

***"The Best of Both Worlds" - The Trend Towards Convergence of the Civil
Law and the Common Law System***

I. Introduction

Increasing commercial and cultural internationalisation and amalgamation have had and will continue to have their consequences in the law of all legal systems. In particular the two great Western legal traditions, the Common Law and the Civil Law system¹, have become closer to each other during the last decades.

This paper will analyse the impact, mechanisms and future developments of the convergence of the two systems. It is divided into seven parts.

After some introductory remarks on the distinction between Common Law and Civil Law systems, this paper will briefly contrast the pros and cons of convergence. The next section examines how some of the previously visible differences between Common Law and Civil Law systems have already been diminished or are about to decrease. The analysis will focus on the trend towards codification in many Common Law countries, the approaches towards the filling of gaps in statutory provisions, judicial activism, the doctrine of *stare decisis* and the roles of judges and legal scholars.

¹ For this categorisation see Clark DS, 'The Idea of the Civil Law Tradition', in *Comparative and Private International Law; Essays in Honor of John Henry Merryman on His Seventieth Birthday* 11, Clark ed., Duncker & Humblot, Berlin, 1991 at 21.

It then looks into the various mechanisms and factors that contribute to the process of convergence, such as the importance of American law, the unification of Europe and the unification of legal rules by means of conventions and model laws.

The final part will examine which elements of both systems should prevail in the "legal evolution" of convergence, in order to make the newly emerging system more efficient. It will be argued that the Civil Law, due to its economy and ability to quickly react to changing societal parameters, is better equipped to meet the challenges of today's fast-paced world.

II. Classification of Common and Civil Law Systems

As an introductory remark, one should keep in mind that the distinction between Civil Law systems and Common Law systems tends to blur the fact that there is no such thing as a uniform system of Civil Law. When Australian, British or US scholars use the expression "Civil Law system", as contrasted to a "Common Law system", they usually refer to the whole body of private law within the countries of the European continent as well as the laws of Latin America. The characteristic common feature of these laws is that they are contained in so-called civil codes. Classic European comparative literature, however, usually does not mention the concept of the Civil Law as such, but distinguishes between the codes of single legal communities, such as the Romanic, Germanic or the Nordic family.² Under this system of classification, the Common Law is just one of the legal communities, which would be qualified as the "Anglo-Saxon family". In fact, there are some arguments in favour of this

classification, as there are considerable substantial divergences as to methods of interpreting the law or judicial style between, for example, the Romanic and the Germanic family. Therefore, one must bear in mind that there is, in reality, no coherent system of Civil Law.

Similarly, the assumption that there is a homogeneous Common Law in all so-called Common Law countries cannot withstand closer scrutiny. For instance, the American concept of judicial review does not exist in the British system. Established by Justice John Marshall in the landmark decision *Marbury v. Madison*³, the doctrine of judicial review confers upon the US Supreme Court and on the highest court of every US state the power to decide the constitutionality of acts of the legislative and executive branches of their jurisdictions. However, for the purpose of this macro-comparative discussion, it is appropriate to employ the distinction between Common Law and Civil Law in a broader sense.

III. The Pros and Cons of Convergence

"Globalisation" and "Internationalisation" have become catchwords that now quasi-automatically arouse positive feelings of progress, mutual understanding and new opportunities. As to the convergence of legal systems, however, it might be useful to step back and reflect on the pros and cons, before rashly celebrating its unrestricted desirability.

² See Lawson, FH, *A Common Lawyer Looks at the Civil Law*, University of Michigan, Ann Arbor, 1953 at 3.

³ 5 U.S. (1 Cranch) 137 (1803).

The values of convergence in modern society are at hand: it facilitates international transactions, increases the general welfare, promotes the diffusion of culture, and leads to international understanding.⁴

From the economic point of view, uniformity and simplicity may reduce the transaction costs and significantly avoid uncertainties connected with the use of conflict of laws rules.

The fact that a mixed body of case law and statutes - such as the law of the European Community - is successfully dealt with by the Civil Law courts of the Continent and by the Common Law courts in the United Kingdom and Ireland proves that convergence works. The hybrid systems of Louisiana, Quebec, Puerto Rico and South Africa provide some more examples.

However, one should not overemphasise the significance and desirability of convergence. It is important to keep in mind that uniformity should never become an end in itself, unrelated to identifiable mutual benefits, but merely striving for simplicity. This is also important as to the preservation of cultural authenticity, variety and richness. When the forces of convergence threaten what gives a people its cultural identity, the mark is clearly overstepped and it is time to draw back and reconsider.

Nevertheless, the convergence between Civil and Common Law Systems is progressing fast and its effects are obvious in today's legal reality, as the following paragraph will demonstrate.

⁴ Merryman JH, 'On the Convergence (and Divergence) of the Civil Law and the Common Law', (1981) 17 *Stanford Journal of International Law* 357, reprinted in: Merryman JH, *The Civil Law Tradition: Europe, Latin America and East Asia*, The Michie Company, Charlottesville/VA, 1994 at 19.

IV. The Effects of Convergence

This section will show how the convergence of the Common Law and the Civil Law has already diminished some of the previously visible differences between the two systems.

1. The Trend Towards Codification

The classic distinctive feature of the Civil Law is the embodiment of general principles of law in a code, whereas the most important sources of law in Common Law jurisdictions are judicial case decisions. Although this observation is still valid, one can detect a trend towards codification in many Common Law countries.

For instance Australia, England and the United States now have an extensive body of codes in the fields of bankruptcy, intellectual property, antitrust, banking regulation, securities and tax law.⁵

As to the United States of America, Judge Calabresi observed in 1982 that the United States have entered the "*age of statutes*"⁶ and that statutes may be used as sources of law beyond their terms.⁷ Others have even drawn the conclusion that the interpretation of statutes is America's new "*primary source of law*".⁸

Many American cases are indeed concerned with the interpretation of statutes, such as the Bankruptcy Act or the Internal Revenue Code and in carrying out this task, courts

⁵ See Mattei U, *Comparative Law and Economics*, University of Michigan Press, Michigan, 1997 at 101-21.

