

SOME THOUGHTS ON BIJURALISM IN CANADA AND THE WORLD

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General Introduction

A society produces various types of discourse and translates them into reality. In this way, it learns to know itself and to evolve. It finds words, signs and symbols for those realities. Law plays a role in this process, and that role is defined by its relationship to methods of reasoning and regulation and through its identification with values that ensure its coherence.

Juridical cognition that is manifested through diverse methods of legislation is of course a matter of interest to more than one discipline. And an understanding of more than one legal system in a single community raises even greater challenges to the extent that the coexisting systems have their own identity. However, the linear view one might be tempted to take of the manner in which legal traditions have developed may be convenient in this context, but incorrect. There has been too great a confluence of ideas shaping the history of these traditions for anyone to disregard their similarities and mutual ties. This will be of much greater interest to sociologists and legal historians. We are neither. We are not interested in legal agents or socio-legal representations, but in the meaningful relationships between the various types of legal discourse, that is to say, between legal traditions. It is the areas where these forms of discourse and traditions are superimposed on one another and appropriate and complement each other that lead us to think of bijuralism in its proper place, for which globalization now forces us to set aside multi-dimensional spaces, common areas and fields where ideas coexist or are assimilated.

Bijuralism is defined as the coexistence of two legal traditions within a single state. Since the common law and civil law coexist in Canada in both official languages, Canada is said to be a bijural country.¹

Although many countries are also governed by a combination of two or more systems of law, the combination of civil and common law is much rarer. It is found in scarcely fifteen states and the face of bijuralism differs in each of those countries.

In a presentation entitled *Le bijuridisme au Canada*, the Honourable Mr. Justice Michel Bastarache of the Supreme Court of Canada noted: [translation] "There are relatively few countries where two fundamentally different legal systems coexist. Canada is one of these countries. 'Bijuralism in Canada' means the coexistence of the English common law and French civil law traditions within a federal state."²

¹ By defining bijuralism as meaning the coexistence of two systems of law, we limit its scope to the major contemporary legal systems. Out of a concern to provide a more accurate description of the legal landscape, some authors believe instead that the terms "plurijuralism" or "legal pluralism" should be used to describe the Canadian situation in order to accommodate Aboriginal rights and the specific characteristics of each common law province (see *inter alia* J.E.C. Brierley, "Bijuridism in Canada", in *Contemporary Law, National Reports to the 1990 International Congress of Comparative Law*, Montreal, 1990, (Cowansville, Que.: Yvon Blais, 1992) 22, note 9, at 25).

² Michel Bastarache, "Le bijuridisme au Canada" (luncheon on bijuralism and the judiciary, Department of Justice, Ottawa, 4 February 2000).

The article that follows is an attempt to determine the meaning and gain a better understanding of the nature of the ties that bind these two great contemporary legal traditions.

In so doing, we aim to present various forms of coexistence of the two legal traditions in Canada, and elsewhere in the world (giving non-exhaustive examples), and making reference notably to the harmonization project put into place by the Minister of Justice of Canada, with a view to developing and sharing this expertise in the making.

PART I

CHARACTERISTICS AND CONTEXT OF THE TWO LEGAL TRADITIONS

Historical Background

One will recall the witticism of George Bernard Shaw, “England and America are two countries separated by the same language”. What may one say, then, justly asks the Honourable Pierre Viau, Justice of the Superior Court of Quebec, of our situation in Canada and more specifically in Quebec, where, within the course of one hearing, we switch from one language to another, from public law to private law, from Quebec legislation to federal legislation, from civil law to common law.³

Canada is a bijural country because it applies two bodies of common law in the private sphere: the common law and the civil law. The existence of two common laws may be explained by history and by the colonisation of America by the English and the French.⁴ The colony was first subjected to French law, then, following the British victory in 1759-60, to the English common law.⁵ The preservation of this legal duality in Canada resulted from the historical relationship of complementarity within which the common law and civil law continued and which was entrenched by the *Quebec Act of 1774*⁶ and later on by the division of legislative powers provided for by the Canadian Constitution of 1867.⁷

The *Quebec Act*⁸ specifically provided that French law applied to matters of property and civil rights and English law to matters of public and criminal law. The *British North America Act*⁹ divided legislative powers between the federal government and those of the provinces. Subsection 92(13) allowed for continued national legal duality by providing that property and civil rights would be under provincial jurisdiction.¹⁰ Quebec was thus able to preserve its civil law and the other provinces their common law.

By conferring on the provinces exclusive authority over property and civil rights, subsection 92(13) forms the basis of the complementary relationship between federal law and provincial private law. Only those standards accordingly adopted by the provincial legislatures can complement federal instruments which are silent on an aspect relating to property and civil rights which appears essential to their application.¹¹ A number of matters with a private law component, such as bills of exchange, bankruptcy, marriage and divorce,¹² were placed under federal

³ P. Viau, “Quelques considérations sur la langue, le droit, le bilinguisme et le bijuridisme au Canada”, in E. Gayme, *Langue et Droit, XVth International Congress on Comparative Law*, Bristol 1998, collection of reports (Brussels: Bruyant, 1999) at 142-143.

⁴ See on the subject J.E.C. Brierley, *supra* note 1, at 23ff.

⁵ By the Royal Proclamation of the Treaty of Paris, the King of England prescribed the formation of courts of judicature and public justice to hear all cases in accordance with the laws of England.

⁶ (U.K.) 14 Geo. III, c. 83.

⁷ U.K. 1867, 30-31 Victoria, c. 3 (since 1982, *Canada Act 1982* (U.K.), 1982, c. 11).

⁸ The official title of this statute is *An Act for making more effectual Provision for the Government of the Province of Quebec in North America*.

⁹ *Supra* note 7.

¹⁰ The expression “property and civil rights” has been interpreted as generally including relations in civil society, including those relating to property and contracts.

¹¹ There is nevertheless a notable exception to this rule. Under the general theory of the division of powers, provincial private law may not apply on a supplementary basis to offset Parliament’s failure to exercise its primary power over a matter. (*Union Colliery v. Bryden*, (1899), A.C. 580, at 588 [hereinafter *Union Colliery*].)

