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## Meeting Points between the Traditions of English–American Common Law and Continental-French Civil Law

(*Developments and Experience of Postmodernity in Canada*)\*\*

**Abstract.** A scale of globalisation is witnessed in the present case study as exemplified by (1) the transformation of the role of precedents; (2) the multicultural and multifactorial search for a common solution instead of any law-based administration of justice; (3) dissolving definition by and conclusion from the law in the name of a legal socio-positivist approach; accompanied with (4) some new prerogatives acquired by courts through a) unfolding statutory provisions through principles in judicial actualisation, (b) constitutionalisation of issues, as well as c) the Supreme Court imposing upon the nation as its supreme moral authority. 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 when searching for a kind of trans-national cultural community. By gradually eliminating the law's substantivity, legal self-identity is mostly preserved in a rather procedural sense.

**Keywords:** civil law, common law, precedents, constitutionalisation, legal positivism, proceduralisation

Canada has not been treated well by legal comparatists up to the present day. Compendious works like the mapping of the legal world by *René David*, *Rudolf B. Schlesinger* or, from among present-day authors, by, e.g., *Michael Bogdan*,<sup>1</sup>

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<sup>1</sup> David, R.: *Les grands systèmes de droit contemporaines* (Droit comparé), Paris, 1964. 630 pp. [Précis Dalloz]; Schlesinger, R. B.–Baade, H. W.–Damaska, M. R.–Herzog, P. E.: *Comparative Law. Cases–Text–Materials*, 5th ed. [1950], Mineola, N. Y., 1988. liii + 923

do not, apart from a few commonplaces, devote much attention to it either. In textbooks, Canada is usually characterised—perhaps to even further emphasise the peripheric or downright provincial role attributed to it anyway—by some simple stereotypes according to which the largest part of the area, once developed under British influence, unified later on in a federation, while Quebec could retain its French law from 1663 until today. Its geographical location neighbouring the United States has all along—and mainly from post-World War II-years (first of all in foreign policy and government administration, but sensible in the tone of scholarly and journalistic literature as well)—served as a motive to emphasise its sovereignty; albeit, for obvious reasons, it can scarcely (and increasingly less) withdraw itself from the dominant influence of the adjacent superpower in aspects as philosophical orientation, artistic taste, legal patterns and other segments of life.<sup>2</sup> Nowadays, Canada excels in both 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 a 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 decision-making tradition and partial codification.<sup>3</sup> The French-speaking part, Quebec, has retained French law irrespective of the fact that France renounced its sovereignty already centuries ago. The overall legal continuity was interrupted only by the systematic codification achieved by *Napoleon* in France. This explains why the necessity of resuming legal contacts was formulated 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: “the old laws still in force in Lower

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[University Casebook Series]; Bogdan, M.: *Comparative Law*. Dewenter, 1994. 245 pp. The classical work of Schnitzler, A. F.—*Vergleichende Rechtslehre*. Basel, 1955. xii + 497—is genuinely outstanding in giving at least a rough outline (207–208) of the foundations and directions Canada’s law has taken throughout history.

<sup>2</sup> Having stayed in Quebec enjoying the hospitality of Professor Melkevik 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.

<sup>3</sup> E.g., Criminal Code (1883).

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.”<sup>4</sup>

Of course, trying to give any rough outline involves the risk of covering up details—whereas theoretical dilemmas and structural features can mostly be understood precisely from these. The most important feature of the legal map of the territory and population of Canada is that the Quebec Act (1774)<sup>5</sup> maintains the French heritage in property and civil rights, while the English tradition is followed in constitutional, administrative and criminal law. In addition, English testamentary and land law are extended over English settlements and settlers. In general, it provides for English law in commercial lawsuits and evidence, and it introduces jury in civil cases.<sup>6</sup> 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«.”<sup>7</sup> It is no mere chance that, when 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 jurisdiction. (In addition, we may add, he found the French language used there very old-sounding and outdated as regards both pronunciation and

<sup>4</sup> Cf., e.g., Baudouin, L.: Les apports du Code civil de Québec. In: *Canadian Jurisprudence. The Civil Law and Common Law in Canada* (ed.: McWhinney, E.), Toronto, 1958. 71–89.

<sup>5</sup> 14 Geo. III, chap. 83.

<sup>6</sup> 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 doctrinal and practical jurisprudence. For a few theoretical indications, see, from Melkevik, B.: Question identitaire, le droit et la philosophie juridique libérale: Réflexion sur le fond du droit autochtone canadien. *Cahiers d'études constitutionnelles et politiques de Montpellier* (1995), No. 1, 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. Barbosa, J. S.), Québec, 1997, 95–111 and 246, as well as Aboriginal Legal Cultures. In: *The Philosophy of Law. An Encyclopedia* (ed.: Gray, Ch. B.), New York–London, 1999. 1–4. [Garland Reference Library and the Humanities 1743], all reprinted in Melkevik, B.: *Réflexions sur la philosophie du droit*. Québec, 2000, part on ‘Identité et Droit’, 35–87; and, as practical overviews, also *Delgamuukw*. The Supreme Court of Canada on Aboriginal Title (comm. Persky, S.), Vancouver, British Columbia, 1998. vi + 137 pp., Isaac, Th.: *Aboriginal Law. Cases, Text, Materials and Commentary* [1995] 2nd ed., Saskatoon, Sask. 1999. xxx + 610 pp. and Macklem, P.: *Indigenous Difference and the Constitution of Canada*. Toronto, 2001. x + 334.

