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The English Fox in the Louisiana Civil Law Chausse-Trappe: Civil Law Concepts in the English Language; Comparativists Beware!

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The English Fox in the Louisiana Civil Law Chausse-Trappe: Civil Law Concepts in the English Language; Comparativists Beware![*]

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I. Introduction

The Avant-Projet of the French Law Obligations and the French Law of Prescriptions, which we will cite as the Projet-Catala,[1] is a monumental undertaking to modernize Parts III and IV of Book Three of the French Civil Code, "Obligations," and to continue the work of Jean Carbonnier who demonstrated "in transfiguring the first Book" that it was possible to "rehabilitate" the Code of 1804 "without damaging its structure or form."[2] "The program mobilized thirty-four persons"[3] under the sponsorship of the Association Henri Capitant and was presented in the form of a "Rapport à Monsieur le Garde des Sceaux"[4] in September 2005. A few months later, this draft of the Projet-Catala was sent to several foreign comparative law scholars throughout the world for the dual purpose of translating it, if possible, into their national languages and, on that occasion, to contribute their comments, observations, and remarks as they considered appropriate, especially as regards the content of this preliminary draft of a law that could

[*] The article presented here in English is based on an article by Professor Levasseur to be published in French, in the January 2009 issue of the Revue Internationale de Droit Comparé (R.I.D.C.). The title of the article in the R.I.D.C. is "Les maux des mots en droit comparé." Professor Levasseur felt that this article would be of interest to Louisiana lawyers and legal scholars and he asked Mr. Feliú, because of Mr. Feliú's background in Linguistics and the Common Law, to work with him in translating and redacting the original French article for publication in English.

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[1] Named after Professor Pierre Catala to whom the Projet was entrusted in 2003.

[2] General Presentation of the Avant-Projet, Pierre Catala.

[3] *Id*

[4] Report to the Keeper of the Seals.

become incorporated into the French Civil Code, should it be approved by the French Parliament.

These foreign comparative law scholars were advised that, in fulfilling their tasks, the authors of the Preliminary Draft had not been motivated by any "plan ... to oppose that which is or anything of what should be the idea of the Civil Law" and that "the modernization of the Civil Code will continue as the hub of private law, the sturdy trunk of a tree whose branches can stretch out without loosing their strength" so that the modern Civil Code becomes "the natural recourse of the judge faced with the silence of statutes and conventions, the pool of our legal reason."[5] The instructions received informed us that "the Projet-Catala does not propose a breaking of the Code, but an adjustment" and that "it (the Projet) is supportive of doctrine and jurisprudence." These goals having been made clear to all, among the comparativists two sets of scholars were asked to undertake an English translation of the Projet; one set of English legal scholars trained in the Common Law of England and two Louisiana scholars[6] trained both in the common law and in the Civil Law both totally fluent in the French language of the projet Catala as well as in the English language of the translated version of that projet.

The focus of this article is to express the reasons why a translation of the French Civil Law of Obligations into the English language is an undertaking that can only be

[5] General Presentation of the Avant-Projet, Pierre Catala. For the civilians called to translate the Projet, this unity of purpose was seen as guiding line rather than a directive. The number of languages into which the Projet would be translated evoked these reflections from Denis Mazeaud: "… this could mean that (creating a European unity of contract) constitutes an impossible mission because of the linguistic diversity of the members of the Landö Commission. Since the law is also a language, a unity of contract does not imply a linguistic unity of those who conceive it." Denis Mazeaud,*Un droit européen en quête d'identité. Les Principes du droit européen du contrat,* RECUEIL DALLOZ 2959 (Dalloz, 2007).

[6] Professors Alain. A. Levasseur, LSU Law Center, and David W. Gruning, Loyola University Law School (N.O.)

assigned to those who have experienced the “civil law in English,” i.e. Louisiana legal scholars. The legal system of Louisiana is one of a handful in the world in which the Civil Law is practiced in English as a matter of routine. The success of this, now two hundred year old, experience illustrates that the Louisiana legal professions have found a way to shape the English language of the common law to fit the Civil Law of the State. The fundamental issue that the reader will be juggling with all through this article is whether, on the one hand, the translation of Civil Law concepts into English Common Law words and concepts can become an accurate reflection and transposition of the essence of Civil law concepts or whether, on the other hand, the Louisiana Civil law expressed in its natural English “garment” has not already created the natural and only proper legal language to accomplish the goals of the Projet Catala and of the “Instructions.” In other words, can there exist two different English versions of one and the same civil law text. The conclusion we have reached, and that we hope will be convincing, is that the “legal linguistic vocabulary, of an English-written Civil Law has been in existence in Louisiana for the last the two-hundred years and that there is no need to resort to the legal vocabulary found in the Common Law of England to express the “Civil Law in English.” Actually, we are issuing a strong warning against any such attempt. The survival of the civil law system in the English language of the Louisiana Civil code since 1808 is a vivid testimony that the Civil law can exist in “English” as long as it is an English that has been tested and tried in a civil law environment.

II. The Louisiana Civil Code or Digest of 1808: two hundred years of Civil Law in English.

A brief history of the civil law in Louisiana will help illustrate, on the one hand, the very close interrelationship that exists between a legal culture and the legal language that serves as its external manifestation and, on the other hand, the dilemma facing a translator caught between the political and legal languages of the issuing legal culture and the political and legal languages of the target legal culture.

A. History

The year 1682 marks the beginning of the official presence of France on the immense territorial expanse from the shores of the Gulf of Mexico to the Great Lakes. A royal edict of 14 September 1712 entrusted the economic exploitation of the royal colony, Louisiana, named in honor of King Louis XIV, to Antoine Crozat and placed it under the legal rule of the Coutume de Paris. By Letters Patent of December 18th, 1717, a High Council for the colony was entrusted with the administration of the Coutume as well as the Civil and Criminal Ordinances of 1667 and 1670. The procedure then in effect before the courts was that of the Châtelet in Paris. In that same year 1717, the Compagnie des Indes assumed operation of the colony. Financial difficulties forced the Compagnie to return to the crown the administration of the colony.[7] On November 3rd, 1762, the King of France ceded the territory of Louisiana to his cousin the King of Spain by means of the "secret" Treaty of Fontainebleau. The Treaty of Paris of 1763 officially confirmed the transfer of Louisiana to Spain. The news of this transfer was not very well received by the French inhabitants of Louisiana who were very apprehensive about what would

[7] from 1731 until 1762.

become of their forms of government, their laws and their customs. During this same period of time there was a wave of "forced" immigration of several hundred Acadians from the Canadian province of Nova Scotia or Acadia who had fled to Louisiana after being forced from their lands by British troops. The first Spanish Governor of Louisiana, Don Antonio de Ulloa was very badly received by his French subjects and had to leave the territory in great haste after the Legislative Council voted expulsion from Louisiana in October of 1768. The Spanish government resorted to drastic measures, sending an expeditionary force to deal with the rebels. Once order was restored, the new Governor, General Alexander O'Reilly, began a thorough reform of the administrative, military and judicial structures of the colony.[8]

On November 25th, 1769, O'Reilly created the "cabildo for the administration of justice and to keep order" and he declared that he had "thought useful and even necessary to make a summary or regulation from those Spanish laws ... until a better knowledge of the Spanish language can help all by the reading of these laws above, to deepen their knowledge in the details ..." "Time [would] bring with it familiarity [with Spanish law] and before the end of the first decade, the French inhabitants and the Spanish legal system had become friends, the people found that, after all, ... the difference (with the laws of Spain) was not so much that it could justify their first reaction of disgust to the change ... of system."[9]

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[8] *See generally* CHARLES GAYARRÉ, HISTOIRE DE LA LOUISIANE (2 Volumes, 1845-1847); CHARLES GAYARRÉ, HISTORY OF LOUISIANA (4 Volumes, 1879); FRANÇROIS XAVIER MARTIN, THE HISTORY OF LOUISIANA (1882); MARCEL GIRAUX, HISTOIRE DE LA LOUISIANE FRANÇAISE (4 Volumes, 1953-1954); Henry Plauché Dart, Sr., *The Legal Institutions of Louisiana*, 2 LOUISIANA HISTORICAL QUARTERLY 72 *et seq* (1918).

[9] Henry Plauché Dart, Sr., *Colonial Legal System of Arkansas, Louisiana and Texas* 56 REPORT OF THE LOUISIANA BAR ASSOCIATION (1926).

On October 1st, 1801, by the Treaty of St. Ildephonso, Spain agreed to transfer Louisiana to Napoléon, who ceded it to the U.S. in accordance with the Treaty of Paris of April 1803. The U.S. took possession of the territory on December 30th 1803 and installed William C. Claiborne as the first territorial Governor. On March 26th, 1804, The U.S. Congress passed an act "for the organization of the Territory of Orleans and the District of Louisiana."[10] A provision of that act stated that "the laws in effect in the said territory at the beginning of the implementation of this act and which are not incompatible with its provisions, will continue to have effect, until amended, modified or abolished by the legislature."[11] In place of the words "laws in effect" one should read "Spanish law' which had been the official law of Louisiana since 1769. The conflict was then opened between the language of the law, Spanish, and the language of communication, English.

