MEETING POINTS BETWEEN THE TRADITIONS OF ENGLISH–AMERICAN COMMON LAW AND CONTINENTAL-FRENCH CIVIL LAW
Developments and the experience of postmodernity in Canada

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ABSTRACT: *The scale of globalisation witnessed in Canada - as exemplified by the treatment of (1) the transformation of the role of precedents; (2) the multicultural and multifactoral search for common solution instead of law-based administration of justice; (3) dissolving definition by and conclusion from the law under the aegis of legal socio-positivism; accompanied with (4) prerogatives acquired by courts to a) unfold statutory provisions through principles while judicial actualisation, (b) constitutionalise issues, and c) impose the Supreme Court upon national community as its supreme moral authority - is spreading over the European Union as well. The point is to release law from positivated self-restriction by embedding it in informal cultural community through gradually eliminating the rest of substantivity from it, in order to treat it in an exclusively procedural sense in the final account. This involves change in the very concept and technicality of law, with consequences utterly unforeseeable. Globalisation does not necessarily result in, but is expected to secure, that "sustainable development" will be accompanied by "sustainable diversity". Accordingly, great legal cultures and traditions what the human kind has evolved until now have to preserve their share in interaction and as source for future inspiration as well.*

KEYWORDS: *precedents, laws, positivism, socio-positivism, principles, constitutionalisation*

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1. CANADIAN LAW IN GENERAL

Canada has not been treated well by legal comparatists up to the present day. Compendiums like the ones mapping the legal world by René David or Rudolf B.

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SCHLESINGER or, from among present-day authors, by, e.g., MICHAEL BOGDAN,[1] do not, apart from a few commonplaces, devote much attention to it either. In textbooks, Canada is usually characterised - perhaps to emphasise even further the marginal or downright provincial role attributed to it - by some simplistic stereotypes according to which the largest part of the area, originally developed under British influence, was unified later on in a federation, while Quebec has retained its French law since 1663. Its geographical location neighbouring the United States has all along - and particularly from the post-WWII-years (principally in foreign policy and government administration, but as discernable in the tone of scholarly and journalistic literature as well) - served as a reason to emphasise its sovereignty; albeit, for obvious reasons, it can scarcely (and increasingly less so) withdraw itself from the dominant influence of the adjacent superpower on philosophical orientation, artistic taste, legal patterns and other aspects of life.[2] Nowadays, Canada excels in both its high living standard and openly professed multiculturalism as one of the most self-confident leading powers of the world. Its law has indeed developed in the periphery. The English-speaking parts of the one-time dominion followed the usual development of a British colonial empire until the recent past, in both the decision-making tradition and partial codification.[3] The French-speaking part, Quebec, has retained French law irrespective of the fact that France renounced its sovereignty centuries ago. The overall legal continuity was interrupted only by the systematic codification achieved by NAPOLEON in France. This explains why the necessity of reconfirming legal contacts was given as the reason for preparing and promulgating a *Code civil de Québec* (1866), 62 years after the issuance of *Code NAPOLÉON*. The preamble reads as follows: "[T]he old laws still in force in Lower Canada are no longer re-printed or commented upon in France, and it is becoming more and more difficult to obtain copies of them, or of the commentaries upon them."[4]

Of course, trying to give any kind of rough outline involves the risk of omitting details - whereas the theoretical dilemmas and structural features mostly can be understood from precisely these. The most important feature of the legal map of Canada is that the *Quebec Act* (1774)[5] maintains the French heritage in property and civil rights, while the

[1] René David Les grands systèmes de droit contemporaines (Droit comparé) (Paris: Dalloz 1964) 630 pp. [Précis Dalloz]; Rudolf B. Schlesinger, Hans W. Baade, Mirjan R. Damaska & Peter E. Herzog Comparative Law Cases – Text – Materials, 5th ed. [1950] (Mineola, N. Y.: The Foundation Press 1988) liii + 923 pp. [University Casebook Series]; Michael Bogdan Comparative Law (Dewenter: Kluwer &c. 1994) 245 pp. The classical work of Adolf F. Schnitzler—*Vergleichende Rechtslehre* (Basel: Verlag für Recht und Gesellschaft 1955) xii + 497 pp.—is genuinely outstanding in giving at least a rough outline (pp. 207–208) of the foundations and directions Canada's law has taken throughout history.

[2] Having stayed in Quebec just at the time of the terrorist attack on September 11, 2001, against New York and other US-towns (about to leave for Montreal and then for Toronto), I was confronted with the fact that almost all important settlements (thus, the residence of the great majority of population) are situated in the frontier zone directly bordering on the United States (from West to East, Vancouver, Brandon, Fort William, Hamilton, Toronto, Ottawa, Montreal and Quebec, while others, like Calgary, Regina and Winnipeg, are not farther from the border than a few hundred kilometres either). Canada's population, about the same in size as that of Hungary, can find a living only in this extremely narrow zone of the territory ninety times as large as Hungary. At the same time, any event and news beyond the strictly local sphere is naturally related to the United States or mediated through its channels.

[3] E.g., Criminal Code (1883).

[4] Cf., e.g., Louis Baudouin 'Les apports du Code civil de Québec' in Canadian Jurisprudence The Civil Law and Common Law in Canada, ed. Edward McWhinney (Toronto: Carswell 1958), pp. 71–89.

[5] 14 Geo. III, chap. 83.

English tradition is followed in constitutional, administrative and criminal law. In addition, English testamentary and land law extends over English settlements and settlers. In general, it provides for English law in commercial lawsuits and evidence, and it introduces the jury system in civil cases.[6] Altogether, the French law of Lower Canada has been mixed from the beginning, in contrast to the English law of Upper Canada: "Quebec enjoys »une dualité de droit commun« and even, more structurally, a »bi-systemic legal system«."[7] It is by no mere chance that, having travelled to North America and visited courts in Quebec, Alexis de Tocqueville was astonished at the vast variety of languages and traditions used in the jurisdiction. (In addition, we may add, he found the French language used there very old-sounding and outdated as regards both pronunciation and intonation.)[8] Well, it was the co-existence of these two great cultures that generated, shortly after World War I, the need for Canada to show its own singularity by expressing its independent nationhood in and by the law, thereby contributing, at least with a symbolic force, to a French-Canadian identity too.[9]

This natural desire for self-determination began to bear its fruits by the time around World War II. For instance, in the early 1940s, a growing "prejudice, in the law schools and extending to the courtrooms, commencing against the use of American authorities and texts"[10] was reported. Then, in a few decades, the demand emerged for "Canadian judges developing Canadian law to meet Canadian needs".[11] This era coincided in francophone Canada with the period of ambitions for separation also in legally, but reflected an overall awakening of Canada in every respect. Genuine professors with scholarly attitudes, sometimes distinguished and committed to academic careers, started to appear in law schools, gradually replacing practising judges and lawyers who had usually shuttled between their offices and the university. They already embodied a new style, with scholarly

[6] I do not deal here with the legal status of the Indian aborigines (including their one-time customary law and their present claims), which is becoming topical in Canadian political and social public speech and also in doctrinal and practical jurisprudence. For a few theoretical indications, see, by Bjarne Melkevik, 'Question identitaire, le droit et la philosophie juridique libérale: Réflexion sur le fond du droit autochtone canadien' Cahiers d'études constitutionelles et politiques de Montpellier (1995), No. 1, pp. 23–37, 'The First Nation and Quebec: Identity and Law, Self-affirmation and Self-determination at Crossroads' in Globalization in America A Geographical Approach, dir. José Séguinot Barbosa (Québec: Institudo de Estudios del Caribe/Celat & Université Laval 1997), pp. 95–111 and 246, as well as 'Aboriginal Legal Cultures' in The Philosophy of Law An Encyclopedia, ed. Christopher Berry Gray (New York & London: Garland Publishing 1999), pp. 1–4 [Garland Reference Library and the Humanities, 1743] {all reprinted in Bjarne Melkevik Réflexions sur la philosophie du droit (Québec: L'Harmattan & Les Presses de l'Université Laval 2000), part on »Identité et Droit«, pp. 35–87}; and, as practical overviews, also Delgamuukw The Supreme Court of Canada on Aboriginal Title, comm. Stan Persky (Vancouver, British Columbia: Greystone Books & David Suzuki Foundation 1998) vi + 137 pp., Thomas Isaac Aboriginal Law Cases, Text, Materials and Commentary [1995] 2nd ed. (Saskatoon, Sask.: Purich Publishing 1999) xxx + 610 pp. as well as Patrick Macklem Indigenous Difference and the Constitution of Canada (Toronto: University of Toronto Press 2001) x + 334 pp.