<sup>7</sup> Glenn, H. P.: Quebec: Mixité and Monism. In: *Studies in Legal Systems. Mixed and Mixing* (ed. Öricü, E.–Attwooll, E.–Coyle, S.), The Hague, 5, the first part-quotation by Pigeon, L.-P.: *Rédaction et interprétation des lois*, Québec, 2nd ed. (1978), 50.

intonation.<sup>8</sup>) 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.<sup>9</sup>

This natural desire for self-determination began to bring its fruits by the times around World War II. For instance, in the early 1940s, one reported about a growing “prejudice, commencing in the law schools and extending to the courtrooms, against the use of American authorities and texts.”<sup>10</sup> Then, in a few decades, the demand emerged towards “Canadian judges developing Canadian law to meet Canadian needs”.<sup>11</sup> This era coincided in francophone Canada with the period of ambitions for separation also in law, but reflected an overall awakening of Canada in every respect. Genuine professors with scholarly attitudes, sometimes distinguished and committed to academic career, started to appear in law schools, gradually replacing practising judges and lawyers having usually shuttled between their offices and the university. They already embody a new style, scholarly methodology and theoretical sensitivity, able to bring about magisterial works. This way soon trends and schools emerge to compete with each other; an independent doctrine is formed as developed from the own legal staff; and, from this time on, no longer only law claims to embody the nation but also legal scholarship enters the scene to become widely acknowledged as an integral part of Canadian public thought, intellectual life and internationally acclaimed performance.<sup>12</sup>

The processes—resultants and impacts—are intertwined. What might have once seemed to be one of the causes of a peripheral situation, is about to indicate today general (further)developmental directions (perspectives and availabilities)—perhaps not yet in a way obvious for us, as the entire Central and Eastern European region is in a flux of constant forming—of universal (or at least global) (world)trends. I mean here a kind of inherent lack of originality as one of the

<sup>8</sup> de Tocqueville, A.: *Oeuvres complètes. Voyages en Sicile et aux États Unis*, t. 5, vol. 1, 2<sup>e</sup> éd. Mayer, J.-P., Paris, 1957. 212–213.

<sup>9</sup> “C’est par sa façon d’exprimer le Droit qu’une nation manifeste en partie son originalité”—writes Perrault, A. [*Pour la défense de nos lois françaises*, Montréal, 1919), 8] as a programme.

<sup>10</sup> In: *Canadian Bar Review* 21 (1943), 57.

<sup>11</sup> Read, H.: The Judicial Process in Common Law Canada. *Canadian Bar Review* 37 (1959), 268.

<sup>12</sup> As a case study, see, e.g., Normand, S.: 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. Belley, J.-G.–Issalys, P.), Québec, 1993., 137–183. Cf. also Melkevik, B.: La philosophie du droit au Québec: développements récents. In: Melkevik, B.: *Réflexions sur la philosophie du droit*. 177–192.

features of Canada, deeply rooted in and conditioned by its past. Of course, in itself this is but the outcome of historical *donnés* which—amidst Canada's early by-British and by-French development—did not require or promote 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 interact in a depth never experienced by the proud and legally *chauvin* isolationisms of 19th to 20th century England and France (sharing maybe one single experience in common, their old disdain towards the Germans). What I mean here is the mixing and irreversible intermingling of these laws,<sup>13</sup> which, due to the latter's co-existence and co-operation with the knowledge resulting therefrom, offers unprecedented experience entitling Canadian lawyers to develop a well-founded self-confidence indeed. For such an added and cumulative knowledge can hardly be gained otherwise. Notwithstanding, the pluralism of the parts mixed in themselves does not inevitably imply the pluralism of the entire structure.<sup>14</sup> 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.”<sup>15</sup>

The process of interaction may have also been accelerated by the unprecedentedly enviable fact that the education of both Common Law and Civil Law within the same faculties and offering separate degrees began some decades ago, and now also common law is taught in French and vice versa.<sup>16</sup> Traditions mixed appear also in scholarship with an enhanced interest in both intra- and extra-Canadian comparison of laws. A development like this is not simply the result of some practical decision. Whether we think of the experience (and crucial theoretical message) of the mutual (un)*translatability* of legal texts

<sup>13</sup> Cf., e.g., Tancelin, M.: Comment un droit peut-il être mixte? In: *Le domaine et l'interprétation du Code Civil du Bas Canada* (dir. Walton, F. P.), Toronto, 1980. 1–32.

<sup>14</sup> See, first of all, Rouland, N.: Les droits mixtes et les théories du pluralisme juridique. In: *La formation du droit national dans les pays de droit mixte*. Aix-en-Provence, 1989. 41–55, especially 42, quoted by Glenn: 'Quebec', 1.

<sup>15</sup> *Ibid.*

<sup>16</sup> 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 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.

within the European Union<sup>17</sup> or of their *commensurability* at the intersection of diverging legal cultures,<sup>18</sup> evidently both refer to the hermeneutic significance of the symptom “I interpret your culture through mine” (symbolised by the figurative expression of “missionaries in the boat”)<sup>19</sup> and, thereby, to the fact that, beyond sheer textuality, law is primordially an expression of culture.<sup>20</sup> 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 doing interpretation (re-interpretation) in another—inevitably different—medium.

