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Jan Jakob Bornheim, Property Rights and Bijuralism

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PROPERTY RIGHTS AND BIJURALISM, by Jan Jakob Bornheim, Mohr Siebeck, 2020, ISBN 978-3-16-159168-6, 554 pp., €89.

The author gives a superb account of some of the differences between the common law and civil law of property as they appear in "the Canadian experience with bijuralism."[1] His concern is "not with how the holder of a property right can use her property."[2] It is with how movable property can be used to secure obligations.

The common law and civil law approaches are different. One of Bornheim's goals is to show that to "harmonize" them would be a mistake. He rejects "the law-and-economics suggestion that a Common Law system is inherently 'better law'"[3] in which the "benefits of the Common Law systems are intrinsically linked to what defines Common Law or Civil Law property."[4] He shows that both the common and the civil law allow debtors to secure the same types of obligations and to provide their creditors with similar security. He does so by making a painstaking and detailed comparison of the two.

Those who claim that "a Common Law system is inherently 'better law'" should learn from his example. Their work rarely rests on a comparison of the economic advantages of the rules that govern contracts, property or, in Bornheim's case, credit financing. Their conclusion often rests on gross comparisons showing the greater economic success of countries with common law systems. They often base their conclusions on stereotypes: for example, the common law shows greater concern for private autonomy. The stereotypes are wrong. Before the 19th century, there was no common law of contract in the modern sense but particular writs such as covenant and assumpsit. Common law contract doctrine, as we know it, was in large part imported in the 19th the century by borrowing and modifying civil law doctrine. Along with this doctrine came the "will theories" which showed concern for private autonomy but were

1. JAN JAKOB BORNHEIM, PROPERTY RIGHTS AND BIJURALISM 4 (Mohr Siebeck 2020).
2. *Id.*
3. *Id.* at 3.
4. *Id.*

pioneered by civil law jurists who defined them in terms of autonomous choice. In reaction, many legal systems have allowed courts to refuse to enforce unfair contracts, but their willingness do so is not a distinguishing feature of civil law. The doctrine of unconscionability has had greater scope in the United States than in England, and the German doctrine of *Treu und Glauben* has played a greater role than any comparable doctrine in France. Civil law jurisdictions have required the parties to exercise "good faith" in negotiating a contract, and yet comparative studies have shown that common law jurisdictions give relief in the same sorts of cases: when fraud is committed, promises are broken, or ideas are appropriated.[5] As these studies show, the only way to determine how legal systems differ, let alone which is "better," is as Bornheim does, by analyzing particular rules and their effects.

As he observes, those who rely on comparisons between the economic success of the common law and civil law systems have a "simplistic . . . understanding of the Civil Law/ Common Law distinction."[6] "[F]rom a functionalist perspective [their] simple benchmarking approach . . . insufficiently accounts for functionally equivalent legal rules."[7] He describes the approach of Konrad Zweigert and Hein Kötz, who start out "with the assumption that every legal system faces similar problems."[8] The goal of their "functionalist approach" is "to examine how different legal systems tackle these similar problems."[9] There is a *praesumptio similitudinis*: where the problem is the same, the result will often be the same, despite a difference in how rules are formulated.[10]

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5. Edward Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217 (1987).
6. Bornheim, *supra* note 1, at 66.
7. *Id.*
8. *Id.* at 64.
9. *Id.*
10. *Id*. (citing KONRAD ZWEIGERT & HEIN KÖTZ, EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG AUF DEM GEBIETE DES PRIVATRECHTS 33, 37–38 (3d ed. Mohr 1996)).

Indeed, Bornheim's book shows how successful a functionalist approach can be. Despite great differences in their rules, Bornheim shows how common law and civil law provide equivalent opportunities for debtors to obtain funds on the security of their assets, for creditors to determine the priority of their claims against these assets, and for third parties to be protected. Sometimes the differences are not merely in the rules but in the concepts in which they are formulated. There is no civil law equivalent to the common law distinction between legal and equitable legal title. Yet Bornheim shows that by recognizing equitable title, the common law arrives at results like those the civil law achieves by allowing an owner to reclaim his property through an action of vindication.

Bornheim then disposes of another argument for harmonization. Even if the civil law were at least as good as the common law in these respects, could it not be that that harmonization would avoid the difficulties of governing the same transactions by two different legal systems, particularly in Canada, where the difference exists between provinces? Bornheim considers "vertical integration" in which federal laws such as those governing insolvency must deal with the differences in the legal systems as to the rights of secured creditors. He considers the problems that arise when a transaction spans jurisdictions, for example, when a secured property is moved from one jurisdiction to another, or the rights a creditor is granted in one province must be perfected in another. His thorough and convincing study should not only be of interest in bijural states such as Canada. Any proposal for supranational legislation will confront the problems of vertical integration. Any proposal for harmonizing national laws will have to consider whether the advantages of doing so could be attained instead by well-developed doctrines of international private law (or conflict of laws, as common law systems would say).