An editorial published in The Louisiana Gazette, November 9th, 1804, defined very clearly the positions of the partisans engaged in a confrontation that had just begun: "…by the treaty ceding Louisiana to the U.S., Louisiana obtained the right to be incorporated into the Union. From that moment on, Louisiana should be considered as the point of departure for many other states to be assimilated, from all points of view and as much as possible, similar to all its sister states. In all other states the law is based on the Common Law of England… Spanish laws are, in general, excellent because they are based on the Roman Code, one of the most perfect and pure of legal systems ever given to the world… I recognize that the introduction of the English language will provoke some inconveniences. But would these inconveniences not be felt if the French language

[10] 9 THE TERRITORIAL PAPERS OF THE UNITED STATES *The Territory of Orleans* 202 et seq (1803-1812).
[11] 9 THE TERRITORIAL PAPERS OF THE UNITED STATES *The Territory of Orleans* 210 (1803-1812).

should be recognized to the exclusion of all others? Those whose mother tongue is English, even though they now represent a small portion of the population, will form in a few years the majority of the population. Is it not wise to start with a gradual introduction of this language, which will become the common language of the country in the interest of all?.."[12] In order to prevent any possible intrusion of the Common Law under the pretense of the use of English, on March 22nd, 1806 the Legislative Council and the Chamber of Representatives of the Territory of Orleans declared "which laws continue be in force in the Territory of Orleans and those scholars who can be referred to as authorities on the laws of the same territory."[13] The members of the two Assemblies made clear that the law in effect was Spanish law and that the scholars considered as authorities were not only the cited Spanish Scholars but also Domat and Pothier. In response to the strong position taken by the Assemblies, governor Claiborne vetoed this Resolution. Immediately, the Assemblies declared their dissolution but not without first drafting a "Manifest" as plea intended to highlight the values of their legal culture and to underscore the commitment to the francophone population to the Civil Law.[14] Carried away by their fervor and resolute in their aim to enforce the will of the people, the members of the "dissolved" Assemblies met again with the sole aim of adopting a resolution to empower two attorneys, James Brown and, especially, Louis Moreau Lislet, with the drafting and organization of a Civil Code. These two lawyers were instructed to "take as the basis of the prescribed Code, the civil laws actually governing the

[12] Editorial, THE LOUISIANA GAZETTE, Friday, November 9, 1804.
[13] 9 THE TERRITORIAL PAPERS OF THE UNITED STATES *The Territory of Orleans* 649 (1803-1812).
[14] Editorial, LE TELEGRAPHE-NOUVELLE ORLEANS, Tuesday, June 3, 1806.

Territory…"[15] The Governor gave in. On March 31st, 1808, the Assemblies endorsed the outcome of the work of Brown and Moreau Lislet under the form of a "Digest of the Civil Laws now in effect in the Territory of Orleans."[16]

B. The Digest or Code of 1808: Language of policy, legal language, and legal culture.

Excerpts from the Manifesto in May 1806 will serve to illustrate the challenge that the people of Louisiana of the 1800s faced to ensure the survival of its legal culture in a geographic and political environment which continued to tilt towards the Common Law, riding the powerful wave of the English language. The latter had become the language of national policy and was to become the common language of the State. Due to historical, political and social events, the civil law and the common law were forced to cohabitate as the two dominant legal traditions on the American continent as early as the first quarter of the 19th century.

With the distance of time, the "Manifest" allows us to assess, with some degree of speculation, an other aspect of the cohabitation of the two major legal traditions in the "social laboratory" of the Louisiana experience. That aspect of the cohabitation can be identified in the legal translation of the civil law into the language of the common law. As any experience conducted in a laboratory, this one was hard fought.

1. The "Manifest" and the legal culture of the Civil Law in the Louisiana of 1808.

[15] *Session Laws of American States and Territories, Territory of Orleans, 1804-1811*; LE MONITEUR, Saturday, 7 June, 1806.
[16] 9 THE TERRITORIAL PAPERS OF THE UNITED STATES *The Territory of Orleans* 780-781(1803-1812).

The General Assembly issued its "Manifest" to give the citizens of Louisiana the reasons for its resolution to "dissolve immediately" on May 26th, 1806 after Governor Claiborne had affixed his veto to the declaration of March 22nd, 1806 on the laws in effect in the Territory of Orleans. Foremost among the reasons the members of the Assembly put forward was the wisdom of the U.S. Congress in allowing Louisiana to maintain its own laws while ensuring that the laws of Louisiana were not in conflict with that of other states.[17] This "Manifest" was more than an expression of an intellectual or spiritual attachment to the letter of the Civil Law. It was, undeniably, a plea arising from the depth of the heart of the people of Louisiana. It was an emotional statement by the people of Louisiana that it had a visceral attachment to its legal culture and that that culture was itself the creation of a fortuitous mélange of other moral, social, psychological, and religious cultures. To open the Louisiana legal system to the English language and the Common Law would have been like erasing with the stroke of a pen more than two hundred years of the history of a people.

An attempt to settle these issues took the form of the "comprehensive collection of laws that govern us" which was written and published on March 1808 as a "Digest of the Civil Laws…"[18] Written in French, this Digest or Code was subsequently translated into English. We will focus here on the English text to assess the accuracy of the relationship between the English language used to translate into English legal concepts which are identified with the legal culture of the Civil Law. Because of the history of the civil law in Louisiana, it will be proper and necessary to include Spanish law, as well as Roman

[17] *See Extract from the meeting of the Legislative Council on May 26, 1806* THE TELEGRAPH, NEW ORLEANS, Tuesday, June 31806, for the complete text of the "Manifest." *See* 9 THE TERRITORIAL PAPERS OF THE UNITED STATES *The Territory of Orleans* 643 *et seq.* (1803-1812).
[18] *See* ALAIN A. LEVASSEUR with the assistance of VICENÇ FELIÚ, MOREAU LISLET: THE MAN BEHIND THE DIGEST OF 1808 (Claitor's Publishing Division, 2008).

law, in our assessment in addition to the culture, the principles and the rules of French law but French law as it existed at that time, i.e., as a twin sister of Spanish and Roman law.[19] However simple in its presentation, the question masks a great difficulty. In our attempt at elaborating our response, we have had to bring together and reconcile many component parts that are situated at different levels in the existential reality and outward expression of the law. Indeed, we have on the one hand a language, or natural and necessary vehicle of transmission, English in this case and, on the other hand, the legal culture of the Civil Law which has borrowed or ridden, for centuries, totally different vehicles of transmission, i.e. different languages, such as Spanish, French and Latin in our case. The obvious question is, therefore, the following: can an "old" legal culture, the civil law, preserve its integrity and authenticity if "disguised" in a new expression, that of the language of transmission of a much "younger" legal culture, the common law? Placed in the context of the Louisiana of the 1800s, the question becomes: did the English language "translation" of the Digest or Civil Code of 1808 remain faithful to the "old" legal culture of the Civil Law when it was couched under the form of a "legal" English language presumably specific to the Civil Law of Louisiana and, therefore, necessarily distinct from the legal English of the "younger" legal culture of the Common Law?

2. The English language and the Civil Law legal culture of the Louisiana Codes of 1808 and 1825.

[19] Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL.L.REV. 4 (1971). Professor Batiza concludes in his examination of the "letter" of the articles of the Digest that 85% of those articles are of French origin. For another point of view, *See* MOREAU LISLET: THE MAN BEHIND THE DIGEST OF 1808, *supra.*

In their "Preliminary Report" of 1823 on the Draft Civil Code of Louisiana 1825,[20] the three reporters did hint that if "certain parts of the Digest of 1808 raised questions of interpretation, it is mainly due to the fact of the incorrect translation or the mistakes that are inevitable in a work that was composed in haste."[21]

These errors, as the examples below will illustrate, were errors either of grammar, or punctuation or more seriously, of terminology. All these types of errors are well known to the translator who must "avoid sometimes anglicisms, sometimes refuse copying or borrowing, not succumb to the temptation to paraphrase from other legal and administrative texts, avoid the use of neologisms to find an equivalent in the target language, or should rewrite or simply reformulate an idea so as to respect the syntax and style of each language. To do this, the translator should in turn become a philologist, grammarian, terminologist, editor, in addition to having the knowledge of the specific material to complete the transaction of translating."[22] "Above all, Anglo-Saxon legal texts are usually characterized by the length of their sentences. It is not rare to find… sentences reaching 10 or 15 lines… To complicate matters even more, punctuation is often lacking in texts written in English: it is obvious that Anglo-Saxon drafters are less inclined to emphasize punctuation than their French peers, who are more accustomed to handling the comma, an item which they consider essential to the organization of their ideas… English, as everyone knows, is a synthetic and elliptical language whose suppleness is often the sources of great difficulties for the francophone translator, who is

[20] 1,2 *Preliminary Report of the Code Commissioners, February 13, 1823*, LOUISIANA LEGAL ARCHIVES (1937).
[21] The translation into English was criticized in the "Preliminary Report of the Code Commissioners, dated February 13, 1823": "…some parts have given rise to questions of construction,…arisen either from a faulty translation, or…"
[22] JEAN-CLAUDE GÉMAR, *Fonctions de la traduction juridique en milieu bilingue et langage du droit au Canada*, in LANGUE DU DROIT ET TRADUCTION: ESSAIS DE JURILINGUISTIQUE 130 (Montreal, Linguatech, 1982).

