Comparative Analysis of Preliminary Title in Spanish and American* Civil Codes

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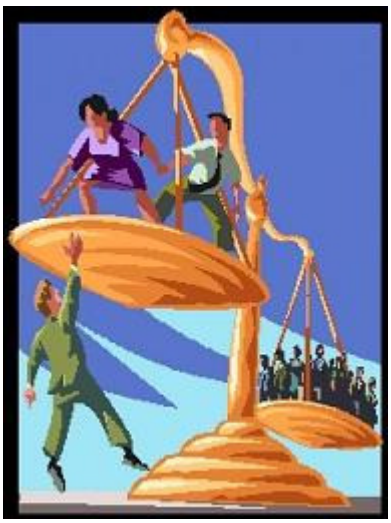
* Throughout this study, American Civil Code refers to the law in the state of Louisiana.

The magistrates are the ministers for the laws, the judges their interpreters, the rest of us are servants of the law, that we all may be free.
Marco Tullio Cicerone (106-43 B.C.), ancient Roman lawyer, politician, philosopher, writer and speaker.

"Nobody has a more sacred obligation to obey the law than those who make the law".
Sophocles (c. 496-406 B.C.), ancient Greek playwright.



Contents

1. Introduction. Legal Nature of Texts.

Before starting analysing both civil codes, it is necessary to offer some historical background information so as to understand their legal nature. This step is considered relevant to our analysis since it demostrates, or might demostrate, the fundamental and general differences between them which may go unnoticed to the reader.

The Spanish Civil Code was enacted in 1889. Its structure responds to the Roman-French plan as it is considered that the only possible objects of the law are people, things and actions. As such, it follows the plan adopted by the French (i.e., people, things and ways of acquiring) and consists of a preliminary title and four books. The books are divided into titles, titles into chapters, chapters into sections and sections into articles.

The Civil Code of Louisiana, whose first version appeared in 1808, is one of the documents with greater logic, coherence, unity, simplicity and clarity in the law of that State. The code has its roots in the French Civil Code of 1804. It consists of a preliminary title about law in general and four additional books (people, assets, acquisitions, transfers, losses on the right things and conflicts of law). To this day, Louisiana enjoys the distinction of being the only state in the United States to have a civil law system rather than a common law system.

Therefore, the ultimate goal of this paper is to compare the Preliminary Title in Spanish Civil Code with its American counterpart in terms of their cognitive structure, their legal interpretation, both their lexical and syntactic features and the presence of intertextuality in this kind of texts, if any, in an attempt to elicit their similarities and dissimilarities. For practical purposes, we shall call the first code as Law 1 (Spain) and the second one as Law 2 (Louisiana).

2. Textual Analysis: the Cognitive Structuring or Macrostructure.

The macrostructure represents the dominion of the text in its functional level, that is to say, how the elements of a textual typology operate. A text of legal nature has in its macrostructure a title, few chapters, articles and paragraphs that give a sequential order and a categorization of the topics (laws) to be treated as well as a declaration of principles, a logical development, an intentionality stated and a style to set out the contents. The use of titles which are divided into chapters reveals a taxonomy or classification of content in which some are subcategories of others. The non-use of titles, on the contrary, reveals a thematic structure organized in a simple sequential order.

Having said that, the macroestructure of both texts (see appendices) is as follows:

Law 1	Law 2
➢ The text reveals a sequential order: ◘ name of the code. ◘ preliminary title. ◘ three chapters. ◘ articles (7): numbered but without sub-titles. ➢ Structure: short introduction to go to a specific presentation dealt explicitly (general-specific). ➢ Long articles, long paragraphs in 8-10 lines aprox. ➢ Complex interpretation.	➢ The order reveals some priority issues: sequential order. ◘ preliminary title. ◘ chapter (only one). ◘ articles (13): numbered and with sub- titles. ➢ Structure: the same as Law 1. ➢ Short articles in no more than 3 lines. No long paragraphs. ➢ Easy interpretation.

3. Sources of Law in Spain and Louisiana.

For both codes, the sources of law are custom and legislation. This means that judges in Spain and Louisiana are obligated to look first to written laws for guidance in reaching their decisions. However, in the case of Law 2, the court is forced to proceed according to the principles of equity in absence of legislation or custom. Equity provided remedies in situations in which precedent or statutory law (the laws enacted by the Parliament) might not apply or be equitable.

