COMMON LAW, CIVIL LAW, AND THE CHALLENGE FROM FEDERALISM

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I. LITVINOVIA

Let me start with some personal anecdotes regarding the life of he who was rightly termed "the great Litvinoff."[1] Borrowing again from the same source, I shall call them "Litvinovian observations."[2] To each observation I shall assign a label; each will attempt to illustrate some trait of his intriguing personality.

The first one I shall name, not without a certain boldness, "Litvinovian Intransigence."[3] From the outset I must clarify that I

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1. From the words read by don Saúl's colleague and friend Cheney C. Joseph, Jr. on the occasion of don Saúl's funeral, a copy of which is on file with the author. The great Litvinoff's life was aptly evocated in a piece by Agustín Parise and Julio Romañach, the latter having a long standing friendship with don Saúl. *See* Agustin Parise & Julio Romañach, *Saúl Litvinoff (1925-2010),* LA LEY [L.L.] Feb. 2, 2010 (Arg.). For a more detached point of view on Litvinoff's life, *see* Honoring the Legacy of Litvinoff, Years of Service 1964-2009, 6.6 THE CIVILIAN, Feb. 2010 at 1.

2. Professor Paul R. Baier rightly pointed out to me that they are actually "Legarrian observations" on don Saúl's life. Comment by Prof. Baier subsequent to the oral presentation of February 4th, 2010 at the LSU Law Center.

3. Let me share with you, gentle reader, that after some hesitation the senior members of the faculty present at the workshop laughed heartily—with seeming approval—when I promulgated my choice of this label.

am talking about intransigence in certain matters only—minor matters it would seem, matters of detail. I shall illustrate Litvinovian Intransigence with two one-on-one experiences.

My first encounter with Saúl Litvinoff occurred at a time when he and other LSU faculty were visiting Argentina. Roberto Bosca, then Dean of Universidad Austral Law School, had asked if I could take don Saúl and him as my guests to the Jockey Club in Buenos Aires. The three of us were to have dinner. But at the lobby of the Club, don Saúl was kindly requested to wear a blue jacket in place of the extremely elegant beige jacket that he was wearing. I had completely forgotten to forewarn my guest that light colors are not admitted at night in this traditional venue. This omission would not have been a problem since the Club has extra blue jackets intended precisely for these situations. That is, it would not have been a problem had it not been for Litvinovian Intransigence.

Saúl refused to take the old, worn out, rather dirty jacket he was offered by the bewildered janitor. He would not remove his own beautiful garment, even if that entailed leaving the Jockey Club and, as it turned out, dining at a much less elegant restaurant: a last minute, improvised choice. For don Saúl, the only thing that really mattered was that his own elegance had been preserved.

The second anecdote instantiating Litvinovian Intransigence also took place in the early 2000's in Buenos Aires. During this period of time, my country was in the midst of economic turmoil. Many businesses would not take Argentine currency; only U.S. dollars. That was the case at the Alvear Palace, a venerable Parisian-like hotel located on the most beautiful street in the city. The Alvear Palace was Saúl's favorite hotel.

When Saúl attempted to pay with pesos, the manager explained to him the Alvear Palace's policy (and perhaps the reasons thereof: I do not remember). The reaction was immediate. Saúl stated, "I am Argentine, I am in Argentina, I will pay pesos or I will lodge somewhere else." The manager was perplexed. But even before any kind of response could have been elicited, Litvinoff had already exited the building. Litvinoff would not negotiate. He would stick to principle. What principle? That I do not know.[4]

I move now to "Litvinovian Culture," another remarkable trait of don Saúl. My next story happened in Argentina in 2001 when

4. This reference to principle was (by far) the remark that the audience celebrated the most. As it happens, it was an *ad-lib.*

several members of this faculty, including then Chancellor John Costonis, were visiting IAE—the Universidad Austral Business School. At some point we were all in the Chapel with an unknown gentleman showing us around. The gentleman indicated that the altarpiece—a Nativity scene—was by a famous Spanish painter whose name I don't recall. "That is incorrect," interjected Saúl, reminding me of Muriel Spark's unfathomable *Miss Jean Brodie*. "The painter," he proceeded, "was indeed called [. . .] but this was by a namesake of his [. . .] who is Mexican, not Spanish." Of course, the guide was flabbergasted. He had given this tour a number of times, and he spoke with a mixture of relaxed pride and carelessness typical of one who thinks that he already knows everything about his trade. He had not counted on Litvinovian Culture.[5] Nor had the gentleman counted on "Litvinovian Wit," which takes me to a third remarkable trait of don Saúl.