¹² The division of powers has moreover confirmed the role of the common law in public and criminal law.

jurisdiction. There are only a few federal statutes that concern private law matters exclusively.¹³ However, a number of acts interact with provincial private law, which, in the case of Quebec, is the civil law.

However, this satisfactory division of powers sometimes becomes less so when one thinks of the juxtaposition of both public and private law in the same law, such as the common law retained by the Federal legislator and the civil law of Quebec. Let us not forget either that legal drafting in these fields follows different fundamental structures. Moreover, as the Honourable Justice Viau maintains,

[translation] “Two languages mean, first of all, two styles, at least as regards drafting. And more than that also. French law and English law are conceived differently. The same ideas are not concealed in the same fashion within words whose meaning and import are sometimes difficult to discern”.

In this regard, he cites Louis-Phillipe Pigeon, who later on became Justice of the Supreme Court of Canada, and who describes this situation particularly well:

[translation] “English legal style subordinates every consideration to the search for precision. It attempts to say all, define all, to intimate nothing, and to never assume the intelligence of the reader. Consequently, in formulating a rule, it begins under reserve of all exceptions. [...] In the French style, which is tending unfortunately to disappear in France, because a lot more is legislated by decree than by law, the search for precision is dominant. One tries to find the precise word, and to formulate a general rule instead of enumerating multiple applications.”¹⁴

We will now provide some more detail on these two legal traditions.

Characteristics of the two legal traditions

- ***The civil law tradition***

The civil law is often defined as a law which derives its source and inspiration from Roman law. However, this only partly reveals the essence of the civil law. Most civil law countries have, of course, rules that can be traced back to Roman law, but they also generally have canonical rules or rules of customary law. What characterizes the civil law is perhaps more precisely its “style”,¹⁵ even [translation] “a certain way of conceiving, expressing and applying a legal rule which transcends legislative policies which shift periodically in the history of a people”.¹⁶

With this style, the civil law managed to conquer America, through Quebec, Louisiana and a number of South American countries. The French heritage remains alive today and the particular forms it takes have helped to enrich all the countries that share this legal culture. While remaining resolutely civil in form, Quebec private law differs from French law and features original rules that are at times based on English law. The civil law is that body of law consisting of the fundamental rules of private law—general legal principles, rules concerning the status of persons and the family, property and the theory of obligations—which constitute its common law. In Quebec, these fundamental rules are mainly stated in the Civil Code, as may be seen from the Code's Preliminary Provision:

¹³ For example, the *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3; *Family Orders and Agreements Enforcement Assistance Act*, R.S.C. 1985 (2nd Supp.), c. 4, and *Marriage (Prohibited Degrees) Act*, R.S.C. 1990, c. 46.

¹⁴ P. Viau, *supra* note 3, who cites L.P. Pigeon, *Rédaction et interprétation des lois* (Government of Quebec) 1065, at 5-6.

¹⁵ See R. David cited in P.-A. Crépeau, “Préface”, in Office de révision du Code civil, *Rapport sur le Code civil du Québec*, Vol. 1, *Projet de Code civil* (Quebec: Éditeur officiel du Québec, 1978) at XXIX.

¹⁶ *Ibid.*

Preliminary Provision

The Civil Code of Quebec, in harmony with the Charter of human 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 jus commune, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it.

- **The common law tradition**

Starting with the Norman Conquest of England in 1066, the common law was gradually developed by the Royal Courts which sought to standardize the law, contrary to local custom, on the basis of a general—and fictitious—custom applicable throughout the kingdom. The common law thus derives from the activity of the courts. It is the work of judges. The rules developed by the courts do not necessarily constitute common law rules in the strict sense because only those rules accepted and applied by the Royal Courts of Westminster form the common law. Starting in the XVth Century, however, the Court of Chancery added rules of equity to English law.

Jurisdictional duality was abolished in England by the Judicature Acts of 1873 to 1875 and a new jurisdiction was created—the High Court of Justice, comprising three divisions: the Queen's Bench (Common law), Chancery (Equity) and Probate (formerly Probate, Divorce and Admiralty). In the common law provinces of Canada, the equivalent divisions were gradually integrated into a unified judicial system. Although the jurisdictions were merged, the two systems of rules, (common law and equity), remained separate. Although all courts may apply both rules, equitable remedies (e.g., the right to an injunction) are even today contrasted with common law remedies (e.g., the right to damages). However, in case of conflict between the rules of common law and those of equity, the latter prevails.

Common law and equity are sometimes referred to generically as common law. In this sense, the common law must be understood as unwritten law based on judicial precedent (as opposed to statutory law which derives from legislative sources) and are applicable in the absence of relevant statutory provisions. "This method [strict construction of exceptions to general law] is based on the opposition between common and statute law. Historically, common law was the general law and statute law the exception."¹⁷

Common law is distinguished by its method and inductive reasoning, which consists of generalizing from precedents and observing similarities. Civil law, on the other hand, is characterized by its deductive method, high degree of abstraction and generalization.¹⁸ In short, the method of the civil law is rational, that of the common law empirical.

¹⁷ P.-A. Côté, *Interpretation of Legislation in Canada*, 3rd ed. (Montreal: Thémis, 1999) at 644.

¹⁸ See R. David, René, *Le droit anglais*, (Paris: Presses universitaires de France, 1975); J.E.C. Brierley, *Major Legal Systems in the World Today* (London: Stevens, 1985); A.R. Hogue, *Origins of the Common Law*, (Indianapolis: Liberty Press Edition, 1966); M. Bastarache, "Les défis nouveaux du bijuridisme", (1998) 29 R.G.D. 241, at 243; M. Dion, "Le bijuridisme canadien : perspective du ministère de la Justice", (1998) 29 R.G.D. 253, at 254ff.

Characterization of the two legal traditions: private law and common law in Canada

In Canada, the distinction between private law and public law makes it possible to determine the common law applicable to a legal relationship: the common law in public law, the civil law in Quebec private law and the common law in private law elsewhere in the country. As a result of the division of legislative powers, Canadian bijuralism is a significant presence whenever the application of a common law federal statute requires recourse to private law.

In this context, provincial private law applies [translation] “as a supplement to every federal statutory provision concerning a private law matter in order to complete it [...]”¹⁹ Although the notion of private law traditionally means the body of rules of law applicable to relations between individuals, these rules in some instances have an impact on the development, interpretation or application of rules which, at first glance, do not concern relations between individuals.

