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Defining mixed jurisdictions: the case of Louisiana

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ABSTRACT: Louisiana is the only U.S. state to embody a mixed jurisdiction. Louisianians have tenaciously defended their French-inspired codes against Anglo-American influences and, as a consequence, Louisiana remains a unique legal system "stranded" in an otherwise homogeneous common-law territory. The article, through the definitions and generalizations given by the most prominent scholars on the subject, aims at demonstrating that Louisiana is a perfect example of mixed jurisdiction. Furthermore, the discussion will cover the gradual abandonment of the French language in Louisiana's constitutions, codes and civil procedure and the peculiar figure of the judge, "suspended" between its common-law and civil-law role.

KEYWORDS: Mixed Jurisdictions – Louisiana - Judge

1. Introduction

Louisiana¹, the eighteenth State to join the Union, has been the object of increasing academic interest throughout the twentieth century. This is mostly due to this State's cultural and social heritage, a mixture of French, Native-American, Spanish and African cultures that is viewed as an exception in the United States. Louisiana is in fact one of the only two States to be *de facto* bilingual, having both English and French as

¹ On Louisiana, see also S. Daggett, J. Dainow, P. Hebert, & H. McMahon, *A Reappraisal Appraised: A Brief for the Civil Law of Louisiana*, 12 Tul. L. Rev. 12, 41 (1937); A. Tate, *Techniques of Judicial Interpretation in Louisiana*, 22 La. L. Rev. 727, 727 (1962); R. L. Tullis, *Louisiana's Legal System Reappraised*, 12 Tul. L. Rev. 113, 119 (1937); H. P. Dart, *The Place of the Civil Law in Louisiana*, 4 Tul. L. Rev. 163 (1930); E. Fabre-Surveyer, *The Civil Law in Quebec and Louisiana*, 1 La. L. Rev. 649 (1939); J. H. Wigmore, *Louisiana: The Story of its Legal System*, 1 S.L.Q. 1 (1916); G. Ireland, *Louisiana's Legal System Reappraised*, 11 Tul. L. Rev. 585, 596 (1937); R. Pound, *The Influence of French Law in America*, 3 Ill. L. Rev. 354, 359 (1908); A. J. Reeves, *The Common Law State of Louisiana*, 2 Tul. Civ. L.F., No. 3, 1, 32 (1974); V.V. Palmer, *The many guises of equity in a mixed jurisdiction: a functional view of equity in Louisiana*, in Tulane Law Review, 1994, 7; G. Dargo, *Jefferson's Louisiana: politics and the clash of legal traditions*, Cambridge, Harvard University Press, 1975; M. Franklin, *Concerning the Historic Importance of Edward Livingston*, 11 Tul. L. Rev. 163, 169-70 (1937); R. Batiza, *Origins of Modern Codification of the Civil Law: The French Experience and Its implications for Louisiana Law*, 56 Tul. L. Rev. 477, 580-81 (1981); R. Batiza, *Sources of the Civil Code of 1808, Facts and Speculation: a Rejoinder*, in Tulane Law Review, (1972); R. Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, in Tulane Law Review, (1971); H. P. Dart, *The Influence of the Ancient Laws of Spain on the Jurisprudence of Louisiana*, in Tulane Law Review, (1931); T. Doi, *An introduction to the history of the Louisiana civil law*, Institute of Comparative Law of Waseda University (1960); R. Hildreth, *History of the United States of America, from the Discovery of the Continent to the End of the Sixteenth Congress*, New York 1860; P. J. Kastor, *The Bicentennial of the Digest of 1808 – Collected Papers: Adapted to Its Present System of Government”: Legal Change, National Reorganization, and the Louisiana Civil Law Digest*, in Tulane European and Civil Law Forum, (2009); K. A. Lambert, *An Abridged History of the Absorption of American Civil Procedure and Evidence in Louisiana*, in Louisiana, Microcosm of a Mixed Jurisdiction, (1999); F. Martin, *The History of Louisiana XXIX*, New Orleans (1829); E. Somerville Brown, *The Constitutional History of the Louisiana Purchase 1803-1812*, Berkeley, (1920).

legally recognized languages. Without forgetting the undoubted importance of the other influences, the two main sociocultural systems that met in this territory were indeed the Anglo-American and the French one. This circumstance created the fertile soil that made Louisiana a mixed jurisdiction.

The purpose of this paper is to recall the different definitions of mixed jurisdiction that were used throughout the years and to analyze why Louisiana is considered a mixed jurisdiction. The work has been divided in four parts. The first part describes the various definitions of mixed jurisdiction used by prominent scholars and focuses on common traits and similar “*topoi*” found in these systems. The second part briefly depicts Louisiana’s legal system. The third part analyzes the gradual abandonment of the French language in the Louisiana’s constitutions, civil codes and civil procedure. Finally, the fourth part examines the Louisianan judge, a peculiar figure influenced by both the civil law and the American common law.

2. Defining mixed jurisdictions

Mixed jurisdictions are peculiar political units where the legal system is a unique merge of two or more legal traditions. Because of this, these systems are viewed as oddities suspended between the two main legal traditions of civil law and common law.

Mixed jurisdictions are found at the four corners of the earth and this circumstance often makes such systems look like isolated islands, “separated by cultural gulfs and vast ocean stretches²”. The eminent Scottish comparatist, Sir Thomas Smith, described these jurisdictions in very broad terms as being “basically a civilian system that had been under pressure from the Anglo-American common law and has in part been overlaid by that rival system of jurisprudence³”. This definition may mislead one into thinking that the entire legal system is essentially civilian when in reality only the private-law sphere is civilian while public institutions are usually under Anglo-American public law⁴. In 1907, F.P. Walton described mixed jurisdictions as legal systems in which the Romano-Germanic tradition has become suffused to some degree by Anglo-American law⁵. More recently, Robin Evans-Jones categorized mixed legal systems as “a legal system which, to an extensive degree, exhibits characteristics of both the civilian and the English common law traditions⁶”. It is evident how this two definitions share the same basic concept of a common law/civil law mixed legal system generating from different legal traditions. According to these definitions then, we can consider common law/civil law mixed jurisdictions a fair number of nations

² V. V. Palmer, *Mixed Jurisdictions worldwide, the third legal family* 3 (Vernon V. Palmer, 1st ed. 2001).

³ T. B. Smith, *The Preservation of the Civilian Tradition in “Mixed Jurisdictions”*, 35 Rev. Jur. U.P.R. 263, 265 (1966) (containing Smith’s definition of a mixed jurisdiction).

⁴ V. V. Palmer, *supra* note 2, at 7.

⁵ F. P. Walton, *The Scope and Interpretation of the Civil Code of Lower Canada* 21-22 (Wilson & Lafleur eds., 1st ed. 1907).

⁶ W. Tetley, *First Worldwide Congress on Mixed Jurisdiction: Salience and Unity in the Mixed Jurisdiction Experience: Traits, Patterns, Culture, Commonalities: Nationalism in a Mixed Jurisdiction and the Importance of Language (South Africa, Israel, and Quebec/Canada)*, 78 Tul. L. Rev. 175, 182 (2003) (containing Jones’ definition of a mixed legal system).

and territories, among which Québec, St. Lucia, Puerto Rico, Zimbabwe, South Africa, Botswana, Lesotho, Swaziland, Namibia, the Philippines, Sri Lanka, Scotland and of course Louisiana⁷. Some of these systems are codified, such as Québec and Louisiana, others absorbed Roman law throughout a longer time span without ever adopting actual codes⁸. Among those, we encounter Scotland and South Africa⁹.

In order to achieve a satisfying description of mixed jurisdictions two general considerations should be made.

First, the description should cover the legal system as a whole and not just the private law branch. In fact, when analyzing mixed jurisdictions, the focus is mostly on private law with little to no interest on public law¹⁰. This limit often diverges attention from a fairly important unifying trait of these jurisdictions: public law always maintains its Anglo-American character and content¹¹. This branch of the law will then generally recognize the principles of separation of powers, judicial review of governmental acts, the independence of the judge, due process of law, free speech and freedom from arbitrary search and arrest¹². Moreover, the criminal law will acknowledge the presumption of innocence, trial by a jury of one's peers and the principle *nulla poena sine lege*¹³. Neither a separate constitutional court, nor a separate administrative hierarchy (both typical of a civilian legal system) will be established¹⁴. Private law is then where the true "hybridization" happens, nevertheless a complete description of mixed jurisdictions should also encompass the interactions between Anglo-American public law and a hybrid private law¹⁵. For example, mixed jurisdictions have common law courts called to create law and policy while interpreting and applying civil law texts¹⁶. They have judges perceived as law creators and policy makers, while the civil law they interpret and apply does not traditionally consider them as such¹⁷.

The second consideration involves the necessary distinction between the original structure of the system when it was founded and its subsequent evolution¹⁸. At a closer look, two receptions of Anglo-American law stand out¹⁹. The first one obviously happens at these systems' birth but only involves public law, with the overtaking of common law institutions on previous civil law ones²⁰. On the contrary,

⁷ W. Tetley, *Mixed Jurisdictions: Common Law vs Civil Law*, 60 La. L. Rev. 678, 679 (2000) (listing mixed jurisdictions across the world).