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Developments in present-day Canada are of a special interest for us first of all because they, with the interaction of two leading European traditions in law, highlight mutual influences with the perspective of convergence (which, in view of the unificatory civil law codification decided by the European Union, has raised the topicality of *rapprochement* of Common Law and Civil Law and, within it, the need for reconsidering the controversy *Savigny* and *Thibaut* had in 18th-century Germany<sup>21</sup>), and also outline the potentials of development (or of possible deformation) in the light of the Canadian experiment with experiences lived through. Here I recall again, as the indication of a kind of belated development, the specific feature of the Canadian past which I referred to earlier as a mere followance of external patterns under peripheric conditions, accompanied by a lack of self-reliance. For around the mid-20th century, this state of mind was replaced by self-building and self-determination set as a new objective. Unbalancedness, swinging into opposites and neophytism may accompany the process. Provincial imitation is replaced by autonomous

<sup>17</sup> Cf., e.g., de Groot, G. R.: *Recht, Rechtssprache und Rechtssystem: Betrachtungen über die Problematik der Übersetzung juristischer Texte. Terminologie et traduction* 3 (1991), 279–312 [abridged transl. In: *European Legal Cultures* (ed.: Gessner, W.–Hoeland, A.–Varga, Cs.), Aldershot, Brookfield USA, Singapore, Sydney, 1996, para 20, 115–120 {Tempus Textbook Series on European Law and European Legal Cultures I}].

<sup>18</sup> Cf., e.g., from Glenn, H. P.: *Commensurabilité et traduisibilité*. In: *Actes du Colloque “Harmonisation et dissonance: Langues et droit au Canada et en Europe (mai 1999)”* published as a double issue in *Revue de la common law* 3 (2000) 1–2, 53–66. and *Are Legal Traditions Incommensurable? The American Journal of Comparative Law* XLIX (Winter 2001) 1, 133–146.

<sup>19</sup> Cf. Cohn, B. S.: *Anthropology and History: The State of the Play. Comparative Studies in Society and History*, 22 (1980), 199.

<sup>20</sup> Cf., from the author: *Lectures on the Paradigms of Legal Thinking*. Budapest, 1999. vii + 279 [Philosophiae Iuris].

<sup>21</sup> Cf., e.g., from the author: *Codification à l’aune du troisième millénaire*. In: *Mélange offert au Professeur Paul Amselek*. Strasbourg, 2003. [in press].

construction. At the same time, Canada's economic safety coupled with relative political tranquillity and constitutional stability encourages to kinds of experimentation which could by far 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 that the final balance will be drawn up by the people of Canada. However, for the external observer, all this schemes a path for the future. For everything in move in Canada develops in line with dominant ideas of our age, mainstream but also self-fulfilling.<sup>22</sup>

In this overview, I undertake to analyse (1) the change in the role precedents play in judicial process; (2) the transformation of law-application into a collective, multicultural and multifactorial search for finding a practical solution, assessable by inter-national 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 procedure, such as a) the unfolding of principles from the statutory provisions, themselves taken as mere guide-marks for the courts, b) the critical filtering of the entire legal system according to the Charters' human rights by deducing legal solutions directly from the constitution and, in conclusion, c) the courts becoming an ultimate ethical forum in debated moral issues as well.

## **1. The transformation of the role of precedents**

Our thinking may prove to be ahistorical whether or not we realise it. In average cases, we tend to take any event as a preliminary by presuming the present to be given with frameworks consolidated, and try to analyse and understand anything that merely precedes it, by forcing it into a straitjacket often alien and external to it, thereby also distorting it. In our present-day legal thought, we tend to consider the body of common law and the entire English legal tradition as a normative material differing from continental law mostly in methodological elaboration, albeit the substantiation (substantivisation) of the decisional patterns of English law, developing mainly from the adaptation of forms of action and formulated mostly through procedural forms, is only a product of initiatives

<sup>22</sup> One of my vital Canadian sources has been the oeuvre of Glenn, H. P.: *Legal Traditions of the World. Sustainable Diversity in Law*, Oxford, 2000. xxiv + 371, a universal overview, based upon the generalising re-consideration of his observations built on comparisons focussing on Canada.

taken in the 19th century and not earlier.<sup>23</sup> 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 divert from civil law development has by now disappeared from behind the reality of this law over the past one and a half centuries. To wit, there are no forms of action in England any more; the institution of jury has in the meantime declined; those few ambulant justices once wandering all through the kingdom have in the meantime been replaced by a judicial moloch with an army of judges; the decisive judicial role of the first and last instance declaring what in the case the law is has disappeared from this machinery of an enormous hierarchical complexity; the number of cases to be heard by a judge has increased sky-high, with litigation having grown to massive proportions; the one-time exceptionality of judicial adjudication has been degraded into a mere state-provided servicing, and, with the solemnity of justice reduced to mere routine, judicature has transformed into case-managing-adjudication, fulfilled as a task to be administered obligatorily; substantive law defining the legal status of behaviours shadows already the once dominant procedural approach; and the exclusivity of jurisdiction exercised by a handful of elect men is challenged by the inclusion of women and all types of careers recruited from fellow-citizens of various colours and cultural backgrounds, eligible by mere professional qualification (and ‘learned’ only in this respect).<sup>24</sup> Even according to the self-portraying of common law, all this has resulted in a change of character so that from now on nothing else can identify common law than some vague “habit of thought”.<sup>25</sup> 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 occasionally at times when he felt he should indeed do so, because he found the parties’ conflict mature and balanced enough in legal positions that he might esteem his decision was needed indeed for the dispute to end. That means that, in those earlier times, the parties were expected to co-operate in reaching a situation somewhat cleared and balanced.<sup>26</sup>

The unification of the judicial system in 19th century England had a series of impacts pointing beyond simple institutional rationalisation. In conclusion, also

<sup>23</sup> Glenn, H. P.: La civilisation de la common law. *Revue internationale de Droit comparé*, 45 (1993) 3, 559–575.

