The Right Honourable Beverly McLachlin, PC

Canadian Bijuralism: A Conversation of Cultures

Canada's legal culture is a mixed legal culture, encompassing both the common law tradition inherited from England, and the civil law tradition, which connects Canada to its roots in Continental Europe. This mixed legal culture has come to be known as bijuralism. Inevitably, the presence of two legal cultures or traditions on Canadian soil means that they often come into contact with one another; the interaction of concepts, values and practices expressed in each of those legal traditions results in a true conversation of cultures. I will suggest that broader insight can be drawn from the conversation of Canada's legal cultures, insight that may be helpful in other contexts in which a plurality of cultures or systems of values and norms interact in a sustained manner, within a single space.

I begin by explaining how Canada came to encompass both the civil and common law traditions and how Canada's federal system affects the conversation between these legal cultures. I will then consider the three possible modes of interaction that are possible where legal traditions, cultures, religions, or any other set of norms and values coexist, wrestle or clash in the same space: denial of plurality, which leads to the silencing of the minority tradition; acknowledgement of plurality, which requires one to create a space for each tradition; and embracing plurality, which treats the conversation of cultures less as a challenge than as a gift. I will examine how patterns reflecting each of these modes of interaction have repeated themselves, concluding that despite the unquestionable challenges posed by plurality, there is hope for a fruitful embrace of competing visions which must surely yield better self-knowledge and peaceful coexistence.

Canada's Experience of Bijuralism

The Roots of Bijuralism in Canada

The common and civil law traditions can be distinguished generally on the basis of a few defining characteristics. Historically, the civil law tradition arose in Continental Europe, and traces its origins back to a revival of Roman law that took place between the twelfth and sixteenth centuries. It is characterised by a faith in written law, often manifest in

the presence of a Civil Code, in which ordinary rules relating to family, property, contracts and wrongdoings, successions and other such topics – the rules of private law – are expressed in general language, arranged systematically. It is a legal tradition that accords primacy to the sovereign in the act of stating the law (Watkin 1999). As a result, judges in civil law countries typically deny that they are making law when they decide cases.

By way of contrast, the common law tradition finds its roots in Great Britain in the eleventh century (Bélanger-Hardy and Grenon 1997). It underlies the legal systems of the United Kingdom and the United States, as well as Commonwealth countries around the world. It is characterised by the special authority given to concepts and principles developed over time by judges deciding particular cases and, as a result, by the emphasis on unwritten law and incremental conceptions of the quest for justice (Glenn 2004).

While problems in the two legal traditions often reach very similar solutions, one can see from this brief sketch that they operate under very different assumptions about, among other things, the role of legislatures, the role of judges, and the optimal mode of expression of legal norms. Civil law and common law are different legal cultures in that sense. They are two different languages which communicate differently within the law. How is it, then, that Canada came to house these two Western legal cultures?

The early history of Canada, as is well known, is a mixture of settlement and conquest. In a land occupied by our First Nations, portions of Canada were settled by British subjects, who were presumed to have brought the common law tradition with them (Hogg 2002). However, what is now referred to as Central Canada was originally settled by the French, who established the civil law Custom of Paris as the principal set of legal norms in New France (Dickinson 2001). When the territory of New France was ceded to Great Britain by the Treaty of Paris in 1763, it was imagined that the new ruler could replace the pre-existing civil laws and legal institutions with new ones. Thus the Royal Proclamation, 1763 (UK), RSC 1985, Appendix II, No. 1 required the governor of Quebec to establish courts to decide all matters 'as near as may be agreeable to the Laws of England'.

While this was certainly advantageous to the British merchants who were coming to the newly conquered territory, it did not sit well with a population that lived and had been educated under French law. Indeed, there is historical evidence that the Canadiens, as the French population

was then referred to, effectively ignored the change of legal systems and continued to resolve their property, succession, family and contract disputes through old French law, resorting to priests and notaries as mediators, thus staying away from the courts (Brierley 2001). For ten years, the law in the books was not coterminous with the law in action and, eventually, under pressure from Governor Carleton and the Canadian population, the Crown re-established the Civil Law on the territory of its colony, through the Quebec Act, 1774 (UK), RSC 1985, Appendix II, No. 2.

When Confederation came in 1867 and the former British colonies united, the new country was made up of four different provinces. Three of these provinces, New Brunswick, Nova Scotia and Ontario, continued to rely on the common law tradition as the expression of their general law. On the other hand, the province of Quebec retained its historical connection to the civil law tradition of France. As further colonies and territories joined Canada, the province of Quebec remained the only one with this link to the civil law, and this characteristic remains one of its distinctive features to this day.