Cheney Joseph observed, on the occasion of the funeral, that Saúl was endowed with "sarcasm laced with warm affection."[6] I think these words capture "Litvinovian Wit."

In 2005, I was lingering in the faculty lounge of the LSU Law Center when our beloved colleague unexpectedly showed up. It was a Saturday morning. "Are you free tonight?" he asked. "Yes," I replied. Saúl stated, "Well, in that case I could take you to the movies. Is there one you would like to see?" Unlike the first question, which took me by surprise, I replied immediately, "The Phantom of the Opera." And "The Phantom" it was.

I had listened to the music a thousand times and found the idea of watching the movie version of the Broadway show extremely exciting. As we exited the theatre, master Litvinoff asked if I had enjoyed the movie. With some hesitation due to the tone of the question, I passionately described the movie version of "The Phantom" as a fabulous, incredible adaptation. But Saúl wryly observed:

> Well, my dear, [actually, he said *Querido,* one of his favorite Spanish terms] the movie was indeed very bad. It could have been worse, but it was really bad. Nevertheless,

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5. John C. Costonis observed as we left the Chapel, seemingly intent in distressing all of us present: "Saúl is a renaissance man." And how right he was!

6. From Cheney C. Joseph, Jr. words on the occasion of the funeral, *see supra* note 1.

> your whim has been indulged, and that was what mattered this time.

Perhaps this was a taste of "sarcasm laced with warm affection."

Finally: "Litvinovian Charm." On one occasion, Saúl was a dinner guest at my parent's residence. I have very fond and funny recollections of the dinner. When I learned of his death a few weeks ago, I asked my mother if there was anything she recalled from that evening so that I could share it with you today. Interestingly, she did not single out any particular moment (although I remember, for example, that Litvinoff arrived with remarkable presents for both of my parents). Instead, she said, "What a charming old man he was!" Surely, intransigence, culture, and wit had been displayed throughout the dinner. But the only thing that caught my mother's memory was Litvinovian Charm—the one characteristic among all of the Litvinovia I have selected that we all should cherish in our own memories as we move on in this land that Saúl has relinquished for good to be with the "great spirit up there."[7] With his charm in mind, and using it as a source of inspiration, I will move on to the second part of this lecture.

II THE MULTIFARIOUS FRAGMENTATION OF UNIFORM LAW

The title of this presentation is an ambitious one: "Common Law, Civil Law, and the Challenge from Federalism."[8] Henri

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7. *See* e-mail from Saúl Litvinoff to Santiago Legarre (Sep. 20, 2009) (on file with author). The full sentence was: "*Si me verás depende de tu gran espíritu allá arriba, pero si yo sigo abajo te veré con mucho gusto pues ya se te espera con cariño*," which translates to: "Whether you see me or not [when you come to LSU in February 2010] depends on your great spirit up there, but if I am still down here I shall have much pleasure in seeing you." I have reason to think that Saúl was a believer, although I acknowledge that this view is contrary to a widespread assumption favored and reinforced by Saúl himself. I will not go further into Saúl's religious views here other than to mention one more exchange with Saúl. In reply to my Christmas wishes of 2006, he wrote: "*Tus plegarias siempre me vienen muy bien y te las agradezco mucho*," which translates to: "Your prayers always do me good and I appreciate them very much." *See* e-mail from Saúl Litvinoff to Santiago Legarre (Dec. 22, 2006) (on file with the author).