⁸ *Id.* at 680.

⁹ *Id.*

¹⁰ Sir Thomas Smith's definition of mixed jurisdiction is a clear example of this.

¹¹ V. V. Palmer, *Louisiana: Microcosm of a Mixed Jurisdiction* 8-9 (Vernon V. Palmer, 1st ed. 1999).

¹² V. V. Palmer, *supra* note 2 at 9-10.

¹³ *Id.* at 10.

¹⁴ *Id.*

¹⁵ Curiously enough, a mixed jurisdiction where public law and private law are "reversed", therefore stemming respectively from common law and civil law, has never existed.

¹⁶ V. V. Palmer, *supra* note 11, at 9.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

the second reception provokes a gradual incorporation of common law ideas into the original private law of the system²¹. During this phase, entire sectors of private law can switch to common law (especially commercial and procedural law) through the agency of the legislator and jurisprudence²². Alternatively the reception might occur in a more subtle way, through the insertion of Anglo American legal instruments into the civil law context (typical approach in the fields of torts and obligations)²³.

As pointed out above, mixed jurisdictions exist in all parts of the world. Each nation or territory has its own people, language, culture, religion and economy that cannot be compared to the others²⁴. Yet, it is astonishing how these legal systems present some profound similarities and to a certain point, also the same intellectual history²⁵. In fact, we encounter comparable circumstances leading to their birth and similar patterns and phases of development, involving mixed jurisdiction judges, bilingualism and the ever-present propensity to take in common law procedure and evidence²⁶.

As for the founding of a mixed legal system, four moments are commonly encountered:

- The system is born from a change of domination on a territory: a European power, after having already introduced its own version of the *ius commune*, transfers its sovereignty to an English or American power which imposes at least part of its laws²⁷.

- In a second moment, the Anglo-American domination institutes a new political and public law system throughout the adoption of common law based constitution and statutes. Courts and administrations are placed on the territory, run by judges and officials trained in the common law²⁸.

- Laws are now published in two official languages, one of which is English²⁹.

- Even if the sovereignty has changed, there is still a consistent number of European citizens, accustomed to civil law in their everyday matters such as: personal status, property and land, the family, inheritance, contractual and delictual liability. This part of the population intends to protect its culture, language and property titles and induces the government to keep enforcing the pre-existing private law by means of political demands, non-cooperation and protests³⁰.

As stated above, in a mixed jurisdiction courts are run by common law judges. Therefore these magistrates retain their characteristics of law creators and policy

²¹ V. V. Palmer, *supra* note 10, at 9.

²² *Id.*

²³ *Id.* at 9-10.

²⁴ *Id.* at 10.

²⁵ *Id.*

²⁶ V. V. Palmer, *supra* note 11, at 10.

²⁷ *Id.* at 11.

²⁸ According to F.P. Walton “a change of sovereignty necessarily means a change in this part of the law. For the public law is the law which regulates the rights and duties of citizens as such, and determines the powers and duties of all authorities from a parliament to a police constable”. F. P. Walton, *supra* note 5, at 27-28.

²⁹ V. V. Palmer, *supra* note 10, at 11.

³⁰ *Id.*

makers and they do not act as *bouche de la loi*³¹. Nevertheless they are bound to interpret and apply civil law³². Courts are usually mentioned in a constitution, as a co-equal branch of the government according to the separation of powers³³. Judges are therefore absolutely independent and appointed or elected from among senior practitioners and not recruited from law schools³⁴. Finally, the ordinary court is a *unicum*³⁵. Neither separation between administrative, commercial or constitutional courts nor any institutional separation between law and equity exist³⁶.

While a multiethnic society can exist without a mixed jurisdiction, a mixed jurisdiction cannot exist without a multiethnic society³⁷. As a consequence, in a mixed jurisdiction there are always more idioms spoken³⁸. These languages have various statuses, ranging from officially recognized to widely spoken by certain ethnic groups to source languages, which were used in the drafting of a certain State's law sources, but are not commonly spoken by the population anymore³⁹. The disappearing of literacy in one of the source languages is a universal tendency in mixed jurisdictions⁴⁰. This phenomenon inevitably prevents a full understanding of the civil law tradition, because professionals have now to rely on translations and codified text, which can be more or less imprecise⁴¹. Finally, when a jurisdiction adopts multiple languages as official, the government must always make sure that laws and judicial procedure are not enforced in a language that citizens do not understand⁴².

Almost ubiquitous among mixed jurisdictions is also the shift of civil procedure and evidence from the civil law inquisitorial model to the common law adversarial model⁴³. The Romano Canonical procedure is replaced right after the change of power⁴⁴. New accusatory instruments are introduced, such as cross-examination of witnesses and oral presentation of testimony⁴⁵.

This descriptive analysis made clear that mixed jurisdictions all over the world surprisingly show a lot of common traits. Nevertheless the analysis is not complete without one last consideration: every mixed jurisdiction produces new legal creations, stemming from unique interactions of common law and civil law. Common law instruments are absorbed into the civil law frame and vice versa, forcing doctrine and

³¹ " mouthpiece of the law"

³² *Id.* at 12.

³³ *Id.*

³⁴ *Id.*

³⁵ V. V. Palmer, *supra* note 11, at 12.

³⁶ *Id.*

³⁷ *Id.* at 18.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ V. V. Palmer, *supra* note 11, at 19-20.

⁴¹ *Id.* at 19-20.

⁴² *Id.* at 20.

⁴³ *Id.* at 15.

⁴⁴ *Id.*

⁴⁵ V. V. Palmer, *supra* note 11, at 15.

jurisprudence to adapt these “legal transplants” to the mutated context⁴⁶.

3. An overview of Louisiana’s legal system

Louisiana is quite certainly a mixed jurisdiction. However, it cannot be considered neither a civil law system that has been partly replaced by Anglo American law, nor a civilian jurisdiction that has been to some extent influenced by the common law. Instead, the best definition of Louisiana’s legal system was probably given by Professor Yiannopoulos. In fact, he described it as “neither common nor civil law” but rather an “example of American law with a civil law and common law component”⁴⁷. Today, Louisiana’s legal system is contained in a strong common law framework, although a major element of the substance of Louisiana law (that aspect of private law that consists of the civil code and its ancillary statutes) maintains a characteristic civil law mark⁴⁸. This current situation derives from the historical vicissitudes of Louisiana, which was deeply rooted in the civil law tradition before the admission into the Union, but was also subject to a radical transformation after the purchase of this territory from France in 1803⁴⁹. During this transition, Louisiana managed quite incredibly to maintain the civil law substance by preserving and updating its Civil Code⁵⁰. In most of the other branches of law instead, the legal system was overwhelmed by common law, especially with regard to historical sources of law generally acknowledged by the legal system, the general structure of the system, legal methodology, and the rules of evidence and procedure (criminal and civil)⁵¹. Indeed the legal system’s infrastructure is clearly inspired by the common law: the structure and competence of the courts, the contacts between such courts and the legislative branch, the integration of legal profession and legal education, all follow the common law tradition⁵². Yet, the legal style adopted throughout the state reflects both civil and common law traits⁵³. The legal fictions that are commonly found in private law surely reside in the civil law⁵⁴. On the contrary, some of the legal fictions found in the law of procedure are unknown to the civil law tradition⁵⁵. The judicial style adopted by Louisiana courts more closely resembles the common law approach rather than the civil law one⁵⁶. Connected to legal style is the method of interpretation used

⁴⁶ See V. V. Palmer, *supra* note 11, at 16-18.

⁴⁷ A. N. Yiannopoulos, *Louisiana Civil Law: A Lost Cause?*, 54 Tul. L. Rev. 830, 847 (1980) (Yiannopoulos’ definition of Louisiana’s legal system).

⁴⁸ C. Osakwe, *Louisiana Legal Systems: A Confluence of Two Legal Traditions*, 34 Am. J. Comp. L. Supp. 29, 38 (1986) (containing an overview of Louisiana’s legal system).

⁴⁹ *Id.* at 38-39.

⁵⁰ *Id.* at 39.

⁵¹ *Id.*

⁵² *Id.*

⁵³ C. Osakwe, *supra* note 48, at 39.

⁵⁴ *Id.* at 39-40.

⁵⁵ *Id.*

⁵⁶ *Id.*

by judges⁵⁷. Interpretation is very different between civil law and common law systems⁵⁸. Deductive reasoning characterizes the civilian methodology: when the civilian jurist searches for the applicable law in a given situation, he immediately consults general principles of law and only later, if necessary, he resorts to specific applications of such principles⁵⁹. The common lawyer instead is trained to search for the applicable law starting from decided cases and gradually moving on to general principles of law as laid out by legislated law⁶⁰. In fact when a common lawyer does not find any case law on a specific matter, he concludes that there is no law to apply since it is a case of first impression⁶¹. In the common law then, legislated law needs to be interpreted by a court before it becomes applicable and this method of interpretation is called inductive reasoning⁶². The Louisiana lawyer is consequentially trained in the inductive reasoning tradition⁶³. Louisiana law of procedure and law of evidence also do not differ from the other forty-nine common law jurisdictions in the United States⁶⁴. On the other hand, the area of law where the civilian tradition was more tenaciously preserved is private law, gathered in the Civil Code and its accessory statutes⁶⁵. Finally, most branches of public law⁶⁶ blend traits of American common law with regulatory law and constitutional principles⁶⁷.

