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REPORT ON THE STATE OF LOUISIANA TO THE SECOND THEMATIC CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW

*Agustin Parise**

This Report was presented at the Second Thematic Congress of the International Academy of Comparative Law in Taipei City, Taiwan, on May 24, 2012. It was presented as an annex to the *US National Report*. This Report provides answers to the questionnaire presented by the General Reporter to the session on *The Scope and Structure of Civil Codes: The Inclusion of Commercial Law, Family Law, Labour Law and Consumer Law*.

I. OVERVIEW OF LOUISIANA PRIVATE LAW LEGISLATION¹

Louisiana is the only state that is considered to be a member of the Romano-Germanic family.² It is the only state with a civil code that originally followed the tenets of nineteenth-century continental European codes. As in other civil law³ jurisdictions, Louisiana's code governs, among other things, obligations and family law. The reforms to the civil code, as well as its interaction with other areas of law and with the activities of the judiciary, provide a basis for regarding Louisiana as a mixed jurisdiction.⁴ In other areas, such as procedure and criminal law, common law approaches predominate.

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1. See generally Agustin Parise, *Codification of the Law in Louisiana: Early Nineteenth-Century oscillation between Continental European and Common Law Systems*, 27 TUL. EUR. & CIV. L.F. 133–164 (2012).

2. René David, when referring to Louisiana, indicated that it is “ruled by mixed laws, borrowing certain elements from the common law but, to a certain extent, retaining [its] membership in the Romano-Germanic family.” RENÉ DAVID & JOHN E. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW* 59–60 (1968).

3. The terms “Civil Law,” “Romano-Germanic,” and “Continental European” will be used indistinctly to refer to the prevailing system of private law that applies in Louisiana.

4. As early as the 1930s, scholars debated whether Louisiana should still be considered a civil law jurisdiction. The debate generated a movement towards the enhancement of the civil law. See Kenneth M. Murchison, *The Judicial Revival of Louisiana's Civilian Tradition: A Surprising Triumph for the American Influence*, 49 LA. L. REV. 1, 3–4 (1988); Gordon Ireland, *Louisiana's Legal System Reappraised*, 11 TUL. L. REV. 585 (1937); Harriet Spiller Daggett et al., *A Reappraisal Appraised: A Brief for the Civil Law of Louisiana*, 12 TUL. L. REV. 12 (1937); Paul Brosman, *A Controversy and a Challenge*, 12 TUL. L. REV. 239 (1938).

II. ABOUT THE LOUISIANA CIVIL CODE⁵

The Louisiana Civil Code is a revision of the Civil Code of 1870, which itself was a revision of the Civil Code of 1825. Louisiana used codification as a way of preserving its continental European heritage. Due to cultural and economic interests, early inhabitants opted for those principles to protect property rights they had received during the pre-American period.⁶ Since the early 1800s, Louisiana has been an isolated “Civil Law island” partially surrounded by a “sea of Common Law.”⁷ This motivated Louisianans to opt for revision and decodification, instead of recodification, as a way of modernizing the Louisiana Civil Code in order to match current standards and remain competitive with the other states of the Union. A recodification might have been perceived as a complete and drastic break with the past and, therefore, a threat to a fragile collective identity.

One of the first steps towards codification was made in 1806. The legislature directed the drafting of a civil code that would “make the civil law by which this territory is now governed, [its] ground work.”⁸ In 1808, they promulgated a *Digest of the Civil Laws now in force in the territory of Orleans* (“Digest of 1808”).⁹ The Digest of 1808 was based on an array of sources; it is debated whether they were predominantly French or Spanish law.¹⁰

In 1822, the legislature appointed Pierre Derbigny, Edward Livingston, and Louis Moreau-Lislet to revise the text of the Digest of 1808.¹¹ They prepared a draft and presented it to the legislature, which made it effective in 1825.¹² The resulting civil code sparked considerable interest in the rest of the Union, which was beginning to consider codification.

The Civil War, the abolition of slavery, and the great economic transformation of the United States led to a revision of the 1825 text.¹³ A draft

5. See generally Olivier Moréteau & Agustín Parise, *Recodification in Louisiana and Latin America*, 83 TUL. L. REV. 1103, 1120 (2009).

6. J.R. Trahan, *The Continuing Influence of le Droit Civil and el Derecho Civil in the Private Law of Louisiana*, 63 LA. L. REV. 1019, 1024 (2003); RICHARD HOLCOMBE KILBOURNE, A HISTORY OF THE LOUISIANA CIVIL CODE: THE FORMATIVE YEARS 1803-1839, at 41 (1987).