4. Comparative Legal Interpretation of Spanish and American Civil Codes.

Although similar in appearance, both legal codes differ in content, in what the texts say and/or comunícate to the reader. In other words to be more precise, the shortcomings or gaps in one are in abundance in the other. So, what do they say explicitly?. How do they differ?. What does one say that the other fails to say?. Lot of questions we want to answer briefly through a comparative legal interpretation of both texts.

Law 1 covers the following aspects/says explictly:

- Sources of law, custom and principles of law.
- Jurisprudence: *"[...]complementará el ordenamiento jurídico en la doctrina [...] que establezca el Tribunal Supremo"* (art. 1).
- Repealing and retroactivity of laws: "*Las leyes no se derogan por otras posteriores; "Las leyes no tendrán efecto retroactivo si no dispusieren lo contrario"* (art. 2).
- Application of norms: *"Las normas se interpretarán según el sentido propio de sus palabras"; [...] La equidad habrá de ponderarse en aplicación de las normas"* (art. 3).
- Law enforcement: *"La ignorancia de las leyes no excusa de su cumplimiento"* (art. 6).
- No ambiguity of language expressed implicitly except for the context of the law: "*Las normas se interpretarán según el sentido propio de sus palabras, en relación con el contexto ..."* (art. 3).

Law 2 covers the following aspects/says explicitly:

- Sources of law, legislation and custom.
- Principle of equity: "*When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity"* (art. 4).
- Repealing and retroactivity of laws: *"Laws are repealed, either entirely or partially, by other laws; A repealed [...] is expressed when it is literally declared by a subsequent law; It is implied when the new law contains provisions that are contrary to [...] those of the former law"* (art. 8).
- Law enforcement: *"No one may avail himself of ignorance of the law"* (art. 5).
- Unclear and ambiguous words: *"When the words of a law are ambiguous, their meaning must be sought by examining the context in which they occur and the text of the law as a whole"* (art. 12).
- Clear and unambiguous words: *"When a law is clear and unambiguous, [...] the law shall be applied as written and no further interpretation may be made"* (art. 9).

►►Through this analysis we can see a clear difference between Law 1 and Law 2: law the repealing of the law. On the other hand, Law 2 reveals the ambiguity of language whereas Law 1 does not explicity mention the clarity of words and what one can do when ambiguity occurs, except for the context of the law.

5. Legal language analysis: lexical and syntactic features.

Legal discourse is a highly specialized use of language requiring a special set of habits. This kind of writing is such a departure from our everyday usage of language that it is worthwhile to consider some of the specific characteristics of legal language to understand and interpret the law. Understanding why legal language is the way it is can help us to develop a sense of how language functions in legal discourse.

When we talk about legal discourse we mean that of a community made up of lawyers, judges, and all those involved in drafting laws. As such, there are different types of legal discourse: the language used between lawyers and clients (o between lawyers); the language of the courts; the language of law reports and academic texts and the language of legal documents as the subject that concerns us here. In this section, both a lexical and a syntactic analysis of Law 1 and 2 will carried out so as to show the clarity of language used, if any.

Law 1. Lexical, syntactic features:

- adverbial/prepositionalexpressions: "*en defecto de; "en relación con"*.
- widespread use of future constructions: "*entrarán en vigor";"se interpretarán"; "serán válidas; "se considerarán"; "deberán ejercitarse*".

Law 2. Lexical, syntactic features:

- widespread use of passive: "*can be derived from"; "literally declared by; "must be interpreted as"; "must be given"; "is made to"*.
- impersonal style (3rd person): *"no one may avail himself of ignorance of the law"*.
- nominalization: *"laws for the preservation of the public interest"; "the repealed of a repealing law does not revive the first law"*.
- parallel structures: *"when no rule for a particular situation can be derived from legislation or custom …"* (A or B); *"procedural and iterpretative laws apply both prospectively and retroactively"* (A and B).
- negation: "*custom may not abrogate legislation"*; "[…] *unless there is a legislative expression to the contrary"*.

6. Indexes of hybridation or intertextuality.

In Wikipedia (http://en.wikipedia.org/wiki/Intertextuality) the concept of intertextuality **(1)** is defined as *the shaping of texts' meanings by other texts. It can refer to an author's borrowing and transformation of a prior text or to a reader's referencing of one text in reading another*. It can be said that intertextuality is taking ideas, words, phrases or concepts as a source of inspiration and information, adding or expressing those same sources in different ways, putting an opinion, one view or another approach. In the analysis of legal discourse, intertextuality refers to the construction of discourse from a combination of other speeches, some from other disciplines. In this regard, intertextuality comes into play in the legal discourse because it speaks of what is legitimate or not taking into account the social situation, beliefs and values of a specific historical moment. This section will established the way in which intertextuality is expressed in Law 1 and Law 2, if any.