Common law means the law applicable in the absence of specific rules. It is a body of rules that may apply where unopposed and especially provides “the interpreter with conceptual resources to apply specific statutes”.²⁰ The term *supplementary law* is at times used to describe the common law, but the common law is not an addition to special rules; it supports them.²¹

¹⁹ J.M. Brisson and A. Morel, “Droit fédéral et droit civil : complémentarité, dissociation”, *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism* (Ottawa: Department of Justice, 1997) 213, at 231.

²⁰ J.M. Brisson, “Le Code civil, droit commun?”, in *Le nouveau Code civil, interprétation et application, Les journées Maximilien Caron — 1992* (Montreal: Thémis, 1993) 292, at 296.

²¹ *Dictionnaire de droit privé*, 3rd ed., forthcoming, s.v. “droit commun”.

PART II

FORMS OF COEXISTENCE OF THE TWO LEGAL TRADITIONS IN CANADA

An understanding of bijuralism calls for an analysis of a fundamental notion, the notion of mixed law. This notion is not *a priori* hard to understand—it means a system of law whose institutions derive from different legal systems and result from the cumulative application, or from the interaction, of techniques belonging to those systems.

The notions of “bijuralism” and “mixed law” do not describe the same aspects of reality. Two legal systems may coexist within a single state without interacting, in which case that state may be considered “bijural”, but not as having a mixed legal system. Canada is said to be a bijural country because civil law is the common law of Quebec and common law that of the rest of Canada. However, Federal law is also a mixed law since its development, interpretation and application are based on the common law of each province.

Certain writers hold that the reciprocal action of two coexisting legal systems may manifest itself in various ways, in particular:

1. By the *cumulative application* to a single institution of rules deriving from either of those systems—substantive rules belonging to one system and formal rules to the other, for example;
2. By an *interaction* of their respective rules that leads the legislator or the interpreter of the legislation to proceed with the harmonization or necessary coordination of relations between the two legal systems.

The rules, concepts or institutions of one of the systems may implicitly or explicitly *influence* the drafting, interpretation and application of the rules, notions and institutions of the other. The rules, notions or institutions of one of the systems may, with the appropriate changes, be *incorporated* in the other system.

The rules, notions and institutions of the two systems may furthermore *interact* with each other.

Thus it may be said that the evolution of coexisting legal systems may be characterized by their relations of influence, integration and interaction. In Canada, the two legal traditions coexist in these two ways at the national level: at times they influence each other, at other times, they interact.

The following section discusses the relationship of *interaction*, which in Canada is properly known as *complementarity*. But first, what about relationships of *influence* and *integration*?

Influence through interpretation or integration

Are the civil law and common law as dissimilar as one might be inclined to believe? Some writers state that many differences between the civil law and common law systems are *more apparent than real*,²² resulting much more, in their view, from the manner and order of presentation of the rules than from their content, and that the few substantive differences can mainly be explained as a matter of *historical accident*.²³

²² J.A. Clarence Smith and Jean Kerby, *Private Law in Canada, A Comparative Study* (Ottawa: University of Ottawa Press, 1987) at 12ff.

²³ *Ibid.*

The convergence in Western society today largely transcends the national systems which in some instances have perhaps been contrasted to an exaggerated degree in comparative law. In fact, the similarities between civil law and common law are much greater than are the technical differences.

These similarities are often the result of the influences the two have had on each other over time: Quebec civil law, for example, is definitely a faithful reflection of French law, but the latter is in philosophical agreement with English law.

The common law thus plays a very great role in Quebec private law in both formal and substantive terms. The form of judgments, for example, reveals a very clear relationship with the common law. Case law illustrates the mixed nature of Quebec law—the task of Quebec judges, as civil law judges, is not to restate a rule established by a court on the basis of the facts before them. Like French judges, they apply an abstract rule to specific facts. Unlike French judges, Quebec judges, like common law judges, explain their reasoning. They generally proceed with a detailed analysis of the rule, of previously applied judgments and of the relevant doctrine, then set out the reasons leading them to apply the rule to the facts before them.

As to substance, the influence of the common law is apparent in two major respects: interpretation of the *Civil Code of Quebec* and law reform.

Following the adoption of the *Civil Code of Lower Canada*, a number of judges resorted to common law rules as instruments of interpretation. Application of the common law was not limited at the time to rules based on English law. Its approach was not based on a comparative law method whose purpose was to find the most appropriate solution to the situation, but rather, to interpret the rules of civil law so that they would lead to solutions identical to common law rules.

Today, since Quebec's civil law enjoys full autonomy, judges ensure that the specificity of the two systems is respected, without depriving themselves of the wealth of lessons afforded by comparative legal analysis. The Supreme Court of Canada often adopts a comparative method, drawing at times on the civil law in a common law context.

The common law, or more precisely the statute law existing in common law jurisdictions including the United States and the other Canadian provinces, in turn exercises an influence on Quebec law. In the 1960s, the Quebec legislature drew on it when it proposed to reform the law, passing an act amending the Civil Code, *An Act to protect borrowers from certain abuses and lenders from certain privileges*, which was patterned on an Ontario statute, *The Unconscionable Transactions Relief Act*. Similarly, the reform of insurance law and development of rules respecting family patrimony followed upon studies concerning, among other things, the law of the other Canadian provinces.

Interaction between the two legal traditions: the relationship of complementarity and its exception, dissociation

In parallel with the influences the legal systems exercise on each other, the reciprocal action of those systems may also manifest itself through the interaction of their respective rules and principles.

In Canada, the division of legislative powers has established relationships of complementarity between the law of the provinces and federal law. By conferring exclusive authority over property and civil rights on the provinces, subsection 92(13) of the *Constitution Act, 1867* forms the basis of the complementarity between federal law and provincial private law. Only standards adopted by the

provincial legislatures can supplement federal instruments that are silent on a matter pertaining to property and civil rights that is essential to their implementation.

