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Mixed Jurisdictions: A Model for the XXIst Century?

Jean-Louis Baudouin

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Let me first tell you how thrilled and grateful I am to be back once again in Louisiana and more particularly at the LSU Law School which, for me, is full of very happy memories. I had the privilege of teaching twice here in the early 70's a first year class on obligations. It gave me the unique opportunity at that time to meet and become friends with great scholars, amongst others, some who are no longer with us, such as the late Joseph Dainow and Al Tate, and some who are still very active such as Robert Pascal, Saul Litvinoff, Bill Crawford, Athanassios Yiannopoulos, George Pugh, just to mention a few. I also had the opportunity to be back a couple of years ago for the Tucker Lecture and to witness how much this Law School has changed.

The LSU Law School has effectively grown and become under the leadership of its successive chancellors a pole of attraction not only in the USA but for an international clientele, more particularly in the area of comparative law and bijuridicism.

Louisiana and Quebec share, of course, a common heritage. They both were, at one time or another, under French rule and thus have seen their legal system influenced by the French legal tradition and school of thought and more particularly by the philosophy and technique of codification of private law rules. Both were also cut off from their mother country's legal culture and have had to live during a certain period of time in a state of cultural and intellectual isolation.

Louisiana, however, unlike Quebec, has had a different evolution.[1] It has first also been influenced by Spain. Las Siete Partitas, as some scholars like Robert Pascal have demonstrated, did play an important role in the making of the successive Louisiana

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** Professor of Law at the University of Montreal for twenty-six years, judge of the Quebec Court of Appeal for twelve years and author of several books, two of them on obligations and civil liability.

1. *See also* A.N. Yiannopoulos, *Louisiana Civil Law: A Lost Cause?*, 54 Tul. L. Rev. 830 (1980); A. Levasseur, "La réception du système de common law par le système législatif français en Louisiane," M. Doucet and J. Vanderlinden, eds., in *La réforme des systèmes juridiques: implantation et destin,* Brussels, 1994, Bruylant, p. 381; "Le système mixte de la Louisiane," L. Perret and P.f. Bisson, eds., in *The Evolution of Legal Systems, Bijuralism and International Trade,* Montreal, Wilson et Lafleur, 2003, p. 201.

Civil Codes.[2] Unlike Quebec also, the largely predominant use of the English language in Louisiana since the cession of 1803 has given the Louisiana jurists a more direct access to American authors, jurisprudence and common law culture, and has been a stronger vehicle of common law influence. On the opposite, in Quebec, the fight for the preservation of the French culture and language has had, as a consequence, that by and large, courts stayed closer to French legal literature and French jurisprudence. At one time, more particularly during the 19th and the first half of the 20th centuries, they regarded any intrusion of common law as a direct threat to the civilian system.[3]

One must thus acknowledge the fact that even if both jurisdictions are of course American in the geopolitical sense of the term, the Quebec and Louisiana traditions are certainly not identical in terms of historical and social environment, culture and language.

Any critical evaluation of the value of mixed jurisdictions, whether it be Quebec, Louisiana, Puerto Rico or other countries cannot be divorced from the lessons of history and the permeability of culture which, of course, took different turns in each country.[4]

I will try to argue in this short paper that both the civil and common law systems are coming to be much closer one to another than they have ever been. This is, I believe, but one of the many facets of globalization, but I will also argue that while mixed jurisdictions like Louisiana and Quebec can and indeed will probably serve as potential models for the future regime and concept of law in the 21st century, this cannot be done in a manner that would make them lose their originality.

I. THE BLENDING OF CIVIL AND COMMON LAW: THE EUROPEAN EXPERIENCE

It is, of course, the dream of a number of jurists to see the birth of a universal system of law applied at least in the occidental world. It is but a dream, but also, in my opinion, a dangerous illusion for it

2. Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance,* 46 Tul. L. Rev. 4 (1971); Robert A. Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza,* 46 Tul. L. Rev. 603 (1972).

