general, these displacements have been rare.

Each state has its own judiciary and the construction and interpretation of state law is the province of the state courts. State court decisions are reviewable by the United States Supreme Court in instances in which one of the litigants claims that the judgment, or the law on which it is based, is in violation of the Constitution, laws, or treaties of the United States.³⁴ It is true also that federal courts do construe and interpret state laws involved in proceedings otherwise properly before them, but in these instances they usually adhere to the constructions and interpretations that have been, or should be, made by the courts of the state.³⁵ In general, therefore, the Louisiana courts determine the construction and interpretation of state laws.

Louisiana State courts are organized much in the manner of Anglo-American courts. The judges are elected, and one of the qualifications for election is service at the bar for a number of years.³⁶ Perhaps because they are elected, the judges tend to be regarded popularly somewhat as representatives of the people, and not simply as interpreters and appliers of the law.

32. *U.S. Constitution*, Article X: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.

33. See, for example, *Dedon v. Dedon*, 404 So. 2d 904 (1981) declaring that United States military retirement benefits form no part of the community of gains between spouses, even though they would under Louisiana legislation.

34. The *U.S. Constitution* declares that the U.S. Constitution, laws, and treaties are "the supreme law of the land" and that "the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding".

35. Federal courts sometimes request construction of a state statute by the highest court of the state before proceeding to apply it. See *Aguillard v. Treen*, 440 So. 2d 704 (1983). For a recent example of the U.S. Supreme Court's implicit affirmation of the federal courts obligation to apply state law as construed by the state courts, see *Migra v. Warren City School Dist. Bd. of Education*, 104 S.Ct. 892 (1984), at 899.

36. *La. Constitution* (1974) Art. 5, secs. 22, 24.

Anglo-American common law pleading was never in use in Louisiana. In the year following the establishment of the Territory of Orleans, the territorial Legislature promulgated a very simple civil procedure in which the judge was obliged to apply the law to the alleged and proven facts.³⁷ It was not necessary for the litigant to formulate the legal issues. This was "fact pleading" rather than the "issue pleading" under the forms of action at common law in use in the other states at the time. The *Codes of civil procedure* of 1825, 1870, and 1960 were organized on the same principle.

THE HIERARCHY OF LOUISIANA PRIVATE LAW SOURCES

All state legal norms are without effect if they are contrary to the provisions of the *United States Constitution*, the legislation of Congress enacted in conformity with its competence, or treaties of the United States.³⁸ The state legal norms, in turn, must conform to the State Constitution. As between legislation and custom, there is no difficulty with customs *praeter legem* and *secundum legem* because of their very nature, and it is arguable, especially on the basis of Louisiana's Spanish legal heritage, that customs *contra legem* have the force of law.³⁹ There are, however, many pronouncements to the contrary in Louisiana jurisprudence.⁴⁰

The *Civil Code* does not enjoy a special legal position among legislative acts, but it may be said to represent the *jus commune* of the state. In civil law and commercial law situations in which there is no other legislation to be applied or extended, the *Civil Code* applies. Though precedents have no legal authority, the acceptance of the rule of a decision by the people should be recognized as creative of a custom.⁴¹ The Louisiana

37. La. Acts 1804-05, p. 210, commonly known as the *Louisiana Practice Act of 1805*.

38. *U.S. Const.* Art. VI.

39. The writer has argued the affirmation in *op. cit.* footnote 21, at 925, 926.

40. The early decisions are numerous. See, however, *Mathe v. New Orleans Sugar Shed. Co.*, 32 La. Ann. 531 (1880), in which it was said that custom might not be contrary to a "prohibitory" (*i.e.*, dispositive) law, and perhaps to the same effect, *Broussard v. Bernard*, 7 La. 211 (1834), stating that a custom creating an exception to "ordinary rules" might be tolerated, but not one contrary to "the general law of the land". See also Kilbourne, *Louisiana Commercial Law — The Antebellum Period* (1980), at 152-156, discussing the views of Judge Charles Watts of the Commercial Court in the Parish of Orleans (Louisiana), which latter existed from 1839 to 1846.