⁶ See generally Calabresi G, *A Common Law for the Age of Statutes*, Harvard University Press, Cambridge/Mass., 1985.

⁷ See *id.* at 87.

⁸ See Eskridge WN, Frickey PP, 'Statutory Interpretation as Practical Reasoning', (1990) 42 *Stan. L. Rev.* 321, Herman S, 'The Fate and the Future of Codification in America', (1996) 40 *Am. J. Legal Hist.*

in the United States are basically using canons that have been developed by civilian methodology.⁹ Some states, such as California, even have complex civil codes.¹⁰

The creation of the American Uniform Commercial Code (UCC) is another indication of the growing number of codification and the subsequent increased importance of systematic thinking in American law. Scholars have identified a strong element of German influence on the style and structure of the UCC.¹¹ For instance, Schlesinger observes that Karl N. Llewellyn, the principal drafter of the code, "*spent considerable time in Germany, and there can be no doubt that some of the Code's important features were inspired by his study of German law.*"¹²

Moreover, there are also a number of developing Common Law-based countries that imported some codes wishing to modernise their legal system quickly by transplanting some aspects of the law of a more developed Civil Law nation¹³, rather than engaging in the more difficult and time-consuming "updating" of their judge-made law. The adoption by Ethiopia of European-style codes, including a civil code based on the Code Napoleon, provides an example.¹⁴

The reason for the increasing codification in Common Law jurisdictions, in the words of Guido Calabresi, is that '*the courts are not capable of writing speedily enough most of the rules that a modern society apparently needs.*'¹⁵ Considering the constant

407, Rosen MD, 'What Has Happened to the Common law? Recent American Codifications and Their Impact on Judicial Practice and the Law's Subsequent Development', (1994) *Wis. L. Rev.* 1119.

⁹ See Mank BC, 'Textualism's Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies', (1998) 86 *Ky. L.J.* 527 at 528, Sunstein C, 'Interpreting Statutes in the Regulatory State', (1989) 103 *Harv. L. Rev.* 405.

¹⁰ Published, for instance by Parker Publications (*Parker's 1997 California Civil Code: Within Excerpts from the Legislative Council's Digest of New and Amended Code Sections*)

¹¹ For a general overview see Whitman J, 'Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code', (1987) 97 *Yale Law Journal* 156.

¹² See Schlesinger RB, *Comparative Law, Cases, Text, Materials*, 6th ed., Foundation Press, Mineola/NY, 1998, at 21.

¹³ Merryman JH, 'Convergence and Divergence of the Civil Law and the Common Law supra note 2,' at 21.

¹⁴ *Id.* at 21.

¹⁵ Calabresi G, supra note 4, at 163.

changes in today's fast-moving world, the "age of statutes" and the concurrent convergence of the Common Law and the Civil Law system are likely to continue.

2. Gap Filling

Many scholars assert that there are still remarkable differences as to how Civil Law and Common Law jurists fill gaps in statutory provisions.¹⁶ However, this is highly contestable.

Let us first turn to the traditional civilian approach to the role of statutes, which is reflected in a citation by French jurist Jean Etienne Marie Portalis: "*The function of the law (loi) is to fix, in broad outline, the general maxims of justice (droit), to establish principles rich in suggestiveness (consequences), and not to descend into details.*"¹⁷

French jurists distinguish between those situations in which the facts do not fall within the scope of a statutory provision or code ("*silence de la loi*") and those in which they only partly fall within the scope of that code or statutory provision ("*insufficiency of the law*").¹⁸ In the former cases, French judges attempt to find a link by means of deductive reasoning or analogy. In the latter cases, they try to overcome the insufficiency of the law by a "creative interpretation" of the code provisions concerned, which may include resorting to factors such as the "intent of the legislature" or the "interest of the parties".¹⁹ The French example illustrates how Civil

¹⁶ Farnsworth EA, 'A Common Lawyer's View of His Civilian Colleagues' (1996) 57 *La. L. Rev.* 227 at 230.

¹⁷ Portalis JEM et al. , 'Discours Preliminaire Prononce Lors de la Presentation du Project (de Code Civil) de la Commission du Gouvernement, in: Fenet PA, *Recueil Complet des Travaux Preparatoires du Code Civil* T.I. 470, 1827, as quoted in: Farnsworth EA, supra note 13 at 230.

¹⁸ Mousourakis, G, LA 431/LA 631 Lecture in Comparative Law, 20. April 2000, The University of Queensland, TC Beirne School of Law.

¹⁹ Id.

Law judges usually attempt to find a solution coherent with the "spirit" and "system" of the code.

Furthermore, section 7 of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch* or *ABGB*) states that “[...] where a case cannot be decided either according to the literal text or the plain meaning of a statute, regard shall be had to the statutory provisions concerning similar cases and to the principles which underlie other laws regarding similar matters.”

Civilian jurists in fact distinguish between two methods of analogy: statutory analogy (“*Gesetzesanalogie*”) and analogy of law (“*Rechtsanalogie*”). If the judge follows the method of statutory analogy, he or she fills a gap in the code by deriving a rule from a provision contained in the code and applies it to the case at hand, because he or she finds that the two cases are similar. In the case of analogy of law, the starting point is not one single provision but several provisions. Again, a rule is derived from the codified law and applied to the case before the court.

In light of these observations, American scholar Grant Gilmore described a civilian code as “[...] a legislative enactment which entirely pre-empts the field [...]: thus, when a court comes to a gap or an unforeseen situation, its duty is to find, by extrapolation and analogy, a solution consistent with the policy of the codifying law.”²⁰

Common Law judges, on the other hand, traditionally did not need to fill gaps at all. The reason for this is what E. Allan Farnsworth called the Common Law “*Swiss cheese theory*” of interpretation: Regard the Code as a piece of Swiss cheese with all its holes, and if, when you search for a solution to your case, you find a hole in the

²⁰ See also Gilmore G, 'Legal Realism: Its Cause and Cure' (1961) 70 *Yale L.J.* 1037 at 1043.

