SEMINAR DISCUSSION: HOWES

Chair: Thomas J. Condon*

Thomas Kuttner:[1] I found this a very resonant sort of talk. The contrast between orality and literacy, between written law and oral law is so central to religious legal traditions. There has been much work done. My own familiarity is with Jewish law and this tension has been one within Jewish culture since its very beginnings. It seems to me that one of the benefits if one can call it that, of the destruction of the Jewish state in 69 A.D. was that a lively oral tradition was able, in fact, to predominate over what up until that time had been the dominant written tradition. So that in classical Jewish law, one speaks of both the written law, but simultaneously of the oral law and the one cannot exist without the other. Of course there is constant tension because the written always threatens to take over. In Yeshivas today students study vast tractates of the Talmud memorizing these oral debates. They memorize these questions and answers concerning the written law but out of that process they can develop their own questions and answers, and the strength of the Talmudic scholar is his ability to pose questions again and then answer them.

One can contrast Jewish law with Islamic law with which it has some similarity. Many people say that a problem within Islam was the decision around the fourteenth century to do away with an oral tradition as authoritative--the closing of the gates of consensus, as they called it. It wasn't until this century that Islamic scholars attempted to reopen that gate and of course we see a reaction in modern political terms. The takeover by the Mullahs in Iran is in many ways a reaction to a lively oral tradition as opposed to a stultifying written one. I am just noting that by way of comparison. Within the Christian legal tradition, there is of course the contrast between Catholicism and Protestantism. Catholicism has retained its concept of an oral tradition in the magesterium of the church which for better or for worse has meant a concept of continuity, of a single community that is always developing but never cut off from its past. Whereas Luther's insistence on *sola scriptura* rejects an authoritative oral tradition. It seems to me one sees this in the multiplicity of Protestant sects. There is a kind of loss of a single community that extends over time. It seems to me there is a lot of fruitful comparative study one can do with these and other legal systems.

David Howes: I think that my essential point would be that precisely, that the civil law of Quebec was written into existence. To break up that reliance on writing might begin to restore some of the lost grandeur of the Quebec civil law. I have argued elsewhere that in order for Quebec judges to recover their former competence what should happen is that all decisions in matters of civil law that are appealed in all other provinces of Canada should be directed to that. In other words, they should hear appeals in all matters of common law and civil matters in Quebec as a first stage before any kind of

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Supreme Court because they used to have that competence in the middle of the nineteenth century; they understood the common law as well as the civil law and worked between the two systems in terms of arriving at a decision.

Harry Arthurs: I also found your paper very interesting and wondered if I could just offer one or two additional examples of this movement from orality to textualism. In a historical vein, of course, through the nineteenth century you see the very same thing happening in England, but the shift is not so much from one professional tradition to another as from a kind of generalized system of popular justice disseminated through oral traditions at the local level within the context of, for example, business communities, through municipal courts and so on. All of which are very explicitly mandated to dispense what we might call customary law, orally transmitted customary law expressing community consensus whether that was a geographical or an occupational community. From that we see a radical shift towards textuality, the codification of commercial law, for example, a suppression of the local courts. Now that leads me to my next question. We find very different historical circumstances producing contemporaneously similar behavior and therefore my question really comes to this: are we experiencing something here that is unique to Quebec which is a reflection of its peculiar history and political circumstances or are we experiencing a kind of general shift, which is caused by changing material circumstances, a change in general intellectual development? I rather suspect the latter. And I would be interested in your reflections on how this very particular experience relates to at least one other, but I think that the same is true in America, I suspect it is true in a lot of other places. Only to finish with one other thought that has crossed my mind as a result of your very stimulating paper; in my own field of labor relations one sees the same shift from orality to texuality, from the custom of the shop to the meticulously detailed collective agreement, from the internal informal dispute settling process as to very carefully elaborated administrative and judicial and indeed arbitral structures. So it seems to me that we are dealing with somewhat more general phenomena. I would be interested in your reaction.