Firstly, according to Burgueño (2006), *the concept of intertextuality faces the texts as historical transformations of the past into the present. The kinds of speech tend to change directions using particular conventions and routines for texts finally naturalized. Change can also be done in creative ways with new configurations of elements of orders of discourse and new modes of intertextuality. An intertextual perspective that determines the inherent historicity of the texts need to relate to a theory of social and political change in order to investigate the changes of language within broader processes. […] The concept of intertextuality points to the productivity of texts, i.e., how the texts can be transformed and restructured existing conventions (genres, discourses) to generate new texts*. Having said that, intertextuality is manifested in the following ways: quotes, plagiarism and allusions. In its most restrictive way, Gérard Genette **(2)** defines these forms as:

> *"Co-presence of a relationship between two or more texts as the actual presence of a text in another. Its most explicit and literal form is quoted (with quotation marks, with or without specific reference) ... Plagiarism, which is a copy unreported but literal ... The reference, i.e., a statement which implies the full understanding of their perceptions regarding the other statement that necessarily this or that refers to their inflections, otherwise no perceptible"* (1982).

Having said that and focusing on the civil codes under discussion here, there is no sign of intextertuality in any of the texts we are studying and analyzing.

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(1) The concept of intertextuality was introduced into literary theory by poststructuralist Julia Kristeva in 1966. Kristeva's coinage of "intertextuality" represents an attempt to synthesize Saussure's structuralist semiotics — his study of how signs derive their meaning within the structure of a text — with Bakhtin's dialogism — his examination of the multiple meanings, or "heteroglossia," in each text and word — .

(2) See *Palimpsestes: La littérature au second degré*, 1982. Trad.: *Palimpsestos*, Taurus, 1989.

7. Conclusion.

To conclude briefly, the most relevant aspects of each text will be highlighted here which at the same time might differenciate them, where appropriate:

- The texts are similar (in appareance), but differ in content.
- There are shortcomings or gaps in one that are in "abundance" in the other (ambiguity of language).
- The methods to repealing laws represents their major difference.
- Legal language is a specialized language that requires a set of habits. Language in both texts is archaic peppered with formulated expressions and presented in fixed structures.
- Both texts occur in the generalization, the long sentence and redundancy.
- Intertextuality, the document within the document, is not observed in any of the civil codes under discussion.

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9. Appendices.

Código Civil Español: Título Preliminar
De las Normas Jurídicas, su Aplicación y Eficacia.

CAPÍTULO PRIMERO
Fuentes del Derecho

Artículo 1.

1. Las fuentes del ordenamiento jurídico español son la Ley, la costumbre y los principios generales del derecho.

2. Carecerán de validez las disposiciones que contradigan otra de rango superior.

3. La costumbre sólo regirá en defecto de Ley aplicable, siempre que no sea contraria a la moral o al orden público y que resulte probada.

Los usos jurídicos que no sean meramente interpretativos de una declaración de voluntad tendrán la consideración de costumbre.

4. Los principios generales del derecho se aplicarán en defecto de Ley o costumbre, sin perjuicio de su carácter informador del ordenamiento jurídico.

5. Las normas jurídicas contenidas en los tratados internacionales no serán de aplicación directa en España en tanto no hayan pasado a formar parte del ordenamiento interno mediante su publicación íntegra en el *Boletín Oficial del Estado*.

6. La jurisprudencia complementará el ordenamiento jurídico con la doctrina que, de modo reiterado, establezca el Tribunal Supremo al interpretar y aplicar la Ley, la costumbre y los principios generales del derecho.

7. Los Jueces y Tribunales tienen el deber inexcusable de resolver en todo caso los asuntos de que conozcan, ateniéndose al sistema de fuentes establecido.

Artículo 2.

1. Las Leyes entrarán en vigor a los veinte días de su completa publicación en el *Boletín Oficial del Estado*, si en ellas no se dispone otra cosa.

2. Las Leyes sólo se derogan por otras posteriores. La derogación tendrá el alcance que expresamente se disponga y se extenderá siempre a todo aquello que en la Ley nueva, sobre la misma materia, sea incompatible con la anterior. Por la simple derogación de una Ley no recobran vigencia las que ésta hubiere derogado.

3. Las Leyes no tendrán efecto retroactivo si no dispusieren lo contrario.

CAPÍTULO SEGUNDO
Aplicación de las Normas Jurídicas

Artículo 3.

