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The Distinctive Character of the Quebec Legal System

Quebec is unique in Canada not only for its language and culture but also for its legal system. Unlike the other Canadian provinces which are based on the British common law tradition, the roots of Quebec's private law are based on the civil law and Napoleonic Code¹ from France. The common law influence has penetrated into the Quebec legal system, making it distinctive, influenced both by the civil law and the common law (Tjaden). There are only few countries in the world in which different legal regimes co-exist. Such countries, like for example South Africa, Zimbabwe, the Philippines or Scotland, and provinces/states such as Quebec or Louisiana, are often called "mixed jurisdictions" or "bijuralist systems" (Tetley, 677-738; Orucu et al.). The classic definition of a mixed jurisdiction was made by Frederick P. Walton and it says that: „Mixed jurisdictions are legal systems in which the Romano-Germanic tradition has become suffused to some degree by Anglo-American law” (Walton, 1). Let us take a brief historical walk in the past to see what influenced the Canadian legal system, to show the main differences between common law and civil law, and to prove the distinctive character of current laws of Quebec.

Canada's present legal system derives from two main European systems brought to the continent by explorers and colonists. Before the Treaty of

¹ Set of civil laws that was instituted by Napoleon in France in 1804. The Code took over 14,000 decrees that had been passed under revolutionary governments, and simplified them into one unified set of laws. Many countries created their own laws according to Code's provisions or even adopted them in whole. Lower Canada (today's Quebec), along with many European countries, based its first codifications on the structure and provisions of the Napoleonic Code (Markesinis, 561-579). The significant role of the Code is mentioned by many researchers: "As the first truly modern code of laws, the Code of Napoleon for the first time in modern history gave a nation a unified system of law applicable to all citizens without distinction. By providing uniformity of laws it further promoted the national unity fostered by the Revolution" (Holtman, 98).

Paris (1763) by which New France was ceded to Great Britain, most of the territory of today's Quebec had a private law² governed by the Custom of Paris – customary laws written down in 1580 for the city of Paris. The Custom of Paris was imposed on New France by King Louis XIV in 1663, becoming the main source of civil law beside a few important ordinances and regulations³. After English victory over the French in Quebec in 1759, the country fell under English law. As a matter of fact, next ten years became a period of confusion as to the applicable law, during which the French population tended to boycott the English courts and settled private law disputes according to the old French law. The Quebec Act of 1774 changed this situation, because it allowed to apply French civil law and civil procedure in Quebec, while leaving English criminal law there. Due to the migration of loyalists, the colony increased, and in 1791 the Constitutional Act divided the old Province of Quebec into Lower Canada (southern parts of the present Quebec) and Upper Canada (the present Ontario). English common law was established in Upper Canada, without disturbing the primacy of the civil law in Lower Canada (Breierley, 6-15). The foundation had been laid for Quebec to become a mixed jurisdiction.

After the Act of Union of 1841, reuniting Upper and Lower Canada as the Province of Canada, legislation was adopted confirming that the civil law, rather than the common law, applied in the territories where land had been granted in free and common socage since 1774. The diversity of the sources of the civil law, the diversity of languages in which it was expressed, the absence of contemporary commentaries on that law and strong position of the French code, resulted in pressure for codification, which led to the formation of a commission in 1857⁴. The commission prepared the Civil

² It is important to mention that private law deals with relationships between individuals in society and is used to settle private disputes in contrary to public law which deals with matters that affect the society as the whole that is the relationship between the individual and the state (Canada 2005).

³ Most of them were edicts and decisions from the Sovereign Council of New France. It was a political body appointed by the King of France and consisting of Governor General, intendant and bishop of the Roman Catholic Church. They were responsible for legislative, executive, and judicial matters (Du Bois).

⁴ It was Attorney General George-Étienne Cartier who masterminded codification. Established under his codification bill, the codification commission was made up of his old political and legal colleagues: Rene-Edouard Caron, Charles Dewy Day, and Augustin-Norbert Morin (Dickinson and Young, 172).

Code of Lower Canada in 1866 and the Code of Civil Procedure in 1867, both of which were in force when Canada East became part of the Dominion of Canada on 1 July 1867 (Tetley, 677-738). It is very important to notice, that when Quebec became a province of Canada under the British North America Act, it had an official, unified civil code.