Bornheim's analysis provides solid support, then, for his conclusion that harmonization is not necessary to provide an effective way of using movable property to secure obligations. If I have a criticism,

it is that he goes a step further. Quebec, like my state of Louisiana, was French before it became part of the British Empire by conquest and mine became part of the United States by purchase. In both cases, the preservation of French law has been identified with the preservation of a distinct culture. Indeed, since the enactment of the Civil Code, Frenchmen themselves have regarded it as a monument to their culture, much as Englishmen have regarded the common law as a hallmark of their own. To protect the civil law, according to this view, is to protect "the cultural identity of Québecers."[11] Bornheim quotes the distinguished French-Canadian jurist Paul-André Crépeau: the civil law is "l'un des plus beaux monuments, l'un des joyaux de notre patrimoine culturel."[12] According to Bornheim, what is "euphemistically referred to as 'harmonization'" means "the abolishment of one legal system,"[13] "a radical levelling of the legal culture of either Common Law or Civil Law, or both."[14]

Although he took pains to show that both systems arrive at similar results, his defense of the cultural importance of civil law takes him in the opposite direction. He claims that despite these similarities, the civil law embodies principles which are different and embody cultural values. He suggests that because of these principles, "Civil Law property rights are more secure than their Common Law counterparts."[15] "[T]he framework for vindication of property is more straightforward. . . . Unlike Common Law, Civil law has a clearly defined notion of ownership of movable property. . . . It is the most complete right in property in relation to everybody."[16]

One of these differences is that "the Common Law has no vindication action."[17] Moreover, because the common law recognizes

11. *Id.* at 28, 502.
12. *Id.* at 28 (citing Paul-André Crépeau, *Les lendemains de la réforme du Code civil*, 59 CAN. BAR REV. 625, 637 (1981)).
13. *Id.* at 5.
14. *Id.* at 3.
15. *Id.* at 502.
16. *Id.*
17. *Id.* at 503.

"an equitable property right,"[18] "its secured transactions law has not been fully integrated into its property law."[19] He immediately notes, however, that the importance of this distinction "should not be overemphasized."[20] Indeed, one of his achievements is to show that the common law recognition of equitable interests and the civil law vindication action achieve largely the same results. Can one imagine, then, the difference in the way that these results are achieved conceptually is "one of the joys of cultural patrimony" to which Crépeau referred? Bornheim began his book with a quotation: "There are topics of conversation more popular in public houses than the finer points of the equitable doctrine of the constructive trust."[21] I imagine that there are aspects of their cultural tradition dearer to the patrons of French bistros than the superiority of the action of vindication.

Among the other differences he mentions are a civil law concern with the concept of patrimony (*patrimoine*), the "absolute" concept of ownership in civil law, and the idea that common law protects possession rather than ownership.

According to Bornheim, "[t]he notion of patrimony is a *differentia specifica* between Québec Civil Law and the Common Law."[22] As he notes, "[t]he reception of [the] patrimony concept in French doctrine took place through the writings of Aubry and Rau, who saw themselves in the tradition of the German writer Zachariä."[23] Indeed, the first edition of their treatise was a translation of Zachariä's *Handbuch des französischen Civilrechts*. They improved it each edition, and it became one of the finest treatises of French civil law. The concept of patrimony was borrowed from Zachariä. He defined the German term *Vermögen* (wealth, assets) as comprising the things

18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 1 (citing *Attorney General's Reference (No. 1 of 1985)*, [1985] QB 491, 506 (CA Crim), Lord Lane).
22. *Id.* at 75.
23. *Id.* at 76–77.

(*Gegenstände*) that belong to a person, considered not as individual things, according to their individual characteristics, but as goods, according to their monetary value (*Geldwerth*). Considered in this way, they constituted a *Ganze* (whole) or *Gesammtheit* (ensemble).[24] Aubry and Rau explained that "[t]he ensemble of a person's goods constitutes his patrimony (*patrimoine*)."[25] "[O]ne can also, substituting . . . cause for effect, define patrimony as the ensemble of a person's civil rights."[26] One has to wonder why such a concept should be regarded as a *differentia specifica* between civil and common law. It may be useful to have a definition of what is meant by a person's assets, but one could explain French law without it, and in much the same way. French jurists would have done so had Aubry and Rau not happened to translate Zachariä's *Handbuch* or if Zachariä had not tried to define *Vermögen*. Common lawyers, had they chosen to do so, could have used the same definition to explain what they mean by "assets."

