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Foreword

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FOREWORD

The Saúl Litvinoff Civil Law Workshop Series was the second of its kind to be conducted at the Louisiana State University Center of Civil Law Studies (CCLS). It was conducted under the leadership of the two signatories of the present foreword, co-editors of the Series, who also happened to be friends and colleagues of Don Saúl.

The LSU Law Center had declared 2009 the Year of Litvinoff. The Civil Law Workshop Series that started in 2009 and ended in the spring of 2010 was dedicated to our regretted civilian and comparatist, at a time where he moved to retirement after a rich career as practitioner, teacher, author, and reformer of the civil law of Louisiana. He attended the first sessions, but passed away in January 2010, at a time when the Series was moving to its conclusion. Every single contribution in this volume honors Don Saúl and echoes the vibrant tribute by Dr. Agustín Parise and Julio Romañach, Esq. The present volume also publishes the list of Saúl Litvinoff's academic publications, which reflects his prolific and diverse scope of writings. It complements the *Liber Amicorum* offered to Don Saúl in 2008 by his friends and published by his beloved CCLS.[1]

A broad theme had to be found, so that the series could be enriched by the contributions of Distinguished Visiting Professors teaching short courses at the LSU Law Center and Visiting Scholars conducting research at the CCLS. Given the bijural nature of the LSU curriculum and the focus on mixed or hybrid jurisdictions in recent years, the editors of the series thought that cross influences between the civil law and the common law was a topic to be visited under multiple, if not kaleidoscopic, angles.

Here is how the editors introduced this Workshop Series on *Civil Law and Common Law: Cross Influences, Contamination and Permeability*:

> This Civil Law Workshop Series visits the relationship between the civil law and the common law. How much and

1. ESSAYS IN HONOR OF SAÚL LITVINOFF (Olivier Moréteau et al. eds. 2008).

> to what extent does each system influence or contaminate the other?
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> At all times, legal ideas have circulated, often ignoring the boundaries between legal families such as the civil law and the common law. At the time of its Revolution, France borrowed from England the jury system and justices of the peace, yet with considerable adjustments. Earlier on, English law had borrowed many techniques from Roman law and Canon law, making them distinctly English. The Anglo-American doctrine of mistake in contract is based on Pothier's *Treatise on Obligations*. The American UCC did not invent the irrevocability of offers. Trusts prosper in a number of civil law countries. Examples are manifold and can be found in every jurisdiction, "purely" civil or "purely" common law or "mixed," like Louisiana implanting promissory estoppel in its Civil Code.
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> This Civil Law Workshop Series does not aim at tackling all cross references and transplants. Speakers will identify cross influences in their area of scholarship and are invited to determine whether outside influences strengthen, weaken, or contaminate a given system, in an attempt to answer the following question: to what extent are the civil law and the common law permeable to each other?
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> Topics will cover areas of substantive law, procedure, law making and legal reform techniques, and legal education.[2]

Volume 3 of the JCLS follows the sequence of the Workshop presentations. Essays presented at the Workshop are preceded with an *Introduction to Contamination* by Professor Olivier Moréteau, proposing the adoption of a preliminary provision to the Louisiana Civil Code in order to remedy the impact of common law contamination in areas of private law governed by ancillary statutes. They are followed with a short article where Professor Juan Cianciardo, Dean of the Austral University School of Law (Buenos Aires, Argentina) develops challenging thoughts on the principle of proportionality. The principle is applied in both civil

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2. This is how the topic is described on the CCLS website. *See* www.law.lsu.edu/civillaw; and more precisely, http://www.law.lsu.edu/index.cfm?geaux=ccls.civillawworkshopsecondseries (last visited July 10, 2010).

law and common law systems, in countless jurisdictions. The article shows the application of the principle does not always guarantee the supremacy of the human rights and makes proposals to remedy the problem without abandoning proportionality.

The Series opens with a proposal to revive the case method in civil law education, authored by Professor Fernando Toller, also from Austral University School of Law, where he serves as the director of doctoral studies. His oral presentation was objected to by some members of the civil law faculty at the LSU Law Center, who feared that the case method may weaken the civil law in the State of Louisiana. Contamination would likely happen if the case method was to be applied according to the model recommended by Langdell for the Harvard Law School during the late nineteenth century. The case method familiar to students all over the United States was conceived not only as a teaching method, but also as the best tool for the discovery of the principles of the common law.