To understand the character of the Quebec legal system we have to take a deeper look into both systems that create this unique state of affairs. The common law, which developed in Great Britain after the Norman Conquest, was based on the decisions of judges in the royal courts. The system mainly consists of rules based on “precedents” – whenever a judge makes a decision that is to be legally forced, this decision becomes a precedent: a rule that will guide judges in making subsequent decisions in similar cases (Knight et al., 1019-1020). The common law theoretically cannot be found in any code or legislation; it exists only in decisions that had already been taken. England, the United States or Australia are examples of countries that are based on common law rules. This system is very often called “judge-made-law”, because of the powerful role of judges. They create the law, they shape new rules and regulations following an old Latin phrase *stare decisis et non quieta movere*, which means: “to stand by precedents and not to disturb settled points” (Burnham, 65). Common-law courts don’t rely on codes, but on previous court decisions or – if there is no similar decision – they create a new rule in a case, which is then called “the case of first impression”. According to Oliver Wendell Holmes, a famous U.S. Supreme Court Justice, the law is only what the judges say it is⁵. One of the principal characteristics of the common law is the inductive process, which means generalizing from common points between distinct cases and then establishing legal categories with vague foundations and flexible limits. The „ratio decidendi” (legal reasoning) of a previous decision is ascertained, and judges proceed by way of analogy. Each development must be justified by linking it to a principle drawn from the preceding cases. Common law is often called “case law”, because legal cases play main part in understanding the principles and provisions of particular system.

The tradition of civil law is quite different, because it is based on Roman law (Stein, 61-63). Since the times of emperor Justinian, civil law has been associated with a civil code, containing almost all private law. All civil

⁵ “The life of the law has not been logic, it has been experience” – Oliver W. Holmes in *United States v. Schenck* 249 U.S. 47 (1919).

codes, such as for example the Code of Napoleon in France, contain a statement of rules, many of which are framed as general principles so as to deal with any dispute that may arise. Unlike the common law courts, courts in civil law system first look to the Code, and then refer to previous decisions for consistency. There are many civil law systems in the world, including most of continental Europe and Japan. The key feature of a civil law system is that all laws of the country are codified or arranged into a coherent system. Generally speaking, the laws in a civil code are broad statements of principles, setting out the standards of conduct, by which relations between people and their property should be governed (Law). As in Quebec: the Quebec civil law system forms the basis for Quebec's private law. It does not mean that judges in Quebec do not develop case law, or that all disputes in Quebec are resolved by simply consulting the Civil Code; Quebec judges do produce written judgements which may have some precedential value. The basic difference is, that in the civil law system, the main principles are generally found in the codes, in contrary to a body of judicial decisions, so important in a common law system.

Perhaps the most important feature of the civil law tradition differentiating it from the common law tradition, is the primacy of written laws⁶. Rather than proceeding from the legal reasoning of previous judicial decisions, the emphasis in the civil law tradition is on the written law, which is the primary source of law. The civil law is regarded to be more codified law than “judge-made law”. As a result the civil law approach to legal reasoning is deducting, which means proceeding from the general to the specific, opposite than in common law courts. Civil law judges therefore derive conclusions through interpreting the rules set out in codes (Bastarache, 20). An important source of law in the civilian tradition is also legal scholarship (Dainow, 1-350), which has little influence on the common law jurisdictions. We may even emphasize that previous judicial decisions are the real and only doctrine for common law judges – if there's a rule set out by the courts and it is binding, there's no need to focus on its theoretical aspects, because the rule defends itself. Courts and legal scholars are bound by the results that judges have reached, not in the sense that they can never disagree, but in the sense that they try not to do so. Legal analysis begins with the decided cases and looks for rules, doctrines, or policies to explain as many of them as possible⁷. The

⁶ This primacy is more theoretical nowadays, but as a matter of principle, common law is often called non-written law – *leges non scriptae* (Blackstone).