Code, look through it to the backdrop of case law.²¹ Therefore, for a Common Law judge case law has represented the classic source of law and statutes were an exceptional intrusion into the body of Common Law.²² Thus, whenever a statute did not specifically address the facts, the Common Law was the default rule and courts in Common Law countries have usually refused to fill gaps in statutes by statutory analogy.²³

This approach, however, evolved from an age where statutes were of marginal importance. Today it is, to a large extent, no longer tenable. This is due to the above-mentioned increase in codification in countries such as Australia, the United Kingdom and the United States. This development of statutes as a source of law in Common Law jurisdictions justifies and in some areas even requires the use of statutory analogies in order to fill gaps. For instance in the United States, entire areas of business law are regulated by federal statutes, but at the same time, as Justice Brandeis noted in the famous US Supreme Court case of *Erie Railroad Co. v. Tompkins*²⁴ "*there is no federal general Common Law*" in America.

The increase in statutes in Common Law jurisdictions is likely to require Common Law judges to fill gaps in those codes by statutory analogies, just as Civil Law judges do. Thus, the filling of gaps is likely to be an area of future convergence.

3. Stare Decisis

Another classic perceived difference between the two systems is that Civil Law juris-

²¹ See Farnsworth EA, *supra* note 16 at 231.

²² See Landis JM, 'A Note on "Statutory Interpretation"', (1930) 43 *Harv. L. Rev.* 886.

²³ Atiyah RS, 'Common Law and Statute Law' (1985) 48 *Mod. L. Rev.* 1 at 12.

²⁴ 304 US 64, 78 (1938).

dictions, unlike Common Law countries, do not acknowledge the doctrine of stare decisis.²⁵

However, a recent survey of several civil and common law countries demonstrates that today the way judges in both legal systems treat precedents is very similar.²⁶ The factors that lead to this practical convergence are examined below.

a) Horizontal Stare Decisis

Let us first turn to the aspect of *horizontal stare decisis*, i. e. that a court is generally bound by its own decisions. Unlike their Common Law counterparts, the supreme courts in Civil Law countries were never to be formally bound by their own precedents.

However, this difference lost much of its distinctive character when the British House of Lords announced in 1966 that it would abandon the doctrine of strict stare decisis.²⁷

The US Supreme Court had distanced itself from the doctrine even earlier.²⁸

Furthermore, most Civil Law courts - at least the ones in Europe - will, in practice, not easily overrule their former case law.²⁹ This is due to the fact that they do not wish to undermine their authority by correcting their own decisions.

A comparative German-American study³⁰, for instance, found that, in the almost 50-year history of the German Federal Constitutional Court (*Bundesverfassungsgericht*), in which it published around 4000 decisions, it departed from precedents in fewer than

²⁵ Lundmark T, *Juristische Technik und Methodik des Common Law*, LIT Verlag, Münster, 1998 at 22, Merryman JH, *The Civil Law Tradition*, Stanford University Press, Stanford/CA, 1969, at 24-25.

²⁶ Peczenik A, 'The Binding Force of Precedents', in: *Interpreting Precedents: A Comparative Study*, McCormick ND, Summers RS (eds.), Ashgate Dartmouth, Sydney, 1997 at 461.

²⁷ See *Dawson's Settlement, Lloyds Bank, Ltd. v. Dawson and Others* (1966) 1 W.L.R. 1234.

²⁸ See for example, *Erie Railroad Company v. Tompkins*, (1938) 304 U.S. 64, which overruled *Swift v. Tyson*, (1842) 16 Pet. 1, 10 L. ed. 865.

²⁹ See Hoyer H, 'Die Selbstbindung des österreichischen Obersten Gerichtshofes', (1974) 29 *Österreichische Juristenzeitung* 141.

³⁰ Lundmark T, 'Stare decisis in der Rechtsprechung des Bundesverfassungsgerichts', (1999) *Rechtstheorie* at 78.

a dozen cases.³¹ This consistency is all the more remarkable in light of the fact that 78 different judges sat on the court during this period.³²

b) Vertical Stare Decisis

As to the concept of *vertical stare decisis*, that is, the decisions of higher courts are considered binding on lower courts, there are some more similarities between Civil Law and Common Law countries.

Spain and Germany, for example, enacted statutory provisions in the last decades that make some decisions of their constitutional courts expressly binding on courts and governmental institutions.³³ In regard to Spain, Article 5.1 of the Organic Statute of the Judicial power states that "*the Constitution is the supreme norm of the legal system and is binding for all judges and courts, who shall interpret and apply laws and administrative norms according to constitutional precedents and principles, in accordance with the interpretation of them resulting from the decisions handed down by the Constitutional Court.*"³⁴

According to section 31(1) of the German Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* or *BVerfGG*), decisions of that court are binding "*on the federal constitutional institutions, on the states and on all courts and agencies.*" While there is no comparable statutory provision fortifying the binding quality of the decisions of other highest courts of appeal in Germany, such as the Federal Supreme Court (*Bundesgerichtshof*) and the Federal Administrative Court (*Verwaltungsgericht*), there is a great practical uniformity due to the availability of appellate review and reversal.

³¹ Id. at p. 78.

³² Id. at p. 78.

³³ Lundmark T, 'Umgang mit dem Praejudizienrecht', (1999) 3 *DAJV-Newsletter* 34.

³⁴ See Miguel AR, Laporta FJ, 'Precedent in Spain', in: *Interpreting Precedents*, supra note 26 at 275.

Concerning the situation in France, David and de Vries have stated that

*"...despite the absence of a formal doctrine of stare decisis there is a strong tendency on the part of the French courts like those of other countries, to follow precedents, especially those of higher courts [...] The attitude of lower courts towards the decisions of the Cour de Cassation is in substance quite similar to that of lower courts in common law jurisdictions towards decisions of superior courts."*³⁵

This should not come as a surprise, for one has to consider that in the highly bureaucratic court systems of France, Spain or Germany, a judge's career is negatively affected by too many reversals of his decisions. Due to that, judges will strive to do their best to deliver judgements consistent with the opinions of higher courts.