Another distinguishing feature of the civil law, according to Bornheim, is "the idea of absolute ownership."[27] It entered French law as "a result of the abolition of the seigneurial system and feudal law."[28] Before the Civil Code was enacted, French law distinguished two types of ownership: the *dominium directum* of the lord, which entitled him to feudal rent, and the *dominium utile* of the person entitled to occupy and use the land but obligated to pay the rent. By abolishing this distinction, the French Civil Code has been said to have ended feudalism. Yet the significance of the distinction was symbolic. Economically, dual ownership was like a mortgage. One party had the use of the land. The other was entitled to periodic

24. KARL SALOMO ZACHARIÄ, HANDBUCH DES FRANZÖSISCHEN CIVILRECHTS § 168 (4th ed., Heidelberg 1837).

25. CHARLES AUBRY & CHARLES RAU, COURS DE DROIT CIVIL FRANÇAIS PAR C.-S. ZACHARIÄ TRADUIT DE L'ALLEMAND § 168 (2d ed., Lagier 1842).

26. *Id*.

27. Bornheim, *supra* note 1, at 82.

28. *Id.*

payments and had his claim to them secured by the land.[29] The right of the first party to use the land was as "absolute" before the abolition of dual ownership as afterwards. Similarly, William Blackstone, borrowing from civil law, described the right of property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[30] Yet the owner of an English fee simple held what had been a feudal fief. In either system, then, one could describe an owner's rights as absolute. Nevertheless, in either system, to do so, one would have to qualify that statement by describing the many restrictions that prevent an owner from using his land in ways that bother his neighbors or from alienating it on whatever terms he chooses.

Another distinction, according to Bornheim, is that traditionally the common law protects "possession" rather than ownership.[31] He acknowledges, however, that the modern common law protects both.[32] He criticizes an article I wrote with Ugo Mattei in which we showed that English common law courts first acknowledged that they protected possession as such in *Asher v. Whitlock* (1865).[33] We cited many prior cases in which the courts said that the reason they protected a person who had possessed land for a long time or been forcibly expelled was that long possession or forcible expulsion was evidence of title.[34] According to Bornheim, our mistake was that, when the courts spoke of title, we "assume[d] that the notion of absolute ownership exists at law, and thus interpret any reference to 'title' in the case law as a reference to absolute ownership."[35] Not at

29. James Gordley, *Myths of the French Civil Code*, 42 AM. J. COMP. L. 459, 501–02 (1994).
30. WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND 2 (Oxford 1765-69).
31. Bornheim, *supra* note 1, at 125–26.
32. *Id.* at 146.
33. L.R. 1 Q.B.1.
34. James Gordley & Ugo Mattei, *Protecting Possession*, 44 AM. J. COMP. L. 293, 321–25 (1996).
35. Bornheim, *supra* note 1, at 146–47.

all. Whatever the courts may have meant by "title," they said one must have it to be protected, and that loss of possession mattered, not in itself, but because it could create a presumption of title.

The reason the French Civil Code is a great achievement is not that it protects ownership as well as possession, as the common law now does, or that it symbolically broke with the feudal past by abolishing dual ownership, or that it introduced the concept of *patrimoine*, which it did not. The greatness of the Civil Code lies in the clarity with which it expressed principles of law that have a significance which, if it is not universal, extends far beyond the orbit of French culture. It owes its clarity to the simplicity and elegance of the French language. It owes its significance to the aspiration of its drafters to formulate universal principles.[36] For those reasons, it became the model for most of the codes in force throughout the world. Those who share the same language and aspirations can be proud of it for those reasons without claiming that it rests on peculiarly French concepts. It would be a poorer code if it did.

I was educated as a common lawyer, but I have made even more critical remarks about the idea that the common law embodies distinctively Anglo-American concepts of liberty. In an article I wrote in the year 2000, I expressed my wish that over the next century, the common law will lose the remaining traces of its English origins and come to look more like civil law.[37] Features such as the doctrine of consideration, the nominate torts, the law of estates and future interests, and the treatment of a leasehold as an interest in property serve no good purpose. I closed by saying that one can admire the role that common lawyers played in the struggle for liberty when they opposed Charles I, which later inspired Americans who opposed George III. That struggle, however, has nothing to do with the English doctrines I mentioned. Moreover, Englishmen today do not need

36. *See* Jean-Étienne-Marie Portalis, *Discours préliminaire, Corps législatif, séance du 23 frimaire an X [14 déc. 1801]*, *in* 1 PIERRE-ANTOINE FENET, RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL 471 (1827).

37. James Gordley, *The Common Law in the Twentieth Century: Some Unfinished Business*, 88 CALIF. L. REV. 1815, 1817 (2000).

protection against a return of the Stuart dynasty any more than Americans against reincorporation in the British Empire.

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