[7] H. Patrick Glenn 'Quebec: Mixité and Monism' in Studies in Legal Systems Mixed and Mixing, ed. Esin Örücü, Elspeth Attwooll & Sean Coyle (The Hague, &c.: Kluwer Law International 1996), pp. 1–16 on p. 5, the first part-quotation by Louis-Philippe Pigeon Rédaction et interprétation des lois [1965] 2e éd. (Québec: Éditeur officiel 1978) xiii + 70 pp. on p. 50.

[8] Alexis de Tocqueville Oeuvres complètes Voyages en Sicile et aux États Unis, t. 5, vol. 1, 2e éd. J.-P. Mayer (Paris: Gallimard 1957), pp. 212–213.

[9] „C'est par sa façon d'exprimer le Droit qu'une nation manifeste en partie son originalité"—writes Antonio Perrault—*Pour la défense de nos lois françaises* (Montréal: Bibliothèque de l'Action française 1919) 72 pp. on p. 8—as a programme.

[10] In Canadian Bar Review 21 (1943), p. 57.

[11] Horace Read 'The Judicial Process in Common Law Canada' Canadian Bar Review 37 (1959), p. 268.

methodology and theoretical sensitivity, able to create magisterial works. This way trends and schools soon emerged to compete with each other; an independent doctrine was formed as developed from the dedicated legal staff; and from that time on, no longer only law claimed to represent truly the nation but legal scholarship entered the scene to become widely acknowledged as an integral part of Canadian public thought, intellectual life and internationally acclaimed performance as well.[12]

The processes - results and impacts - are intertwined. What might have once seemed to be one of the causes of Canada's peripheral status, today indicates general (further) developmental directions (perspectives and availabilities) - perhaps in a way not yet obvious to us, as the entire Central and Eastern European region is in a flux of constant formation today - of universal (or at least global) (world) trends. I mean here a kind of inherent lack of originality as one of the features of Canada, deeply rooted in and conditioned by its past. Of course, in itself this is but the outcome of historical *donnés* that - amidst Canada's early bi-British and bi-French development - did not require or promote their own solutions to be attained. Although those remote Canadian re-formulations of English and French technicalities may have been faint replicas in law, in their new medium they were exposed to interaction in a depth never experienced by the proud and legally *chauvin* isolationisms of the 19th to 20th century England and France (sharing perhaps a single experience in common, their old disdain towards the Germans). What I mean here is the mixing and irreversible intermingling of these two main cultures of law[13] that, due to their co-existence and co-operation and, not least, to the chance of deeper knowledge resulting therefrom, offers an unprecedented experience entitling Canadian lawyers to develop a well-founded self-confidence indeed. For such an added and cumulating knowledge can hardly be gained otherwise. Notwithstanding, pluralism of the parts mixed in themselves does not inevitably imply pluralism of the entire structure.[14] Accordingly, "mixed jurisdictions may function as monist jurisdictions. The original sources of law may be disparate in character, yet monist state institutions may already have largely completed the task of transfiguration into a single, national, systemic structure of law."[15]

The process of interaction may have also been accelerated by the unprecedentedly enviable fact that education in both Common Law and Civil Law within the same faculties, which still offered separate (specific) degrees, began some decades ago, and now Common Law is also taught in French and vice versa.[16] Mixed traditions also appear in scholarship with an enhanced interest in both intra- and extra-Canadian comparison of laws. A

[12] As a case study, see, e.g., Sylvio Normand 'Tradition et modernité à la Faculté de droit de l'Université Laval de 1945 à 1965' in Aux frontières du juridique Études interdisciplinaires sur les transformations du droit, dir. Jean-Guy Belley & Pierre Issalys (Québec: GEPTUD 1993), pp. 137–183. Cf. also Bjarne Melkevik 'La philosophie du droit au Québec: développements récents' in his Réflexions... [note 6], pp. 177–192.

[13] Cf., e.g., Maurice Tancelin 'Comment un droit peut-il ętre mixte?' in Le domaine et l'interprétaton du Code Civil du Bas Canada dir. Frederick P. Walton (Toronto: Butterworths 1980), pp. 1–32.

[14] See, first of all, Norbert Rouland 'Les droits mixtes et les théories du pluralisme juridique' in La formation du droit national dans les pays de droit mixte Les systčmes juridiques de Common law et de droit civil (Aix-Marseille: Presses universitaires 1989), pp. 41–55, especially on p. 42, quoted by Glenn 'Quebec' [note 7], p. 1.

[15] Ibidem.

[16] At present, parallel degrees in Civil Law and Common Law can be earned at McGill University (Montreal) and the University of Ottawa; the Universities of Ottawa and Moncton offer common law programmes in French, while McGill University offers civil law course in English. Other faculties provide a variety of student exchange programmes, and the federal government arranges for inter-Canadian comparative legal studies organised every summer.

development like this is not simply the result of some practical decision. Whether we think of the experience (and the crucial theoretical message) of the mutual (un)translatability of legal texts within the European Union[17] or of their commensurability at the intersection of diverging legal cultures,[18] evidently both refer to the hermeneutic significance of the symptom "I interpret your culture through mine" (symbolised by the figurative expression of the "missionaries in the row boat" model[19]) and, thereby, to the fact that, beyond sheer textuality, law is primordially an expression of culture.[20] Accordingly, the use of another language is not simply an issue of translation (or communication technique) but the choice of another culture, that is, an issue of (re-)interpretation in another - inevitably different - medium.

Developments in present-day Canada are of a special interest to us first of all because they involve the interaction of two leading European traditions in law, and thus highlight mutual influences from the perspective of convergence (which, in view of the unificatory Civil Law codification decided on by the European Union, has raised the topicality of *rapprochement* of Common Law and Civil Law and, within it, the need to reconsider the controversy between SAVIGNY and THIBAUT in early 19th-century Germany[21]). They also outline the potential of development (or possible deformation) in the light of the Canadian experiment with experiences lived through by them. Here I recall again, as an indication of a kind of belated development, the specific feature of the Canadian past that I referred to earlier as a mere inclination to follow external patterns under peripheric conditions, accompanied by a lack of self-reliance. Around the mid-20th century, this state of mind was replaced by self-building and self-determination, set as a new objective. A lack of balance, swinging between opposites and neophytism may accompany the process. Provincial imitation is replaced by autonomous construction. At the same time, Canada's

[17] Cf., e.g., Gérard René de Groot 'Recht, Rechtssprache und Rechtssystem: Betrachtungen über die Problematik der Übersetzung juristischer Texte' Terminologie et traduction 3 (1991), pp. 279–312 {abridged trans. in European Legal Cultures ed. Volkmar Gessner, Armin Hoeland & Csaba Varga (Aldershot, Brookfield USA, Singapore, Sydney: Dartmouth 1996), pp. 115–120 [Tempus Textbook Series on European Law and European Legal Cultures I]}.

[18] Cf., e.g., from H. Patrick Glenn, 'Commensurabilité et traduisibilité' [in Actes du Colloque »Harmonisation et dissonance: Langues et droit au Canada et en Europe (mai 1999)«] Revue de la common law 3 (2000) 1–2, pp. 53–66 and 'Are Legal Traditions Incommensurable?' The American Journal of Comparative Law XLIX (2001) 1, pp. 133–146.

[19] "In this model, the missionary, the trader, the labor recruiter or the government official arrives with the bible, the mumu, tobacco, steel axes or other items of Western domination on an island whose society and culture are rocking along in the never never land of structural-funcionalism, and with the onslaught of the new, the social structure, values and lifeways of the »happy« natives crumble. The anthropologist follows in the wake of the impacts caused by the Western agents of change, and then tries to recover what might have been." Bernard S. Cohn 'Anthropology and History: The State of the Play' Comparative Studies in Society and History 22 (1980) 2, pp. 198–221 at p. 199.

