Why did Louis XIV establish High Courts of Justice in North America?

The Sovereign Council of Québec (1663) and the Superior Council of Louisiana (1712) through the prism of legal transplant theories[*]

Serge DAUCHY

CNRS – University of Lille (France)
serge.dauchy@univ-lille.fr

In February 1663, the Company of New France, also known as *Compagnie des Cent Associés*, was dissolved due to overwhelming financial difficulties. Chartered in 1627, the company had been granted by Richelieu, Louis XIII's chief minister, a monopoly on fur trade in the North American territories colonized by France one century earlier. The company, however, quickly demonstrated its inability to meet its contractual obligations, in particular the settlement of French Catholics and the organization of a rudimentary local administration. These failures led to its dissolution and the royal decision to place the colony under direct rule[1]. Two months later, in April 1663, Louis XIV issued an edict ordering the establishment of a Sovereign Council in Québec[2], the first overseas high court.

Fifty years later, under totally different circumstances, the King decided by letters patent dated 23 December 1712[3] to install a second high court on the American continent, the Superior Council of Louisiana[4]. Since Cavelier de la Salle had taken possession of the territories along the Mississippi in the name of the King in 1682, the Monarchy had completely neglected Louisiana, partly because of the War of the Spanish Succession, but also because Louis XIV considered the settlement in this very large and inhospitable territory too difficult and too expensive to administer. Native tribes allied with the English, unhealthy conditions, and destructive hurricanes threatened the very existence of the small colony on the shores of the Gulf of Mexico. Nevertheless, in 1710 the new governor, Antoine de Lamothe-Cadillac, convinced the banker Antoine Crozat to invest in the abandoned colony and in September

[*] I would like to thank very warmly my colleague and friend M.C. Mirow (FIU) for his remarks and observations which have improved and enriched this study.

[1] On the history of New France, see G. Vattier, *Esquisse historique de la colonisation de la province de Québec (1608-1925)*, Paris, 1928; Cl. de Bonnault, *Histoire du Canada français (1534-1763)*, Paris, 1950; L.A. de Grouly, *Histoire du Canada français depuis la découverte*, 4th ed., Montréal, 1962; M. Giraud, *Histoire du Canada*, 4th ed., Paris, 1966; M. Trudel, *Histoire de la Nouvelle-France*, 4 vol., Montréal, 1983-1997. More recent studies include W.J. Eccles, *France in America*, Michigan State University Press, 1990; J. Mathieu, *La Nouvelle-France : les Français en Amérique du Nord, XVI-XVIIIe siècle*, Presses de l'Université Laval, 2nd ed., 2001; G. Havard and C. Vidal, *Histoire de l'Amérique française*, Paris, 2003 ; J. Pritchard, *In Search of Empire : The French in the Americas, 1670-1730*, Cambridge University Press, 2004 and R. Lahaise, *Nouvelle France, English colonies. L'impossible coexistence (1606-1713)*, Paris, 2010.

[2] *Edits, ordonnances royaux, déclarations et arrêts du conseil d'Etat du roi concernant le Canada*, vol. 1, Québec, 1803, p. 21-24. Cf. S. Dauchy, *Le conseil souverain de Québec. Une institution de l'ancienne France pour le Nouveau Monde*, Revue du Nord, t. 97, n° 411 (2015), p. 513-526.

[3] Aix-en-Provence, Archives nationales d'Outre-Mer (ANOM), COL A^{22} fol. 10^{v}.

[4] Meanwhile, sovereign councils had been established in Guadeloupe and Martinique in 1664.

1712 the latter obtained a monopoly of trade with Louisiana for fifteen years[5]. The Crown's charter of 1713 to the new proprietor of the colony required a Superior Council, initially for a trial period of three years.

The logic of the establishment of both courts differs completely from that which led Louis XIV to create at the same period sovereign councils in Alsace (1657), Roussillon (1660) and Flanders (1668)[6]. These councils had been created following the attachment of territories previously under the sovereignty of the German Empire and the Spanish crown. In their respective edicts of foundation, the King affirmed his commitment to preserve the customs and privileges of his new subjects and to allow them to be judged, at all levels of the judicial pyramid, by trained lawyers of the province and in accordance with the customs and procedural rules in force in the jurisdictions to which these territories previously belonged. These metropolitan sovereign councils appeared merely through political compromise, as a hybridization of French and provincial legal traditions and eventually as powerful instruments of the pursued 'Francisation' and integration of the newly conquered territories[7]. In distant overseas territories, there were no particular customs to be observed, no established procedural rules, no lower courts, let alone any legal scholars. The North American colonies were 'blank slates'.

In 1663, the colony established along the Saint Lawrence River was inhabited by 3,000 settlers, mainly in the boroughs of Quebec, Trois-Rivières, and Ville-Marie on the Island of Montreal[8]. Justice – rather conflict resolution and criminal punishment – was the responsibility of the governor and the lords, such as the Jesuits who in 1626 established a jurisdiction in their seigneury of Notre-Dame-des-Anges[9].

As for Louisiana, we can hardly speak of a colony before the founding of New Orleans in 1718. During the first years of the eighteenth century, the French presence consisted only of two small garrisons, established in Mobile and Biloxi, and about twenty families[10]. The local

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[5] Isambert e.a., *Recueil général des anciennes lois françaises depuis l'an 420 jusqu'à la Révolution de 1789*, t. XX, Paris, 1830, p. 576-582 : Lettres patentes du 14 septembre 1712, accordant au sieur Crozat privilège pour le commerce de la Louisiane. On the history of French Louisiana, see M. Giraud, *Histoire de la Louisiane française*, 5 t., 1952-1974; Idem, *A History of French Louisiana*. *The Company of the Indies (1723-1731)*, Baton Rouge, 1991 and B. G. Bond (ed.), *French colonial Louisiana and the Atlantic World*, Baton Rouge, 2005.

[6] A. Lemaître, *Le conseil souverain d'Alsace. Les limites de la souveraineté*, Revue du Nord, t. 97, n° 411 (2015), p. 479-495 ; B. Durand, *Le conseil souverain de Roussillon. Un édit de création aux frontières de la Catalogne*, Ibid., p. 497-511 ; F. Souillart, *La création du conseil souverain de Tournai par l'édit d'avril 1668 : une ébauche du parlement de Flandre*, Ibid., p. 461-477.

[7] V. Demars-Sion, *Le parlement de Flandre : une institution originale dans le paysage judiciaire français de l'Ancien Régime*, Revue du Nord, t. 91, n° 382 (2009), p. 687-725

[8] M. Trudel, *La population du Canada en 1663*, Montréal, 1973, estimates the population in 1663 at 3.035 French settlers. The first population census dates back to 1666 (at the initiative of Intendant Jean Talon) and reports 3.173 inhabitants of French origin.

[9] J. A. Dickinson, *La justice seigneuriale en Nouvelle-France : le cas de Notre-Dame-des-Anges*, Revue d'histoire de l'Amérique française 28 (1974), p. 323-346.

[10] M. Giraud, *Histoire de la Louisiane française*, t. 3 : *L'époque de John Law (1717-1720)*, Paris, 1966, p. 113. The population census of 1706 mentions 24 families for a total of 194 persons, and that number had hardly increased when the colony was ceded to John Law in 1717. These figures do not include slaves (of both Amerindian and African origin), whose number is estimated in 1712 at about 100.

commandant, acting under the Naval Ordinance of 1681, had charge of everything, including justice [11]. The memoirs and reports written from 1713 onwards by Lamothe-Cadillac and Jean-Baptiste Dubois-Duclos, the King's commissioner, emphasize the worrying situation of public health. Above all, difficulties maintaining adequate supplies forced local authorities to keep the garrison alive in Indian villages and to send ships to Pensacola and Vera Cruz to seek help from the Spaniards. As governor Lamothe-Cadillac wrote to Antoine Crozat in July 1716: 'la colonie est dans un désordre horrible… c'est un monstre qui n'a aucune forme ni gouvernement'[12].

For most authors, high courts of justice in the sparsely populated North American territories under French rule expressed the King's sovereignty in his overseas colonies and asserted France's position on the international scene[13]. Such institutions legitimized the conquest of new territories to other European powers. These institutional transplants also coincided with the rise in power of Colbert, Comptroller-general of Finances, and, from 1669 on, also Secretary of State of the Navy. Organizing justice fitted into his economic plans to develop settler colonies as a cornerstone of France's mercantilist policy. The overseas sovereign councils in other words emphasized the idea of belonging to France and the colonies' commitment to the political and institutional values of the absolute monarchy. Eric Wenzel advocates the idea that royal authorities sought to found a new and original France, a "Nouvelle"-France, but under the strict control of the metropolis: ' […] faire de la colonie un modèle de territoire contrôlé par la monarchie et par des institutions transplantées de la Métropole, mais en même temps choix de développer sur les bords du Saint-Laurent comme sur les rives du Mississippi une société nouvelle du fait des particularismes américains'[14].

