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# The Interrelationship Between Common Law and Civil Law

Guy Canivet\*\*

When we talk about the “interrelationship” between two legal systems, it is not the similarities or differences in the substantive law that really count, but mostly the different types of encounters and exchanges between the legal systems that are created in each legal culture. A legal culture is a spirit, a mentality, a set of reflexes of the legal professionals facing a practical problem. As the great jurist of the 19th century Rudolf von Jhering wrote in his book *The Spirit of the Roman Law in the Different Phases of its Development*,

While rules reveal themselves from the outset, while institutions and definitions of law announce themselves in their implementation, the driving forces of the law are buried at the deepest level of its intimate essence. They only operate little by little by infiltrating, it is true, into the whole of the organism, but they nowhere manifest themselves necessarily in a manner evident enough to notice them . . . They are not rules but qualities, traits of character of legal institutions, general ideas that are not capable of any implementation by themselves, but that have exercised a decisive influence on the formation of practical legal rules.

The two great legal cultures of the world, the common law culture and the civil law culture, refer to two deep conceptions of justice—the manner of reaching a just decision. These conceptions can properly be called “deep” because they are linked to a history, representations, legal traditions, political philosophy, and a sociology of legal professions. All these elements form an environment inhabited by narratives, symbols, and meanings implicitly shared by a community, a milieu that, even though it is omnipresent in legal practices, is never expressed as such. Each legal culture is, thus, like an original fold which is the matrix of the mentalities and professional reflexes of a country’s lawyers.

Now, the process of globalization is so powerful that, by now, all lawyers have the feeling of living a sort of generalized legal

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\* This is a translation of *Influence croisée de la Common Law et du Droit Civil*. The authenticity of this article was ascertained only by the author.

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acculturation due to the competition legal systems engage in. The reason is that, whatever their national and identity force, the two great legal cultures are certainly not monolithic and closed; they mutually define and influence themselves; they assert themselves in confrontation and comparison much more than in withdrawal and the illusory protection of legal "sovereignism." Culture is not an intangible and frozen dogma, it is not a denial of renewal; it is a dynamic, interactive, and living reality. Since it is peculiar to a legal culture to evolve, and to evolve by opening to other legal traditions, the problem of the receptivity of each legal culture to the others is inevitably raised.

There are, in my view, two forms of interrelationship between the two great legal cultures, common law and civil law, that constitute two corresponding models of legal globalization: *convergence* and *hybridization*. These models influence the solutions each legal system will give to the same type of problems it has to resolve. They represent two different sensibilities, two modes of encounter and exchange between the universe of common law and that of Romanist law.

### I. CONVERGENCE

The process of convergence between two legal systems is undoubtedly stimulated by the fact that these systems have the same types of problems to confront everywhere. Law is not an exact science; it is rather a form of realization of practical reason. Lawyers are pragmatic people. They are first and foremost interested in resolving concrete problems by means of the institutional tools they have at their disposal, or through other means that are capable of realizing the expected aims. But since globalization puts us increasingly in a position of grappling with the same types of practical problems, what would be simpler and more natural than to give legal responses that look alike? The model of convergence seems simpler in the eyes of lawyers because it involves only the *institutional* level of justice. We have to discover a parallelism of legal forms that is not interested in knowing if this or that institutional transplant from the country of origin will be compatible with the legal culture and the professional customs of the addressee country.

The principal reason for the existence of the convergence model is undoubtedly the pressure of facts, the imperative—especially material—needs of a country's apparatus of justice. This model gains force as citizens who go to court do not consider themselves anymore as mere users of a sovereign public service on which they have no power. The irreversible movement towards an evaluation of

the quality of justice and the establishment of a culture of responsiveness in judges show that the former “administered” citizens (*administrés*) adopt now the posture of true clients of a good that is scarce and that has a certain cost. Consequently, we are witnessing at the same time the rising of a consciousness of the quality-price relationship in the “consumers” of justice and of the taking into account of financial considerations by the government. Of course, one of the main forces of common law systems is exactly the fact that they have integrated very early in their reasoning the criterion of the *efficiency* of justice. The good outputs in the decongestion of the court rolls, the speediness of judicial decisions, and the true respect of legal rules are visible to the naked eye of Continental lawyers. It is, therefore, logical that the latter will have the tendency to copy those foreign solutions that have “proved themselves,” as they say. One can summarize all this by saying that the growing influence of the convergence model currently occurring is surely due to the empirical force and to the taking into account of pragmatic and financial considerations by the Continental lawyers.

