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New France: Law, Courts, and the *Coutume de Paris*, 1608-1760

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WITH ITS CIVIL LAW CODIFIED in the form of the *Coutume de Paris*, and an inquisitorial criminal procedure, the legal culture of New France differed dramatically from the English common law, being simultaneously transplanted to New England. From the establishment of a trading post at Quebec in 1608 to the surrender of Montreal in 1760, French law was received in the Canadian colony. Despite claims of the sovereign council that it had to register French laws for them to be in effect in the colony, its leading legal officials, the intendant and the attorney-general, were metropolitans and servants of empire who enforced all French legislation. Although the situation was different in continental Acadia and the fur trading territories in the west,[1] which had few formal administrative structures, the superior councils of Louisbourg and New Orleans applied the same law in Cape Breton and Louisiana. This essay deals with the Canadian colony in the St. Lawrence valley and aims to make the legal system of New France intelligible to readers more familiar with the English experience.

I. The Legal Heritage of France

The legal system adopted in New France was that of the French metropolis and reflected the growing power of the centralised state. This process was not linear and had been marked by strong popular and noble resistance. After the Hundred Years War (1337–1453), the French monarchy had embarked on a century of consolidation and expansion (1461–1559) at the expense of feudal landlords, municipalities, and the church. A centralised absolute monarchy failed to take form as in England, however, because the crown lacked the financial resources needed to establish an independent bureaucracy. The following century (1559–1653) became a period of crisis when many useful reforms could not be made effective because of dynastic and religious strife. Despite popular revolts in the 1630s, Cardinal Richelieu managed to pave the road toward absolute monarchy, through imposition of a harsh fiscal policy administered by a professional royal bureaucracy headed by provincial intendants. The advent of Louis XIV's personal reign (1661) marked a new period of consolidated political and administrative powers that would prove impervious to the weaknesses inherent in the regency of Philippe d'Orléans (1715–1723). During

[1] See *infra*, the essays by Jacques Vanderlinden, David Bell, Dale Gibson, Hamar Foster, Graham Price and Philip Girard.

the first half of the eighteenth century, French administrative monarchy reached a peak of efficiency. The attack on absolutist theory by *philosophes* (Montesquieu's *L' Ésprit des Lois*, published in 1748) began after 1750.[2] By then, France's Canadien colony was little influenced by this or any other critique from France, since the English Conquest (1760) would sever most remaining institutional and intellectual ties to the metropolis.[3]

Since the middle ages, French judicial administration had been hampered by a multiplicity of courts with poorly defined jurisdictions and overlapping geographic boundaries, and by a preponderance of local customs and privileges that allowed certain social groups to bypass normal procedures. This already complex reality was further clouded by royal reforms, which superimposed new courts on older institutions without replacing them.[4] The trend to limit these abuses began with the Valois monarchs. The 1536 *Edict of Crémieu*[5] extended and defined more precisely the jurisdiction of royal courts in an attempt to reduce conflicts between rival jurisdictions; but it did nothing to diminish the number of appeals that could involve several seigneurial jurisdictions, as well as up to four levels of royal justice. Only in 1749 did the crown succeed in abolishing lower royal courts that sat in the same city as a higher royal court.[6] At the same time, the crown diminished the power of ecclesiastical courts but allowed seigneurial courts to continue to have important powers in both criminal and civil spheres.

Since justice was considered a foremost responsibility of kingship, the crown consistently tried to speed up the judicial resolution of private conflicts, principally by enlarging its summary jurisdiction. The 1579 *Ordinance of Blois*[7] defined summary jurisdiction as covering all personal cases involving less than 10 *livres*, to be judged in court without recourse to *procureurs* (attorneys who represented parties in court) or *avocats* (barristers) and without court fees. The 1629 *Code Michau* further enlarged this definition, raising the amount to 20 *livres* and stipulating that judgments were without appeal.[8] The final modification, incorporated in the *Civil Ordinance* of 1667,[9] raised the monetary limit to 200 *livres* for personal cases and to 1,000 *livres* for almost all cases involving commercial transactions, wages, and leases. Judges were ordered to render a decision immediately without fees.

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2 Denis Richet, *La France moderne: L'ésprit des institutions* (Paris: Flammarion, 1973) at 65–77.

3 Important legal treatises that promoted modernisation of the *Coutume de Paris* to meet demands of new capitalist organisation were published after the Conquest. The most influential writer was Robert-Joseph Pothier whose *Traité des obligations* (1761) prefigured the reforms embodied in the *Napoleonic Code* (1804). Robert-Joseph Pothier, *Oeuvres de Pothier annotées et mises en corrélation avec le Code civil et la législation actuelle*, 9 vols. (Paris: Plon, 1861) See Greenwood, *Infra* p.144..

4 Pierre Goubert et Daniel Roche, "Les Français et l'Ancien Régime" *La société et l'État* (Paris: Armand Colin, 1984) vol. I at 271–290.

5 F.-A. Isambert, *Recueil générale des anciennes lois françaises* (Paris: Plon, s.d.) vol XII at 504–510.

6 *Ibid*, vol. XXII at 222.

7 *Ibid*, vol. XIV at 417–418.

8 *Ibid*, vol. XVI at 260–261.

9 *Ibid*, vol. XVIII at 130–132.

According to royal theory, justice was free to all subjects.[10] Venality prevented the realisation of theory since officials expected a decent return on their investments and the royal treasury never had the means to pay proper salaries or to buy back the offices. Summary jurisdiction did take some of the sting out of court costs in a wide-ranging set of cases, but costs remained an important factor limiting access to judicial institutions.

Civil law in France depended on a confusing mixture of customs in the north and Roman law in the south. In the north, there were over 300 specific customs that regulated land-holding and inheritance.[11] In an effort to standardise civil law, the crown ordered codification of customary law in the fifteenth century, but that work dragged on through the following century. Publication of codified customary law (e.g., the *Coutume de Paris* in 1580), ensured a more uniform law, but one that was subject to interpretation and modification through decisions establishing new precedents. Male authority over women strengthened, for example, as jurists became more influenced by Roman law, which presumed women incapable to manage properly their own affairs.[12] Although it was hoped that the *Coutume de Paris* would become the model for all of northern France, provincial *parlements* (law courts) resisted the encroachment of a central body of law.[13]

Unable to override local customs, the crown did succeed in imposing uniform procedure through its *Civil Ordinance* of 1667. It also enacted new legislation to regulate matters outside the old law such as the slave trade (*Code Noir*, 1673), or inadequately covered in customary law such as trade (*Code Marchand*, 1673) and maritime affairs (*Ordonnance de la Marine*, 1681).

During the same period, the state consolidated criminal law by enacting the *Criminal Ordinance* of 1670. In the inquisitorial system, sharply influenced by Roman law, crucial stages of the trial were conducted *in camera* so that witnesses could testify without fear of retaliation. Since personal honour was highly prized, secrecy could protect innocent people from malicious prosecution.[14] Even the attorney-general, who acted as prosecutor, was absent from the courtroom during testimony, lest he influence the witnesses. Since in theory the accused did not know the exact nature of the charges or the elements of evidence against him or her, a convincing alibi was more difficult to fabricate. Because of distrust of glib lawyers, this system prohibited legal counsel for the accused, as did the English common law

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10 John A. Dickinson, "Court Costs in France and New France in the Eighteenth Century" (1977) Historical Papers/Communications historiques at 50.

11 Claude de Ferrière, *Corps et compilation de tous les commentateurs anciens et modernes sur la Coutume de Paris* (Paris: Henry Charpentier, 1714) vol. I at 13.

12 Olivier Martin, *Histoire de la Coutume de la Prévôté et Vicomté de Paris* (Paris: Ernest Leroux, 1926) vol. II at 258.

13 Jean Yver, *La géographie coutumière de la France* (Paris: Éditions Sirey, 1966); Emmanuel Le Roy Ladurie, "Système de la coutume" in *Le territoire de l'historien* (Paris: Gallimard, 1973) at 222–251.