⁷ American jurists claim that this process can often produce better law than legislation.

meaning of legal scholarship in common law and civil law systems varies, because of the position and role of judges. This leads us to another difference between the two systems, which is the way the judges are trained and appointed. In civil law systems, judges are usually trained on a separate career track from lawyers. Judges also tend to play a much more active role in the prosecution of civil and criminal lawsuits than do their common law counterparts (Ludwikowska, 249-291). In addition, judges in a civil law system do not make law in the way that common law judges do, since civil law judges generally are required to apply the written law and only interpret it. Different role of judges is also visible in their status: judges in most civil-law countries are highly respected magistrates, but they do not have public status comparable to that of common law judges (Baudenbacher, 355).

To conclude one should point out that, if you want to learn something about Polish law, which belongs to the family of civil law systems, you simply open different codes and you start learning general principles and rules stated there. If you want to learn about common law system in the United States, you simply follow the major cases decided by the Supreme Court, instead of focusing on any codes or codifications. But in order to learn about Quebec law, you should plunge both into codes and courts' decisions.

Now as we know the main differences between the two systems, it is easier to understand the unique position of laws of Quebec. In Canada, there is the Federal Criminal Code, which is applied to all of the provinces and territories, and in which all the criminal offenses are set out, but from all Canadian provinces only Quebec has its own Civil Code. It means that in other provinces criminal and civil law are both based on precedents, and that is why judges reaching a verdict rely mostly on decisions taken by the courts previously. Quite different situation occurs in Quebec, where the current *Civil Code of Quebec* came into force on January 1, 1994, containing 3,168 articles divided into ten sections⁸. The Code may be understood as

It is sometimes easier for judges to see that particular results are right than for a legislator to frame a rule or doctrine or to identify a policy that explains why they are right (Gordley, 1817-1818). In civil law systems, scholars have a significant function in construing the law. Among the most influential scholarly works are the commentaries (Baudenbacher, 354-355).

⁸ As a matter of fact, Quebec has even two Civil Codes, the 1994 Civil Code of Quebec and the 1866 Civil Code of Lower Canada, which remains in force to the extent of federal jurisdiction under the British North America Act of 1867,

a systematic codification of the principles and decisions arising from the case law. Preamble of Code states as follows:

The *Civil Code of Quebec*, in harmony with the *Charter of Rights and Freedoms* and the general principles of law, governs persons, relations between persons, and property. The *Civil Code* comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *ius commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code to make exceptions to it⁹.

The provisions of the *Civil Code* concern matters of private law, by which judicial decisions are viewed differently than in common law. In this system the courts focus on the Code to determine a given principle and then apply the principle to the facts of the case. The primary authority for Quebec judges is the Code itself; therefore, they are entitled to apply it without being bound by a prior decision, even that of a higher court¹⁰. This is unlikely in common law system where many decisions are binding, because they have been made by a higher court. In other divisions of Quebec law (i.e. criminal law) we can see precedents as the main source of courts' decisions. That is because the public law of the province, unlike the private law, derives its principles and general content from the public law of England (Scott, 81). Therefore in one province there are two various ways of proceeding, which must influence the way the court system works. All of the provinces have superior courts which are the highest level of judiciary in the province. The highest, does not mean the last, because a given case may still reach the Supreme Court of Canada which is the last resort for all of the cases in the country. Not all of the cases reach the Supreme Court, as

especially in relation to marriage, interest and insolvency. They both derived the majority of the Code's rules from the Custom of Paris – rules which were very “civil” in their tradition (Canadian). The Civil Code of Quebec contains 10 books, each one defining civil law in a specific domain: persons, family, succession, property, obligation, prior claims and hypothecs, evidence, prescription, publication of rights, private international law.

⁹ We should emphasize the words *general principles of law*, so characteristic for a code.