Legal historians have never wondered about the need to create high courts in the colonies. Jerah Johnson, for example, notes that 'for seven years the Superior Council remained the only court in the tiny colony', but he does not question why[15]. Historians rather have focused on the reasons for the takeover of the colony by the royal authority and on the conditions of rendering justice in such an environment. This historiography emphasizes particular features of colonial justice. Considering New France in particular, scholars have examined the distance from the metropolis; the lack of judicial personnel (often linked to the absence of local legal training); the difficulties of managing territories that were large, poorly controlled, and

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[11] B. Durand, *Des justices de 'bâtiments de mer'*, dans B. Durand et M. Badji (dir.), *Le juge et l'Outre-mer*, t. 5 *: Justitia illiterata aequitate uti ?* , Lille, 2010, p. 199-216, calls this initial stage of colonial organization 'sea-going justice'.

[12] Aix-en-Provence, ANOM, COL C^{13A} 4, fol. 389 : 'the colony is in a horrible mess... it is a monster that has neither form nor government'. See S. Dauchy, *'La maladie s'est mise par toute la ville'. Gouvernance et politique sanitaire en Louisiane française sous le régime des compagnie commerciales (1712-1731)*, in Gouvernance, Justice et Santé, Lille (Centre d'Histoire Judiciaire), 2020, p. 197-207.

[13] For example R. Dubois Cahall, *The Sovereign Council of New France. A study in Canadian constitutional history*, New York, 1915.

[14] E. Wenzel, *La justice criminelle en Nouvelle-France (1670-1760) : Le Grand Arrangement*, Editions universitaires de Dijon, 2012, p. 22-23.

[15] J. Johnson, *La Coutume de Paris : Louisana's First Law*, Louisiana History. The Journal of the Louisiana Historical Association, 30-2 (1989), p. 145-155.

composed of heterogeneous and dispersed settlements; and aspects related to geography and climate. In other words, historians have tried to bring to light a combined art of operating a strategy of differences while taking into account the management of pluralisms.

But why did the monarchy chose to create sovereign or superior councils from the outset, with the same rights, competences and prerogatives as the metropolitan parliaments and sovereign councils? There is no doubt, as the preamble of the 1663 edict states, that justice was a necessary prerequisite for the proper administration of affairs and for good government[16]. This, however, did not justify the establishment of a high court in Québec. In Louisiana, the conditions for installing a superior council appear even more absurd. The edict of foundation of 1712 recalls that the King has been informed that there were a few subjects who had settled in the colony. For that reason it seemed to him essential to establish judges in Louisiana, as he already had in his other colonies. His response, however, appears to be totally disproportionate. Providing justice did not justify the creation of a superior council, even if limited to an initial probationary period of three years. Simply put, the few families that had settled in Louisiana and the scarce merchants who periodically landed there did not need a high court to settle their disputes. There were not even men capable of rendering justice. On July 15, 1713, the King's Commissioner, Jean-Baptiste Dubois-Duclos, addressed a memorandum on this issue to Chancellor de Pontchartain, pointing out that there were no judicial officers in the colony. He alerted the chancellor that he was searching in vain for men capable of serving as counsellor, Attorney General, and clerk, and feared not to find any given the scarcity of the colony's population[17]. Although the court met for the first time in January 1714 with only a makeshift staff, the superior council was nevertheless confirmed by an edict of the Regent dated September 1716[18].

To understand not the will or the need to organize justice in the North American colonies, but rather the surprising decision to respond to it by establishing sovereign councils, i.e. by adopting a political and judicial top-down perspective, we propose to tackle the question through the prism of legal transplant theories. The issue is not whether or not we are in the presence of transplantation of institutions and law; the monarchy's policy was aimed at replicating its original institutions in overseas colonies .

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[16] *Edits, ordonnances royaux, déclarations […]*, *op. cit.*, p. 22 : 'Nous avons estimé […] que pour rendre le dit pays florissant et faire ressentir à ceux qui l'habitent le même repos et la même félicité dont nos autres sujets jouissent […] il fallait pourvoir à l'établissement de la justice comme étant le principe, et en même temps un préalable absolument nécessaire pour bien administrer les affaires et assurer le gouvernement […]'.

[17] Aix-en-Provence, ANOM, COL C^{13A} 3, p. 125-140, *Mémoire pour répondre aux instructions envoyées par Monseigneur le comte de Pontchartrain au sieur Duclos, commissaire de la Marine, ordonnateur à la Louisiane*, 15 juillet 1713 : 'Nous n'avons pas encore pu établir le Conseil supérieur, ayant été occupéz jusqu'à présent […]. Nous cherchons cependant des sujets capables d'estre conseiller et procureur général, ce que nous aurons, je croy, de la peine à trouver par le peu d'habitants que je vois en ce pays-cy…'.

[18] Aix-en-Provence, ANOM, COL A^{22}, fol. 19 : *Edit pour l'établissement définitif d'un Conseil supérieur de la Louisiane*. In the absence of judges in the colony, the King's Commissioner, in his capacity as First Counsellor, officiated as first instance judge in all civil and criminal cases. Cf. M. Giraud, *Histoire de la Louisiane française*, t. 1 : *Le règne de Louis XIV (1698-1715)*, Paris, 1953 p. 280.

E. Wenzel shares this opinion and states that the first French colonial Empire should be considered 'à l'aune d'une volonté politique de fonder en Amérique des répliques de la société-mère, avec des structures et institutions importées de la Métropole et principalement destinées à des populations expatriées"[19]. In practice, this could only be achieved by a complete replication of the original model, in other words, by an overall transplant of the metropolis's political, administrative, and judicial organization. This is observed not only in judicial matters but also in legal matters more generally. The founding edicts of the overseas councils always specify that the court will judge, with sovereign power and in last instance, according to the customs and ordinances of the realm and in the same way (which means according to the same procedural rules) as in the Parliament of Paris. It is therefore not necessary to return in detail to the debate between Alan Watson and Pierre Legrand about the reality or impossibility of legal or institutional transplants. Comparatists and historians, at least the majority of them who do not reject the idea of legal transplants on principle, have since become interested in the role of individual actors in transplantation, in the degrees of transferability and the factors of adjustment or rejection, summarized in its objects, causes, modes, objectives and effects[20]. It is by building on these scholars' work that we will try to understand the colonial policy of the French monarchy and its institutional and legal implementation by Colbert. More specifically, we seek to understand the reasons that led the Versailles authorities to 'duplicate' the metropolitan high courts of justice in the overseas territories, while simultaneously questioning whether it was or not primarily a response to an imperious need to organize justice in the settlers colonies.

1. Did the central courts fit colonial society? Transferability and adjustment of metropolitan institutions and law to the North American colonies.

It is probably not useful to retrace in detail the history of the legal transplant theories since the publication of Alan Watson's influential *Legal transplants* in 1974[21]. John Cairns published an in-depth survey of all the reviews, critics and debates generated by Watson's book, as well as a presentation of the new ideas and theories that it gave rise to among comparative lawyers and legal historians[22]. Indeed, apart from some scholars as Pierre Legrand and Bernhard Grossfeld who have constantly proclaimed that legal transplants were impossible because law as a cultural phenomenon is too closely linked to the culture in which it develops[23], most

[19] E. Wenzel, *op. cit.*, p. 21

[20] Z. Shen, *Legal transplant and Comparative Law*, Revue internationale de droit compare 51-4 (1999), p. 853-857.

[21] A. Watson, *Legal Transplants: An Approach to Comparative Law*, Edinburgh, Scottish Academic Press, 1974.

[22] J. Cairns, *Watson, Walton and the History of Legal Transplants*, Georgia Journal of International and Comparative Law 41 (2013), p. 638-696.

[23] P. Legrand, *The impossibility of Legal Transplants*, Maastricht Journal of European and Comparative Law 4-2 (1997), p. 111-124 and B. Grossfeld, *The Strength and Weaknesses of Comparative Law*, transl. T. Weir, Oxford, 1990

comparatists occupy a middle ground by recognizing the reality and effectiveness of the 'migration' or 'imitation' of legal systems[24]. They assert that legal transplants, although they move and are moved, always adapt and change during the process of transplantation, or as Lena Foljanty calls it, 'undergo a process of cultural translations'[25]. Most authors consider transplants in terms of borrowing and adopt the borrower's perspective in their analyses. Institutional and legal transplants are thus studied as borrowed systems operating in places and cultures very different from those in which they initially developed.

This was not the case with respect to the establishment of sovereign councils in the North American colonies. Neither the initiative nor the request came from the settlers, the vast majority of whom had probably never heard of these central jurisdictions. On the other hand, it is questionable whether the Versailles authorities had addressed the adequacy of metropolitan institutions and peripheral realities. This first raises the question of whether the monarchy really considered the setting up of sovereign councils in the overseas territories as 'transplantations'. According to David Gilles, New France's administration and law reflected a royal desire to organize the colonies on a metropolitan model: 'La colonie de Nouvelle-France est relativement exemplaire du point de vue du modèle colonial d'Ancien Régime français. Reprise en main par le pouvoir monarchique au XVII^{e} siècle après une gestion privée, son administration et son droit sont le reflet d'une volonté royale d'organiser les colonies sur un modèle métropolitain'[26]. However, and despite the founding edicts' rhetoric[27], the central government could not take for granted that institutions and legal provisions were transplantable as such outside the environment of their metropolitan origin. Turning to the question of prerequisites, Otto Kahn-Freund echoes Montesquieu's statement that 'laws should be adapted in such a manner to the people for whom they are framed, that it is a great chance if those of one nation suit another'. He therefore supports the principle that any attempt to use a pattern outside its original environment entails a risk of rejection. For O. Kahn-Freund, the degree of transferability indeed depends as well on political, religious, and cultural as on environmental criteria such as climate, geography, or density of population. These factors determine the chances a new legal and institutional system can be adjusted or even 'naturalized'[28]. The possibility of a rejection was never seriously considered, either from the point of view of the absolute monarchy, for whom the taking over of the colony was part of a much larger political and economic project, nor on the part of the settlers who could only

[24] R. Rodière, *Approche d'un phénomène : les migrations des systèmes juridiques*, in Mélanges dédiés à Gabriel Marty, 1978, p. 947 sq. and J. Rivero, Les phénomènes d'imitation des modèles étrangers en droit administratif, Pages de doctrine 2 (1980), p. 459-473.