[20] Cf., by the author, Lectures on the Paradigms of Legal Thinking (Budapest: Akadémiai Kiadó 1999) vii + 279 pp. [Philosophiae Iuris].

[21] Cf., e.g., by the author, 'La Codification ŕ l'aube du troisičme millénaire' in Mélanges Paul Amselek org. Gérard Cohen-Jonathan, Yves Gaudemet, Robert Hertzog, Patrick Wachsmann & Jean Waline (Bruxelles: Bruylant 2004), pp. 779–800 and 'Codification at the Threshold of the Third Millennium' Acta Juridica Hungarica 47 (2006) 2, pp. 89–117 {& http://www.akademiai.com/content/cv56l91505t7k36q/fulltext.pdf> & 'Codification on the Threshold of the Third Millennium' in Legal and Political Aspects of the Contemporary World ed. Mamoru Sadakata (Nagoya: Center for Asian Legal Exchange, Graduate School, Nagoya University 2007), pp. 189–214}.

economic safety coupled with its relative political tranquillity and constitutional stability encourages kinds of experimentation that by far could not be available elsewhere (because of imperial dimensions or the want of reserves). Moreover, situations brought about by chance or provoked by empty slogans may come about due to inexperience. Needless to say, the final balance will be drawn up by the people of Canada. However, for the external observer, all this indicates a path for the future. For everything on the move in Canada develops in line with the dominant ideas of our age, mainstream but also self-fulfilling.[22]

In this overview, I undertake to analyse (1) the change in the role precedents play in the judicial process; (2) the transformation of law-application into a collective, multicultural and multifactorial search for a practical solution, assessable by international standards; (3) the practical trends of dissolving the law both in Common Law and Civil Law jurisprudence; and, finally, (4) the new prerogatives acquired by courts for their own procedures, such as a) the unfolding of principles from statutory provisions, themselves taken as mere guide-marks for the courts, b) the critical filtering of the entire legal system according to the Charter's human rights by deducing legal solutions directly from the Constitution and, in conclusion, c) the courts becoming an ultimate ethical forum for debated moral issues.

2. CANADIAN LEGAL DEVELOPMENTS IN PARTICULAR

2.1. The Transformation of the Role of Precedents

Our thinking may prove to be a historical whether or not we realise it. In average cases, we tend to take any event as a preliminary to something else, by presuming the present to be given with the frameworks consolidated. We try to analyse and understand anything that merely precedes it, by forcing it into a straitjacket that is often alien and external, and thereby distorting it. In our present-day legal thought, we tend to consider the body of Common Law and the entire English legal tradition as normative material differing from continental law mostly in methodological elaboration; albeit the substantiation of the decisional patterns of English law, developed mainly through adaptation of forms of action and formulated mostly through procedural forms, is a product of initiatives taken only in the 19th century and not earlier.[23] Moreover, as a result of historical reconstruction, we may even declare that practically every feature that had once caused the tradition of Common Law to diverge from Civil Law development has by now disappeared from behind the reality of this law over the past century and a half. To wit, there are no forms of action in England any more; the institution of jury has declined; those few justices once riding circuit all through the kingdom have been replaced by an army of judges; the decisive judicial role of the first and last instance declaring what is the law in the case has disappeared from this machinery of enormous hierarchical complexity; the number of cases to be heard by a judge has increased sky-high with litigation having

[22] One of my vital Canadian sources has been the oeuvre of H. Patrick Glenn Legal Traditions of the World Sustainable Diversity in Law (Oxford: Oxford University Press 2000) xxiv + 371 pp., a universal overview, based upon the generalising re-consideration of his observations built on comparisons focussing on Canada.

[23] H. Patrick Glenn 'La civilisation de la common law' Revue internationale de Droit comparé 45 (1993) 3, pp. 559–575.

grown to massive proportions; the one-time exceptionalism of judicial adjudication has been degraded into a mere state-provided service and, with the solemnity of justice reduced to mere routine, the judicature has been transformed into case-managing-adjudication, fulfilled as an obligatory task; substantive law defining the legal status of behaviours overshadows the once dominant procedural approach; and the exclusivity of power exercised by a handful of elect men has been challenged by the inclusion of women and candidates with all types of work experiences recruited from fellow-citizens of various colours and cultural backgrounds, eligible through mere professional qualification (and 'learned' only in this respect).[24] Even according to the self-portrayal of the Common Law, all of this has resulted in a change of character so that from now on nothing else can characterise Common Law than some vague "habits of thought".[25] In the light of our post-modern and cosmically extended universal expectations of the rule of law's service-providing state and law, it may seem almost bizarre to recall in historical contrast that even some centuries ago, the judge was not to decide out of duty but at the time when he felt he should indeed do so, because he found the parties' conflict ripe and balanced enough as to their respective legal positions that he might consider his decision was indeed needed for the dispute to end. That means that, in those earlier times, the parties were expected to co-operate in reaching a situation somewhat clear and balanced.[26]

The unification of the judicial system in 19th century England had a series of impacts pointing beyond simple institutional rationalisation. In conclusion, the one-time identity of Common Law was also done away with, as precisely the rivalry of judicial fora (referring to varying normative sources according to differing traditions) had until then defined the identity of English law, across more than half a millennium. For Equity, Admiralty and ecclesiastical law had equally received and channelled Civil Law impacts so that ideas by Cujas, Pothier and other (mainly French) lawyers could freely stream into the English law. True, 19th-century England did block this abundant source by that re-organisation of the judiciary. All this notwithstanding, Common Law concepts and institutions could be further fertilised by the English interest in German pandectism during the same century.[27]

As to the law's structure, Blackstone was of the opinion that "human laws are only declaratory of, and act in subordination to [divine law and natural law]".[28] In fact, the unthinkable dream of a judge making law (i.e., the term 'judge-made law') was only invented by Jeremy Bentham - and not earlier than in 1860.[29] Anyway, the formal system of precedents with the principle of *stare decisis* developed and solidified around the same

[24] Cf., e.g., H. Patrick Glenn 'The Common Law in Canada' The Canadian Bar Review 73 (June 1995), pp. 261–292.
[25] Lord Oliver of Aylmerton 'Requiem for the Common Law' The Australian Law Journal 67 (1993), pp. 675–687 on p. 686.
[26] J. H. Baker 'English Law and the Renaissance' Cambridge Law Journal 44 (1985) 1, pp. 46–61, especially at p. 58.
[27] E.g., Glenn 'The Common Law…' [note 24], p. 278. Both the rich continental collection of classical law libraries (especially of the Inns in London or the Bodleian at Oxford) and John Austin's recurrent visits to Bonn and Berlin may be remembered here. For the latter, see, e.g., Barna Horváth Az angol jogelmélet [English legal theory] (Budapest: Magyar Tudományos Akadémia 1943) x + 657 pp. [M. Tud. Akadémia Jogtudományi Bizottsága kiadványsorozata 13], p. 256.
[28] The Sovereignty of the Law Selections from Blackstone's Commentaries on the Laws of England, ed. Gareth Jones (Toronto: University of Toronto Press 1973) lv + 254 pp. on p. 51, note 31.
[29] Jim Evans 'Change in the Doctrine of Precedent during the Nineteenth Century' in Precedent in Law ed. Laurence Goldstein (Oxford: Clarendon Press 1987), pp. 35–72 at p. 68.

time. Judicial law-making had become overtly transparent due to the growing resort to the method of distinguishing cases, while courts became accustomed to following earlier and superior decisions. All this presumed an approach of renewal. For "[c]ases […] could not be rules to be followed and were hence examples of the type of reasoning which had thus far prevailed […]. Since cases only exemplified arguments, there was no closure of sources".[30]

As is known, in England in 1966, the House of Lords absolved itself from compulsory compliance with its own earlier decisions.[31] This soon resulted - through the Court of Appeal's seventeen justices proceeding in panels - in what we can now call the practical desuetude of earlier decisions. (This same change of direction would lead to similar absolutions from the Supreme Court of Canada and, gradually, from all courts of the provincial Courts of Appeal.) All this amounts to an inevitable change in the law's overall operation. From now on, one has to recognise that decision-making based upon pondering principles is replaced by a "discretionary dispute resolution with a low level of predictability",[32] in which no component can be more than "relaxed" and "flexible".[33] The internal order of Common Law countries comes increasingly close to what we have learned so far about their mutually fertilising interconnections, taking over solutions from each other with persuasive force.[34] At the same time, "[c]itation of single cases has been replaced by search and citation methods which batch or group large numbers of cases, as indicating the drift of decisional law."[35] Accordingly, syllogisms of law-application are also substituted by "statistical syllogism".[36]

Any theoretical formulation of the doctrine of precedent implies the dual chance of an *ex post facto* arrangement with retroactive effect (as an *a posteriori* manifestation or declaration of the law)[37] and - for want of any clear ability to use formalism, due to which "[j]udges […] proceeded on the basis of law they felt they could reasonably articulate,

[30] Gerald J. Postema 'Roots of our Notion of Precedent' in Precedent in Law, pp. 9–33 on p. 22. In a similar sense, see also Michael Lobban The Common Law and English Jurisprudence 1760–1850 (Oxford & New York: Oxford University Press & Clarendon Press 1991) xvi + 315 pp. and David Lieberman The Province of Legislation Determined Legal Theory in Eighteenth-Century Britain (Cambridge & New York: Cambridge University Press 1989) xiii + 312 pp. [Ideas in Context].