On the European continent, this distinction is sometimes abbreviated by the phrase that precedents are binding *de facto*, not *de iure*.³⁶ This quasi-normative effect of a higher court's decision is an intended means for achieving uniform and predictable application of the law.³⁷ The authority of precedents is even greater when there is a settled line of cases. In Spain, Art 1.6 of the *Codigo Civil* even provides that a settled line of cases can be made binding by legislation.³⁸

Accordingly, some Civil Law scholars have claimed that, today, there is no great difference in how Common Law courts and Civil Law courts deal with precedents. The German comparatist Ernst Rabel pointed out that the practical differences between the practice in Civil Law countries and in Common Law countries had *"to be sought with a magnifying glass"*.³⁹ Further, Zweigert and Kötz have stated that *"it is*

³⁵ David R, de Vries HP, *The French Legal System: An Introduction to Civil Law Systems*, Oceana Publications, New York, 1958 at 117-119.

³⁶ See Peczenik A, supra note 26 at 465.

³⁷ Id. at 466.

³⁸ See also Miguel AR, Laporta FJ, supra note 30 at 272 ff.

³⁹ See Rabel E, 'Deutsches und Amerikanisches Recht', (1951) 16 *Zeitschrift fuer auslaendisches und internationales Recht* 340 at 345.

hardly an exaggeration to say that the doctrine of stare decisis in the Common Law and the practice of Continental courts generally lead to the same results."⁴⁰

With respect to the developments examined above, these statements appear to be in accordance with judicial practice.

4. Judicial Activism vs. Mechanical Decision-making

A further previously perceived difference is that Civil Law judges are not as judicially active as their Common Law counterparts and rather simply mechanically apply legal rules.⁴¹ In the 1969 edition of his classic textbook *The Civil Law Tradition*, John Henry Merryman stated that in Civil Law countries "*the judicial function is narrow, mechanical, and uncreative*".⁴² Similarly, Pietro Calamandrei wrote in 1957 that an Italian judge had told him: "*We decided unanimously, because juridical logic required it, but when we parted we were all full of sadness.*"⁴³ However, whether such statements would still be appropriate today is very doubtful.

This paragraph will demonstrate that the traditional concept of civil law judges that merely mechanically apply rules laid down for them by the legislature cannot withstand closer scrutiny. As will be demonstrated below, many Civil Law courts have in the 20th century moved away from the old French revolutionary ideal of judicial disempowerment and have been actively making law.

⁴⁰ Zweigert K, Kötz H, *Einführung in die Rechtsvergleichung auf dem Gebiet des Privatrechts*, 3rd ed., Mohr, Tübingen, 1998 at 263.

⁴¹ See, for instance, Friesen JL, 'When Common Law Courts Interpret Civil Codes' (1996) 15 *Wis. Int'l L.J.* 1 at 7, Merryman JH, *The Civil Law Tradition* supra note 2 at 39.

⁴² See Merryman, JH, *The Civil Law Tradition*, Stanford University Press, Stanford, 1969 at 39. That phrase, however, has been deleted from the most recent 1994 edition of *The Civil Law Tradition*.

⁴³ Calamandrei P, La funzione della giurisprudenza nel tempo presente, in: 6 *Studi sul Processo Civile* 89 (1957).

An example is the German Supreme Court (BGH), when it had to deal with the issue of post-World War I inflation in the so-called revalorisation cases.⁴⁴ The issue in these cases was whether long-term contracts concluded before or during the war were still enforceable in accordance with the terms fixed at the time of the war's conclusion.⁴⁵ The German Civil Code (*Bürgerliches Gesetzbuch* or *BGB*) did not contain a rule that could have served as the major premise for a simple judicial syllogism. Yet the BGH found a solution by applying the general clause ("*Generalklausel*") of section 242, which states that the debtor is bound to effect performance according to the requirements of good faith, giving consideration to new usage. The new approach meant that the courts could in certain circumstances, adjust contractual relationships.⁴⁶ Since then, section 242 has become a sort of open-ended rule granting the courts competence to fill lacunae in the code as well as correct it.⁴⁷ What the German judges in fact did was what, in the view of many Common Law scholars, a Civil Law judge is prevented from doing: they rewrote the law to suit current needs as the court saw them.

Article 1 of the Swiss Civil Code (*Zivilgesetzbuch* or *ZGB*) even expressly states that the judges shall decide cases not covered by statutory provisions or customary law according to the rule the judges would establish as a legislator.⁴⁸

Similarly, in Italy, modern scholarly literature now states that judges are expected to supplement the *Codice Civile* and their judge-made law is explicitly recognised as a source of law.⁴⁹

⁴⁴ See RGZ 100, 129.

⁴⁵ See RGZ 100, 129 (130).

⁴⁶ See Baudenbacher C, 'Some Remarks on the Method of Civil Law' (1999) 34 *Tex. Int'l L.J.* 333 at 340.

⁴⁷ *Id.* at 341.

⁴⁸ See also Zweigert K, Kötz H, *supra* note 35 at 120-21.

⁴⁹ See, e.g., Trabucchi A, *Istituzioni di Diritto Civile*, 32nd ed., CEDAM, Padova 1991 at 34; Trimarchi P, *Istituzioni di Diritto Privato*, 11th ed., Giuffrè, Milano, 1996 at 23.

Judicial activism is even necessary in the vast majority of civil law jurisdictions that have a Bill of Rights.⁵⁰ The reason for this is that the general and sometimes even vague notions of rights stipulated in a Bill of Rights have to be formed and refined in order to enable judges to apply them to concrete facts. The courts also have to balance the conflicting rights in a Bill of Rights, such as one person’s freedom of speech or expression and another one’s human dignity.

Similarly, one should also note that the EC Treaty is of a rather open-textured nature - and due to that, the European Court of Justice (ECJ) is and has to be extremely judicially active as well.⁵¹ The ECJ therefore contributes not only to the unification of Europe and European Law⁵², but also to the further convergence of the degrees of judicial activism in Common Law and Civil Law countries.