[25] L. Foljanty, *Rechtstransfer als kulturelle Übersetzung: Zur Tragweite einer Metapher*, Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft (2015), p. 89-107.

[26] D. Gilles, *Les acteurs de la norme coloniale face au droit métropolitain : de l'adaptation à l'appropriation (Canada, XVII^{e}-XVIII^{e} s.)*, Clio@Thémis. Revue électronique d'histoire du droit 4 (2011), https://www.cliothemis.com/Clio-Themis-numero-4.

[27] Aix-en-Provence, ANOM, COL A^{22}, fol. 10-12 : '[…] de notre certaine science, pleine puissance et autorité Royale, Nous avons créé et etably, creons et etablissons par ces presentes signées de notre main dans la province de la Louisiane un conseil superieur a l'instar de ceux des autres colonies qui sont sous notre obeissance'.

[28] O. Kahn-Freund, *On the Uses and Misuses of Comparative Law*, The Modern Law Review 37-1 (1974), p. 1-27.

applaud the attention paid by the distant metropolis to the legal and institutional development of their colony. Nonetheless, there was a real risk of inefficiency and even failure if the colonial context was not taken into consideration.

A. Reshaping institutions to meet colonial constraints

The central government was perfectly aware that a wholesale transfer of the metropolitan institutional framework had to be combined with pragmatic adaptations to the particular colonial context. Some evidence indeed points in that direction. The courts' organization first, although largely modeled on the metropolitan model, was adapted from the outset to the local situation and, in particular, to the lack of qualified lawyers and experienced judges. The founding Act of the Sovereign Council of New France foresaw that the King would appoint five councilors, an Attorney General, and a chief clerk among a list of candidates proposed by the governor and the bishop of Québec. This joint participation in selection was unprecedented and the records do not provide any explanation for it. It is likely that Bishop de Laval used his influential connections in the royal entourage to obtain the co-presidency of the council and the right to appoint the members of the court jointly with the governor. In 1662, François de Laval had requested, and obtained, a personal audience with Louis XIV. We can presume that the King consulted Laval about setting up a high court in New France. Moreover, Laval likely succeeded to convince the monarch to appoint him, on an equal footing with the governor, as chair of the future court. Nothing is known about the arguments that won the royal will. Was it simply a question of counterbalancing the power of the governor or should it be seen as a means of supporting the Church's evangelization, assimilation and finally Francisation of the natives? In any case, controlling the composition of the court appeared essential to assert the Church's moral, political, and even judicial position in the new institutional landscape[29]. It was also the prelate, and not the new governor de Mézy, whom the King entrusted with the responsibility of bringing the edict establishing the Sovereign Council to Québec.

Three days after Mézy and Laval disembarked at Québec, on 18 September 1663, the court was officially established[30]. The five councilors (Louis Rouer de Villeray, Jean Juchereau de la Ferté, Denis-Joseph Ruette d'Auteuil, Charles Legardeur de Tilly and Mathieu Damours de Chauffours), the Attorney-General (Jean Bourdon) and the clerk (Jean-Baptiste Peuvret Demesnu)[31] had been appointed 'conjointly and in agreement'; all of them faithful to the bishop, who had been resident in Canada since 1659[32].

More surprising was the decision to appoint councilors for a renewable one-year term. It is perfectly understandable that the monarchy did not wish to introduce a system of venality

[29] C. Jaenen, *The Role of the Church in New France*, New York–Montréal, 1976.
[30] R. Dubois Cahall, *The Sovereign Council of New France. A Study in Canadian Constitutional History*, New York, 1915.
[31] Bibliographical information is provided by the online *Dictionary of Canadian Biography*: http://www.biographi.ca/en/index.php.
[32] A. Vachon, *François de Laval*, in *Dictionary of Canadian Biography*, *op. cit.*

and heredity offices into the colonies. It may be assumed that the decision to provide for short-term offices – and the refusal to grant irrevocability to the members of the court – was justified by legitimate doubts as to their competence and availability. All of them were born in France and belonged to the lower provincial nobility. They had arrived in Canada between 1630 and 1650 as merchant, soldier, shipmaster or engineer. They had become important landowners with seigneurial rights. None, however, had held a judicial office. Only the chief clerk, Jean-Baptiste Peuvret Demesnu, had some legal experience. He had been secretary to Governor de Lauson (1651-1656), whose daughter he had married, and had served as a notary for the Company of New France. As the judicial staff had to be replaced or confirmed in office each year, tensions quickly arose between the governor and the bishop, especially over the highly sensitive office of Attorney General. The royal edict of 1663 gave no guidance on how to cope with such an impasse. The court only recovered stability in 1665 when a new governor, de Tracy, and the first royal Intendant, Jean Talon, disembarked in Québec.

According to the Letters Patent of 1713, the Superior Council of Louisiana was to be composed of the Governor and Intendant of New France, the King's particular Governor in the Province [of Louisiana], two councilors, an Attorney General, and a clerk. It is difficult to understand – except to recall that Lower Louisiana was still an integral part of New France at that time – why the governor and the intendant who resided in Québec were mentioned among the members of the Superior Council set up in Louisiana[33]. This made little sense; the Versailles authorities could have simply appointed a judge in Mobile with the possibility of appealing decisions to the Sovereign Council in Québec. As already mentioned, royal Commissioner Dubois-Duclos did not find staff to compose the court and served for a long time as single judge. It was not until 1719 and the transfer of Louisiana to the *Compagnie d'Occident* that the high court was definitively detached from Canadian oversight and its composition adapted accordingly to the local directors of the Company, the commander general and two lieutenants on behalf of the King, three councilors, an Attorney General, and a clerk[34]. Each member combined his duty as judge with that of administrator on the board of directors in charge of the day-to-day management of a colony which had been entrusted to the exclusive care of the Company of the West after Crozat had willingly transferred his interests to John Law. A judge was also appointed in each of Louisiana's eight outlying districts to put justice within reach of the colonists who, by then, were dispersed over an ever-widening area. Each local judge – often the head of the trading post – formed a court by appointing two citizens to sit with him when hearing civil cases and four when hearing criminal cases. The same rulings were also applicable to the Superior Council, which acted as a supreme court of the colony as

[33] 'New France' originally designated all North American territories under French administration. At its largest extension, before the Treaty of Utrecht of 1713, New France included five provinces, each with its own administration: Canada, Acadia, Hudson Bay, Newfoundland, Upper (Illinois) and Lower-Louisiana.

[34] Aix-en-Provence, ANOM, COL A22, fol. 98^{v}-101^{v}, *Lettre patentes en forme d'Edit pour regler les juge qui doivent composer le Conseil supérieur etably en la Louisiane et pour etablir des premiers juges dans les lieux éloignéz*. For more information on the members of the court, see M. Giraud, *Histoire de la Louisiane française*, t. 5 : La Compagnie des Indes (1723-1731), reprint Paris, 2012, p. 21-29.

well as first and final instance for the capital district in which it sat, first Biloxi and, after 1723, New Orleans[35].

Another major adaptation was the prohibition to practice as solicitor (*procureur*) and advocate in the colonies, a prohibition that was constantly recalled in the instructions issued by the central government to the colonial administrators. The ban of legal professionals was due first of all, but not exclusively, to the absence of trained lawyers in these distant and sparsely populated territories (with the exception of a few notaries working for the commercial companies). In 1678, the Sovereign Council still asserted that the colony should not, under any circumstances, authorize litigants to request the assistance of solicitors and advocates. The reasons put forward by the court included the poverty of the inhabitants and the lack of legal experience of most of the judges[36].

This measure was also consistent with the programmatic objectives of the Sovereign Council as set out in the edict of 1663, namely '...to remove as far as possible any quarrel in the country of New France so that prompt and brief justice may be done there'. Justice, as the King reminded his judges in all his instructions to the ultramarine councils, must be accessible and without charge[37]. This was not just a figure of speech. Consulted after the Company of One Hundred Associates returned New France to the Crown, the Office of Colonial Affairs in Versailles issued a memorandum proposing various means of ensuring the conservation and development of Canada. It dwelt on questions of justice at length, advocating extra-judicial means of conflict resolution and, if these proved impossible, judicial formalities reduced to their simplest form. It is imperative, a memoir of 1663 states, 'de prévenir les contestations et les estoufer dès leur naissance ; il faut entendre les parties par leur bouche sans admettre les artifices et les desguisemens ordinaires des procédures, les juger sur le champ et sans frais; et s'il estoit absolument necessaire d'employer quelques instructions, se servir de celles qui ont esté ordonnéz pour les consulz qui sont les plus courtes et les moins à charge'[38].