There is nevertheless a notable exception to this rule. Under the general theory of the division of powers, provincial private law cannot be applied on a supplementary basis to offset Parliament's default in exercising its primary power over a matter:

"The abstinence of the Dominion Parliament from legislating to the full limit of its powers, could not have the effect of transferring to any provincial legislature the legislative power which had been assigned to the Dominion [...]"²⁴

The private law of a province will thus apply only in matters under Parliament's ancillary power, that is to say in an area falling mainly under provincial jurisdiction under subsection 92(13) of the *Constitution Act, 1867*, but which may be governed by Parliament to the extent required for the furtherance of an objective under Parliament's exclusive authority.

For these reasons, the expression "property and civil rights" ("propriété et droits civils") has come to mean the field of private law *stricto sensu* in general—except matters under federal jurisdiction—as well as certain fields of public law, particularly administrative law, as it relates to private law. As noted by Professor Hogg:

"In other words, the evolution of our laws has now swept much public law onto the rubric which was originally designed to exclude public law."²⁵

The ties that bind the civil law to federal statutes are analogous to those between the legislation of the Province of Quebec and the *Civil Code of Quebec*. Quebec's Civil Code establishes Quebec's common law and is capable of supplementing other statutes. This correlation also exists between federal law and the private law of the other provinces, although it is less apparent, because those provinces have the same fundamental law in common (the common law), which moreover is visibly present in the federal statutes. This facilitates their interpretation and administration in the provinces with this private law legal tradition in common. In this context, the notion of suppletive law, which forms the basis of the complementarity principle, is decisive.

The question of the civil law's complementarity with federal legislation, particularly with regard to what differentiates the various types of interactions, remains to be considered in greater depth. This question arises each time a provision in a federal statute relies directly or indirectly on a private law concept. The specific fields of law governed by federal acts, bills of exchange, banks and bankruptcy, for example, often raise this issue.

As Parliament has only limited power in private matters, provincial law thus applies in principle in supplementing federal legislation. The civil law supplements the federal act through the *implicit dependence* of such a federal statute on the common law system governing relations between individuals in the province. The civil law can also supplement a federal act via a formal reference to it in the federal law. For example, subsection 91(4) of the *Canada Marine Act* provides:

*(4) A lease or licence may be effected by any instrument by which real property may be leased or a licence may be granted by a private person **under the laws in force in the province in which the property is situated.***

²⁴ *Union Colliery*, *supra* note 11, at 588.

²⁵ Hogg, Peter W., *Constitutional Law of Canada*, 4th Edition, Carswell, Toronto, 1997, at page 547.

Subsection 21(1) of the *Crown Liability and Proceedings Act*, as amended by Bill S-4, *A First Act to harmonize federal law with the civil law of Quebec*, tabled in the Senate last January, is another example:

*c) In all cases where a claim is made against the Crown, except where the Federal Court has exclusive jurisdiction with respect to it, **the superior court of the province** in which the claim arises has concurrent jurisdiction with respect to the subject-matter of the claim.*

Where it must be determined which creditors will be preferred over others in bankruptcy, the *Bankruptcy and Insolvency Act* provides for such determination by reference to concepts of provincial private law which, in Quebec, are stated in the *Civil Code of Quebec*.

Parliament further relies, implicitly or expressly, on private law where it refers in the *Income Tax Act* to the concepts of trust and hypothec.

Parliament may also expressly disregard the common law of the province and choose another law of reference.

The complementarity that links federal law with the civil law, like that between federal law and the law of the other provinces in the same circumstances, is the cornerstone of work being done by the Department of Justice Canada and of the efforts here being made to ensure that the particular characteristics and advantages of that work are understood. How has Canada's Parliament gone about establishing complementarity? Before answering this question, the concept of *dissociation*, which is an exception to complementarity, will briefly be addressed.

In a work published in 1996 for the Department of Justice Canada, Professors Morel and Brisson mention that there are exceptions to the rule of complementarity which they characterize as dissociations. In such cases, a standard foreign to the private law of the province of application corrects the incompleteness of the federal legislation, thus excluding any suppletive application of the law of that province. It will be said of such standards that they display no relationship of complementarity with the provincial law. Consequently, an area of activity will be said to be of "autonomous federal law" where all legislative standards governing it maintain this kind of relationship of dissociation.

Thus we will consider the sources of dissociation where, in choosing a law other than that of Quebec to supplement silences in its legislation, Parliament excludes all application. The degree of dissociation of federal law from the civil law is moreover subject to variation—the dissociation can be absolute or relative.

Section 2 of the *Federal Court Act*,²⁶ is a prime example of implicit dissociation.

The Supreme Court considered this section in *ITO—International Terminal Operators v. Miida Electronics Inc.*²⁷ The approach adopted by the Supreme Court of Canada in defining the scope of Parliament's legislative powers in navigation and shipping differed from the traditional approach previously used to consider the constitutionality of statutes.²⁸ To determine the scope of Parliament's legislative powers in the matter, the Supreme Court relied instead on the expression "Canadian maritime shipping" contained in the *Federal Court Act*, rather than "navigation and shipping" in

²⁶ R.S.C. 1985, c. F-7.

²⁷ [1986] 1 S.C.R. 752 [hereinafter *International Terminal Operators*].

²⁸ In the traditional approach of the general theory of the division of powers, a problem regarding the constitutionality of a statutory provision is resolved first by considering the definition of the powers which the Constitution, not the legislation, confers on an order of legislative power. The legislation cannot meet the definition of the scope of those powers. See on the general theory of the division of powers F. Chevrette and H. Marx, *Droit constitutionnel* (Montreal: Presses de l'Université de Montréal, 1982) at 271-273.

subs. 91(10). The Federal Court, created in 1971, assumed the admiralty jurisdiction previously conferred upon the Exchequer Court. Its original act clarifies and expands this jurisdiction by assigning it the administration of “Canadian maritime law”. This law is defined in section 2 as follows:

“Canadian maritime law” means the law that was administered by the Exchequer Court of Canada on its admiralty side by virtue of the Admiralty Act, chapter A-1 of the Revised Statutes of Canada, 1970, or any other statute, or that would have been so administered if that Court had had, on its Admiralty side, unlimited jurisdiction in relation to maritime and admiralty matters, as that law has been altered by this Act or any other Act of Parliament.