41. See William Thomas Tête, "The Code, Custom and the Courts", (1973) 48 *Tulane Law Rev.* 1, at 22.

Supreme Court, nevertheless, has been known to reverse a decision whose rule, in the writer's opinion, had been accepted as custom.⁴²

Even though precedents have no obligatory force, the Courts of Appeal and the Supreme Court demand that inferior courts follow their decisions.⁴³ The Supreme Court is not obliged to follow even its own settled jurisprudence and reversals of decisions do occur.

Precedents, nevertheless, generally are adhered to in practice. There is no doubt that ordinarily both advocates and judges prefer to be guided by judicial rather than doctrinal opinions. Often practitioners search for solutions first in the decisions and take the research no further if the results satisfy their purposes.

CONSTRUCTION AND INTERPRETATION OF LOUISIANA PRIVATE LAW

Inasmuch as the Anglo-American common law is not in force in Louisiana, it is impossible to treat our legislation, whether civil or commercial, as in derogation of it. The common law as such does not exist in Louisiana. Nor is there a Romanist *jus commune* with force of law against which the *Civil Code* or other legislation must be construed. All the Romanist laws in force in Louisiana's Spanish days and in force in 1825 were repealed in 1828.⁴⁴ Accordingly, the practice of citing the Romanist laws decreased dramatically after 1828. But it did not cease completely.⁴⁵ In 1839, Justice François Xavier Martin, one of the first three justices of the Louisiana Supreme Court, remarked that it was the habit of Louisiana attorneys and judges to make these consultations. In the same opinion Justice Martin decided that the Legislature did not even

42. In *Johnson v. Butterworth*, 180 La. 856, 157 So. 121 (1934), the Louisiana Supreme Court construed art. 2318 of the *La. Civil Code* to mean that parents were not liable civilly for the damages occasioned by their minor child who, because of age, was incapable of fault or negligence. Forty-one years later, however, in *Turner v. Bucher*, 308 So. 2d 270 (La. 1975), after everyone had come to recognize and act upon the rule of *Johnson v. Butterworth* as a rule of law, the Supreme Court reversed the decision to construe art. 2318 to render parents liable irrespective of their minor child's capacity to be guilty of fault or negligence. The issue of custom does not appear to have been considered.

43. Perhaps the strongest statements are in *Johnson v. St. Paul Mercury Ins. Co.*, 256 La. 289, 236 So. 2d 216 (1970), on a conflict of laws point not regarded as covered by legislation, and in *Pringle Associated Mort. Corp. v. Eanes*, 254 La. 705, 226 So. 2d 502 (1969), on the construction of a *Civil Code* article on mortgages.

44. See footnote 15, above, and the text it supports.

45. The practice is described in detail in the manuscript of a book by Richard Kilbourne, on the history of the *Louisiana Civil Code* in its formative era, 1808-1839, now being edited for publication by the Center of Civil Law Studies, Louisiana State University.

have the competence to repeal the former "civil laws" in their entirety, but only to repeal those positing new rules, and not those merely repeating principles and rules already discovered by courts of justice in cases not founded on purely positive legislation.⁴⁶ He was affirming, in other words, that whereas legislation is only posited or man made, and therefore alterable by man, the juridical order (*droit, derecho, jus*) discovered by the judiciary is ontological, and therefore unalterable in principle. The practice of consulting the former Romanist laws continues, but the instances are less frequent now that judicial precedents are so numerous.⁴⁷