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[35] Ch. Gayarré, *History of Louisiana*, 4 vol., reprint New Orleans, 1965, vol. 1, p. 252 and 273.

[36] *Édits, ordonnances royaux, déclarations..., op. cit.*, p. 95 sq., procès-verbal des modifications apportées par le Conseil du roi à l'ordonnance d'avril 1667, procès-verbal dans lequel sont reprises les motivations formulées par le Conseil souverain de Nouvelle-France, 16 novembre 1678 : '[…] il est de l'avantage de la colonie de ne pas recevoir en ce païs avocats, procureurs ny praticiens vue la difficulté qu'il y a de faire des voyages et la pauvreté des habitans qui entreprennent à grands frais des procès sans y réfléchir […] et le peu d'expérience de la pluspart des juges'. G. Doutre, *La profession d'avocat et de notaire en Canada*, Revue canadienne, 1873, p. 840-848, argued that Colbert wanted to banish lawyers from New France 'because they are the main enemies of the system of coercion that had been instituted in the colony'.

[37] Aix-en-Provence, ANOM, COL A^{22}, fol. 19v, Edit pour l'établissement d'un Conseil Supérieur de la Louisiane du mois de septembre 1716 : '[…] donnons pouvoir audit Conseil Superieur de juges en dernier ressort tous les proces et differens meus et a mouvoir entre nos sujets de la dite Province et ce sans aucuns frais'.

[38] Aix-en-Provence, ANOM, COL C^{11A} 2, f° 41 : '… it is imperative to prevent disputes and to stifle them as soon as they arise; it is necessary to hear the parties by their mouths without admitting the ordinary procedural artifices and disguises, to judge them on the spot and without charge; and if it appears absolutely necessary to use some instructions, to use those which are the shortest and least expensive'. According to Alice Bairoch, *La centralisation du droit dans les colonies françaises, 1600-1764*, in F. Hafner, A. Kley, V. Monnier and S. Schmid (edd), *Commentationes Historiae Iuris Helveticae* XVI (2018), p. 35–70 (p. 60), the ban on the arrival of legal professionals was intended to prevent the creation of a movement reflecting critically on the law and advancing the drafting of doctrine and jurisprudence specific to the colonies. While this argument can (cautiously) be

B. Adjusting law and procedural rules to a colonial context

Since justice in the colonies was not, or could not be, as suggested by the Office of Colonial Affairs, organized on the model of the commercial courts, the monarchy nevertheless agreed to numerous adaptations of the law and the procedural rules. In 1664, on the formation of the West India Company, the Custom of Paris was imposed as the sole customary norm for the colony, to the exclusion of all others. 'Une transplantation du droit français au Canada', as Jacques Vanderlinden wrote[39]. As soon as the Custom of Paris was received by the Sovereign Council, the judges and administrators of the colony quickly experienced the difficulties of its implementation and adapted it to the colonial context. Numerous modifications were adopted, without modifying the overall logic and flexibility of the customary norm. According to David Gilles, however, criticisms of the faulty or difficult implementation of the custom often served political strategies and highlighted power struggles within the colony[40].

The same adaptation or adjustment occurred in procedural matters. When the Council of New France was invited, as were the other sovereign jurisdictions of the realm, to register formally the civil ordinance of 1667, the court asserted its right of remonstrance. The lack of judicial personnel and court officers[41] and problems associated with travel and communication, among others difficulties, made it impossible to enforce many of its articles in Canada. Half of the forty-seven articles on which the court made observations related to procedural delays resulting from the climate, geography, and size of the North American colony; its remoteness from the metropolis; and, last but not least, the lack of court officials and supporting personnel. In 1679, the Royal Council endorsed almost every modification requested by the Québec judges, giving preference to oral proceedings, minimizing the formal complexities, and giving the judges full discretion to grant delays[42]. This appears to contradict Alan Watson's assertion that 'with transmission or the passing of time modifications may well occur, but frequently the alterations in the rules have only limited significance'[43].

In Louisiana, the crown's charter of 1713 to Antoine Crozat also decreed the Custom of Paris in effect. For the same reasons as those already outlined for Canada, its provisions were also subject to numerous 'adjustments', sometimes in response to local peculiarities, but more

applied to eighteenth century Canada, it is certainly not valid in the seventeenth century, nor is it true in Louisiana.

[39] J. Vanderlinden, *La réception des systèmes juridiques européens au Canada*, Tijdschrift voor Rechtsgeschiedenis / Legal History Review LXIV (1996), p. 359-389. See also Y. Zoltvany, *Esquisse de la coutume de Paris*, Revue d'Histoire de l'Amérique française 25-3 (1971), p. 365-384.

[40] D. Gilles, *Les acteurs de la norme* coloniale, *op. cit*. See also D. Gilles, *La condition juridique de la femme en Nouvelle-France : essai sur l'application de la Coutume de Paris dans un contexte colonial*, Cahiers aixois d'histoire des droits de l'outre-mer français 1 (2002), p. 77-125.

[41] See P. E. Audet, *Les officiers de justice des origines de la colonie jusqu'à nos jours*, Montréal, 1986.

[42] *Édits, ordonnances royaux, déclarations..., op. cit.*, p. 241 sq. : Édit du roi pour l'exécution de l'Ordonnance de 1667, juin 1679. Cf. S. Dauchy, *La réponse du conseil souverain de Québec au problème des délais de procédure (1663-1703)*, in C.H. van Rhee (dir.), *The Law's Delay : Undue Delay in Civil Litigation*, Maastricht, 2004, p. 83-93.

[43] A. Watson, *Comparative Law and Legal Change*, Cambridge Legal Journal 37 (1978), p. 313-336.

often due to misapplication by judges with little legal experience. Similarly, the royal ordinances were enforced. The archives of the Superior Council regularly refer to the criminal ordinance of 1670. The civil ordinance of 1667, on the contrary, is very rarely alleged, and there is no trace of a request for amendment of its provisions, unless of course the 'Canadian' version was the prevailing one. In 1716, however, a memorandum on Louisiana dealing with the application of the Custom of Paris and the civil ordinance in the colony likewise raised the problem of their implementation, among other reasons because of the delays[44]. The royal legislation to which the judges most often referred was, unsurprisingly, the Louisiana Black Code enacted in 1724 and modelled in large part on a similar code drafted in 1685 for the French Antilles. Its 55 articles regulated the status of slaves and free Blacks and the relations between masters and slaves. In fact, the planters, with the passive complicity of the local authorities and judges, complied with the legislation only when it suited them. Louisiana's Black Code differed from the law in the Caribbean in several negative ways. Interracial marriage was prohibited and enslaved persons could no longer be freed at their master's discretion. Any request for freedom required the approval of the Superior Council based on an extraordinary reason[45].

In an article discussing the theories set out by Alan Watson in *Sources of Law, Legal Change and Ambiguity* (1985), M. Hoeflich agreed with the Edinburgh professor's conclusions that 'Reception is both possible and explicable so long as one recognizes that the most important group for reception of legal rules is the legal elite who may act as a filter'[46]. In the decades following the establishment of the superior courts of justice in the French colonies of North America, there may have been a political elite, but certainly not a legal elite. The transplanted law that these inexperienced non-professional judges were expected to enforce was clearly akin to what Alan Watson described as 'front rank law', i.e. law which is immediately comprehensible to most citizens, legally trained or not, and which provides answers to the very great majority of legal problems[47]. That front rank law can then be supported, rejected or adjusted by a second rank of law – what we might call judge-made law – which must respond in concrete terms to issues that arise in daily practice. The colonial high judges indeed acted as filter. However, when they felt that the applicable law provided no answer to local

[44] Aix-en-Provence, ANOM, COL C^{13A} 4, p. 933 : Mémoire sur la Louisiane à l'attention de la Compagnie d'Occident, 1716 : 'Il faudroit suivre en tout la coutume de Paris quant au fond [...] Quant a la forme, l'on trouve de la difficulté a la suivre, parce que quand il s'agiroit que des delais seulement dans un pays de Bois habité par des nations différentes et qui n'est pas encore bien connu, il n'y auroit pas moyen surtout quant aux effets mobiliers de jamais terminer aucun procez ny de s'asseurer d'aucun sceléz car une partie dont la cause ne seroit pas bonne se retireroit avec tous les effets dans les habitations des Sauvages [...]'.

[45] S. White, *Les esclaves et le droit en Louisiane sous le régime français, carrefour entre la Nouvelle-France, les Antilles et l'Océan indien*, in E. Wenzel (dir.), *Adapter le droit et rendre la justice aux clonies (XVI^{e}-XIX^{e} siècle)*. Dijon, 2015, p. 59.

[46] M. Hoeflich, *Law, Society and Reception. The vision of Alan Watson*, Michigan Law Review 85 (1987), p. 1083-1094.

[47] A. Watson, *Two-Tier Law. A New Approach to Law-Making*, International and Comparative Law Quarterly 27 (1978), p. 552-575.

societal demands or an inadequate answer, they reported the difficulties to the central authorities who had the final word: confirm or adjust the transplanted legal provisions.

