

Journal of Civil Law Studies

Volume 1

Issue 1 *Civil Law Workshop*

Robert A. Pascal Series

Revisiting the Distinction Between Persons and Things

Article 2

1-1-2008

Avant-Propos

Olivier Moréteau

Louisiana State University Law Center, olivier.moreteau@law.lsu.edu

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Olivier Moréteau, *Avant-Propos*, 1 J. Civ. L. Stud. (2008)

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AVANT-PROPOS

Olivier Moréteau*

This publication is part of the revival of the Center of Civil Law Studies (CCLS) at the Louisiana State University Paul M. Hebert Law Center. Two projects, started in the year 2006, the year of the Centennial of the Law Center, are coming to fruition with this Number One volume of the newly created Journal of Civil Law Studies, coming out at the close of 2008, the year of the Bicentennial of the Louisiana Civil Code.

The first project was the creation of a new Journal, devoted to comparative studies, with a focus on the civil law and the common law traditions, bijuralism being what makes LSU so special and unique in the United States academic world. This Journal is intended to promote a multidisciplinary and pluralistic approach, and to focus on the following themes:

- The evolution of the law in mixed jurisdictions, chiefly Louisiana;
- The evolution of the civil law in an English speaking environment;
- The impact of globalization on the evolution of the civil law and the common law;
- The impact of the civil law and the common law outside the western world and their interrelation with other legal traditions;
- Bridging the divide between civil law and common law in the American hemisphere and in the European area; and
- The combination of the civil law and common law traditions in the harmonization and unification processes, with a focus on linguistic issues.

First named Journal of Bijural Studies, the project has been renamed Journal of Civil Law Studies (JCLS), to mark its close connection with the CCLS and also the universal character of the

* Professor of Law, Russell B. Long Eminent Scholars Academic Chair, Director of the Center of Civil Law Studies, Paul M. Hebert Law Center, Louisiana State University; formerly Professor of Law, Université Jean Moulin Lyon 3 and Director of the Edouard Lambert Institute of Comparative Law.

civil law, which never grew in an insulated way but in constant relationship with other legal traditions.

The JCLS is published electronically, and yet it is laid out and referenced exactly like a traditional hard-copy journal. English is the main language, but articles may be submitted and published in French or in Spanish with an abstract in English. The JCLS is peer-reviewed. The Board of Editors is composed of distinguished comparatists from all over the world, mostly civilians with a strong knowledge of the common law systems but also common law jurists with civil law experience, and in any case, scholars with a strong expertise and interest in mixed jurisdictions. Room is made for student participation. Volume One was carefully edited by a group of Graduate Editors, selected among LSU talented and devoted LL.M. students.

Every year, there will be at least two volumes. One of them will function like a regular journal, with articles, review of normative documents and cases, and book reviews. Another volume will publish the papers of the annual Civil Law Workshop.

The second major project inaugurated in 2006 is the creation at the CCLS of an annual Civil Law Workshop Series, focusing every year on a broad topic, based on the civil law but to be treated with large comparative and interdisciplinary perspectives. At every session, the contributor is invited to make a presentation, followed by an open discussion. All this takes place in a relaxed, congenial atmosphere, with drinks being served. The Civil Law Workshop is open not only to the legal community, but also to attendees that are interested in interdisciplinary studies. It is hoped that in the years to come, the Civil Law Workshop will attract a broader and more diverse audience.

Credit must be given to my friend and former LSU colleague Michael McAuley, who introduced me to the workshop experience conducted at McGill University Faculty of Law, under the leadership of a great supporter of the CCLS revival, Professor, now Dean, Nicholas Kasirer. Nothing would have been possible without the trusting support of former Chancellor John Costonis and present Chancellor Jack Weiss, and the active participation of the LSU law faculty. The daily work of a most dedicated staff must also be praised: Agustín Parise, Research Associate, also a contributor to the present volume, Jennifer Lane, CCLS Coordinator and more than occasionally Megan Lawrence,

Coordinator for European Studies. And last but not least, credit must be given to my friend and accomplice in the Civil Law Workshop First Series, Professor John Randal Trahan, who accepted to embark with us in this new adventure. He is the co-editor of the present publication.