Professor Toller must be read carefully. He takes us back to the medieval origins of the academic tradition on the European continent, pointing out the importance of casuistry in moral science. The magisterial lecture, which remains the dominating teaching method in the civil law world, was in medieval times preceded by the *quaestiones disputatae*, or disputed questions, which took at least as much time as the lecture. Cases were debated, two students engaging in a dialectic competition. The teacher would then wrap up the arguments, cite the authorities, and give his solution. Fernando Toller shows how this practice was lost with the advent of the national codes and makes a strong case for reviving case discussion in legal education, elaborating on the experience made at the Austral University School of Law. Readers will understand the term "case method" may either be used for lack of a better word or simply to show that if there is a common law way of doing it (the Langdellian model), there is also room for a civil law model. Under the civil law model, case studies are meant to combine with lectures educating the students to the principles of the civil law. Intelligently combined, case studies and lectures help students gasp that the civil law is an organized system, not to be confused with the inchoate maze of cases, patchy statutes, and burgeoning solutions, as the common law may appear through a purely Langdellian approach.

In his Tucker Lecture given in 2008 at the LSU Law Center, Professor Emeritus Jacques Vanderlinden argued that the generalization of the case method had been the turning point anchoring American law in the common law tradition, showing that until then, the deductive method prevailed over the inductive approach.[3] Teaching methods may have a strong and sometimes unexpected impact on the evolution of legal practice. This is why Toller's proposal may be found controversial, especially in those parts of the world where the civil law tradition is weakened and the risk of contamination very high. However, moral and legal issues do emerge in the context of disputes. They can be debated in fact based situations without weakening the principles structuring and underlying the civil law. Legal education is no doubt an area of cross-fertilization between the civil law and the common law traditions. More case discussion is needed in the traditional civil law classroom and some lecture-based overview of the subject would better serve the training of the common law jurist.[4]

Things are moving the world over, not only in Europe or Latin America, the regions visited by Fernando Toller, but also in East Asia, as described by Professor Xiangshun Ding, of the Renmin University School of Law in China. Professor Ding gives a brief historical survey of the development of legal education in China and Japan. He points to some American influence, in China in the 1990s with the creation of the Jurist Master (J.M.) program, and after 2001 in Japan with the development of new professional law schools. The Chinese J.M. seems to be modeled on the American J.D., and reformation has been made on the initiative of the government. In Japan, the initiative came from the private sector, in an attempt to triple the number of lawyers by the year 2010, offering legal education and training at graduate level. Whilst being aware of the limits of the American influence, the reading shows how much stress is now placed in the development of legal skills, with attempts to have more legal practitioners teaching in

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3. Jacques Vanderlinden, "From the Civil Code of Louisiana to Langdell– Some Hypothesis about the Nature of Legal Systems," 35th John H. Tucker, Jr. Lecture in Civil Law, Baton Rouge, May 16, 2008. To be published under the title *Is the Pre-20th Century American Legal System a Common Law System? An Exercise in Legal Taxonomy*, in 4 JCLS (forthcoming 2011).

4. *See* Olivier Moréteau, *Bilan de santé de l'enseignement du droit*, ETUDIER ET ENSEIGNER LE DROIT : HIER, AUJOURD'HUI ET DEMAIN. ETUDES OFFERTES A JACQUES VANDERLINDEN 273 (2006).

classrooms, as well as increased participation in simulation and moot court competitions, the development of externships and internships, and the dawn of clinical legal education.

Professor Ulrich Magnus, of the University of Hamburg, invites Leibnitz to tell us that developing a legal system combining civil law and common law techniques makes us live in "the best of all possible worlds."[5] The pessimist may not agree that this is the case in Louisiana, though this no doubt makes it a fascinating jurisdiction to study for purposes of understanding the dynamic of legal systems in an age of globalization. Professor Magnus clearly demonstrates that the Vienna Sales Convention (CISG), after thirty years of existence, still offers the best possible compromise between the two leading legal traditions. We are proud to publish this masterful comparative essay in the year 2010, marking the thirtieth anniversary of the signature of this very successful and most promising international instrument.