4. The gradual abandonment of the French Language

After the Purchase by the United States government, the constitutional convention of 1812 marked the end of the founding period for Louisiana. After obtaining the conservation of civil law, creoles now intended to protect it by constitutional means⁶⁸. They managed to draft two constitutional provisions designed to preserve the civil code from any possible subversion by American law⁶⁹. The first provision declared that the existing civil law in the Territory would continue to be in force until modified with the here mentioned limit: “The legislature shall never adopt any system or code of laws, by a general reference to the said system or code, but in all cases, shall specify

⁵⁷ *Id.*

⁵⁸ C. Osakwe, *supra* note 48, at 40.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ C. Osakwe, *supra* note 48, at 40.

⁶⁴ *Id.* at 40-41.

⁶⁵ For example the law of persons, law of successions, law of property, law of obligations, law of matrimonial regimes, and certain institutions of commercial law.

⁶⁶ The law of persons and the family, successions, property, donations, obligations and the various private contracts, the security devices of pledge and suretyship along with mortgages and privileges and the liberative and acquisitive prescriptions.

⁶⁷ C. Osakwe, *supra* note 48, at 41-42.

⁶⁸ V. V. Palmer, *Two Worlds in One: The Genesis of Louisiana's Mixed Legal System*, in *Louisiana: Microcosm of a Mixed Jurisdiction* 23, 35 (Vernon V. Palmer ed., 1999).

⁶⁹ *Id.* at 35-36.

the several provisions of the laws it may enact⁷⁰”. This restriction was aimed at inhibiting common law and equity systems, in fact these uncodified systems were thought to be unlikely ever to be redacted and therefore the prohibition against their adoption “by general reference” was hoped sufficient to keep English interferences out of the civil law⁷¹. The second provision imposed to all judges, in every definitive judgment, to make express references to *la loi particulière* (the statutory source) upon which their final decision was based and to state the reasoning⁷². Again, the creole political forces attempted to restrict judges to codified civilian sources, preventing subtle introductions of the unwritten common law into the state’s jurisprudence⁷³. Due to the Creoles efforts, the substantive invasion of the common law was effectively repelled, yet they failed to foresee the danger of a different attack that would quickly undermine these efforts: the Constitution did not have any provision in defense of the French language⁷⁴.

During the first quarter of the nineteenth century, the immediate need was then to save civil law from common law threats and no attention was given to the preservation of the French language⁷⁵. In fact, French was commonly spoken in Louisiana up until 1825 and there was no political will to defend it by legal means⁷⁶. Another reason behind this policy was Louisiana’s desire to consolidate relations with an Anglophonic Congress and therefore to be quickly accepted into the Union⁷⁷. Yet, nobody expected English to take over as the dominant language with such speed as it did⁷⁸. Creole lawmakers lost the opportunity to protect their idiom in 1812, when civil law was entrenched in the Constitution but not its native mean of expression⁷⁹. If we compare the early state constitutions, the demise of French becomes evident. Twenty-six of the forty-three delegates that drafted the Constitution of 1812 were of French extraction⁸⁰. The 1812 Constitution itself adopted the French language and had to be translated into English before being sent to Washington⁸¹. At that moment Louisiana seemed perfectly francophone and delegates were so careless as to even include an English language preference clause in the Constitution⁸².

By the 1845 Constitutional Convention, French was already declining⁸³. The

⁷⁰ La. Const. of 1812, art. IV, § 11.

⁷¹ V. V. Palmer, *supra* note 68, at 36.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 37.

⁷⁶ V. V. Palmer, *supra* note 68, at 37.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ V. V. Palmer, *supra* note 68, at 37.

⁸² The clause was obviously aimed at satisfying Congress and fulfilling the requirements of statehood. The English preference clause did not ban French from legislative and judicial proceedings, but only declared English the official language to promulgate and preserve the laws. *Id.* at 38.

⁸³ *Id.* at 38.

Americans were able to control both houses of the Louisiana Legislature and outnumbered the French by more than three to one⁸⁴. The turning point for the State was probably in the 1830-1840 decade. During that time the white population tripled because of the Irish and German immigrants who identified more with the American culture and language⁸⁵. The creole minority at the Convention was finally worried about the demise of French: Bernard Marigny eventually asked constitutional protection for bilingualism and proposed that English and French could be used on the floor of the legislature and members could be addressed in both tongues⁸⁶. The proposal was adopted, and the Constitution of 1845 went as far as mandating the promulgation of laws in both English and French⁸⁷. The succeeding Constitution of 1852 also safeguarded the official status of the French language. Needless to say, these efforts were at least thirty years late. In the 1864 Constitution, any protection of bilingualism was removed⁸⁸. This was easily done by reverting to the English-language preference clause of 1812 and more anti-French provisions were inserted by adopting an English-only policy in public schools⁸⁹. Despite the clear pro-English approach, the Constitution of 1864 did not completely kill the French language⁹⁰. In fact, article 128 prohibited any law that forbade public office to non-English speakers Louisianians and the new Constitution was written in French, as well as English and German⁹¹. Yet, this only proves the intention of the American majority to wait before the final blow, since there were still many citizens that only spoke French⁹². In 1868 the last constitutional protections finally fell⁹³. The Civil War was over and, as a condition of readmission to the Union, Louisiana was required to draft a new constitution stating certain rights to all citizens, including emancipated slaves⁹⁴. After the South's defeat the Republican Party rose to power, but only few French-speaking belonged to it⁹⁵. Hence, in the Republican-controlled convention, creoles' interests were completely ignored and the few remaining constitutional guarantees abolished⁹⁶. The new draft maintained the "English-only" provision in public schools instituted in the Constitution of 1864⁹⁷. Additionally, Article 109 established that "laws, published records and judicial and legislative proceedings of the State...be promulgated and preserved in the English language; and no laws shall require judicial process to be

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ V. V. Palmer, *supra* note 68, at 38.

⁸⁷ *Id.* at 38-39.

⁸⁸ *Id.* at 39.

⁸⁹ *Id.*

⁹⁰ R. K. Ward, *The Death of the French Language in Louisiana Law*, in *Louisiana: Microcosm of a Mixed Jurisdiction* 41, 47 (Vernon V. Palmer ed., 1999).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ R. K. Ward, *supra* note 90.

⁹⁶ *Id.*

⁹⁷ *Id.*

issued in any other than the English language⁹⁸. This article effectively pulled the guillotine on the French language. French-Louisianians were forced to speak English and embrace the English culture⁹⁹. The “English-only” clause in schools prevented young generations from acknowledging their heritage¹⁰⁰. As Pierre Soulé once noted, “When we cast our eyes about us we must admit that we are strangers in this land of Louisiana¹⁰¹”.

Creoles were able to salvage some of their constitutional protections with the next Constitution of 1879¹⁰². The Democratic Party was now in charge and it included a heavy French-speaking composition¹⁰³. The new Constitution of 1879 stated that “laws, public records and judicial and legislative proceedings of the State...be promulgated and preserved in the English language, but the General Assembly may provide for the publication of the laws in the French language¹⁰⁴”. The English-only education was also reversed, reintroducing the possibility of primary school instruction in French¹⁰⁵. The Constitution of 1898 extended this last provision to all grades in the territory of South Louisiana¹⁰⁶. A similar provision can also be found in the Constitution of 1913¹⁰⁷. Notwithstanding these efforts, French-speaking legislators could not mend the damage mercilessly brought by the constitutions of 1864 and 1868 upon their culture as a whole¹⁰⁸. Creoles never regained their pre-Civil War hegemony¹⁰⁹. After 1881, laws were no longer published in French and in the Constitution of 1921, the need to protect the French language in Louisiana had ultimately faded away¹¹⁰. Delegates to the 1921 Convention excluded all references to the French language and established that “the general exercises in the public schools...be conducted in the English language¹¹¹” This period also signed the lowest moment for the civil law. Reading judicial decisions of the 1920s and 1930s, one may feel that the civil law was dead. The Tulane Law Review¹¹² was still publishing articles dealing with the civilian heritage, but these articles dealt more with institutions of

⁹⁸ *Id.* at 47-48.

⁹⁹ *Id.* at 48.

¹⁰⁰ R. K. Ward, *supra* note 90 at 48.

¹⁰¹ L. W. Newton, *The Americanization of French Louisiana: A Study of the Process of Adjustment Between the French and the Anglo-American Populations of Louisiana, 1803-1860* 195 (Arno ed. 1st ed. 1980).

¹⁰² R. K. Ward, *supra* note 90 at 48.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 48-49.