In the wake of a lengthy series of judgments concerning the Federal Court's jurisdiction, the Supreme Court recognized in *ITO v. Miida Electronics Inc.* the existence of a uniform Canadian maritime law covering the entire field of federal jurisdiction in the matter and excluding the supplementary use of provincial law.²⁹ Based essentially on the common law of England, it held, Canadian maritime law thus embraces certain principles originating in English maritime law which have been received in Canada law.

As maritime law has been defined by the Supreme Court as autonomous law, the concept of dissociation thus applies in that the application of this provision bars the supplementary application of the law of the provinces.

The reciprocal action of these two legal systems can thus manifest itself in various ways and it is in the interaction of their respective rules and principles, as it sometimes leads the legislator or the interpreter of the act to proceed with the harmonization or necessary coordination of their relations, that the most interesting phenomena are discerned.

The realization of the Complementarity relationship

The process of harmonizing federal statutes with the new terminology and concepts of the recent *Civil Code of Quebec* and bijural and bilingual legislative drafting techniques put into place with respect to the Harmonization Project of the Department of Justice Canada validate precisely these relationships of complementarity, while at the same time respecting the just discussed notion of dissociation. The experiment in this field is unique to Canada and, as Senator Gérald-A. Beaudoin³⁰ said during the debate on Bill S-22, *A First Bill to harmonize the federal law with the civil law*, tabled in the Senate on May 11, 2000, “gives us weight on the international scene”.

This experience has quite naturally resulted in a certain number of neologisms and new concepts and in the development of new research and harmonization techniques. The Civil Code Section has undertaken to systematize these harmonization techniques in view of the extensive methodological implications of the harmonization process.

²⁹ *International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752, at pp. 774-779. In this judgment, the point for determination was whether there was a body of federal law on which the Federal Court could decide a case involving the extracontractual civil liability of a stevedoring business. In excluding application of the rules stated in the *C.C.L.C.*, McIntyre J. held as follows at p. 779: “It is my view [...] that Canadian maritime law is a body of federal law encompassing the common law principles of tort, contract and bailment. I am also of the opinion that Canadian maritime law is uniform throughout Canada [...] Canadian maritime law is that body of law defined in s. 2 of the *Federal Court Act*. That law was the maritime law of England as it has been incorporated into Canadian law and it is not the law of any province of Canada.” See on the subject G. Lefebvre, *L’uniformisation du droit maritime canadien aux dépens du droit civil québécois : lorsque l’infidélité se propage de la Cour suprême à la Cour d’appel du Québec* (1997) 31 *R.J.T.* 577.

³⁰ Debates of the Senate (Hansard) 2nd Sess., 36th Parl., Volume 138, Issue 58, (18 May 2000), online: Parliament of Canada, http://www.parl.gc.ca/36/2/parbus/chambus/senate/deb-e/58db_2000-05-18-e.asp.

- ***First methodological implication***

The first methodological implication derives from analysis of the interaction between federal statutes and the civil law. The singular nature of the harmonization approach stems from the nature of the ties that bind federal law to the civil law of Quebec.

Describing the successive stages of reasoning justifying a legislative amendment recommendation, the harmonization process makes it possible, based on a preferred **characterization** model, to identify provisions likely to be harmonized and to obtain the most appropriate harmonization solutions. In a given legal situation, the following questions will thus be asked:

1. What is the intention of the legislator that presided over the establishment of the federal standard?
2. What is the linguistic and conceptual vehicle?
3. Is it a civil law or common law situation and which of the four audiences—civil law Francophones, civil law Anglophones, common law Francophones, common law Anglophones—does it concern?
4. What solution is likely to result in a bijural situation?
5. Does the chosen solution result in a linguistic or conceptual change, or both?
6. What is the most effective methodological and drafting technique for meeting the objective?
7. Lastly, what is the impact of the amendments thus proposed?

In the context of the harmonization work under way at the Department of Justice Canada, a legal situation can be considered either unijural or semi-bijural.³¹

- ***Second methodological implication***

The second methodological implication follows from the first, and that is that rules must be established for legislative drafting and harmonization. Here follow some guidance for the drafting and interpretation of future statutes:

Although both versions of a federal legislation are equally authoritative, it is important to ensure that the civil law and common law concepts used or eventually proposed are each given the meaning they have in the legal system in which they originate and which is in effect in the province in which the statute is applied. This is of course a laudable objective, but recommending and drafting amendments to given provisions is never an easy matter where complex questions must be resolved. Federal legislation must simultaneously address four audiences and be both bilingual and bijural.

³¹ See L. Maguire Wellington, *Bijuralism in Canada: Harmonization Methodology and Terminology*, in *Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism: Second Publication*, Booklet 4 (Ottawa: Department of Justice Canada 2001).

The creation of new terms and the development of new research techniques is thus accompanied by new legislative drafting techniques or, it might also be said, harmonization methods such as the *double*, either *simple* or *paragraphed*, which consists in expressing, through different terms, the legal rule applicable to each legal system, or *neutral terminology*, that is employing neutral terms that have no connotation in either legal system.³²

All these reflections on the forms of coexistence of the two legal traditions in Canada leads us to recognize that the interaction of two systems can influence the evolution of one or the other, and sometimes even both. Canada is not the only country in which these phenomena are found. Studies of Canadian bijuralism can be enhanced by consideration of legal systems elsewhere in the world. The United Kingdom, the United States, and Europe provide examples of other possible forms of interaction between these legal systems.

³² *Ibid.*

PART III

FORMS OF COEXISTENCE OF THE TWO LEGAL SYSTEMS IN OTHER PARTS OF THE WORLD

There are many instances of bijuralism around the world. Nearly one hundred countries are governed by a combination of two or even more systems of law. Bijuralism is most often the result of the juxtaposition of a legal system—typically civil law or common law—with a pre-existing law such as customary law, Islamic law or Talmudic law. The combination of *civil law/common law* is much rarer and found in scarcely fifteen states. The examples which follow will deal with some of these.³³

The United Kingdom³⁴ and laws applicable in Scotland

England and Scotland were autonomous kingdoms until James VI succeeded to the throne of England in 1603. Starting in that year, they shared the same head of state, but remained two separate kingdoms. Unification was achieved in 1707 by the *Union with Scotland Act* and the *Union with England Act*. The creation of the new kingdom, Great Britain, with its own Parliament, resulted in the disappearance of the English and Scottish kingdoms and their parliaments. Despite the Union, Scotland retained its private law and courts, but the House of Lords, consisting mainly of judges trained in the common law, became the court of highest jurisdiction in civil matters. The disappearance of Scotland's Parliament gave the British Parliament the power to amend Scottish private law, which power was to be exercised “for the evident utility of the subjects within Scotland”.