14 Fear of malicious prosecution is cited as one of the principal complaints of Canadiens against English criminal law by Douglas Hay, "The Meanings of Criminal Law in Quebec, 1764–1774" in Louis A. Knafla, ed., *Crime and Criminal Justice in Europe and Canada* (Waterloo: Wilfrid Laurier University Press, 1981) at 92–94.

formally until 1836. Since discovery of all pertinent facts was essential, the judge was not limited to the evidence provided by the accusation, but had to validate all the facts by conducting an independent investigation. The effectiveness and fairness of this system depended on the conscientiousness and impartiality of the judges.[15]

In seventeenth-century French law, individuals could sue for civil damages but only the king's attorney could initiate criminal proceedings. The judge had to determine the nature of alleged crimes and the identity of the guilty party. Although judges had great latitude in gathering evidence, they had to follow strict guidelines in its evaluation. Evidence was weighed and divided into three different categories: "complete proofs," "proximate indications," and "remote indications." Eyewitness testimony was considered best evidence, but it had to meet certain criteria. Two eyewitnesses who agreed on all the particulars had to make three identical statements. They also had to be unimpeachable. Testimony from a single eyewitness was insufficient for a capital sentence. Written proof was adequate in certain cases such as forgery if the accused admitted writing the document. Hearsay and indirect evidence were considered "proximate indications," which could not lead directly to a conviction. They could, however, justify torture to extract a confession, which would then constitute a complete proof. "Remote indications," such as the attitude of the accused when questioned, were not given much weight.

When the necessary conditions to prove guilt were met, judges could choose from over twenty different types of punishment clearly specified in the *Criminal Ordinance* of 1670. Penalties included death, torture, perpetual service in the king's galleys, permanent banishment, service aboard the galleys, the lash, branding, the *amende honorable* (publicly asking forgiveness), banishment, and fines. Since there were no prescribed penalties for specific crimes, judges had considerable discretion to take into consideration circumstances of the crime and the defendant's social position. Three judges were required to sentence an accused to corporal punishment and the most lenient opinion of the three always prevailed.[16] To dissuade others from committing crimes, punishment was exemplary and meted out in an elaborate public ritual that was in itself a political statement designed to reinforce the power of the state. None but the king, by virtue of divine right, could exact vengeance for a wrong or grant pardon.[17]

When the crown took over New France in 1663, judicial reform was high on the monarchy's agenda and the colony was a virtual *tabula rasa* on which to impose a new order. There were no long established local customs and no powerful interest groups to resist change. Important steps were taken to ensure uniformity and lessen costs. The colony did benefit from imposition of the *Coutume de Paris* and of a coherent system of weights and measures. Venality was not introduced and salaries

15 For a general review of criminal procedure, see A. Esmein, *A History of Continental Criminal Procedure with Special Reference to France* (Boston: Little, Brown, and Company, 1913).

16 Although *ancien régime* punishments are often seen as unduly harsh and arbitrary, there is considerable evidence that criminal justice in France was administered humanely, in that judges rarely had recourse to the most severe penalties. Alfred Soman, "Criminal Jurisprudence in *Ancien Régime* France: The *Parlement* of Paris in the Sixteenth and Seventeenth Centuries" in Knafla, ed., *supra* note 14.

17 Michel Foucault, *Surveiller et punir. La naissance de la prison moderne* (Paris: Seuil, 1975).

were higher than those common in France, despite the persistent belief in court circles that New France was a drain on the royal treasury. Since the crown considered *avocats* the main villains in prolonging trials by playing on procedure, they were not allowed to practise in the colony before the Conquest. As a result, cases were slightly less expensive and resolved more quickly.[18] But the basic administrative structures of France were repeated for New France. There was no attempt to abolish existing seigneurial courts or to impede creation of new jurisdictions. Only Montreal's seigneurial court was abolished when transformed into a royal court in 1693. Although royal jurisdictions in each government (the St. Lawrence colony was divided into three administrative districts, called governments) and an appellate jurisdiction for the colony were clearly necessary, the creation of an admiralty court at Quebec in 1719, came as much from the intendant's desire for new patronage positions as from a need to resolve maritime disputes.[19]

II. Judicial Institutions in New France

In the early years of colonisation, there was no need for elaborate administrative structures.[20] From the founding of Quebec in 1608, through most of the period of the Company of One Hundred Associates' control, the governor-general held supreme authority over military affairs, civil administration, and the law, being sole judge in both civil and criminal cases. One court clerk assisted him, usually as his secretary. The first notary, Guillaume Audouart, started practising in the colony in 1647. Most seigneurial grants conferred the right to hold a seigneurial court with jurisdiction over virtually all civil and criminal litigation. The first such court was established at Beaupré in 1646, a second at Montreal in 1648. The most important early seigneurial court was the *sénéchaussée* of Quebec established by Governor Jean de Lauson in 1651. There a judge, deputy judge, seigneurial attorney (responsible for prosecuting criminals and acting on behalf of the company in civil suits), clerk, and *huissier* (process server), heard cases at first instance and appeals from other seigneurial courts, such as at Beaupré. Its decisions could be appealed to the governor-general until 1659 when a royal edict declared that all *sénéchaussée* decisions had to be appealed directly to the *parlement* of Paris.

The first royal governor-general, Augustin de Saffray de Mézy, arrived in New France in September 1663, accompanied by Bishop Laval. They appointed a sovereign council made up of five councillors, an attorney-general, a clerk and a *huissier*. The new council possessed broad and unified legislative, executive, financial, and judicial powers. Although it initially passed some useful legislation and continued to function adequately as a law court, conflict between the governor

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18 Dickinson, *supra* note 10 at 59.

19 The case load at the *Prévôté* in the second decade of the eighteenth century was only about 350 a year, but this was much less than the over 550 cases a year it settled in the 1670s. John A. Dickinson, *Justice et justiciables. La procédure civile à la Prévôté de Québec, 1667–1759* (Québec: Les Presses de l'Université Laval, 1982) at 38–39, 221–222.

20 The most complete and concise overview of administrative structures is found in André Vachon, "The Administration of New France, 1627-1760" *Dictionary of Canadian Biography* (Toronto: University of Toronto Press, 1967) vol. II at xv-xxix.

and bishop soon disrupted its other roles. To complicate matters, in 1664 Louis XIV ceded the colony to the *Compagnie des Indes occidentales*, which became the seigneur. Arrival of the first intendant, Jean Talon, in 1665 intensified conflict between royal officials and company agents. The intendant's commission gave him control over justice, civil administration, and finance, leaving little room for the company's agent. By 1670 royal officials asserted their preeminence and the crown resumed control of the colony in 1674. The royal government in place thereafter underwent only a few minor modifications before the Conquest of 1760.

As the senior judicial official in the colony, the intendant had wide-ranging powers. Although the governor-general was honorary president of the Sovereign Council, the intendant presided over sessions. He supervised the other tribunals, judges, and law officers to ensure that all decrees, edicts, ordinances, and regulations were obeyed. He had power to judge any case submitted to him and to hear cases pending in regular courts. He could revoke decisions of the Sovereign Council if he deemed them contrary to the interests of justice or of the crown. He had specific jurisdiction over crimes against the security of the state, smuggling, cases involving the king's domain, and questions regarding seigneuries. Despite holding such powers, most intendants referred cases to the regular courts; but Claude Boutroue (1668–1670), Jacques de Meulles (1682–1686) and Jacques Raudot (1705–1711) were the exceptions, actively intervening in local jurisdictions.[21] Since appeals of an intendant's sentence could only be made to the king's council in France, that expense effectively rendered his decision final. Appointments to superior judicial posts came from the king, but normally on the intendant's recommendation. The intendant granted commissions to all minor judicial officials: *huissiers*, notaries, and surveyors.

The Sovereign Council (the name changed to Superior Council in 1702) remained the highest court in the colony. Composed of the governor-general, the bishop, or his vicar-general in his absence, the intendant, five councillors (seven after 1675, and twelve after 1703), an attorney-general, a clerk, and a half-dozen *huissiers*, the Council progressively lost its legislative power and, by the beginning of the eighteenth century, only heard appeals from lower jurisdictions.[22]

Royal courts were established at Quebec (1667), Trois-Rivières (1667) and Montreal (1693).[23] These tribunals had both civil and criminal jurisdiction, presided over by a *lieutenant-général* assisted by a *lieutenant-particulier*, a king's attorney, a clerk, and up to a dozen *huissiers*. They had an important role in enforcing police regulations, especially those concerning urban markets, fire prevention, and public sanitation.[24] They also judged appeals from the private seigneurial courts.