Howes: I think that it is a general phenomenon and that we do find it taking a slightly different form in each of these various countries in which it is observed. With the instant case, what I think I find significant is that there were two possibilities embodied in the codification of 1866: one would be to continue the dialogue, the other would be to focus on the form. As a consequence of focussing on the form, the Quebec civil law came to be assimilated to that of France.

Arthurs: Might I just press you on one point, your last suggestion that the lack of reciprocity was an important consideration. I can easily accept this, but it has no counterpart really in some of the other experience, the English and American experience which is contemporaneous. And so I really would press you just a little harder on whether or not . . . what we see in codification and suppression of popular justice in the homogenization of law had the hegemonic influence of legal professionalism. Others pass beyond that to the require-

ments of a modern economy and so forth. There are a variety: certainty, predictability and all of these things. In fact the interesting thing is despite suppression and again, I would be interested in your reaction, there is survival. In fact the world does not work as you think it ought to work if you read the Bankruptcy Act or anything else. We find ways around these things and do so in a way which is only brought to the surface.

Howes: In terms of a generalization, maybe I can point to a recent development. You have an Ontario case or Nova Scotia case, a justice of the Supreme Court drawing inspiration from the civil law. There had been a number of cases of that interchange at earlier points but it was comparatively rare. And I guess that my primary concern would be that if we look at the codification of 1866, in effect it was the product of the union Parliament of Canada. There was no division between Quebec and Ontario at that point in time. And that is interesting in terms of how we receive the code now as a kind of fortress that sort of keeps the province separate from the other provinces of Canada. In effect, if one looks at the intent behind the code it was to serve as a model for basically the private law of all the rest of Canada. There is a section of the *British North America Act*, s. 94 which deals with the unification of the laws of Canada and, as we have begun to see, the idea was that the civil code of Quebec would serve as the model for that unification. Now in that regard originally the code was intended to be exported, not simply to defend a province against the outside world. There was, in other words, a collapse on both sides into a kind of implosion to the point where we find the two solitudes today. It was just that possibility of dialogue which seemed to be the form of the nineteenth century, something surviving, which now seems to be rekindled.

Bernard Vigod (History, UNB): In answer to the points that both of you have just made, I would like to make the case for the uniqueness of the Quebec historical experience at this point in time. I read the whole codification experience in exactly the opposite way that you do, that it is true that under the supposedly united province of Canada there was a duality of legal development, of institutional development over quite a broad range, in some cases culturally based, in other cases geographically based. It seems to me, however, that what really motivated the codification was the necessity arising out of more complex and dynamic property relations, to make a fundamental choice. That was whether Quebec or French Canada's integration into this commercial and capitalistic era was going to take place entirely within the context of the British legal system and institutional system or whether the modernization of French Canada was going to have a character of its own. It is an issue that did not merely arise with the codification but a decade earlier or more with the abolition of the seignorial system with all the implications that had for property relationships. In that light I would suggest that as much as we might want to look at Bibaud as a kind of golden age, I would question whether he was really appropriate to this age. In the sense of integrating what had gone before, yes, but in the sense of dealing with the present and the future, it was very unlikely that an oral tradition could survive. My understanding of s. 94 was quite the opposite. As I recall the wording of that

section of the Act it allowed for the integration of the civil law, the common law, of all of the other provinces but specifically excluded from the power of Parliament the right to include Quebec in that unification of the civil law. So it would seem to me the inclusion of that clause would not seem to be a prescription for expanding the use of the civil code but rather for guaranteeing its integrity within Quebec. Finally with regard to the fact that there was not a dynamic evolution of that civil code which would arise out of analysis and debate and dialogue, I think that might have had more to do with cultural and social circumstances than with the lack of dialogue with other jurisprudence within Canada. There was a real tension between those who wanted to ensure that Quebec's legal structure and its institutional structure somehow took account of the modern age, to keep it relevant--and what could be called the ideology of preservation. An ongoing analysis of the legal structure and of legal principles implies two things, a questioning of fundamental values and beliefs that goes far beyond the law, and secondly it raises the question of integration into the common law tradition. That is to say that if you keep on adapting and someone suddenly discovers that your adaptations (because you are adapting to the same kinds of economic and social circumstances) are similar to those which are being made beside you in the English system, the common law system, eventually somebody is going to raise the fatal question--what is the point of having two systems? And I think it was a reluctance to face that fundamental issue which explains why Quebec legal thinkers just steered away from the kind of analysis that would deal with fundamentals.