used to a style of language that is more articulate and analytic. These difficulties are compounded in the case of legal English where, in addition to current structures of the language, the English drafter makes use of numerous terms of art, constructions, and figures of style that are particular to the language of the law."[23] Regarding the ellipse which is manifested in the English language mainly in the usage of compound words (eg.), it "is a characteristic feature of English... Less articulated than French, the English speaker can make use of some bridge-words where the French speaker needs to punctuate his reasoning. Aided in this manner by strictly linguistic factors, the ellipse is still favored by the Anglo-Saxon mind, which often prefers to suggest an understanding where the French must make it explicit."[24]

In regard to the translation of the "whole" of a legal concept from one language into another, it is clear that "English law ... is composed of legal concepts within which the rules of Law are structured, and take their value. But, and this is the great originality of English law, the concepts of the Common Law, which when used by English lawyers are not the same concepts as those of French law ... The basic concepts of French law ... often seem either not to exist or have in English law a second order of importance... The concepts of English law are different from those of French law, and there is not, and there cannot exist, a satisfactory corresponding vocabulary to translate into French words the English legal language or conversely to translate into English the words used by French scholars..." [25]

[23] FREDERIC HOUBERT, GUIDE PRATIQUE DE LA TRADUCTION JURIDIQUE 46 (La Maison du Dictionnaire, 2005).
[24] HENRI VAN HOOF, TRADUIRE L'ANGLAIS 39 (Duculot, 1989).
[25] RENE DAVID, TRAITE ELEMENTAIRE DE DROIT CIVIL COMPARE 282-283 (Paris, LGDJ, 1950).

Some examples of mistakes and bad translations taken from the law of Obligations of the French text of the Digest and its English version will illustrate the difficulties of translating a text of an originating and controlling legal culture into the language of a target legal culture or culture of arrival.

Let us take, first, examples of mistakes in the structure of the articles or mistakes of punctuation.

The French version of Article 2, Book III, Title III of the Code of 1808 was as follows: "Le contrat est Synallagmatic ou bilatéral, lorsque les contractants s'obligent réciproquement les uns envers les autres."[26] Article 3 stated that a contract "est unilatéral, lorsqu'une ou plusieurs personnes sont obligées, envers une ou plusieurs autres, sans que de la part de ces dernières il y ait d'engagement."[27] The English versions were as follows: Article 2 "A contract is synallagmatic or bilateral, when...." Article 3: "It is unilateral, when one or more persons…"[28] In the 1825 Code there is some change in the order of articles and a change in words used. Thus Articles 1 and 2 of Book III, Title III of the Code of 1808 were merged into a single Article 1758 in the Code of 1825. This Article 1758 was preceded by a kind of introduction, which we can assume, was designed to differentiate the concept of contract in the Civil Law from that of the same concept at Common Law. Indeed this article was thus drafted in its French version: "A tout contrat, il faut qu'il y ait au moins deux parties, l'une desquelles fait ou s'oblige à faire ou à ne pas faire quelque chose, et l'autre envers laquelle l'engagement est pris. Si celle-ci ne

[26] "The contract is *synallagmatic* or bilateral, when the contracting parties reciprocally obligate themselves to each other." English version of La. Civ. Code Bk. III, tit. III, art. 2, at 260 (1808).
[27] "It is *unilateral*, when one or more persons have entered into an obligation towards one or more other persons, without the latter's being under any engagement." English version of La. Civ. Code, Bk. III, tit. III, art. 3, at 260 (1808).
[28] *See* previous two notes, *supra*, for complete English version of both articles.

s'oblige à rien expressément, le contrat est appelé unilatéral même dans le cas où la loi attache certaines obligations à son acceptation. Le contrat est appelé bilatéral ou réciproque, lorsque les parties s'engagent mutuellement à quelque chose d'une manière expresse."[29] It is important to point out here the reversal in the treatment of the "bilateral" or "reciprocal" contract (and not "synallagmatic or bilateral") in contrast with the unilateral contract. The reason for the reversal was most likely because of the fundamental difference between the nature and legal regime of the "unilateral contract" at Common Law and the nature and legal regime of that contract at Civil Law. "Unilateral" at common law and "unilateral" at civil law had become "faux-amis"!

Another example taken from the Civil Code of 1825 deals with the old Article 1934 about the nature of damages. The French version of that article was very clear and well balanced. But an error of punctuation, the addition of prepositions and adjectives and the elimination of certain words in the English version have led the Louisiana Courts to give an interpretation, and necessarily an application, to that article that was contrary to the foundations of the French version of that same article.

The French version of the third paragraph of Article 1934 read:

> ...Lorsque le contrat a pour but de procurer à quelqu'un une jouissance purement intellectuelle, telle que celles qui tiennent à la religion, à la morale, au goût, à la commodité ou à tout autre espèce de satisfaction de ce genre, quoique ces choses n'aient pas été appréciées en argent par les

[29] "In every contract, there must be at least two parts, one which does or undertakes to do or not do something, and the other to which the commitment is made. If this party does not expressly agree to the contract, it is called unilateral even if the law attaches certain obligations to its acceptance. The contract is called bilateral or reciprocal when the parties mutually agree to something expressly." La. Civ. Code art. 1758 (1825).

parties, des dommages n'en seront pas moins dus pour la violation de la convention...[30]

The English version became: ...Where the contract has for its object the gratification of some intellectual enjoyment, whether in religion, morality *or* taste, *or some convenience or other legal gratification*, although these are not appreciated in money by the parties, yet damages are due *for their breach*;..."[31] The Louisiana jurisprudence, relying solely on the English version of this article, has never given the English words "some other legal convenience or gratification" the meaning that the French words "tout autre espèce de satisfaction de ce genre" (any other kind of satisfaction of this kind) would give "a purely intellectual enjoyment" that a party to a convention could draw from religion, morality..... In other words, Louisiana's courts have given no "intellectual and moral damages" for breach of a contract except where the parties had expressly provided for such damages.[32]

Let us now consider some examples from the translation of concepts. Where "basic concepts of French law" did not exist in the Common Law or where these concepts could not be translated into words out of the legal language of the Common Law, the translators of the Civil Codes of Louisiana of 1808 and 1825 did not hesitate to use the vocabulary of Civil Law concepts to give to the "translated text" the full content of the civil law legal culture with which those concepts were identified.

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[30] "When the contract is designed to provide a purely intellectual enjoyment, such as those things relating to religion, morality, taste, convenience or any other kind of satisfaction of this kind, although these things have not been appreciated in money by the parties, damages will not be less due to the violation of the convention." La. Civ. Code art. 1934 (1825).

[31] Note: the important differences in the two version of the article are italicized.

[32] In 1984 Louisiana legislators added an article, article 1998, which deals specifically with damages for "non-pecuniary" losses.

The examples we have chosen are intended to demonstrate that there exists and has always existed, a continuity in the use of an "English" legal vocabulary of the Civil Law. The jurisdictions that have been the "creators and promoters of the civil law in English are the state of Louisiana and the province of Quebec. They are the models of yesterday that we have followed today in our English translation of the Avant-Projet Catala.

Because of its importance in the culture of the civil law, our first example of a civil law concept is that of "solidarité." Article 97 of the civil Code of 1808[33] and Article 2083 of the civil Code of 1825 stated that "l'obligation est solidaire…" Article 100 of the same Code of 1808[34] and Article 2086 of the same Code of 1825 stated that "il y a solidarité de la part des débiteurs…" The English versions, translated from the French, of those same articles used the term "in solido" wherever these articles referred to solidarity, except in one single article of the Code of 1825, Article 2088[35], which stated that "the obligation is in solido, or joint and several between the creditors…" An asterisk following the word "*several*" tells us that "*or joint and several*" did not have a counterpart in the French text. There is no doubt that this addition is an anomaly because no other reference to "joint and several" is found anywhere in the other articles on solidarity. Furthermore, this English expression "joint and several" appears in one article out of four under the title of "rules which govern obligations between *creditors* in solido." It does not appear, either the title on solidary obligations between *debtors* or in the texts of the sixteen articles listed under this title. Yet, isn't this solidarity between debtors the most common and most important form of solidarity? Is it sufficient, and therefore acceptable, for one single use of the

[33] At 279. The articles of the Code of 1808 are number from 1 in each of the Titles of its three Books, therefore the need to cite the page in which each article is found.
[34] At 279.
[35] Not in La. Civ. Code of 1808.

common law legal expression "joint and several" to become "the" alternative to the civil law concept of solidarity? The Civil Code of Louisiana of today refers only to "solidary obligations"[36] and to "solidarity."[37]

Other concepts of the civil law should be briefly mentioned here because their true identity has been faithfully respected in the translation from the French legal language of the Codes of 1808 and 1825 into the official English legal language of the same codes.[38] Since we are making comparisons between, on one hand, the "legal French" and the "legal English" of the Civil Codes of Louisiana and, on the other, the legal French and the two "legal" English translations of the Avant-Projet Catala, we have intentionally chosen concepts that are found in the texts of the Civil Codes of Louisiana and in the text of the Avant-Projet. In other words, we have taken as models the "civil law in English" of the Louisiana (and Québec) civil codes to translate into English a civil law text written in French, the Avant-Projet Catala.

