**Podcast 12 – My Law Includes Quebec: Understanding the Civil Law Tradition**

**Professor Forcese**

Welcome back to the virtual orientation for the English JD program. In this podcast I speak to Professor Pierre Foucher about the civil law tradition of the province of Quebec and how it’s distinct relative to the common law tradition in which you’re schooled in the JD program. Many of the people with whom you share the building at the University of Ottawa’s law school are being schooled in the civil law tradition. An understanding of the law of the province that lies just across the river is a useful aptitude for any common law lawyer. It is important to understand the terminology for any lawyer. Civil law in the context of this conversation with Professor Foucher refers to the civil law tradition of the province of Quebec inherited from the French tradition. The term civil law also arises in the common law tradition with reference to those private law issues such as tort, contract and property. They give rise to a civil cause of action or a civil action. Civil law in this matter is different from criminal law and so do not confuse the varying meanings of the word “civil” as we progress. Again the focus in this conversation is on the species of law inherited in Quebec from the French tradition known as civil law.

I began by asking Professor Foucher to introduce himself.

**Professor Foucher**

My name is Pierre Foucher. I teach here at the Faculty of Law in the University of Ottawa in both civil law and common law sections. I teach mainly introduction to public law, division of powers, federalism and also language rights.

**Professor Forcese**

And so your original learning in law would have been in the civil law tradition.

**Professor Foucher**

Yes, my background was in civil law. I graduated from the University of Montreal.

**Professor Forcese**

What is civil law?

**Professor Foucher**

Civil law is a system imported from France. The main topic or issue about civil law is the pretension to have all the law within one code. Civil law students and civil lawyers will mainly use a Civil Code to look into legal answers to any problem that is put to them.

**Professor Forcese**

How does that differ from the common law?

**Professor Foucher**

There are many differences. The common law is mainly a judge-made law. That is not to say that there aren’t legislation or statutes passed by our parliament, but the judges have a much more important role to play in common law.

In civil law, and it dates back to Napoleon and even earlier than that... Some civil law thinkers would say that the judge is just the mouth of the law. He has no role whatsoever in creating a rule. All he has to do is interpret a rule that he finds in the code.

**Professor Forcese**

Which jurisdictions in Canada use civil law?

**Professor Foucher**

Only Quebec and only in private law matters.

**Professor Forcese**

Some students will very quickly be learning in their common law studies; they will be taking topics that will be described as civil as opposed to criminal. Should they confuse our reference to civil topics in that context with which you mean by civil law?

**Professor Foucher**

No. Civil law relates to private law matters. For instance, in the Civil Code of Quebec you will find sections about contracts, torts, obligations, family law matters, responsibilities between parents and children, wills and estates. All matters pertaining to the private law of the citizen.

**Professor Forcese**

So that’s all codified in the civil code.

**Professor Foucher**

Indeed. I will take a very easy example even for people who haven’t really studied in depth. In common law, torts are defined by the courts. They are specific to different criteria for different torts. In civil law, you have only one section. Saying in the codes, a tort is an error and then damages, and a causal link between the two. If you have those 3 elements, then you have a tort. That’s all. All the judge has to say is to look into the situation to look for fault, damages, and causal link between the two. Then there is a tort.

**Professor Forcese**

That suggests that students in civil law will read fewer cases.

**Professor Foucher**

Indeed. Actually I remember some classes where there were no cases whatsoever involved. We did only read the code and interpret the code. The roll of the doctrine is much more important. Commentators will write treatises about dispositions of the civil code and that will weight very heavily when the matters come to court. The judgements in Quebec, for instance, in the civil law section are much more formal. They use the French way of writing. “Attendu, considerant….” And then the issue, what in common law we would call the ratio, the core of the decision, to them will be just one paragraph. It is very succinct. Very reasoned. Very logical. And facts are not as important as the interpretation of the law.

**Professor Forcese**

Is there a difference the way the common law and civil lawyers think?

**Professor Foucher**

Definitely. Civil lawyers will tend to look into the principle. They will tend to go from the more general to the more particular. Whereas common lawyers work the other way around. They will tend to start by the facts and then try to interpret the facts to see what kind of laws could be applicable to the facts.

**Professor Forcese**

You move in both worlds. Is it difficult to move back and forth?

**Professor Foucher**

Yes, it is. When I teach in the common law section… I have done all my career in common law faculties so I’ve been exposed to a lot of common law. I’ve learned from my colleagues how reasoning goes and how to deal with matters. In common law you give a lot of cases to read to the students. Then you skip through the cases trying to find the rules, the thread between the cases to see the rule and how to distinguish cases from one another. When I do that in civil law, the students are confused. Especially in public law matters, because in public law it is the same law everywhere. The constitution is the law throughout Canada. The criminal law is the same throughout Canada. Administrative law, public administration is the same. So they have to be exposed to the common law somehow. They are very wary and confused about that because they will in their other classes, all they do is read the civil code and discuss the sections. Whereas the answer to the problem is not in the code. You do not find the answer in the cases, you will find some arguments in the cases, so read your cases carefully and try to find in the cases what is important for the next issue that will arise to you.

There is a lot of difference. There is also a difference in the way to apply and interpret the constitution. Common lawyers in the British tradition are more pragmatic. We’ll fix the problem when we have a problem. Whereas in the civil law they tend to like have everything written down.