Bijuralism in Practice: Separate Lives within a Federal State

Having considered the roots of bijuralism in Canada, the question of what bijuralism means in concrete terms arises. Canada is a federal state. Within a federal state, the coexistence of several legal systems is neither unusual nor problematic. Each province is granted constitutional authority to make laws in respect of certain matters, for application within a defined geographical area (Hogg 2002). As long as each province is viewed as a self-contained legal system within its sphere of jurisdiction, the coexistence of legal systems within a federal state need not be more significant than the coexistence of legal systems of different countries on the international scene. The interplay of legal systems is neither more complicated, nor less complicated, across provincial boundaries than across national boundaries. Within Canada, as within Europe, or on the world scene, one confronts different rules, different languages, as well as different legal cultures.

This aspect of the interplay of legal systems across borders gives rise to two phenomena. The first phenomenon is the cross-border legal problem. Because human beings cannot be expected to remain in one place forever, the fact that legal systems are not identical across borders is bound to generate circumstances in which it is difficult to determine whether the rules of one system or the rules of another system are

applicable. Citizens married in one jurisdiction may give birth to children in another, invest their life savings in a third, divorce and remarry in a fourth, and die in a fifth jurisdiction, as in the nightmarish hypothetical of law school exams. All legal systems have developed rules to address what are then called 'conflicts of laws' or 'private international law' issues. Those rules determine, for instance, the status and capacity of persons by the law of their domicile, the required form for contracts by the law of the place where they are made, or the rights and obligations of parties to a transaction by the law that they have chosen, or the law of the country with which the transaction is most closely connected, in light of all the circumstances (Collins [ed.] 1993). Similar rules govern the exercise of jurisdiction by one court over foreign nationals, and the recognition and enforcement of foreign judgements within one's national courts (North and Fawcett 1999). But subject to principles of reciprocal cooperation, cross-boundary convenience, and, within the Canadian federation, certain constitutional imperatives, each jurisdiction controls the extent to which legal events in another nation are recognised within its territory. This results less in a conversation of cultures than in a one-sided appreciation of the foreign and extraneous.

The second phenomenon arising from the interplay of legal systems across borders is the practice of comparative law. Where different legal systems or cultures exist side by side, it is inevitable that someone, somewhere, will be tempted to look over the fence at what is happening next door. Scholars will study, analyse and explain the similarities and differences. Law-makers may look to neighbouring jurisdictions for inspiration in reforming the law or tackling similar issues. Policy-makers may push for harmonisation of law across borders, in order to serve wider economic or political goals. Against the latter, others may advocate the protection of their fragile legal culture from the overwhelming influence of dominant ones. There is a thriving practice of comparative law in Canada, which looks to the civil law and common law, as well as the law of different provinces. It is often pursued as an end in itself – comparative law for the mere sake of greater knowledge. And it is sometimes invoked by those who favour unification of law, and by those who resist acculturation.

Because of its position as the highest court in Canada, the Supreme Court has been a recurring participant in the practice of comparative law. While most cases come to us from provincial appellate jurisdictions, there is no question that each ruling may have a significant impact beyond the provincial jurisdiction from which it emerges. As a result, we must always

be sensitive to the distinctive legal regimes in force within each of the provinces. This may not be overly demanding where rules and ideas travel from one common law province to the next. On the other hand, the Supreme Court must be especially careful not to undercut the genius of the civil law or the common law by carelessly transposing principles and concepts from one tradition to the other. In this regard, in the first half of the twentieth century, the Supreme Court of Canada was criticised for needlessly undermining Quebec civil law through ignorance of its distinctive voice (Azard 1965). A better understanding of the conditions of comparative law has improved matters since then.

Whether in the Supreme Court, in legislation or in scholarship, comparison always remains a matter of choice – the choice to look over the fence in search of knowledge, answers and models. What we are concerned with here, however, are circumstances in which the interplay of legal systems or cultures is not a matter of choice, but a matter of obligation, compelled by the mixed nature of a jurisdiction. A good example of that, and the topic here, is the interplay of civil law and common law within federal legislation.

We have seen how Canada came to encompass both the civil law and the common law traditions, and how different provincial legal systems resting on those traditions can exist in relative isolation from one another, being largely autonomous yet not totally oblivious to one another's presence. On the federal scene, however, Parliament is competent in many fields to pass legislation that must be comprehensible and effective throughout the country. Federal laws must speak to all Canadians in a language that they will understand. Leaving aside the complexities of drafting legislation in both of Canada's official languages, English and French, I will address the equally complex effort to speak in the voice of the civil law and the common law within a single legislative text, beginning with a brief discussion of federal legislation in Canada. I do this in order to shed some light on the ways in which conflicting sets of norms and values interact with one another.