One first concept we have identified is that of "terme" used by the Louisiana Civil Code of 1808 in its French version of Article 85:[39] "le terme diffère de la condition…" The English text states that "the term differs from the condition ..." The same is true of the Civil Code of 1825.[40]

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[36] *See* for example La. Civ. Code Ann. arts. 1790, 1794 (2008).
[37] *See* for example La. Civ. Code Ann. arts 1796, 1802 (2008).
[38] We will look at the Louisiana and Québec English versions.
[39] At 277.
[40] La. Civ. Code art. 2046 (1825). In addition, Article 2048 of this Code defines "terme" and "term". In the present Civil Code of Louisiana the English word "term" is used: *See* for example La. Civ. Code Ann. art. 1777 (2008). In the British English version of the Projet, the French legal word "terme" is translated as "A delay point": Articles 1185 and 1186-1. In the Louisiana Civil Law English version of the Projet the same concept is translated as "term". The Spanish/Colombian version of the Projet uses "el término" and the Italian version uses "termine". The Civil Code of Québec uses the French word "terme" and the English word "term". See for example Article 1508.

The second concept, that of "cause," has a slightly more hectic path. In the Civil Code of 1808 the word "cause" is not found in the French version of the articles on: "*Essential conditions for the validity of Conventions.*"[41] In the English version of these articles the word "purpose" can be found in Article 8.[42] But the title of Section IV[43] is "*Of The Cause*" and the three articles which make up this Section only use "cause." In the Civil Code of 1825, the word "cause" is used in the French text of Article 1779 while the word "purpose" is used in the English version. The title of Section IV has become in English: "Of the Cause or Consideration of Contracts" and the articles of this Section, in their English version, use the word "cause" only.[44] It is later in Article 1896, where "cause" is defined, that the word "consideration" appears. But, interestingly enough, the French version of this article uses the word "*considération*." It is obvious that the word "*consideration,*" with the acute accent, is used in its own legal and original sense in the Civil Law as is demonstrated very well by the definition given: "On entend par la cause du contrat dont il est fait mention dans cette section, la considération ou le motif qui a engagé à contracter. On dit qu'un contrat est sans cause ..." The English version has transposed the word from the French word "considération" into an English word containing a Common Law legal tone: "By the cause of the contract, in this section, is meant, the consideration or motive for making it, and a contract is said to be without a cause..." How is it possible not to understand that the words "consideration" and/or "motive" had the same content and meaning, and the same legal value in the Civil Law, especially when they are placed in the context of contracts without "consideration" in the

[41] *See* La. Civ. Code Bk. III, tit. III, ch. II (1808) and, above all, section IV Of the Cause.
[42] La. Civ. Code Bk. III, tit. III, ch. II, art. 8 Of the conditions essential to the validity of agreements (1808).
[43] La. Civ. Code Bk. III, tit. III, ch. II, section IV (1808).
[44] *See* for example La. Civ. Code arts. 1893-1895 (1825).

Common Law sense of this concept? The same French word "*considération*" could not possibly have two opposite meanings in the same sentence, in the same article. One needs only read Article 1897 to realize that: "The contract is also considered to be without cause ... According to this rule; a donation that may be made in consideration of a future marriage is void, if the marriage does not occur." One cannot help but notice the repetition of the words "*considered* and *consideration*." The present Civil Code of Louisiana makes use of not only the word "cause" itself, but more importantly also of its legal content as defined in Article 1967-1 in this form: "Cause is the reason why a party obligates himself." An unofficial commentary which appears under this article adds that in this article, "cause is not consideration"! Louisiana Civil Law has remained faithful to the historical concept of "cause" of the Civil Law and it still exists today in the French civil code, the Quebec civil code, the Argentinean civil code…. It remains a concept "common" to many civil law jurisdictions.[45]

Another concept mentioned in our English version of the Avant-Projet Catala and in the French text of the same Avant-Projet is the concept of "violence." In both the French and English versions of the Louisiana Civil Codes of 1808 and 1825, the legal concept of violence is reflected in the same French word "violence." That French word has been carried over into the English text under the same English word "violence." The

[45] In the Common Law "consideration is something at once sought by the promise in exchange for its promise and paid for by the recipient of this promise in exchange for it. This thing or consideration must have a monetary value but the amount is a condition of validity of the consideration. The fundamental difference between the concept of cause in French law and English law of the consideration is enhanced by the existence of two forms derived from the consideration that are "detrimental reliance", especially in American law, and "promissory estoppel". *See* ALAIN A. LEVASSEUR, LE CONTRAT IN DROIT AMERICAIN 41-49 (Paris, Dalloz, 1996); Alain A. Levasseur, *Louisiana: A Vessel Adrift?* LE PLURIJURIDISME, ACTES DU VIII CONGRES DE L'ASSOCIATION INTERNATIONALE DE METHODOLOGIE JURIDIQUE (Aix-en-Provence, Presses Universitaires d'Aix-Marseille, 2003).

legal context surrounding this word has been a part of the Civil Law of Louisiana since 1808.[46] Unfortunately, and unwisely, the legislative reform of 1984 substituted the English word "duress" for the French and English "legal" word "violence" in the contemporary edition of the Civil Code of Louisiana.[47] Whatever the reasons that motivated the change in "words,"[48] substituting one English word "violence" with another English word "duress," has brought about a major change in the actual legal content of that vice/defect of consent. As explained below, "violence" in the Civil Law is not the equivalent or mirror image of "duress" in the Common Law; to translate one for the other is to affect the essence or content of the Civil Law legal concept of "violence."

"Lesion" remains "lesion" in English and was "*lésion*" in the French text of the Louisiana Civil Code of 1825.[49] In the contemporary, all English, Louisiana Civil Code, the original French word "lésion" remains "lesion."[50]

"Compensation," in the French version of the Civil Codes of 1808 and 1825, remained "compensation" in the English translations of the relevant Articles of these Codes. [51] The word and the concept of "Compensation" remain in use in the present Louisiana Civil Code.[52]

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[46] It is appropriate to add here that the "English" legal word "tort" is only the "*old law-French word tort*" which referred to any kind of legal injury. (from the latin "injuria"). JOHN HAMILTON BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 336 (2d ed., Butterworths, 1979).
[47] La. Civ. Code Ann. arts 1959-1964 (2008).
[48] The commentary tells us that there is equivalence and that the word "duress" is a term of art or a technical word of the English language which means exactly what is implicit in the words violence or threats. The commentary added that the adoption of the word duress does not need to include concepts that are incompatible with its meaning. We can see nothing but bad faith in these double-speak explanations!
[49] La. Civ. Code arts. 1860-1880 (1825).
[50] La. Civ. Code Ann. art 1965 (2008).
[51] Combination of Articles 2203 and 2204 of the La. Civ. Code (1825).
[52] La. Civ. Code Ann. art 1893 – 1902 (2008).

"Confusion" in the present Civil Code[53] was "confusion" in the French and English versions of the Civil Codes of 1808 and 1825.

These examples of concepts of truly civil law origin and identity have remained engraved in English words for two centuries now. The same examples, should suffice to prove that concepts or institutions of the Civil Law can preserve their traditional legal value and culture although "exteriorized" in a legal vocabulary borrowed from a foreign language, English in particular. It can be done provided that the translator wisely chooses to give preference to the internal and substantial content of the concept rather than to its external and literal form. It must not be forgotten that "the authority of a law or statute by the simple fact that it should apply "*erga omnes*" imposes an obligation to achieve a flawless translation. Such is necessary to avoid later disputes on the inconsistency of terms. In the operation of translation, the choice between the spirit and the letter of the law results from the constraints of a language on the one hand and the required fidelity to a text on the other hand. We must respect the form and content of the original text."[54] The "Legal-Scholars/Translators" of the Louisiana Civil Codes of 1808 and 1825, because of their "natural and genetic" up-bringing, so to speak, as comparativists and linguists and given the legal and linguistic environment in which they worked, instinctively and quite naturally made this message of wisdom their modus operandi and their moral guide. The same "Legal-Scholars/Translators" lived the reality of their time and felt the sensitivity of their environment through their awareness that "… [T] he terms of exclusive legal provenance are in reality technical terms that fulfill a very precise

[53] La. Civ. Code Ann. arts. 1903 -1905 (2008); La. Civ. Code arts. 2214-2215 (1825); and La. Civ. Code arts. 200-201 (1808).
[54] Jean-Marc Kieffer, *Le Traducteur Jurilinguiste*, 227-228 FRANÇAIS JURIDIQUE ET SCIENCE DU DROIT (Brussels, Bruylant, 1995).

function in the language of law ... Because each legal system has its own history and its own peculiarities, we must never translate when the term has no direct equivalent and is not immediately recognizable in the target language ... One must therefore translate only when it is possible to do so without transposing from one country to another, from one system to another ..."[55]