Howes: I find that a very comprehensive critique and I think there is that other perspective on each of the points that I have made in this paper. I can only say with respect to s. 94 that Quebec was accepted for the time being and there is a whole historical reconstruction that has to go on here. I refer actually to a paper by Blaine Baker about how to understand where that provision is going. I also would like to say that in terms of understanding the legal culture of Quebec, I find that there is a difference between political rationality and legal rationality. What was remarkable and what is really beautiful about the judgments of late nineteenth century is how Thomistic they are rather than positivistic, in other words the code was a work of rationalization and of systemization, but the judges had these imaginations that were too wild to be domesticated and they continued to roam all over the place in search of good authorities, not just simply the authorities that were presented.

Donald Fleming (Law, UNB): Unlike Prof. Vigod I am a lawyer, but I have to apologize for my naivete in matters historical here. I'm possibly going to go out on quite a bit of a limb in the comment I would like to make. In looking at the rationale for codification, this movement from an oral tradition to a written tradition in Quebec, I think one has to look at the broader range of legal developments in the whole world. It appears that the advent of the Code Napoleon seems to have met a need that was a universal one in the sense that virtually every legal system in the world is now based upon it with the exception of those who trace their heritage from the United Kingdom. It

makes me feel that there must have been some great need to attract every country in the world to adopt a system of codification as their legal system and I would submit, again without any historical basis, that it might have been recognition that there was a need for specificity of some sort or another in the adversarial process. This point was raised by President Arthurs when he referred to the labour arbitration problem. You have a tremendously complicated collective bargaining agreement governing everything from sweeping the floors to academic tenure and promotion. It appears that it is based not upon a need other than the fact that things are addressed in an adversarial manner now rather than a cooperative manner. I don't know whether that is true or not, I would like your comment on it. I have one more comment I'd like to make. It deals with what we should do today, what does the historical significance of the oral tradition mean and I would again go out on a limb and make a submission. That submission would be that we must continue to respect the hierarchy of written authority but that we should as a legal profession perhaps be prepared to expand our respect for what is written, get back into historical writings, respect more than merely the hierarchy of our precedent. I think in terms of what I understand of your writing to be a need for the development of the Canadian jurisprudence, perhaps the intermingling of a codification form of legal system in the common law legal system, would be to recognize that the oral tradition is alive in the sense that there is so much written and so much more that ought to be included in our hierarchy of authority.

Howes: What I have found in studying the history of judicial reasoning in Quebec is that there is a decline in the standards by which people are held responsible. In other words one finds very often that there is an objective of standard of responsibility according to which people are held liable for what we call torts which declines after codification and it is as a result of this loss of history and this coming to focus on the text. In that regard there is a profound slippage in standards and that is actually because of the loss of a historical consciousness. At the same time that historical consciousness survived until the end of the nineteenth century and therefore preserved a certain standard down to that point in time. So I think that the need that codification answers in the need to abolish history, to abolish standards and to lower them for the purposes of a more procedural but not necessarily more just or more sound kind of existence.

Fleming: It appears that if you have your written law, whether it be codification or case law as your essential framework, and work out from there then you would have achieved the same thing, is that not possible in your mind?

Howes: In fact that can happen to the extent that we would treat a code as a library, one with a whole series of conflicting sources which we'd have to keep in mind at the same time.