The Special Challenge of Bijuralism in Federal Law

Under the Constitution Act, 1867, RSC 1985, Appendix II, No. 5, the provinces of Canada are competent on all matters relating to 'property and civil rights' (s. 92(13)), which has been understood to include most of the domain of private law: property, indeed, but also, for instance, family law, wills and estates and ordinary commercial and personal transactions (Hogg 2002). Thus, within each province, these matters are governed by

provincial legislation set against the background of a general law, or a *ius commune*, linked either to the common law, or, in the case of Quebec, to the civil law tradition.

In this context, it may not be obvious how the civil law and the common law can ever be brought together in a single piece of legislation, but this occurs at the federal level in a number of ways. Generally speaking, federal legislation, just like provincial legislation, must be set against the background of a general law. A statute will not always define every concept or term it uses to state the rule. Thus, for instance, when the federal Income Tax Act, RSC 1985 c. 1 (5th Supp.) makes reference to a debt, or a contract of sale or lease, or the age of majority, the meaning of those terms must often be found in the underlying principles and concepts of general law. But what 'general law'? Whereas provincial legislation rests on a single body of rules and principles constituting its general law, federal legislation potentially rests on as many general laws as there are provinces and territories – it is a single plant growing in many different soils. Where the meaning to be given to a private law expression used in a federal statute is unclear, courts will refer to the applicable provincial private law for interpretation (Department of Justice Canada 2003). Stated differently, the legal systems of the provinces, including the distinctive civil law system of Quebec, are in a very real sense included by way of reference into federal legislation. This is referred to as the principle of complementarity (Department of Justice Canada 2003).

The phenomenon of complementarity between federal legislation and provincial legal principles and concepts is particularly acute in areas where Parliament has competence over matters that fall within private law. Under the Constitution Act 1867, the federal Parliament is given legislative competence over matters such as marriage and divorce (s. 91(26)), bankruptcy and insolvency (s. 91(21)), bills of exchange (s. 91(18)), and copyrights (s. 91(23)) and patents (s. 91(22)), all of which could have formed part of 'property and civil rights', which we have seen fall to the provinces under section 92(13). In those areas, more so perhaps than in other matters within federal competence, the choice of language of expression – common law or civil law or both, or something else altogether – is exceedingly complex. How does Parliament speak in private law matters? How can it do so in a manner that reflects the different legal cultures of its audience?

The scope and complexity of this problem was not fully understood until an important event brought it to the front stage. In 1994, the

Province of Quebec enacted a new civil code, the Civil Code of Quebec, to replace the Civil Code of Lower Canada, which dated from 1866. One obvious question arose: assuming that some existing federal legislation rested on terminology and concepts expressed in the old civil code, what was the impact of the new codification? Had it indirectly altered the content of federal legislation? Were some federal statutes now obsolete, at least in the province of Quebec, with the codified 'rug' pulled from under their feet?

The federal Department of Justice began considering these issues in the year the Civil Code of Quebec was enacted. A rapid survey of its legislation revealed that, indeed, many statutes would have to be amended to reflect the revised terminology and concepts of the new civil code (Morel 1999). An effort to harmonise the federal law with the reformed civil law of Quebec would have to be undertaken. But as legislative drafting principles were being considered in this context, a deeper conundrum emerged. The starting point was the realisation that all Canadians, those living in common law jurisdictions and those living in the civil law jurisdiction of Quebec, were the intended audience of the federal legislation. As a matter of principle, each of them would have to understand it, and to recognise in it traces of his or her own legal culture.

From this perspective, the survey of federal legislation revealed serious failings. Much of federal legislation was drafted in the conceptual language of the common law (Morel 1999), systematically ignoring the citizens of Quebec, who could not recognise themselves in this framework. And indeed, given the relative weight of the common law and civil law in Canada, that was not a surprising outcome – the overwhelming presence of the common law tradition had made it, over the years, an obvious reference point for federal legislation.

Other federal legislation provided evidence of an earlier drafting policy that had linked legal traditions to language. The English version of the statute was expressed in common law terms, and the French version was expressed in civil law terms (Morel 1999). But that was obviously problematic as well, in light of the presence of English-speaking citizens within Quebec, and the presence of French Canadians in the common law provinces. In effect four legislative voices were necessary to address the interplay of languages and legal cultures: civil law in French, common law in English, but also civil law in English, and common law in French.