A good example of this type of influence exercised by the common law universe on French law comes from criminal law: specifically, plea bargaining. Plea bargaining is a form of negotiated justice that has become, by now, one of the main means of exercising criminal policy in the United States. Its principal justification lies in considerations of economy of justice. This institution, that permits the prosecutor to negotiate with the accused a milder penalty if the accused accepts to plead guilty to the charges, was conceived, and then institutionalized, in the United States in order to liberate the most precious resource of justice, meaning the time spent in open trials. It is progressively extending to countries of Latin legal tradition. Indeed, the problem of court overload—most importantly the hearings of immediate appearance in court—has already taken such an extent in our country that the French Department of Justice has put all its hopes in a project called “appearance in court on a previous recognition of guilt” (*comparution sur reconnaissance préalable de culpabilité*). That procedure, just enacted by the French Parliament, will apply to any person who admits to having committed a crime punishable up to 5 years of prison at the most, and will result in a deal on sentencing that will be approved by the judge, and that will lead to a sentence of no more than 6 months of imprisonment without parole.

To what extent does the introduction of plea bargaining in France comply with the model of convergence between common law and civil law? The truth is that institution is purely and simply transplanted into our legal culture only for its virtue of efficiency, without any effort of adapting its underlying philosophy to our

cultural background. According to the economic theory of law, plea bargaining is a win-win contract, a rational allocation of resources between the parties. Since each criminal trial is uncertain in its result, the rational accused is induced to avoid a trial where he could be convicted to a harsher penalty than the one he deserves, and the prosecutor is induced to avoid a long and costly trial that could result in too light a sentence or in an acquittal. Thus, the lawyer for the defense and the prosecutor's office agree, following a more or less informal procedure sealed by a written agreement approved by a judge in open court, on a sentence inferior to the maximal penalty provided for by the law, in exchange for a relinquishment by the accused of his right to trial and to due process of law.

But the theory does not withstand reality. The prosecutor disposes of a negotiation power by far superior to that of the accused; he is capable of imposing to the latter a settlement that looks more like blackmail by threatening the maximum sentence. We are aware that, by that system of negotiation of sentencing, many innocent people have an incentive to declare themselves guilty for crimes they have not committed, for fear of being even more heavily convicted if they take the risk of going to trial. Thus, the idea itself of a public good of justice, that is impartial and respectful of persons' fundamental rights, is undermined.

The dominant penal philosophy in France is very distrustful of the economic and utilitarian model of sentencing in the common law. In our legal culture, individual rights normally are not legal titles that can be disposed of freely by their holders. The right to a fair trial and the right of due process are absolute and inalienable; they cannot be negotiated or traded off, whatever the anticipated benefit for their holder or for third parties. The criminal trial does not exist in the interest of the parties; the presumption of innocence and the due process rights, that form the axis of every criminal trial, are priceless and cannot be exchanged for a promise of enhanced utility or collective well-being.

Nevertheless, we must note that, even in our system that once attributed a great symbolic force to the penalty of imprisonment, the finiteness of resources has contributed to the fact that henceforth, more and more judges conceive of their job as managing the flood of cases rather than rendering justice solemnly. The project of the French Department of Justice shows clearly that in France, despite the cultural barriers separating us from the Anglo-Saxon culture, punishment consisting in the deprivation of liberty is progressively becoming a risk that other people have to manage rationally, or even to trade off in optimal conditions. The convergence here is one-way only. Punishment, a public and solemn form of manifesting social reprobation, an expression of sovereignty that has accompanied the

birth of the modern State since the Enlightenment, will thus have lost much of its symbolic aura in our legal culture.

## II. HYBRIDIZATION

If the convergence model is, finally, a pragmatic model that rests on the similarity of the problems the two great legal systems of the world have to resolve, the hybridization model is a model taking the form of a mixture of the *structural* elements of these systems. In this case, the differences between the Anglo-American and the Continental legal cultures are not to be overlooked: the difficulties the two judicial systems have to confront are different, or even diametrically opposed. But each system is mutually influenced by the solutions that seem attractive in the other system. The outcome is a procedural or substantive hybridization that results in an original construction mixing elements of both great families of legal systems.

Behind the existence of two legal cultures that assert themselves from the outset as very different, and that resist, consequently, the movement of convergence consciously pursued, we can find some internal evolutions in all democratic countries. These evolutions are induced by globalization. Justice has become a scarce good because it is increasingly popular. By democratizing itself, by becoming a commodity like the others, justice, both in the common law and in the civil law environment, is being transformed. Even though difficulties are peculiar to each legal culture, the challenges that face justice nowadays are universally common: delays and excessive costs, uncertainty, and lack of transparency and responsiveness to the users. This is the point of departure of the hybridization process. Nevertheless, contrary to the convergence process, hybridization is the sign both of the existence of legal cultures and of their evolution in parallel. Solutions tend, of course, towards a convergence of legal systems, but they do not obliterate the cultural specificity of each system's respective points of departure.

One can see this process at work in the field of civil justice. The famous 1996 Report by Lord Woolf on the access to civil justice in England and in Wales will be used as a basis for the argument concerning civil justice.