3. *See also* J. Brierley, *Quebec's Civil Law Codification Viewed and* Reviewed, 14 McGill L.J. 521 (1968); S. Normand, *Un thème dominant de la pensée juridique au Québec: la sauvegarde de l'intégrité du droit civil,* 32 McGill L.J. 559 (1987). For a specific example, see H. Fabre-surveyer, "Un cas d'ingérence des lois anglaises dans notre Code civil," 13 R. du B. 245 (1953).

4. Vernon V. Palmer, Mixed Jurisdictions Worldwide: The Third Legal Family (Cambridge University Press 2001).

is predicated upon the fundamental postulate that, despite the existence of a common core of values, all countries enjoy an identical and similar culture which, of course, is not the case and will not be the case in the future, despite the undeniable worldwide influence of North America.

What is rather happening is that the traditional, and sometimes artificial differences between the common law and civil law systems are slowly being edulcorated. The Louisiana and Quebec systems are, in that respect, an interesting field of investigation and observation.

This closer interaction is largely due to the fact that in this century, modern systems of communication have encouraged a cross fertilization of legal cultures. The 1994 recodification of Quebec private law is a good illustration of that fact. The various codification committees working on the new Civil Code have had ample opportunity to refer not only to French and continental legal solutions as possible models but also to Anglo American common law institutions. The 1994 Quebec Civil Code has, for instance, codified the common law institution of trust,[5] like Louisiana,[6] and that of the chattel mortgage,[7] known as hypothec on moveable property.

The political and economical integration of European countries is also a good example. It is certain that, even now, the United Kingdom common law system and the civil law system of continental Europe can no longer be said to be totally ignorant and divorced one from the other.

I am certain, while German, French or Italian lawyers look more and more to common law solutions, more particularly in the commercial and business law fields, that English jurists have also become more aware of a number of civil law solutions in the areas of contracts and torts. It is also a well-known fact that the United Kingdom looks more and more to legislation as the primary and most important source of law. It is also true that France, Italy, Spain and Germany have increasingly been examining case law as one of the most serious and important sources. In this respect, the ideas of François Gény have been vindicated.[8]

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5. Art. 1260 and f. C.C.Q.; J. Brierley, "The New Quebec Law of Trusts: The Adaptation of Common Law Thought to Civil Law concepts," P. Glenn, ed., in *Droit québécois et droit français: communauté, autonomie et concordance*, Éditions Yvon Blais, Cowansville, 1998, p. 383.

6. Edward F. Martin, *Louisiana's Law of Trusts 25 Years After Adoption of the Trust Code*, 50 La. L. Rev. 501 (1990).

7. Arts. 2696 and f. C.C.Q.

8. F. Gény, *Méthodes d'interprétation et sources en droit privé positif*, 2e éd.,

Three main areas deserve closer scrutiny. The first one is legislation. There is little doubt that legislation is, in all occidental countries, now the main source of law. One can no longer, with the extreme complexity of modern life, rely only on courts to state what the governing rules on business transactions, for instance, should be. By and large then in common law countries, legislative activity has grown to occupy the very first rank in the hierarchy of legal sources. This is, of course, also true of Europe, the more so since, with political integration, most of these countries have been forced to review and redraft their respective laws to match the standards of the European community.

Despite this apparent similarity, however, fundamental differences still separate the ways laws are drafted in the civilian and in the common law world. Because of historical factors (mainly the traditional resistance of common law courts to what they felt to be the intrusive power of Parliament), the common law statutory formulation remains very specific. The typical common law statute contains at the very beginning a list of definitions (totally unknown in civilian countries). Sections or articles are usually drafted in specific terms rather than in general principles, and much more detailed. Civilians on the contrary tend to state the rules in general principles and leave to the courts the task of applying them it to specific factual situations.[9]

In the United Kingdom and through the common law world, this has in turn created a very complex body of canons of interpretation, totally unknown in civil law.[10] The grammatical purposive, pragmatic methods, the literal interpretation, and *ejusdem generis* rules, for instance, are really somewhat bewildering to the civilian lawyer. Whereas in civil law recourse to the legislative history of a given piece of legislation is thought to be of primary and decisive importance,[11] the traditional rule of the exclusion of Parliamentary history as a tool of interpretation is still very much in favour in common law.[12] There is little doubt in that respect that the civilian and common law legislative

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Paris, L.G.D.J., 1954.