Thus, throughout its history, Louisiana has experienced what some would call the "coexistence" and others the "confrontation," of the inevitable tension that is created between language and law and between political language and legal language.[56] This experience has made Louisiana capable of reaching for "(t)hat which seals the need of kinship between law and language, be it the mediation of a third term, a nurturing environment that accompanies their development, a word, the culture from which they spring." For Louisiana "Law and language are cultural facts... When a law born in a language is transposed to another, the equality of the two versions will never be greater than that of the natural affinity that exists between the law and its language of birth…; the success of the transposition is an achievement of struggle, the fruit of hard labor… It should be recognized that there is, within each legal system, a spirit of the language of the law (which is the reflection of that legal system). Hence the need (and vision) to admit that in a language "swarming" in several branches scattered in various countries, the language of the law flourishes differently in each of these branches.[57] It is true that it borrows concepts and rules from other legal systems, but these borrowings can be made

[55] FREDERIC HOUBERT, GUIDE PRATIQUE DE LA TRADUCTION JURIDIQUE 22, 37 (Paris, La Maison du Dictionnaire).
[56] *See* Editorial, LE COURRIER DE LA LOUISIANE, May 16, 1821; Alain A. Levasseur, *Langue Politique, Langue Légale, les Tribulations du Civiliste Louisianais,* 233 FRANÇAIS JURIDIQUE ET SCIENCE DU DROIT (Brussels, Bruylant, 1995).
[57] For example, the notion of "detrimental reliance" which is expressed in the US branch of the Common Law but which is expressed as "efficient breach" in language of the British Common Law.

only on the condition that they are conscious and voluntary. It cannot consist in the adoption of words which bring with them a content that was not chosen... These surreptitious and soft invasions are the most perverse."[58]

Do these reflections on the Civil Law of Louisiana from the last two centuries find an echo, today, in both English translations that were made of the Avant-Projet Catala? We have on one side a translation in "a swarming language," as Gérard Cornu said, the legal language of England and English, on the one hand and, on the other hand, a translation in a "branch" of that language under the form of the two-centuries old legal English or American legal English of the State of Louisiana.[59]

III. The Avant-Projet Catala: a civil law text confronts the English language.

The mission entrusted to us[60] by the Association Henri Capitant was to translate into English the articles of the Avant-Projet Catala. This mission required that we develop a working method built around well sharpened techniques so as to achieve what we considered the only acceptable objectives: a translated civil law text with which a Civilian, whatever his location, could identify in its nature and its spirit. Some of these objectives had been expressed by Pierre Catala in the overall presentation of the Projet and by Gérard Cornu in his Introduction to Book III-Title III: Obligations. These objectives fitted perfectly well with our long experience as a bi-cultural[61] and bilingual[62]

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[58] GERARD CORNU, LINGUISTIQUE JURIDIQUE 4-5, 8 (3d ed., Paris, Montchrestien, 2005).
[59] Louisiana has lived for two centuries as an English speaking (and written) civil law jurisdiction, in contrast with England, the mother land of the Common law in English. See Lord Denning's Bollinger decision, Bulmer v. Bollinger, 2 CMLR 91, 1974, contrasting English (Common Law) and European (Civil Law) perspective.
[60] Professors Alain A. Levasseur (LSU) and David W.Gruning (Loyola University).
[61] Educated in France and the US

comparativists immersed in the mixed legal system of Louisiana for so many years. Were we as well equipped or better equipped than our colleagues from England to face the challenge that was presented to all of us under the same terms and conditions which were actually very simple: undertake a translation in English of the Avant-Projet Catala? The differences we are pointing out below between the "British-English" translation and the "Louisiana-American-English" translation will help the reader formulate a rational conclusion.

A. The Louisiana objectives and working method.

As stated above, some of the objectives for the translation of the Avant-Projet in many different languages had been identified by Pierre Catala and Gérard Cornu. Obviously we felt compelled to make these objectives our own in our translation. However, our approach to the task was also motivated by objectives which were not identified in our mind, at first, but which quickly "crystallized" when confronted with the use of the language of the common law to give their authentic meaning to concepts of the civil law. Our comparative law experience, naturally led us to reach for our "civil law family" to strengthen the ties between its members so that any "civilian," whether in Latin America or on the European continent would easily identify with our translation of civil law concepts in the English language.

Pierre Catala wrote that the Title "Obligations" must be the repository of maxims embodying a "jus commune" of the Law of Obligations to be found in the specificity of the new particular codal provisions. Thus, the Code will remain "the natural recourse for

[62] Professor Alain A. Levasseur is actually trilingual, he is also a Spanish speaker.

a judge facing the silence of the particular statutes and the conventions. The Code still is the foundation of our legal mind."[63] Two goals emerge from this statement: an updated "jus commune" and a common core for our legal reasoning.[64] It is also stated "that the Avant-Projet does not mean to become a Code breaking with the past but, rather, to bring an adjustment."[65] Very important for us was this aim that the Projet intended to bring about adjustments to the present law of obligations and not to create a break with that law. We had to be on our guard not to "betray when translating."[66] Echoing this goal by placing it in a broader context, Gérard Cornu wrote that "the law of contracts demands, in turn, to be merged in the body of the law to which it belongs. Within the Civil Code, the recodification of this part is to be made in relationship with the others, so that consistency will prevail."[67] Gérard Cornu added that "the domains of the general theory of law have been approached with coordination and coherence. This principle of consistency is the first aspect of their union ... so that... in the text, the concepts of substantive law still re-emerge with the same meaning."[68] These notions of substantive law that Gérard Cornu addressed or this "jus commune" and "common" core for our legal reasoning as Pierre Catala wrote were like an anvil on which we have hammered our translation projects until finally a unique "sculpture" or form obtained our approval.

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[63] Avant-Projet at 3.
[64] *un droit commun* and *un fonds commun.*
[65] Avant-Projet at 4. Of particular note is the word "rupture" (break) in the original; the new Code of Obligations does not break with its past. We believe that there is a danger that some concepts of the law of obligations, when they are translated into a legal language that is foreign to the Civil Law and when this foreign legal vocabulary gives that law the legal content of that foreign vocabulary, could be distorted as to constitute a "break", in their foreign legal version, with the original legal content of those concepts of the law of obligations. We will give some examples of this danger below.
[66] Following the French adage: traduire c'est trahir (to translate is to betray).
[67] Avant-Projet at 8. Principally important for a Civilian is this image that the Civil Code is a unity, a "symphony" in three movements, or even an "ocean" in which all rivers converge as some Louisiana judges have written. This unity requires coherence.
[68] Cornu, *supra* note 58, at 13. Below we will illustrate this principle of consistency and the need for substantive concepts to still have the same meaning within the examples of "solidarity", "confusion", term and condition.

This approval was also conditioned by a reference to two objectives that we had forged, most likely by a defense reflex, over the years in this unique laboratory of a mixed legal system, now two hundred years old, which is Louisiana. These two objectives had in common a deeply felt moral obligation. We had to find in the culture of our legal system the reason for and the answer to the why of the concepts of the civil law that had been the fabric of the Louisiana civil law system since 1808. Since there could not be a rupture or a break with the past, why, then, not maintain in existence the two hundred years of a Louisiana civil law system, a civil law nearly identical to French law and which, besides, enjoyed the added feature of having two perfectly matched faces: a French one and an English one?[69]

It followed that our first objective had been to find "allies" among "akin" or related legal systems[70] in which the civil Codes had been written in parallel English-French versions, or in which the law written in the national legal language had been translated into another legal language, English in particular.[71] What we were hoping to find among these "allies" was, of course, uniformity and consistency in the translations into English of the same concepts and institutions of the civil law, especially when the civil laws of our "allies" all converged towards the same origin, the same source. We were pleased to find that these civil laws, whether expressed in Spanish, Italian, or French… remained very loyal to their "common descent" and that their intellectual and spiritual heritage could be traced back to the same origins easily identifiable by the same "familial" characteristics. This is particularly true of some concepts of the civil law that

[69] See LEVASSEUR, MOREAU LISLET: THE MAN BEHIND DIGEST 1808, *supra* note 18. Moreau Lislet can be compared, for Louisiana, to Portalis for France.
[70] Pierre Catala's invitation to the symposium on 1 April 2008.
[71] Québec, for example.

have been carried over in the Projet and whose "substantial" identity had been translated into "an" English legal language and not "the" English legal language. Indeed, the two English translations that were made of the Projet[72] differ fundamentally in the English vocabulary they use to express the essence of these concepts or institutions of the civil law. We will present below some of these concepts to illustrate the profound differences that are hidden to the unaware reader behind the artful and subtle choices that translators have to make in their selection of one word out of many "siblings or relatives."

