

Book Reviews & Notices ***Comptes rendus bibliographiques***

Maurice TANCELIN, *Des obligations en droit mixte du Québec*, 7th ed. – Montreal: Wilson & Lafleur, 2009 – ISBN 978-2-89127-846-1, pp. 1092 + xli.

The appearance in 2009 of a new edition of Maurice Tancelin's treatise on the law of obligations in Quebec is a happy occasion that invites comment on a number of fronts. The two parts of this treatise address the sources of obligations and their effects. The part on the sources of obligations treats legitimate juridical acts and illegitimate juridical acts (juridical facts), and the part on their effects treats compulsory execution, voluntary performance, and extinction without performance.¹ If contributors to this journal occasionally give the impression that the action in the law of obligations has shifted, and decidedly so, towards the elaboration within the arbitral forum of de-territorialized uniform rules, the investment of scholarly energies in the Province of Quebec testifies to an abiding concern with the legislated rules of State law. This latest enunciation engages forcefully with other recent interventions in an ongoing doctrinal dialectic.² Tancelin's work thus stands to contribute significantly to the manner in which the law of obligations in Quebec is conceived.

This treatise distinguishes itself from others by its avowedly normative character and the political content of the views advanced. In the Avant-propos to the new edition, Tancelin distils from a review of the preceding decade's doctrine, including discussion of his own work, the imperative of systematically separating the exposition of rules from commentary on them. He has responded to

¹ English translations are taken from Quebec Research Centre of Private & Comparative Law, *Dictionnaire de droit privé et lexiques bilingues: Les obligations*, Cowansville: Yvon Blais (2003).

² Pierre-Gabriel JOBIN, *Les obligations*, 6th ed., with Nathalie Vézina, Cowansville: Yvon Blais (2005); Didier LLUELLES & Benoît Moore, *Droit des obligations*, Montreal: Thémis (2006); Vincent KARIM, *Les obligations*, 3rd ed., Montreal: Wilson & Lafleur (2009), 2 vols.; J. PINEAU, D. BURMAN & S. GAUDET, *Théorie des obligations*, 4th ed., by J. Pineau & S. Gaudet, Montreal: Thémis (2001).

criticisms that his earlier editions lacked objectivity (x). To underscore those efforts, this edition segregates substantial criticisms of the positive law under the rubric “Commentary.” Indeed, the commentary is signaled not only verbally but also numerically: all paragraphs are numbered, but the commentary is inserted between the whole numbers with a decimal point. In this way it risks giving the misimpression that those paragraphs had been inserted during a later amendment, rather than forming an integral part of the exposition. One senses tension between this admirable aim at transparency and the discussion that follows almost immediately, in which Tancelin questions – with a candour that would alarm some jurists – the idea of a purely descriptive legal doctrine. He accepts the possibility of a descriptive linguistics, but taxes as unrealistic the notion that doctrine could describe law without subjecting it to critique (xi). After all, he writes, law is recognized “*unanimentement*” (!) as a normative discipline, and hypothesis and intuitive judgments are omnipresent (xi-xii); law is not a mathematical, but a human science (para. 34.1). In his view, the study of the law of obligations cannot be reduced to the study of technical legal rules: the subject is “*intimement lié aux conceptions philosophiques, sociales, économiques et politiques dominantes de la société*” (para. 19).

Tancelin’s book commands a special place on the jurist’s shelf for the particular views it advances and for his awareness of the time at which he was writing. Although the architecture of the civil law of obligations aspires to be timeless, Tancelin is aware of writing during what he calls “*la grande noirceur économique*” begun in 2008 (ix). Space permits only a superficial summary of Tancelin’s carefully – and passionately – elaborated positions in relation to his subject, ones inscribed decidedly to the left of the political spectrum. His overall reading of the Civil Code of Québec – enacted in 1991, in force since 1994³ – departs markedly from that of his fellow commentators. What some regard as Québec’s leading doctrinal work on obligations characterizes the legislature as having “*clairement entendu tempérer les abus d’un libéralisme contractuel en faveur au XIX^e siècle et donner aux tribunaux un plus large pouvoir de contrôle sur l’équité contractuelle.*”⁴ For his part, Tancelin reads the new Code as bearing “*très nettement la marque du discrédit des doctrines interventionnistes dans le monde contemporain et du triomphe du libéralisme, qui a accentué en les ‘mondialisant’ ses traits dominants du XIX^e siècle, avec les bouleversements technologiques et les mutations sociales qu’ils ont engendrés au cours du XX^e siècle*” (para. 22).⁵ Indeed, he has expanded discussion in the 6th edition by

³ S.Q. 1991, c. 64.