Shortly after Justice Martin's era, however, the bench and bar began to consult commentaries on the French *Code Civil* to obtain enlightenment about the meaning and application of our own. To understand how and why this practice developed, one must remember that familiarity with the Spanish language was decreasing, the Spanish law had not yet been codified in a modern way, that taking place in 1888, and accordingly Spanish works comparable to the French commentaries had not yet become available. At the same time many in the population still knew French well, the French commentaries were marvels of simplicity and clarity, the texts of the *Louisiana Civil Code* often were identical or similar to those of the French *Code Civil*, and happily, the diffuse and different common law legal materials had not become readily available through efficient indices and encyclopedias. The practice waned in the first part of the twentieth century, to be revived during the period of renewed interest in Romanist

46. *Reynolds v. Swain*, 13 La. 193 (1839), at 198: "The repeal spoken of in the code, and the act of 1828, cannot extend beyond the laws which the legislature itself had enacted; for it is this alone which it may repeal; *eodem modo quiquid constitutur, eodem modo dissolvitur*. The civil or municipal law . . . is necessarily confined to positive or written law. 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. We, therefore, conclude, that the Spanish, Roman, and French civil laws, which the legislature repealed, are the positive, written, or statute laws of those nations, and of this state; and only such as were introductory of a new rule, and not those which were merely declaratory — that the legislature did not intend to abrogate those principles of law which had been established or settled by the decisions of courts of justice."

47. Perhaps the most remarkable case in this respect in recent times is *Creech v. Capitol Mack, Inc.*, 287 So. 2d 497 (La. 1974), in which Justice Barham discussed thoroughly ancient Spanish laws to arrive at an eminently correct judgment concerning the nature of the Louisiana community of gains then in force. See also the more recent concurring opinion of Judge Lottinger in *Danos v. St. Pierre*, 383 So. 2d 1019 (La. App. 1st Cir., 1980), at first reversed by the Louisiana Supreme Court, but affirmed on rehearing, 402 So. 2d 633 (1981), allowing recovery for the wrongful death of an unborn child. A much older case is *Moulin v. Monteleone*, 165 La. 169, 115 So. 447 (1928), examining ancient Spanish laws to decide that damages would not be granted for alienation of a spouse's affections.

law that attained momentum in the 1930s and after World War II, of which more will be said later in this paper. Much of this use of French doctrinal material was helpful, but sometimes it proved disastrous, the bench and bar ignoring the subtle, and sometimes the obvious, differences between the *Louisiana Civil Code* and the French *Code Civil*.⁴⁸ The proper use of French doctrinal materials as aids to understanding our civil law even now is not well understood.

The legislation of Anglo-American type pertaining to civil or commercial matters often is construed in the context of the common law, even though the latter is not a formal source of law, in order to give it the same sense it would have in the Anglo-American states. If, however, it must be said that the legislated common law rule does not fit the facts at hand, it is the *Civil Code* as general law or *jus commune* that applies. This practice has been confirmed legislatively for commercial matters not provided for by that portion of the *Uniform Commercial Code* enacted into law in Louisiana.⁴⁹

There are, nevertheless, areas in which the common law has served as a source of ideas for the more particular specification of *Civil Code* articles that are so general in content as to be statements of principle rather than of rule. The major example is that of the *Civil Code* articles on obligations *ex delicto* and *quasi ex delicto*. Fault and negligence are not defined in the *Civil Code*. Our judges, and our advocates as well, perhaps because they were without a sufficient Louisiana doctrinal literature to guide them, turned to the common law.⁵⁰ After all, if fault and

48. Thus it was that in *Feazel v. Feazel*, 222 La. 113, 62 So. 2d 119 (1952), the court refused to allow disavowal of paternity by proof of non-cohabitation during a period of voluntary separation, even though art. 188 of the *Louisiana Civil Code* permitted it, citing, among other reasons, French doctrinal writing that did not mention the ground, the judges not noticing that French doctrine was as it was because the French *Code Civil* did not contain a similar provision. Similarly, in *Wilkinson v. Wilkinson*, 323 So. 2d 120 (La. 1975), the court relied on French doctrine even though Louisiana's pertinent legislation on the marriage contract and on paternal authority quite clearly was of Spanish character.