[31] 'Practice Statement (Judicial Precedent)' Weekly Law Reports 1 (1966), p. 1234, as well as All England Reports 3 (1966), p. 77.

[32] Glenn 'The Common Law…' [note 24], pp. 269–270.

[33] George Curtis 'Stare Decisis at Common Law in Canada' University of British Columbia Law Review 12 (1978) 1, pp. 1–10 on p. 8 and, similarly, Wolfgang Friedmann 'Stare Decisis at Common Law and under the Civil Code of Quebec' Canadian Bar Review 31 (1953), pp. 722–746 at pp. 723 et seq.

[34] According to J. A. Hodgins 'The Authority of English Decisions' Canadian Bar Review 1 (1923), p. 470 et seq., especially at p. 483, borrowing of ideas could always take place in case the reasoning was applicable conclusively. K. MacKenzie's formulation—'Back to the Future: The Common Law and the Charter' Advocate 51 (1993), pp. 927 et seq. on p. 930—is even more laconic on the decline of precedent, more rapid in Canada than in England.

[35] Glenn 'The Common Law…' [note 24], p. 270.

[36] H. Patrick Glenn 'Sur l'impossibilité d'un principe de stare decisis' Revue de la recherche juridique / Droit prospectif XVIII (1993) 4, No. 55, pp. 1073–1081, especially on p. 1081.

[37] John Chipman Gray The Nature and Sources of the Law [1921] 2nd ed. (New York: Macmillan 1938) xviii + 348 pp. at pp. 168 et seq., and pp. 174 et seq. For a more detailed exposition, see, by the author, 'Ex post facto Regulation' in The Philosophy of Law An Encyclopedia, ed. Christopher Berry Gray (New York & London: Garland Publishing 1999), pp. 274–276 [Garland Reference Library and the Humanities, 1743] {& http://books.google.hu/books?id=58O5cXzHX8QC&pg=PA100&lpg=PA100&dq=%22csaba+varga%22+%22philosophy+of+law%22&source=bl&ots=RawbO-vK&sig=Y9T-BEsTexYG8QdoTVIePTdBq1A&hl=hu&sa=X&oi=book_result&resnum=5&ct=result#PPA99,M1>}.

through a »careful working out of shared understandings of common practices«"[38] - of social interests being weighed in the recourse to distinguishing. Or, the chance of law and order becoming transformed into an open-ended play of social mediation has become actual and acute.

All of this results in a new doctrine of case law, with the radical renewal of the ideal of regulation as well. Accordingly, "[t]he announced rule of a precedent should be applied and extended to new cases if the rule substantially satisfies the standard of social congruence".[39] This way, Talmudic tradition comes back into the tradition of Common Law with its distrust in logic and theoretical generalisation for moral choices, by considering both thesis and antithesis suitable to embody the word of the living God.[40] Ultimately the question 'Is the Common Law Law?' arises. For - as the response holds[41] - "[c]ommon law rules are a strange breed. They can be modified at the moment of application to the case at hand, and their modification depends upon the background of social propositions. If […] a doctrinal proposition should be enforced or extended when and only when it is congruent with the relevant social propositions, and a doctrinal proposition should be discarded or reformulated when it lacks such congruence, then the doctrinal proposition seems to be no more than a rule of thumb."

2.2. The Transformation of Law-Application into a Collective, Multicultural and Multifactorial Search for a Solution

The principle of *stare decisis* has never been accepted in Quebec, although Canadian legal development has always remained open to borrowing, especially from English and French law. This is the reason why it has seldom tried to either formalise or close down its normative sources. Typically, not even the first Quebec Civil Code (1866) abrogated the previous law and did not prohibit reference to former decisions as sources of the law. Or, it generously left in force from pre-code law anything not in simple repetition of wording from codes or incompatible with code provisions, with the effect that "the codification of the Quebec laws seems rather like a half-measure, typical of compromise."[42] For it is to be remembered that demarcation lines between "us" and "them" have always been alien to Canadian tradition. Just as no "formal »adoption«" was known there, eventual borrowings were not regarded as "radically »foreign« laws" either, since, pragmatically, "they represent living law which may be useful in the practical process of dispute resolution."[43]

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[38] Postema 'Roots...' [note 30], p. 31.
[39] Melvin A[ron] Eisenberg The Nature of the Common Law (Cambridge, Mass.: Harvard University Press 1988) x + 204 pp. on p. 154, note 75.
[40] Suzanne Last Stone 'In Pursuit of the Counter-text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory' Harvard Law Review 106 (1993) 4, pp. 813–894, especially at p. 828, and, as built into the philosophical understanding of legal argumentation, cf., by the author, Lectures… [note 20], p. 93, note 120.
[41] Frederick Schauer 'Is the Common Law Law?' California Law Review 77 (1989) 2, p. 455–471, quotation on p. 467.
[42] Code civil de Québec, Art. 2712, and the quotation by M. A. Tancelin 'Introduction' in F. P. Walton The Scope and Interpretation of the Civil Code of Lower Canada [1907] New ed. M. A. Tancelin (Toronto: Butterworth 1980), p. 27.
[43] H. Patrick Glenn 'Persuasive Authority' McGill Law Journal 32 (1987) 2, pp. 261–298 at p. 289.

As if learned from the admonitions of the Institutions of GAIUS that peoples are governed both by law that is particular to them and by law that is common to humanity,[44] the normative bases referred to in judicial decisions testify to a rather open and international audience. A recent analysis of jurisprudence shows the following proportion of citations for:

the Supreme Court of Canada[45]

to decision		**to doctrine**	
domestic	367	domestic	63
British	110	British	29
American	045	American	24
Australian–Asian	014	French	09
French	002	Australian–Asian	07
other	004	other	02
foreign	175 (32,3%)	foreign	71 (53%)
foreign altogether		**36,4 %**	

and Quebec[46]

to local decision	129	
to French author	117	
to common law decision	079	
to local author	029	
to French decision	025	
to common law author	013	
to foreign decisions altogether		44,64%
to foreign authors altogether		81,76%
to foreign sources altogether	**234**	**(59,7%)**

All this means that references to foreign authors are more frequent in all of Canada, and significantly more frequent in Quebec, than to domestic, respectively local ones; reference to foreign decisions is made in one third, and two fifths of all references, respectively; altogether, reference to foreign materials is made in one-third, and three fifths of all references, respectively; and finally, in Quebec, the frequency of references

[44] „Omnes populi qui legibus et moribus reguntur partim suo proprio, partim communi omnium hominum iure utuntur" in Inst. Gaius 1.1.

[45] Supreme Court Reports 1 (1985), p. 296. According to another survey, the frequency of citation of foreign decisions or laws at the Supreme Court of Canada amounts to 24,2–32,7% of all the references as compared to other Canadian sources, and as compared to foreign ones (typically reference to United States sources in public law, to French ones in cases of Quebec and, in other cases, mostly to German and Israeli ones), 18,9–21,8% of all the references. Cf. H. Patrick Glenn 'The Use of Comparative Law by Common Law Courts in Canada' in The Use of Comparative Law by Courts ed. Ulrich Drobnig & S. van Erp (Dordrecht, &c.: Kluwer Law International 1999), pp. 59–78, especially p. 68.