5. Role of Judges

Another classic perceived disparity between Civil Law and the Common Law systems concerns the status of the judge. Some comparatists have stated that judges in most Civil Law countries are highly respected magistrates, but that they do not have public

⁵⁰ The same is, of course, true for Common law jurisdictions. Consider, for example, the judicial activism of the United States Supreme Court with respect to the interpretation of the American Bill of Rights. A famous examples of this activism are the creation of a right to privacy in *Griswold v. Connecticut* 381 U.S. 479.

⁵¹ See Lewis X, 'A Common Law Fortress under Attack: Is English Law Being Europeanised?' (1995) 2 *Colum. J. Eur. L.* 1; Moens GA, Tzovaras T, 'Judicial Law-Making in the European Court of Justice', (1992) 17 *The University of Queensland Law Journal* 76 at 110. The EC Treaty takes the form of a declaration of aims, objectives, purposes and general principles. It uses words and notions of value. Article 2 EC Treaty refers to the Community’s task of establishing a common market and progressively approximating the economic policies of Member States; it refers to the promotion of ‘a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability’ and ‘an accelerated raising of the standard of living’. There are no definitions and no precise stipulations of rights and obligations. Its language is akin to that used in such social instruments as the United States Bill of Rights and the United Nations Declaration of Human Rights. It is this very form of the EC Treaty which necessitates that the Court of Justice engage in judicial activity or law-making. Famous examples of the Court’s judicial activism are the cases C-26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1.; C-6/90 & C-9/90 (joined cases), *Francovich v. Italian Republic*, 1991 E.C.R. I-5357.

status comparable to that of their Common Law counterparts.⁵³ It is true that, unlike for example in Australia or the United States, the names of the Civil Law judges are generally not known to the general public.

However, whether this will still be the case in the future seems highly questionable. Traditionally, judges were considered mere civil servants⁵⁴, or, expressed in the words of Montesquieu, "*la bouche qui prononce les paroles de la loi.*"⁵⁵ (... "the mouth which utters the words of law"). Probably as a consequence of this traditional assumption, Civil Law judges have carried out their duties with a considerable amount of anonymity. The most apparent feature of this concept is the secrecy of deliberations and of the vote. Most Civil Law courts show a uniform face to the outside world. There are usually no dissenting or concurring opinions. All that is made known to the outside observer are the names of the judges who have participated in the decision. Each judge must sign the judgement, regardless of whether the judge was part of the majority.

Exceptions are the constitutional courts in Germany and Spain, which also deliver dissenting opinions.⁵⁶ Dissenting opinions may also be delivered at the European Court of Human Rights in Strasbourg, which was established within the framework of the Council of Europe.

The public attention given to judges on these courts, however, has started a process to personalise justice and transform the way people in Continental Europe think about judges throughout all European legal systems. The *erga omnes* effects of

⁵² See also Part V of this paper.

⁵³ Stein PG, 'Roman Law, Common Law and Civil Law' (1992) 66 *Tul. L. Rev.* 1591 at 1597.

⁵⁴ See, e.g., Schlesinger RB, *supra* note 9 at 183-185.

⁵⁵ Montesquieu CL, *De l' esprit de lois*, Livre XI, ch. VI, 1748; as quoted in: Merryman JH, 'The French Deviation', (1996) 44 *Am. J. of Comp. L.* 109 at 112.

⁵⁶ Concerning Germany, see Alexy R, Dreier R, Precedent in the Federal Republic of Germany, in: *Interpreting Precedents*, *supra* note 23 at 19; concerning Spain, see Miguel RA, Laporta FJ, *supra* note 30 at 262.

constitutional decisions have increased the relative prestige of the judges. It is surely premature to conclude from this observation that the Civil Law tradition is at last breaking free from the excesses of the French revolutionary ideology. Still, a fundamental reformulation of the way people think about the role of judges appears to be gathering force in Europe.

Accordingly, as to the role of the judges, which has been one of the classic differences between Civil Law and Common Law jurisdictions, there seems to be a trend towards convergence as well.

6. Legal Scholars

The increasing status of the Civil Law judge is also likely to have a reciprocal influence on the importance of legal scholarship (*la doctrine*) in Civil Law countries.

Traditionally, Civil Law professors and academics have not primarily been regarded as teachers, but as distinguished academics, and accordingly have usually had more influence on the development of the law than their Common Law counterparts.⁵⁷ The reason for this is historic. Since the precodification medieval study of Roman law in European universities, scholars have been central to the development of the Civil Law.⁵⁸ The rediscovery of the Justinian Codex was perceived so difficult that it was left to the scholars (the *glossators* and the *post-glossators* or *commentators*) to explore the text and explain its meaning.⁵⁹ Accordingly, even up to the present time, the Civil Law judge often looks to legal scholarship to determine "what the law is" in

⁵⁷ Friesen JL, *supra* note 36 at 7, Stein PG, 'Roman Law, Common LA and Civil Law', *supra* note 46 at 1597, Stein PG, 'Judge and Jurist in the Civil Law: A Historical Interpretation', (1985) 46 *La. L. Rev.* 241.

⁵⁸ See Stein P, *Justinian's Compilation: Classical Legacy and Legal Source*, (1993) 8 *Tul. Eur. & Civ. L. F.* 1, 2-14.

⁵⁹ Stein PG, 'Judge and Jurist in the Civil Law: A Historical Interpretation', *supra* note 46 at 243.

connection with particular problems. Thus, eminent scholars in all Civil Law countries tend to have considerable influence on the interpretation of the law.⁶⁰ Modern commentaries are among the most influential scholarly works. Commentaries are private annotations of the codes whose goals are to give guidance to practicing lawyers, to influence the case law of the courts, and to make contributions to the academic debate. In most European countries, commentators are usually university professors.

However, it is disputable whether this difference will persist in the next years. Firstly, there is a likelihood that the relative importance of legal scholars will decrease due to the increasing importance of the judge. This is especially true for the growing area of European Case Law, where it is the judges' task to determine what the law is and to clarify how to interpret the legal rules laid down by them, rather than leaving that task to academics.