49. La. Revised Statutes 10:1-103 (1975). Article 1-103 of the *Uniform Commercial Code* understandably refers instead to the common law, equity, and the Law Merchant for solutions not derivable from the UCC itself.

50. In 1937 Professor Gordon Ireland, then of the Louisiana State University law faculty, declared Louisiana no longer was a civil law jurisdiction. G. Ireland, "Louisiana's Legal System Reappraised", (1937) 11 *Tulane Law Review* 585.

In a rebuttal by Professors Daggett, Dainow, Hebert, and McMahon, "A Reappraisal Appraised", (1937) 12 *Tulane Law Review* 12, it was admitted that the area of delict was the "firmest ground on which Professor Ireland stands". Yet the Louisiana use of Anglo-American experience in determining fault or negligence is not different from French doctrinal use of Anglo-American experience for the same purpose, and that scarcely renders French doctrine Anglo-American. See, for example, H. Mazeaud and A. Tunc, *Responsabilité Civile*, 6^e éd. 1965, Vol I, Nos. 439, 444.

negligence are matters of fact rather than of law and as such should be judged according to popular notions, then perhaps it was reasonable for our advocates and judges to put themselves in accord with their Anglo-American brethren. We are Americans as well as Louisianians.

But it is to be admitted that Louisiana advocates and judges have used common law notions in the construction and interpretation of the *Civil Code* even in instances in which the texts were clear and demanded other solutions, sometimes with extensive effects. For example, even though article 2985 defines *mandate* as a contract in which one person gives another authority to act juridically *in his name*, the Louisiana Supreme Court attributes the direct effects of mandate to an act in the mandatary's own name. The reason indicated by the Court is simply that the narrower construction would make it impossible to give all the effects of mandate to an act by the mandatary in his own name!⁵¹ Here without doubt is a construction designed to bring Louisiana practice into conformity with undisclosed agency in the common law in spite of the different rule provided by Louisiana legislation. Another example: Even though article 2320 holds the employer liable for the delict of his employee only in the case in which the employer had the possibility of preventing the employee from causing the injury or damage, a rule consistent with the Romanist-Germanic tradition, the Supreme Court decided that the text of the article probably was the result of a copying error in the course of the drafting of the *Civil Code* and therefore should be construed in the contrary sense.⁵² It was another instance of a construction designed to bring our law into conformity with the Anglo-American in a matter in which uniformity of rule throughout the nation is important. Articles 2985 and 2320 remain today as they were at the time of those decisions and no one even attempts to have them amended to conform with the jurisprudence.

It must be noted, too, that our judges at times have used Anglo-American common law and equity concepts in instances in which they could have found solutions more in conformity with our law. Thus at one time they used collateral estoppel⁵³ to go beyond the rules on *res judicata*, and often they had recourse to *quantum meruit* when enrichment without

51. *Sentell v. Richardson*, 211 La. 288, 29 So. 2d 852 (1947).

52. *Ware v. Barataria & Lafourche Canal Co.*, 15 La. 169, 35 Am. Dec. 189 (1840), noted the "unfortunate and unadvised departure from the Napoleon Code", but enforced the rule as written. Later, however, in *Hart v. New Orleans & Carrollton R. Co.*, 1 Rob. 178, 36 Am. Dec. 689 (1841), the Louisiana Supreme Court refused to apply the rule and instead held the employer liable though its agents could not have prevented the injury. This judicially substituted rule has been applied ever since.

53. The practice of using collateral estoppel in addition to *res judicata* was rejected finally in *Welch v. Crown Zellerbach Corporation*, 359 So. 2d 154 (La. 1978). See Frank L. Maraist, "Civil Procedure", in (Symposium) "The Work of the Louisiana Appellate Courts for the 1977-78 Term", (1979) 39 *Louisiana Law Review* 657, at 914.

cause would have been more consistent with our law.⁵⁴ The use of consideration instead of cause in contract analysis is yet another example.⁵⁵

It should be evident, therefore, that Louisianians have never developed the method of legislative positivism, which identifies legislation as the unique source of the positive law (except for custom) and, accordingly, limits the rules and principles of the positive law to those explicitly or implicitly in the legislation (or custom).