¹⁰⁷ R. K. Ward, *supra* note 90 at 49.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² The Tulane Law review was Louisiana’s first modern law review. First published in 1916 as the Southern Law Quarterly, it was a product of the Tulane Law School Faculty and adopted its current denomination in 1929. A. N. Yiannopoulos, *supra* note 47, at 839.

comparative law than with the living law of Louisiana¹¹³.

At the end of the 1960s, French-Louisianians began to overcome society's ostracism towards their culture¹¹⁴. A strong movement promoted pride in the French heritage, and pushed for a reintroduction of the language on the territory¹¹⁵. Because of this movement, the Louisiana Legislature passed Act 409 of 1968, which allowed the establishment of CODOFIL (Council for the Development of Louisiana-French)¹¹⁶. CODOFIL had (and still has) as its objective the development, utilization, and preservation of the French language¹¹⁷. In addition to that, the Louisiana Legislature also supported French language by adopting an act concerning public schools, "strengthening its position in the public schools of the State" and demanding "that the French language and the culture and history of French populations in Louisiana and elsewhere in the Americas...be taught for a sequence of years in public elementary and high school systems of the State¹¹⁸". In theory, young Louisianians were once again exposed to French language and culture¹¹⁹. Creoles representatives were pleased to see this renewed interest in their heritage but they wanted more¹²⁰. French language advocates wanted to regain the old constitutional recognition and protection, so they pushed for a constitutional convention¹²¹. In 1972, the Louisiana Legislature established a convention aimed at revising the Constitution of 1921¹²². French speaking lobbyists and CODOFIL representatives urged the committee to introduce Francophone rights and official recognition for the language¹²³. In the end, the Constitution of 1974 did not explicitly acknowledge French-Louisianians' rights¹²⁴. It contained just a general blanket statement recognizing "the right of the people to preserve, foster, and promote their respective historic, linguistic and cultural origins¹²⁵". This general provision conceded the same constitutional protection to all ethnic groups within the State¹²⁶. Hence, as for today, the Constitution is lacking of any express reference to the state's French past¹²⁷. No real status or special protection is recognized to French-Louisianians, therefore the French language can be declared officially defunct¹²⁸.

¹¹³ *Id.* at 841.

¹¹⁴ R. K. Ward, *supra* note 90, at 49.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 49-50.

¹¹⁹ R. K. Ward, *supra* note 90, at 50.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ R. K. Ward, *supra* note 90, at 50.

¹²⁵ *Id.*

¹²⁶ *Id.* at 50-51.

¹²⁷ *Id.*

¹²⁸ *Id.*

In order to understand the present situation regarding French language in Louisiana, it might be useful to examine the Louisiana Civil Codes. The Louisiana Civil Code of 1808 was published in both French and English, but the English version was merely a translation from the French original¹²⁹. Since there were two different versions of the same text, the Territorial Legislature ruled that in case of any obscurity or ambiguity both versions had to be consulted and would serve to the interpretation of one another¹³⁰. The disparities between the English and French text arose almost immediately and the Louisiana Supreme Court had to resort to the more exhaustive of the two versions¹³¹. The same Court eventually directed that both texts had same authority and were considered as equal¹³². Yet, by comparing the two different versions of the Digest, it is evident that the French edition is of higher quality¹³³. Thus, the English translation resulted in ambiguous and obscure provisions, while French provisions were clear and effective¹³⁴. Therefore the Supreme Court's holding was unfortunate, allowing litigants to "hide" behind the poorly rendered English provisions, forcing the meaning of such provisions by the use of a convenient interpretation¹³⁵. The state of confusion regarding the laws in force that the Louisiana Civil Code of 1808 sought to eliminate reappeared with the 1817 Supreme Court case of *Cottin v. Cottin*.¹³⁶ The holding of the case ruled that the legislature's act that adopted the Civil Code of 1808 only abrogated those ancient laws of the territory that became contrary or incongruous with it¹³⁷. Hence, according to the Supreme Court, Spanish law not incompatible with the Code was still in force in Louisiana. This decision destabilized the judicial situation once again and compelled the Legislature to pass a resolution to update the Digest of 1808¹³⁸. The men appointed for this task were Louis Moreau Lislet, Pierre Darbigny and Edward Livingston¹³⁹. The three jurists clarified that it was their intention to prepare a code that would result complete in every aspect, freeing Louisiana Courts from the necessity of resorting to Spanish Law once and for all¹⁴⁰. In 1823, a *projet* was submitted to the legislature for review¹⁴¹. The legislature revised the *projet* and consequentially adopted and promulgated the new Civil Code on April 12, 1824¹⁴². Just like the Digest of 1808, the Louisiana Civil Code

¹²⁹ R. K. Ward, *The French Language in Louisiana Law and Legal Education: A Requiem*, 57 La. L. Rev. 1299, 1303 (1997) (discussing the use of French in the Civil Code of 1817 and the following codes).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ R. K. Ward, *supra* note 129.

¹³⁵ *Id.*

¹³⁶ *Id.* at 1303-04.

¹³⁷ *Cottin v. Cottin*, 5 Mart. (o.s.) 93, 94 (1817).

¹³⁸ R. K. Ward, *supra* note 128, at 1304.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

of 1825 was written in French and subsequently translated into English¹⁴³. Only this time the English translation was even worse, to the point that the Supreme Court defined it as spectacularly bad¹⁴⁴. As a consequence, the Supreme Court had to overrule its holding that the French and English version had the same authority and changed its practice to resort to one version to interpret the other and vice versa¹⁴⁵. On the contrary, the Supreme Court this time recognized the superiority of the French version and held that, in case of conflict between the two versions, the French one would always prevail on the English¹⁴⁶. This French-preference became a rule regularly applied by Louisiana Courts¹⁴⁷. The Louisiana Civil Code of 1825 was probably the most accurate republication of Roman law and demonstrated the supremacy of the French language in Louisiana's civil law matters. After the Civil War, Louisiana was required to revise not only its Constitution, but also the Civil Code, as a prerogative for readmission in the Union¹⁴⁸. The most important requirement was the elimination of slavery from statutory law¹⁴⁹. The legislature assigned the task of updating the Civil Code to John Ray of Monroe, Louisiana¹⁵⁰. Ray eliminated all the articles regarding slavery, incorporated all the amendments enacted since 1825 and assimilated various legislative acts which regarded codal articles without specifically abrogating them¹⁵¹. Other than these minor updates, the Revised Civil Code of 1870 was the same as the Civil Code of 1825¹⁵². Nevertheless, the biggest difference involved the language: the Revised Civil Code of 1870 was drafted only in English¹⁵³. No official French version ever existed and this proved consistent with the Louisiana Constitution of 1868¹⁵⁴. It would seem logical to convene that, in lack of a French version, the English version of the Civil Code is controlling¹⁵⁵. Yet, Louisiana law and jurisprudence have always been of different advice. In fact, the majority's view is that the Code of 1870 is a mere revision of the 1825 Code and was never intended to overrule its antecedent¹⁵⁶. According to this theory, the law found in provisions which remained untouched between the two codes is the same. Hence, in case of conflict between the English version and the old French version, the latter one prevails. Therefore, even if French is no longer the language directly used in Louisiana civil law, it still works as a precious instrument of interpretation of the English language in which the actual Civil Code is

¹⁴³ R. K. Ward, *supra* note 129 at 1304.

¹⁴⁴ *Id.* at 1305.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ R. K. Ward, *supra* note 129 at 1305.

¹⁴⁹ *Id.* at 1305-06.

¹⁵⁰ *Id.* at 1306.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ R. K. Ward, *supra* note 129 at 1306.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

drafted¹⁵⁷. Many cases decided in Louisiana nowadays still refer to the French versions of the Louisiana Civil codes of 1808 and 1825 to achieve an accurate definition of the law applied in the concrete case¹⁵⁸.

In the year of the Louisiana Purchase, Louisiana's procedure was based on the Spanish model imposed by Governor Alexander O'Reilly¹⁵⁹ in his Ordinance¹⁶⁰. The model was known as the O'Reilly's Code and was intended to replace the rules of procedure that were enforced during the French domination¹⁶¹. Once the United States acquired sovereignty on the territory, the need to establish a different procedure able to integrate with the new federal agencies and courts established in the territory was immediately felt¹⁶². The 1804 Act of Congress that divided Louisiana in two territories also assigned judicial power to a superior court and commissioned the creation of inferior courts to the legislative council¹⁶³. The territorial Legislature provided for the adoption of two acts, one relating to the practice of superior courts in civil cases and the other establishing inferior courts and furnishing them with rules of practice¹⁶⁴. The aforementioned two acts became the basis of civil procedure in Louisiana until the Code of Practice was drafted in 1825¹⁶⁵. While *Cottin v. Cottin* threw Louisiana's substantive civil law into chaos, civil procedure suffered as well¹⁶⁶. Hence, the three juriconsults charged with the task of updating the Digest of 1808 were also commissioned a treatise of civil procedure. As a consequence, Moreau Lislet, Derbigny and Livingston prepared a *projet* that later became the Code of Practice of 1825¹⁶⁷. Just like the Civil Code and state constitution, the Code of Practice was originally written in French and underwent a translation into English that allowed for promulgation in both languages¹⁶⁸. The Supreme Court held that in case a conflict arose between the two texts, the French version would prevail¹⁶⁹. The Code of Practice inserted some relevant procedural rights in favor of French speakers into Louisiana's civil procedure¹⁷⁰. To make an example, article 172 stated that a petition must be drawn both in French and English when one of the two parties spoke French as a mother tongue unless the defendant or his attorney agreed that the plaintiff's

¹⁵⁷ *Id.*

¹⁵⁸ R. K. Ward, *supra* note 129 at 1306-07.