Secondly, in some of the fastest growing areas, such as international commercial law, intellectual property law or telecommunication and media law, developments mostly take place outside legal scholarship, but through practitioners working in that field, such as lawyers or arbitrators. Accordingly, their expertise and practical experience carries more weight than theoretical academic writings.

Finally, scholars in Common Law countries have managed to come closer to their Civil Law counterparts in terms of influence as well.

An example are the American Restatements of Tort and Contract Law⁶¹, which are an indispensable feature of US American law and have enhanced the status of those

⁶⁰ See Schlesinger, *supra* note 12 at 715.

⁶¹ The Restatements, however, do not have a character comparable to codes. Rather - and this might be a reason for their vast acceptance among American judges - they are restatements of the American common law as laid down in judicial decisions. Restatements have also been adopted for the areas of agency, conflict of laws, foreign relations, property, trusts, unfair competition and other areas of law.

involved in their compilation: They are put together by the American Law Institute, a private organisation which brings together distinguished scholars and practitioners.⁶²

All of this is about to diminish the once considerable difference as to the influence of legal scholarship in Common Law and Civil Law jurisdictions and it is likely that this process of convergence will continue further.

These are the most important visible effects of convergence in both Common and Civil Law jurisdictions. Let us now turn to the mechanisms that at present contribute to further convergence of the two legal systems.

V. Current Mechanisms of Convergence

1. The Importance of American Law

It can hardly be disputed that US American Law has had a great influence on several important Civil Law concepts. In the aftermath of its victory in World War II, the United States exported many of its ideas to Europe – especially in the field of contract law, antitrust law, or product liability law.⁶³ Among some European scholars, it has even become popular to compare the importation of American legal ideas and culture with Europe's rediscovery of Roman law and the gradual reception within Europe between the twelfth and sixteenth centuries of a *ius commune* inspired by Roman

⁶² von Mehren AT, *Law in the United States: A General and Comparative View*, Kluwer, Deventer, 1988 at 21.

⁶³ Baudenbacher C, ‘Das Europäische Modell bei Kartellverbot und Missbrauchsaufsicht – ein Exportartikel?’, in: *Schwerpunkte des Kartellrechts* 9, FIW-Schriftenreihe No. 175, 1997, at 13.

Law.⁶⁴ Although the concept of American law as the *ius commune* of the 21st century appears exaggerated, there are certain areas of law in all European nations - particularly rules of commercial law - that have felt an increasing American influence. Modern types of contracts such as factoring, franchising and leasing, for example, are but few of the concepts which evolved in an active and creative American business climate and have served as models for legal reform in other nations.⁶⁵

Moreover, U.S. law schools attract many European scholars and students. In the course of their studies, these students become familiar with American legal thinking and, thus, with the common law methodology. This, some writers conclude, reinforces and accelerates an evolution towards the recognition of precedents as a source of law that is already occurring in the countries of the European continent.⁶⁶

2. The Unification of Europe

Of perhaps greater importance is the convergence that goes along with the unification of Europe. The work of such organs as the European Human Rights Commission and Court or the European Court of Justice is a unifying legal force, bringing the legal systems of member states, both Common Law and Civil Law, closer to each other.

For instance, the continuous pronouncements of principles by the European Court of Justice, expounding basic rules of the treaty, has led to the development of relatively extended bodies of case law which play an important role every European citizen's

⁶⁴ See de Cruz P, *Comparative Law in a Changing World*, Cavendish, London, 1999 at 485 ff., Wiegand W, *The Reception of American Law in Europe*, (1999) 39 *Am. J. Comp. L.* 22. The term *ius commune* refers to a common basis – Roman law and Canon law- for the study of law throughout medieval Europe.

⁶⁵ Zekoll J, 'The Louisiana Private-Law System: The Best of Both Worlds' (1995) 10 *Tul. Eur. & Civ. L.F.* 1.

⁶⁶ Baudenbacher C, 'Some Remarks on the Method of Civil Law', (1999) 34 *Texas International Law Journal* 333 at 356.

daily life. When European lawyers name a case, such as "*Cassis de Dijon*" or "*Francovich*", they expect their colleagues to know the rule or the set of rules behind it. Thus, the law of every European member state becomes increasingly dominated by case law. Civil Law jurists usually do not feel uneasy about that, perhaps because they are reassured by the possible reliance on the EC treaty or treaty-executing law text. This may be because the application of the EC treaty with its constitution-like features requires the European member state jurisdictions to follow a path moving very closely along familiar Civil Law practice.⁶⁷

Further examples of how the Civil Laws of the European Union have been supplemented by common law elements include the concept of true and fair view in accounting law, the evolution of due process in competition law, and an interpretation of Article 81(1) of the EC Treaty – the provision prohibiting cartels- as a sort of a rule of reason.⁶⁸

The English legal system, on the other hand, has been influenced by some Civil Law concepts as well. Lord Denning M.R. stated as early as in 1977: "*We know, of course, that the practice on the continent of Europe is different. It seems to me that the time has come we should revise our practice.*"⁶⁹ Today, the main gateway for Civil Law concepts into English Law are the EU directives, which are issued by the EC Commission and Council in collaboration with the European Parliament.⁷⁰ Those directives impose on the United Kingdom (and all other member states) the obligation to enact legislation in accordance with the requirements of the respective directive. An

⁶⁷ Zweigert K, Koetz H, supra note 40 at 261.

⁶⁸ See Ritter L et al., EC Competition Law: A Practitioner's Guide, 2nd edition, Kluwer Law International, The Hague/Netherlands, 2000 at 648.

⁶⁹ *Nippon Yusen Kasha v. Karageorgis* 1 W.L.R. 1093 at 1095-1095.