It is well known that civil law is a culture of written, and exhaustively codified law, expressed in general commandments that do not leave the judge but a narrow margin of interpretation, but that gives her, on the other hand, in both criminal and civil matters, an active role in the direction of the trial and the management of evidence. It is much less known that civil law is a culture of multiplication of the means of appeal, of safety valves to assure oneself that justice will indeed be rendered. In the common law,

justice is rendered by a body of only a few judges—who are, though, of great quality and acknowledged by legal professionals for their excellence. It is, therefore, difficult to accede to judgment, but once that access is granted, everything—or almost everything—is decided in the first degree of jurisdiction (at the trial level); in fact, it is difficult to *enter* into the judicial system, but not to *exit* from it, given that the means of appeal are not absolutely necessary. On the other hand, in France, the big number of judges, their way of nomination, and their status, make the quality of justice more uncertain. This is the reason for the need to multiply the means of appeal in order to make oneself sure of the quality of justice's "final product." One might as well handle the cases quickly at the trial level, since we know that the ultimate decision will be taken at the appellate level, or even at *certiorari*, which is open to everyone without restriction, contrary to what is the case in the common law countries.

Consequently, the problem of delays and excessive costs exists only at the trial level in a country like England (with the abnormal pretrial swelling of procedural motions and of exchanges of documents), while it exists at the appellate level in France (with the proliferation of dilatory or unfounded appeals, of appeals against restraining orders, etc.). But if the abuses the two systems have to fight against are the opposite (vertical for the French system, horizontal for the English system), the solutions devised on the two sides of the Channel share, in reality, a common objective: that of excluding from the civil courts the cases that merely encumber the court rolls in order to free judicial resources for "real" litigation. In the common law countries, the obstacles to a democratic civil justice, close to ordinary people, are essentially the excesses of the adversarial system. That system leaves the management of evidence and the control over the trial's unwinding solely to the hands of the parties and their attorneys, who are extremely expensive. As said by Lord Woolf in his Report, "the argument in favor of a universal application of the most red-blooded adversarial model is only valid if the problems of time and cost are put aside. The system now works sufficiently well for lawyers and judges, but the ordinary people are kept out of court."

In France, on the contrary, we have a judicial system that is not overly costly for the parties, but that tends to make judges themselves oblivious of the trial's "economic reality." The French judicial system traditionally functions as an administration, and the French professionals have not yet integrated the fact that the resources of justice are finite. The famous principle of the gratuity of public services often goes against the economic rationality of the system.

We are witnessing the fact that the reformers inside common law systems (such as Lord Woolf) are trying to control the legal

professionals by breaking their dominion over the functioning of the judicial system. For that purpose, they propose some measures broadly inspired at the same time by the Continental legal universe (measures such as the public logic of administrative control) and by the liberal culture (measures such as the wide opening and the transparency of the market for legal services). On the other hand, the reformers of Continental systems (like the first president Coulon, author of a report on the desirable reforms in French civil procedure) try mostly to give the legal professionals a sense of responsibility by opening them to arguments of a financial order. But the two systems are heading towards a sort of “mixed economy of justice,” by the one borrowing from the other several structural components in order to combine them into a novel assembling.

The need for an economic, administrative, and procedural rationalization of justice that is expressed in both cases by a need for simplification, unification, and standardization of the forms of action, will result in propositions of readjustment and hybridization of the civil trial. Thus, Lord Woolf makes two very Continental propositions for the reform of civil justice in his country: firstly, the active involvement of judges before trial – judges who would thus lose their immemorial status of neutral and impartial umpires who never leave their courtroom; and secondly, the establishment of a beginning of hierarchy between judges of the same degree of jurisdiction – judges who would thus move away from their superbly solitary image of “legal heroes.” The need for a true policy of civil justice is so strong in Lord Woolf’s Report that he openly praises, at the end of the Report, the unwavering merits of the codified Continental law: unity, simplicity, and above all, accessibility of the law.

On the other bank, the propositions of the Coulon Report tend also towards a mixed model that borrows several elements from the common law, notably the immediate execution of the trial court decisions in order to restrain the recourse to appeal, and the rehabilitation of the lawyer in civil justice as an instituted check against the *imperium* of the judge that must be preserved in order to promote efficiency in the management of the trial. The appeal to the legal professionals calling them to assume their responsibilities is certainly something new in the civil law universe. This sense of responsibility is required both from judges and from lawyers. We need to create a sense of responsibility in the former by making them more responsive to the economic constraints of the trial, whereas the latter must ameliorate the quality of their briefs and arguments.

In fact, this model of reciprocal influence and of hybridization does not respond to a need to copy or, on the contrary, to resist the opposite model, but simply responds to a common need to rationalize

justice. The propositions formulated recently by distinguished jurists from the two great legal cultures sketch the outlines of a new trial, a mixed model between common law and civil law. We can hope that this hybrid that is proposed to us will combine the best elements from both cultures, in the respect of everyone's cultural identity.