ANALYSIS OF LOUISIANA PRIVATE LAW

The fact that Louisiana has a civil code and that its form was inspired by (and often its very words taken from) the French *Code Civil* or the *Projet de l'An VIII* accounts in large measure for the impression of many persons, law professionals as well as non-professionals, in Louisiana and elsewhere, that our civil law is French in rule⁵⁶ and in philosophy⁵⁷. Neither of these notions, however, is in accord with the historically probable facts. Far from intending to replace Spanish law with French civil law, the redactors used the French *Code Civil* and *Projet de l'An VIII* only as models for the plan of the *Digest* and as collections of already-written texts that reflected, or could be modified to reflect, the substance of the Spanish civil law.⁵⁸ The reasons are not difficult to find.

The Spanish- and French-speaking Louisianians of 1803 to 1828, that formative period of modern Louisiana private law, sought to preserve the Romanist law that conformed so well with both their cultures. The French majority and the Spanish minority both appear to have been satisfied with the Spanish law. Many of the French creoles, especially those

54. See Note, (1957) 18 *Louisiana Law Review* 209, at 211. Today the tendency is to recognize unjust enrichment as a non-legislated rule of law. See Albert Tate, jr., "The Louisiana Action for Unjustified Enrichment: A Study in Judicial Process", (1977) 51 *Tulane Law Review* 446.

55. A thorough analysis of the use of cause and consideration in Louisiana decisions is contained in Saul Litvinoff, *Obligations* (1969), Book 1, Secs. 294-303 (Louisiana Civil Law Treatise, Vol. 6).

56. See, particularly, Rodolfo Batiza, "The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance", (1971) 46 *Tulane Law Review* 4, where it is contended that the great bulk of the articles of the *Digest* of 1808 are copies or modifications of French legal texts and that therefore the *Digest* represents a repudiation of Spanish civil law and an adoption of French civil law. Professor Batiza has reached similar conclusions about the additions and amendments made to the *Digest* of 1808 in 1824. See Rodolfo Batiza, "The Actual Sources of the Louisiana Projet of 1823: A General Analytical Survey", (1972) 47 *Tulane Law Review* 1.

57. See Shael Herman, "Legislative Management of History: Notes on the Philosophical Foundations of the Civil Code", (1979) 53 *Tulane Law Review* 380.

58. The writer's appreciation of the facts appears in his "Sources of the Digest of 1808: A Reply to Professor Batiza", (1972) 46 *Tulane Law Review* 603.

in the New Orleans area, derived from southern France, whose law before codification was closer to the law of Spain than it was to the largely customary law of northern France codified in the *Code Civil* of 1804. As a political reality, moreover, there could have been no question of adopting French law after the American domination. French law was foreign law. It would have been understandable only to retain the Spanish civil law or to adopt Anglo-American law.

The Spanish law in force, according to its description by the Legislature of the Territory of Orleans in 1806,⁵⁹ consisted of, first, the compilations of Justinian illuminated by the commentaries on them, but only insofar as they had not been derogated from by the Spanish law; and, secondly, of the Spanish legislation of 1255 to 1803 illuminated by the commentaries thereon recognized in the courts. Certainly this was not a codified law in the French sense of 1804. Actually it was a law, or legal system, much closer in thought and method to the Anglo-American law of the time. The Romanist-Spanish law certainly contained much more legislation than the Anglo-American, but the opinions of the commentators on the Roman and Spanish legislation occupied a position similar to those of the judges in Anglo-American law. For the Spanish, moreover, the juridical order (*droit, derecho, jus*) was ontological, and the legislation only man-made attempts to discover, specify, and implement it, as was suggested by Justice Martin in 1839. Legislators, judges, and commentators all cooperated, each according to his function, in the effort to discover what could be considered good juridical order (*droit, derecho, jus*) and to specify it as positive legal order. The legislation was only one species of judgment, even if the principal one, on the question of the order proper for a people predominantly of Spanish and French culture, living under essentially Spanish conditions, and sharing the same philosophy and Catholic religion.