In the first French colonial Empire it appears difficult to isolate and identify clearly the role of lawyers in shaping the law. The fate of transplanted institutions and laws seems to have been the exclusive prerogative of the donor and not of the recipient. For example, in 1717, Benoit-Matthieu Collet, Attorney General at the Sovereign Council of Québec and former lawyer at the parliament of Paris, proposed to consolidate the procedural provisions of the 1667 ordinance and the 1678 regulations – in particular those adapted to the overseas conditions – into a single text. The central government rejected this proposal for a procedural 'code' specific to the Canadian colony. The Secretary of State for the Navy made it clear that he did not want the law of the colonies to be separated from that of the metropolis[48]. How could it have been otherwise? The overseas territories were merely extensions of the kingdom. Although remote and sparsely populated, they were an integral part of France. Its inhabitants were thus subject to the royal institutions and ordinances, the same institutions and laws that applied to the metropolitan subjects of the King of France.

Nonetheless, legal and judicial implementation did not necessarily justify the creation of a central court, nor did the King have to respect the customs, usages, and privileges of these provinces – in the eyes of the Europeans devoid of any political, institutional or legal tradition – by establishing courts of last resort. Consequently, other reasons must have convinced the monarch to erect sovereign or superior councils in the colonies.

2. Sovereign councils key instruments to advance Louis XIV and Colbert's colonial policy?

Contrary to Kahn-Freund's assertion[49], the establishment of royal high courts in the North American colonies proves that institutions, however closely tied to their original environment, can change their 'habitat'. This, however, does not explain the choices that were made in the seventeenth and eighteenth centuries. To understand the founding of sovereign or superior councils in the colonies, it is necessary to consider these institutional transplants or migrations as a whole within a broader framework. In other words, one must question the reasons for the retrocession of the colony to the Crown on the one hand, and the specific objectives assigned to the high courts of justice on the other hand. It is therefore necessary to reformulate our initial research question. Indeed, the central question is not so much why organize justice in the colonies starting from the highest level of the traditional judicial structure, but rather what role did the central government intend to assign to the central courts and why could these tasks not be assumed by a lower court or by any other institution.

[48] Aix-en-Provence, ANOM, COL C^{11A} 37, f° 247, 18 juin 1717. cf. A. Morel, *Collet, Mathieu-Benoît*, in *Dictionnaire biographique du Canada* (http://www.biographi.ca/fr/bio/collet_mathieu_benoit_2F.html).
[49] O. Kahn-Freund, *op. cit.*, p. 5.

A. The main goals of legal and institutional transplants: control, prestige, and innovation

Going beyond the questions of the transferability of a legal system or the adaptability of legal and judicial transplants, several comparatists have looked at the causes and objectives of these processes. Although comparatists generally adopt the receiving perspective, their observations may nonetheless point the way forward and allow historians to question the past from present perspectives and issues, here by moving contemporary viewpoints to the seventeenth and eighteenth centuries. 'Spatializing law in a comparative perspective of legal history', as Jean-Louis Halpérin puts it[50], makes it possible to draw a relationship between the center and the peripheries or, applied to our subject, between the goals of the absolute monarchy and the means implemented in the colonies to achieve them.

Rodolfo Sacco argued that there are two fundamental reasons for legal and institutional migrations or transplants[51]. The first reason is control and prestige. Every culture that has faith in itself rends to spread its own institutions and law which, as should be recalled, applied in the French colonies exclusively to the relations between Europeans. The second reason is innovation, in this case top-down innovations that originate from the central authority. There is no doubt that strengthening direct control over the North American colonies by transplanting the metropolitan institutional and legal framework was part of the monarchy's assertion of its prestige on the European stage and of direct rule over its overseas territories and inhabitants. This is also consistent with Jonathan Miller's findings that among the reasons to transplant or transfer institutions or legal regulations, the legitimacy-generating principle is paramount: 'a foreign model is seen as a way to enhance legitimacy in a given legal or political system… as in the case of fulfilling the assertion of prestige'[52]. Thus, prestige is a factor that cannot be neglected in understanding France's colonial policy in the seventeenth century. To give just one example, the mission statement issued in 1665 by the King to the first Intendant of New France expressly urged him to restrict colonial expansion to an area of land that the colony itself would be able to maintain and develop, rather than to extend the King's sovereignty and thus embrace too vast a territory, part of which France may one day be forced to give up… 'because it would result in some damaging diminution of His Majesty's reputation and of this Crown's prestige'[53].

Arguments focused on the idea of innovation have often been put forward by historians. The colonies, as Alice Bairoch recently wrote[54], would have been places of innovation in the sense that the government could experiment with reforms, such as the unification and centralization of law, that metropolitan resistance would have made difficult or impossible in other locations. Examples of colonial innovations subsequently taken up in metropolitan France

[50] J.-L. Halpérin, *Spatializing Law in a Comparative Perspective of Legal History*, Extrême-Orient, Extrême-Occident 40 (2016), p. 207-218; http://journals.openedition.org/extremeorient/644.
[51] R. Sacco, *Legal formants: A Dynamic Approach to Comparative Law II*, The American Journal of Comparative Law 39-2 (1991), p. 343-401 (p. 400-401).
[52] D. Miller, *op. cit.*, p. 849–850 et 854–855.
[53] Quoted in a letter from Colbert dated April 5, 1666 ; Aix-en-Provence, ANOM, COL C^{11A} 2, fol. 202.
[54] Alice Bairoch, *La centralisation du droit, op. cit.*, p. 51 sq.

exist for the nineteenth and twentieth centuries[55], but – and contrary to what I myself and others might have written in terms of 'experimental laboratory'[56] – this does not seem to have been the case during the Ancien Régime, and certainly not under the reign of Louis XIV. What appears as innovations or attempts at innovation are in reality nothing more than a pragmatic adaptation or adjustment of a general system to various local constraints. The monarchy intended to extend its legal system to all claimed territories; it did not seek to experiment – and least of all in the colonies – with future reforms to be passed in force throughout the realm.

Nonetheless, innovation can be understood in a different way. Berkowitz, Pistor and Richard assert that the skill to adapt successfully transplanted law to local conditions and the ability to foresee the institutional designs for their practical implementation have a major effect on economic development and 'innovation'[57]. Innovative aims of legal transplants should not be confined solely to the legal and institutional sphere; they should be understood within a global legal, political, economic, and social discourse.

On the basis of Alan Watson's reflections, some theorists of history, comparatists, and legal historians have been exploring this path over the last two decades, focusing more on the objectives and expectations of those who transplant law and institutions than on their objects, modalities or obstacles. Reinhart Koselleck was the first to assert that legal transplants should be considered as a range of experiences that are expected to be realized in the future and in a different space. His theoretical construction insists on the interconnection between past and future through the concepts of (the space of) 'experience' and (the horizon of) 'expectation'. 'Expectation ', he states, 'is the future made present; it directs itself to the not-yet, to the non-experienced, to what is to be revealed'. Expectations therefore should be described in terms of horizons, because 'the horizon is that line behind which a new space of experience will open, but which cannot yet be seen'[58]. When transplanting law or institutions, an authority thus tries to anticipate the future and consequently to shape or to change it. Albeit with no direct reference to Koselleck, David Nelken clearly argues that 'legal transplants are frequently – perhaps predominantly – geared to fitting an imagined future. Most legal transfers are imposed, invited, or otherwise adopted because the society, or at least some groups or elites within that society, seek to use law for the purposes of change. The goal is not to fit law to what exists but to reshape what exists through the introduction of something different'[59]. Transplanted law and institutions act as an index of what a society or social group wants to

[55] See B. Durand, *Introduction historique au droit colonial*, Paris, 2015, p. 528-533.
[56] S. Dauchy, *Stratégies coloniales et instruments judiciaires en Nouvelle-France (1663-1703)*, in B. Durand et M. Fabre (dir.), *Le Juge et l'Outre-mer*, t. 1 : *Phinée le divin ou les leçons du passé*, Montpellier, 2005, p. 207-225 (p. 221-223).
[57] D. Berkowitz, K. Pistor and J.-Fr. Richard, *Economic Development, Legality and the Transplant Effect*, European Economic Review 47-1 (2003), p. 165-195.
[58] R. Koselleck, *The practice of Conceptual History: Timing History, Spacing Concepts*, Stanford, 2002, p. 100-114 and Idem, *Futures Past : on the Semantics of Historical Time*, New York, 2004, p. 255-276.
[59] D. Nelken, Comparatist and Transferability, in P. Legrand and R. Munday (eds), *Comparative Legal Studies: Traditions and Transitions, Cambridge*, 2003, p. 437-466 (p. 451-457).

become or what an authority or elite wants it to become. Synthesizing previous research, George Rodrigo Bandeira Galindo endorses the observation that 'legal transplants rest fundamentally on a spatial dimension, […] rules or institutions existing in one specific space become applicable, for several different reasons, in another space'[60]. A rule or institution that is transferred from one space to another carries at its core expectations to be fulfilled in the receiving system. Thus, he asserts that every transplant embodies some form of mediation between what has been experienced and what is expected. Transplants, in other words, are simultaneously grounded on the past and oriented to the future. From a legal-historical perspective, these ideas unquestionably open new avenues. Beyond the traditional relationship between law and society that caused so much debate between the supporters of Watson or Legrand, it is the goals of transplantation as a means rather than as an end that ought to be highlighted.