Let us a take a simple example. The spending power. The federal government spends on education. Education is a provincial jurisdiction but it is recognized implicitly that the federal government has the constitutional power to spend money into areas belonging to the provinces.

If you look around, which province is opposing that most fiercely it is Quebec. Of course there is a nationalist question. But beyond that there is a cultural issue. Because civil lawyers don’t like implied things. They would like the spending power to be written down in the constitution. With firm rules that you will refer to in order to be able first of all to identify to the power and how to exercise it. This is only one difference among many others between the two systems.

**Professor Forcese**

Just so we’re clear, in the province of Quebec the private law matters – torts, contracts, property – codify into a civil code. And then in areas of criminal law and public law, which would include administrative and constitutional law, those are national areas. It sounds like it’s a bit hybridized in the sense that there’s a criminal code. In that you have law that is written down. But the way that its construed, there’s a construal that draws from the other provinces. So a lawyer in Quebec can confine their discussion and their analysis to civil law for the purposes of private law but as soon as they move into the realm of public law and the criminal law, they have to be attentive both to the criminal code and the common law way of learning.

**Professor Foucher**

Indeed, and they have to be wary of the common law way of reasoning and applying the Charter of Rights for example. But the proportion of private law, rather than public law, in civil law faculties will be 70% private law and 30% public law. Like it or not, the students are much more exposed to the civil law way of thinking and when they get into common law or national matters they tend to apply this reasoning to the public law matters. Secondly, their schemes of reference in law are in France. In France, the way they construe and interpret the law itself is very different from Great Britain. For example, we have a Supreme Court. In France, you don’t have a supreme court. You have 3 different levels of courts for specialized matters. They have the Conseil d’Etat for the administrative law, the Conseil Constitutionale for the constitutional law and the Cour de Cassation for private law mattres. We have only one supreme court for the whole of the law.

You see that they have a way of specializing and entrenching the law in different areas with very fixed difference between themselves.

In common law, it’s the common law of everybody. If you retrace the origins of the common law, it was the king that was trying to impose his own law upon everybody, including himself at one point in history. The king was also subject to laws of the land and there was no exception for the king. It was the common law for everybody. And there was no specialization.

This makes for a challenge I would say for a civil law student to gather into public law.

**Professor Forcese**

What about the other way? What about for the common law students? Who are taking common law and contemplate provinces outside of Quebec. In what way is the civil law tradition important to them?

**Professor Foucher**

Well the civil tradition is very heavy in international law, in international forums. Naturally, very important countries use civil law that are part of international treaties. They are very much a presence in international law matters.

In private law matters outside of Quebec, if you are not in a border area or don’t have a case dealing with someone residing in Quebec. You will probably not get exposed very much to civil law matters. Anytime you have a client having links with Quebec, you will have to understand that it comes from a different legal system and in private law matters, the civil law is very much different from the common law. That is the way of thinking. I’m not talking about the law itself.

Maybe I should mention the way that civil law influences the practice of law outside is in federal matters. They have to take into account that part of the federal legislation will apply in Quebec. For instance, federal real property in Quebec, in Gatineau, has federal building. They are under federal law, but in a civil law jurisdiction. The legislation must take that into account. We’ll have sometimes in federal legislation, some sections saying that in Quebec the rule is such and such because you have to take into account the civil code.

**Professor Forcese**

There’s a term that is often used in this law school and town called bijuralism. What do we mean by bijuralism?

**Professor Foucher**

It’s about the example I just mentioned. In some matters, areas of the law, you have to take into account both systems. You have to accommodate both systems. It is even more complex because you have the common law in French and the civil law in English. You have the legal system that you have to take into account and you have the language.

**Professor Forcese**

It’s not just bijuralism, but in both systems you need to take into account bilingualism.

**Professor Foucher**

Indeed. You have to be careful because the same word might not mean the same thing in the civil law system and the common law system. There are people who are very specialized. This is a branch of the law that is quite specialized and if students want to get into that I know that there is a lot of demand for those people that have a background both in civil law and common law, and also language matters. It is called jurlinguistics. It is highly specialized. Very few people in Canada are specialized in jurlinguistics. They are sought after because they are the experts choosing the exact terms for any jurisdiction and any language.

**Professor Forcese**

Because of course so many provinces in the federal government have bilingual statutes, and the words you use in those bilingual statutes are equally important one versus the other.

**Professor Foucher**

Yes, that’s right.

**Professor Forcese**

Anything else that you’d like to convey to our listeners about the civil law tradition and bijuralism.

**Professor Foucher**

Just to be mindful when you deal with colleagues from Quebec civil law. Even at the law school, colleagues coming from the civil law tradition that they have been exposed to a system where everything is codified. The answers to the exams are in 5 lines. You would identify the correct section of the code to apply and say why is this applicable. You have to be mindful that these people come from that background and to them it is an adaptation to get into the system of the common law. I suppose the reverse is true also, a common law lawyer that will come to the civil law system from another year will be quite surprised that he or she will not have any jurisprudence to read, not many cases, but a lot of legislation, code, and doctrine.

**Professor Forcese**

Wonderful. Thank you very much Pierre.

**Professor Foucher**

You’re welcome.