7. Agustín Parise, *Non-Pecuniary Damages in the Louisiana Civil Code Article 1928: Originality in the Early Nineteenth Century and Its Projected Use in Further Codification Endeavors* 14 (May 18, 2006) (unpublished LL.M. thesis, Louisiana State University, Paul M. Hebert Law Center) (on file with the LSU Law Library).

8. 1806 La. Acts 214–19.

9. 1808 La. Acts 122. See generally A DIGEST OF THE CIVIL LAWS NOW IN FORCE IN THE TERRITORY OF ORLEANS, WITH ALTERATIONS AND AMENDMENTS ADAPTED TO ITS PRESENT SYSTEM OF GOVERNMENT (1808).

10. Compare Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 4 (1971), with Robert A. Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 TUL. L. REV. 603 (1972). See Alain Levasseur, *Grandeur or Mockery?*, 42 LOY. L. REV. 647 (1997); John W. Cairns, *The de la Vergne Volume and the Digest of 1808*, 24 TUL. EUR. & CIV. L.F. 31, 74 (2009). See also Agustín Parise, *A Constant Give and Take: Tracing Legal Borrowings in the Louisiana Civil Law Experience*, 35 SETON HALL LEGIS. J. 1 (2010).

11. Ira Flory, *Edward Livingston's Place in Louisiana Law*, 19 LA. HIST. Q. 328, 346 (1936).

12. See generally LA. CIV. CODE (1825).

13. See A. N. Yiannopoulos, *The Civil Codes of Louisiana*, in 1 LOUISIANA CIVIL CODE 2010 EDITION liii, lxvi-lxii (A. N. Yiannopoulos ed., 2010).

was directed and produced in 1869, and the legislature adopted it without major changes in 1870.¹⁴ That revised text survived with minor changes until the 1970s. At that time, an on-going revision process of the Louisiana Civil Code was started, and it was estimated, by 2003, that seventy-two percent of the nineteenth-century text had been revised.¹⁵

Although Louisiana has a civil code, it too has a large compilation of special law like other states. In Louisiana, that compilation is known as the Revised Statutes. It is arranged in titles running in alphabetic order and extending from one to fifty-six. Some of these titles are called codes, like Title 22 (Insurance Code) and Title 31 (Mineral Code). Particularly important for private law is Title 9, which contains what are called civil code ancillaries. The structure of Title 9 runs parallel to that of the code, and contains provisions that may be seen as a product of decodification, such as the Trust Code.¹⁶

III. THE LOUISIANA CIVIL CODE AND CONSTITUTIONAL LAW

Louisiana is subject to the supremacy of federal law, as is any other state in the Union. Louisiana built into its state constitution an unusual provision designed to protect the state's autonomy in prescribing its own law. The state's constitution of 1812 provided that "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 the several provisions of the laws it may enact."¹⁷ The current constitution of 1974 provides in similar lines that "no system or code of laws shall be adopted by general reference to it."¹⁸ That provision could have been designed to prevent the encroachment of the common law system in Louisiana,¹⁹ but it serves just as well to prevent the wholesale transplantation of foreign civil codes.

IV. CONTENTS OF THE LOUISIANA CIVIL CODE

The structure and content of nineteenth-century civil codes in Louisiana was in harmony with that of other contemporaneous codification endeavors. The structure in Louisiana followed the model provided by the *Code Napoléon*, a situation that also took place with other civil codes in Latin American countries. The Louisiana Civil Code is divided into 1) Preliminary Title; 2) Book I, of persons; 3) Book II, of things and the different modifications of ownership; 4) Book III, of the different modes of

14. See JOHN RAY, *THE CIVIL CODE OF THE STATE OF LOUISIANA, REVISED, ARRANGED AND AMENDED VII* (1869); *THE REVISED CIVIL CODE OF THE STATE OF LOUISIANA III* (1870).

15. Vernon Valentine Palmer, *The French Connection and The Spanish Perception: Historical Debates and Contemporary Evaluation of French Influence on Louisiana Civil Law*, 63 LA. L. REV. 1067, 1112 (2003).

16. LA. REV. STAT. ANN. §§ 9:1721–2252 (2012).

17. LA. CONST. of 1812, art. IV, § 11. See *THE FIRST CONSTITUTION OF THE STATE OF LOUISIANA* 19 (Cecil Morgan ed., 1975) [hereinafter *THE FIRST CONSTITUTION*]; Dale E. Bennett, *Louisiana Criminal Procedure—A Critical Appraisal*, 14 LA. L. REV. 11, 11 (1953).