9. F.P. Walton, *Le domaine et l'interprétation du Code civil du Bas-Canada*, trad. M. Tancelin, Toronto, Butterworths, 1980.

10. P.A. Côté, *The Interpretation of Legislation in Canada*, 3d ed., Toronto, Carswell, 2000, p. 1 and f.

11. M. Cantin-cumyn, "Le recours à l'ancien Code pour interpréter le nouveau," P.A. Côté, ed., in *Le nouveau Code civil, interprétation et application*, Montréal, Éditions Thémis, 1993, p. 161 and f.; C. Masse, "Le recours aux travaux préparatoires dans l'interprétation du nouveau Code civil du Québec," *ibid*, p. 149. Also: S. Normand, "Les travaux préparatoires et l'interprétation du Code civil du Québec," 27 C. de D. 347 (1986).

12. S. Beaulac, *Parliamentary Debates in Statutory Interpretation: A question of Admissibility or of Weight?*, 43 McGill L.J. 287 (1998).

drafting, and by way of consequence the judicial interpretation of legal rules, are still far apart.[13]

Yet if one looks, for instance, at recent English statutes, one cannot help notice that in certain cases, the truly traditional methods of drafting have changed and are becoming comparable to the civilian model. There might come a time, in the future, where both systems under the political European unification movement will finally blend. What will remain however to be changed will be the court's attitude.

The second area is case law or jurisprudence. Both systems, in this respect, are, in my opinion, much closer than they have ever been. Nobody in continental Europe would nowadays seriously question the fact that jurisprudence is indeed an important, if not the most important source of positive law.[14] Although the jurisprudential techniques of delivering written judgments are still far apart, lawyers all across Europe look to case law as a decisive source both for the interpretation of legislation and for the expression of legal rules and principles.

It has been argued time and again that both systems cannot really meet each other because of the rule of *stare decisis* in common law.[15] This, in my opinion, while true in theory, does no longer reflect the reality. No one would now argue in civilian jurisdictions that a judgment from the French Cour de Cassation or the Supreme Court of Canada does not have, in real life, a decisive and binding authority. This question seems to have fascinated the Louisiana legal doctrine, but much more in a perspective of resistance to the influence of case law coming from other states of the Union on the interpretation of the Louisiana Civil Codes.[16]

Finally, the third source of law, doctrine, needs to be mentioned. It is still a fact that, by and large, doctrine has a more direct and powerful influence in civilian countries than in the common law

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13. J.L. Bergel, " Spécificités des codes et autonomie de leur interprétation," " P.A. CÔTÉ, ed., in *Le nouveau Code civil, interprétation et application,"* op. cit., *supra*, note 11, p. 3; P. Issalys, "La rédaction législative et la réception de la technique française," P. Glenn, ed., in *Droit québécois et droit français: communauté, autonomie et concordance*, op. cit., *supra* note 5, p. 119.

14. *See, for example*, for France: J. Ghestin, G. Goubeaux et M. Fabre-magnan, *Traité de droit civil: introduction générale*, 4e éd., Paris, L.G.D.J., p. 432 and f.

15. Sir Rupert Cross, Precedent in English Law (3d ed. Oxford University Press 1978).

16. Joseph Dainow, The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdiction (Louisiana University Press 1974); James L. Dennis, *Interpretation and Application of the Civil Code and the Evolution of Judicial Precedent*, 54 La. L. Rev. 1 (1993).

world.[17] But, here again, things are slowly changing and I will take only two examples. In France, the new generation of civilian authors (for instance the civil law treatise of Ghestin) gives an increasingly important role to jurisprudential analysis in a way that is, in many ways, comparable to that of American authors. In Canada, the Supreme Court has long abolished the unwritten rule that it would not cite any living author. In many areas not only of private but also of public law, our Supreme Court judges do refer to and cite Canadian and foreign doctrinal works relying on their analysis to solve complex legal problems.