¹⁰ The judicial courts of Quebec are: the Court of Quebec, the Superior Court, the Court of Appeal and the Human Rights Tribunal. The court of last resort in the province is the Court of Appeal.

a matter of fact most of them do not. Especially those from Quebec. Some may say that it is caused by the separatist movements and *distinct society* of Quebecois, but in my opinion the main reason is a different legal system, this mixed jurisdiction. The Supreme Court of Quebec makes decisions in civil cases basing on the code's provisions and very often those cases do not reach the Supreme Court of Canada, making the Quebec Court of Appeal unofficial last resort¹¹. What's more, the suitability of judges educated in the common law tradition to hearing cases involving civil law issues, has been the subject of some debate in Quebec and has even led to some opinion favouring a distinct Supreme Court for Quebec or a separate civil law division within the existing Supreme Court¹². There is also a perception that while Ontario courts often serve as persuasive authority in other Canadian provinces, decisions of Quebec courts that are rendered in French are not fully heeded in other jurisdictions, due to the language barrier. That is why much of Quebec civil law „remains a closed book to those outside Quebec” (Kolish, 339-343). Whatever our opinion is, we have to admit that language can also become an element or symbol of distinction of the Quebec legal system.

Looking at the practice of law in Canadian provinces we can also see some differences caused by the civil law tradition in Quebec. Admission to the practice of law in Quebec, like in the other provinces in Canada, requires writing and passing provincial bar exams and then articling for a specific period of time. Notaries in Quebec have a different status and play a more elevated role than notaries in other provinces. They concentrate on contractual matters, especially in real estate, and cannot appear in court except in non-contentious matters (Canada 2004). In the rest of the country, lawyers can provide any kind of legal service. But the distinctive character of Quebec notaries is visible in three other aspects: 1) the number of notaries in Quebec is neither limited nor linked to a specific number as a function of population, 2) a notary may exercise his profession anywhere in Quebec, and even abroad if his services involve Quebec residents or if the object of the transaction is situated in the province, and 3) Quebec notaries may draft documents in either French or English, at the parties' request (Lambert). There is also a huge benefit for all the lawyers who are taught in Quebec,

¹¹ In more than 99% of the cases, this court is the court of last resort (Quebec).

¹² The existing Supreme Court of Canada has nine members. What's interesting, three of them, according to the law, must come from Quebec (Hausegger and Haynie, 638; Brune and Bulgutch).

because they are skilled in two different legal regimes. As we are aware of the differences between common law and civil law systems, we may assume, that these additional abilities create many advantages for Quebec lawyers.

While analyzing the Quebec legal system we cannot forget that there are some similarities between Quebec and the common law provinces, despite the civil code tradition in Quebec:

- like all other provinces Quebec is bound by Canadian federal laws, such as the *Criminal Code*. Case law regarding matters of federal jurisdiction that apply in Quebec is relevant no matter where it originates. Federal law is a higher law than laws of the provinces and in this view Quebec is equal with other provinces, even if there are people who consider it to be on special conditions;
- judges in Quebec are appointed in the same manner as judges in other provinces – for instance judges of superior courts are appointed by the federal government, therefore we can say judges in Quebec are more similar to judges from other provinces than French judges.
- Last but not least, common law and civil law systems have been changing throughout the years and became closer to each other (Merkesinis, 87-89). There is no common law country nowadays that would not have codes and there is no civil law judge who would not make a decision based on previous courts' decisions. This statement could lessen the distinctive character of the Quebec legal system, but there are still visible differences which place this province in a unique position in the world.

Some scholars compare the legal system of Quebec with the legal system of Louisiana (Fitzgerald, 291-313; Ward). There are definitely many similarities – province/state in a common law country with a strong role of civil law, historical genesis in French codes, smaller role of the *stare decisis* principle. But I would never call Louisiana's legal system distinctive: both countries (the United States and Canada) have federalist system, but the role of Louisiana's courts or Louisiana's codes in the whole American legal system is much smaller than Quebec's role in Canadian legal system. From its beginning, Quebec Civil Code served as fundamental ideological pillar emphasizing the province's distinct civil law system from the rest of Canada (Dickinson et al., 173). It is hard to express the same statement about Louisiana's Code. We may call Quebec a mixed or shared jurisdiction, a bijuralist country or dual system of law, the name is not important. What is

important that it is a country which is able to preserve two major legal systems at the same time, proving that such a mixture is not only possible, but also successful. I am not stating that this is a perfect system, but according to the preamble of Louis XIV's Edict on Civil Procedure of 1667 for New France, "justice is the most solid foundation ensuring the continuation of the State" (Russell). It does not matter if a country has a common law tradition, a civil law tradition, or both, as long as justice prevails.

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