While this may be complicated, the importance of acknowledging Canada's legal cultures was recognised as being greater than any complexities

which would arise in legislative drafting. In 2001, Parliament adopted the Federal Law-Civil Law Harmonisation Act, No. 1, SC 2001, c. 4, which amended the most problematic statutes, and introduced new forms of legislative drafting, reflecting the particularities of bijuralism in Canada. Some provisions, in effect, did resort to the four legislative voices of Parliament and expressed the rule in French and English, with terminology drawn from the common law and from the civil law. As is the practice in Canada, these legislative texts are now published side by side in both official languages, so that the four articulations of the rule speak to one another for interpretive purposes. Other provisions, much less numerous, seek to establish a neutral terminology, drawn from neither the civil law, nor the common law, but nevertheless meaningful in both traditions. In these new forms of legislative drafting, one can see the tangible signs of a mixed legal culture, defined by the inescapable dialogue of different, and possibly conflicting, representations of the world and ways of being in the law.

Drawing Insight from Bijuralism

What can we draw from this brief incursion into the meanderings of bijuralism and legislative drafting in Canada? I suggest that there are three lessons that emerge from this Canadian effort to reinvent the language of national legislation.

The first lesson is obvious: many of our discourses and practices exclude others and it is easy to be oblivious to that fact. We have seen that the common law tradition is, numerically, the dominant legal tradition in Canada. Historically, it is most often expressed in the English language, which is also the dominant language in Canada. Taken together, these features explain why much federal legislation was drafted in a manner that did not take account of the historical and continued presence of the civil law tradition, and of the importance of giving expression to this presence. For those who partake of the dominant discourse, it always sounds natural, and only those who are excluded can hear their own silence. But enacting rules and drawing boundaries that make other cultures invisible to us does not always eradicate them. They may still exist underneath the surface of uniformity that we create. Thus the attempt to erase the civil law from Quebec in the eighteenth century was met with passive resistance on the part of the Canadiens, and the failure to acknowledge its presence in later federal legislation merely pushed

contradictions and dissonance off the stage, without resolving them.

The second lesson is also obvious: acknowledging plurality is more complicated than ignoring it, but is well worth the effort. It is indisputable that statutes were shorter and simpler when drafted in the single voice of the common law, or in the two dominant voices of the common law in English and the civil law in French. It is also true that the juxtaposition of civil law and common law in a single legislative text highlights the potential for disharmony, and the very real possibility that federal legislation does not have exactly the same scope and meaning within the Province of Quebec as elsewhere in Canada. But it is equally true that much is gained in the light that each text, each additional expression of the norm, sheds on the other. Just as one version of bilingual legislation may sometimes resolve ambiguities present in the other version, the interplay of civil law and common law versions of the same norm offers additional indications of legislative intention, and additional avenues for further development of the norm.

Of course, the legislative practice of bijuralism presupposes that the drafters and at least some members of the intended audience of legislative texts are able to decode both versions at once. Two separate audiences, each receiving one side of the text, would never be able to ascertain any correspondence between the versions. This leads us to the third lesson: the very idea of bijuralism, of legislation expressed in the language of two distinct legal traditions, highlights the possibility of communication across the barriers that separate distinct cultures. It highlights the possibility of neutral language that serves as a bridge between them. It highlights the possibility that rich and complex mixed identities might emerge from the conversation of cultures.

In short, our experience with bijuralism points to three modes of interaction between cultures occupying the same space. The dominant culture may deny the existence of the plurality and exclude other cultures in its midst from official recognition, as in federal legislation written in a single voice. The dominant culture may acknowledge the presence of other cultures in its midst, make room for its expression, and confront openly the difficult issue of conflicting sets of norms, as in federal legislation with multiple voices. Finally, the dominant culture may embrace the presence of other cultures in its midst, consider it as a gift and a challenge, and seek better expressions of its values in a new discourse that builds on diversity, as in federal legislation constructing a new private law that resonates in both legal traditions.

These ideas should be taken further. Thus far, I have considered the

interplay of the civil law and common law, two Western legal cultures, within federal legislation. Yet there are other legal cultures in Canada, aside from those that were brought by European settlers. While Aboriginal legal orders may be largely suppressed, the legal fact of their existence is undeniable. Our First Nations had, and continue to have, distinctive conceptions of law, property, community, personal wrongdoing and so on. As a result, it must be recognised that Canada's diversity of legal cultures is only partially addressed in bijural legislation. But that is not to say that the same modes of interaction of cultures – denial, acknowledgement and embrace – are not relevant in this context as well.