¹⁵⁹ Don Alexander O'Reilly (1722, Dublin, Ireland – March 23, 1794, Bonete, Spain) was a young Irishman who, before being appointed as Governor and military commander of Louisiana, distinguished himself in the Spanish army. C. Osakwe, *supra* note 47, at 32.

¹⁶⁰ R. K. Ward, *supra* note 129 at 1307.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 1307-08.

¹⁶⁵ R. K. Ward, *supra* note 129 at 1308.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ R. K. Ward, *supra* note 129 at 1308.

petition be prepared in English only¹⁷¹. In case the plaintiff filed only an English petition, the French-speaking defendant could demand for a French version¹⁷². Failing to serve a French petition to a francophone party would result in the interruption of prescription¹⁷³. Finally, the Code allowed a French-speaking defendant to answer the plaintiff's petition in French, as long as an English copy was also provided¹⁷⁴. Article 251 dealing with orders of attachment also recognized the French language and was useful in noticing French-Louisianians that court proceedings regarding their property were under way¹⁷⁵. Even if bilingual provisions proved quite effective, petitions to the Court still needed to be addressed in English¹⁷⁶. In fact, early Louisiana courts were highly ineffective because of bilingualism, having sometimes attorneys and judges expressing themselves in different languages during the same trial¹⁷⁷. This confusion led the courts to finally adopt English as their language. It must be noted that the English preference was born out of necessity and was not intended to cause harm to the French language, which continued to benefit from the various provisions included in the Code of Practice¹⁷⁸. Unfortunately, the Code of Practice itself underwent revision after the Civil War and any special right or privilege to Francophones was repealed¹⁷⁹. From that moment on, any pleading, writ or petition had to be prepared exclusively in English¹⁸⁰. Therefore, unlike in substantive civil law where French survives as a tool for interpretation, French language has completely disappeared from Louisiana's civil procedure¹⁸¹.

5. The Louisiana Judge

One of the most peculiar figures in a mixed jurisdiction such as Louisiana is certainly the judge. The main question is how much did the Louisiana judge borrow from the civil law and how much did he borrow from the American common law. At the very basis of this question lies the fundamental assumption that judges hold a very different role in the two legal systems: while the common law judge acts like a law and policy maker, a politician or a statesman, the civil law judge is none of the sort. Even if most French judges do not consider themselves as mere "*bouches de la loi*" anymore and the jurisprudence of the *Cour de Cassation* is today much more important than at the time of the *Code Napoleon*, they still cannot act as law-makers and certainly cannot be politicians¹⁸².

¹⁷¹ *Id.*

¹⁷² *Id.* at 1308-09.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ R. K. Ward, *supra* note 129 at 1309-10.

¹⁷⁶ *Id.* at 1309.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 1310.

¹⁸⁰ R. K. Ward, *supra* note 128 at 1310.

¹⁸¹ *Id.* at 1310.

¹⁸² S. C. Symeonides, *The Louisiana Judge: Judge, Statesman, Politician, in Louisiana: Microcosm of a Mixed*

In 1712 the French King decided to commercially develop the Mississippi River basin by issuing a charter to a private investor, Anthony Crozat¹⁸³. Regarding the administration of justice, the charter to Crozat established that the edicts and ordinances of France along with the Custom of Paris had to be applied in the Louisiana territory¹⁸⁴. A court system was set up by two edicts issued in December 18th and 23rd of 1712, as part of a conciliar form of government¹⁸⁵. The edicts provided that a Superior Council had judicial power over the territory¹⁸⁶. At the beginning, members of the council were the Governor General, the Intendant of New France, the Governor of the territory of Louisiana, the King's Lieutenant (a representative of the king), the Senior Councilor (an appointed attorney), two puisne councilors (judges of an inferior rank), a procurer-general (an attorney general), and a clerk¹⁸⁷. One of the earliest practical adjustments was that the Intendant of New France would serve only as an honorary president of the council, while the Senior Councilor was the president-in-fact and sat as a court of first instance (general trial court) in all provisional matters¹⁸⁸. If an instance had to be heard by the council as a court, all the members would sit *en banc*¹⁸⁹. A quorum was required in the number of three for criminal cases and five for civil matters¹⁹⁰. In case of temporary vacancies in the council, the other members would choose members *ad hoc* from important citizens of the territory¹⁹¹. Subsequent royal edicts altered the Superior Council in later years, but its substantial structure remained the same even when the charter was surrendered by Crozat and later re-issued by the king to the Western Company¹⁹². On the other hand, the territory was experiencing some dynamic transformation¹⁹³. The population was on the rise and settlements were emerging in lands fairly distant from the seat of the Superior Council in New Orleans¹⁹⁴. As a consequence, new edicts provided for the appointment of inferior local judges and courts throughout the territory¹⁹⁵. Members of these courts were an agent of the company, some local notable and

Jurisdiction 89, 89-91 (Vernon V. Palmer ed., 1999).

¹⁸³ H. Ward Fontenot, *The Louisiana Judicial System and the Fusion of Cultures*, 63 La. L. Rev. 1149, 1150 (2003) (containing early history of the Louisiana judge).

¹⁸⁴ A. Parise, *Codification of the Law in Louisiana: Early Nineteenth-Century Oscillation Between Continental European and Common Law Systems*, 27 Tul. Eur. & Civ. L.F. 133, 137 (2012) (discussing the first ordinances applied in the territory of Louisiana).

¹⁸⁵ H. Ward Fontenot, *supra* note 182.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ H. Ward Fontenot, *supra* note 183.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ H. Ward Fontenot, *supra* note 183.

sometimes even the local military commander¹⁹⁶. In the case of civil and criminal matters of certain relevance, the Superior Court would serve as a court of second instance¹⁹⁷.

On November 3, 1762 the Treaty of Fontainebleau ceded the Louisiana territory and the city of New Orleans to Spain¹⁹⁸. The treaty was secret to the point that the colonists did not know about the change of sovereignty until October of 1764¹⁹⁹. A Spanish delegation arrived only in 1766, and up to that date the administration of the colony, including the judicial system, remained in the hands of the Superior Council²⁰⁰. The inferior courts kept working without any change as well²⁰¹. When the Spanish representative finally arrived, the new governor Don Antonio De Ulloa found himself devoid of enough military support to establish the authority of Spain in its new possession²⁰². In fact, the Governor arrived with a few armed men, and soon found out that local French soldiers would not serve under Spanish command²⁰³. As a consequence, Ulloa agreed to share power with the head of the military, Charles Philippe Aubry²⁰⁴. At first, Ulloa tried to cooperate with the existing French administration and in 1766 ordered the compilation of a code²⁰⁵. This document reported all previous edicts and the custom of Paris, along with newly introduced Spanish theory and practice²⁰⁶. Since most of the inhabitants were either French or of French lineage, the code was prepared in French²⁰⁷. Shortly after, tension developed between the Spanish Governor and the local population until in January 1767 an open revolt broke up²⁰⁸. Ulloa, feeling the loss of control over the territory, issued a royal decree to dissolve the Superior Council and transfer all judicial powers to himself²⁰⁹. The decree did not serve its purpose and although the revolt did not result in any real violence, Ulloa feared for his safety and left the colony for Cuba²¹⁰. For a long time, no Spanish boat was sighted along the coasts of Louisiana and the citizens thought that the Spanish King had lost interest in the newly-acquired colony²¹¹. Instead, on July 24, 1769 an impressive fleet indicated the arrival of a newly appointed Spanish governor, Don Alexander O'Reilly²¹². O'Reilly soon took steps to dismantle the

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 1151.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ H. Ward Fontenot, *supra* note 183, at 1151.

²⁰¹ *Id.*

²⁰² *Id.* at 1151-52.

²⁰³ *Id.* at 1152.

²⁰⁴ *Id.*

²⁰⁵ H. Ward Fontenot, *supra* note 183, at 1152.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ H. Ward Fontenot, *supra* note 183, at 1152.