The United Kingdom's legal system in this context is bijural: the English common law and the Scottish civil law coexist because *The Union Act* provided that Scotland would retain its private law.

In 1998, Parliament passed *The Scotland Act 1998*, which established a Scottish Parliament with jurisdiction in a number of matters.³⁵ The Scottish Parliament's jurisdiction is not exclusive. Other matters such as defence, social security, foreign policy, immigration and citizenship and unemployment are solely under the jurisdiction of the Parliament of the United Kingdom.

In Scotland, the laws may be of local origin (United Kingdom, Scotland) or supranational origin (Europe). Most of the laws that apply in Scotland are passed by the Parliament of the United Kingdom. Scottish statutes in effect include *The Union Act (1707)*, Scottish statutes prior to Union and those passed by the Scottish Parliament since 1999.

The legislative process frequently accommodates the different legal traditions of England and Scotland by means of a number of methods:

- the use of a neutral legal vocabulary, one not based in either tradition (e.g., the expression “devolution by law” used in section 2 of the *Succession Duty Act* is a purely descriptive expression of the situation contemplated);
- the use of the Scottish legal term following a common law term (e.g., *Partnership Act*, *Bill of Exchange Act*);

³³ The following examples were given to us by our colleague, M^e Elise Charpentier, during her time at the Department of Justice.

³⁴ Great Britain includes England, Wales and Scotland, whereas the United Kingdom refers to Great Britain and Northern Ireland.

³⁵ For example, health, local communities, education, housing, transportation, sports, law and order, agriculture, fisheries and forests, the arts, etc.

- the adaptation of statutes by specific provisions such as section 7 of the *Damages Act 1996*: “In the application of this Act to Scotland 'personal injury' has the meaning given by subsection 10(1) of the *Damages (Scotland) Act 1976*” and section 17 of the *Defamation Act 1996*: “In this Act as it applies to proceedings in Scotland 'costs' means expenses; and 'plaintiff' and 'defendant' mean pursuer and defender.”

What of the principle of complementarity in the United Kingdom? Although the courts acknowledge that the laws are intended to be applicable in two separate systems of law, they interpret the law on the basis of the meaning attributed to the legal terms in the tradition from which they originate. They then apply the statute analogously to the other tradition.³⁶ The interaction of the civil law and common law thus gives rise to the dissociation of these two systems rather than their complementarity.³⁷

Thus it is said that the Scottish law is a civil law imbued with Roman law and the result of a lengthy evolution. Its principles have been drawn from numerous sources (canon law, *lex mercatoria*, allodial law, Celtic law and feudal law). Roman law has exercised a decisive influence comparable to that of English law. Following unification, a number of common law-based solutions were incorporated in Scottish law. Although the House of Lords did not deliberately anglicize Scottish law, its role in this regard cannot be underestimated: it at times applied English solutions to Scottish problems, thus disregarding the principles of that law. The sources of Scottish law are custom and usage, statutes, case law and doctrine. Certain doctrinal texts dating from the late XVIIth and XVIIIth Centuries are considered as formal sources of law and are the work of “institutional writers” (Stair, Erskin, Bell and Hume).

United States and laws applicable in Louisiana

The United States is a country with a federal constitution. The states have preserved their legislative powers, the American government enjoying only limited power, legislating only to the extent that the states have delegated that power to it. This is provided for by the Tenth amendment:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.³⁸

Each state has the power to establish the rules of private law that it deems appropriate, hence the plurality of legal systems which makes the United States a bijural country. The private law includes the civil law but not necessarily commercial law since Article I, Section 8 provides:

The Congress shall have Power [...] To regulate Commerce with foreign Nations, and among the several States [...].³⁹

Most states adopted the common law, but Louisiana preserved the civil law. From the time it was colonised, the territory that would later become Louisiana was subject to French law, namely the *Coutume de Paris*. In 1762, Spain acquired Louisiana and imposed its law in 1769. That left the greatest mark on Louisiana because, although Spain ceded the territory back to France in 1800, France allowed Spanish law to remain in effect. Similarly, upon the sale of Louisiana to the United

³⁶ *Income Tax Commissioners v. Pemsel*, (1891) A.C. 531.

³⁷ However, the courts recognize the particular nature of Scottish law in determining the applicable rules of law. Thus it was held (*Levy v. Jackson*, (1903) 5 F. 1170) that an act drafted without reference to Scottish institutions, the terminology of which was English and which reflected only English procedure and English public officers did not apply to Scotland, despite the presumption that Scotland is subject to statutes containing no express limitation.

³⁸ See <http://www.access.gpo.gov/congress/senate/constitution/toc.html>.

³⁹ *Ibid.*

States in 1803, Congress did not impose the common law on the territory, even though it had the power to do so at the time. Congress lost this power when Louisiana became a state in 1812.

At its inception, the state of Louisiana provided in its constitution that it would never be permitted to adopt unwritten law, thus excluding the common law.⁴⁰ This law was “codified” in 1808, although reference is usually made to the Civil Code of 1825, since many additions and amendments were made to the Code at that time.⁴¹ The Civil Code was revised in 1870 and 1987.⁴²

Does the principle of complementarity exist in the United States? The American legal system consists of courts that apply federal law and other courts under the jurisdiction of each of the states that apply state law.⁴³ Except in constitutional matters, cases may be brought before a federal court or a state jurisdiction. Among other things, the system is intended to ensure standard administration and interpretation of federal law throughout the land.

When the federal courts are called upon to interpret a state statute, and a question pertaining to a state law arises in a matter of federal law, they must adopt the interpretation of the courts of that state.⁴⁴ This is what the U.S. Supreme Court held in *Erie Railroad Co. v. Tompkins*:⁴⁵

Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or “general”, be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.