8. After some reflection and consultation with my friend Paul Yowell, I decided that "from Federalism" does a better job here than "of Federalism." The

Lapeyre, Jr., a distinguished member of the Louisiana bar in attendance here today, made an astute observation: "I can't imagine how you can cover the subject of your talk in only an hour and fifteen minutes, but then, perhaps, you will not attempt to lecture on ALL there is to know about the common law, civil law, and the challenge from federalism."[9]

Maybe the title should not be taken too seriously. Maybe it is more like a catch-phrase. Had I chosen a title such as "Recent developments of federalism in Greenland" (or in Argentina, for that matter), Professor Moréteau would likely be the lone member in attendance. On the other hand, a title that includes three key notions in it—common law, civil law, and federalism—has a greater likelihood to catch the interest of lawyers. Indeed, such a title is relevant to a family lawyer, a criminal lawyer, a constitutional lawyer, a civil lawyer, and a common lawyer alike.

The title, however, is not only a catch-phrase. It also illustrates a methodology or style of presentation which involves the picking of an excuse to deal with a substantial problem of law. For instance, my mental process for selecting this title was the following.

I would like to deal with a certain issue that really matters, try to understand it better, explore its potential, and then be able to explain it to others (colleagues, students). For those purposes I choose a given jurisdiction—an excuse—that instantiates the problem at stake in an interesting and rich way. It is not about how *many* jurisdictions I pick; it is about how *much* I can learn from the selected one(s).[10] In other words, it is not so much about the

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reader shall judge after exploring the argument. I would like to share with the reader that one of the reasons I had in mind for the choice of preposition was that, when I Google'd both alternatives, there were a million more of the one I ultimately rejected. That should tell you a lot about the extent of my love for Google searches as source of authority.

9. E-mail from F. Henri Lapeyre, Jr., to Santiago Legarre (Jan. 27, 2010) (on file with author).

10. The same, by the way, happens with the study and teaching of the class I have been charged with for the last few years at LSU Law Center, "Comparative Constitutional Law." When it comes to selection of countries for purposes of comparative analysis the medieval saying applies: "*Non multa sed multum*"—a saying that captures the essence of the distinction between the English words many and much.

quantity of comparisons as it is about having a topic deserving to be compared on account of its worth and relevance.

What is the topic and why is it relevant? Relevance being a relative concept in law, I will rephrase the latter part of my question. Why is it relevant for an American readership and audience?

The challenges for the common law that flow from federalism in the United States can be exemplified in a way which may illuminate both the connection of the Argentine situation to those challenges and the relevance of my analysis with a view towards a possible solution to some American problems.

The following are only a few examples of these American problems that are related to the aforementioned Argentine situation: the *Erie*[11] doctrine and the idea that there is no such thing as national common law; the Restatements of the Law and other works by the American Law Institute; the Uniform Commercial Code and the varying interpretations by the U.S. state courts; and the several instances of the U.S. federal government using federal funding to mandate conformity with national standards set forth in federal legislation.[12]

Moving now to my *excuse*: the case of my country: what I have called "the Argentine situation." It is a well-known fact that in 1853 Argentina used the Constitution of the United States as a source of inspiration for its own constitution enacted in that year. Another well-known fact is that Argentina deviated from this model in some instances. It is not so well-known, however, that one of these deviations was the distribution of powers to make and apply the law.

Pursuant to the American model of 1787, the powers not delegated to the Federal Government are reserved to the states.

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11. The *Erie* Doctrine, which follows from the Supreme Court landmark decision in Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), requires U.S. federal courts to honor state common law when deciding state law issues.

12. Patrick H. Martin mentioned to me the proposed legislation requiring each state in the U.S. to forbid text-messaging while driving if the state wishes to receive Federal highway funding. Michael Leachman also noted that this strong-arm approach was successfully used by the U.S. federal government to mandate a uniform minimum age of 21 for purchasing and publicly possessing alcoholic beverages. *See*, The National Minimum Drinking Age Act, 23 U.S.C. § 158 (1984).