<sup>24</sup> Cf., e.g., Glenn, H. P.: The Common Law in Canada. *The Canadian Bar Review* (June 1995), 261–292.

<sup>25</sup> Lord Oliver of Aylmerton: Requiem for the Common Law. *The Australian Law Journal* 67 (1993), 686.

<sup>26</sup> Baker, J. H.: English Law and the Renaissance. *Cambridge Law Journal*, 44 (1985), 58.



the one-time identity of common law was done away with, as precisely the rivalling 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 the Equity, the Admiralty and the 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 English law. True, 19th-century England did block this abundant source by the said 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.<sup>27</sup>

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)".<sup>28</sup> In fact, the unthinkable dream of a judge making law (i.e., the term 'judge-made law') was only invented by *Jeremy Bentham*—in 1860.<sup>29</sup> Anyway, the formal system of precedents with the principle of *stare decisis* developed and solidified around the same time. Judicial law-making has become overtly transparent due to the growing resort to the method of distinguishing, while courts got accustomed to following earlier and superior decisions. All this presumed a renewing approach. For "Cases (...) 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".<sup>30</sup>

As known, in England in 1966, the House of Lords had absolved itself from the compulsory compliance with its own earlier decisions.<sup>31</sup> 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 led to similar absolutions with the Supreme Court of Canada and, gradually, with all courts of the provincial Courts of Appeal.) All this amounts to an inevitable change in the law's overall operation.

<sup>27</sup> E.g., Glenn: *The Common Law...*, 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.

<sup>28</sup> *The Sovereignty of the Law* Selections from *Blackstone's Commentaries on the Laws of England* (ed.: Jones, G.), University of Toronto Press, Toronto, 1973. 51, note 31.

<sup>29</sup> Evans, J.: Change in the Doctrine of Precedent during the Nineteenth Century. In: *Precedent in Law* (ed.: L. Goldstein), Oxford, 1987.

<sup>30</sup> Postema, G. J.: Roots of our Notion of Precedent. In: *Precedent in Law*, 22. In a similar sense, see also Lobban, M.: *The Common Law and English Jurisprudence 1760–1860*. Oxford–New York, 1991. and Lieberman, D.: *The Province of Legislation Determined*. Legal Theory in Eighteenth-Century Britain Cambridge University Press, Cambridge–New York, 1989.

<sup>31</sup> 'Practice Statement (Judicial Precedent)' *Weekly Law Reports* 1 (1966), 1234, as well as *All England Reports* 3 (1966), 77.

From now on, one has to recognise that decision-making based upon the pondering of principles is replaced by a “discretionary dispute resolution with a low level of predictability”,<sup>32</sup> in which no component can be more than “relaxed” and “flexible”.<sup>33</sup> 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.<sup>34</sup> At the same time, “Citation 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.”<sup>35</sup> Accordingly, also syllogisms of law-application are substituted by “statistical syllogism”.<sup>36</sup>

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)<sup>37</sup> and—in want of any clear formalisability, due to which “Judges (...) proceeded on the basis of law they felt they could reasonably articulate, through a »careful working out of shared understandings of common practices«.”<sup>38</sup>—of social interests being weighed in the recourse to distinguishing. Or, the chance of the law and order getting transformed into an open-ending play of social mediation has become actual and acute.

All this results in a new doctrine of case law with the radical renewal of the regulation ideal as well. Accordingly, “The announced rule of a precedent should be applied and extended to new cases if the rule substantially satisfies the standard of social congruence”.<sup>39</sup> This way, Talmudic tradition comes back into the tradition of common law with its distrust in logic and theoretical generali-

<sup>32</sup> Glenn: *The Common Law...*, 269–270.

<sup>33</sup> Curtis, G.: *Stare Decisis at Common Law in Canada*. *University of British Columbia Law Review* 12 (1978), 8 and, similarly, Friedmann, W.: *Stare Decisis at Common Law and under the Civil Code of Quebec*. *Canadian Bar Review* 31 (1953), 723 et seq.

<sup>34</sup> According to Hodgins, J. A.: *The Authority of English Decisions*. *Canadian Bar Review* 1 (1923), 470 et seq., especially 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), 930—is even more laconic on the decline of precedent, more rapid in Canada than in England.

<sup>35</sup> Glenn: *The Common Law...*, 270.

<sup>36</sup> Glenn, H. P.: *Sur l’impossibilité d’un principe de stare decisis*. *Revue de la recherche juridique / Droit prospectif*, XVIII (1993) 4, No. 55. 1073–1081, especially 1081.

<sup>37</sup> Gray, J. Ch.: *The Nature and Sources of the Law* [1921] 2nd. ed., New York, 1948. 168 et seq. and 174 et seq. For a more detailed exposition, see, from the author: *Ex post facto regulation*. In: *The Philosophy of law*. An Encyclopedia (ed.: Gray), 274–276.

<sup>38</sup> Postema: *op. cit.* 31.