Anxiety may, however, plague both the civil law and the common law, as demonstrated by Professor Sheldon Leader, of the University of Essex. Professor Leader writes: "The civil and common law systems both raise a question that is well known. How is it possible to combine the acknowledged fact that courts often make fresh law with the belief that the legislature is the site for law making with which democracies are most comfortable?"[6] He then introduces the question of judicial bias, which is more troubling when the judge acts in good faith. Cures are looked for both in legal positivism and natural law, and an intermediate theory is proposed, inspired by Ronald Dworkin. Judges decide cases on the basis of settled law, a collection of valid statements that may be explicit but also implicit. Dworkin makes the argument that judges may add to the body of explicit law as long as they remain faithful to the body of implicit law and keep the system coherent. The issue of moral impartiality is also discussed and the beauty of this analysis is that it fits the shoes of both civil law and common law jurists: Best of both worlds? The role of the judiciary is no doubt magnified, yet does not sacrifice democracy, as discussed at the end of this short but major contribution, showing the convergence of the two western legal traditions.

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5. GOTTFRIED WILHELM LEIBNIZ, ESSAI DE THÉODICÉE (1710).

6. Sheldon Leader, *Legal Theory and the Variety of Legal Cultures*, 3 JCLS 99 (2010).

Reading Dr. Nono Makarim's essay on freedom of the press in Indonesia, one comes to realize that anxieties such as those described by Professor Leader may be blissful dreams in other parts of the world. Indonesia received Dutch law during the colonial period and has a codified legal system with a sophisticated civilian heritage. However, the essay indicates that it still has a long way to go to have a fully independent judiciary. During a three-month Fulbright visit at the LSU Law Center, Dr. Nono Makarim, holder of both an LL.M. and a Doctorate in Law from the Harvard Law School, co-founder, thirty years ago, of one of a leading law firms in Jakarta, worked at evaluating the teaching of legal method in order to assist the Indonesian Judicial Commission in the design and administration of law exams to assess candidates for the position of Justice at the Indonesian Supreme Court. His essay is rich in legal analyses, presented in the context of a complex political, economic, and social evolution. Dr. Makarim proves, if need be, that legal analysis does not go that far if limited to the study of black letter law. Comparison with other East-Asian countries shows a rather conservative judiciary and a slow move from dictatorship to democracy, whilst statistics reveal that Indonesia seems to do better than its neighbors in protecting freedom of the press. Comparatists know that everything is relative, and yet this does not prevent the article from making a number of strong points on matters of interest for constitutional law, tort law, and criminal law scholars. Freedom of the press is challenged in many ways in all parts of the world, including Europe and Latin America. One can only benefit from a diversity of perspective and experience in understanding the problems and testing possible solutions.

Professor Santiago Legarre, of the Catholic University School of Law (Buenos Aires, Argentina), is a longtime friend of the LSU Law Center, where he has taught several times as a Distinguished Visiting Professor. He explains how the model of the United States Constitution inspired the Argentine Constitution of 1853, allowed Congress to enact, in the words of Legarre, a general legislation for all the provinces to be applied by federal courts. Provincial courts were left with a smaller spectrum of laws to apply. Once Buenos Aires joined the federation, a revision of the constitution took place in 1860, allowing provincial courts to apply

federal *derecho común* (*ius commune*). This resulted in the development of provincial variations in the interpretation of that *derecho común*, to which no remedy has been found so far.

Professor Legarre's article starts with a vibrant homage to Saúl Litvinoff, rich in personal anecdotes adding to the "Litvinovian" legend of intransigence, elegance, culture, wit, and charm. It is too late to ask Don Saùl to make concluding remarks to this volume. He was second to none at bridging differences between the civil law and the common law without tampering with each system's integrity. An art largely reflected in his publications, the list of which concludes the present volume.

The Saúl Litvinoff Series also included a presentation by Professor Jörg Fedtke, a distinguished German scholar who joined the Tulane University School of Law, where he is a Co-Director of the Eason Weinmann Center for Comparative Law. His *Time to Move On-Challenging a Tired Division-Common Law Methods in a Civil Law System* was not ready in time and had to be moved on to a forthcoming volume, proving that our theme is too broad to be dealt within a single volume.

Our last fore-words will be of thanks, to our devoted student editors, to Jennifer Lane who facilitates everything, to our wonderful Information Technology team, and last but not least to our unsurpassable Managing Editor, Dr. Agustín Parise, who served during four years as a most active and efficient Research Associate at the CCLS before heading to Europe, and must be remembered as the co-founder of the Journal of Civil Law Studies: *"En unión y libertad,"* and, if I may add, *"y amistad!"*

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