²¹¹ *Id.*

²¹² *Id.*

French system of justice which had been operating in Louisiana for around fifty years²¹³. His first act towards this direction was the dissolution of the Superior Council and the introduction of a “*Cabildo*” in its place²¹⁴. The *Cabildo* was a peculiar type of government already put to a test by Spain in other American colonies²¹⁵. This structure was composed of six perpetual *regidores* (administrative members of the *ayuntamiento* whose position was often purchased), two ordinary *alcades* (judicial officers), an Attorney General Syndic (a procurator or advocate representing the Governor), and a clerk²¹⁶. Presidency was vested in Governor O’Reilly himself²¹⁷. Moving on to the administration of justice, O’Reilly introduced single judge courts for the first time²¹⁸. Indeed, ordinary *alcades* would operate as individual judges, hearing both criminal and civil disputes²¹⁹. The status of litigants was also differentiated following Spanish practice elsewhere and parties were divided in two categories on the ground of privileges²²⁰. A party with privileges was given “*fuero*”, while a party with no privileges was defined “*ordinario*”²²¹. For example, a soldier could ask to be heard by a military court (*fuero militar*), while a man of the cloth could ask to be heard by an ecclesiastical court (*fuero eclesiastico*)²²². In 1780, a *fuero* court was founded to hear treasury issues²²³. During the first years of the new judicial system, the governor’s court served as the tribunal of last resort from the *fuero* courts until in 1771 a superior court based in Havana, Cuba was given the task to function as a court of appeals from the governor’s court in New Orleans²²⁴. However, appeals to Cuba were very onerous²²⁵. As a consequence, civil matters were never appealed, while the only criminal cases heard from the superior court of Havana were those contemplating the death penalty²²⁶.

While the Spanish government was being shaped in New Orleans, the rapid growth of population in remote areas of Louisiana required the establishment of local courts of justice²²⁷. Military outposts were used to meet the need for justice in those areas difficult to reach by the central administration²²⁸. In each district, an army officer had

²¹³ *Id.* at 1153.

²¹⁴ *Id.*

²¹⁵ H. Ward Fontenot, *supra* note 183, at 1153.

²¹⁶ A particular system was used for the selection of posts in the *Cabildo*. An auction would offer the positions of perpetual *regidor* and clerk and the purchaser could re-sell his position with no restrictions. The Attorney General Syndic and the ordinary *alcades* were instead elected by the other members. *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ H. Ward Fontenot, *supra* note 183, at 1153-54.

²²¹ *Id.* at 1154.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ H. Ward Fontenot, *supra* note 183, at 1154.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

the authority to hear any civil case in exchange of a sum of money²²⁹. If the parties paid a greater sum, he would receive both the petition and the opposition, somehow record testimonies, and then transmit the whole material to the *Cabildo*, where a competent court would address the matter²³⁰. Regarding criminal cases, the army officer had the authority to immediately arrest and imprison persons accused of crimes²³¹. Subsequently, the officer would report the arrest to the *Cabildo* and await directions as to either release the person or send him to New Orleans for trial²³². A fundamental aspect of the *Cabildo* was the recording of acts in the Spanish language²³³. Nevertheless, French was tolerated in juridical acts since most of the population did not speak Spanish and because O'Reilly's charisma had a conspicuous number of French soldiers joining the Spanish army²³⁴. In 1769, the Spanish government issued a decree that explicitly abolished French law in favor of a compilation known as "the O'Reilly Code²³⁵". The Code was merely a combination of the Laws of the Indies, the *Siete Partidas*, and the *Code Noir* but marked an abrupt change in practice for all the courts operating in Louisiana²³⁶. In fact, all civil and criminal proceedings had now to be conducted according to the laws of Castille and of the Indies, yet surprisingly justices did not find particular difficulties in adapting to the new body of laws, probably due to the common origins shared by French and Spanish law²³⁷. The judicial system established by O'Reilly lasted for almost forty years only with some slight changes until the territory was sold to the United States in 1803²³⁸.

In the year 1800, the treaty of San Idelfonso retroceded Louisiana from Spain to France and Napoleon sent a representative in order to take control of the territory²³⁹. The man for the job was Pierre Clement de Laussat, but before he even set foot upon land, the Louisiana Purchase happened²⁴⁰. Laussat then assumed the office of governor with the only purpose of preparing the delivery of the territory to the United States²⁴¹. Still, Laussat managed to effectively affect the judicial system. In fact, he issued an order abolishing the *Cabildo* and the entire court system²⁴². As a consequence, after just three weeks of governorship, on December 20, 1803 Laussat made a formal delivery of Louisiana to emissaries of the United States but the territory did not have any judiciary in place and there was much confusion about the system of

²²⁹ *Id.*

²³⁰ H. Ward Fontenot, *supra* note 183, at 1154.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ H. Ward Fontenot, *supra* note 183, at 1155.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ H. Ward Fontenot, *supra* note 183, at 1155.

²⁴² *Id.*

laws in force²⁴³.

Immediately after the Louisiana Purchase of 1803, judges started to depart from their French and Spanish role models. The American administration indeed moved quickly to deal with the unstable situation in which Laussat left the judiciary system of Louisiana²⁴⁴. After a few months, the Congress created a temporary system of conciliar government made of a governor and a thirteen-man legislative council²⁴⁵. President Jefferson had the power to choose the members of said government and he appointed his cousin William C.C. Claiborne as governor²⁴⁶. On December 30th 1803, the new governor founded a Court of Pleas²⁴⁷. The authority of the Court of Pleas was limited to civil matters not exceeding three thousand dollars²⁴⁸. More important matters would be heard directly by the governor's court or be suspended until the establishment of a more permanent system of justice²⁴⁹. Claiborne also decided to appoint local judges as members of the Court, but struggled to find candidates²⁵⁰. In fact, the perfect aspirant had to be a person not only in favor of the new American administration, but also fluent both in English and French, and expert of both common law and civil law²⁵¹. As a matter of fact, no one in Louisiana possessed all of the required qualifications, therefore Claiborne was forced to appoint a group of people having different legal training, political tendencies and speaking different languages²⁵². The Court of Pleas had its first meeting on January 10, 1804 and immediately adopted procedural rules²⁵³. In addition to that court, Claiborne also formed the aforementioned governor's court: a court of first instance in important civil matters, but also a court of appeals for cases decided by the Court of common pleas²⁵⁴. In criminal matters, the governor's court also functioned as a court of last resort for cases involving capital punishment²⁵⁵.

Regarding criminal law, President Jefferson ordered the governor to impose common law concepts reflecting the U.S. Constitution²⁵⁶. Hence, Claiborne did not rely on French and Spanish criminal law previously applied in Louisiana when he passed a "Crimes Act" reforming the whole branch of justice²⁵⁷. After that Act, the void which had been left by Laussat was finally filled²⁵⁸. Even if the courts established

²⁴³ *Id.* at 1155-57.

²⁴⁴ *Id.* at 1157.

²⁴⁵ *Id.*

²⁴⁶ H. Ward Fontenot, *supra* note 183, at 1157.

²⁴⁷ *Id.* at 1158.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ H. Ward Fontenot, *supra* note 183, at 1158.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ H. Ward Fontenot, *supra* note 183, at 1159.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

by Claiborne were all expressly provisional, there were a judicial system again and a more or less solid body of laws to govern the life of Louisianians²⁵⁹.

This temporary judicial system remained in effect until 1804, when an Act of Congress divided Louisiana in two territories²⁶⁰. Indeed the Act not only ruled that preexisting French and Spanish laws remained in force, but also created a superior court and inferior courts on the model of other U.S. territories²⁶¹. This marked division between substantive law and the judicial system that had to interpret and apply the law survived today²⁶². Both substantive law and the judicial system kept growing apart from their French and Spanish counterparts but this has been far more noticeable for the latter rather than the former²⁶³. The first legislative compilation ever passed in Louisiana, the Legislature of the Territory of Orleans, was designed to confirm the civil law in force while at the same time preparing the ground for a new restatement of it²⁶⁴. Since there was no time to draft a brand new civil code, the legislature called the restatement a *Digest*²⁶⁵. Hence, instead of introducing new law, the legislature updated the old law in force, making it more accessible to judges²⁶⁶. It must be pointed out that the Digest of 1808, while embracing the principle of legislative supremacy, did not contain a counterpart of Article five of the *Code Napoleon*²⁶⁷. Article five was meant to avoid any future abuse like the ones perpetrated by the courts of the *Ancien Régime*, the Parlements, and to prevent judges from engaging in judicial law making using their jurisprudence²⁶⁸. No need for the same provision was felt in Louisiana, since judges were never an instrument of the Old Regime and the Digest even included an Article twenty-one stating that it was the judge's duty to fill the gaps that necessarily affect positive law²⁶⁹. Article twenty-one survived in the Civil Code of 1825 and was included in the Revised Code of 1870, still in force today²⁷⁰.

Louisiana's first Constitution was promulgated in 1812 and established a supreme court on a standard American model: a small court with its own strength and independence towards the other two branches of government²⁷¹. The only provision that showed a civil law background stated that "the judges of all courts within this state, shall, as often as it may be possible so to do, in every definitive judgment, refer to the particular law, in virtue of which such judgment may have been rendered, and

²⁵⁹ *Id.*

²⁶⁰ S. C. Symeonides, *supra* note 182, at 91.

²⁶¹ *Id.* at 91-92.

²⁶² *Id.* at 92.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ S. C. Symeonides, *supra* note 182, at 92.