<sup>39</sup> Eisenberg, M.: *The Nature of the Common Law*. Cambridge, 1988. 154, note 75.

sation for moral choices, by considering both thesis and antithesis suitable to embody the word of living God.<sup>40</sup> Ultimately, the question ‘Is the Common Law Law?’ arises. For—as the response holds<sup>41</sup>—

“Common 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. The transformation of law-application into a collective, multicultural and multifactorial search for a practical solution**

The principle of *stare decisis* has never been accepted in Quebec, although the Canadian legal development has always remained open to borrow, especially English and French law. This is the reason why it seldom tried to either formalise or close down its normative sources. Typically, not even the first Quebec Civil Code (1866) did abrogate the previous law and did 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 codal wording or incompatible with codal provisions, with the effect that “the codification of the Quebec laws seems rather like a half-measure, typical of compromise.”<sup>42</sup> 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, all “they represent living law which may be useful in the practical process of dispute resolution.”<sup>43</sup>

<sup>40</sup> Stone, S. L.: In Pursuit of the Counter-text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory. *Harvard Law Review* 106 (1993), 813 et seq., especially 828, and, as built into the philosophical understanding of legal argumentation, cf., from the author: *Lectures ...*, 93, note 120.

<sup>41</sup> Schauer, F.: Is the Common Law Law? *California Law Review* 77 (1989), 455–471, quotation on 467.

<sup>42</sup> *Code civil de Québec*, Art. 2712, and the quotation by Tancelin, M. A.: Introduction. In: Walton, F. P.: *The Scope and Interpretation of the Civil Code of Lower Canada* (new ed. Tancelin, M. A.), Toronto, 1980. 27.

<sup>43</sup> Glenn, H. P.: Persuasive Authority. *McGill Law Journal* 32 (1987) 2, 289.

As if learned from the admonitions of the Institutions of Gaius that peoples are governed both by law which is particular to them and by law which is common to humanity,<sup>44</sup> anyway, the normative bases referred to in judicial decisions witness a rather open and international auditorium. A recent analysis of jurisprudence shows the following proportion of citations

*at the Supreme Court of Canada*<sup>45</sup>

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
<b>foreign</b>	<b>175 (32,3%)</b>	<b>foreign</b>	<b>71 (53%)</b>
<b>foreign altogether</b>		<b>36,4 %</b>	

*in Quebec*<sup>46</sup>

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
<b>to foreign decisions altogether</b>	<b>44,64%</b>
<b>to foreign authors altogether</b>	<b>81,76%</b>
<b>to foreign sources altogether</b>	<b>234 (59,7%)</b>

<sup>44</sup> “*Omnes populi qui legibus et moribus reguntur partim suo proprio, partim communi omnium hominum iure utuntur*” in *Inst.* Gaius 1.1.

<sup>45</sup> *Supreme Court Reports* 1 (1985), 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. Glenn, H. P.: *The Use of Comparative Law by Common Law Courts in Canada*. In: *The Use of Comparative Law by Courts* (ed.: Drobnig, U.–van Erp, S.), Dordrecht, 1999., 59–78, especially 68.

<sup>46</sup> Jobin, P.-G.: Les réactions de la doctrine à la création du droit civil québécois par les juges: les débuts d’une affaire de famille. *Les Cahiers de Droit* 21 (1980), 257–275, especially 270.

All this means that references to foreign authors are more frequent in all Canada and significantly more frequent in Quebec, than to domestic, resp. local ones; reference to foreign decisions is made in one third, resp. two fifths of all references; altogether, reference to foreign sources is made in one-third, resp. three fifths of all references; and finally, in Quebec, the frequency of references to foreign decisions is higher by 38,2%, and that to foreign authors by 54,26%, than in Canada at large.<sup>47</sup>

Well, at the level of call-words, 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.<sup>48</sup> Or, also great (English, French, German or American) legal cultures—serving usually as standards for us—are in the final analysis nothing but products of trans-national learning and mutual borrowing.<sup>49</sup>

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.”<sup>50</sup> 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.”<sup>51</sup>

The feeling of insecurity, the renouncement of any search for law, the wish for agreement and legitimation from any source at any price add to the above, as

<sup>47</sup> 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% [Merryman, J.: *Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970. California Law Review* 50 (1977), 394–400], or downright unheard of (0%). In its own past, however, this ratio was 25,7% in 1850 and 1% in 1950 [Manz, W.: *The Citation Practices of the New York Court of Appeals, 1850–1993. Buffalo Law Review* 43 (1995), 153].

<sup>48</sup> Cf. primordially Coing, H.: *Handbuch des Quellen und Literatur der neueren europäischen Privatrechtsgeschichte* I, München, 1973.

<sup>49</sup> Glenn: *Persuasive Authority*, 263.

<sup>50</sup> Jackett, W. R.: *Foundations of Canadian Law in History and Theory*. In: *Contemporary Problems of Public Law in Canada* (ed.: Lang, O. E.), Toronto, 1968. 29.

<sup>51</sup> *Ibid.*, 293.

if inherent scepticism were to be overcome by a rush for substitute to 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”.<sup>52</sup>

All in all, new call-words take indeed the lead: *diversity, pluralism and concurrence*—as much in law as in other fields.<sup>53</sup> We can be sure that they are fulfilled. According to figures, for instance, the safe, foreseeable and calculable civil law excels in both client circulation and the queuing for justice administered, as well as in mass-scale litigation. Spectacular and frivolous lawsuits are more typical in the Anglo–American world—filed out of individual rivalry (sometimes represented by gender-, colour- or culture-specific groups), of mutual ambition to suppress, to revenge or profit-seeking or business interest (e.g., in divorce, for real or alleged discrimination, sexual harassment, medical malpractice, or in liability for harms caused by products, etc.)—, albeit all this is, due to the complexity of procedure and the costs of lawyer’s fees, only available to those in middle-class with balanced financial backgrounds. Anyway, the number of judges per 100 000 inhabitants is<sup>54</sup>

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 early modern common law (with the social exceptionality of a judicial event) is continued. Moreover, from the comparative numerical data of the caseload *per annum* of supreme courts—

Canada	<b>Supreme Court</b>	100–150 cases heard
France	<i>Cour de cassation</i>	28 000 decided cases

<sup>52</sup> Baudouin, J.-L. : Le Code civil québécois: crise de croissance ou crise de vieillesse. *Canadian Bar Review* 44 (1966), 406.