[46] Pierre-Gabriel Jobin 'Les réactions de la doctrine f la création du droit civil québécois par les juges: les débuts d'une affaire de famille' Les Cahiers de Droit 21 (1980) 3, pp. 257–275, especially p. 270.

to foreign decisions is higher by 38,2%, and to foreign authors by 54,26%, than in Canada at large.[47]

Well, at the level of catch-phrases, we may encounter globalised multiculturalism perfected. Interestingly enough, something more is also at stake for a comparative historical investigation of legal traditions. Repeated experience is the case, reminding us that European legal development came about through continuous (doctrinal and judicial) re-interpretation of traditions in *jus commune* rather than from oeuvres created in original construction.[48] Or, the other great (English, French, German or American) legal cultures - which usually serve as standards for us - are in the final analysis nothing but products of trans-national learning and mutual borrowing.[49]

Common Law as a historical accumulation of precedents is process-like by definition: "common law is a developing system in the sense that there is a continuing process of development and exposition of rules."[50] For this very reason, "the search for law is too important for any potential external source to be eliminated *a priori*. The law is never definitively given; it is always to be sought, in the endlessly original process of resolution of individual disputes through law."[51] The feeling of insecurity, the renunciation of any search for law, the wish for agreement and legitimisation from any source at any price add to the above, as if inherent scepticism were to be overcome by a rush for a substitute for safety. After all, the judge "feels much safer if he can rely on foreign jurisprudential continuity instead of own sources gained exclusively from the text".[52]

All in all, new catch-phrases indeed take the lead: diversity, pluralism, and concurrence - as much in law as in other fields.[53] We can be sure that they are fulfilled. According to statistics, for instance, the safe, foreseeable and calculable Civil Law excels in both the number of cases and the time needed for justice administered, as well as in other features of mass-scale litigation. Spectacular and frivolous lawsuits are more typical in the Anglo

[47] There is a remarkable contrast here with the United States asserting itself as open and multicultural, where the frequency of citations in one state from another is about 10%, whereas from an authority outside the USA is scarcely 1% [John Henry Merryman 'Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970' Southern California Law Review 50 (1977) 3, pp. 394–400], or downright unheard of (0%). In its own past, however, this ratio was 25,7% in 1850 and 1% in 1950 [William H. Manz 'The Citation Practices of the New York Court of Appeals, 1850–1993' Buffalo Law Review 43 (1995) 1, pp. 121–179 on p. 153].

[48] Cf. primordially Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte I, hrsg. Helmut Coing (München: Beck 1973) [Veröffentlichung des Max-Planck-Instituts für Europäische Rechtsgeschichte].

[49] Glenn 'Persuasive Authority' [note 43], p. 263.

[50] Wilbur Roy Jackett 'Foundations of Canadian Law in History and Theory' in Contemporary Problems of Public Law in Canada Essays in Honor of Dean F. C. Cronkite, ed. O[tto] E. Lang (Toronto: University of Toronto Press 1968), pp. 3–30 at p. 29.

[51] Glenn 'Persuasive Authority' [note 43], p. 293.

[52] J.-L. Baudouin 'Le Code civil québécois: crise de croissance ou crise de vieillesse' Canadian Bar Review 44 (1966), p. 406. [„se sent beaucoup plus sûr de lui, ayant comme appui la continuité jurisprudentielle étrangère plutôt que ses seules propres ressources d'exégèse du texte"]

[53] Cf., e.g., Vittorio Villa La science du droit (Bruxelles: Story-Scientia & Paris: Librairie Générale de Droit et de Jurisprudence 1990) 209 pp. [La pensée juridique moderne]. In Canada, due to inclination towards experiment, differing from the US at any price and concentrating in cities, all this can turn into a remarkable driving force. Cf., for the symbolic resonance of the concurrence of pluralist diversity in Canadian philosophical life, Rita Melillo Ka-Kanata Pluralismo filosofico, I–II (S. Michele di Serino: Pro Press Editrice 1990) 165 + 306 pp.

- American world - filed out of individual rivalry (sometimes represented by gender-, colour- or culture-specific groups), or mutual ambition to suppress, or for revenge or profit-seeking or business interests (e.g., in divorce, for real or alleged discrimination, sexual harassment, medical malpractice, or product liability, etc.). Albeit all this is, due to the complexity of procedure and the cost of lawyer's fees, only available to those in the middle-class with balanced financial backgrounds. Anyway, the number of judges per 100 000 inhabitants is[54]:

in Germany	26
in France	11
in Canada	08
in England	01,9

The data are not only relevant for employment statistics: they speak of the extent of actual workload and institutional significance as well.

Accordingly, the litigation habit developed in the early modern Common Law (with the social exceptionality of a judicial event) continues. Moreover, from the comparative numerical data of the caseload *per annum* of supreme courts,

Canada	Supreme Court	100–150 cases heard
France	*Cour de cassation*	28 000 decided cases

it is revealed that two hundred to two hundred and fifty times fewer cases are decided in Canada yearly as against, say, the mass-scale caseload in France.[55]

2.3. Practical Trends of Dissolving the Law's Positivity

The possibility of a judge becoming his own master by complementing legal considerations with social assessment is inherent in the doctrine of precedent. Take, for instance, the DWORKINian approach, which by differentiating between principles and rules and, thereby, establishing by principles the relevance of rules,[56] involves the mixing of purely legal aspects with external axiological and social considerations.[57]

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[54] H. Patrick Glenn 'La Cour Supręme du Canada et la tradition du droit civil' The Canadian Bar Review 79 (March–June 2001), pp. 151–170, especially p. 161.

[55] Ibid., p. 154. This comparison does not take account of the mass of unsettled cases, the number of which has grown by 200 000 in France in one single decade. Edgar Tailhades La modernisation de la justice Rapport au Premier Ministre (Paris: La documentation française 1985) 263 pp. [Collection des rapports officiels], particularly at p. 36.

[56] Ronald M. Dworkin 'The Model of Rules' University of Chicago Law Review 35 (1967) 1, pp. 14–45 {reprint: 'Is Law a System of Rules?' in The Philosophy of Law ed. Ronald M. Dworkin (Oxford: University Press 1977), pp. 38–65}.

[57] Precisely, 'questions of law' themselves cannot be anything else than products of an abstraction taken out of a merely analytical interest. Cf., by the author, Theory of the Judicial Process The Establishment of Facts (Budapest: Akadémiai Kiadó 1995) vii + 249 pp., especially para. 3.8.1 at pp. 99–106.

This is a complete change in the law's nature, running against the one-time JUSTINIAN creed, according to which adjudication has to be based upon not the former instance but the law.[58] Now, a conviction according to which it is "closer to the truth to regard the law as a continuing process of attempting to solve the problems of a changing society, than as a set of rules"[59], becomes the deontological corner-stone of the judicial profession. Also a self-reassuring thought appears to persuade the sceptics that all this may conform even better to the claims of participatory democracy than legal positivism, based upon the alleged sovereignty of law. This concept is post-modern, worthy of our brave, new world indeed: "Law is less precise but more communal and there are more possibilities of persuasion and adherence to law, and eventually of eliminating it. Decisions are less conclusive, other sources may later prevail, and broader forms of agreement become possible, tolerant of differences now seen as minor and perhaps transient."[60]

From now on, old patterns of institutional development again enter the scene. Once the dam breaks, what used to be merely a phenomenon becomes essential and what was just symptomatic transforms into a programmatic vision about the future, now forming in the womb of society. Anyway, this aspiration is descriptively formulated, yet fulfils a justificatory function, leaving behind any limiting and disciplining framework as an outdated obstacle. The claim for innovation is also formulated as a theoretical claim: "Modern societies have been […] oriented towards the rationalization of autonomous fields of social practice, they have raised the problem of the unity of social action to the level of a formal, universalizing and abstract law, and have understood law as the deduction of an ideal of justice characterized by individual freedom. The indeterminate nature of this idea of justice, namely the impossibility of deducing some concrete content from a principle, has generated a crisis of the power to make law and brought about inductive and pragmatic procedures for recognizing the rights claimed in social conflicts by various categories of actors."[61]