It should not be astonishing that the *Digest* of 1808 and the *Civil Code* of 1825 incorporated preliminary titles on law (*droit*) that viewed the positive legal order as based on "natural law and reason"⁶⁰ and the Louisiana jurists availed themselves of a non-positivistic methodology in conformity with the Romanist and Anglo-American juridical traditions represented in the state. Neither one nor the other yet had become philosophically positivistic, and even legislative positivism would have

59. The description is given in an act of the Orleans Territorial Legislature, vetoed by Governor W. C. Claiborne, apparently because he considered it to state no more than what everyone knew. The original is in the National Archives, U.S. State Dept., Orleans Territorial Papers, Vol. VIII, and it is reprinted in 9 Carter, Territorial Papers of the United States (1940) at 642.

60. The writer's exegesis of the preliminary title of the *Louisiana Civil Code* appears in his "The Sources of Civil Order According to the Louisiana Civil Code", (1980) 54 *Tulane Law Review* 916.

seemed very foreign to most creoles and Americans in Louisiana. Whatever the reason may have been, however, the non-acceptance of legislative positivism in the formative years of our system permitted our legal professionals to remain in closer contact with the primary experiences of ontological order for almost a century after the repeal of the background Romanist laws.

One may ask, nevertheless, why the *Louisiana Civil Code*, so well organized, did not inspire the development of a method for construing and interpreting it that would be closer to that of the French *Code Civil*, though without adopting its legislative positivism. Two reasons, though not by any means the only ones, have been the inadequacy of our legal education for this purpose and the absence of sufficient local doctrine. It was only in 1847 that the first university law school was founded in the state.⁶¹ The other three were begun in 1906, 1912, and 1947. Before World War II many aspirants to the profession attended Anglo-American law schools and a number simply "read law" under the tutelage of attorneys.⁶²

Beginning in the twenties there arose a new interest in Romanist law and codification. Precisely at this moment, however, the Louisiana law schools sought accreditation from the American Bar Association and the Association of American Law Schools⁶³ and, in order to obtain that accreditation, began to teach even codified law subjects according to the case method, a method that, in fact, though not theoretically, poses an obstacle to the appreciation of a civil code. Through it the students — the advocates, judges, legislators, and professors of the future — are given the habit of organizing their knowledge of the law around factual situations rather than legal concepts. The *Civil Code*, then, seldom comes to be appreciated in its totality, for its general plan, its principles, and its rules as specifications of its principles.

It should not be astonishing that professors given this kind of formation have not developed serious doctrine. We do have articles in the reviews, but it was not until 1966 and 1969 that there appeared the first volumes of two works on Louisiana civil law truly deserving of being called treatises: and these were written by professors brought to Louisiana

61. The Law School of Tulane University was begun in 1847, and those of Louisiana State University, Loyola University, and Southern University in 1906, 1912, and 1947.

62. 1965 was the first year in which a degree from an approved law school was required as a condition for admission to the bar.

63. The Tulane University Law School was admitted to the Association of American Law Schools in 1909 and approved by the American Bar Association in 1925; Louisiana State University Law School, in 1924 and 1926; Loyola University (New Orleans) Law School, in 1931 and 1934. The Southern University Law School, founded in 1947, was approved by the American Bar Association in 1953.

from other Romanist jurisdictions.⁶⁴ Most lengthy works on Louisiana civil law might be classed better as lawyer's manuals.