⁷⁰ See art. 189 (Treaty of the European Union)

example of an important directive is the European Product Liability Directive⁷¹, which led to the enactment of the English Product Liability Law in 1987.⁷²

Further convergence is achieved by means of European Conventions. For instance, the Brussels Convention and its detailed, refined and complex elaborations by the European Court of Justice have led to the harmonisation of European Civil Procedure. Accordingly, comparative legal scholars have frequently highlighted the effect of convergence that goes along with the unification of Europe.⁷³

The precise limits, if any, of this trend towards convergence are difficult to formulate. According to some commentators, certain areas of law – family law or inheritance law, for example – are more resistant to a “European standardisation” than others such as commercial law.⁷⁴ Supposedly, this has to do with differences in fundamentally held values – for instance, on abortion or euthanasia – and ultimately, with differences in outlook on life itself.⁷⁵

Nevertheless, the vast majority of scholars agree that the European Court has made a

⁷¹ European Product Liability Directive (European Council Directive 85/374 of July 25, 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, O.J.LL 210/29 (7 August, 1985).

⁷² See Zimmermann R, 'Civil Code and Civil Law: "Europeanisation" of Private Law within the European Community and the Re-Emergence of a European Legal Science' (1994) 1 *Colum. J. Eur. L.* 63 at 73-82.

⁷³ See, for instance, Merryman JH, 'Convergence and Divergence of the Civil Law and the Common Law, supra note 4 at 23-24; Vranken M, *Fundamentals of European Civil Law and Impact of the European Community*, The Federation Press, Sydney, 1997 at 217-21; Vranken M, 'The Relevance of Civil Law Doctrines in Australian Courts: Some Examples from Contract and Tort', (1999) *UNSW Law Journal* 1.

⁷⁴ Van der Bergh GCJJ, 'Ius Commune, a History with a Future?', in De Witte B, Forder C (eds), *The Common Law of Europe and the Future of Legal Education*, Kluwer, Deventer, 1992 at 605; Sandrock O, 'Das Privatrecht am Ausgang des 20. Jahrhunderts: Deutschland – Europa – und die Welt', (1996) *Juristenzeitung* 1 at 9; Zimmermann R, 'Roman Law and Comparative Law: the European Perspective', (1995) 16 *Journal of Legal History* 21 at 24-25.

⁷⁵ Vranken M, *Fundamentals of European Civil Law and Impact of the European Community*, supra note 74 at 218.

substantial contribution to the convergence of the Civil law and the Common Law and the continued importance of its role is beyond doubt.⁷⁶

3. The Unification of Law

Finally, convergence is enhanced by the ongoing unification of law, which is usually accomplished through the use of institutions specifically intended to unify private law. Some of the most important international organisations are the Hague Conference on Private International Law, the International Institute for the Unification of Private Law (UNIDROIT) and the United Nations Commission on International Trade Law (UNCITRAL).

The unification of law places great faith in the power of legislation and raises all of the issues regarding the possibility and desirability of reform along foreign lines that were discussed in Europe in the early nineteenth century in the context of the Savigny-Thibaut debate.⁷⁷ The unification of law movement has traditionally concentrated on rules of law and is therefore at the mercy of the different legal institutions, actors, and procedures existing within nations for uniformity in the interpretation and application

⁷⁶ See also Hartlief T, ‘Towards a European Private Law? A Review Essay’ (1994) 1 *Maastricht Journal of European and Comparative Law* 166 at 174, Vranken M, *Fundamentals of European Civil Law and Impact of the European Community*, supra note 74 at 218.

⁷⁷ Merryman JH, ‘Convergence and Divergence of the Civil Law and the Common Law’ supra note 4, at 21. The term Savigny-Thibaut Debate is used to describe the confrontation between *Friedrich Carl von Savigny* and *A.F.J. Thibaut* on the desirability of a German Civil Code in 1814. *Thibaut* and his followers (the “*Heidelberger School*”), proposed to replace the diversity of German territorial laws by a General Civil Code modeled on the French *Code Civil*. *Savigny*, the founder of the *Historical School*, countered that the time was not yet ripe for a unified German Code. He argued in a famous essay entitled „*Of the Vocation of our Time for Legislation and Legal Science*“⁷⁷ that the imposition of a common Code would violate the traditions of the territorial laws it opposed. *Savigny* and the *Historical School* considered law the product of history. Therefore, they argued in favour of a legal science to analyse the historic development of law first. A common German Code should only be drafted on the basis of those findings. At the time *Thibaut’s* proposal had only slim chances of bearing fruit, since after fall of *Napoleon* in 1815 the various German rulers strengthen their powers. This rendered the democratic integration and the whole of Germany very unlikely. *Savigny’s* opposition, added to these unpropitious circumstances, finally killed *Thibaut’s* proposal.

of rules.⁷⁸ Merryman states that these observations raise important questions about the extent to which unification of law is likely to be accomplished outside a few narrow areas in which there is sufficient international consensus and identity of interest to ensure a common understanding and a continuing effort to achieve similar results in practice.⁷⁹ In this context one should note that so far, the unification, to a large extent, took place in the area of international trade, such as with the drafting of the UNCITRAL Model Law on International Commercial Arbitration, the UNIDROIT Principles and the INCOTERMS 2000. However, there are now many international conventions in a variety of fields, all adopted by nations from both legal traditions. Each convention has the effect of bringing legal systems closer together and can even start "chain reactions of convergence". In 1990, for example, the United States adopted the moral right of the artist, which is a French invention, as a result of adherence to the Berne Copyright Convention.⁸⁰

Interestingly, the Uniform Law for the International Sale of Goods under the 1980 United Nations Convention (CISG) is a European/American hybrid itself. On the one hand, the rules pertaining to the formation of a sales contract are reflective of European civilian sources.⁸¹ On the other hand, the provisions that define the rights and obligations of the seller and the buyer closely resemble solutions espoused by Article 2 of the American Uniform Commercial Code.⁸²

Yet the practical effect of that formal convergence by means of the adoption of a convention should not be overestimated. Merryman has pointed out that, for instance, a French judge will interpret the terms of the convention through the French legal-

⁷⁸ Merryman JH, 'Convergence and Divergence of the Civil Law and the Common Law' supra note 4, at 21.

⁷⁹ Id. at 21.

⁸⁰ Hoeren T, 'Internationales Urheberrecht', (1999) University of Muenster Lecture Paper.