⁴ JOBIN, *supra* note 2, at para. 13.

⁵ For example, Tancelin notes the new prominence of the legal person and the trust; the limited recognition granted to consumers in the Civil Code relative to the *Consumer Protection Act*, R.S.Q. c. P-40.1; the neglect of the vulnerability of small contractors, unless they are the adhering party to a contract of adhesion; and the relegation of the status of worker, as opposed to

adding a new conception that he characterizes as ultra-liberal, anti-interventionist, and hyper-individualist. Ultra-liberalism differs, in his view, from the preceding conception of neo-liberalism, which while hostile to State intervention at least took such intervention as its point of departure (paras. 20, 22-23). This detected progression is part of Tancelin's self-consciously diachronic reading of the law of obligations, one resisting the synchronic conception prone to pure description of the law in its present state (para. 19.1). He detects the rejection of a positive role for the State in the deliberate failure to have incorporated into the 1991 Code the "*acquis législatifs*" of the preceding century, for instance leaving labour law and workers' compensation in ordinary statutes, as exceptions to the codified general private law (ix; also para. 20).

While it has been suggested that what threatens the 1991 codification's claim to be a Civil Code is its excessive measure of distributive, as opposed to corrective, justice,⁶ Tancelin would withhold the Code's primary adjective on another basis. In his eyes, the new Code "n'est plus véritablement civil, c'est-à-dire relatif à l'ensemble des citoyens"; absent is "[l]e compromis caractéristique du droit civil, destiné à maintenir l'équilibre et l'harmonie entre tous les intérêts économiques et sociaux" (x). In elaboration of this notion, he has expanded his criticism of the decision, in 1991, to treat legal persons on equal footing with natural persons, pointing out that the human being becomes tiny by comparison, overshadowed by giant enterprises regarded as his equal by the Civil Code and protected by charters of human rights (para. 5.1).

However much the political claims in Tancelin's text merit reflection, what matters most for readers of this journal, alert to the possibilities for harmonization of private-law rules, is the question of the mixed character of Quebec civil law. The preceding edition of this work bore the title "*Des obligations: actes et responsabilités*",⁷ and the title of the present edition is striking for its somewhat casual location of its subject "*en droit mixte du Québec*." Such a shift can be understood as evoking work by comparatists on mixed jurisdictions,⁸ but what

employee, to Book Ten on private international law, not Book Five on obligations (para. 22). The legislature's reticence regarding lesion is another instance of the rejection of interventionism (para. 207.1).

⁶ Catherine VALCKE, "The Unhappy Marriage of Corrective and Distributive Justice in the New Civil Code of Quebec" [sic] 46 *University of Toronto Law Journal* (1996), 539.

⁷ Maurice Tancelin, *Des obligations: Actes et responsabilités*, 6th ed., Montreal: Wilson & Lafleur (1997). Here is the genealogy: *Théorie du droit des obligations* (Quebec: Presses de l'Université Laval, 1975); three editions titled *Des obligations – Contrat et responsabilité* (1984, 1986, 1988); a three-volume edition, *Sources des obligations – L'acte juridique légitime* (1993), *Des obligations – L'acte illégitime et modes d'exécution* (1993), and *Des obligations – Les techniques d'exécution et d'extinction* (1994) (all by Wilson & Lafleur).

⁸ Vernon Valentine PALMER, ed., *Mixed Jurisdictions Worldwide: The Third Legal Family*, Cambridge: Cambridge University Press (2001). On Quebec specifically, see Vernon Valentine

does it augur for the understanding of Quebec's law of obligations? What is the sense in which Tancelin now speaks of Quebec law as "*droit mixte*," an expression absent from the index of the prior edition?