So let us consider courts of justice as a means and not as an end in themselves. Justice, in fact, does not have the assignment of defining the main orientations of a colonial policy. It can contribute to a policy or, on the contrary, it can slow it down or even hinder it. Justice, just as the law, is a tool, essential of course, but simply one tool among others in the implementation of a more global strategy defined by the monarch and his close advisers. Legislation defines the framework for this strategy, and justice is intended to set it in motion. It is in this sense that the preamble of the edict of creation of the Québec Sovereign Council of 1663 should be interpreted: 'l'établissement de la justice est un préalable absolument nécessaire pour bien administrer les affaires et assurer le gouvernement, dont la solidité dépend autant de la manutention des lois et de nos ordonnances que de la force de nos armés'[61]. To discover the monarchy's expectations with regard to the colonies and the strategies for achieving its objectives, it is necessary to consult the correspondence and more particularly the instructions addressed by the King or on his behalf to the local authorities. The administrative reorganization of New France following the dismantling of the Company of One Hundred Associates in 1663 saw the emergence of two central figures in colonial policymaking. These were Jean-Baptiste Colbert, who in 1665 was appointed Comptroller General of Finance, and Jean Talon, who disembarked in Québec in September of the same year as the first Intendant of Justice, Police and Finance in Canada, Acadia, the Island of Newfoundland and other territories of 'septentrional France'. Colbert, who from 1669 onwards strengthened his position by becoming Secretary of State for the Navy – and in this capacity the King's principal adviser on all overseas matters – naturally stood as the main architect of colonial policy. As for the Intendant, he was in charge of the civil administration of the colony and especially the implementation of Colbert's policy.

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[60] G. R. Bandeira Galindo, *Legal Transplants between Time and Space*, in Th. Duve (ed.), *Entanglements in Legal History: Conceptual Approaches*, Frankfurt, 2014, p. 124-148 (p. 136 sq).

[61] S. Dauchy, *Le conseil souverain de Québec*, *op. cit.,* p. 517 : 'the establishment of justice is an absolutely necessary precondition for the proper administration of affairs and government, the soundness of which depends as much on the handling of laws and our ordinances as on the strength of our armies. See also S. Dauchy, *Stratégies coloniales*, *op. cit*., p. 207-225.

'Le commerce est la base et le fondement des nouvelles colonies et qui rend les royaumes florissans'[62]. Colbert's mercantilist policy was rooted in a favorable trade balance thanks to the export of manufactured goods, which implied a powerful navy able to compete with rival European powers, and external markets essential to the development of international trade, i.e. solidly established and well-populated colonies[63]. 'Clearing and populating Canada', these were the priorities that the ministerial correspondence repeated over and over again. The mission letter that Colbert gave to Jean Talon strongly insisted on the need to populate the colony. The letter, however, specified that this could not be done by sending new settlers. In response to a pressing request from the Intendant to send him 'men and women chosen strong and capable of work', Colbert replied once more in April 1666: 'le roi ne peut consentir à dépeupler son royaume pour faire du Canada un grand et puissant Etat; la France n'a pas assez de surnuméraires et de sujets inutiles pour peupler la colonie'[64]. Sending new settlers, especially young girls to marry, remained the exception[65]. The increase in the colonial population was bolstered by a natalist policy and, somewhat randomly, by an intensification of evangelization and Francisation of the (especially female) indigenous population.

Several measures, both incentive and coercive, were therefore taken to encourage marriages and births. In 1670, a decision of the Council of State in Versailles granted, in order to encourage large families, an annual pension of three hundred pounds to families with ten living children and four hundred pounds to families with twelve or more children. The same ruling also required the Intendant to fine fathers who did not marry their boys before the age of twenty and their daughters from their sixteenth year onwards. A present of twenty pounds was also to be given to boys and girls who married before this age[66]. The following year, the Intendant issued a regulation ordering bachelors to marry on the spot the girls who arrived from France on pain of being deprived of their right to hunt, fish, and trade in furs[67]. To advance settlement , the colonial authorities also multiplied their actions against the *coureurs de bois*. In less than ten years, the results of this natalist policy were already obvious. The population of Canada tripled, and the inhabitants, gathered in village communities at the

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[62] Aix-en-Provence, ANOM, Col C^{11A} 6, fol. 181, 4 November 1683: 'Trade is the bedrock and foundation of the new colonies that makes the kingdoms flourish'.

[63] Y. Charbit, *Les colonies françaises au XVII^{e} siècle : mercantilisme et enjeux impérialistes européens*, Revue européenne des Migrations internationales 22-1 (2006), p. 183-199.

[64] Aix-en-Provence, ANOM, COL C^{11A} 2, fol. 199 : 'the King cannot consent to depopulate his kingdom to make Canada a great and powerful state; France does not have enough people and useless subjects to populate the colony'.

[65] Between 1663 and 1673, the king nevertheless took charge of sending some 800 girls to be married. Upon their arrival in Canada, the Intendant granted them some clothing and provisions. A dowry, known as the 'King's gift' (fifty pounds for commoners and one hundred pounds for noble girls), was given to them after signing a marriage contract before a notary. See S. Dumas, *Les filles du roi en Nouvelle-France*, Québec, 1972 ; Y. Landry, *Orphelines en France, pionnières au Canada. Les filles du roi au XVII^{e} siècle*, Montréal, 1992 and G. Lanctôt, *Filles de joie ou filles du roi : étude sur l'émigration féminine en Nouvelle-France*, Montréal, 1992.

[66] *Edits, ordonnances royaux, déclarations […]*, *op. cit.*, p. 57-58 : Arrêt du Conseil d'Etat du roi pour le mariage des garçons et filles de Canada, 12 avril 1670.

[67] P.-G. Roy, *Ordonnances, commissions etc. des gouverneurs et intendants de la Nouvelle-France Archives de la Province de Québec*, Beauceville, 1924, vol. 1, p. 104-105, 20 October 1671.

initiative of Jean Talon, had already cultivated more than fifteen thousand acres of land[68]. Québec had become a provincial town, and villages were developing along the St. Lawrence River, as witnessed also by the first superior of the Ursuline monastery founded in Québec [69]. Colbert also placed great hope in the Francisation of the native populations. In the instructions he addressed to Intendant Talon in 1671, he wrote: '[..] travaillez tousjours par toute sorte de moyens à exciter les ecclésiastiques et religieux qui sont audit pays d'eslever parmy eux le plus grand nombre des dits enfans qu'il leur sera possible affin qu'estant instruits dans les maximes de notre religion et dans nos mœurs, ils puissent composer avec les habitans du Canada un mesme peuple et fortiffier par ce moyen la colonie'[70].

This policy, however, was a failure; local authorities blamed the Jesuits. Noting that little progress had been made in the settlement and assimilation of the indians, Governor Frontenac accused the Jesuits in a letter addressed to the Ministry of the Navy in 1672 'of thinking as much about the conversion of beavers as about the conversion of souls'[71]. The Jesuits were not the only ones responsible, even though they were faulted for having always maintained indigenous people in 'Indian reductions' organized on the model of those founded as early as 1610 by the Society in South America[72]. The local authorities did little more to encourage assimilation or mixed unions, refusing systematically, for example, to grant financial incentives to encourage mixed marriages. Finally, the resistance from indigenous people should not be minimized, as evidenced by the limited results achieved by the Ursulines. 'A Frenchman becomes wilder faster than a savage becomes French', wrote the superior of

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[68] P.-G. Roy, *Papier-terrier de la Compagnie des Indes occidentales pour les années 1667-1668*, Archives de la Province de Québec, Beauceville, 1931.

[69] P. F. Richaudeau (ed.), *Lettres de la Révérende Mère Marie de l'Incarnation, première supérieure du Monastère des Ursulines de Québec*, Tournai, 1876, vol. II, p. 420 : '[…] lorsque nous y sommes venues, il n'y avait que cinq ou six petites maisons tout au plus ; tout le pays était de grandes forêts pleine de halliers. Maintenant Québec est un ville, au-delà et aux environs de laquelle se trouvent quantité de bourgs et villages dans une étendue de plus de cent lieues'. See also D. Gauvreau, *Québec, une ville et sa population au temps de la Nouvelle-France*, Québec, 1991

[70] Laval, Archives nationales du Québec, série B : Instructions à Talon, vol. III, p. 66-67, February 1671 : 'Work daily by all means to stimulate the clergymen who are in the said country to raise as many of the said children as possible, so that, being instructed in the maxims of our religion and in our moral, they may compose with the inhabitants of Canada a single people and fortify the colony'. The French considered the Amerindians as subjects of the king to be civilized. As early as 1608, Champlain stated that 'with the French language, they will also acquire a French heart and spirit'. This position was confirmed in 1627 by Richelieu in the charter issued to the Company of One Hundred Associates. Cf. C. J. Jaenen, *Francisation et évangélisation des Amérindiens de la Nouvelle-France au XVII^e siècle*, Société canadienne d'histoire de l'Eglise catholique, 1968, p. 33-46.