18. LA. CONST. art. III, § 15.

19. *THE FIRST CONSTITUTION*, *supra* note 17, at 12.

acquiring the ownership of things; and 5) Book IV, of conflict of laws.²⁰ Each book is divided, when pertinent, into titles, chapters, sections, subsections, paragraphs, and articles. The numeration of the latter extends from 1 to 3556.²¹

V. THE LOUISIANA CIVIL CODE AND COMMERCIAL LAW

Louisiana does not have a commercial code.²² In the 1820s, Moreau-Lislet, Derbigny, and Livingston drafted a commercial code that was never adopted due to changes in the legislative interests of the state.²³ That draft used the French *Code de commerce* as a model both for form and substance, yet had several original elaborations, and recurrently reflected common law influences.²⁴

Louisiana resisted adoption of the Uniform Commercial Code, but now has largely capitulated to it. Exceptions are found in Articles 2 (Sales) and 6 (Bulk Sales) of the UCC. In revising the Louisiana Civil Code, Article 2 was considered, and some ideas from it were introduced into the Louisiana text.²⁵ In making those changes, the legislature declared it had adopted “whatever provisions were thought useful, regardless of the source, yet [adapted] the language of those provisions to fit the civilian mould and the plan of the Louisiana Civil Code. The result is a modern sales scheme that fits well in Louisiana’s civil law tradition while at the same time adequately serving the personal and commercial needs of Louisiana citizens.”²⁶

VI. THE LOUISIANA CIVIL CODE AND CONSUMER LAW

The Louisiana Civil Code includes protections for consumers, but special laws supplement them and have led to substantial decodification.²⁷ The code provides a general warranty provision against redhibitory defects, dealt in Chapter 9, Title 7, Book III. According to article 2520, defects are redhibitory when the buyer, had he known of the defect, would have not bought the thing or would have paid a lesser price for it.²⁸

20. LOUISIANA POCKET CIVIL CODE—2010 EDITION (Alain Levasseur ed., 2010). See the description and assessment of the structure and content of the current Louisiana Civil Code in Robert A. Pascal, *Of the Civil Code and Us*, 59 LA. L. REV. 301, 302–07 (1998).

21. That numbering also includes blank and repealed articles.

22. Title 10 of the Revised Statutes, however, may be referred to as “Uniform Commercial Code.” LA. REV. STAT. ANN. §§ 10:1–101 (2012).

23. RICHARD HOLCOMBE KILBOURNE, *LOUISIANA COMMERCIAL LAW: THE ANTEBELLUM PERIOD* 29–33 (1980). See generally *COMMERCIAL CODE FOR THE STATE OF LOUISIANA* (1825).

24. Max Nathan, *In Search of a Missing Link: Edward Livingston and the Proposed Code of Commerce for Louisiana*, 48 TUL. L. REV. 43, 48 (1973); KILBOURNE, *supra* note 23, at 29, 67–69. See also ISAAC SMITH HOMANS, *A CYCLOPEDIA OF COMMERCE AND COMMERCIAL NAVIGATION, WITH MAPS AND ENGRAVING* 394 (2d ed. 1859).

25. David Gruning, *Bayou State Bijuralism: Common Law and Civil Law in Louisiana*, 81 U. DET. MERCY L. REV. 437, 458 (2004).

26. H.B. 106, 1993 La. Sess. Law Serv. 841 (West).

27. Additional codified tools for consumer protection can be found in the law of obligations (art. 1758) and in the law of torts (art. 2315) of the Louisiana Civil Code.

28. LOUISIANA POCKET CIVIL CODE, *supra* note 20, art. 2520.

Louisiana has special consumer laws that parallel those in other states and in comparable numbers. So there is, among others, a Louisiana Unfair Trade Practices and Consumer Protection Law,²⁹ a Louisiana Consumer Credit Law,³⁰ and a Louisiana Products Liability Act.³¹

VII. THE LOUISIANA CIVIL CODE AND FAMILY LAW

Family law provisions, since the enactment of the Digest of 1808, have occupied a paramount position in Book I of the civil codes. For example, Book I, Title 4, deals with marriage; Title 5 addresses divorce and its effects (e.g., spousal support, child custody, child support); Title 7 explains filiation and parental authority, including filiation by adoption; and Title 8 addresses tutorship. Matrimonial regimes, however, found their place in Title 6, Book III.

