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The Survival of Civil Law in North America: The Case of Louisiana

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Louisiana, with its civil law heritage, can be characterized today as a mixed jurisdiction. Professor Carbonneau describes the civilian elements of Louisiana law and speculates about the future.

Introduction

There are legitimate historical reasons for speaking seriously about a civil law heritage in Louisiana. French and Spanish civilian influences permeated the Louisiana Civil Code when it was first enacted in 1808. The current status of the civil law in Louisiana, however, is problematic; the American common law methodology has made significant inroads into the operation of the current legal system. Separated from its parenting source by geography, time, and culture, Louisiana civil law has become an ill-defined civilian entity that, in reality, is more of a common law process with civil law trappings. The civil law nonetheless has a destiny in Louisiana and other American jurisdictions. The development of international trade and commerce creates a global need to accommodate and merge different legal traditions. The future mission of the civil law in North America may reside in its ability to provide a sensible procedural and substantive model of law for the resolution of international commercial disputes.

I. Contemporary Status of Civil Law in Louisiana Legal Culture

A. The Four Law Schools

Louisiana State University, Loyola University, Southern University, and Tulane University each teach a hybrid curriculum that gives students

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the option of selecting a civil law track. Otherwise, these schools are fairly typical American institutions for legal instruction in terms of faculty and students, with perhaps more attention given in the curriculum to the comparative and transnational dimension of law. Such instruction is not necessarily integrated into the general approach to teaching, and can remain a specialty approach and offering. Tulane, because of its comparatively higher tuition charges, draws fewer Louisiana students than other law schools in Louisiana, and many fewer students admitted to Tulane opt for the civil law track and curriculum.

The perception among students and faculty, to some degree, is that civil law is Louisiana law and is therefore local law. National standards and reputation as well as considerations of employment dictate that attention be devoted to more national legal training. The civil law curriculum, unfortunately, is not seen as an opportunity for exposure and training to a more universal form of legal education.

Practical considerations of law school governance, however, do have an impact upon perceptions of and commitment to the civil law of Louisiana, making the recruitment of Louisiana students important for maintaining the relationship with the local bar and alumni. There is also a traditional academic commitment to Louisiana civil law. At least part of the faculty at each institution is deemed to be "civilian," and they have a vested interest in sustaining their professional specialty.

B. The Louisiana Law Institute, Law Council, and the Legislature

The machinery for adapting the civil law heritage to the circumstances of contemporary Louisiana society is in place. The process, however, is informed by variegated considerations and sometimes dichotomous agendas.

The Louisiana Law Institute is dedicated to the integrity and reformulation of Louisiana civil law. Various committees, composed of law professors and legal practitioners, undertake the study of and recommend amendments to sections of the Louisiana Civil Code, Code of Civil Procedure, and Code of Evidence. For example, the Marriage-Persons Committee deals with Book One of the Civil Code and has made significant recent changes in the law of persons as it relates to marriage.

Proposals made by Law Institute committees are considered by the Law Council for ultimate recommendation to the legislature. The Council is a prestigious body, consisting primarily of distinguished legal practitioners, state and federal judges, and a number of legal academics. Proposals made by Law Institute committees are not necessarily adopted by the Law Council or accepted *in haec verba*. Discussions can be lengthy, and recommended changes can be obliterated entirely. When negative action

ensues, the proposal can be redrafted or abandoned by the committee or can be introduced by a sympathetic legislator to the legislature without Law Council approval.

Adroit political action and consensus-building are of central importance, not only within a committee or the Council, but also (obviously) within the legislature. As a rule, the Law Institute committees and the Council are more sensitive to the "civilian integrity" of law than are the various components of the state legislative process. Legislators are more attuned to pragmatic dictates and, by and large, have little in-depth regard for the edifice of the civil law. A recent debate about forced heirship illustrates the point. One position believes that forced heirship (*la réserve héréditaire*) should be disregarded because of the popular disaffection with it and because it makes Louisiana unattractive as a state in which to settle. The other position believes forced heirship should be maintained because it is an integral part of the civil law heritage. Which attitude is the better disposition is a subject of legitimate debate.

C. The Bench and the Bar

Judges are elected at all levels of the state judicial system. The quality of judges is highly variable; dockets are crowded, and little attention is or can be devoted to the question of the integrity of the civil law. Attorneys must function in both the federal and state court systems; therefore, they must be acquainted with both civil law and common law. Common law, American-style procedure, appears dominant, however. For example, because of choice of law clauses, business transactions from outside the state usually are governed by the Uniform Commercial Code rather than the Louisiana Law of Obligations.[1]

There is also the constraint of U.S. constitutional federalism, requiring conformity to substantive and procedural due process. Judicial opinions in many substantive areas are essentially cast in an American common law style of presentation; the opinions are lengthy, discursive, and case-oriented. Hearings and other matters of procedure are controlled and regulated by the adversarial ethic and due process standards that apply in other American jurisdictions. Finally, as discussed above, the training of lawyers in law schools and law firms is largely done in the typical American manner.