<sup>53</sup> Cf., e.g., Villa, V.: *La science du droit*. Bruxelles–Paris, 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, Melillo, R.: *Ka-Kanata*. Pluralismo filosofico, I–II, S. Michele di Serino. 1990. 165 + 306 pp.

<sup>54</sup> Glenn, H. P.: La Cour Suprême du Canada et la tradition du droit civil. *The Canadian Bar Review* (March–June 2001), 151–170, especially 161.

—, it is revealed that two hundreds to two hundreds and fifty times less cases are tried in Canada yearly as against, say, the mass-scale caseload in France.<sup>55</sup>

### 3. Practical trends of dissolving the law

The possibility of a judge becoming his own master by complementing legal considerations with social assessment is inherent in the doctrine of precedent. Taking, for instance, the *dworkinian* approach, the differentiation between principles and rules and, thereby, the establishment by principles of the relevance of rules<sup>56</sup> involve already the mixing of purely legal aspects with external axiological and social considerations.<sup>57</sup>

This is a complete change in the law's nature, running against the one-time *justinian* creed, according to which judication has to be based upon not the example but the law.<sup>58</sup> 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"<sup>59</sup>, becomes the deontological corner-stone of the judging profession. Also a self-reassuring thought appears to persuade the sceptics that all this may conform even better with 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."<sup>60</sup>

<sup>55</sup> *Ibid.*, 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. Tailhades, E.: *La modernisation de la justice*. Rapport au Premier Ministre, Paris, 1985. 36.

<sup>56</sup> Dworkin, R. M.: The Model of Rules. *University of Chicago Law Review* 35 (1967), 14 et seq. [reprint: Is Law a System of Rules? In: *The Philosophy of Law* (ed.: Dworkin, R. M.), Oxford, 1977. 38–65].

<sup>57</sup> Precisely, 'questions of law' themselves cannot be anything else than products of an abstraction taken out of a merely analytical interest. Cf., from the author: *Theory of the Judicial Process*. The Establishment of Facts. Budapest, 1995. vii + 249.

<sup>58</sup> Justinianus (C.7.45.13): "*non exemplis sed legibus iudicandum est*".

<sup>59</sup> Waddams, S. M.: *Introduction to the Study of Law*. Toronto, 1979. 5.

<sup>60</sup> Glenn: Persuasive Authority. 297 and 298.

From now on, old patterns of institutional development enter again the scene. Once the dam breaks, what used to be merely phenomenal becomes essential and what was just symptomatic transforms into a programmatic vision about the future, forming in the womb of society now. 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.”<sup>61</sup>

Well, we may freely meditate on the sense of such and similar theses reminiscent of the leftist Utopian radicalism of Critical Legal Studies, nevertheless, it is a fact that they are neither exceptional nor unique any longer. What they betoken are real alterations in actual practice and factual arrangement. They ascertain, for instance, on a theoretical level that

“Two 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.”<sup>62</sup>

Thus, once the dam breaks, a further recognition (mixed with some neophyte haste and hypocrisy) is added to it: of course, all this is true, quite to the extent

<sup>61</sup> Gagné, G.: Les transformations du droit dans la problématique de la transition à la postmodernité. *Les Cahiers de Droit* 33 (septembre 1992) 3, 701–733 and in: *Aux frontières du juridique*. 221–253, abstract, 221.

<sup>62</sup> Issalys, P.: La loi dans le droit: tradition, critique et transformation. *Les Cahiers de Droit* 33 (septembre 1992) 3, 665–699 and in: *Aux frontières juridiques*. 185–219, abstract, 186.



that this has never been otherwise either in civil law<sup>63</sup> or in codification.<sup>64</sup> 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, “The legal system of every society faces essentially the same problems and solves these problems by quite different means, though often with similar results”.<sup>65</sup> 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 done today proves to be quite open-ended, which may signal the advent of a new era.

Though in 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”.<sup>66</sup> Actually, hereby, both the subjects and the play, topic, purpose and stake of a legal process, as well as the invoked arguments and the function of the entire judiciary are changed over. “All the World’s a Courtroom”—they shout not quite unfoundedly, heralding a new millennium. At once a methodology builds upon the apparent description, explaining that

“The 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 foundations provided for the resolution of the affair before the court. Otherwise, among these extra-frontier sources, 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,

<sup>63</sup> “Law is prior to the law (...) law is not entirely included in the law” Rémy, Ph.: *Éloge de l’exégèse. Revue de la Recherche Juridique / Droit prospectif* VII (1982), 261. — “Law is variable and diffuse. It is a material to be explored and not to be created.” Mouly, C.: *La doctrine, source d’unification internationale du droit. Revue internationale du Droit comparé* 38 (1986), 364. — “law is prior to legal rule and overflows it everywhere” Varaut, J.-M.: *Le droit commun de l’Europe. Gazette du Palais* (19–20 September 1986), Doct., 9. — “Law is not some kind of construction, but a reality to be explored” Atias, Ch.: *Une crise de légitimité seconde’ Droits* 4 (1986), 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.” Rigaux, F.: *La loi des juges*. Paris, 1997. 65 and 247.