²⁶⁶ *Id.*

²⁶⁷ Article 5 of the Napoleonic code reads: "The judges are forbidden to pronounce, by way of general and legislative determination, on the causes submitted to them". A Barrister of the Inner Temple, *The Code Napoleon; or, The French Civil Code* 2 (William Benning ed., 1st ed. 1827).

²⁶⁸ *Id.* at 92-93.

²⁶⁹ *Id.* at 93.

²⁷⁰ *Id.*

²⁷¹ S. C. Symeonides, *supra* note 182, at 93.

in all cases adduce the reasons on which their judgment is founded²⁷². The provision was systematically disregarded by Louisiana judges, just like the Law of February 17, 1821 that required each judge of the Supreme Court to prepare individual opinions starting from the younger member²⁷³. The Law of 1821 showed a certain respect for judges as individuals instead of anonymous and interchangeable members of a collective body and this was in stern contrast with French Law and practice of the time, where no space was given to dissenting or concurring opinions²⁷⁴. Surprisingly, a brief change of course happened with the Louisiana Constitution of 1898 that prohibited for the first time the publication of dissenting or concurring opinions²⁷⁵. Anyway the Constitution did not attempt to redefine the role of judges in a more civil law inspired way, after all Louisiana had become a common law state by that time²⁷⁶. The change finds an explanation in the tense political atmosphere preceding the Constitution²⁷⁷. During that time Louisiana had a dual government, including two Supreme Courts²⁷⁸. Even if by 1898 the conflict had settled, the prohibition to publish dissenting or concurring opinions was probably an act of political intimidation, and as such was repeatedly ignored by the members of the Supreme Court²⁷⁹. By 1900 the practice of rendering dissenting or concurring opinions was already common place and even if the prohibition was repeated in the Constitution of 1913, it kept being violated²⁸⁰.

From the very beginning of Louisiana as a State, judges acted more like law-makers²⁸¹. They filled gaps in the Digest and later in the Civil Code and they sometimes engaged in open conflict with the Territorial Legislature which tried many times to repeal the pre-existing French and Spanish laws, but to no avail²⁸². It seems useful to mention, out of these judges, at least the most prominent ones. François Xavier Martin was born in France, but soon moved to North Carolina where he worked as a printer for a few years²⁸³. On the job, Martin translated and published for the first time in English Pothier's treatise on Obligations from 1803²⁸⁴. Martin's legal education also took place in North Carolina where he served as a member of the Territorial Legislature²⁸⁵. For a brief period of time he also served as a judge in

²⁷² La. Const. of 1812, art. IV, § 12.

²⁷³ S. C. Symeonides, *supra* note 182, at 94.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 95.

²⁷⁷ *Id.*

²⁷⁸ S. C. Symeonides, *supra* note 182, at 95.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.* at 96.

²⁸² *Id.* at 96-97.

²⁸³ T. W. Tucker, *Interpretations of the Louisiana Civil Codes, 1808-1840: The Failure of the Preliminary Title*, 19 Tul. Eur. & Civ. L.F. 57, 132 (2004) (reporting Judge Martin's life).

²⁸⁴ *Id.*

²⁸⁵ *Id.*

Missouri, before joining the Superior Court of the Territory of Orleans in 1810²⁸⁶. Martin was a man of great erudition and also of a certain political stature. He lasted in the Superior Court for less than three years before resigning to become Attorney General and being appointed to the new Louisiana Supreme Court only two years after²⁸⁷. Martin's nomination was supported by Governor Clayborne, who came to a compromise with his opponents in the Louisiana Senate after they rejected his five previous nominees²⁸⁸. Judge Martin served in the Supreme Court for thirty-one years, predominantly as presiding judge²⁸⁹. The case *Johnson v. Duncan* ended with Martin's first opinion, showing an intrepid character. In the opinion, Martin vehemently attacked General Andrew Jackson who, as military chief of New Orleans, had issued martial law on the city. Martin declared the act ineffective, since it resulted in a usurpation of the Supreme Court's authority²⁹⁰. He was also well aware of the importance of the precedent, so much that in his *Martin Reports*, the first law reports of Louisiana, he encouraged the conservation of the Supreme Court's opinions and their use in future judgments²⁹¹. As mentioned above, Martin first served in the Territorial Superior Court, which lasted from 1804 to 1813²⁹². None of the six judges that served in that period had any civil law training, Martin included²⁹³. They were also all recent immigrants in Louisiana (with the only possible exception of John Thompson), but they also all claimed past judicial or legislative experience in another state: Sprigg and Lewis had held a legislative charge, Prevost and Mathews had held a judicial office, and Martin had both types of experiences²⁹⁴. Later, Judge Lewis also ran for Governor in 1816, but unsuccessfully²⁹⁵. The first Louisiana Supreme Court lasted from 1813 to 1846 and a total of thirteen judges served as members, including Martin and Mathews who previously served in the Superior Court²⁹⁶. Again, all of the members were born out of state, and only three had some previous civil law training²⁹⁷. All of the judges had political experience, having served either in the Louisiana legislature or the U.S. Congress before being appointed to the Supreme Court and many of them kept pursuing politics after, sometimes running for governorship²⁹⁸. The second Supreme Court operated between 1846 and 1853 and was equally politically oriented²⁹⁹. George Rogers King, the first member of this new court and also the first Louisianan justice, was involved in the Territorial Legislature before being appointed to the Supreme

²⁸⁶ *Id.*

²⁸⁷ S. C. Symeonides, *supra* note 182, at 97.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Johnson v. Duncan*, 3 Mart. (o.s.) 530, 552-53 (1815).

²⁹¹ S. C. Symeonides, *supra* note 182, at 97-98.

²⁹² *Id.* at 98.

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ S. C. Symeonides, *supra* note 182, at 98.

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 98-99.

²⁹⁹ *Id.* at 99.

Court³⁰⁰. Second member was Thomas Slidell, a Democrat who later became Chief Justice³⁰¹. The third member was Isaac Trimble Preston, another very active politician³⁰². None of the three new members had any civil law training³⁰³. In time, foreign judges were gradually replaced by Louisianians but the composition of the Supreme Court remained strongly political³⁰⁴. The court showed a quivering participation in the civil law division and the aftermath of it³⁰⁵. At the beginning of the 20th Century, two out of five members of the Supreme Court were former governors: Francis T. Nicholls and Samuel Douglas McEnery³⁰⁶.

The Constitution was amended at the turn of the century and provided for a Supreme Court with elected members, rather than appointed³⁰⁷. The aim was probably to impair the executive's power over the court, but this result took several years to come about³⁰⁸. Elected judges owed their office to popular vote, therefore they tended to perceive themselves as representatives and this increased their political stature and potential contrast with the legislature³⁰⁹. Today, the Louisiana judge is still elected by popular vote and the U.S. Supreme Court case *Chisom v. Roemer* officially approved the appellation of judges as "representatives" in 1991³¹⁰. In conclusion, we can say that throughout the formative years, the Louisiana judge has always been a politician, self-conscious of his role in the law-making process, equal with the Legislature. He never perceived himself as mere "mouth of the law" and the election system only accentuated this trait.

In the last title we saw that the Louisiana judge started departing from its French role model the moment sovereignty switched to the United States. After more than 200 years, a comparison of today's Louisiana judge and its French counterpart reveals some interesting affinities and divergences. French judges take a different path from the rest of the legal profession immediately after completing the basic course of legal studies, while Louisiana's office of judge or Supreme Court justice is traditionally seen as a position of honor to which only very experienced lawyers have access³¹¹. Also, since the Louisiana judge is elected, courts cannot be as detached from politics as French ones³¹². This does not mean that courts are hindered in their judicial function, in fact the judiciary as a whole is able to respond to public needs while managing to

³⁰⁰ *Id.*

³⁰¹ S. C. Symeonides, *supra* note 182, at 99.

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ S. C. Symeonides, *supra* note 182, at 99-100.

³⁰⁷ *Id.* at 100.

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Chisom v. Roemer*, 501 U.S. 380, 386 (1991).

³¹¹ M. E. Barham, *Methodology of the Civil Law in Louisiana*, 50 Tul. L. Rev. 474, 482 (1976) (comparing judges in France and Louisiana).

³¹² *Id.*

maintain a certain distance from political interferences³¹³. Judges are also subject to a certain degree of control, somewhat reminiscent of the civilian tradition; in fact the Louisiana constitution allows the Judiciary Commission to solicit the Supreme Court in suspending or removing from office a judge guilty of misconduct or inaction³¹⁴. Another limited control consists in the parties' right to seek review of cases in front of the United States Supreme Court³¹⁵. A significant divergence between the French and Louisianian system emerges in the relationships between judges, lawyers and law professors³¹⁶. In France these careers are strictly separated in their areas of interest while in Louisiana they share the same membership in the bar and participate together in the field of law revision or in work performed for the Council of the Louisiana State Law institute³¹⁷. Hence, these careers are defined by a certain "*mixité*" in Louisiana and this allows both lawyers and judges to teach part time in law schools, professors to practice law, and lawyers to temporarily fill vacancies in courts³¹⁸.