The Avant-Projet deals with "solidarité" in its articles 1197 to 1212. This word, "solidarité," is translated in Spanish with the word "solidaridad" in the civil Codes of Argentina, Colombia and Spain. This same word "solidarité" is translated in English, in the "official" English version of the civil Code of Québec, by the word "solidarity."[73] It has always been translated in Louisiana law, since the Civil Code of 1808 until the present civil Code, by the English word "solidarity."[74]

The concept of "confusion" is presented, using this French word, in articles 1249 and 1250 of the Projet. This same concept appears as "confusión" in the Spanish translation, as "confusione" in Italian translation of the Projet,[75] and under the term "confusion"[76] in the English versions of the Civil Codes of Québec and Louisiana.[77]

The word "terme" in Articles 1185 to 1188 of the Avant-Project becomes a "term" in the English version of the Québec Civil Code and in the Louisiana Civil

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[72] One translation "made in England" and one translation "made in Louisiana."
[73] Civil Code of Québec: *See* for example art. 1525, *Solidarity between debtors*…
[74] La. Civ. Code Ann. *See* for example art. 1796 (2008), *Solidarity of obligation shall not be presumed*…
[75] Spanish/Colombian translation of the Projet: art. 1249, *Cuando… una confusion.*…; art 1250, *La confusion que opera en la persona…* In the Italian translation: art. 1249, *Quando… si verifica, di diritto, la confusione.*…; art. 1250, *La confusione che riguarda.*…
[76] Pronounced with an English or American accent!
[77] La. Civ. Code Ann. art. 1903 (2008) When… is extinguished by confusion…; La. Civ. Code Ann. art. 1904 (2008), Confusion of the qualities…;Civil Code of Québec: art. 1683, Where the qualities… confusion is effected; art. 1685, Confusion of the qualities…

Code.[78] This same word "terme" becomes "término" and "termine" in the Spanish and Italian translations of the Projet.[79] The concept known as "compensation" which is included in Articles 1240 to 1247of the Avant-Projet, appears under the English word "compensation" in the civil Codes of Québec and Louisiana.[80]

If our first objective had been to find "allies" in both "pure" civil law jurisdictions and in "mixed" legal systems, and as we felt that this objective had been satisfactory achieved, it still remained to aim for a second, and more ambitious goal well known by most comparativists: how to reconcile, without any ambiguity and compromise, the culture of the Civil Law with a terminology identified with the Common Law. Our mandate was to preserve, in this operation of transposition into an English legal language, the absolute legal and cultural integrity of the concepts and institutions of the Civil Law that the Avant-Projet carried over so as not to cause a "rupture" or "break" with the past.

In our mind, this second goal or objective was to assist and encourage two types of legal scholars in their experiencing and feeling the deep differences in the legal cultures of the Civil Law and the Common Law. First among these legal scholars was the English speaking scholar capable of reading and understanding the French language, especially legal French or legal Spanish. Such an English speaking legal scholar should be able to do research in French, Spanish or Québecois doctrinal writings as well as in the reporters of jurisprudence of the same jurisdictions. Thus, if we translated the word "solidarité" by "solidarity," this scholar, starting with his knowledge of that same

[78] Civil Code of Québec: art. 1508, An obligation with a suspensive term…; La. Civ. Code Ann. art. 1777 (2008): A term for the performance…
[79] Spanish version: art: 1185, *El término es un*…; Italian version: art. 1185… *Il termine è un evento futuro*…
[80] *See* for example, La. Civ. Code Ann. art. 1893 (2008), Compensation takes place… Civil Code of Quebec: art. 1672 Where two persons… are extinguished by compensation…

colloquial English word but now "legalized" by borrowing the "legal aura" of the civil law text in which it appears so as to become the legal equivalent of "solidarité" in the Civil Law, could very easily find the word "solidarité" in the index of any doctrinal work on French law, Spanish law or Quebec law. This scholar's research into French law, for example, would then be "remotely guided" by one single and same word, "solidarity," that would lead him to his goal. Likewise, this same scholar, if he could read Spanish, could find the equivalent of "solidarity" in the Spanish word "solidaridad" and have access to the Spanish legal doctrine on the exact same subject.[81]

The concept of "confusion" provides another very striking example. If the French "legal" word "confusion" is translated into English by "confusion"[82] and finds its equivalent as "confusión" in a Spanish legal text, our bilingual scholar would encounter no difficulty in his research. In a sense, he would be taken by the hand from the beginning of his research and led to the end of it on a straight line without blind lead, meanders or endless deviations and bifurcations.

More importantly for us and of much greater concern was the second type of legal scholar, the exclusively English speaking scholar. Assuming that he would be called upon to do research in the Civil Law, he could turn only to materials and books written in the English language. In the absence of books or materials written directly in English by bilingual or trilingual[83] civilians, this scholar could possibly have access to English

[81] This would not be the case if "solidarité" were to be translated as "joint and several" as we explain below since the concept of "solidarity" in the Civil Law is very different from the combined or mixed concept of "joint and several" in the Common Law.
[82] And not "merger", see below, a word that is translated in French as "fusion" *e.g.* fusion de sociétés = merger of corporations.
[83] *See* SAUL LITVINOFF, *The Law of Obigations*, LOUISIANA CIVIL LAW TREATISE (West, 1992); ALAIN A. LEVASSEUR, LOUISIANA LAW OF OBLIGATIONS IN GENERAL, A PRÉCIS (LexisNexis, 2006); ALAIN A. LEVASSEUR, LOUISIANA LAW OF SALE AND LEASE, A PRÉCIS (LexisNexis, 2007).

translations of works on the Civil Law.[84] However, this raises both an issue about the fidelity of such translations to the civil law legal culture and a concern about the liberties that the English translation might have taken to be appreciated, not to say enjoyed, by an English only reader. Although not original, this concern must be stressed again. Indeed, in the operation of translation, the choice between the letter of a legal text and its spirit results from the constraints of language on one side and fidelity to the text on the other side. We must respect both the form and content of the original text. François Gény wrote that words in a legal context are almost necessarily an extension of legal concepts and that lawyers and legal scholars must express the rules of law in the appropriate words and phrases.[85]

Convinced of the "experienced" truthfulness and profound wisdom of Gény's thoughts, we were committed to cast our English translation of the Avant-Projet in "an extremely precise legal language. The law, whose main purpose is to establish a firm order capable of ensuring all interests, must seize tightly social realities and contain them in rather firm boundaries to avoid, where possible, uncertainties and ambiguities."[86] In the same vein, we wanted, in our own way, to answer in our translation of the Projet, the generic question that Denis Tallon posed in these terms: "how do we introduce foreign lawyers and legal scholars to one's own law?" This distinguished comparativist answered his own question in this way:

> One might think that the best method is to grasp the law of a foreign country directly in the legal literature of this country and, therefore, in that country's own

[84] *See for example* the English translations done by the Louisiana State Law Institute of Lazarus, Ripert, Carbonnier, Aubry, West Publishing Co.
[85] 3 FRANÇOIS GENY, SCIENCE ET TECHNIQUE EN DROIT PRIVE POSITIF 448, 454, 459 (Paris: Société du Recueil Sirey, 1921-1930).
[86] *Id.* 462.

> language. This is obviously not always possible because to do this it is necessary to know that language. Furthermore it is not always desirable, at least not as a first step. The risks of misunderstanding or misinterpretation are too important. We must take into account the specificity of the legal language, often quite distant from the colloquial language. The perfect mastery of the latter does not ensure the grasp of the exact meaning of a legal text... The pure and simple translation of foreign books... will not do the trick... The author (or the translator) must adapt the language without betraying the substance of the law. The author (or translator) must strike a delicate balance between a purely national presentation and a deep integration into the law *ad quem*. And here we find the classic question: translate/keep the term in the language *a quo*, with an explanation.[87]

We were aware throughout our work of translation of the damage that we could cause to the integrity of the French civil Law if it were ever transposed in an English language at odds with or unsuitable to the legal concepts of the Civil Law as they were incorporated in the Avant-Projet. To be faithful to the legal culture of the civil law, we could not, under cover of the English legal language, introduce legal concepts of the Common Law. Should this happen, we would inevitably be faced with intractable conflicts between an English legal version only apparently civilian in its inspiration and on the surface, with a translation or a direct writing of the same text in another form of the English language, but a translation or a direct writing thoroughly and carefully crafted by a civilian hand. Furthermore, would it not be a little disconcerting, and detrimental to the uniformity of many concepts of the Civil Law if, for example, the translation in the

[87] DENIS TALLON, FRANÇAIS JURIDIQUE ET SCIENCE DU DROIT: QUELQUES OBSERVATIONS 338-349 (Brussels, Bruylant, 1995).

same fundamental text of the concept of "solidarité," would become "joint and several" in an English version and "solidaridad" in a Spanish version? Inevitably, common law lawyers and scholars would have their own understanding of this concept since it would be couched in common law legal terminology, while their civil law counterparts, located in Argentina for example, would have a very different understanding, actually the original and only authentic understanding of that concept.

Another major and subtle danger would be hidden in the appealing form of a Common Law doctrine and jurisprudence which could easily find their credentials in pretending to be the spokespersons of their civilian peers. They would be assimilated to their civilian counterparts in the eyes and minds of all those who could not read the civil law in legal French or legal Spanish or who could not have access to the legal culture of the Civil Law. Our experience with the Louisiana Civil Law enables us to say that these dangers are not hypothetical, they are real and pernicious. An illustration can be found in the articles of the Louisiana Civil Code on "Offenses and Quasi Offenses"[88] or torts. The Civil Code of Louisiana has always followed the pattern of the articles of the French Civil Code on civil liability. The English translation of these articles has preserved the legal concepts of "act" for "fait," "faute" became "fault," "garde" became "custody," "negligence" remained "negligence,"[89] *etc*. Unfortunately, the dearth, years ago, of Louisiana Civilian doctrinal work in English or of translations into English of civil law doctrinal writings, resulted in the Louisiana Civil Code articles on civil liability being absorbed into the tort law of the Common Law. As a result, a whole portion of the

[88] La. Civ. Code Ann. Bk. III, tit. V, ch. 2 (2008).
[89] Without the accent on the first "e" as would be required in French.