A federal statute may moreover contain provisions contrary to the private law of the state, whereas the federal law applies as though the state law did not exist.⁴⁶ As a result it was held that a retirement pension paid to a soldier was not part of the community of property, contrary to the prescriptions of Louisiana law.⁴⁷

Europe and the autonomy of European law

In 1951, the treaty of the European Coal and Steel Community (ECSC)⁴⁸ laid the groundwork for a new Europe by creating a “High Authority”, a Parliamentary Assembly, a Council of Ministers, a Court of Justice and an Advisory Committee. It was followed by the treaty of the European Economic Community (EEC),⁴⁹ which provided *inter alia* for the elimination of customs duties between member

⁴⁰ See *inter alia* A.A. Levasseur, “La réception du système de la common law par le système législatif français en Louisiane”, *La réception des systèmes juridiques : implantation et destin. Textes présentés au premier colloque international du Centre international de la common law en français (CICLEF)*, Doucet, M. and Vanderlinden, J., Ed., Bruxelles, Bruylant, 1994, 381; *id.*, “Le bijuridisme dans un système fédéral ou d’autonomie locale — États-Unis”, *Contemporary Law, National Reports to the 1990 International Congress of Comparative Law*, Montreal, 1990; R.A. Pascal, note 41.

⁴¹ These amendments, among others, were necessary in order to facilitate the work of jurists who always had to consult Spanish law since the text of 1808 had not had the effect of repealing it. See R.A. Pascal, “Louisiana’s Mixed Legal System”, (1984) 15 R.G.D. 341, p. 342.

⁴² See N. Yiannopoulos, “The Civil Codes of Louisiana”, *Louisiana Civil Code 1993*, St. Paul, Minn., Wets Pub. Co., 1993.

⁴³ However certain matters are under the exclusive jurisdiction of the federal courts. See A. Levasseur, *Droit des États-Unis*, 2nd ed. (Paris: Dalloz, 1994) at 30-36.

⁴⁴ *Ibid.*, p. 36, A.R. von Mehren, *Law in the United States, A General and Comparative View* (New York: Kluwer, 1988) at 39ff.

⁴⁵ 304 U.S. 64 (S.Ct., 1937).

⁴⁶ See R.A. Pascal, *supra*, note 41, pp. 345 ff.

⁴⁷ *Dedon v. Dedon*, 404 So. 2d 904 (1981), cited by R.A. Pascal, *supra*, note 41, p. 346 (note 33).

⁴⁸ Entered into effect on July 25, 1952.

⁴⁹ Signed on March 25, 1957, entered into effect on January 1, 1958.

states, the establishment of a common external customs tariff, introduction of a common agriculture and transportation policy, creation of a European Social Fund, institution of a European Investment Bank and development of closer relations between member states. The guiding principles of the EEC treaty provided the framework for the legislative activity of the Community's institutions—common agricultural policy,⁵⁰ transportation policy⁵¹ and common trade policy⁵². The main objectives of the common market are to permit the free movement of goods, workers, businesses, services and capital.

In 1986, the European countries entered into a new treaty, the *Single European Act* (SEA),⁵³ the main objectives of which are to enhance the role of Europe's Parliament to correct the democratic deficit in the community's decision-making system and to enhance the Council's decision-making ability. To do so, decision-making procedures were expedited and European institutions were granted new powers in areas such as domestic markets, social policy, economic and social cohesion, research and technological development and the environment. One of Europe's main new projects, described in Title VI of the *Maastricht Treaty* of 1992, is the construction of an "Area of freedom, security and justice". Title IV of the *Amsterdam Treaty* of 1997 gave concrete form to this domain by setting out new legislative options. Common security and police and judicial cooperation remain under the Union's jurisdiction,⁵⁴ while questions of justice and internal affairs⁵⁵ are under that of the European communities.⁵⁶

The European Community is in the process of shaping a common law in which English common law and French-style civil law play an important role. In the economic field, the European Community is establishing itself as a source of specific, autonomous law with a hierarchy of its texts (regulations, directives, recommendations, notices and communications) and particularly with the role of the Court of Justice of the Communities whose well-settled case law affirms the primacy of Community law over national laws. The Community strives moreover to create favourable conditions for the integrated development, through *harmonization*⁵⁷ of national legislation or by creation of a community law. Harmonization is done on the basis of directives which establish the standards which member states must incorporate in their national law. The directives may concern a host of subjects, in particular agriculture, transportation, internal trade and consumer protection. The creation of a community law directly applicable in the member states is being effected by the adoption of regulations.⁵⁸

⁵⁰ Ss. 38-43.

⁵¹ Ss. 74-75.

⁵² Ss. 110-113.

⁵³ Signed on February 17, entered into effect on July 1, 1987.

⁵⁴ See articles 11 to 45 of the Treaty of the Union.

⁵⁵ That is to say asylum, immigration, visas and judicial cooperation in civil matters.

⁵⁶ See ss. 61-69, *Treaty Establishing the European Communities* (former articles 73 I-73 Q, *EC Treaty*). Since May 1999, three initiatives have already been completed: *Regulation on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters*; *Regulation on insolvency proceedings*; *Regulation on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses* (Brussels II).

⁵⁷ As the presentations made at the *Evolution of Legal Systems, Bijuralism and International Trade* conference in Ottawa in October 2000 will attest, we should note that the term "harmonization" is used in the European experience to describe a very different situation from that addressed by the harmonization work under way at the Department of Justice. The drafters of European law have a more marked preference for neutrality and even the creation of new terms which have gained the approval of various legal stakeholders. The results of the harmonization work done at the Department suggest a greater likelihood of *cohabitation* (Marie-Claude Gervais, Moncton article) of the two traditions in a given provision through use of the double and territorial limitation.

⁵⁸ *Council Regulation (EEC) No. 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG)*, for example, affords the corporations of the member state the opportunity to cooperate in a common purpose with corporations or individuals of other member states.

The main object of the harmonization of national legislation is not private law but rather standards specific to the free movement of goods, services, people and capital (i.e., standards for product manufacturing, packaging, transportation, service standards and tariff deregulation). The Community law thus has a much greater impact in the field on regulatory or administrative law. However, private law may be directly concerned. In other cases, it is simply drawn on for the implementation of regulations or directives, as is the case in the field of transportation with respect to the application of the principles of civil liability to accidents.