21 Dickinson, *supra* note 19 at 54.

22 Raymond Du Bois Cahall, *The Sovereign Council of New France, a Study in Canadian Constitutional History* (New York: Longmans, 1915); J. Delalande, *Le Conseil Souverain de la Nouvelle-France* (Québec: L.-A. Proulx, 1927); Gustave Lanctôt, *L'administration de la Nouvelle-France* (Paris: Librairie Honoré Champion, 1929).

23 The first two were seigneurial courts during the *Compagnie des Indes occidentales'* régime from 1667 to 1674, but underwent no change in structure or personnel when the Crown took control.

24 John A. Dickinson, "Réflexions sur la police en Nouvelle-France" (1987) 32 McGill Law Journal at 497–522.

In 1719 the crown created an admiralty court located in Québec to adjudicate matters concerning shipping. It was responsible for registering ships entering or leaving the port of Québec, inspecting their cargos, and ensuring that all vessels had a full complement of men including a surgeon. It judged cases concerning damaged cargo or equipment, prizes captured in wartime, mutinies or other crimes on board. Apart from the court officials (a judge, king's attorney, clerk), a harbourmaster had to insure that the port was clear of obstacles and that ships loaded and unloaded in an orderly fashion.

In 1677 the crown appointed a *Prévôt de la maréchaussée*. In France these officials had important functions in repressing banditry and vagrancy. They summarily judged, without appeal, crimes committed by vagrants and the military. In New France such cases were judged by the Sovereign Council, so the *Prévôt*'s principal function was to search and arrest criminals and deserters.

At the bottom of the judicial hierarchy were the seigneurial courts established in the most populous fiefs, such as Notre-Dame-des-Anges, Beauport, Beaupré, and the Ile de Orléans. These private courts had full jurisdiction in almost all civil and criminal cases, useful for enabling seigneurs to collect quit-rents, taxes, and other fees. They also enforced royal ordinances and police regulations within their jurisdiction. Since costs in these courts were lower than in royal courts, little time or money was lost in travel and they served rural populations well.[25]

The final judicial institution was the *officialité*, an ecclesiastical court created by Bishop Laval in 1660, but not officially recognised by the secular authorities until 1684. This court had jurisdiction in cases involving the clergy and its sentences could be appealed to the Sovereign Council.

III. Civil Law in New France

The edict establishing the *Compagnie des Indes occidentales* in 1664, made the *Coutume de Paris* the law of the colony. Codified in 1580, this fairly comprehensive body of legal rules governed property and family law. With its medieval origins, it had less to say about commercial law, relations between masters and servants, and community obligations regulated *ad hoc* by royal edicts and ordinances. Roman law could also be used where customary law was inadequate, but its authority was only moral, and judges could opt for the application of another custom.[26] Commercial law, broadly covered by the *Code Marchand* of 1673, grouped regulations governing commercial practices. Master-servant relations were regulated by local ordinances drafted by the Sovereign Council and then by the intendant. Indentured servants and apprentices had the legal capacity of children, meaning no independent legal rights. Their master held full parental authority over them and they were prohibited from leaving their places of work without permission. Tavern keepers could not sell them drink without written permission of their employers. It was almost impossible for a servant or apprentice to be freed from their contractual obligations.[27]

25 John A. Dickinson, "La justice seigneuriale en Nouvelle-France. Le cas de Notre-Dame-des-Anges" (1974) 28 Revue d'histoire de l'Amérique française at 323–346.

26 Emile Chéron, *Histoire générale du droit français, public et privé des origines à 1815* (Paris: Sirey, 1929) vol. II at 331–332.

A body of rules governing local administration developed through police regulations drawn up by the intendant. These ordinances did not constitute a fixed body of law, but sought to deal with specific problems as they arose, such as road construction and safety, public hygiene, and respect for places of worship. The most important legislation, however, was for fire prevention and urban provisioning. Fire was a major pre-occupation in pre-industrial cities, with their highly flammable wood and thatch buildings. Authorities prescribed measures to limit risks of general conflagrations. Public order demanded that townspeople be properly fed, so butchers and bakers had to be licensed, to guarantee specified quantities of meat and bread each week at set prices. Urban retailers, including inn and tavernkeepers, could not buy food directly from producers except at urban markets, and then only after the local citizenry had bought their provisions.[28]

A. The *Coutume de Paris*

In the words of its most influential commentator, customary law was "formée par la nature et par la raison, qui enseignent aux hommes à se procurer une manière de vivre, et une règle ordinaire qui soit la plus convenable à leur état."[29] Reflecting the social concerns of the sixteenth century, it sought to reinforce a system based on the patriarchal family. Although Roman law was recognised as the "mother" of all legal systems and taught in all French universities after 1679, it had a limited influence on magistrates[30] because customary law incorporated different assumptions, especially regarding property and family.

The *Coutume de Paris* was divided into sixteen titles (the short twelfth title[31] was not operative in New France); six concerned family and inheritance (titles 7, 10, 11, 13, 14 and 15), five concerned property (1, 2, 3, 4, and 9) and four dealt with debt recovery (5, 6, 8 and 16).[32]

The patriarchal family was the basis of *ancien régime* social order and the *Coutume* sought to insure the husband's marital authority and the integrity of patrimonial lands and chattels. All marriages were regulated by the *communauté de biens* unless otherwise specified in a marriage contract. Property possessed before marriage or obtained through inheritance remained personal (*propre*),[33] but all other

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27 Jean-Pierre Hardy et Thierry Ruddel, *Les apprentis artisans à Québec, 1660–1815* (Montreal: Les Presses de l'Université du Québec, 1977) at 71–80.

28 Dickinson, *supra* note 24 at 497–522.

29 "Law was formed by nature and reason to give men a way of life and rules that were the most suitable to their status." Ferrière, *supra* note 3, vol. I at 3.

30 *Ibid.*, at 15–19. Its influence was increasing, however, and Olivier Martin insists on magistrates' tendency to interpret customary law in the light of Roman law. Martin, *supra* note 12, vol. II at 258.

31 The seven articles of *De garde-noble et bourgeoise* allowed noble and Parisian bourgeois parents to freely dispose of the revenue of their minor children's inheritances. Pothier, *supra* note 3, vol. VI at 499–512.

32 Yves-F. Zoltvany, "Esquisse de la Coutume de Paris" (1971) 25 Revue d'histoire de l'Amérique française at 365–384.

33 Women contributed one third of their assets to the community at marriage. Men contributed little since they participated through their "industry and labour." Ferrière, *supra* note 11, vol. III at 61.

property acquired during marriage became common. Authoritarian concepts of monarchical government provided the model for the husband in the administration of family property, even over his wife's personal assets. Women were not allowed to act in any legal capacity without their husband's authorisation,[34] except if a woman had separate business activities.[35] Although the husband benefited from the income of his wife's property, he could not alienate her assets. Women could recover legal rights by a judicial separation if they could prove that their husband was unfit to administer their property.[36]

Submission to marital authority gave several advantages to widows. If a *préciput* was stipulated in the marriage contract, widows received a fixed amount considered personal property, over and above their normal share of the inheritance. On the principle that a wife could not be held accountable for debts incurred by her husband, because she had had no say in their common administration, widows were secured a *douaire*[37] even if the husband's estate could not cover outside debts. This allowed women "soûtenir avec honneur le rang et la dignité de son mary après sa mort."[38] To obtain her *douaire*, she had to renounce all claim to the succession. In keeping with the underlying religious moralism of the *Coutume*, this privilege could be revoked if the husband had accused his wife of adultery before his death, if the widow lived scandalously during the year of mourning or if she remarried someone beneath her social station.[39] Most contracts also included a *don mutuel* by which the surviving partner received a lifetime usufruct of the family's moveable property and of real property acquired during marriage.[40]

Paternal authority over children was also emphasised in the *Coutume*. The age of majority, fixed at the relatively "old" age of twenty-five, technically meant that any property acquired by a minor legally belonged to the parents; but actual practice recognised such acquisitions as the child's assets.[41] Nevertheless, even married

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34 Unlike Roman law which considered women too frivolous to administer property, the *Coutume de Paris* considered women partners and did not take away legal rights because of gender, but "*Dieu les a assujeties par une puissante raison, que l'homme et la femme étant unis ensemble par le mariage, par une union qui ne peut se rompre que par la mort de l'un d'eux, il serait nécessaire que l'un fût soumis à l'autre pour le gouvernment et l'administration des affaires communes.*" *Ibid.* at 141. Despite their legal incapacity, women were more active in judicial affairs than has been thought. France Parent, *Entre le juridique et le social. Le pouvoir des femmes au XVIIe siècle* (Québec: Cahier de recherche du GREMF no. 42, Université Laval, 1991).