<sup>64</sup> [1977] 2 R.C.S. 67, à la p. 76.

<sup>65</sup> *Rahey v. The Queen* [1987] 1 S.C.R. 598, at 319.

<sup>66</sup> Rémy: *op. cit.* 260.

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."<sup>67</sup>

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,

“The 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.”<sup>68</sup>

One has to note here that duality may have an additional meaning in relation to the specific case of Canada, as it 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.”<sup>69</sup> 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*.<sup>70</sup> The scholarly motive of elevating all this into theoretical heights is neutral in itself: apparently it results from the merely sociologically inspired approach to and specification of the concept of law,<sup>71</sup> 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

<sup>67</sup> Glenn: *La Cour Suprême du Canada...*, 169. Cf. also Abrahamson, S.–Fischer, M. J.: All the World's a Courtroom: Judging in the New Millennium. *Hofstra Law Review* 26 (1997), 273 et seq.

<sup>68</sup> Morin, E.: *Penser l'Europe*. Paris, 1987. 28. Quotation by Glenn, H. P.: Harmonization of Private Law Rules between Civil and Common Law Jurisdictions. In: Académie internationale de droit comparé: *Rapports généraux*. XIII<sup>e</sup> Congrès International, Montréal, 1990. Cowansville, Qué., I.C., 79–95, 89, note 29.

<sup>69</sup> Melkevik, B.: Penser le droit québécois entre culture et positivisme: Quelques considérations critiques. In: *Transformation de la culture juridique québécoise* (dir. Melkevik, B.) Québec, 1998. 9–21, especially 15.

<sup>70</sup> *Ibid.*, passim.

<sup>71</sup> Rottleuthner, H.: Le concept sociologique de droit. *Revue interdisciplinaire d'Études juridiques* (1992), No. 29, 67–84.

facts regarded as legal.<sup>72</sup> 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 extra-legal (social, economic, ethical, etc.) norm-systems invokeable.<sup>73</sup> Otherwise speaking, it is a duality, a compound of “law as a *socially constructed* fact” and “law as a specifically *normative* fact”.<sup>74</sup> As hoped for, this is already on the way to dissolve the law’s separation, distinction and specificity. Its ideologists are about to take sides. Accordingly,

“We 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).”<sup>75</sup>

#### 4. Some new prerogatives acquired by courts

The specific ambition of the Supreme Court of Canada was to unify common and civil law in the first half-century of its operation, which it has, however, recently renounced, probably for lack of better results than the ones achieved until now.<sup>76</sup> It has assumed new ones 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, the fact notwithstanding that they demand indisputable authority for themselves, like the one due to decisions taken in law.

a) *Unfolding in principles the statutory provisions.* The new *Code civil de Québec* (January 1, 1994), awaited and prepared for long (wasting the masterly,

<sup>72</sup> Melkevik: *ibid.*

<sup>73</sup> See, e.g., *Entre droit et technique*. Enjeux normatifs et sociaux (dir. Côté, R.–Rocher, G.), Montréal, 1994.

<sup>74</sup> Lajoie, A.: Avant-propos. In: Lajoie, A.–Brisson, J. M.–Normand, S.–Bissonnette, A.: *Le status juridique des peuples autochtones au Québec et le pluralisme*. Cowansville, 1996.

<sup>75</sup> Laperrière, R.: À la recherche de la science juridique. In: *Le droit dans tous ses états*. La question du droit au Québec, 1970–1987. Montréal, 1987. 515–526, quotation on 524.

<sup>76</sup> Glenn, H. P.: Le droit comparé et la Cour suprême du Canada. In: *Mélanges Louis-Philippe Pigeon*. Ottawa, 1989. 197.

albeit belated commentary of the old code<sup>77</sup> as mere bogus paper), actually anticipated the dawn of the new era. Sharply opposed to classical tradition—as set forth by the president of the office devoted to the old code’s revision<sup>78</sup>—, 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 announced also before the code entered into force—, the period for which it was foreseen, might prove even surprisingly short.<sup>79</sup>

Its drafters aimed at the consolidation of jurisprudential developments since the earlier code as *de lege lata* addenda, on the one hand, and its codificational integration with newly formulated *de lege ferenda* doctrinal ideas, on the other. At the same time, also some balancing and value- and interest-representing function was also assumed. After all, the first internationally acclaimed performance of post-modern codification has halted halfway,<sup>80</sup> by codifying without making the law rigid.

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 codifier were aware of the fact that what was achieved was hardly more than the reconstruction of the dilemmas and conditions of mid-18th-century Europe, undertaking also tasks normally performed through judicial processes.

This is why the outstanding Canadian comparatist could proudly declare—not denying the need for continuous national legal development either—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.”<sup>81</sup>

<sup>77</sup> *Quebec Civil Law*. An Introduction to Quebec Private Law (ed.: Brierley, J. E. C.–Macdonald, R. A.) Toronto, 1993. Iviii + 728 pp.

<sup>78</sup> Crépeau, P. A.: Les lendemains de la réforme du Code civil. *Canadian Bar Review* 59 (1981), 625 et seq., quotation on 626–627.

<sup>79</sup> Gaudet, S.: La doctrine et le Code civil du Québec. In: *Le nouveau Code civil*. Interprétation et application (1993), 223–240.

<sup>80</sup> Cf. note 36.