II. The Ideology and Identity of Louisiana Civil Law

There are historical reasons to speak seriously about Louisiana Civil Law. The Civil Code has accompanied the genesis and evolution of the

1. On January 1, 1990, article 9 of the Uniform Commercial Code was adopted. LA. REV. STAT. ANN. § 10-9-101-605 (West 1990).

state legal system, emerging from French and Spanish civilian influences. There remains also a civil law style in Louisiana and some amount of lip service to the civilian tradition. Whether a rebirth of civil law is taking place, or whether there are merely academic and some judicial vestiges and relics of the civil law are questions that are more directed and poignant, as well as more difficult to answer.

There is an authentic Civil Code, drafted primarily by academic lawyers with foreign legal credentials (Litvinoff and Yiannopoulos), which has both the trappings and content of a European civil code. The Code of Civil Procedure is a much less viable civil law instrument or document, being heavily influenced by the Federal Rules of Civil Procedure in its latest versions. There is in most aspects of Louisiana law simultaneously a departure from and a continuing link to the European civil law parent. The link is fading increasingly, and the identity of Louisiana civil law is more and more sui generis.

III. Geopolitical Factors

Louisiana is beset by economic problems as a result of the collapse of the oil market. Primary political attention at the executive and legislative levels, therefore, is devoted to issues of economic survival and revival rather than to the intricacies of juridical culture. Louisiana also has one of the highest levels of illiteracy in the United States, making it difficult for cultural manifestations and developments of a sophisticated nature to serve as an anchor in the larger community or to survive in the larger culture. For commercial and political reasons, then, there must be an essential conformity to the basic tenets of the larger American legal culture. At the same time, there is little in the way of linguistic or cultural ties to the parenting civilian legal systems in Europe. This has contributed significantly to the retrenchment of the civil law culture in Louisiana, relegating it to a primarily historical relevance. As a result, there is a growing sense of isolation, defensiveness, and insecurity among civilians in Louisiana.

IV. The Question of Survival

Louisiana, and New Orleans in particular, are complex places in terms of population, culture, and community. Differences are accepted and tolerated, although there is a good deal of segregation among the various camps. The mixture of differences includes: northern versus southern Louisiana, Southern culture and civility, a strong Caribbean and Spanish

influence, black and white racial relations, and the uptown and "yat"[2] cultures.

The historical foundation for civil law has resulted in a unique (some might say bastardized) mix of legal cultures that could serve a vital role for the twenty-first century, different from the historical patterns of the nineteenth century.

The survival of the civil law in Louisiana is very questionable on its own terms. Demographic, linguistic, and political factors point to the triumph of the common law. Louisiana is no longer a mixed or hybrid jurisdiction, but rather a common law jurisdiction with some traces of a civil law influence. The fate appears inevitable and irreversible. That perception, however, is sterile and really begs the question. The real issue is not one of history, but of modernity: Is there any role left for the civil law in Louisiana in terms of the state's cultural, political, demographic, and linguistic constitution?

V. A Response to the Question of Survival

The internationalization of law and legal practice offers an opportunity to update, adjust, and adapt Louisiana's civil law heritage to the realities of contemporary society and to resurrect it from the ashes of historical memory. The national and international legitimacy of Louisiana civil law lies in its comparative law role as a means of bridging the gap between the two principal Western legal traditions. The familiarity with opposing legal concepts and methodology and the academic sophistication in teaching different branches of law could make Louisiana a training ground for American and European lawyers who wish to engage in the practice of transnational commercial law.

The renewed interface with European civilians might also buttress the civilian content of Louisiana law and give it greater relevance and presence in the local legal culture. Law schools in Louisiana have, in fact, used the civil law curriculum as a means of building an extensive program in comparative legal studies. The globalization of commerce and of national economies has given comparative law a new practical mission that should also serve the interest of civil law.

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2. The term "yat" is used to designate a group within the local population whose ancestors migrated to New Orleans in the early part of the twentieth century from Brooklyn, New York, to dig the canal system in the city and surrounding area. The present-day members of this group still speak with a pronounced Brooklyn accent and commonly greet each other with the phrase "where you at." Hence, the nomenclature of reference (when spoken quickly) "yat."

VI. Civil Law in North America

The question of the survival of civil law in Canada is related to the larger issue of Québec within the federated Canadian union. Québec has a much stronger cultural and linguistic basis in which to embed its civil law heritage. Also, the civil law heritage is part of a vibrant and evolving provincial culture that is fully established and is a dominant element in provincial life.

As to the integration of civil law in the United States in states other than Louisiana, if a foothold for the civil law is to be found, it also must emerge from the changing economic structures of the global community. Comparative law and courses in transnational law must become a staple within American law school curricula.

The vast majority of American law schools have traditionally envisaged courses in comparative and transnational law as electives and as part of an esoteric cultural component to the mainstay offerings. EEC unification, developments in Eastern Europe, the interrelation between stock markets, debt-financing schemes to the developing world are all factors that demand that lawyers of the twenty-first century be able to deal with and address the transborder implications of their commercial practices.

The question becomes one of unifying and making uniform both legal procedures and rules. The efforts in this direction must be preceded by an understanding of the basic differences and similarities between legal methodologies and traditions.

United States lawyers cannot simply export their legal culture into the international arena because of the imperialistic nature of such an endeavor and because the adversarial ethic is too costly and inefficient. United States law schools, therefore, must cease being insular and prepare attorneys for global legal practice. Civil law studies and a receptive attitude toward world legal traditions are essential to this enterprise.