35 Articles 234 and 235 explain that women could administer a business separately from that of their husbands. Given the public nature of trade, the law presumed that the husband gave his wife tacit authorization. Ferrière, *supra* note 11, vol. III at 350ff.

36 For an examination of separations see Sylvie Savoie, *Les couples en difficulté au XVIIe et XVIIIe siècles: les demandes de séparation en Nouvelle-France* (M.A. thesis, Université de Sherbrooke, 1986)

37 The douaire was either *préfix* (an amount stipulated in the contract) or *coutumier* (*usufruct* of one half of the husband's assets at marriage and of any property inherited during the duration of the community). A *douaire préfix* could exceed the value of the *douaire coutumier*. Ferrière, *supra* note 11, vol. III at 659–661.

38 *Ibid.*, at 655.

39 *Ibid.*, at 692–694.

40 *Ibid.*, at 1479.

children under the age of majority could not alienate real estate during their minority.[42] Because the laws of nature prescribed that children should succeed parents, and that husbands take care of their wives, the *Coutume* severely restricted what could be alienated through gift or testament.[43] Children could not be disinherited unless they married against their parent's will or left the Roman Catholic Church.[44] The law also upheld the sanctity of marriage by prohibiting gifts to concubines or illegitimate children.[45]

Preservation of patrimony within the family was the key concern governing succession. Noble lands divided in such a way as to conserve families in their "état et splendeur."[46] The eldest son inherited all of a *fief de dignité*, such as a barony, and one half or two thirds of ordinary fiefs depending on the number of heirs. Males excluded females of the same degree of parentage.[47] Non-noble land divided equally among all heirs, both male and female. If children participated in their parents' succession, all advantages received before marriage had to be returned. Although in theory no child could receive preference, there were many ways of getting around a completely egalitarian division of property. Girls often renounced their share of the succession in their marriage contract to favour their brothers, and children who had received substantial gifts could keep them by not sharing in the succession.[48] Members of religious communities could not succeed their parents. Legitimate children were the only heirs to their parents' estate; but if the marriage had been childless, property reverted to ascending or collateral relatives, depending on the branch which had originally contributed the property.[49]

Since landed property was the basis of a family's wealth and status, care was taken to preserve patrimony within the same lineage.[50] Through the *retrait linager*

41 Martin, *supra* note 12, vol. I at 152–157.

42 Ferrière, *supra* note 11, vol. III at 491.

43 Even though the husband was master of property held in common, "il décède en qualité d'associé avec sa femme, or un associé ne peut aliéner la part qui appartient à ses associés dans les biens commmuns." Therefore, he could not alienate his wife's *préciput* or *douaire* and had to preserve four fifths of his *propres* for his children: *ibid.*, vol. IV at 151, 259, 294.

44 *Ibid.*, vol. IV at 768. However, the inheritance was guaranteed to an adult child who had fulfilled the judicial requirements of the *sommations respectueuses* before marrying. Claude-Joseph de Ferrière, *La science parfaite des notaires ou le parfait notaire* (Paris: Babuty, 1771), vol. I at 246.

45 Children born out of wedlock became legitimate when their parents subsequently married, providing that both parents had been free to marry when the child was conceived. Ferrière, *supra* note 11, vol. III at 1205, vol. IV at 175, 715-717, 728.

46 *Ibid.*, at vol. I at 29.

47 *Ibid.*, vol. IV at 359ff.

48 *Ibid.*, at 436ff. Recent studies on peasant family inheritance strategies in New France indicate that perfect equality between heirs was rare except in the first years of settlement. See, e.g., Sylvie Dépatie, "La transmission du patrimoine dans les terroirs en expansion: un exemple canadien au XVIIIe siècle" (1990) 44 Revue d'histoire de l'Amérique française at 171–198, and Gérard Bouchard et Joseph Goy, *Famille, économie et société rurale en contexte d'urbanisation (17e–20e siècle)* (Chicoutimi et Paris: Centre interuniversitaire SOREP et École des hautes études en sciences sociales, 1990).

49 Zoltvany gives a clear chart of the order of succession, *supra* note 32 at 380.

50 The *Coutume de Paris* considered it a general principle with biblical origins that persons ought to conserve property passed down from their ancestors in their family. Ferrière, *supra* note 11, vol. II

any member of the branch could claim property within a year and a day of the sale, upon reimbursement of the principal and costs. The first relative to act, not necessarily the closest, was preferred and the *retrait linager* took precedence over the *retrait féodal*, essentially an escheat right of a seigneur to reintegrate land into his demesne when it was offered for sale. While property was susceptible to a *retrait*, it could not be improved and even necessary repairs had to be approved by a judge.[51]

Property divided into moveable and fixed assets. To encourage trade, moveable property could not be mortgaged and was not considered a *propre* (personal) unless specified in the marriage contract.[52] Fixed assets (land, offices, and *rentes constituées*) were *propres* if acquired before marriage or through inheritance, and *propres naissants* (i.e., they would become *propres* as soon as the succession was open) if purchased during marriage. This distinction was crucial because of the many limitations imposed on the disposal of *propres*.

In customary law the maxim "nulle terre sans seigneur" was the rule. Seigneurs were required to pay *hommage* to the King, draw up periodical censuses of their estates, and pay the *quint*, a sales tax equivalent to one fifth the price if a seigneury was sold outside the lineage. The French rule that a seigneur could not grant more than two-thirds of his demesne was not followed in New France. The principal seigneurial right was the *cens* from which derived the *lods et ventes* (a sales tax equivalent to one twelfth of the sale price), fines, and the right of *retrait*. *Banalités*, monopolies over milling, water power, hunting, and fishing, were part of the seigneury. Peasants also had to pay a fixed quit-rent for land stipulated in their concession contracts. Tenants could not deteriorate their holding to the extent that the revenue it produced would be insufficient to cover the annual dues owed to the seigneur.[53] In New France, the *Edicts of Marly* (1711) modified some of the prescriptions of the *Coutume* to force seigneurs to develop their land but, given the close ties between seigneurs and royal administrators, these were not very effective.[54]

The *Coutume* also contained a title, equivalent to a building code, prescribing rules for commonly owned property such as walls.[55] But generally the police regulations were more important in the colony for construction, fire prevention, and public hygiene.

Four titles in the *Coutume* dealt with commercial transactions and debt collection, deeply influenced by the canonical censure of usury. Notaries were prohibited from including interest charges in any of their contracts, with the notable exception of

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at 559.

51 *Ibid.*, at 557–994.

52 Ferrière, *supra* note 44, vol. I at 173.

53 *Ibid.*, at 1038–1075.

54 The most important legal documents are found in W. B. Munro, *The Seigniorial System in Early Canada: A Study in French Colonial Policy* (New York: Longmans Green, 1907). For discussions of seigneurialism consult Louise Dechêne, "L'évolution du régime seigneurial au Canada: le cas de Montréal aux XVIIe et XVIIIe siècles" (1971) 17 Recherches sociographiques, at 143-183 and Sylvie Dépatie, Christian Dessureault et Mario Lalancette, *Contributions à l'étude du régime seigneurial canadien* (Montréal: Hurtubise HMH, 1987).