The contributions assembled in the present volume are dedicated to a very unique scholar whose life covered most of the 20th century and who is still active in the 21st. Professor Emeritus Robert A. Pascal started his academic career at the time of Roscoe Pound, whom he witnessed inaugurating the LSU Law Building in 1938.¹ He then was a law student at the Loyola Law School in New Orleans and served during the summer as a Research Assistant at LSU. He published his first article in the first issue of the *Louisiana Law Review*, also seventy years ago,² and his most recent piece this year,³ leaving us with almost uninterrupted scholarship on a span of seventy years. Robert A. Pascal conversed with some of the great pioneers of comparative legal studies, such as Ernst Rabel, John P. Dawson, and Hessel Yntema in Ann Arbor, Max Rheinstein in Chicago, Gino Gorla in Rome, and René David in Paris. He is far too modest to accept being portrayed as a living legend but may accept being referred to as a living memory: few law schools having reached their centennial, like LSU in 2006, can claim to have within their walls a faculty member who has been on Earth nearly as long as the law school. My *Foreword* to his latest article on legal education gives a short account of his career and academic achievements.⁴ He is a man whose unique ambition was, and still is, to serve others; he educated his students to become Priests of the Legal Order. He does not like to be praised and calls every compliment flattery. He attended all but one session of our Civil Law Workshop inaugural series, and enriched all discussions.

This Civil Law Workshop First Series will be referred to in the future as the Robert A. Pascal Series. A list of Professor Pascal's *Writings About Law, 1937-2008*, is published at the end of this

1. Roscoe Pound, *The Influence of the Civil Law in America*, 1 LA. L. REV. 1 (1938).

2. Robert A. Pascal, Comment, *Duration and Revocability of an Offer*, 1 LA. L. REV. 182 (1938).

3. Robert A. Pascal, *A Summary Reflection on Legal Education (with Foreword by Olivier Moréteau)*, 69 LA. L. REV. 125 (2008).

4. *Id.* at 125-128.

volume. The editors thought there was no better tribute than an invitation to discover or rediscover the writings of our great Louisiana civilian.

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The Robert A. Pascal Civil Law Workshop Series focused on *Revisiting the Distinction between Persons and Things*. This is a fundamental distinction in the civil law, going back to early Roman law and presented, together with actions (better named obligations), as the *summa divisio* in Gaius' Institutes. The distinction between persons and things may seem a mundane distinction, an easy one to work out. And yet, in the past, western societies were challenged with the following problems:

- Were the natives (then called savages) found in the Americas human beings?
- May slaves be traded as other commodities?
- May animals be tried for their wrongdoings?

Today, the following issues do come up:

- May animals share some human rights?
- Are frozen human embryos persons or things?
- What is the legal status of body parts?
- May ownership be an absolute right in a world where many resources are becoming scarce for a large part of mankind?

This turns out to be a huge topic, the literature showing a contemporary tendency towards commodification.⁵ There was no ambition to cover all possible facets. Our speakers were set free to address any topic of their choice, in relation with the general theme, which is far from being exhausted.

The present publication follows the sequence of the Workshop presentations, with the addition of Professor Trahan's Introductory Remarks *in limine*, giving a historical perspective to the project. This may give the reader a feeling of the intellectual path and experience of those having the privilege of attending all sessions.

Dr. Audrey Guinchard, a French trained scholar now in England (University of Essex), opened the series with a fundamental question about name. Is the name property? She compares the evolution of English law and French law, and

5. See RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE (Martha M. Ertman & Joan C. Williams eds., 2005).

concludes that “[t]he debate about the nature of the name is not on whether the name is property or not, but on what the relationship should be between a person and his name,”⁶ with responses that may borrow to property and personality.

Professor Jacques Vanderlinden (Université libre de Bruxelles and Université de Moncton) then analyzes property in different societies, taking us to the less familiar shores of “black” Africa. From field-studies and with an anthropological outlook or a pluralistic approach, Professor Vanderlinden tells us that the Zande do not own land, since there is nothing corresponding to *abusus* or way of disposing of land in their relationship with the land they cultivate. They use it and derive the fruit of it, and follow their chief, the *ira*, to a better *sende* when the resources of the occupied land can no longer sustain the people. This is indicative of a system where “man does not own the land, the latter owns him.”⁷ There is much data to be observed in Africa, and as Professor Vanderlinden explains, words are missing in our western languages: we are still short of a legal science to help us do anything with these facts.