Specificity and developments both in the civil law of Louisiana and in the common law of sister states generated the elaboration of provisions outside the code, forcing a decodification process. For example, a Children's Code promotes "the stability of the family and . . . secure[s] simplicity in procedure, fairness in adjudication and administration, and the elimination of unjustifiable delay."³² Also, Title 9 on civil code ancillaries of the Revised Statutes governs sensitive areas such as human embryos,³³ covenant marriage,³⁴ child support,³⁵ post-separation family violence,³⁶ and removal of personal property.³⁷ In Louisiana, same-sex marriages cannot be celebrated,³⁸ and those from sister states cannot be recognized as valid.³⁹

VIII. REFORMS TO THE LOUISIANA CIVIL CODE

The Louisiana State Law Institute ("LSLI") is responsible for keeping the Louisiana Civil Code up-to-date while also initiating and recommending most revision efforts. The Institute was created in 1938 as an "official advisory law revision commission, law reform agency and legal

29. LA. REV. STAT. ANN. § 51:1401 (2012). See Paul L. Zimmering, *Louisiana's Consumer Protection Law—Three Years of Operation*, 50 TUL. L. REV. 375 (1976); Zachary I. Rosenberg, *Consensus at Last: The Broadening of LUTPA Standing in Cheramie v. Shell Deepwater Production*, 85 TUL. L. REV. 1121 (2011).

30. LA. REV. STAT. ANN. §§ 9:3510–77.8 (2012).

31. LA. REV. STAT. ANN. §§ 9:2800.51–60 (2012).

32. LA. CHILD. CODE ANN. art. 102. (1992). The code took effect on January 1, 1992. H.B. 939, 1991 La. Sess. Law Serv. 235 (West).

33. LA. REV. STAT. ANN. §§ 9:121–33 (2012).

34. Covenant marriages, pioneered by Louisiana, have been addressed inside the Louisiana Civil Code (arts. 102 and 103), but also outside the code (LA. REV. STAT. ANN. § 9:272). See Katherine Shaw Spaht, *What's become of Louisiana Covenant Marriage through the Eyes of Social Scientists*, 47 LOY. L. REV. 709 (2001).

35. LA. REV. STAT. ANN. §§ 9:315–315.48 (2012).

36. LA. REV. STAT. ANN. §§ 9:361–69 (2012).

37. LA. REV. STAT. ANN. § 9:373 (2012).

38. LA. CONST. art. XII, § 15.

39. LOUISIANA POCKET CIVIL CODE, *supra* note 20, art. 3520.

research agency.”⁴⁰ Although some states have law revision commissions, the LSLI has a clearer charge and greater role than those commissions. In 1948, the Louisiana legislature instructed the LSLI to prepare a comprehensive revision of the text of the civil code of 1870.⁴¹ With that same purpose in the 1960s, the LSLI created a civil-law section to accomplish a revision and to advance the civil law.⁴² In the 1970s, the LSLI began a title by title revision, which continues to this day.⁴³

IX. PLACE OF THE LOUISIANA CIVIL CODE⁴⁴

Louisianans are familiar with a codified system that states their private law needs. Lay people are aware that the core of private law dispositions are dealt with in the Louisiana Civil Code.⁴⁵ Louisiana law practitioners, though knowing that private law provisions are also dealt with outside of the code, are well trained in seeking for solutions in the codified text.⁴⁶ A generalized familiarity with the code is a result of this scenario: a scenario,

40. 1938 La. Acts 429–33.

41. 1948 La. Acts 810.

42. A.N. Yiannopoulos, *The Civil Law Program of the Louisiana State Law Institute*, 12 LA. B.J. 89, 90 (1964).

43. Saúl Litvinoff, *Codificación en Louisiana, in 2 LA CODIFICACIÓN: RAÍCES Y PROSPECTIVAS* 127, 135 (2004); William E. Crawford & Cordell H. Haymon, *Louisiana State Law Institute Recognizes 70-Year Milestone: Origin, History and Accomplishments*, 56 LA. B.J. 85, 91–92 (2008). The revision to the Code includes changes to the following:

1) Preliminary Title: Chapters 1 and 2 (1987), Chapter 3 (1987 and 1991);

2) Book I: *Title I—Natural and Juridical Personas* (1987), *Title II—Domicile* (2008), *Title III—Absent Persons* (1990), *Title IV—Husband and Wife* (1987), *Title V—Divorce* (1990, 1993, and 1997), *Title VI—Of Master and Servant* (repealed in part in 1993), *Title VII—Parent and Child* (1993), Chapters 1–3 (1976, 2005), Chapter 4 (2008), *Title VIII—Minors, of their Tutorship and Emancipation*, Chapter 2 (2008), *Title IX—Persons Unable to Care for Their Persons or Property* (2000), *Title X—Of Corporations* (repealed in part in 1993);