55 "Des servitudes et rapports de jurés", *ibid.*, vol. II at 1471–1830.

rentes constituées. Although this type of loan was usury in principle, it allowed interest because the debtor could not be forced to reimburse the capital so long as the interest was paid on time.[56] The only way to obtain interest on unpaid sums was through a court order. To encourage commerce, possession of moveable property was considered title and these goods could not be mortgaged.[57] Notarial contracts bearing a financial obligation incurred a *hypothec* on property presently owned and even on property acquired after the contract's date. Because there was no registration procedure, *hypothecs* remained secret. In cases of bankruptcy, several categories of creditors were privileged in the following order: the wife or widow, judicial officials, funeral and medical expenses, workers who had preserved or improved the asset, people who had lent money to buy the asset, and then feudal lords.[58]

Debtors had to be sued within a given length of time depending on the object of the indebtedness. Tavernkeepers operated strictly for cash or barter and could not extend credit; payment for foodstuffs had to be demanded within six months; a year was the limit for most other business transactions.[59] In case of non-payment, the creditor had three types of lawful seizure.[60] The *saisie exécution* allowed a creditor to have a *huissier* seize moveable goods. The debtor then had eight days to settle accounts or the goods would be sold at public auction. The *saisie réelle* committed real estate to the care of a commissioner. The sale was publicly announced on three successive Sundays, following an elaborate procedure before the land could be sold or leased for a specified period.[61] This procedure also applied to guardians managing estates of minors. The *saisie arrêt* consigned goods or money to the keeping of a third party, pending a judicial decision as to their disposal.

B. Notaries

Unlike England, the French legal tradition created an important role for notaries.[62] They were public officials recognized by the courts as qualified to draw up binding agreements that could not be challenged in court. For this reason the notary was considered "un médiateur qui termine les contestations avec équité [...] une espèce d'arbitre ou juge, qui, par son exactitude à mettre les intentions des contractants dans tout leur jour, assure tout-à-la-fois, & la possession des biens & la tranquilité des familles."[63]

Notaries were also deemed the equivalent of judges in some cases, to settle disputes including those already before the courts. Their intervention might

56 Ferrière, *supra* note 44, vol. I at 132–141.

57 Martin, *supra* note 12, vol. II at 110–119.

58 Ferrière, *supra* note 11, vol. II at 1219ff; Pothier, *supra* note 3, vol. II at 459–461.

59 *Ibid.*, at 281–589.

60 *Ibid.*, at 995–1470.

61 The steps required are set down in the 16th title of the *Coutume*: *ibid.*, at 1181-1522.

62 André Vachon, *Histoire du notariat canadien, 1621–1960* (Québec: Les Presses de l'Université Laval, 1970).

63 That is "a mediator who put an end to disagreements with equity [...] a sort of arbitrator who, by his exactness to respect the wills of contracting parties ensures, at the same time, the possession of property and the tranquility of families." Ferrière, *supra* note 44, vol. I at 1–9.

peacefully end disputes in at least three ways: *transactions* (one party ceded something voluntarily to end a suit), *accords* (an agreement that recognised that nothing was due by the other party), and *désistements* (the withdrawing of a case before the courts).[64]

Property law provided the most business for rural notaries in New France. Deeds concerning property transactions (concessions, sales, leases) made up almost two-thirds of Guillaume Barette's workload at La Prairie, 1709–1744.[65] Since ownership depended on a notarial contract of concession, exchange or sale, this document could not be contested before the courts unless the notary had not observed the prescriptions of the *Coutume*: a rare event. Since all land in New France was ceded recently and virtually all holders had written titles,[66] proof of property rested on written documents rather than the oral testimony needed to prove possession since time immemorial, 40 years, as in France.[67]

Family law and notably inheritance was the second major sphere of notarial activity. Barette, for example, drafted 362 deeds covering the transmission of estates (marriage contracts, estate inventories, wills, deeds of gift, and divisions into equal shares) making up just over 22% of his practice. Most successions could be settled without recourse to the courts, except for appointments of tutors for minor children.

Notaries also played an increasingly important role in the resolution of conflicts involving indebtedness. In a rural parish such as La Prairie, where the local economy was poorly developed, contracts concerning debt were infrequent. In large urban practices, commercial deeds dominated. The *obligation* was the most common means for a creditor to guarantee payment, since it involved a *hypothec* on all of the debtor's real property. This type of act was used to consolidate debts on current account as well as to extend credit for commercial ventures, such as fur trading expeditions to the west. Notaries could also act as investment brokers for people with surplus capital. The most common form of lending was the *rente constituée*, which provided a given sum of capital against a perpetual, rent equivalent to 5%.

C. Civil procedure

Civil procedure set down by the *Civil Ordinance* of 1667 was scrupulously followed in the colony.[68] Cases brought before the courts fell into two categories:

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64 *Ibid.*, vol. II at 430–455.

65 Louis Lavallée, "La vie et la pratique d'un notaire rural sous le Régime français: le cas de Guillaume Barette notaire à La Prairie entre 1709–1744" (1994) 47 Revue d'histoire de l'Amérique française at 499–519.

66 The French crown did not recognise Aboriginal title.

67 John A. Dickinson, "Conceptions de la tenure en Normandie et en Nouvelle-France au XVIIIe siècle" Joseph Goy, Jean-Pierre Wallot, Rolande Bonnain, et al., *Évolution et éclatement du monde rural. France Québec XVIIe-XXe siècles* (Montréal—Paris: Presses de l'Université de Montréal—Éditions de l'École des Hautes Études en Sciences Sociales, 1986) at 163–172.

68 Dickinson, *supra* note 14 at 59–76. Among the best commentaries on civil procedure, see Robert-Joseph Pothier, *supra* note 3, vols. VII and VIII; Claude-Joseph de Ferrière, *Dictionnaire de droit et de pratique contenant l'explication des termes de droit, d'ordonnances, de coutumes et de pratique*, 2 vols. (Paris: Savoye, 1762).

summary or trial processes. Most of the Quebec royal court's case load fell into the first category.

For summary cases, procedure was simple and required few documents. A person seeking redress went to a *huissier*, who drew up a summons stating when the case would be heard, the motive, and copies of any pertinent documentation. On the given day, both parties appeared in court. The plaintiff stated his claim and the defendant stated any objections or mitigating circumstances. The judge rendered his verdict on the spot and the decision was drawn up by the clerk. In cases of debt collection, interest charged from the day of the sentence, if payment was not immediate. If one of the parties did not appear in court, a second summons issued and, after a second absence, judgment passed against the defaulter.

For cases going to trial, procedure was more complex. The plaintiff presented a written claim to the judge, which gave details of the case, copies of any documentation, and a request that a specific sentence be handed down. If the judge considered the claim acceptable, he authorised the plaintiff to summon the defendant. The *huissier* issued a writ to the defendant, who could consult legal or notarial counsel if he so desired. On the given day, both parties had to be present at the court before nine in the morning. When the *huissier* called the case, both parties went in person before the bench for questioning by the judge. In relatively uncomplicated cases, the judge sought the quickest means to resolve the conflict. If written documents were essential to reach a decision, he could ask for the originals to be left in his care for examination. If conciliation appeared possible, he could appoint an arbitrator to settle the dispute.[69] He could also name experts to evaluate the work or merchandise. In some cases, ratification of a verbal contract for example, he could call for witnesses to be heard. When he had decided on the procedure to be followed, he set the date for the next court appearances.

Presentation of documents usually ensured rapid resolution but, in the case of commercial bankruptcies, matters could be more complex. As soon as a merchant's credit was in doubt, people to whom money was owed initiated independent suits. When it was apparent that assets could not cover debts, the court named a curator to administer all business. The curator drew up a statement of net worth. All claims against the failed merchant then went before the judge. The principal creditor was always the wife, who could claim any amounts guaranteed to her in the marriage contract. Next came privileged creditors,[70] and finally people with court orders who split what remained on a *pro rata* basis.

Witnesses rarely testified in civil cases in New France. The *enquête* was much more common in France, where local customs and real property were guaranteed by the collective memory of local residents. Colonial courts might call witnesses to testify in cases of assault involving civil damages. Although such cases were normally minor instances of verbal abuse, they could involve physical assault such

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69 The law provided for two kinds of arbitrators: *arbitres* who had to follow judicial formalities in their decisions, and *arbitrateurs* or *aimable compositeurs*, agreed upon by both parties, who decided the case based on their sense of equity. Given the lack of legal training in the colony, the second form was commonly used. Ferrière, *supra* note 44, vol. II at 422–423.