To briefly conclude then, whereas there still exists some major and important differences between civilian and common law countries in the respective role that they allow to legislation, jurisprudence and doctrine and to methods and techniques of interpretation, those differences are no longer perceived as an absolute bar to a cross fertilization of ideas and concepts. The European experience attempting to accommodate both traditions will be an interesting reality to observe in the 21st century.[18]

Mixed jurisdictions like Louisiana and Quebec have had the unique opportunity to have been constantly challenged by both legal traditions and thus to have acquired a critical view of each of them. They have also succeeded in assimilating crucial elements of both cultures and traditions, to finally blend them into an original legal system. They, in my opinion, could serve, in that respect, as models for a possible integration and authentic bijuridicism.

II. THE BLENDING OF CIVIL AND COMMON LAW: DRAWING FROM THE LOUISIANA AND QUEBEC EXPERIENCE

The experience of Louisiana and Quebec has been, as their system, a mixed one. There is no doubt that while positive lessons can be drawn from it, there have been some negative ones which should serve also as a lesson and warning to those who believe bijuridicism to be nothing but a positive adventure.

On the positive side, both jurisdictions can certainly offer their experience in the teaching of the law. It is certain, for instance, that the Anglo-American Socratic method of teaching may, with necessary adaptations, be used to teach certain areas of civil law. It

17. J. Ghestin et al, op. cit., *supra* note 14, p. 575 and f.; Shael Herman, *The Contribution of Roman Law to the Jurisprudence of Antebellum Louisiana,* 56 La. L. Rev. 257 (1995).

18. M. Bridge, "The Evolution of Common Law in the United Kingdom and the Influence of European Law," L. Perret and A.F. Brisson, eds., in *The Evolution of Legal Systems, Bijuralism and International Trade,* op. cit., *supra* note 1, p. 57.

is also true and desirable that, in traditional common law fields, a more synthetic lecture method could prove advantageous, if only to help better identify basic general principles, abstract notions leading to concrete solutions.

In the field of legal education, Quebec can cite two different experiences, which are extremely interesting but still too recent to draw some firm conclusions. The McGill Law School has recently remodelled its curriculum to encourage the simultaneous teaching of Canadian common law and Quebec civil law courses. In other words, spread over a period of four years, a given section of the law is taught at the same time in both traditions. To the opposite, the University of Montreal Law School continues to teach the traditional civil law curriculum for three years, but offers an optional fourth year in Anglo-Canadian American common law. This duality of approach has given rise to discussions amongst the Quebec legal community[19] and those two separate experiences are too recent to draw conclusions on which system, if any, is best.

As far as the lawmaking process is concerned, the federal government came up, in 1997, with an interesting series of studies to make the federal corpus of legislation more compatible with the new 1994 Quebec Civil Code.[20] These have, in turn, given rise to a series of proposed modifications of the Canadian statutory law. It is also to be observed that in a particular field, the federal legislator now drafts the two official English and French versions in a way that is compatible with the tradition of each system. I imagine that this approach could also serve as a possible source of inspiration to European legislators.

Again, on the positive side, Louisiana and Quebec can also be cited as a potential example in the domain of judgment drafting. Both these jurisdictions have taken in that respect from the common law tradition, allowing judges to draft their own opinion and also permitting dissent.[21] The adoption of the common law system has not, in any case, been seen as a threat to civilian tradition but, on the contrary, has served as a means of stimulating legal thought and of

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19. A. Popovici, "Aperçu de l'enseignement au Québec du droit comparé et de l'enseignement comparatif du droit," 36 R.J.T. 803.

20. *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism*, Ottawa, Department of Justice, 1997; M. Dion, "Bijuridisme canadien et harmonisation du droit," L. Perret and A.F. Bisson, eds., in *The Evolution of Legal Systems, Bijuralism and International Trade,* op. cit., *supra*, note 1, p. 188. *See also* Bill S–22.