Our country's policy toward the ancestral inhabitants of Canada's lands, the Aboriginal Peoples, has throughout its history veered between denial, exclusion and assimilation on the one hand and respectful acceptance on the other. Prior to Confederation, Aboriginal groups were more often than not treated as autonomous nations (Hogg 2002). But in the nineteenth century, as settlement progressed, exclusion, confinement and assimilation came to dominate Canadian policy (Harring 1998). The results, most now agree, were, at best, a failure, at worst, tragic. The simultaneous pursuit of exclusion and assimilation produced cultural displacement, marginalisation and tragic loss of identity and self-esteem.

The policy of exclusion cut Aboriginal Peoples off from opportunities available to the rest of the country. At the same time, the policy of assimilation undermined their identity as members of a group – their shared history, language and culture. The good aspects of the group dynamic – a solid identity rooted in one's history and culture – were weakened; the negative aspects – isolation, alienation and lack of opportunity – enhanced. Despite the often good intentions of well-meaning people, it is difficult to conceive in retrospect of a more problematic approach to the other.

Only in recent decades have First Nations people begun to reclaim their group identity and their rightful place in our country. Nowadays, recognition and reconciliation are the dominant objectives of Aboriginal law in Canada (Van der Peet 1996). In addition to the constitutional entrenchment of ancestral rights of Aboriginal peoples in s. 35(1) of the Constitution Act, 1982,[1] Canada now attempts to acknowledge the distinct Aboriginal cultures that exist in our midst, and to take advantage of the different light that they cast on Western legal conceptions. The task is not easy. Many Aboriginal concepts do not translate easily into the common law language of property, ownership and dominance. Yet, if we are to fully recognise and protect Aboriginal rights and entitlements, we must find a way to make them 'cognizable to the non-aboriginal system',

to borrow a phrase used by Chief Justice Lamer (Van der Peet 1996: note 21, para 49).

Canadian courts, haltingly at first, then more systematically, have come to understand this. Thus, it is now established that it is a mistake to approach Aboriginal issues, whether under treaty or at common law, from a purely Eurocentric perspective. We must seek to look at the matter through the eyes of Aboriginal people and their forbears (*Delgamuukw v. British Columbia* 1997). In short, acknowledging the presence of Aboriginal cultures within our legal system demands new approaches, new legal vocabulary.

Conclusion

I have considered the interplay of civil law and common law, and the interplay of Western and Aboriginal legal traditions in Canada, but in the diverse world in which we live, we could easily multiply the examples. Obviously, there are numerous instances of distinct cultures sharing the same space, of discrete sets of norms and values making conflicting demands on the self, and of separate communities struggling to live together in peace. One of the fundamental purposes of any legal order committed to justice and the rule of law must be the reconciliation of the diverse groups that make up its social fabric. Indeed, initiating and structuring these conversations of cultures is at once the greatest challenge and the greatest gift of modern democracies. In these conversations, the pattern of denial, acknowledgement and embrace, which is by no means sequential, is repeated *ad infinitum*. In Canada, as elsewhere, the denial of plurality is increasingly unacceptable. Legal institutions as well as individuals are struggling with the complexities of acknowledging the other, and the destabilising consequences of plurality. There is hope for a fruitful embrace of competing visions, yielding better self-knowledge and peaceful coexistence.

In closing, I must acknowledge that I may have underplayed how exceedingly difficult the conversation of cultures turns out to be in real life – and that I have not offered much by way of strategies to understand the other. I have simply pointed to values of tolerance, respect, and celebration of diversity, which are defining features of the Canadian spirit. But surely, the celebration of diversity does not translate into radical moral scepticism. Not every set of values is equally defensible; not every system of rules is equally worthy of recognition; not every culture,

no matter how harmful, cruel or oppressive, is to be embraced.

The higher standards that enable us to separate the inspiring from the demeaning are not to be found within a single culture. Much as a judge consciously holds her own values in check in the hope of achieving impartiality, these higher standards are to be found in the act of imagination which the conversation of cultures requires of each of us, in the effort to stand in the shoes of the other, to appropriate another view of the world, and to reflectively evaluate our own conceptions. The higher standards that enable us to live together in peace are to be found in the recognition that each of our individual identities are mixed, inextricably intertwined by history and our shared humanity – in the ultimate recognition that I am of you and you are of me.

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Notes

1. Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK, 1982, c. 11).

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