1. Las normas se interpretarán según el sentido propio de sus palabras, en relación con el contexto, los antecedentes históricos y legislativos, y la realidad social del tiempo en que han de ser aplicadas, atendiendo fundamentalmente al espíritu y finalidad de aquéllas.

2. La equidad habrá de ponderarse en la aplicación de las normas, si bien las resoluciones de los Tribunales sólo podrán descansar de manera exclusiva en ella cuando la Ley expresamente lo permita.

Artículo 4.

1. Procederá la aplicación analógica de las normas cuando éstas no contemplen un supuesto específico, pero regulen otro semejante entre los que se aprecie identidad de razón.

2. Las Leyes penales, las excepcionales y las de ámbito temporal no se aplicarán a supuestos ni en momentos distintos de los comprendidos expresamente en ellas.

3. Las disposiciones de este Código se aplicarán como supletorias en las materias regidas por otras Leyes.

Artículo 5.

1. Siempre que no se establezca otra cosa, en los plazos señalados por días, a contar de uno determinado, quedará éste excluido del cómputo, el cual deberá empezar en el día siguiente; y si los plazos estuviesen fijados por meses o años, se computarán de fecha a fecha. Cuando en el mes del vencimiento no hubiera día equivalente al inicial del cómputo, se entenderá que el plazo expira el último del mes.

2. En el cómputo civil de los plazos no se excluyen los días inhábiles.

CAPÍTULO TERCERO
Eficacia General de las Normas Jurídicas

Artículo 6.

1. La ignorancia de las Leyes no excusa de su cumplimiento.

El error de derecho producirá únicamente aquellos efectos que las Leyes determinen.

2. La exclusión voluntaria de la Ley aplicable y la renuncia a los derechos en ella reconocidos sólo serán válidas cuando no contraríen el interés o el orden público ni perjudiquen a terceros.

3. Los actos contrarios a las normas imperativas y a las prohibitivas son nulos de pleno derecho, salvo que en ellas se establezca un efecto distinto para el caso de contravención.

4. Los actos realizados al amparo del texto de una norma que persigan un resultado prohibido por el ordenamiento jurídico, o contrario a él, se considerarán ejecutados en fraude de Ley y no impedirán la debida aplicación de la norma que se hubiere tratado de eludir.

Artículo 7.

1. Los derechos deberán ejercitarse conforme a las exigencias de la buena fe.

2. La Ley no ampara el abuso del derecho o el ejercicio antisocial del mismo. Todo acto u omisión que por la intención de su autor, por su objeto o por las circunstancias en que se realice sobrepase manifiestamente los límites normales del ejercicio de un derecho, con daño para tercero, dará lugar a la correspondiente indemnización y a la adopción de las medidas judiciales o administrativas que impidan la persistencia en el abuso.

Louisiana Civil Code: Preliminary Title

CHAPTER 1 - GENERAL PRINCIPLES

Art. 1. Sources of law
The sources of law are legislation and custom.

Art. 2. Legislation
Legislation is a solemn expression of legislative will.

Art. 3. Custom
Custom results from practice repeated for a long time and generally accepted as having acquired the force of law. Custom may not abrogate legislation.

Art. 4. Absence of legislation or custom
When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages.

Art. 5. Ignorance of law
No one may avail himself of ignorance of the law.

Art. 6. Retroactivity of laws
In the absence of contrary legislative expression, substantive laws apply prospectively only. Procedural and interpretative laws apply both prospectively and retroactively, unless there is a legislative expression to the contrary.

Art. 7. Laws for the preservation of the public interest
Persons may not by their juridical acts derogate from laws enacted for the protection of the public interest. Any act in derogation of such laws is an absolute nullity.

Art. 8. Repeal of laws
Laws are repealed, either entirely or partially, by other laws.
A repeal may be express or implied. It is express when it is literally declared by a subsequent law. It is implied when the new law contains provisions that are contrary to, or irreconcilable with, those of the former law.
The repeal of a repealing law does not revive the first law.

Art. 9. Clear and unambiguous law
When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature.

Art. 10. Language susceptible of different meanings
When the language of the law is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law.

Art. 11. Meaning of words
The words of a law must be given their generally prevailing meaning.
Words of art and technical terms must be given their technical meaning when the law involves a technical matter.

Art. 12. Ambiguous words
When the words of a law are ambiguous, their meaning must be sought by examining the context in which they occur and the text of the law as a whole.

Art. 13. Laws on the same subject matter
Laws on the same subject matter must be interpreted in reference to each other.