European standards do not emanate from a state body but rather from an organization both supra-governmental and intergovernmental. The division of powers among the member states and the community is governed by the principle of subsidiarity. This principle implies that the member states retain their power in fields where they are more effective, and the powers they cannot satisfactorily exercise fall to the Community.

In comparing the European situation to that prevailing in Canada, it must first be emphasized that the nature of standards is quite different. However, regulations may be likened to federal statutes in that they are directly applicable in each of the countries. Unlike the statutes of the Canadian provinces, the legislative, regulatory and administrative provisions of the member states are lawful only to the extent the regulations provide or that is required for their effective application. In addition, the implementation measures taken by member states cannot in any case alter or supplement the scope and useful effect of a regulation.⁵⁹

General Conclusion

What happens when a Federal legislator, working in his field of competence, calls into play private law that is within the provincial sphere in virtue of subsection 92(13) of the *Constitution Act of 1867*? We know that the domains of marriage and divorce, bankruptcy and insolvency, and intellectual property are obvious examples. Moreover, in many laws that pertain principally to public law matters we find the presence of dispositions that call for private law concepts that regulate private law relationships. In fact, more than 300 (three hundred) federal laws in effect contain clauses that relate to provincial competency in private law. Even though Parliament is not legally required to express itself in a bijural fashion, these laws must integrate, in their two linguistic versions, the civil law of Quebec and the common law of the other provinces. The Honourable Justice Viau has stated that this is how Canadian courts conceive of and interpret them. The task becomes more difficult, he also states, when the Federal legislator uses vague terms instead of the more precise ones of the Civil Code or when it gives priority to the common law in both linguistic versions. He justly cites Professor Morel:

[translation] "This clearly happens when federal legal rules are phrased exclusively in common law terms, or where they reflect notions particular to the common law, making reconciliation with the civil law system difficult. It also occurs when a statute artificially equates civil law concepts with common law concepts through definitions or interpretative provisions."⁶⁰ We know to what point the situation has become more complicated since the coming into effect, in 1994, of the *Civil Code of Quebec*, which made substantial changes to certain concepts, ideas, and institutions.

Because of this interaction of rules originating from different sources which is a phenomenon which cannot be separated from Canadian law, the department of Justice Canada adopted the

⁵⁹ See *EC Treaty*, art. 10(5).

⁶⁰ P. Viau, *supra* note 3, at 144, which cites A. Morel, "Harmonizing Federal Legislation with the *Civil Code of Quebec*: Why? and Wherefore?" in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism—Collection of Studies* (Ottawa: Department of Justice Canada, 1999) at 15.

Policy on Legislative Bijuralism, implemented a Program to Harmonize Federal Legislation with the Civil Law of Quebec, and established a Committee on Bilingualism and Bijuralism

However, the harmonization of federal legislation with Quebec civil law has long been an issue because, prior to the 1970s, federal statutes and regulations were essentially based on common law. They were drafted in English and translated into French by translators who had no particular legal background. As the Department did not have the French common law and English civil law resources it currently has, the requirements of bilingualism were met, but those of bijuralism had yet to be clarified. Since 1978, federal bills and regulations have been drafted by teams of two jurists, one Anglophone (usually a common law lawyer), the other Francophone (most often a civil law lawyer).

The comments made during the consultation conducted by the Department between 1988 and 1991 on the French version of federal legislation helped gain an understanding of how important it is that both versions faithfully reflect Canada's two legal systems. Many Francophones outside Quebec and Quebec Anglophones have lamented the fact that the French version of federal legislation is too heavily based on the civil law and the English version too dependent on the common law.

In harmonizing federal legislation in light of the *Civil Code of Quebec*, the Department of Justice also noted that a harmonization of federal legislation was necessary, not only with just the new features of the Civil Code, but also with the Quebec Civil Code as a whole.

It is difficult enough to draft legislation in two official versions in a country that has only one legal system. But responding to the imperatives of institutional bilingualism and drafting bilingual legislation in a bijural context constitutes a real challenge. In fact, adds the Honourable Justice Viau, it is easier,

[translation] "to discuss these questions in the abstract than it is to draft laws that exactly respect stated principles. The ideal system would have been to adopt not less than four official versions: a civil law version in French and in English, and two others based on common law. The cost would be prohibitive, given the number of laws affected."⁶¹

It is in this context that in June 1995, the Department of Justice adopted a policy on legislative bijuralism in which it undertakes, whenever a federal bill or regulation concerns provincial or territorial private law, to draft each of the two versions of that legislation in a way that reflects the terminology, concepts and institutions specific to the two Canadian systems of private law.

The *Policy on Legislative Bijuralism*⁶² thus acknowledges that the four Canadian audiences—common law Anglophones, civil law Anglophones, common law Francophones and civil law Francophones—must be able to read federal legislation in the official language of their choice and find its terminology and phrasing consistent with the legal system in effect in their province or territory.

The Department of Justice Canada is thus an organization that believes in bijuralism and its advantages, as attested to by its modernization work. The putting into effect of bijuralism by the Department of Canadian Bijuralism has no counterpart or precedent in the world, linked as it is to Canadian legal history.

⁶¹ P. Viau, *supra* note 3, at 145.

⁶² L. Maguire Wellington, *supra* note 31, in appendix 3.

By lending strength and substance to bijuralism, the Department better reflects Canadian reality and ensures that Canada continuously develops its legal system both on a national level and as regards the challenges of globalization. Other countries, by virtue of their internal structure or commercial necessity, face similar challenges. This article has dealt briefly with these.

The diversification and complexity of legal instruments has placed the law in a new dynamic that is not unfamiliar to these countries, especially Canada with its history of the coexistence of two legal systems. The mandates given to our Department on the national and international level attest to this, as do the steps undertaken by the Department to promote Canadian bijuralism with the Department's partners.

The comparative analysis of common law and civil law that is necessary as a result allows one to identify each system's values and limitations. The analysis also contributes to an improvement and a rationalization of the law in Canada and elsewhere in the world. Finally, it also contributes to a questioning of our methods of legal interpretation and of the underlying values in the development of our legal norms. In other words, the coexistence of legal systems and their practical realization leads to other, even more remarkable discussions.