This general principle of federalism permeates the whole American constitutional design and is confirmed by the Tenth Amendment.[13]

The Argentine text of 1853 embraced this general principle of federalism and expressly memorialized it in Article 101 of the Federal Constitution (currently, Article 121).[14] Nevertheless, a power the framers of the U.S. Constitution did *not* delegate to the Federal Government—and which, therefore, was retained by the states—was indeed delegated by the Argentine drafters to the Federal Government: the general legislative power, if I may call it so on this occasion, using a hopefully justified simplification.[15]

Rather limited legislative powers have been vested in the United States Congress[16] (at least in theory[17]). Instead, most legislative powers have been retained by the states. These legislative powers are exercised primarily by the respective state legislatures (in all cases, but especially in Louisiana) and secondarily by the state courts interpreting and applying statutes and the common law.[18]

By way of contrast, the Argentine Constitution vested in the Federal Congress the power to make and subsequently develop what in our country is termed "*derecho común,*" or substantive law, *i.e.*, legislation on civil, commercial, criminal and other matters. Although *derecho común* translates literally as "common

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13. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." US. CONST. amend. X.

14. "The Provinces retain all powers not delegated by this Constitution to the Federal Government." In the case of older texts, I follow Ma. Laura San Martino de Dromi's compilation: MA. LAURA SAN MARTINO DE DROMI, DOCUMENTOS CONSTITUCIONALES ARGENTINOS (1994).

15. In the United States the adjective "general" is used to describe the power of each state. Thus: "power is shared between state governments of *general* jurisdiction and a federal government of delegated and enumerated powers." Robert P. George, *The Concept of Public Morality*, 45 AM. J. JURIS. 17, 20 (2000) (emphasis added).

16. *Cf.* the different clauses of US. CONST. art. I, § 8, and their interpretation by the U.S. Supreme Court in United States v. Lopez, 514 U.S. 549, 552 (1995). The foregoing is without prejudice to open rules allowing for a limited extension of enumerated powers. *Cf.* particularly US. CONST. art. I, § 8, cl. 18.

17. Questions have been raised, rightly, as to the extent of this limited delegation in practice. George, *supra* note 15, at 22-23.

18. *See generally* ALLAN E. FARNSWORTH, UNA INTRODUCCIÓN AL SISTEMA LEGAL DE LOS ESTADOS UNIDOS (1990).

law" it is better described under the name of *ius commune*, to avoid confusion with the common law system.[19] Having said that, in the Argentine legal system, the content of *derecho común* is analogous to that of common law in the United States, in the sense that both are "general law," even though they obviously differ considerably in other aspects, *e.g.*, "*derecho común*" is enacted, whereas common law is case law. In sum, the Argentine provinces—unlike the American states—delegated to the Federal Government the enactment of "general" law.

Why so? The situation of colonial legislation, mostly imported from, or consisting of Spanish law, was absolutely chaotic. In the words of one of the most conspicuous members of the 1853 Constitutional Convention, Benjamín Gorostiaga, a new legislation was needed in order to replace the Spanish laws, which were confusing—on account of their number—and inconsistent. Furthermore, he added, if as a consequence of the emulation of the American model every province were to retain their general legislative power, the country's legislation would become a baffling maze of legal rules leading to "inconceivable evils."[20]

Objections had been raised when this criterion was put forward at the Constitutional Convention of 1853. Delegate Zavalía asserted that the idea entailed an undue encroachment on the powers of local legislatures and, therefore, on each province's sovereignty. And, as source of authority, he brought up the American model, where "each of them [in reference to the states] enacts its own laws."[21]

Delegate Zenteno tried to mediate this debate. In an attempt to ease delegate Zavalía's concerns, delegate Zenteno explained that the Federal Congress was "a meeting of men from all the provinces"[22] which would be sufficient to protect provincial sovereignty and interests.

Ultimately, the Argentine drafters chose to deviate from the U.S. model in an attempt to unify the law with a view to putting an end to the chaos brought about by Spanish legislation. For this

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19. *Cf. infra* note 26.

20. 4 EMILIO RAVIGNANI, ASAMBLEAS CONSTITUYENTES ARGENTINAS 528-529 (1937).

21. *Id.* 528.