One subject that in recent years has attracted the attention of our professors, attorneys, and judges is the role of the judge in the construction and interpretation of law, particularly codified law.⁶⁵ This was the preoccupation of the late Professor Joseph Dainow, a native of Montreal, in the last fifteen years of his life. More recently, in 1981, another of our professors coming from another Romanist jurisdiction published an extensive work on the judicial construction of legislation in Anglo-American and Romanists systems that has attracted widespread attention. It is, however, a work more in the American realist tradition than in that of civilian methodology. In any event, the fact that Louisiana legal professionals are particularly interested in this subject may indicate the importance of the judge in our system. It would be difficult, however, to affirm that this interest in construction and interpretation of legislation is indicative of a widespread tendency among Louisiana legal professionals, especially those outside the academic world, toward a more profound respect for legislation as the basic evidence of our private law.⁶⁶

From 1803 until about 1925, or perhaps 1930, Louisiana professionals respected the legislation as the primary specification of the positive legal order, but also were ready to construe and interpret it in the context of notions of objective justice in general acceptance in the Romanist and Anglo-American legal worlds. As late as 1947 a Louisiana Supreme Court justice declared to the author seriously that he bore the title "justice" because it was his obligation to do justice, and that he would do justice even if it were necessary for him to "twist" the law. Some later justices have shared this view and occasionally the Supreme Court itself has rendered opinions that, notwithstanding the justices' subjectively good intentions toward one litigant, worked grave injustice on the other.⁶⁷ There may be

64. Athanassios N. Yiannopoulos, *Civil Law Property* (Vol. 1, Things; Real Rights; Real Actions) appeared in 1966; S. Litvinoff, *Obligations* (Vol. 1, General Theory; Classification of Contracts; Formation of Contracts) appeared in 1969.

65. To be cited particularly is J. Dainow, ed., *The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions*, 1974, containing contributions of, among others, Louisiana justices Tate and Barham, Professor Yiannopoulos of Louisiana State University, and a number of foreign jurists, notably Jean-Louis Baudouin of Québec, Carbonnier and David of France, Lorenz of Germany, Walker of Scotland, Kahn of South Africa, and Tedeschi, Zemach, and Yudin of Israel.

66. Among the judges of recent years, Justices Albert Tate and Mack E. Barham of the Louisiana Supreme Court, both of whom now have left the court, were especially capable. Also to be mentioned are Justices James L. Dennis and Harry T. Lemmon of the same court, yet sitting. Among the attorneys, no one was more dedicated to the civil law and codification than John H. Tucker, jr., of the Shreveport bar, who has published widely on Louisiana civil law and who headed the Louisiana State Law Institute for many years.

67. Judicial reluctance to label a child illegitimate, for example, long has resulted in decisions applying the presumption of the husband's paternity even in instances in which

here an explanation as to why Louisiana judges have been able to adopt Anglo-American concepts in the place of, or in supplement to, those of the Romanist law. It is possible to venture the opinion that Louisiana professionals viewed the juridical order as ontological, the legislation merely as necessarily incomplete measures for its positive specification.

Today, however, popular thought — not simply that in law — tends to ignore the possibility of knowledge of the ontological order, itself the only basis of community among men, which in turn is the sole basis of moral obligation. The result is an egocentrism that cannot acknowledge an ontological community and that logically, if not rationally, must limit itself to an association of individuals for ultimately individualistic ends. Accordingly society, law, convention, and conventional morals reduce themselves to that. In this milieu there is no juridical right order (*droit, derecho, jus*), only positive legal norms without moral obligation. Accordingly individuals are deemed to have license to make what use of legal norms they wish and, in addition, to have the legal “right” or “liberty” to do anything not deemed part of the positive legal order by legislation or by a common law reduced to a historical consensus.⁶⁸ Under these conditions one may not speak of a method of construction and interpretation in service of the law. There can be only methods for utilizing the laws pragmatically for ends that are considered to be without ontological basis and therefore ethically uncriticizable.