70 See *supra* note 58, at 15–16.

as wife-beating. *Enquêtes* could be used to establish the conditions of verbal agreements or as proof that merchandise had been delivered. They were also required in cases of separation since the spouse had to prove that their partner was not fit. In most cases it was the wife who asked for a separation, because the husband was dissipating family assets through excessive drunkenness or mismanagement. Occasionally, however, a husband complained of his wife's dissolute life and sought to have her banned to some isolated village or returned to France to prevent her shaming the family.[71]

Once the judge had sifted the evidence, he read his verdict to the court and then had it delivered to the parties by a *huissier*. In the case of debt recovery, the judge often ordered the defendant's property seized, pending sale if necessary. For small debts a few items of clothing or some common utensils might suffice. The law tried to ensure that its action would not harm the viability of the domestic economy, so tools and livestock were rarely seized except in cases of heavy indebtedness. Land could be sold but more often than not it was leased at an auction, with the proceeds used to pay creditors.

The civil courts of New France were essentially debt collection agencies.[72] Over one half of the cases brought before the *Prévôté* of Quebec concerned commercial transactions or money owed for wages. Merchants were the largest single group of plaintiffs seeking payment for consumer goods, followed by artisans demanding remuneration or the valuation of their labour. This often involved the naming of experts to inspect work done, especially in the building trades. Peasants sought payment for the sale of foodstuffs. In the absence of written proof of debt, the courts accepted sworn statements. Collection of seigneurial dues was an important function of courts in France, but seigneurial administration in New France was more lax, except on large ecclesiastical seigneuries. In recently settled areas it was difficult to force peasants to pay until they made it productive. As improvements made tenures viable, conflicts over banal rights and payment of dues increased.

Few cases concerned real property: a sign that notarial work effectively prevented conflict in this area. Even fewer cases concerned property lines, and they were generally resolved by ordering the parties to have the plots surveyed. Inheritance was a major cause of conflict in France, especially among the élite whose perception of justice was often colored by drawn-out conflict over the preservation of patrimony. In New France, the number of cases steadily increased across the century of the *Prévôté*'s existence, but only accounted for about 11% by the 1750s. Family solidarity, paternal authority, and mediation by notaries probably explained the relative unimportance of conflicts in this field. Family law also involved non-contentious issues settled by the courts. Registration of marriage contracts and donations steadily increased across the period, as did the election of guardians, authorisations for guardians to lease or dispose of property, and inventory closings. This type of activity constituted about 20% of the *Prévôté*'s work load by the 1750s.

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71 Savoie, *supra* note 36.

72 Dickinson, *supra* note 14 at 117–138; Jacques Mathieu, "Les causes devant la Prévôté de Québec en 1667" (1969) 2 Histoire sociale/Social History at 101–111.

Less important in volume were appeals from seigneurial courts, demands for civil damages following an assault, and infractions of police regulations.

Although the royal courts were open to all, they mainly served an urban élite made up of merchants, seigneurs, religious communities, and officials. Peasants and artisans had little business with the courts, except when being sued for payment or when asking for a court order to establish a guardian. Costs and distance were major factors in dissuading peasants from using the courts. Notaries undoubtedly satisfied most of their legal business, while mediation by local élites resolved more contentious problems.[73]

IV. Criminal Law in New France

Trials in New France conducted under the inquisitorial system followed procedure established by the *Criminal Ordinance* of 1670.[74] Since judges controlled the proceedings and were responsible for gathering proof and weighing evidence according to well-defined rules, their professional training was crucial. In France, all judges had to be university law graduates, but there would be no law faculty in New France or Lower Canada until the mid-nineteenth century. Although several judges were recruited among French immigrants with law degrees, not all magistrates had formal legal training. Some, such as René-Louis Chartier de Lotbinière, who succeeded his father as chief judge of the Quebec royal court, received legal training from their fathers. The only colonial official who had to be a member of the Paris bar, was the attorney-general of the Sovereign Council. An eighteenth century attorney-general, Louis-Guillaume Verrier lectured on the ordinances, contemporary jurisprudence, and the *Coutume de Paris* to sons of officials who aspired to careers in judicial administration.[75] Despite the lack of formal legal training, most judges followed the ordinances scrupulously. Evidence from the inventories of their libraries indicates that they read the most important contemporary commentaries on criminal law.

A. Criminal procedure

Criminal trials went through various stages. In cases where guilt was evident after the interrogation, there were only eight stages. If any doubt remained in the judge's mind, four or six additional steps could be required.

Accusations, *la plainte*, could be made by citizens seeking redress for such crimes as theft or assault, or by the attorney-general when a crime became public knowledge, most often in the case of murder, dueling, or arson. A *plainte* was

73 Priests and notaries knew the law and followed it in their mediation since the conflict could go to court if they were unsuccessful. There is little evidence of legal pluralism in the Laurentian colony except in the case of Native communities. On this subject, see Sally Engle Merry, "Legal Pluralism" (1988) 22 Law and Society Review at 869–896.

74 André Lachance gives a detailed description of the procedure followed in Canada in *La justice criminelle du roi au Canada au XVIIIe siècle. Tribunaux et officiers* (Québec: Les Presses de l'Université Laval, 1978). See also André Morel, "La justice criminelle en Nouvelle-France" (1963) 14 Cité Libre at 26–30.

75 Claude Vachon, "Louis-Guillaume Verrier" *Dictionary of Canadian Biography* (Toronto: University of Toronto Press, 1974), vol. III at 647.

addressed to the local judge and included all circumstances of the crime: date, time, place, people present, and a brief description of what had transpired. Individuals took an active role only if they sued for civil damages, primarily in cases of assault. By becoming the *partie civile*, they were liable for many of the expenses incurred. Normally, formal charges were laid by the attorney-general and the crown paid all court costs. To safeguard against frivolous accusations, informers were prosecuted for libel if the accused was acquitted.

When the judge was convinced that a crime had been committed, he scheduled an *information*, the equivalent of a preliminary hearing. In cases involving physical violence, he awaited a doctor's report on the exact extent and nature of the injuries or the cause of death. The court summoned any possible witnesses mentioned in the accusation. People of all social conditions could testify, even children and servants, and only drunkenness invalidated testimony.[76] It was given under oath to the judge in the presence of a clerk. After identifying themselves, witnesses were read the *plainte* and asked to tell everything they knew about the crime. After they had finished, the clerk read them their statement and they were then asked if they wanted to change any part of it before signing or apposing their mark. Witnesses were paid for testifying in court. The judge determined remuneration based on the social position of the witness, and sums awarded usually equaled a day's labour for tradespeople and five to ten times that amount for merchants, officers and nobles.

If the preliminary hearing had not enabled the judge to determine the criminal's identity, he could ask for *monitoires* to be published by the religious authorities. These documents, read from the pulpit at Sunday Mass for three consecutive weeks, described a crime and ordered all persons with any knowledge of it to testify under pain of excommunication if they failed to come forward.

When the judge had sufficient evidence to identify a suspect, he could choose from three kinds of writs. A summons ordered the suspect to appear in court for interrogation, while a personal citation prohibited the suspect from exercising any functions until sentencing or acquittal. An arrest warrant was issued only if the crime deserved "corporal or ignominious punishment." Judges were ordered to give criminal trials highest priority and they had to notify the attorney-general of the incarceration of all prisoners. If the case did not proceed quickly enough, detainees could be freed. Given the difficulty of guarding prisoners, judges in New France tried to finish trials as quickly as possible. When an arrest warrant had been issued, a *huissier*, accompanied by soldiers, went to arrest the suspect. If the suspect could not be found, the trial was carried out *in absentia* and the sentence executed on an effigy by whipping or hanging a dummy.

Once arrested, the accused had to be interrogated under oath within twenty-four hours in the presence of the judge and a clerk. The judge drafted questions, sometimes with the help of the prosecutor. The clerk recorded all replies and the complete transcript was read to the accused, who then signed the document to

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76 Despite reluctance to accept their testimony, Native peoples were increasingly summoned to court as witnesses in the eighteenth century. Jan Grabowski, *The Common Ground. Settled Natives and French in Montreal, 1667–1760* (Ph.D. dissertation, Département d'histoire, Université de Montreal, 1993) at 117–119.

confirm all statements made. The transcript was immediately sent to the attorney-general, who addressed his "conclusions" to the judge. In the case of a minor crime, he could ask for a final judgment and suggest the penalty, recommend that the case be sent to civil jurisdiction since only civil damages were warranted, or ask for acquittal. In the case of a more serious crime, the prosecutor automatically called for the "extraordinary procedure."