Louisiana Civil Code has become a jurisprudential image of the Common Law, whereas the "statutory law," the basic code articles in particular have remained in their expression pretty much what they were over the last two centuries.

B. The Henri Capitant Translation[90]: In the tradition of the Civil Codes of Louisiana and Québec.

The two major legal traditions, the Roman-Germanic tradition on one side and the tradition of the common law on the other side, are distinct from one another by multiple characteristics which can be traced to their historical origins[91] whose line of demarcation, could be identified, somewhat artificially, with the English Channel.[92] As suggested above, there are incompatibilities between certain fundamental concepts and institutions of the civil Law of Obligations, as it is referred to in the Civil Law tradition, with concepts and institutions of the "Law of Contracts," the whole inclusive title generally adopted by the Common Law.[93] This topic will now hold our attention.

We will look at a few examples of institutions or principles of the law of conventional obligations that, we believe, will confirm two things: first, the Avant-Projet

[90] The Louisiana Chapter of the Association Henri Capitant, as the only English speaking civil law member chapter, was selected to undertake one of the two translations in English of the Avant Projet. The Association was named after Henri Capitant, a prominent law professor and scholar of the civil law of the first half of the 20th century at the University of Paris, France.

[91] On the Common Law and Civil Law in the English language, see OLIVER WENDELL HOLMES JR., THE COMMON LAW (Little Brown and Co., 1881); MELVIN A. EISENBERG, THE NATURE OF THE COMMON LAW, (Harvard University Press, 1988); JULIO CUETO-RÚA, THE COMMON LAW, ITS NORMATIVE STRUCTURE (Dallas, Southern Methodist University School of Law, 1957); FREDERICK HENRY LAWSON, A COMMON LAWYER LOOKS AT THE CIVIL LAW (University of Michigan Law School, 1953); JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION : AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA (Stanford University Press, 1985).

[92] Isn't a little curious that on the French side it is called "La Manche,"(or "Sleeve") without any reference to a national identity or claim, while on the side of the British Isles it is called "The English Channel"!

[93] ALAIN A. LEVASSEUR, COMPARATIVE LAW OF CONTRACTS, CASES AND MATERIALS (Durham, Carolina Academic Press, 2008).

Catala, the Civil Codes of Québec and Louisiana all belong to the same "traditional" legal family;[94] therefore, the Avant-Projet could not be read and interpreted in the context of the tradition of the Common Law as it does not belong to that legal family. Second, a translation of the Avant-Projet in legal English must not in any way incorporate concepts and notions of the Common Law[95] under the false pretext that some of the vocabulary of the Civil Law has no equivalent in the legal language of the Common Law. Any translation of the Avant-Projet must take into account this warning by Pierre Catala: "a recent symposium organized by the Law Faculty of the Universities of Sceaux [has placed] in parallel French law with the 'European principles of contract law' of the Landö commission. It could be observed that if, in certain respects, our [French] law was or could have been compatible with the framework proposed for Europe, on other matters this same framework was more at odds with our national tradition. In the present circumstances, this should be more thoroughly investigated."[96]

The French legal "national tradition," civilian in spirit and heart, reaffirmed as it is very widely in many concepts of the law of obligations of the Avant-Projet, must be faithfully reproduced by the translator. Why, then, not turn towards "law sisters" or "law cousins" of French law Québec and Louisiana to benefit from their history and their experiences as civilian bilingual and bicultural islands dispersed in an Ocean of English Common Law?

[94] Catala speaks about "cousins".
[95] Being careful of "false friends": a false parallelism of legal concepts made by a distorted use of the colloquial language.
[96] Introduction to the symposium on April 1st, 2008.

Good faith (bonne foi), as a fundamental principle of the civil law of obligations, will be our first example of a "false friend."[97] The literal translation of "bonne foi" in French, is "good faith" in English.[98] Beyond this translation, lies a thoroughly authentic civil law principle the essence of which must be communicated to a Common Law lawyer. What do these words of Article 1104 of the Avant-Projet mean to that lawyer: "The initiative of the negotiations, their on-going course and their breach are unrestricted but they must meet the requirements of good faith. The failure of negotiations can be a ground for liability only if it can be attributed to the bad faith or the fault of one of the parties."

We read in the presentation of the Projet that "a duty of loyalty, implied or expressed, crosses throughout the subject of obligations." In his Introduction to Title III – On Obligations, Gérard Cornu wrote that "all these advances made by contractual justice carry with them—it is an active correlation—a greater influence of good faith. The favor given to good faith circulates throughout the text. Freedom in probity, the motto comes from a high tradition." We can not but be sensitive to the power and the emphasis of the words of Gérard Cornu culminating in the choice words of "high civil law tradition"! The Louisiana Civil Code makes a "General Principle" out of "*good faith*," a general principle

[97] On "bonne foi" in Civil Law and "good faith" in Common Law, see ALAIN A. LEVASSEUR, *Contracts: good faith, estoppel…* in COMPARATIVE LAW OF CONTRACTS 99-122(Durham, Carolina Academic Press, 2008); Denis Mazeaud,*Un droit européen en quête d'identité. Les Principes du droit européen du contrat* RECUEIL DALLOZ 2959 (Dalloz, 2007). On "false friends", *see* for example FREDERIC HOUBERT, GUIDE PRATIQUE DE LA TRADUCTION JURIDIQUE 65-69 (La Maison du Dictionnaire, 2005).

[98] "Good faith" is not cited in the index of GUENTER HEINZ TREITEL, THE LAW OF CONTRACT (7th ed., 1987); GEOFFREY CH.CHESHIRE, CECIL H. S. FIFOOT AND M.P. FURMSTON, CHESHIRE, FIFOOT AND FURMSTON'S LAW OF CONTRACT 27 (13th ed., Butterworths, 1996) devote three quarters of a page to "Good Faith in Contract Law"; JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS (2004), speak about "good faith" here and there in their treatise; E. ALLAN FARNSWORTH, CONTRACTS (New York : Aspen Publishers, 2004), (1928), mentions "good faith" in conjunction with "fair dealing". "Good faith" is the object of Article 1759 of the Civil Code of Louisiana and of article 1375 of the Civil Code of Québec.

of the law of Obligations.[99] The same is true of the Civil Code of Québec which, under the titles "Obligations in General" and "General Dispositions"[100] states that "la bonne foi doit gouverner la conduite des parties …" and, in a parallel English version, "the parties shall conduct themselves in good faith…"[101] In the framework proposed for Europe,[102] under the form of "Principles of European Contract Law"[103] we find that a "general duty" is imposed on "each party to act in accordance with the requirements of good faith" and the parties are forbidden to exclude or limit this duty.[104]

Apparently a translator should have no problem in translating "bonne foi" with "good faith" and the common law lawyer should feel at ease in discussing this concept with his civilian colleagues while negotiating a contract. However, very soon the two lawyers will realize that the English language and the Common Law have misled them. Indeed, one can read a comment and a note under Article 1:201 of the Principles of European Contract law; they read "In English, *good faith* means a state of mind: the will to act honestly and fairly; it is a subjective concept .... *Fair dealing* means to act with loyalty; this is an objective criterion..". Pierre Catala spoke of a "duty of loyalty" and Gérard Cornu spoke of the greater influence of good faith. Hence the difficulty, if not impossibility, for our two lawyers to come to the same understanding because the Common Law makes a distinction between "*good faith*" and "*fair dealing*," while in the French Civil Law tradition the principle of "good faith" is more the equivalent to a

[99] La. Civ. Code Ann. art. 1759 (2008). Good faith shall govern the conduct of the obligor and the oblige in whatever pertains to the obligations.
[100] In French: Des Obligations en Général and Dispositions Générales.
[101] Civil Code of Québec art. 1375.
[102] Catala General Presentation at 2.
[103] *Id.*
[104] *See* Principles of European Contract Law, art. 1:201 (Paris, Société de Législation Comparée, 2003).

benefit of the "duty of loyalty," therefore "*fair dealing*" in the Common Law. The note under this same Article 1:201 adds, in the same vein, that

> the principle of good faith is recognized or at least observed in all countries of the European Union as setting a standard pattern of contractual behavior. There is a considerable difference, however, between the different legal systems as regards the extent and degree of penetration of this principle. An extreme situation is created by those systems (English and Irish) that do not recognize a general duty for the parties to comply with good faith but which, in many cases, reach, by means of special rules, results which are imposed by good faith… The common law of England and Ireland recognizes no general obligation to act in accordance with the requirements of good faith in the performance of contracts.[105]