[71] Aix-en-Provence, ANOM, COL C11A 3 ; fol. 233, 2 November 1672. See also G. F. Stanley, *The policy of 'Francisation' as applied to the Indians during the Ancien Régime*, Revue d'Histoire de l'Amérique française III-3 (1949), p. 333-348 and C. J. Jaenen, *Problems of assimilation in New France, 1603-1645,* French Historical Studies IV-3 (1966), p. 265-289.

[72] A. Beaulieu, *Reduire et instruire : deux aspects de la politique missionnaire des jésuites face aux Amérindiens nomades (1632-1642)*, Recherches amérindiennes au Québec 17- 1 & 2 (1987), p. 139-154 ; M. Jetten, *Enclaves amérindiennes : les 'réductions' du Canada (1637-1701)*, Québec, 1994 ; V. Gregoire, *Conversion through 'Reductions': The Missionaries at work in 17th century New France as described in their yearly relations*, Cahiers du Dix-septième : An interdisciplinary On-line Journal VIII-2 (2003), p. 21-32 (http://se17.bowdoin.edu/2003-volume-viii-2/2003-volume-viii-2).

the Québec monastery[73]. The monarchy was thus pinning all its hopes on the demographic growth of French settlers, and Colbert did not cease to urge local authorities to bring these inhabitants to marriage, 'because it is the safest and almost the only way to achieve a considerable population increase in the colony'[74]. The settlement policy was obviously not an end in itself, although it did provide an external market for the export of manufactured goods. The colony needed people to develop agriculture, fisheries, mining exploration, and shipbuilding[75]. In 1668, Intendant Talon informed the Minister that the colony provided for its own needs in wheat, vegetables, and hops and, two years later, he proudly announced the export of the overproduction of fish and meat to the Antilles and the start of the first woolen mill and brewery. On the other hand, the forestry industry, in which Colbert had high hopes of giving the kingdom a commercial and military fleet worthy of the name, remained anemic due to the lack of skilled workers and the shortage of transport ships[76].

The situation in Louisiana in 1712, when the Superior Council was established, was very different from the circumstances around the establishment of a high court in Canada fifty years earlier. France was emerging exhausted and financially exsanguinated from the War of the Spanish Succession. Since the Canadian Pierre Le Moyne d'Iberville had been given in 1698 the mission of building a garrison (Fort Maurepas) in Louisiana to dispel English claims, the colony had survived with difficulty before it was finally turned over to a commercial company. It was not until the founding of New Orleans in 1718 that Lower Louisiana began to experience economic and commercial development, mainly due to the massive importation of slaves. In 1712, however, this substantial change was still in the future. Correspondence between the Secretary of State for the Navy, the Count of Pontchartrain, and the local officials (the governor and Crozat's representatives), mainly evoked quarrels over precedence, corruption of storekeepers, deplorable sanitary conditions, supply problems, epidemics and hurricanes, belligerent relations with the Indian tribes, and the extreme difficulty of attracting settlers, many of whom decided to settle in the West Indies.

Under these conditions, official documents reveal no precise objectives or clearly defined expectations. Unable to rule Louisiana, the King retroceded the colony to a commercial company whose hopes were quickly deceived. Crozat's enterprise proved anything but

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[73] P. F. Richaudeau (ed.), *op. cit.*, p. 372 : 'C'est une chose très difficile, pour ne pas dire impossible, de les franciser ou civiliser. Nous en avons l'expérience et nous avons remarqué que de cent de celles qui ont passé par nos mains, à peine en avons nous civilisé une. Nous y trouvons de la docilité et de l'esprit, mais lors qu'on y pense le moins, elle montent pas dessus notre clôture et s'en vont courir les bois avec leurs parents, où elles trouvent plus de plaisir que dans les agréments de nos maisons françaises'.

[74] Aix-en-Provence, ANOM, COL C11A 4, fol. 191v., Letter of 15 May 1678, in which he ordered Intendant du Chesneau to send him yearly a detailed statement of the number of marriages and births.

[75] Aix-en-Provence, ANOM, C^{11A} 2, fol. 143-154, 4 octobre 1665, premier rapport de l'Intendant Talon à Colbert: '*quant aux choses necessaires a la vie, on les peut abondamment esperer de ce seul pays s'il est mis en culture et je dis plus que quand une fois il aura esté fourny de toute sorte d'espèces d'animaux champestes et domestiques à la nourriture desquelz il est fort propre, il aura dans 15 ans suffisamment de surabondant, tant en bled ; legumes et chair qu'en poisson pour fournir les Antilles de l'Amérique*'.

[76] L.A. de Grouly, *Histoire du Canada français depuis la découverte*, 4th ed., Montréal, 1962, p. 62.

profitable. The royal interest in Lower Louisiana can only be explained by geopolitical reasons. The Treaties of Utrecht (1713), which put an end to the war in Europe, acknowledged a decline of French dominance. Acadia and part of the Caribbean colonies were lost. Worried about the growing influence of the British colonies, the King sought to contain the English east of the Appalachians by trying to draw closer to New Spain, thus also cherishing the hope of gaining access to the mines in Spanish territory. The edict of creation of the Louisiana court indeed alluded to the war in Europe, asserting it prevented maritime trade and the growth of the colony. The decision to create a Superior Council appears more than ever as a wager on the future, albeit a prudent one because of the limited time provided for its initial establishment.

B. ‘A horizon of expectations’; reasons for sovereign councils.

What role did sovereign councils play in the colonial strategy? What objectives were assigned to them? In what way could they support the implementation of Colbert's mercantilist policy? In short, what were the monarchy's expectations and goals when transplanting high courts of justice in the Americas?

The first objective assigned to the high courts of justice created in the overseas colonies was, of course, to settle disputes that might arise between settlers or between traders and settlers. Dispute resolution methods had to be simplified and adapted to local realities and, more importantly, they had to support government policy. The monarchy clearly expected the judges to contribute to, or at least not hinder, the goals it had set for its North American colonies. In 1663, a brief to the Council from the Office of Colonial Affairs stressed the importance of preventing conflicts and stifling them at birth ‘so that the inhabitants may devote all their time to the cultivation of the land and to trade’[77]. Justice should in no way divert the settlers from their main mission of the growth and prosperity of the colony and the realm. In 1680, the King similarly reminded Intendant Duchesnau that ‘les habitants de la Nouvelle-France doivent être appliqués à la culture des terres, au commerce et manufacture et point divertis par les procédure en justice’[78]. These repeated instructions make it possible to formulate a first hypothesis about the expectations of the central government when choosing to erect in Canada, and a few decades later in Louisiana, a central court of justice before it even considered the establishment of lower courts. By entrusting these high courts with the mission of judging in first and last resort, the number of jurisdictional levels was obviously limited to a strict minimum, which seems all the more obvious in view of a lack of trained lawyers. The impossibility of appealing against the court’s decisions significantly reduced the length of trials and their cost. The non-intervention of solicitors and advocates, oral pleadings, and simplified procedural formalities also contributed to this goal. The King's

[77] Aix-en-Provence, ANOM, COL C^{11A} 2, fol. 41.
[78] Aix-en-Provence, ANOM, COL C^{11A} 5, fol. 209-217v, 2 June 1680 : ‘[…] the inhabitants of New France must be dedicated to the cultivation of the land, trade and manufacturing and not distracted by legal proceedings’.

promise to provide 'good and brief justice', recalled in all his foundation edicts, was thus not just a figure of speech.

The same observation also applies to Louisiana where the lack of men with adequate legal knowledge or any experience as judge was even more striking. This is probably why in the beginning the governor (residing in Québec) and, in his absence, the Intendant of New France chaired the Superior Council of Louisiana. The latter was also responsible for collecting votes and pronouncing judgments. The King awarded him moreover the same functions and advantages as 'the first presidents of his other courts'[79]. After the appointment of the first judges in distant trading posts, the first councilor of the Superior Council continued to serve as first instance judge in New Orleans, where the vast majority of settlers resided. Thus, justice in Louisiana, finally removed from Québec's guardianship in 1719, was also organized to settle disputes within a single instance system, and thus ensure access to prompt and inexpensive conflict resolution. While at the outset, a lower court might have been sufficient to resolve, either amicably or contentiously, disputes between members of a small community, such a solution would have had two disadvantages. First, there was the risk that passing merchants, accustomed to professional and trained judges, would challenge a laymen's judgments. Second, and as far as we can truly measure the 'legal consciousness' of individual actors to a dispute[80], litigants had to be allowed to appeal to a metropolitan court, which was unthinkable given the distance, time, and costs. Disputes had to be settled on the spot and decisions enforced promptly.

Colonial high courts were also supposed to uphold the King's authority and prestige. It might seem ironic to speak of royal authority and prestige with respect to the small community of French settlers on the shores of the Gulf of Mexico in the early eighteenth century. It seems even more ironic to apply Roberto Sacco's theory that every culture or nation that has faith in itself spreads its own institutions and law to this scenario. The impoverished colony depending on Spanish relief and supply did not, at first glance, contribute to the prestige of France in that part of the world. On the other hand, the decision to establish a superior court to render justice in the name of the King expressed without the slightest doubt that France exercised control and sovereignty over the lands extending from the Great Lakes to the mouth of the Mississippi. Although that control was far from effective given the small number of soldiers and royal agents entrenched in the garrisons of Biloxi and Mobile, the fact remained that France still claimed the prestige of a great colonial empire and the ownership of a large part of North America. The transplantation of the royal institutions were thus part of a global strategy to prevent the expansion of the British colonies after the losses suffered as a result of the Treaties of Utrecht (1713). Above all, the Superior Council helped Louis XIV maintain a position of prestige on the European chessboard, despite an obvious loss of influence at the end of his reign.