⁸¹ Zekoll J, supra note 66 at 6.

⁸² Id. at 7.

cultural filter and that therefore, at the end of the day, convergence is rather formalistic.⁸³

It is indeed convincing that the process of domesticating the foreign legal institution will necessarily change it into something different from what it was at its source. Still, in practice, one or the other party in litigation will strive to persuade the judge to deal with the provision so as to supply a result that is consistent with the convergence ideal, and over time that sort of process must have a converging effect.⁸⁴ The area of difference will thus be reduced. One can see that unification clearly in international trade, but also in other fields of law, such as human rights or intellectual property.

VI. The Best of Both Worlds - Where Should the Legal Evolution Take Us?

Of course, despite those processes of convergence, both systems can still adequately be distinguished by describing the Common Law as primarily judge-made law and the Civil Law as primarily relying on codes. If we consider the process of convergence as a legal evolution, in the sense from a less to a more developed legal system, the question arises which system should prevail in the process of convergence to make the newly emerging legal system more efficient.

Starting with the Common Law, its strength is its adaptability and its incremental nature. Every case has a solution and each single decision adds to its richness. This very same richness is, however, at the root of two disadvantages: the Common Law is inaccessible and difficult to research - in spite of improved research techniques due to computer-assisted legal research tools such as Westlaw and Lexis Nexis. Judicial

⁸³ Merryman JH, in: Legrand P, ‘John Henry Merryman and Comparative Legal Studies: A Dialogue’, (1999) *American Journal of Comparative Law* 3 at 46.

⁸⁴ *Id.* at 46.

precedents build the system one case at a time, each different from the other. Most Common Law lawyers are, therefore, specialists, conversant only with certain specific areas of the law. If they need an answer in a field outside their expertise, they usually have to consult a colleague specialising in that field. All of this makes the Common Law system rather expensive.

The Civil Law system, on the other hand, is easy to research: the sources of law are obvious and at hand. Furthermore, it is very accessible: how better to explain a decision than to point to a specific article in a code?

Another strength of the Civil Law is its economy. This economy is so great that in most Civil Law countries lawyers are generalists, conversant with the law at large rather than limited to any specific area of it. As the author of this paper can confirm from her own experience as law clerk with a Washington D.C.-based US law firm, this interesting distinction is clearly illustrated by one question, which is typically asked when Common Lawyers meet their civilian colleagues: "What kind of law do you practise?" A Civil Lawyer might respond that he practises business law, tax law or family law, meaning that most of his clients come to him for legal problems in that area. What is unclear and misleading to a Common Law attorney is that even if a civilian tax lawyer has not looked at any family law for the past twenty years, he can reliably find most answers about, say, divorce, in a matter of minutes. The Civil Law is therefore an elegant legal system built logically upon - more or less - enduring principles.

Modern civilian thinking admits that the codes are the products of particular social settings and reflect the thinking of their time. Still, the enormous intellectual effort underlying a civil code's claim for generality makes it more resistant to political com-

promise, giving it a lasting power only major political and social transformation can interfere with. Examples of the importance of this factor are the French and German civil codes, which have been voluntarily adopted in many countries.⁸⁵ However, despite the above mentioned stability, codes can still be enacted or amended relatively quickly in order to react to changed societal parameters. They are therefore better equipped to keep up with the pace of modern society, rather than relatively slow developing case law.

Thus, it appears to me that the economy of the Civil Law and its ability to quickly adapt to changes of the societal environment clearly win over the complexity of the Common Law. However, one should keep in mind that methodological guidance, no matter whether of Civil Law or Common Law origin, is often of little help when it comes to doing justice in the peculiarities of a concrete case. Courts must walk a certain line between being bound by written norms and case law on the one hand and the free search for a new rule on the other. Going beyond such limits is, however, possible in both systems.

VII. CONCLUSION

In conclusion, this paper has shown that many of the previously visible difference between Common Law and Civil Law systems have been or are about to be diminished.

⁸⁵ For the influence of the German Civil Law in Austria, former Czechoslovakia, Greece, Hungary, Italy, Japan, Korea, Switzerland, and (former) Yugoslavia, for instance, see Glendon MA, Gordon MW, Osakwe C, *Comparative Legal Traditions: Texts, Materials, and Cases on the Civil and Common Law traditions, With Special Reference to French, German, English*, 2nd ed, The West Group, St. Paul/Minn., 1994 at 58-59.

The increasing codification in many Common Law countries represents the dawning of the "age of statutes". As to the filling of statutory gaps, that increase of statutes is likely to require Common Law judges to fill gaps in those codes by statutory analogy, just as Civil Law judges do. Despite the absence of a formal doctrine of *stare decisis* in Civil Law countries, precedents have a *de facto* binding effect in both Civil and Common Law jurisdictions. Further, both Civil Law and Common Law judges do more than merely mechanically apply rules and are judicially active. The *erga omnes* effects of constitutional decisions have increased the status of the judge in Civil Law countries and lessened the former gross disparities in prestige between Common Law and Civil Law judges. The increasing prestige of the Civil Law judge is also likely to diminish the importance and influence of legal scholars, as well as the fact that in many of the fastest growing areas of law, the opinion and expertise of practitioners are more important than classical legal scholarship. Accordingly, the role of scholars in both systems is about to be aligned as well.

The most important mechanisms that currently contribute to the process of convergence are the influence of American Law, especially in the commercial sector, the unification of Europe and the unification of legal rules by means of conventions and model laws.

The fact that a mixed body of law - such as the law of the European Community - is successfully dealt with by the Civil Law courts of the Continent and by the Common Law courts in the United Kingdom and Ireland proves that convergence works. The hybrid systems of Quebec, Louisiana, Puerto Rico, South Africa and Scotland provide some more examples.⁸⁶

⁸⁶ See Schlesinger, *supra* note 12 at 291.

However, when it comes to the question which system should prevail in the process of convergence in order to make the newly emerging system more efficient, the author of this paper takes the view that the economy of the Civil Law and its ability to quickly adapt to changes of the societal environment clearly win over the complexity of the Common Law.

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