Should we, then, translate the "bonne foi" of the Civilian by "*good faith and fair dealing*" of the common law to be sure to communicate the full cultural content of the concept of good faith? Any translator, even if he is also a bicultural comparativist, will not always be in a position to make a reader of a certain legal tradition feel all the cultural subtleties of certain concepts, principles and institutions of another legal tradition. The cultural environment of the Civilian can not always be transported into another cultural environment by the vocabulary in this other environment. That is the reason why the English language shaped by

[105] Principles of European Contract Law *supra*, art. 1:201, at 74-78.

the Civil Law cultures of Québec and Louisiana can be used without any concern and betrayal in the State of Louisiana and the province of Québec.[106]

The importance of this concept of good faith from a cultural civil law point of view requires that we make some additional comments on "*good faith*" in the Common Law tradition. The English authors, Cheshire and Fifoot, only spend three quarters of a page on "*good faith*" and begin by asking this question: "Do the parties owe each other a duty to negotiate in good faith? ... do they have to execute the contract in good faith? Their response, as short as their treatment of good faith, is the following: "Until recently, English lawyers would have not even asked these questions or, if the were asked, they would have responded somewhat cavalierly "of course not."[107] In Treitel's *Law of Contract* good faith is not even listed in the Index.[108] On the U.S. side, the UCC has a different approach of the Common Law as Section 1-203 states:

> Every contract or duty within this Act imposes an obligation of good faith in its performance of enforcement." The same is true of the Restatement of the Law of Contracts in Section 205. The great American comparativist, who left us recently, Allan Farnsworth, wrote that the "concept of good faith plays a fundamental role in the contract law of the civil legal system ... English law, unlike the "Civilians", categorically refuses to recognize such a duty of good faith."[109]

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[106] As Louisiana lawyers and legal scholars, we were, even if this image is simplistic, "like a fish in the water" in our translation of the Projet. Talking about "fish in water" isn't it interesting that in English "poisson rouge" (redfish) is translated as golfish (poisson d'or)?
[107] GEOFFREY CH.CHESHIRE, CECIL H. S. FIFOOT AND M.P. FURMSTON, CHESHIRE, FIFOOT AND FURMSTON'S LAW OF CONTRACT 27 (13th ed., Butterworths, 1996).
[108] GUENTER HEINZ TREITEL, THE LAW OF CONTRACT (7th ed., 1987).
[109] Farnsworth, *supra note* 97.

The "common lawyers" at the UNCITRAL meeting on the Vienna Convention, uncomfortable with the rather vague and broad concept of good faith of the civilians in the performance of a contract, refused to include in the text of the convention a provision which required good faith in the performance of obligations in the Vienna Convention. The Civilians held their ground, determined to defend their point of view and Article 7, Chapter II of the Convention does impose an obligation of good faith in international business transactions.[110]

The second example of a French Civil Law concept which will hold our attention is that of "violence" as vice of consent. As in the French Civil Code,[111] the Civil Code of Québec uses the same concept under the same word in French, "violence".[112] In the English version of the same article of the Québec civil code, we read the word "violence." Identity, therefore, in the use of the same word violence in the two languages. Was this literal translation also a transposition of this same concept of "violence" identifiable with the Civilian legal tradition and the French legal system into the legal tradition of the Common Law identified with English law? Would a Common Law lawyer be able to grasp the full cultural content of this civil law concept?

As we have stated before, the French and English versions of the Louisiana Civil Codes of 1808 and 1825 used the same word "violence" to convey the same basic concept. In 1984 the Louisiana legislature, on the recommendation of a committee of lawyers and legal scholars, chose to substitute the English word "*duress*" for the French and English word "violence" prevailing in Louisiana since 1808. With this name change, the vice of

[110] E. Allan Farnsworth, *A Common Lawyer's view of his civilian colleagues* 57 LA. L. REV. 227 (1996).
[111] French Civ. Code arts: 1109, 1111 *et seq*.
[112] Civil Code of Québec art 1402: "La criante d'un préjudice… provoquée par la violence…"; "Fear of serious injury… induced by violence…"

consent previously known in Louisiana as "violence" also changed in legal content. A new concept, that of the Common Law "*duress*," entered Louisiana Civil Law.[113] If the word "violence" in Art. 1114 of the Projet was to be translated by "*duress*," and only "*duress*," the reader unaware of the original and cultural meaning of this word, would be misled because he would look to consider the two concepts of *violence* and *duress* as identical. We are going back to Gérard Cornu, who said "Yes, we can borrow concepts and rules from other legal systems, but on condition that these borrowings be fully conscious and voluntary. We should not adopt words that drag with them a background that we have not chosen."[114] None of the three works on the English law of contracts we have consulted mention the word "*violence.*"[115] "*Violence*" does not appear either in the few works of American law of contracts that we have consulted.[116] These books, English and American, deal instead with "*duress*"! We read that this concept has evolved in recent decades from dealing with the use of force or the threat of the use of force with intent to cause physical injury to the person of one of the contracting parties, to include threats, illegal of course, to cause economic or financial harm to the other party. The essential component to the concept of duress is the use of physical force or threats to use physical force; it is this element, called coercion in the Common Law, which must

[113] Did Louisiana lawmakers believe there was equivalence or identity in the legal concepts of "violence" and "duress"? A commentary written, in our opinion, either in bad faith or in total ignorance of the difference in the legal content of each of these concepts tries to convince the reader that the word "duress" is a "word of art" which has exactly the same meaning as "violence." If the substitution of one word for another does not change the legal content of these words, why then the substitution? Because the word "violence", if it exists in common English common, does not exist in the legal vocabulary of the Common Law?

[114] Cornu, *supra* note 58,at 8.

[115] GUENTER HEINZ TREITEL & GEOFFREY CHEVALIER CHESHIRE, THE LAW OF CONTRACT (3d ed. Butterworths, 2007).

[116] JOHN D.CALAMARI, JOSEPH M. PERILLO, HELEN H. BENDER, CASES AND PROBLEMS ON CONTRACTS (4th ed., 2004); BRIAN A. BLUM, CONTRACTS: EXAMPLES AND EXPLANATIONS (3d ed., Aspen, 2004); JOSEPH M. PERILLO, 7 ARTHUR. L. CORBIN ON CONTRACTS (2002). Farnsworth, *supra note* 97, doesn't address "violence" but "duress" in § 4.9 et seq.

intimidate one of the contracting parties, so that he is aware that he is entering the contract under the influence of fear and not as a result of error or mistake.[117] Thus, *duress* does not include situations which, under French law, would be described as "moral evil" or "moral constraint" as is the case of "persons who, either naturally or due to some circumstances, have a particular weakness and can easily become victims of unscrupulous contractors."[118] It became incumbent upon the courts of Equity to create the concept of "*undue influence*"[119] so as to take into account situations in which there was no threat of physical force but simply a power of persuasion by a party on the other because of a position of economic dependency of one on the other or a position of dominance of one over the other.

History tells us that the Louisiana civil code of 1808 was only four years younger than its worldwide known "cousin," the French civil code of 1804. For two hundred years the Freanch language and the French civil all surrounded the "Code Napoléon" with prestige, fame and influence while the Louisiana civil code was waging a series of battles on different fronts to ensure the survival of the civil law culture it embodied and had

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[117] The Dictionary of English Law, 1959 edited by Earl Jowitt and Clifford Walsh says that: *Duress is where a man is compelled to do an act by injury, beating or unlawful imprisonment or by the threat of being killed, suffering some grievous bodily harm, or being unlawfully imprisoned...Strictly speaking, there is no such thing as duress to the goods or property of a person.* In BLACK'S LAW DICTIONARY, (7th ed., 2000), duress is defined as*: strictly , the physical confinement of a person or the detention of a contracting party's property ;.. the use or threatened use of unlawful force to compel someone to commit an unlawful act.* The concept of moral duress is described as*: an unlawful coercion to perform by unduly influencing or taking advantage of the weak financial position of another*.

[118] 1 JACQUES FLOUR, JEAN-LUC AUBERT, ERIC SAVAUX, 151 LES OBLIGATIONS : L'ACTE JURIDIQUE (9th ed,. Paris, Armand Colin, 2000).

[119] BRIAN A. BLUM, CONTRACTS: EXAMPLES AND EXPLANATIONS § 13.10 *Undue Influence* at 380 (3d ed., Aspen, 2004); GEOFFREY CH.CHESHIRE, CECIL H. S. FIFOOT AND M.P. FURMSTON, CHESHIRE, FIFOOT AND FURMSTON'S LAW OF CONTRACT (13th ed., Butterworths, 1996).: "Both common law with a limited doctrine of duress and equity with a much wider doctrine of undue influence have acted in this area..."; HEINZ TREITEL TREITEL, THE LAW OF CONTRACT314-315(1987): "Equity gives relief on the ground of undue influence where an agreement has been obtained by certain kinds of improper pressure which were thought not to amount to duress at common law because no element of violence to the person was involved."

inherited from Spain and France. Is it not a strange and paradoxical turn of historical events that, today, this “younger cousin” of the French civil code has turned to its benefit two hundred years of the use of the English language, that same language of the common law as the civil law tradition, to become the only English speaking civil law jurisdiction with a “Civil Code directly written in English”? Would Napoléon be proud to see the “cousin” of “his” civil code use the language of his major enemy and victor on the battlefields to ensure that “his” code will never die but live forever?