Well, while we may freely meditate on the sense of these and similar theses reminiscent of the leftist Utopian radicalism of Critical Legal Studies, nevertheless, it is a fact that they are no longer exceptional or unique. What they betoken are real alterations in actual practice and factual arrangement. They ascertain, for instance, on a theoretical level that "[t]wo paths of legal development may be envisioned. One involves shifting the centre of the legal system away from legislation towards a limited set of fluid principles and concepts. The other implies re-emphasizing legislation as the centre of the system, while rolling back the legislative tide and reactivating the symbolic meaning of legislation - especially through the development of new forms of civic involvement in the legislative process."[62] Thus, once the dam breaks, a further recognition (mixed with some neophyte haste and hypocrisy) is added to the theses: of course, all this is true, quite to the extent

[58] Justinianus (C.7.45.13): „non exemplis sed legibus iudicandum est".
[59] S[tephen] M. Waddams Introduction to the Study of Law (Toronto: Carswell 1979) xv + 270 pp. on p. 5.
[60] Glenn 'Persuasive Authority' [note 43], pp. 297 and 298.
[61] Gilles Gagné 'Les transformations du droit dans la problématique de la transition ŕ la postmodernité' Les Cahiers de Droit 33 (1992) 3, pp. 701–733 and in Aux frontières du juridique Études interdisciplinaires sur les transformations du droit, dir. Jean-Guy Belley & Pierre Issalys (Québec: GEPTUD 1993), pp. 221–253, in abstract, p. 221.
[62] Pierre Issalys 'La loi dans le droit: tradition, critique et transformation' Les Cahiers de Droit 33 (1992) 3, pp. 665–699 and in Aux frontičres du juridique, pp. 185–219, in abstract, p. 186.

that this has never been otherwise either in Civil Law[63] or in codification.[64] One may have been wrong in the past but now one is certainly right.

As the Canadian justice La Forest declared in a recent case, "[t]he legal system of every society faces essentially the same problems and solves these problems by quite different means, though often with similar results".[65] Well, it is precisely the diversity of both the paths of procedure and the instruments applied, the sources invoked and the kinds of reasoning resorted to, from among which the result of the choice actually generated today proves to be quite open-ended, which may signal the advent of a new era.

Though in a theoretical veil, it is now declared with brutal openness that "it is no longer the legislator with whom the interpreter conducts a dialogue but the authorities; namely, the opinions of other learned justices, judges and especially famous justices".[66] Actually, hereby, both the subjects and the play, topic, purpose and stake of a legal process, as well as the arguments invoked and the function of the entire judiciary are changed. "All the World's a Courtroom" - they shout not quite without foundation, heralding a new millennium. At once a methodology builds upon the apparent description, so that "[t]he court does not proceed in a purely deductive manner, because the available sources or principles are not always clear and complete enough to permit deduction. This is wherefrom the dialogical and transnational character of civil law arises. The process is not inductive either, because no simple multiplication of instances or potential examples is able to lead to justification by the foundations provided for the resolution of the affair before the court. Otherwise, among these sources beyond the law's borders, the court does not cite only judicial decisions. It also has recourse to authors expressing opinions and developing principles, just as to laws and codes. If this method should be qualified, it can be described as analogical, first of all. By means of this method, one searches for links and common elements between the problem to be resolved and the model proposed, whatever the institutional source of the latter. […] The legitimacy of the court's decision depends on the legitimacy of the decision's sources; enlarging these, the range of legitimate decisions is enlarged."[67]

[63] "law is prior to the law […] law is not entirely included in the law" [„le Droit est avant la loi" „le Droit n'est pas tout entier dans la loi"] Ph[ilippe] Rémy 'Éloge de l'exégèse' Revue de la Recherche Juridique / Droit prospectif VII (1982) 2, pp. 260–262 on p. 261. – "Law is variable and diffuse. It is a material to be explored and not to be created." [„Le droit est variable et diffus. Il est donc une matière à découvrir et non pas à créer."] C[hristian] Mouly 'La doctrine, source d'unification internationale du droit' Revue internationale du Droit comparé 38 (1986) 2, pp. 351–268 at p. 364. – "law is prior to legal rule and overflows it everywhere" [„le droit est antérieur à la règle de droit et la déborde de partout"] J[ean]-M[arc] Varaut 'Le droit commun de l'Europe' Gazette du Palais (19–20 September 1986), Doct., p. 9. – "Law is not some kind of construction, but a reality to be explored" [„le droit n'est pas une construction mais une réalité à découvrir"] Christian Atias 'Une crise de légitimité seconde' Droits 4 (1986), pp. 21–33 at p. 32. – "There is no one today to declare [confirming the words of Montesquieu] that the judge is nothing else but »the mouth of the law« […] the judge sets up his own barriers for himself." [„Nul n'oserait plus soutenir aujourd'hui que le juge n'est que »la bouche de la loi« […] le juge arrête lui-même ses propres limites"] François Rigaux La loi des juges (Paris: Odile Jacob 1997) 319 pp. on pp. 65 and 247.

[64] [1977] 2 R.C.S. 67, at p. 76.

[65] Rahey v. The Queen [1987] 1 S.C.R. 598, at 319.

[66] [„l'interprète ne dialogue plus avec le législateur, mais avec des autorités: opinions d'autres docteurs; opinion des juges, spécialement l'opinion des grands juges"] Rémy 'Éloge de l'exégèse' [note 63], p. 260.

[67] H. Patrick Glenn 'La Cour Suprême du Canada…' [note 54], p. 169. [„la Cour ne procède pas d'une manière purement déductive, car il n'y a pas toujours de source ou de principe suffisamment clair et complet pour permettre la déduction simple. D'où le caractère dialogique et transnational du droit civil. Le processus n'est pas non plus inductif, car la simple multiplication d'instances, ou d'exemples potentiels, ne saurait donner lieu à une justification, ne saurait fournir une raison pour la résolution de l'affaire particulière devant la Cour. D'ailleurs, parmi ces sources

Thereby, we seem arrive from Common Law tradition (having once originated in Europe) at a peculiar compound of some Anglo–American Europe. A new kind of logic is to correspond to this. In its terms, "[t]he dialogical principle means that two or more various kinds of »logic« are combined into unity in a complex (mutually complementing, concurring and antagonistic) manner without duality being lost in this unity."[68] One has to note here that duality may have an additional meaning in relation to the specific case of Canada, as is clearly shown in the Canadian characterisation of methodological novelty: "the jurisprudence of Quebec, especially in civil affairs, departs from the model of judicial syllogism, in order to practice the discursive and descriptive reasoning characteristic of common law."[69]

This is what was recently announced in Canada with a simultaneously reconstructive and normative claim, as a legal theory of post-modernism, called legal socio-positivism.[70] The scholarly motive of elevating all this to theoretical heights is neutral in itself: apparently it results from the merely sociologically inspired approach to and specification of the concept of law.[71] However, by extending its subject, it also turns the entire conception inside out. Namely, law is not a kind of normativity any longer but a mere fact or, more precisely, an aggregate of facts regarded as legal.[72] Or, law embodies a kind of polycentrism by its "inter-normativity" that mediates - through its network of many actors - between law and the axiologism of invokeable extra-legal (social, economic, ethical, etc.) norm-systems.[73] Otherwise speaking, it is a duality, a compound of "law as a socially constructed fact" and "law as a specifically normative fact".[74] As hoped for, this is already on the way to dissolving the law's separation, distinction and specificity. Its ideologists are about to

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extra-frontalières, la Cour ne cite pas que des décisions judiciaires. Elle a recours aussi aux auteurs, qui émettent des opinions et développent des principes, de même qu'aux lois et aux codes. S'il faut qualifier la méthode, elle peut être décrite comme étant surtout une méthode analogique. Par cette méthode, on cherche des liens, des éléments communs, entre le problème à résoudre et le modèle proposé, quelle que soit sa source institutionnelle. […] La légitimité de sa décision dépend de la légitimité de ses sources; en les élargissant, on élargit le champ des décisions légitimes."] Cf. also Shirley S. Abrahamson & Michael J. Fischer 'All the World's a Courtroom: Judging in the New Millennium' *Hofstra Law Review* 26 (1997) 2, pp. 273–291.