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[79] Aix-en-Provence, ANOM, COL A 22, fol. 11v-12v, letters of provision, 24 December 1712.

[80] D. Nelken, *Defining and Using the Concept of Legal Culture*, in Esin Örücü and David Nelken (eds.), *Comparative Law: A* Handbook, Oxford, 2007, p. 109-132.

Fifty years earlier, at the height of the absolute monarchy's prestige, Colbert's takeover of New France and the migration of the metropolitan institutions to Canada can also be interpreted in terms of control. Transplanted institutions and law indisputably asserted the pre-eminence of royal authority and that of its representatives in the face of competing claims, particularly those of the Church. Before embarking for the Americas, Jean Talon received personally from the hands of Louis XIV a long memorandum, probably written by Colbert, in which the King warned the Intendant of the Jesuits' intolerable hold on the colony. The King informed him that the bishop was the Jesuits' servile creature and that most members of the Sovereign Council, especially the first counsellor and the Attorney General, were entirely devoted to the Society. As C. Jaenen wrote, 'Political power was not distasteful to the Jesuits, but open assumption was undesirable'[81]. The brief specifically instructed the Intendant to keep in a just balance 'the temporal authority which resides in the person of the King and those who represent him, and the spiritual authority which lies in the person of the bishop and the Jesuits, … so that the latter is always inferior to the former'[82]. On October 4, 1665, a few days after his arrival in Canada, Jean Talon wrote to the King that he would keep a watchful eye on the Jesuits and prevent their influence from being prejudicial to his majesty's interests[83]. Talon's royal commission granted him the right to oversee the (annually renewable) appointment of the members of the Sovereign Council, thus recognizing him as the colony's first magistrate. In 1675, a royal ordinance formally established the Intendant as president of the Council.

The controversy over the sale of alcoholic beverages to indigenous people illustrates one facet of the opposition between civil and ecclesiastical authorities. On arrival in New France in the early seventeenth century, the Jesuits called for an outright prohibition on the sale of alcohol to the 'savages' for moral reasons and because drunkenness was a major obstacle to conversion. Not surprisingly the Sovereign Council, after its establishment under the orders of the bishop, acceded to the clergy's persistent demands by imposing increasingly severe punishments for offenders. Nonetheless, under Intendant Talon's pressure, the Council finally legalized the trade of alcohol in 1668. Commercial reasons officially justified this turnaround as indigenous traders preferred to deal with the Dutch who gave them guns and alcohol in exchange for beaver pelts. An unspoken reason for this reversal likely expressed the end of the church's stranglehold on the Sovereign Council, and more broadly on the colony, and a strengthening of Colbert's authority and that of the King's local representatives[84].

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[81] C. Jaenen, *The Role of the Church*, *op. cit.*, passim.

[82] This memorandum, dated March 27, 1665 and handed to Jean Talon during an audience with the King and Colbert, is reproduced in Th. Capais, *The Great Intendant. A Chronicle of Jean Talon in Canada (1665-1672)*, Raleigh, 1914, p. 38-41.

[83] Aix-en-Provence, ANOM, C^{11A} 2, fol. 143-154.

[84] S. Dauchy, *Faisons defenses de traitter ny donner aucunes boissons enyvrantes aux sauvages. Politique colonial et conflits de pouvoirs en Nouvelle-France (1657-1668)*, in E. Bousmar, Ph. Desmette and N. Simon (eds), *Légiférer, gouverner et juger. Mélanges d'histoire du droit et des institutions (IX^{e}-XXI^{e} siècle) offerts à Jean-Marie Cauchies*, Bruxelles, 2016, p. 373-396.

In addition to jurisdictional prerogatives, the Sovereign Council of New France, like all the other supreme courts of the kingdom, was entrusted with extensive regulatory powers to govern 'all police matters, public and private, of the whole country'. Elise Frêlon has shown that from its creation the Québec Council has asserted itself both as an instrument for the diffusion of royal norms and as an autonomous body for the creation of 'provincial' norms[85]. Far from the metropolitan decision-making centers, the Council had to respond to the specific problems facing both the colonial authorities and the settlers. The Council undertook this task at first alone, but after 1665 in agreement with the Intendant who was formally invested with the responsibility of safeguarding the King's right to change, reform, or abolish statutes and regulations and, if necessary, impose new ones[86]. During the first years following the monarchy's takeover of the colony and the transplant of metropolitan law and institutions, this regulatory activity of the Sovereign Council appears to have been even more important than its strictly judicial activity. As in metropolitan France, the legal technique used was the '*arrêts de règlements'*, i.e. solemn decisions of general application that are binding for the future and have the same force as statutory regulations.

Regulatory orders promulgated by the Council were the main instrument for implementing royal policy. For example, the regulations of the Sovereign Council of Québec translate Colbert's repeated expectations regarding settlement and trade into concrete directives. Most regulations concerned family policy and natalist measures, land clearing and the development of food crops, the organization of village communities, the establishment of various factories, and, of course, the fur trade and relations with the indigenous populations. In Louisiana, on the other hand, the regulations relate to fortification works, the construction of a hospital and a pharmacy, the distribution of provisions, the control of stores, the building of a new capital, the draining of marshes, and the many provisions relating to slaves[87]. From 1723 onwards, the Council's regulations progressively dealt with a wider range of subjects reflecting the colony's progressive demographic, economic, and commercial development. For example, a regulation dated May 21, 1723, organized the keeping of civil registers. Such regulations also took on a greater significance because they were no longer promulgated in the name of the directors of the Company but were issued on the proposal of the Attorney General and thus placed directly under royal authority[88].

These regulations are, in other words, as much a mirror of the colony's difficulties and needs, to which the transplanted law had to be adjusted according to time and space, as they are a

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[85] E. Frelon, *Les pouvoirs du Conseil souverain de la Nouvelle France dans l'édiction de la norme (1663-1760),* Paris, 2003. See also R. Dubois Cahall, *The Sovereign Council of New France. A study in Canadian constitutional History*, New York, 1915.

[86] *Edits, ordonnances royaux, déclarations…, op. cit.*, p. 37-39.

[87] The early regulations of the Sovereign Council of Québec have been published in *Jugements et délibérations du Conseil souverain de la Nouvelle-France*, Québec, 1885; those issued by the Superior Council of Louisiana are known only through the periodic reports that the local authorities send to the Minister of State and the directors of the Company.

[88] M. Giraud, *Histoire de la Louisiane française*, *op. cit.*, t. 5, p. 30-31.

vision of the horizon of expectations, of which Koselleck spoke, behind which a new space of experience was expected to open up. Only parliaments and sovereign councils combined judicial and regulatory powers. They were the only courts with the recognized right to issue regulatory rulings. No other jurisdiction than a sovereign council would have been competent to create law and ensure its application at the same time. This was most likely the main reason motivating the monarchy to transplant sovereign councils to the overseas colonies and connecting, by this means, past and future, tradition and innovation. Colbert's expectation was indeed to make the colonies' programmed future present. To this end, he had to anticipate the overseas territories' future development by trying to influence the present to shape the society that would fit within his overall mercantilist policy and consolidate France's glory. Even in Louisiana, where nothing seemed to justify the establishment of a Superior Council, one can think that the monarchy hoped in this way to support the company of Antoine Crozat and, from 1717 onwards, that of John Law. The court's regulations were to encourage the growth of the colony or, at the very least, to prepare its future economic development, and ultimately the Crown's direct rule over this distant land to which the monarchy had not hitherto been able to pay due attention.

To paraphrase David Nelken, the goal of the institutional transplants was not to fit law to what existed but to shape the non-existing through the introduction of something different. The colonial sovereign councils were not perfect replicas of the metropolitan models. Their organization, the way of appointing their members and their rules of procedure were adapted both to local constraints and to governmental concerns (based on past experience with parliamentary opposition). Moreover, there was little or no risk that the transplantation of sovereign courts would be rejected. There were no legal irritants, according to Tuebner's expression[89], that prevented their domestication to the new environment or even changed the very essence of the institution: a court of last resort rendering justice in the name of the King and, above all, exercising real regulatory powers. The transplanted high courts carried at their core the monarchy's expectations of settlement and commercial development to be fulfilled through the kingdom's overseas extensions. Finally, to answer the question 'Why did Louis XIV establish high courts of justice in North America' is to remember, as Michele Graziadei argued[90], that in any transplantation there is a share of ideology which transforms power into influence and acts as an interface between individual decision and collective action.

[89] G. Tuebner, *Legal Irritants: Good faith in British Law or How Unifying Law Ends Up in New Divergences*, Modern Law Review 61 (1998), p. 11-32.
[90] M. Graziadei, *Legal Transplants and the Frontiers of Legal Knowledge*, Theoretical Inquiries in Law 10-2 (2009), p. 723-743 (p. 738-740).