22. *Id.*at 529.

purpose, a centralizing legislative movement was deemed suitable.[23] "Inconceivable evils" would, therefore, be avoided.

But this had, perhaps, an unintended effect: the delegation of the mass of legislative powers to the Federal Congress left the provincial judiciaries with little law to apply.[24] If the Federal Congress was to enact *derecho común*, then this law would naturally be federal and, therefore, be applied by the Federal Judiciary pursuant to the predominant federalist principle enshrined in the constitutions of countries such as the United States.[25]

This story, however, does not finish just there. One of the original provinces, Buenos Aires, had decided not to join the newly born Argentine Republic in 1853 for reasons that are not germane here. When this large and rich province changed its mind seven years later, it established as a condition precedent that a Provincial Constitutional Convention would review the original text of the Federal Constitution.

In order to prevent the aforesaid implications of the centralizing movement, the Buenos Aires Provincial Convention proposed the so-called "reservation" in favor of provincial jurisdictions in 1860. Federal drafters accepted this proposal soon afterwards at a new *ad hoc* Constitutional Convention convened that same year. By means of a rule rather cryptically worded,[26]

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23. Centralization was not complete, since—by virtue of the principle laid down in the current Article 121 of the Argentine Constitution (*see supra* note 14)—the provinces retained legislative power to enact legislation on local procedure and public law.

24. In Argentina, like in the United States, the federal judiciary coexists with a local judiciary: the provincial courts, in the former country; the state courts, in the latter one.

25. *Cf.* US. CONST. art. III, § 2 cl. 1.

26. The original wording—of 1853—of Article 64, paragraph 11, of the Argentine Constitution included among the powers of the Federal Congress: "[t]o lay down the civil, commercial, criminal and mining Codes;" but in 1860 an addition was made: "those codes shall not alter local jurisdiction, and [. . .] shall be applied by provincial courts." Accordingly, Article 100 was amended that year as well, so the original text: "the Supreme Court and the lower courts of the Nation shall hear and decide all cases concerning issues governed [. . .] by the federal laws" was completed with the phrase "except for the reservation of Article 67 [former 64], paragraph 11." The latter article is precisely where the term "reservation" is used to describe the spirit of this amendment. At present, these provisions are included in Articles 75, paragraph 12, and 116, respectively.

provincial courts were granted the application of *derecho común*, despite *derecho común* being federal in nature. Thus, an exception to the aforementioned federalist principle was established.

In 1910—a time equally distant between the bicentennial Argentina celebrates this year and the 1810 revolution that marked the path toward independence—the eminent jurist Felipe Espil shrewdly noted that this so-called "reservation" marked a departure from the rationale behind the U.S. system.[27] Espil captured the very essence of the problem I want to raise awareness about here. As he put it, the original effort at unification had resulted in the possibility—perhaps unnoticed in 1853—of "depriving [provincial courts] of their power to hear and resolve cases on matters already under their jurisdiction."[28] In 1860, in order to remedy an anomaly (according to American federal terms), a new anomaly came into being: pursuant to the new article 67, paragraph 11, each Provincial Judiciary would be qualified to render an *actually different interpretation* of the same *federal* rule, be it the Civil, Commercial, Criminal codes, or the like. This explains why 100 years ago Espil complained that "there were fourteen interpretations of just one code across the nation."[29] His complaint, amplified by the greater number of provincial jurisdictions existing today, still seems to ring in our ears. Unfortunately, all of the attempts to cure the problem have failed so far.[30]

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27. FELIPE ESPIL, LA SUPREMA CORTE FEDERAL 193 (1915): "we have, for compelling reasons, departed from that rationale [behind the U.S. system]."

28. *Id.* at 193-194.

29. *Id.* at 194.

30. For the various attempts to unify law—Federal Court of Cassation, grant of jurisdictional authority to the Argentine Supreme Court of Justice to decide on substantial matters concerning *derecho común*, etc.—*see* SANTIAGO LEGARRE, EL REQUISITO DE LA TRASCENDENCIA EN EL RECURSO EXTRAORDINARIO 44-71 (1994).