21. E. Deleury and C. Tourigny, " L'organisation judiciaire, le statut des juges et le modèle des jugements dans la Province de Québec," P. Glenn, ed., in *Droit québécois et droit français: communauté, autonomie et concordance*, op. cit., *supra* note 5, p. 191.

enriching the doctrinal body of references. The French tradition of a very short and somewhat formalistic "arrêt" is of course at the very opposite, leaving ample space for what one may call an exegetic jurisprudential interpretation.

There are however some clear negative aspects to the cross fertilization of both systems, which must be avoided. It is not because geographical and political conditions have a strong influence on the form and content of a given civilian legal system that one should endorse the common law tradition, lot, stock and barrel. The common law impact on positive law solutions, while certainly welcome and interesting, should not necessarily have as a consequence the abandonment of the civilian methodology, solutions and the relevance of codified general principles.

Blending two systems must rest on a fundamental postulate, that the solutions and rationalizations taken from the imported legal system into the civil law are compatible with it. In other words, there cannot be real bijuralism if the imported rules cannot be totally integrated, and thus continue to live a parallel legal life importing with them their own canons of interpretation and their own foreign sources.[22] The unequivocal rule must be that the system importing the foreign solutions be strong enough to make it its own, and harmonize them with its existing rules. In the opposite situation, two separate orders of norms are created, each with an independent life, carrying its own methods of interpretation, its own hierarchy of sources and its own idiosyncracies. The system cannot, then, really be said to be a "mixed" one in the sense of an integrated one.

By and large both Louisiana and Quebec, perhaps to different degrees, have succeeded over the years in achieving a certain degree of blending. This, however, has necessitated in certain cases, the total rejection of concepts which were sought to be imported where there already existed similar ones in the original system. Two examples can be given of that tact in Quebec law. For a while, courts in their judgments relied in cases of civil responsibility on the common law doctrine of invitee, licensee, and trespasser, to determine the intensity of the duty of care owed by the owner to a third person. The Supreme Court of Canada clearly indicated that this impact of a common law doctrine was to be abandoned since the all-encompassing notion of civil fault was sufficient to achieve and deal with the problem.[23]

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22. For an interesting example in Quebec civil law, see The History of the Interpretation of Former Article, 1056 C.C.B.C., J.L. Baudouin, *La responsabilité civile délictuelle*, 2d ed., Cowansville, Éditions Yvon Blais, 1985, nos 914 and f., p. 425 and f.

23. *Rubis* v. *Gray Rocks Inn*, 1 S.C.R. 452 (1982). A. Mayrand, "À quand le

Another example is the tendency in defamation cases, for certain first instance judges to adopt the common law theory of "fair comment." Recently, the Supreme Court clearly indicated that, here again, this defense opened to the defendant cannot and should not be part of the civilian law on defamation.[24]

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In this bicentenary anniversary for Louisiana, I think it is proper to conclude that mixed systems like Quebec and Louisiana, which have had both the privilege and sometimes the plight of drawing on two different legal traditions could have a leading role to play in a world that is getting smaller every minute and in which countries increasingly exchange with each other.

The influence of foreign legal systems on one's own law can no longer be treated as a sort of pernicious or negative one as it was sometimes thought to be in the late 19th and early 20th centuries where, for political reasons linked to cultural survival, at least in Quebec, the civil law tradition was viewed as a means of resisting linguistic and cultural assimilation. However, one must be aware that it is still absolutely important to keep one's own legal culture and tradition strong and not to let it be weakened by adopting, without the necessary discrimination, parts of another foreign legal system. The examples set by both Louisiana and Quebec in keeping their civilian tradition alive, while partaking from the common law tradition, is of great importance to those countries that will be looking in the XXIst century for stronger political and economical goals and integration.

In my opinion, both Louisiana and Quebec have demonstrated that their respective systems are functional and have succeeded in becoming autonomous and distinct from their original model.

Let me in conclusion thank again the Louisiana chapter of the Association Henri Capitant, Chancellor John Costonis and more particularly my colleague and good friend Alain Levasseur for this invitation to participate in what I believe will be a very stimulating and interesting seminar.

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trépas du tréspasse?" [1961] R. du B. 16.

24. *Prud'homme* v. *Prud'homme*, S.C.L. 85 (2002).