The most obvious referent of the term "mixed law" is the interaction of the common law and the civil law. For the 7th edition, Tancelin has added a new frame of mixed law or mixed jurisdiction to material already present. Consider the start to a discussion of extra-contractual liability and indemnification:

6th ed., 1997:

613. *Problème de droit comparé – Les deux systèmes juridiques qui ont une influence au Québec se caractérisent par l'opposition de leurs conceptions en matière de responsabilité civile.*

7th ed., 2009:

613. *Problème de droit comparé, propre à un droit mixte – Les deux systèmes juridiques qui ont une influence au Québec, juridiction de droit mixte, se caractérisent par l'opposition de leurs conceptions en matière de responsabilité civile.*

The mixed character of Quebec law in the sense of civil and common law also emerges in distinction of the differing meanings of "obligation" with reference to "*les deux traditions juridiques présentes au Québec*" (para. 3; also in 1997, para. 2). Tancelin observes that, while the common law has influenced the civil law of obligations in some respects, the influence or imitation can be reciprocal: he thus notes recent systematizing work in private law theory by common lawyers that draws on civilian theorizations of obligations (para. 3). Indeed, the common law's presence in the book is somewhat greater than the index credits.⁹ The entry for "*droit mixte*" has four references. The first, which includes the passage quoted above, addresses civil and common law approaches to liability, but does not discuss the characterization of a jurisdiction as mixed. The fullest treatment of Quebec law's mixed character appears in the context of civil procedure, raised by the principal's liability, under article 1463, for injury caused by the fault of his agents and servants: "*Au total, le résultat de cette évolution moderne du droit occidental pour le Québec est que le droit mixte québécois a un pied dans ce qui est devenu au XIX^e siècle seulement, la tradition civiliste française, et, l'autre pied dans la tradition de la common law anglaise pour la partie formelle du droit civil, la procédure civile, le droit processuel*" (para. 678; see also para. 714). This

PALMER, "Quebec and Her Sisters in the Third Legal Family", 54 *McGill Law Journal* (2009), 321; Daniel JUTRAS, "Cartographie de la mixité: La common law et la complétude du droit civil au Québec", 88 *Canadian Bar Review* [forthcoming in 2010].

⁹ Only paras. 614 and 626 appear in the entry for "common law (influence de)," while other mentions of the common law do not (e.g. paras. 3, 24.1, 593.1, 613). The rubric preceding paras. 711-14 reads: "*Les présomptions de fait dans la responsabilité du fait des choses (la règle res ipsa loquitur de common law)*", but that passage merits no mention in the index entry for the common law.

discussion, which includes mention of a unanimous Supreme Court of Canada decision “ignorée complètement par la doctrine civiliste québécoise, malgré son extraordinaire intérêt et sa grande valeur explicative pour le fond du droit” (para. 678),¹⁰ is elaborated for the present edition. There is also a passing suggestion that the Civil Code’s promptings to judges to discover the law, via references to equity, constitute “un aspect de la mixité du droit civil du Québec” (para. 324.1). Beyond these references to features that exemplify Quebec law’s mixed character, some readers will find themselves wishing to know rather more about the intellectual journey that led the author, thirty-five years after the first edition, to make this theme central in the title. By so naming his work, Tancelin has, in a sense, planted a flag. The question is not the operation of other norms on Quebec territory or their recognition by Quebec authors. Jobin, for instance, refers many times to the common law, and to instruments detached from the civil law, such as the *UNIDROIT Principles of International Commercial Contracts*, but his index includes no entry for “droit mixte.” Tancelin, by contrast, makes an ontological claim about Quebec private law. And such descriptive claims have normative implications: for instance, acceptance of the character of Quebec civil law as mixed implies that a rule or idea’s origin in the common law does not *per se* constitute a reason for rejecting its potential contribution.