[68] Edgar Morin Penser l'Europe (Paris: Gallimard 1987) 221 pp. [Au vif du sujet], p. 28. [„Le principe dialogique signifie que deux ou plusieurs »logiques« différents sont liées en une unité, de façon complexe (complémentaire, concurrente et antagoniste) sans que la dualité se perde dans l'unité."] Quotation by H. Patrick Glenn 'Harmonization of Private Law Rules between Civil and Common Law Jurisdictions' in Académie internationale de droit comparé Rapports généraux XIIIe Congrès International, Montréal 1990 (Cowansville, Qué.: Éditions Yvon Blais n.y.), pp. 79–95 on p. 89, note 29.

[69] Bjarne Melkevik 'Penser le droit québécois entre culture et positivisme: Quelques considérations critiques' in Transformation de la culture juridique québecoise dir. Bjarne Melkevik (Sainte-Foy, Québec: Presses de l'Université Laval 1998), pp. 9–21, especially on p. 15. [„la jurisprudence québécoise tend, surtout en matières civiles, à sortir du modèle du syllogisme judiciaire pour pratiquer le raisonnement discursif et descriptif caractéristique de la common law."]

[70] According to his expression: '*socio-positivisme juridique*'. Ibid., passim.

[71] Hubert Rottleuthner 'Le concept sociologique de droit' Revue interdisciplinaire d'Études juridiques (1992), No. 29, pp. 67–84.

[72] Melkevik 'Penser le droit québecois' [note 69], ibid.

[73] See, e.g., Entre droit et technique Enjeux normatifs et sociaux, dir. René Côté & Guy Rocher (Montréal: Thémis 1994) x + 425 pp.

[74] Andrée Lajoie 'Avant-propos' in Andrée Lajoie, J. Maurice Brisson, Sylvio Normand & Alain Bissonnette Le status juridique des peuples autochtones au Québec et le pluralisme (Cowansville: Yvon Blais 1996). [„le droit, fait social construit / le droit, fait normatif spécifique"]

take sides. Accordingly, "[w]e prefer a more integrated approach, one in which law also takes part in exercising power and especially state power, and which also allows for the constitution and reproduction of social relations and institutions, moreover, within certain limits, their transformation as well, so that law serves as a system of justification in the exercise of power, consequently also as a point of reference in the contestation of power (out of which the revindication of »rights« may arise)."[75]

2.4. New Prerogatives Acquired by Courts

The specific ambition of the Supreme Court of Canada in the first half-century of its operation was to unify the Common Law and Civil Law, which ambition it has, however, recently renounced, probably for lack of better results than those achieved to date.[76] It has assumed new goals instead, and some of these indicate new shades of judicial function with particular prerogatives. In the following, we shall pay special attention to them, because they use (or misuse) the authority provided by the law when they actually draw from extra-legal sources, notwithstanding the fact that they demand indisputable authority for themselves, like the one due to decisions taken in law.

a) Unfolding the statutory provisions in principles. The new *Code civil de Québec* (January 1, 1994), awaited and prepared for so long (rendering the masterly, albeit belated commentary of the old code[77] mere waste paper), actually anticipated the dawn of the new era. Sharply opposed to the classical tradition - as set forth by the president of the office devoted to the old code's revision[78] - , it was from the very beginning drafted as "temporal, relative, variable, consecrating […] a certain manner of thought, a certain manner of life, at a given time in the history of a people"; moreover - as also announced before the code entered into force - , the period for which it was foreseen to be effective, might even prove surprisingly short.[79]

Its drafters aimed at consolidating jurisprudential developments since the earlier code as *de lege lata* addenda, on the one hand, and integrating it through codification with newly formulated *de lege ferenda* doctrinal ideas, on the other. At the same time, some balancing and value- and interest-representing function was also assumed. After all, the first internationally acclaimed act of post-modern codification was halted halfway,[80] by codifying without making the law rigid.

[75] René Laperrière 'À la recherche de la science juridique' in Le droit dans tous ses états La question du droit au Québec, 1970–1987 (Montréal: Wilson & Lafleur 1987), pp. 515–526, quotation on p. 524. [„Nous préférons une approche plus intégrée selon laquelle le droit participe à l'exercice du pouvoir, et particulièrement du pouvoir étatique, à la fois en permettant la constitution et la reproduction des rapports sociaux et des institutions et même dans certaines limites leur transformation, et en servant de systèmes de justification à l'exercice du pouvoir, et donc de points de référence à la contestation du pouvoir (d'où la revendication de »droits«)."]

[76] H. Patrick Glenn 'Le droit comparé et la Cour suprême du Canada' in [Université d'Ottawa, Section de droit civil] Mélanges ouis-Philippe Pigeon (Montréal: Wilson & Lafleur 1989), pp. 197–214.

[77] Quebec Civil Law An Introducton to Quebec Private Law, ed. John E. C. Brierley & Roderick A. Macdonald (Toronto: Edmond Montgomery Publications Ltd. 1993) lviii + 728 pp.

[78] Paul A. Crépeau 'Les lendemains de la réforme du Code civil' Canadian Bar Review 59 (1981), p. 625–634, quotation on pp. 626–627.

[79] Serge Gaudet 'La doctrine et le Code civil du Québec' in Le nouveau Code civil Interprétation et application ([Montréal]: Université de Montréal Faculté de droit 1993), pp. 223–240 [Thémis].

[80] Cf. note 36.

Nonetheless, this may perhaps offer a model for the private law codification launched by the European Union as well. It seems, anyway, as if the Canadian codifiers were aware of the fact that they had achieved hardly more than the reconstruction of the dilemmas and conditions of mid-18th-century Europe, while also undertaking tasks normally performed through judicial processes.

This is why the outstanding Canadian comparatist could proudly declare - while not denying the need for continuous national legal development - that, back in his time, "SAVIGNY may have been right […] but […] codification may not be the obstacle to this process that SAVIGNY saw it to be […: for] contemporary codes may not represent the type of code that SAVIGNY and others had in mind."[81]

b) Constitutionalisation of issues. The way procedure developed in the United States[82] has already penetrated Hungary and the Central and Eastern European region as well. In Canada, it was the constitutional review to be carried out by the Supreme Court to implement the *Canadian Charter of Rights and Freedoms* (1982) that created this opportunity. The courts took the chance with "enthusiasm"; moreover, in the hope of extending the scope of civil liberties, they were soon to cover private law cases as well.[83] However, the mere prospect of statutory provisions being put aside so that ordinary courts can directly apply principles of charters in their own interpretation, has amounted to a change of legal practice as well. "Conflicts of interest now tend to be framed as conflicts of rights, and the Court is expected to adjudicate."[84]

This development provokes both criticism and fears of the politicisation of the judicature - as the book-title *The Charter Revolution and the Court Party* may illustrate[85] - ; after all, practice has already proven that "the Charter serves merely as a blank cheque in the hands of the judges".[86] The criticism is reminiscent of the indignation against the Supreme Court of the United States actually re-writing the Constitution with no specific authorisation.[87]

[81] H. Patrick Glenn 'The Grounding of Codification' University of California Davis Law Review 31 (Spring 1998) 3, pp. 765–782, especially p. 782.

[82] The subjection of the decisions of state judges (as state-acts) to the Bills of Rights took a start half a century ago [Shelley v. Kraemer, 334 U.S. 1 (1948)], growingly covering the field of state private law with regard to the elected nature of judicial office [New York Times v. Sullivan, 376 U.S. 254 (1964)].

[83] Peter W. Hogg 'The Law-making Role of the Supreme Court of Canada: Rapporteur's Synthesis' The Canadian Bar Review 71 (March–June 2001), pp. 171–180, especially p. 172. The moderate degree of even an explosive "enthusiasm" in a well-balanced state—in contrast with the almost infantile self-asserting fury of the Constitutional Court activism in Hungary in the first nine years since its inception—appears from the fact that a total of 64 statutory provisions (not complete laws!) were struck down in as many as 18 years, in addition to a much larger number of governmental actions by police officers or government officials. Cf. P. J. Monahan 'The Supreme Court of Canada in the 21st century' in ibid., p. 374, note 2.

[84] Ibid., p. 179.