3) Book II: *Title I—Things*, *Title II—Ownership*, *Title III—Personal Servitudes*, *Title IV—Predial Servitudes*, *Title V—Building Restrictions*, *Title VI—Boundaries* (all revised from 1976 to 1979), *Title VII—Ownership in indivision* (added in 1990);

4) Book III: *Preliminary Title* (1981), *Title I—Of Successions*, Chapters 1–3 (1981), Chapters 4–6 and 13 (1997), *Title II—Of Donations Inter Vivos and Mortis Causa*, Chapter 1 (2008), Chapter 2 (1991), Chapter 3 (1996), Chapter 4 (2001), Chapter 5 (2008), Chapter 6 (1997 and 2001), Chapters 8 and 9 (2004), *Title III—Obligations in General* (1984), *Title IV—Conventional Obligations or Contracts* (1984), *Title V—Obligations arising Without Agreement*, Chapters 1 and 2 (1995), *Title VI—Matrimonial Regimes* (1979), *Title VII—Sale* (1993), *Title IX—Of Lease*, Chapters 1–4 (2004), *Title XI—Partnership* (1980), *Title XII—Of Loan* (2004), *Title XIII—Deposit and Sequestration* (2003), *Title XV—Representation and Mandate* (1997), *Title XVI—Suretyship* (1987), *Title XVII—Compromise* (2007), *Title XXII—Mortgages* (1991, 1992, and 2005), *Title XXII-A—Of Registry* (2005), *Title XXIII—Occupancy and Possession* (1982), *Title XXIV—Prescription*, Chapters 1–3 (1982), Chapter 4 (1983), *Title XXV—Of the Signification of the Sundry Terms* (1999); and

5) Book IV (added in 1991).

See Yiannopoulos, *supra* note 13, at lxvi–lxix. See also Moréteau & Parise, *supra* note 5, at 1118–19.

44. See generally Moréteau & Parise, *supra* note 5, at 1161–62.

45. See, e.g., TENNESSEE WILLIAMS, A STREETCAR NAMED DESIRE (New Directions 1947).

46. For example, the local bar examination differs from that of other states. Candidates are not tested on the Multistate Bar Exam but are tested in, among others, civil code subjects. As tested in Louisiana, the first three subjects that are listed (out of nine) are entitled *Civil Code I, II, and III*. See James R. Maxeiner, *Uniform Law and Its Impact on National Laws Limits and Possibilities*, in REPORTS TO THE INTERMEDIARY CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW 34 (2011); *Rule XVII Admission to the Bar of the State of Louisiana*, LASC.ORG § 7, <http://www.lasc.org/rules/supreme/RuleXVII.asp> (last visited Dec. 2, 2012).

however, that has not prevented the development of new codes or special legislation outside the Louisiana Civil Code. Some provisions incorporated by Louisiana have a common-law origin or have been generated as practices in sister states. As a result, Louisiana is sensed to some extent as a mixed jurisdiction, especially with regards to practice before courts. This Report, however, shows that the state-enacted laws spin around what is, in Louisiana, the center of private law: the Louisiana Civil Code.

The content of the Louisiana Civil Code presents interesting features: it is applicable in a mixed jurisdiction, and it is drafted in the English language. This interaction of systems may be valued by jurists and businessmen who intend to implement continental European principles while undertaking their practices in the common law and vice versa. In addition, the *lingua franca* is now English. Scholars both of continental European and common law systems may reach to Louisiana for civil-law terminology in English. For example, the co-author of an English translation of the *Catala Avant-Projet of the French Law Obligations and the French Law of Prescriptions* stated that civilian concepts such as *solidarity* and *confusion* should not be translated or interpreted with common-law terminology because they could easily generate misunderstandings.⁴⁷ It must be acknowledged that there is a valuable know-how in Louisiana civil-law scholars.⁴⁸ The more than two hundred-year old tradition of English language civil-law codification in Louisiana should be valued.⁴⁹ The European Union is exploring changes in civil codes,⁵⁰ and the revisions of civil codes of member states (or the drafting of a uniform text) could benefit from the Louisiana experience.

47. Alain Levasseur & Vicenc Feliu, *The English Fox in the Louisiana Civil Law Chausse-Trappe: Civil Law Concepts in the English Language; Comparativists Beware*, 69 LA. L. REV. 715, 735-39 (2009).

48. *Id.*

49. See Olivier Moréteau, *Les frontières de la langue et du droit*, in REVUE INTERNATIONALE DE DROIT COMPARÉ 695 (2009).

50. Agustín Parise, *Derrotero hacia un código civil europeo*, LA LEY 6 (Feb. 14, 2011) (Arg.).