<sup>81</sup> Glenn, H. P.: The Grounding of Codification. *University of California Davis Law Review* 31 (Spring 1998) 3, 765–782, especially 782.

b) *Constitutionalisation of issues*. The way of procedure developed in the United States<sup>82</sup> 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 gave an opportunity to this. The chance was taken by the courts with “enthusiasm”; moreover, in the hope of extending the scope of civil liberties, they were soon to cover private law cases as well.<sup>83</sup> 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 interests now tend to be framed as conflicts of rights, and the Court is expected to adjudicate.”<sup>84</sup>

This development encounters both criticism and fears of the politicisation of judicature—as the book-title *The Charter Revolution and the Court Party* may illustrate this<sup>85</sup>—: after all, practice has already proven that “the Charter serves merely as a blank cheque in the hands of the judges”.<sup>86</sup> The criticism is reminiscent of the indignation against the Supreme Court of the United States, actually re-writing the Constitution with no specific authorisation.<sup>87</sup>

<sup>82</sup> 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)].

<sup>83</sup> Hogg, P. W.: The Law-making Role of the Supreme Court of Canada: Rapporteur’s Synthesis. *The Canadian Bar Review* (March–June 2001), 171–180, especially 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. Monahan, P. J.: The Supreme Court of Canada in the 21st century. In: *ibid.*, 374, note 2.

<sup>84</sup> *Ibid.*, 179.

<sup>85</sup> E.g., Morton, F. L.–Knopff, R.: *The Charter Revolution and the Court Party*. Peterborough, 2000.—“The rule of the Charter is accompanied by the hyper-judicisation of social relations” J.-F. Gaudreault-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*. 83–119, quotation on 108. Cf. also Bégin, L.: Le Québec de la Charte Canadienne des Droits et Libertés et la critique de la politisation du juridique. In: *ibid.*, 153–165.

<sup>86</sup> Mandel, M.: *La Charte des droits et libertés et la judiciarisation du politique au Canada*. Montréal, 1996. 107.

<sup>87</sup> Cf. chiefly Bork, R. H.: *The Tempting of America*. The Political Seduction of the Law. New York–London, 1990. xiv + 432 and *Slouching towards Gomorrah*. Modern Liberalism and American Decline. New York, 1997. xiv + 382 {reconsidered by the author in “Önmagát

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”.<sup>88</sup>

Such and similar examples of criticism are finally 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*,

“Instead 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.”<sup>89</sup>

Imposing values upon the community by the mere force of judicial authority, only supported by a narrow intellectual elite but without any democratic assessment, may easily end in counter-effects. For the politicising of judicature may prompt democratic voters with legitimately elected legislative and executive institutions to react, by treating the judiciary with its partisan views in a genuinely politicised way, as a political institution. The obvious danger of this was already formulated by some propheting 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’

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felemelő 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, 2000. 71–76. }

<sup>88</sup> Supreme Self-restraint. *National Post* (April 7, 2000), A19.

<sup>89</sup> Leishman, R.: Out-of-control Judges Threat to Rule of Law. *London Free Press* (May 12, 2000).

performance, even the continuance of their employment (as it will be characterized) can be periodically reviewed.”<sup>90</sup>

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 authorial opinions but, besides widely using legal doctrine, it also growingly draws from mostly mainstream philosophical considerations as normative foundations.<sup>91</sup> Thereby it inevitably takes a stand on political and moral philosophical issues as a partisan forum, for, in fact,

“The Supreme Court has, since 1982, taken a one-sidedly praetorian position in favour of liberal philosophy and ideology, which 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*, as the author of the quotation adds—Cs. V.], with any other aspect ruled out at the same time.”<sup>92</sup>

Obviously, no one has entitled the Supreme Court to elevate itself to ethical heights using nothing but its competence of decision.<sup>93</sup> The circumstance itself that in most debated topical questions dividing society (like euthanasia, abortion or in vitro fertilisation), it declares itself to be the highest forum of indubitable authority,<sup>94</sup> implies—despite any short-term effects and actual influences— the long run threat for the Supreme Court itself to make its own position sensibly undefendable and vulnerable.

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<sup>90</sup> 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 Hughes, P.: Judicial Independence: Contemporary Pressures and Appropriate Responses. *The Canadian Bar Review* (March–June 2001), 181–208, especially 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.

<sup>91</sup> Brunelle, Ch.: L’interprétation des droits constitutionnels par recours aux philosophes. *La Revue du Barreau* 50 (mars–avril 1990) 2, 370.

<sup>92</sup> Melkevik: *La philosophie du droit...* 180.

<sup>93</sup> Cf., e.g., Légault, G. A.: La fonction éthique des juges de la Cour suprême du Canada. *Ethica* 1989/1, 95–109 and LeBel, L.: L’éthique et le droit dans l’administration de la justice (ou le juge fait-il la morale?). *Cahiers de recherche éthique* 1991/16, 159–169.

<sup>94</sup> Melkevik: *op. cit.* 186.

The scale of globalisation witnessed in Canada, target 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, common at least in basic principles. In both cases, the main point is to reconsider the law's normative material in a way somewhat released from nationally positivated self-restriction when searching for a kind of trans-national cultural community. By gradually eliminating the law's substantivity, 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 details for the time being.

Although by far not as a *sine qua non*, yet globalisation may nevertheless issue in "sustainable development" to 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.<sup>95</sup>

<sup>95</sup> 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, 841–852 and *Comparative Law and Legal Practice: On Removing the Borders. Tulane Law Review* 75 (2001) 4, 977–1002.