[85] E.g., F. L. Morton & Rainer Knopff The Charter Revolution and the Court Party (Peterborough: Broadview Press 2000) 227 pp. – "The rule of the Charter is accompanied by the hyper-juridicisation of social relations" [„La règne des Chartes s'accompagne d'une hyper-juridicisation des rapports sociaux."] Jean-François Gaudrealt-DesBiens 'Les Chartes des Droits et Libertés comme loups dans la bergerie du positivisme? Quelques hypothèses sur l'impact de la culture des droits sur la culture juridique québécoise' in Transformation de la culture juridique québécoise [note 69], pp. 83–119, quotation on p. 108. Cf. also Luc Bégin 'Le Québec de la Charte Canadienne des Droits et Libertés et la critique de la politisation du juridique' in ibid., pp. 153–165.

[86] Michael Mandel La Charte des droits et libertés et la judiciarisation du politique au Canada trad. Hervé Juste (Montréal: Les Éditions du Boréal 1996) 383 pp. at p. 107.

[87] Cf., chiefly, from Robert H. Bork, The Tempting of America The Political Seduction of the Law (New York: The Free Press & London: Collier Macmillan 1990) xiv + 432 pp. and Slouching towards Gomorrah Modern Liberalism

Press cuttings are also thought-provoking. One of them, entitled *Supreme Self-restraint*, reads as follows: "Canadians have been outraged as the courts have used the Charter to tweak or abolish dozens of laws, including the abortion law, the Lord's Day Act, restrictions on pornography and voluntary school prayer, and laws that kept incompetents from fighting fires".[88] These and similar criticisms have finally been followed by remarks from the United States, according to which this is but the order of values of some self-appointed individuals imposed upon the community, without having ever been confirmed by any democratic voting procedure. For instance, according to the article *Out-of-control Judges Threat to Rule of Law*, "[i]nstead of upholding the law as defined by precedents and legislative enactments, judges now routinely change the rules of law to accord with their own personal political preferences."[89]

Imposing values upon the community by the mere force of judicial authority, supported only by a narrow intellectual elite but without any democratic assessment, may easily end in counter-effects. For politicising the judicature may prompt democratic voters with legitimately elected legislative and executive institutions to react by treating the judiciary and its partisan views in a genuinely politicised way, as a political institution. The obvious danger of this was already formulated by some prophetic justices. "Only judicial independence will suffer if we continue to push the constitutional envelope as we have over the past 20 years. An overridden public will in time, demand, and will earn, direct input into the selection of their judges as they do with their legislative representatives. There will be renewed calls for a supplementary process wherein their judges' performance, even the continuance of their employment (as it will be characterized) can be periodically reviewed."[90]

c) The Supreme Court as the nation's supreme moral authority. It has been observed during the last decade that the Supreme Court of Canada is not only willing to rely on scholarly opinions - moreover, from living authorities[91] - but, besides widely using legal doctrine, it also growingly draws from mostly mainstream philosophical considerations as normative foundations.[92] Thereby, it inevitably takes a stand on political and moral philosophical issues as a partisan forum, for, in fact, "[t]he Supreme Court has, since 1982, taken a one-sidedly praetorian position in favour of liberal philosophy and ideology, which

and American Decline (New York: Regan Books / Harper-Collins 1997) xiv + 382 pp. {reconsidered by the present author in 'Önmagát felemelõ ember? Korunk racionalizmusának dilemmái' [Man, elevating himself? Dilemmas of rationalism in our age] in Sodródó emberiség [Mankind adrift: on the work of Nándor Várkonyi »The Fifth Man«] ed. Katalin Mezey (Budapest: Széphalom, 2000) pp. 71–76.}

[88] 'Supreme Self-restraint' National Post (April 7, 2000), p. A19.

[89] R. Leishman 'Out-of-control Judges Threat to Rule of Law' London Free Press (May 12, 2000).

[90] Justice A. McClung in Vriend v. Alberta (1996), 132 D.L.R. (4th) 595 (Alta. C.A.), paras. 23–63, para. 56. For all three examples from press-cuttings, see Patricia Hughes 'Judicial Independence: Contemporary Pressures and Appropriate Responses' The Canadian Bar Review (March–June 2001), pp. 181–208, especially p. 201, notes 71–72. – It is to be remarked that The International Bar Association Code of Minimum Standards of Judicial Independence itself does by far not exclude the responsibility of each judge to be borne before the community as running against judicial independence: "It should be recognized that judicial independence does not render the judges free from public accountability […]." The International Bar Association Code of Minimum Standards of Judicial Independence, Section 33.

[91] As running against the tradition long-established in Britain. Cf. D. Vanek 'Citing Textbooks as Authority in England' Chitty's Law Journal 19 (1971), pp. 302 et seq.

[92] Christian Brunelle 'L'interprétation des droits constitutionnels par recours aux philosophes' La Revue du Barreau 50 (mars–avril 1990) 2, pp. 353–390, in particular at p. 370.

is a break with formerly prevalent pluralism. What we can see is thus an attachment to one single philosophy [of, e.g., JOHN STUART MILL, DWORKIN or RAWLS or SCHAUER, as the author of the quotation adds - Cs. V.], with any other aspect ruled out at the same time."[93]

Obviously, no one has entitled the Supreme Court to elevate itself to ethical heights using nothing but its competence of decision.[94] The circumstance that in the most debated topical questions dividing society (like euthanasia, abortion or *in vitro* fertilisation), it declares itself to be the highest forum of indubitable authority,[95] implies - despite any short-term effects and actual influences - that the long run threat for the Supreme Court itself will be to make its own position indefensible and vulnerable.

The scale of globalisation witnessed in Canada, the subject of the present case study, is not at all unfamiliar in the European Union either, especially not after the decision was taken a decade ago to prepare a codification of private law, which would be common at least in basic principles. In both cases, the main point is to re-consider the law's normative material in a way somewhat released from nationally positivated self-restriction while searching for a kind of trans-national cultural community. By gradually eliminating the law's substantive nature, legal self-identity is mostly preserved in a rather procedural sense. Naturally, all this involves a change in the concept of, approach to, and even traditional techniques in, law, eventually also leading to a change of character with consequences and perspectives utterly unforeseeable in detail for the time being.

Although by far not as a *sine qua non*, yet globalisation may nevertheless call for an issue in "sustainable development", so it will be accompanied by the preservation of some kind of "sustainable diversity", in the form of the increasing reciprocal action of all great legal cultures and traditions of the human kind with the mutual utilisation of shared sources for inspiration.[96]

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[93] Bjarne Melkevik La philosophie du droit Développements récents, p. 180. [„La Cour suprème a, depuis 1982, pris une position unilatérale et prétorienne en faveur de la philosophie et de l'idéologie libérales qui contraste avec l'ancien pluralisme. Il s'agit ainsi d'une adhésion à une philosophie unique au détriment de tout autre point de vue"] {& his 'La philosophie du droit: développements récents' in La pensée philosophique d'expression française au Canada Le rayonnement du Québec, dir. Raymond Klibansky & Josiane Boulad-Ayoub ([Québec]: Les Presses de l'Université Laval 1998), pp. 465–484, summarised in the Editor's 'Introduction' [pp. 7–40] on p. 32 by claiming that „En effet, la Cour suprème du Canada a pris, à partir de ce moment, une position unilatérale et prétorienne en faveur de la philosophie du droit et de l'idéologie libérale en invoquant des philosophes comme John Stuart Mill, Ronald Dworkin et John Rawls."}.

[94] Cf., e.g., Georges A. Légault 'La fonction éthique des juges de la Cour suprême du Canada' Ethica I (1989) 1, pp. 95–109 and Louis LeBel 'L'éthique et le droit dans l'administration de la justice (ou le juge fait-il la morale?)' Cahiers de recherche éthique 1991/16, pp. 159–169.

[95] Melkevik, ibid. [note 93], p. 186.

[96] These trends are traceable already in Glenn Legal Traditions…, ch. 10: »Reconciling Legal Traditions: Sustainable Diversity in Law«, pp. 318 et seq. as well as in his 'Vers un droit comparé intégré?' Revue internationale de Droit comparé 51 (1999) 4, pp. 841–852 and 'Comparative Law and Legal Practice: On Removing the Borders' Tulane Law Review 75 (2001) 4, pp. 977–1002.

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