Professor David Gruning, of the Loyola University College of Law in New Orleans, contributed on *Heirs of the Body: Cadavers, Claims and Kin*. His cadavers and body parts were not resurrected in time for publication in the present volume.

Much was said about embryos, first by two Paris scholars, Ms. Laurence Brunet and Dr. Sonia Desmoulin. Considering French law applicable to human and animal embryos, they reflect on the status of chimerical embryos. This may be the most troubling paper in this series, taking us to the boundaries of the human species. French law is silent on chimerical embryos, combining human and animal genetic material. The authors go beyond the taboos to explore possible solutions offered by intellectual property. They make reference to the civilian rules concerning “principal and accessories” or composite things. They venture into considering animal and human embryos as legal persons, or making animal embryos and human embryos *in vitro* things. As the authors say, “[t]he range of genomic mixtures leads to infinite

6. Audrey Guinchard, *Is the Name Property? Comparing the English and the French Evolution*, 1 JCLS 21, 58 (2008).

7. Jacques Vanderlinden, *Analyzing Property in Different Societies*, 1 JCLS 61, 71 (2008).

questions,”⁸ all too often ignored by the lawyers. Their paper is fertile in possible answers.

Agustín Parise, of the LSU Center of Civil Law Studies, also reflects on human embryos, this time with an interdisciplinary perspective, focusing on the 16th century debate regarding the legal status of Native Americans. He tells us of these 400,000 *in vitro* embryos cryopreserved in the United States alone, and of their possible use to produce stem cells. The moral debate comes close to the Valladolid Controversy. Should human embryos *in vitro* be regarded as persons or as things? Do they fall in an intermediate category? The in-depth exploration of the opposing arguments of Bartolomé de las Casas and Juan Ginés de Sepúlveda on the status of Native Americans reveal the richness of the Spanish Scholastic movement, proving that “[t]imes of great discoveries are also times of great interrogations.”⁹

Dr. Laura Franciosi and Professor Attilio Guarneri, both of Bocconi University in Milan, raise the delicate question of the protection of genetic identity, at a time where so much information can be found in human DNA. Huge benefits may be derived for human society, yet at the expense of individual interests. The paper explores ways of protecting individual interests, using privacy (a technic that pertains to the person) as well as property paradigms. Though primarily based on American materials, this paper shows that taxonomy alone does not solve complex issues.

This leads us to the final presentation in the series, by Professor Eric Reiter, of Concordia University in Montreal. Based on Domat’s monster, a taxonomic puzzle to which the author adds the case of a human leg found in a barbecue smoker, Eric Reiter gives the key to the mystery. Why keep it hidden till the end rather than publishing the paper at the head of the series? Because scholars, like readers of detective stories, all too often peek in to see the final pages before reading the whole volume. Gaius’ division into persons, things and actions (obligations) provides the basic architecture of the civil law, the French Civil Code and the many civil codes following the French model. It is static however, and may only be useful for problem solving if one moves away from

8. Laurence Brunet & Sonia Desmoulin, *Human Embryo, Animal Embryo, Chimerical Embryo: What Legal Status in French Law?*, 1 JCLS 79, 104 (2008).

9. Agustín Parise, *The Valladolid Controversy Revisited: Looking Back at the Sixteenth-Century Debate on Native Americans While Facing the Current Status of Human Embryos*, 1 JCLS 107, 138 (2008).

the idea of categories as boxes in order to focus on the boundaries. Professor Reiter recommends a triangle model with all three categories mingling in the middle: “all three of the categories play a role in virtually any classificatory decision,”¹⁰ problem solving becoming easier with fluid categories. This may imply a shift from ontological status to relativism. May the two be reconciled? This question is for the reader.

10. Eric H. Reiter, *Rethinking Civil-Law Taxonomy: Persons, Things, and the Problem of Domat's Monster*, 1 JCLS 189, 202 (2008).