American law schools, those of Louisiana included, have not escaped this moral degradation. Under the realist movement of the twenties and later, the law schools, even in Louisiana, began to think of law as only one of the many stimuli influencing those human actions classified as legal.⁶⁹ The law therefore ceased to be the science of order for the common good and was reduced to one of the means of utilizing public

the child enjoyed neither registry nor reputation as his legitimate child, as required by the *Civil Code*. The most extreme decision was that in *Babineaux v. Pernie-Bailey Drilling Co.*, 261 La. 1080, 262 So. 2d 328 (1972), in which the Louisiana Supreme Court was willing to consider the child both a legitimate child of the husband of the mother and also the illegitimately conceived child of the mother's paramour with whom she contracted a bigamous marriage before the child's birth. The injustice to the mother's husband in such an instance is inexcusable.

68. The United States Supreme Court seems to have expressed this view in *Roe v. Wade*, 410 U.S. 113 (1973), the famous abortion decision. The reasoning appears to the author to have been as follows: (1) The justices will not act as philosophers or theologians; (2) There is no historical consensus (common law?) in the United States or England that abortion should be forbidden in the interest of the child; (3) American legislation restricting abortions, until that attacked in the suit, was enacted solely in the interest of protecting the mother's health and life; (4) therefore a woman has a right (described as one of “privacy”, part of a sphere of activity not yet restricted by consensus to the contrary) to abort her child.

69. Perhaps the most explicit work was that of one-time professor and then judge Jerome Frank, *Law and the Modern Mind* (1930). The influence of John Dewey's concept of man, as evidenced in his *Human Nature and Conduct* (1930), also was considerable.

force to attain particular ends.⁷⁰ Instruction in law became more and more without plan as to the substance of the law. Students were allowed to elect the courses they wished because the substance of the legal order no longer was important, only the pragmatic artifice of legislator, advocate, or judge.⁷¹ Law schools have not yet liberated themselves from this pernicious thought,⁷² one that has come to infect today's scholarship not only in law, but also in history, political science, and literature under the label of instrumentalism.

The future is difficult to predict. Respect for law as the science and art of order for the common good in society is not likely to be regained without an intellectual and spiritual revival that will bring about an acknowledgment of the ontological community of mankind and its implications. Unless and until that occurs, law schools will not be better than they are, law will be used rather than applied, and methodology for the purpose of giving the law effect will not be taken seriously.

70. Of considerable influence, particularly through graduate students in law who then became faculty members, and sometimes judges, was that of the Yale Law School, notably through the efforts of Professor Myers McDougal. See especially M. McDougal, "The Law School of the Future: From Legal Realism to Policy Science in the World Community", (1946) 56 *Yale Law Review* 1345, wherein he advocated the utilization of authoritative legal materials in order to achieve objectives of a "policy science", thus subverting law as the plan of order for society and elevating "policy science" in its place. Many influential Louisiana law professors and some judges have been exposed to Yale graduate studies.

71. A reading of that section of the Introduction to the Association of American Law Schools' 69/70 *Pre-Law Handbook* describing law studies (pp. 18-25), for example, concerns itself almost entirely with lawyers' skills, saying little if anything about the nature of law, its purpose, or its principles, except to note that each student should answer questions about these matters for himself.

72. Long after this sentence was written, there appeared in the *Wall Street Journal* of March 5, 1984, an article by Scott M. Freeman, the executive director of the Pennsylvania Law Review, complaining that even a student editor of that review believes that action in violation of law is justified for ends deemed worthwhile by the actor, and concluding that "the rule of law may be threatened in this country".

The author recently had a similar personal experience. A colleague from another faculty, on being asked why he used what he certainly knew to be a misconstruction of an article of the *Louisiana Civil Code* as a premise for an argument, replied that one should not be concerned with the truth of his premises, but only with the merit of that for which he was making the argument.