While it is perilous to review not the book actually written but one that might have been, Tancelin might fruitfully have pressed his theme of mixedness further, using materials already within his fine text. Would not an avowedly pluralist perspective have enabled Tancelin to regard “mixedness” as going beyond just common law and civil law, so as to include a “diversity of influences and juridical institutions”?¹¹ Might it not be said that the law of obligations and the law of property are, together, mixed? One might gather, under such a hypothesis, Tancelin’s repeated assertions as to the blurring in the 1991 Code of the distinction between real rights and personal rights, a phenomenon manifest in his view in the adoption of the trust and in the diminishment of the patrimony as the creditors’ common pledge (paras. 8, 13, 43, 593). Such a blurring is also discernible in the Supreme Court of Canada’s recent revival of liability without fault in connection with nuisance, based on Article 976 in the title on ownership in the book on property (para. 609.1).¹² Might not the idea of “mixedness” also embrace the interaction, in the context of public bodies, between the general

¹⁰ *Lac d’Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743.

¹¹ The phrase is taken from a paragraph entitled “The Civil law in a mixed jurisdiction”, in John E.C. Brierley & Roderick A. Macdonald, eds., *Quebec Civil Law: An Introduction to Quebec Private Law*, Toronto: Emond Montgomery (1993), at para. 62.

¹² *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, [2008] 3 S.C.R. 392. It is regrettable that there should be no entry in the index for any “*inconvenients de voisinage*” or “*troubles de voisinage*”.

private law of the Civil Code and the common law, an entanglement addressed but not determined by the stipulation in Article 1376 that the book on obligations applies to the State, subject to any other rules applicable? (para. 599). Last, might not the notion of mixedness have served, if only as a guiding metaphor, so as to organize the discussion, evidently dear to Tancelin, of the interaction of the Civil Code and the ordinary statute book? Is not the private law of Quebec mixed in form, in a way fully credited neither by the law reformers who prepared the draft Civil Code in the 1970s,¹³ nor by the subsequent ministerial drafters who prepared the final 1991 version, insofar as core elements of modern life remain outside the Civil Code's purview, in statutes relating to consumer contracts, labour, and compensation for various injuries? Tancelin writes of "*la nouvelle dialectique du droit commun et des lois d'exception*" (para. 78): does not Quebec law now comprise multiple common laws, or *droits communs*, at least to the extent that some statutory schemes outside the Civil Code cannot any longer be interpreted restrictively on the basis that they derogate from it? (para. 78). Given his past work, outside his treatise on obligations,¹⁴ it is curious that Tancelin should be bashful in exploring Quebec law's mixedness.

Tancelin's passionately and vividly argued book – how many other texts on obligations begin with epigraphs by Gabriel García Márquez and Victor Hugo? – will persuade some readers of its arguments. It will prompt others to sharpen theirs. Some might reject his embrace of Quebec law as mixed, regarding it as somehow a betrayal. Those doing so would join a line of efforts to preserve what they imagine to be the purity of Quebec civil law. While pedigreed, that lineage is not, in this reviewer's view, an especially happy or productive one.¹⁵ Perhaps the final point for reflection to draw from *Des obligations en droit mixte du Québec* is that in its author's view, the greatest threat to the civil law derives not from incursion by the common law, but from within, in an expulsion from the Civil Code of a social distribution ideology and a disproportionate translation into it of economic imperatives divorced from the human person.

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¹³ Civil Code Revision Office, *Report on the Québec Civil Code: Volume I: Draft Civil Code*, Quebec: Éditeur officiel (1978).

¹⁴ Maurice TANCELIN, "Introduction: Comment un droit peut-il être mixte?", in Frederick Parker Walton, *Le domaine et l'interprétation du Code civil du Bas-Canada*, trans. by Maurice Tancelin, Toronto: Butterworths (1980), 1.

¹⁵ David HOWES, "From Polyjurality to Monojurality: The Transformation of Quebec Law, 1875-1929", 32 *McGill Law Journal* (1987), 523; Sylvio NORMAND, "Un thème dominant de la pensée juridique traditionnelle au Québec: la sauvegarde de l'intégrité du droit civil", 32 *McGill Law Journal* (1987), 559.