In an "extraordinary procedure" witnesses were summoned to a *recollement*. The clerk read their testimony, the judge asked them to confirm their statements, and then asked the deponents if they wished to add any new information. In New France, no witnesses recanted their testimony, though many added a few details. Witnesses who subsequently changed their story could be charged with perjury. After all the witnesses had confirmed their testimony, they confronted the accused. Only at this juncture did the defendant learn the exact nature of the charges and the identity of the witnesses. The *confrontation* afforded the accused the opportunity to attempt to disqualify witnesses or try to point out contradictions in the damaging testimony. With this step completed, all documentation passed to the attorney-general and the magistrates for judgment.

The attorney-general then motioned for a final sentence or, in capital crimes, requested that the prisoner be tortured to extract a confession (preliminary torture), or, after a capital sentence had been handed down, a denunciation of accomplices (preparatory torture). When sentenced to torture, the accused was brought to the court and seated on a stool. Theoretically a doctor and two surgeons had to be present to establish how much the prisoner could endure, but this rule was not always followed in New France. In France, torture normally meant tying the prisoner in a prone position with limbs extended and then pouring several litres of water into the mouth. In New France, the courts resorted to the more dangerous method of using torture boots made of four two-foot-long oak planks, fastened around each calf from the knee to the ankle. Four (ordinary torture) or eight (extraordinary torture) wedges were then driven between the planks on the inside of the legs, tightening the planks and increasing the pain. After each wedge was driven home, the accused was asked to confess. When the torture was finished, the prisoner was laid on a mattress to rest. Any confessions extorted under torture were invalid unless the prisoner repeated them after recovery.

To prevent judges from abusing this method of interrogation, confession under torture was not deemed sufficient proof to warrant the death penalty. When used, the case against the accused had to be strong, lacking only an admission of guilt. All sentences to torture had to be confirmed by the Sovereign Council before a lower court could proceed. Despite its bad reputation, this punishment was rarely inflicted on criminals in either France[77] or New France, where records reveal only eight criminals tortured during the entire era.

Results of the inquiry under torture were then communicated to the attorney-general. His conclusions would be submitted to the bench. Before sentencing, the three presiding magistrates conducted a final interrogation.[78] If doubt persisted as to

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77 Soman, *supra* note 16 at 54–60.

78 This interrogation was conducted in the morning when the judges minds were more alert, their

guilt, the judges could hand down a sentence of "plus ample informé," which meant that the prisoner was released but remained under suspicion and could be retried if further evidence came to light. If guilt was proved, the accused was brought to court and seated on a stool before the bench to hear the sentence, the judge merely stating the basis for condemnation. The crown paid the cost of the trial, but could confiscate a convicted felon's estate in some capital cases.

All convictions could be appealed to the Sovereign Council, before seven magistrates. An appeal was automatic for sentences more severe than the "amende honorable." Appellate judges examined the written documents produced by the lower court to ensure conformity with the ordinance and questioned the prisoner one last time. Beyond the Sovereign Council, convicted persons could appeal to the king's council in Paris and request letters of remission, which could clear them of even serious crimes. Seven asked for and obtained letters of remission in the decades before 1760.

With all avenues of appeal exhausted, a judge and the clerk went to the gaol, and formally pronounced the sentence. The public executioner then meted out the prescribed punishment. The execution was delayed only for a woman who claimed to be pregnant. In this case, she was examined by a midwife and if she was indeed expecting, punishment was deferred until after the birth of the child. Executions were supposed to take place in the same venue as the crime, but because there was only one hangman in the city of Quebec, criminals from Montreal and elsewhere were executed in the colonial capital. This was done in part to save money, but also because it was sometimes difficult to find boatmen or carters willing to transport the hangman.

The official function of public executioner was the most despised job in New France, and there was only one source for willing recruits.[79] Ten of the fourteen public executioners in Quebec were convicted criminals who accepted the post to avoid execution. In 1665, for example, Jacques Daigre was condemned to death for theft along with an accomplice but he eluded the noose by executing his associate. A couple of executioners relapsed into crime, and one, the renegade Irishman Denis Quavillon, was executed for theft a few months after having accepted the position in 1755.

The type and severity of punishments depended on the crime. Murderers suffered hanging, while people convicted of breaking and entering or counterfeiting government notes often received banishment, service on the king's galleys, or branding (the only means for early modern society to identify habitual criminals). Individuals guilty of simple theft were flogged. Common assault, disturbing the peace, and sexual misdemeanours were punished by fines—by far the most widespread punishment. The stocks were a serious punishment and rarely used; only two men were chained to a post with a sign indicating their crime in the eighteenth century records. Imprisonment was not considered a suitable punishment, only a pre-trial measure. Occasionally officials ordered the confinement of prostitutes in

bodies not yet slowed by wine and meat!

79 André Lachance, *Le bourreau au Canada sous le régime français* (Québec: Société historique de Québec, 1966).

the general hospital. Judges could also impose less rigorous punishments. A severe reprimand (*blâme*) was given to people who, although guilty, were not aware of the severity of their offences. For minor breaches of the peace, people received a simple reprimand that was not considered dishonouring.

B. Criminal Activity in New France

Criminal activity was present from the very beginnings of New France, if only because it was made up largely of people conscripted in French prisons. The leader of the expedition, Jean-François de La Rocque de Roberval, ruled with an iron hand and had six people executed for theft during the winter of 1542–1543.[80] One of Samuel de Champlain's first official acts, as commandant of the post at Quebec in 1608, was to execute Jean Duval who led a conspiracy against him.[81]

It is impossible to know and measure the extent of criminal activity in New France. Extant documentation revealed types of crime prosecuted and the fate of the accused; but as with all early modern data, this picture is necessarily incomplete.[82] Repression was most severe in towns, where the crown could exercise authority, and 60% of reported crime had an urban setting, although towns represented only about 20% of the total colonial population. In the countryside, community solidarity often prevented cases from coming before official tribunals. Priests and other local notables such as notaries, militia captains and rural merchants were undoubtedly called upon to mediate conflicts, thereby avoiding costly recourse to the royal judicial machinery. Only when mediation failed or antisocial behaviour persisted was an accusation brought before the courts. Assault and battery was the most commonly reported rural crime and in several instances conflict had clearly been festering long before formal prosecution.

Apart from the urban-rural dichotomy, crime was not evenly distributed in the colony. The Quebec City region always had more than half of the colony's population, accounting for only about 30% of prosecutions. The far more unruly Montreal area witnessed almost 64% of recorded criminal activity. Montreal in the French régime was a frontier outpost, with a large military garrison and the disruptive presence of *coureurs de bois* and voyageurs returning from the west each autumn. It also underwent the most rapid demographic expansion of any region in the eighteenth century, disrupting community and family solidarity networks. Native presence was also strongest near Montreal, increasing potential for conflicts and challenge. Although christianised Natives were theoretically French subjects and liable for prosecution, they were not tried in regular courts lest criminal proceedings jeopardise alliances necessary for New France's security.[83]

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80 R. La Rocque de Roquebrune, "Jean François de La Rocque de Roberval", *Dictionary of Canadian Biography* (Toronto: University of Toronto Press, 1964), vol. I at 423.

81 Georges-Émile Giguère, éd., *Oeuvres de Samuel de Champlain* (Montréal: Les Éditions du Jour, 1973) vol. I at 148–154.

82 André Lachance, *Crimes et criminels en Nouvelle-France* (Montreal: Boréal Express, 1984); Raymond Boyer, *Les crimes et châtiments au Canada français du XVIIe au XXe siècle* (Montreal: le Cercle du Livre de France, 1966); André Morel, "Réflexions sur la justice criminelle canadienne, au 18e siècle" (1975) 29 Revue d'histoire de l'Amérique française, at 241–253.

