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CIVIL CODES AND CONSUMERS

Jason Kilborn[*]

The title of this part of our two-day symposium asks, *Le Code civil des Français—son passé peut-il assurer son avenir?* My response: *bien sur!* The vitality and vibrancy of the Civil Code and the civil law, in economic matters in particular, can be seen in part in the way in which the civil law has grown to deal with consumer concerns over the past two hundred years. The legal structures of France, Louisiana, and many other civil law jurisdictions have remained supple and ready to meet the challenges of modern economic growth—not by laboriously revisiting and revising the Civil Code, but by enriching it with ancillary legislation to address specific problems. This readiness to honor but overcome the boundaries of the Civil Code is an element of civilian legal structures that ought to be taken into account by World Bank analysts and other detractors of the civil law tradition.

Neither the 1804 *Code civil des Français* nor the Louisiana compilations of 1808, 1825, and 1870 took particular account of consumer issues—the age of consumerism was years or even decades in the future, both in Europe and in the United States. Indeed, consumer concerns remained largely at the margins of the law until the late twentieth century. Consumer purchasers received the same protections as their business counterparts, and "consumer law" was largely confined to basic provisions in sales law relating to lesion and redhibition in the civil law, and to rescission and unconscionability in the common law.

By the end of the twentieth century, though, the consumer economy underwent something like the transition from coal-generated steam power to nuclear fission virtually overnight. The deregulation and "democratization" of consumer credit gave masses of simple people access to a huge market of goods and

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services. Today, consumer spending drives two-thirds of the United States economy, and the economies of modern Europe are moving quickly in the same direction. The ability to "buy now and pay later" fuels this powerful economic force and creates serious and wide-ranging challenges to the legal order.

How do we protect unsophisticated consumer borrowers from sharp lending practices? How do we balance the need to control abusive interest rates with the legitimate needs of lenders to charge economically viable interest on smaller-scale consumer lending? In the end, how do we balance the seriousness and sanctity of contractual obligations with the need to provide relief to consumers unable to meet their credit obligations?

The law has sought to restrain overreaching by moneylenders for thousands of years, but how the civil law responded to the very different pressures of the modern consumer credit economy shows its strength and staying power. Consumer economics did not grind to a halt in the civil law world because civil codes contained insufficient provisions for consumer credit and prohibited economically viable higher interest rates. Instead, civil law systems reacted decisively and efficiently to the challenge at hand.

The primary point of potential conflict between civil codes and modern consumer credit practices was usury—maximum rates of allowable interest. Large-scale business lending continued despite restrictions on interest, but small-scale consumer lending could not continue on an economically viable basis at the mandated reduced rates. Usury restrictions hung on in Europe much longer than in the United States, but not because the civil law was somehow more resistant to change. The usury debate still rages in the United States and Europe on social, political, and religious grounds, but civilian doctrine has not stood in the way of consumer lending.

In Louisiana, for example, the legislature did not revise the civil code articles "On Loan" to deal in depth with the range of consumer lending practices. Instead, it acknowledged that such a vital institution deserved separate treatment, outside the Civil Code but consistent with its basic premises. This treatment appears in the Louisiana Consumer Credit Law, which regulates in great detail modern devices like revolving consumer loans, small short-term loans, and extreme-high-interest "payday

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lending." Our civil law jurisdiction allows vastly higher interest rates for these loans, despite the contrary policy of imposing a flat twelve percent limitation in the Civil Code. Our civil law system has proven flexible enough to accommodate modern economic development, unforeseen by the founders of our legal order.

Likewise, European civil law nations have also all but abandoned consumer interest restrictions. They have balanced, however, economic progress with concern for consumer protection. For example, the French *lois Scriveners* raised the roof on consumer interest restrictions in the late 1970s; consequently, the consumer credit economy took off like a rocket in the 1980s. The Civil Code and the civil law tradition with respect to limiting interest rates did not stand in the way of this economic progress. The French legislature accepted that their Civil Code need not burden nor be burdened by detailed consideration of consumer lending issues; but consumers nonetheless required protection. Thus, like in Louisiana, the French created the separate *Code de la Consommation* (Consumer Code)—a model of sensitive, balanced, and thoughtful economic legislation. The Germans also did not revisit their Civil Code to deal with modern consumer credit concerns, leaving those issues to the balanced but fully modern *Konsumentenschutzgesetz* (Consumer Protection Law). Similarly, without demanding changes in basic legal forms and structures, the European Union's Consumer Credit Directive has led to vast modernization and a move toward economic uniformity in the treatment of consumer lending issues in European civil law countries since the mid-1980s.

Indeed, the Civil Codes and their doctrine of protecting conventional obligations also did not stand in the way of the ultimate consumer protection for those overwhelmed by too much debt. A wave of consumer debt relief (bankruptcy) legislation has washed over Europe during the past decade. The French *Code de la Consommation* has proven flexible enough to accommodate the latest and most complex form of consumer credit protection with its provisions on *surendettement des particuliers* (consumer over-indebtedness relief). Many French academics criticized the new consumer over-indebtedness provisions as seriously undermining contract law and theory—yet, the French civil law system moved forward. Likewise, despite the complaints of some traditionalists, the Germans included separate treatment of consumer debt relief

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in their new *Insolvenzordnung* (Insolvency Act). These laws reacted to modern consumer economic developments quickly by evolving through both legislative reform and judicial interpretation over the past several years; they are continuing evidence of the richness and readiness of the response from civil law systems.

The proliferation of "mini-codes" and side legislation led John Merryman to observe a "decodification" of the civil law. But I do not believe that this is intended, nor should it be taken, as a comment on the waning of the Civil Code or its influence. To the contrary, these laws enrich the Civil Code and its adaptability to the challenges of modern economic society.

The fact that civil law countries are reflecting on these issues and passing new statutes shows that civil law systems respond to modern economic challenges just as flexibly—as a matter of form and often substance—as their common law counterparts. These "lagniappe" consumer laws, and many like them in other areas of economic concern, are analogous to similar laws in "Anglo-American Common Law" jurisdictions.

Indeed, such laws in the common law world are evidence of the effectiveness of the civil law approach to codifying policy rather than leaving it to the courts. The modern "age of statutes" in the United States—particularly in the realm of consumer law—reflects the influence of civilian modes of lawmaking. Additionally, the flexible way in which European courts have interpreted both code articles and extra-codal legislation on consumer credit and consumer protection issues reflects a sensitive view of legal theory and modern reality.

The substantive differences among economic law rules in various countries have virtually nothing to do with the classification of the judicial system as civil law or common law. If the World Bank seeks explanations for divergences in the treatment of economic issues among legal systems, it had better search more deeply than a superficial bifurcation of the world into civil law and common law systems. This facile categorization glazes over the real underlying historical, political, social, and religious differences that drive policymaking from country to country.

So I say that the future of the Civil Code and the civil law in

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general is vibrant, indeed. A Civil Code that established and accepted its boundaries and allowed for other laws to go beyond those boundaries to react to economic development certainly assured its future.

Vive le Code civil!

Thank you.

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