Devlin: Just a couple of comments and questions relating to some of the conversation that is going on. Both yourself and Harry Arthurs have talked about interdisciplinary research and that is important, but I think there may

be another way to conceptualize it that could be more significant, and that is to understand it as transdisciplinary rather than interdisciplinary. The difference I think is that interdisciplinary allows the disciplines to remain autonomous of each other and you are drawing on both. To become transdisciplinary you start to break down the differences between the disciplines, that is just sort of a suggestion in terms of understanding what we are doing when we look beyond law and that is the first comment. The second comment relates to some of your suggestions about what we should do now and it also relates to some of the comments that have just been made. Your suggestion is that history should be made compulsory and Roman law should be given a fairly high profile. I am interested that you turn to the past to think about the future and that is perhaps different--my paper was very future oriented, your paper was very past oriented, although we are probably both thinking about the future. Not that I would want to claim turf but I would say that jurisprudence, if you are thinking about people thinking about law, might be better as a compulsory first year course than history or Roman law. I think that is important because we have to think about what are the values and we have to get that fairly directly and I think we can do it through history and we can do it through Roman law. The third comment that I have is, if I am understanding you correctly, you want to try and retrieve the oral tradition and have an element of reciprocity and dialogue--I have some problems with that because we have to wonder then who is asking the questions and who is giving the answers. Who is setting the agenda, and if you think about the Socratic method, sometimes it can be very authoritarian and humiliating and dehumanizing to some people. So to talk about discourse and reciprocity is useful but I think we need more specificity in terms of trying to talk about equality in discourse; an example of that is the gender nature of language generally. That is something I think we also need to talk about further. And finally, I wonder if you are optimistic about retrieving . . . the past given our technological present and future.

Howes: I think they are extraordinary questions and I think that ultimately there is some kind of convergence between possibly what clinical legal studies is doing and whatever this recovery of history which would involve restoring Canadian jurisprudence might be about as well. First, with respect to the question of a transdisciplinary approach, I am evidently engaged, by being an anthropologist, effectively looking at law in that kind of thing. I completely deny it in the sense that I think that part of the way in which interdisciplinary and transdisciplinary research has gone, is sort of like Steven Leacock's horseman, policeman, who jumps on the horse and rides off in all four directions at once. What I am looking at is rather than forging links going back to a moment when all those other disciplines are contained in one. There is a very interesting article in that regard by Peter Russell in the first edition of the *Canadian Journal of Law and Society* about how political science and law were one throughout the nineteenth century up until the 1920's. I think it is understanding things in that kind of way that we must perceive. For example, in another piece that I have done, I have taken the constitutional approach to the songs "We Are the World" and "Tears Are Not Enough" showing how those popular songs are in fact constitutional discords, that you can see "We

Are The World" as flowing out of a constitution which reads "We, the people of United States" and you can see "Tears Are Not Enough" flowing out of a constitution such as the BNA Act. Both songs have the same purpose but flow out of a different direction. In other words, let's bring things back into law rather than dispersing law into other sorts of directions.

With respect to jurisprudence, my concern is with having a canon of some description, and Roman law provided that canon; it is the origin of western society or at least the kinds of traditions that we are mapping here. Going back to Roman law with all its imperfections, setting it up as a standard from which to judge legislation, I think can have advantages in terms of having some kind of common framework which is at the origin of our legal tradition, and that might be preferable to turning to sociology and other social science disciplines which are going to relativize whatever kind of understanding of justice we might have. The most essential kind of understanding of justice was given in Roman law and in that account, justice is natural, and after the fashion of the late George Grant, I think we have to try and recover part of what that notion is. My difficulty is with a number of recent Quebec decisions which will not admit Roman law is still operative in Quebec, whereas in effect it wasn't cut off. Finally, I think it is problematic who is asking the questions and therefore to some extent setting the agenda. We should go back and read the judgments of Taschereau in the nineteenth century and begin to understand what a distinctively Canadian perspective might mean on all these kinds of things. I don't think we know what that perspective is and we are going to keep on losing it until we start recovering that sort of historical perspective.