French judges are professionals who have been trained for their office since the conferment of their *licence*³¹⁹. The composition of the Court of Cassation changes slowly, and the opinions of the Court are the result of a collective work³²⁰. In all the courts of Louisiana, at least half of the judges has been elected less than seven years before, and a lot of the judges elected to the appellate court were practicing attorneys before³²¹. Most importantly, judicial opinions are usually prepared by a single judge; therefore they express the view of an individual and not of an anonymous court like in France³²². Therefore it is key for the attorney to know the name of the opinion's author, so that he can understand the weight of the opinion itself on future judgments³²³. In France, interpretation and consequent application of the law may change without any previous warning sign and this is typical of any civil law jurisdiction³²⁴. Louisiana on the other hand is closer to the common law in this aspect, in fact concurring and dissenting opinions are usually the alarm bell of changes to come in the law³²⁵.

Since so many differences exist between judges in France and in Louisiana, it surprises that the jurisdiction of Louisiana still maintains some strong civil law trait. The main postulate is that the Code is the primary source of law while statutes only

³¹³ *Id.*

³¹⁴ *Id.* at 482-83.

³¹⁵ *Id.* at 483.

³¹⁶ M. E. Barham, *supra* note 311, at 483.

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.* at 488.

³²⁰ *Id.*

³²¹ M.E. Barham, *supra* note 311, at 488.

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Id.*; see also V. V. Palmer, *supra* note 2, at 272-74.

define particular matters³²⁶. This does not prevent few lawyers, professor and judges from recognizing the traditional common law impact of *stare decisis* to Louisiana's jurisprudence, but a larger number of them believes that jurisprudence has no more weight than doctrine, therefore it is secondary to the Code and statutes³²⁷. An exception is made for that jurisprudence which, through continued reference, has become accepted as a customary source of law³²⁸. Louisiana's jurisprudence is more articulate than the concise French one, since the former is meant to teach, while the latter is only a record for trials³²⁹. Every Louisiana court of appeal and Supreme Court decision is published in official reports along with dissents and concurrences; the opinion has no relevance outside the case at hand, yet it frequently forecasts the result of future judgments in the same area³³⁰. It must be highlighted that such opinions are not binding upon future cases like in the rest of the United States, but only provide a guideline for future controversies in the same general area of law³³¹. As such, the rule of *stare decisis* does not officially exist in Louisiana.

In the 1970s, a movement called the civilian renaissance spread out among Louisiana courts. This movement brought more professionalism and expertise to the court and, as a consequence, reduced the influence of politics on the judiciary system³³². The change of course was brought by judges like Barham, Dixon, Dennis and Tate, all scholars with a profound knowledge and respect for the civilian tradition³³³. These justices not only were familiar with any civil law institute, but were also able to use the civil law as a dynamic instrument able to adapt to the changing social and economic conditions³³⁴.

The initial impulse for the revival of civil law in Louisiana came from Justices Mack Barham and Albert Tate, Jr., both on the Supreme Court during the 1970s³³⁵. Justice Barham presented the judicial revival's manifesto in a 1973 article published in the Louisiana Law Review³³⁶. In the article, he heralded the revival of Louisiana's civilian tradition, a heritage that he described as technique rather than substance³³⁷. A key aspect of that technique was the categorical repudiation of *stare decisis*, a common law doctrine which did not serve any present social need³³⁸. Justice Barham believed

³²⁶ M. E. Barham, *supra* note 311, at 483-84.

³²⁷ *Id.* at 484.

³²⁸ *Id.*

³²⁹ *Id.* at 485.

³³⁰ *Id.*

³³¹ M. E. Barham, *supra* note 311, at 485.

³³² S. C. Symeonides, *supra* note 182, at 101-02.

³³³ *Id.* at 101-02.

³³⁴ *Id.* at 102.

³³⁵ K. M. Murchison, *The Judicial Revival of Louisiana's Civilian Tradition: A Surprising Triumph for the American Influence*, 49 La. L. Rev. 1, 5 (1988) (describing the beginning of the civilian renaissance).

³³⁶ *Id.* at 6.

³³⁷ M. E. Barham, *A Renaissance of the Civilian Tradition in Louisiana*, 33 La. L. Rev. 357, 357 (1973) (containing the manifesto of the civilian renaissance in Louisiana).

³³⁸ *Id.* at 359.

that the Civil Code was substantially inadequate to solve the complex problems of modern society; therefore the judge had to appeal to his “legislative duties” by abandoning the traditional view that judges do not make law³³⁹. On top of that, Barham encouraged Louisiana judges to abandon the fiction that the meaning of unclear statutory provisions can be determined from legislative intent; instead, he favored modern judicial decisions capable of directly providing legislative instruments to solve the problems of modern society³⁴⁰. Barham also rejected the widespread idea that legal interpretation in the civil law is mechanistic and almost certain³⁴¹. Instead, he described the readiness to overrule prior decisions as an essential aspect of the civilian tradition³⁴². Additionally, even if he acknowledged the supremacy of legislation, Barham insisted on the importance of other sources of law³⁴³ and argued that judicial decisions had to be taken into consideration by their potential for producing beneficial effects on society³⁴⁴.

Justice Tate was especially concerned with the nature of the judicial function³⁴⁵. In over thirty years, he wrote many articles describing the judicial role from a multitude of perspectives³⁴⁶. Justice Tate further remarked the role of the Louisiana judge in shaping the law, making it more responsive to contemporary socio-economical needs³⁴⁷. Compared to Barham though, he was keener to recognize the American influence on Louisiana law³⁴⁸. Well aware that the Louisiana judiciary was an American creation, Tate often pointed out the importance of precedent for Louisiana lawyers and judges³⁴⁹. Even if sometimes he invoked the civilian doctrine of jurisprudence constante, he also sharply noticed that certain common law jurisdictions had developed techniques fairly similar to those of the civil law³⁵⁰. For Justice Tate, the legislative supremacy in the civilian tradition was not incompatible with the judge’s creative role³⁵¹. In fact he viewed the judge as the legislator’s right hand, actively involved in the process of drawing solutions for specific problems from abstract legislation³⁵². Indeed, judges had to engage in statutory construction not relying on logic alone, but also on policy considerations of what rule seemed to fit best the problem at hand³⁵³. Justice Tate’s theory of statutory interpretation was far more open-ended than Justice Barham’s one; in fact, Tate went as far as contending that the

³³⁹ *Id.* at 370.

³⁴⁰ *Id.* at 371.

³⁴¹ *Id.*

³⁴² M E. Barham, *supra* note 337, at 374.

³⁴³ Such as custom, reason, equity and doctrine. *Id.*

³⁴⁴ *Id.*

³⁴⁵ K. M. Murchison, *supra* note 335, at 8.

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ K. M. Murchison, *supra* note 335, at 8.

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *Id.* at 9.

judge could also ignore the formal wording of legislation if such wording failed to provide the legal principle necessitated for the particular case³⁵⁴. Obviously, Tate agreed with Barham on the fundamental role played by the judge's lawmaking process³⁵⁵. In particular, he advised for judicial lawmaking in three situations: when the law failed to furnish a rule, when a new legislative rule needed to be integrated with the existing legal framework, and finally when new social circumstances made the literal wording of the legislative rule obsolete or inappropriate³⁵⁶.

The Louisiana civilians put the accent on the judge's role in adapting the law to contemporary socio-economic conditions. This new class of judges was charismatic and authoritative and was often accused of "judicial legislation"³⁵⁷. The accusation was far from wrong, since these judges modernized many areas of laws, especially tort law³⁵⁸. Yet, they engaged in such activity knowing that they were simply overruling previous judicial interpretations of the Civil Code clearly inspired by the common law, hence they were restoring the original "civil" sense of provisions³⁵⁹.

6. Conclusion

Over a span of seventy years, Louisiana was subject to three different dominations. Americans came last, and inherited a territory enriched by a multitude of ethnicities and cultures that vehemently resisted to the repeated American attempts to uniform the local legal system with the rest of the Country.

Indeed, to give a complete picture of Louisiana's judiciary system is no easy task. The present essay only provided with a glimpse of this beautifully complex mixed jurisdiction. Yet, an aspect becomes clear by diving into Louisiana's legal history, and that is the tenacious attachment of Louisianians to their civilian heritage and their strong will to preserve it, even by having to compromise with the common law. Such compromises consisted in the unique introduction of common law instruments in a civilian context, which then resulted in the subsequent evolution of those instruments into specifically "Louisianan" ones. One can only hope that the judges, lawyers, and scholars of that land will continue not only to defend their civil law heritage, but also to endorse that evolutionary process capable of producing unique institutions and legal devices.

³⁵⁴ *Id.*

³⁵⁵ K. M. Murchison, *supra* note 335, at 9.

³⁵⁶ *Id.* at 9-10.

³⁵⁷ S. C. Symeonides, *supra* note 182, at 102.

³⁵⁸ *Id.*

³⁵⁹ *Id.*