83 John A. Dickinson, "Native Sovereignty and French Justice in Early Canada" in Jim Phillips,

Criminal behaviour was overwhelmingly a male trait. Only 20% of all accused people in the eighteenth century were women, mainly for prostitution, simple assault, and theft.[84] Most men were relatively young, between 20 and 34, and unmarried. The military contributed a quarter of all criminals. This is hardly surprising, since soldiers had considerable spare time to be spent in taverns and rarely had family ties within the colony. They were also inured to a violent life that valued physical prowess.

Despite its missionary origins, New France never zealously prosecuted religious and moral failings. Heresy was no crime and the secular courts left conversion of Protestants and Natives to the Roman Catholic Church. Blasphemy and witchcraft[85] together accounted for less than 4% of all seventeenth-century prosecutions, and virtually disappeared with only one case each in the eighteenth century. Sexual crimes,[86] of which rape, seduction (gaining sexual favors by promising marriage), prostitution, adultery, and concubinage were the most important, constituted just over 20% of accusations in the seventeenth century. Given the gender imbalance in the colony, authorities severely repressed this type of crime, but when an equilibrium between the genders arrived by about 1700, prosecutions constituted just over 5% of cases in the eighteenth century; most of these were for seduction or prostitution. Apart from rape, punishment for this type of crime was normally light, with most defendants receiving acquittal or a reprimand.

Crimes against the crown were relatively rare in the seventeenth century, accounting for only 6.4% of all prosecutions. They increased significantly to 15% in the eighteenth century, mainly in two areas: forgery and resisting officials. With the generalised use of card money, many literate soldiers tried to increase their pay by forging the intendant's signature on the back of a playing card or increasing the card's face value. Resisting judicial officials attempting to seize property or deliver a court summons was a traditional means for the lower classes in France to protest authority. Sometimes *huissiers* were chased away with brooms, but occasionally axes and knives threatened the representatives of authority.

As in other early modern societies, violence in New France was common. Simple assault was undoubtedly one of the least reported crimes, since crown attorneys were hesitant to prosecute unless serious injury was involved. Many came before the civil courts because damages were the key issue. In a status-oriented society, people were very conscious of their good name, and insults often led to court even if they did not degenerate into physical abuse. Peter Moogk has captured the essence of insults in the title of his article " 'Thieving Buggers' and Stupid Sluts"[87]: men accused of

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Tina Loo and Susan Lewthwaite, eds., *Essays in the History of Canadian Law*, vol.5, *Crime and Criminal Justice* (Toronto: The Osgoode Society, 1994) at 17–40.

84 André Lachance, "Women and Crime in Canada in the Early Eighteenth Century", in Knafla, ed., *Supra* note 14.

85 Robert-Lionel Séguin, *La sorcellerie au Canada français du XVIIe au XIXe siècle* (Montreal: Librairie Ducharme, 1961).

86 Robert-Lionel Séguin, *La vie libertine en Nouvelle-France au dix-septième siècle*, 2 vols. (Montréal: Leméac, 1972); Marie-Aimée Cliche, "Filles-mères, famille et société sous le Régime français" (1988) 21 Histoire sociale/Social History at 39–69.

87 Peter Nicolas Moogk, "'Thieving Buggers' and 'Stupid Sluts': Insults and Popular Culture in

dishonesty, or the chastity of women impugned. Insults accounted for about 10% of cases throughout the period.

Socialisation in urban New France often centred on the tavern, where wine and brandy fueled fiery words and fists were wont to fly. Assault and battery was the single most important offence accounting for 28% of accusations in the seventeenth century, and 36% thereafter. Brawls were mainly confined to the popular classes and royal criminal justice relatively tolerated this behaviour, referring litigants to civil courts where damages could be assessed. Members of the military were more likely to be involved in duels to settle their differences, and those consequences were far more serious, resulting in life-threatening injury or death. Despite strict ordinances against dueling, the military ethos prevailed among many members of the colonial élite, making recourse to swords the definitive method for settling a dispute. Twenty-two people were accused of dueling, but few were convicted because duelists were careful to fight in secluded places with few witnesses. Of those condemned to death, three army officers obtained royal pardons.

Homicide was difficult to conceal, and the courts acted quickly as soon as a corpse was discovered. Killings accounted for about 5% of all criminal cases. Most homicides were accidental, resulting from brawls. Occasionally a servant accused of theft struck out at an employer, as did Catherine Charland, who beat her mistress over the head with a pewter plate. Only six people were tried for murder in the eighteenth century; theft was the main motive in four cases, whereas two other murderers killed their spouses in order to run away with new lovers. Suicide was homicide and punished by symbolically hanging the corpse; only six people were tried for this crime. The final category was infanticide, a crime that the crown considered abominable. All unmarried girls had to report their pregnancy as soon as they became aware of it, on pain of death. Seven women were tried for infanticide in New France and three executed.[88]

Crimes against property, mainly thefts, made up almost one quarter of all cases. In French jurisprudence, theft divided into simple and qualified theft. In the first case the crime was committed in daylight without breaking and entering or threat of physical harm; in the second the circumstances aggravated the crime. Some people, for example, stole food in the market or a shirt hanging out to dry perhaps in need, whereas others stole while under the influence of alcohol. Neither were punished severely. Nocturnal theft involving breaking and entering, and thefts by servants or slaves, were punished much more severely. Flogging, branding, banishment, and service aboard the king's galleys were common sentences for this class of offender. The increase in the prosecution for theft from the seventeenth to the eighteenth century, was particularly marked at Quebec, the main business centre of the colony.

The resale of stolen goods, fraud and arson constituted the other major crimes against property. All were occasional but treated seriously. When black slave Marie-Joseph-Angélique protested her sale in 1734 by setting ablaze her mistress's house in Montreal, the fire ultimately destroyed 46 homes. The local judge sentenced

New France" (1979) 36 William and Mary Quarterly at 524–547.

88 Marie-Aimée Cliche, "L'infanticide dans la région de Québec (1660–1969)" (1990) 44 Revue d'histoire de l'Amérique française at 45.

her to be burned alive, but the Superior Council amended the sentence and she was hanged before her body was set on fire.

Criminal activity in New France matched that of contemporary France. Criminal justice was moderately effective as a means of social control in the towns, but lack of an efficient police force and the relative ease with which criminals could leave for the west or the southerly English colonies, limited its overall power. Despite the fearful array of punishments available to judges, only a quarter of all accused people were actually punished. The Sovereign Council usually was less severe than the lower royal jurisdictions. As a result only 41 of the 78 people convicted of a capital offense in the eighteenth century were executed.

V. Conclusion

The law of New France mirrored the social structure favored by the absolute monarchy: authoritarian and paternalistic. The patriarchal family was at the centre of this structure and the law sought to reinforce marital authority, the sanctity of marriage, and to protect patrimony and lineage. Hierarchy underlined seigneurialism. Conceived at the end of the Renaissance, the *Coutume de Paris* remained insensitive to new capitalist business practices, evidenced by secret *hypothecs*, insistence on the integrity of patrimony within the lineage, seigneurial monopolies, and protection afforded to widows and orphans. Yet it was not a monolithic code, instead evolving by case experience and royal legislation that encouraged commercial capitalism to flourish throughout the *ancien régime* French empire. The Conquest of 1759 introduced a new business class that did not understand how the system worked and this led to repeated demands for change that continued for over a century.[89]

Criminal law, with its secrecy and torture may appear barbaric to the modern observer, yet the entire system was probably less harsh and equally as fair as what existed in New England. All criminal codes seek to ensure governmental social control and uphold society's values as defined by the crown. Effectiveness was limited by the repressive power at its command. In New France, authority was present in the towns, but the countryside mediated conflicts largely outside royal administrative institutions.

France preceded England by nearly a century in exporting a legal system to what would become a federated Canada, but the French legal inheritances had to adapt to a frontier culture that had generated its own mature régimes and procedures, even before 1760.

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89 See *infra*, essays by F.M. Greenwood at p. 144 and N. Kasirer and J-M. Brisson at p. 144. See also Brian Young, *The Politics of Codification: The Lower Canadian Civil Code of 1866* (Montreal & Kingston: The Osgoode Society and McGill-Queen's University Press, 1994) at 3–42.