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## **The CISG, the European Court of Justice and the Search for Legal Uniformity**

by

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The title of my paper reflects the topic I originally undertook to explore: namely, a comparison of the European Union's quest for legal uniformity with that of the U.N. Convention on Contracts for the International Sale of Goods (better known in this country as the "CISG" or the "Vienna Convention").

A few years ago I considered the Vienna Convention in terms of its Article 7 (1), which mandates that, "[i]n the interpretation of this Convention, regard is to be had to . . . the need to promote uniformity in its application . . ." Legal uniformity of application seems destined to remain an unrealized goal for the CISG. Briefly, the numerous courts in the CISG's over fifty signatory States encounter manifold impediments to uniformity of application.<sup>1</sup>

First, there are inevitable problems of judicial interpretation itself within each national legal system, regardless of the source of the governing legal authority, such that, even within a given legal system, legal uniformity remains an unrealized ideal rather than an achievable practice. Second, tensions often exist between what judges may perceive to be an objective

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<sup>1</sup> Curran, J.Law&Comm.

interpretation of the CISG text, and what they consider fairness and justice to require in a pending case. Third, problems surround the mythology that the CISG is a single text, when in fact in all of its versions it is a translated text, published in more than one official and unofficial language translations, with both intentional and unintentional substantive disparities appearing in its different language versions.<sup>2</sup> Fourth, differences in legal traditions, cultures and practices are such that concepts of legal phenomena as basic as "trials" and "contracts" fail to denote the same concepts in different languages, despite the ease with which a translator may pick an allegedly equivalent word in a different language. Fifth, differences abound in what are considered primary and secondary sources of legal authority. These differences are particularly vivid between civil-law and common-law legal systems.

For example, where a U.S. judge would be prepared to consult prior CISG case law, a French judge would expect to consult scholarly commentary rather than the judicial decisions themselves. Moreover, a U.S. judge would be perplexed by a French judicial application of the CISG, because the French court opinion might well consist of one sentence without any clear description of the case's underlying factual scenario, and essentially be inaccessible without the explanatory scholarly commentary that French lawyers seek when trying to understand French judicial decisions. Consequently, a French judge assessing United States CISG case law instinctively would look for *la doctrine*, the scholarly commentary that occupies a privileged position of influence on French court adjudications, but which, to a common-law trained legal mind, may be perceived as tainted by the scholar's interpretive subjectivity (not to speak of by the lowly status of American scholars in terms of their influence on court decisions). Given

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<sup>2</sup>Flechtner, J.Law &Comm.

these significant differences across legal cultures in the understandings of what a judicial decision is, uniform application of the CISG based on prior judicial decisions of necessity is compromised by the inevitable variety among judicial interpretations of prior case law, much of which is a consequence of the legal methodology used in each signatory State.

Even at first glance, it is apparent that some of the challenges to a uniform application of the CISG have been resolved in the European Union context. Perhaps the most dramatic and visible differences between the CISG and the European Union are, on the one hand, the significant disparity, arguably amounting to a difference in order of magnitude, between the number of CISG signatory States (listed at 54 as of April, 1999),<sup>3</sup> in contrast to the European Union's smaller number of member States; coupled with, on the other hand, the use of a single court to interpret European Community law, as opposed to the use of the panoply of the national courts of signatory States for the CISG.<sup>4</sup>

The remarkable success in the European Union of the referral process from national courts to the European Court of Justice has been analyzed at length in recent years.<sup>5</sup> By all

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<sup>3</sup> See Michael Will's updated "The First 555 or so [CISG] Decisions" (1999).

<sup>4</sup> It should be noted that international arbitration tribunals adjudicate many disputes arising under the CISG, benefitting at least in part from the advantages of some degree of uniformity, although perhaps less so than a single court with a discrete body of case law. On the other hand, in addition to the 54 signatory States, each of whose courts adjudicate CISG issues, the United States may be viewed as including another 51 courts at least, inasmuch as each state has its own legal system, with a parallel federal court system. Nor is the United States' federal system univocal. On the contrary, substantive legal conflicts persist among different federal circuit courts, due to the small number of cases the United States Supreme Court agrees to hear. For further discussion of this issue, see CASS SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

<sup>5</sup> See, e.g., J.H.H. Weiler, ... (19-).

indications, the readiness of domestic courts to participate actively in referring cases to the ECJ appears to have become a tradition in the national life of the member States, with national judges abstaining from referral generally where the ECJ has made its position on the relevant legal issue clear.<sup>6</sup>

The referral structure triumphs by funneling a multitude of legal issues towards a single European court, so long as they ostensibly fall within its sphere of competence. However cacophonous the languages of origin may be, however stubborn the problems of translation may be that persist on numerous levels between referring member State court and the European Court of Justice, the adjudication of issues deemed European is univocal, issued and uttered by the European court, and, moreover, based on that court's body of precedents.

The European Union's structural remedy to the CISG problem of adjudication by diverse courts in numerous nations need not, however, mean that legal convergence, either substantive or methodological, would be realized at a substructural level. Scratching the surface of the European Union's legal system might bring into view a juridical Tower of Babel, due to the clash of discordant legal cultures between the two principal, divergent legal systems coexisting in the European Union: namely, the common-law and civil-law systems.

Certainly, the European Union member States do suffer from some of the same barriers to legal uniformity as the CISG, such as the use of numerous different languages, with inevitable attendant imperfections of translations that go beyond the realm of language, extending to profound conceptual differences, to conflicts between disparate understandings in common-law

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<sup>6</sup>See Andenas & Jacobs, 1998 [cite to particular ch.].

and civil-law systems as to the defining characteristics of law itself.<sup>7</sup> These obstacles to legal uniformity are very real and will persist in diminishing the extent to which legal uniformity can be achieved or perfected. The European Union may, however, be overcoming critical obstacles to legal uniformity. It seems to be developing a kind of homogenization of the two judicial traditions it encompasses – in other words, a new and different product is emerging, a byproduct of the unique composition of the European Union’s legal institutions.

I do not want to overstate the case, or, worse, to appear to minimize the critical differences between the common and civil-law legal systems. Many flaws, especially in comparative legal analysis, have resulted from an unfortunate tendency to overlook the profound and fundamental nature of those differences.<sup>8</sup>

Indeed, in *Bulmer v. Bollinger*, Lord Denning of Britain’s House of Lords seemed almost to despair of reconciling those differences. In an opinion that has been reproduced in part by Claire Kirkpatrick in her recent article in the *EUROPEAN LAW JOURNAL* (vol. 4, June, 1998); and, still more recently, by Anthony Arnall in *EUROPEAN COMMUNITY LAW IN THE ENGLISH COURTS* (Oxford, 1998), Lord Denning expressed the collision of the two legal traditions in terms of a common-law court’s dilemma as it attempted to deal with European legislation drafted in the civilian style. His opinion brings to light the alien aspect to the common-law legal perspective of what, ultimately, is the civilian idea of law itself, of the law as text, and of the function and nature of legislation. Lord Denning signals how ill-equipped the common law is to assimilate and process texts drafted and conceived in the civil-law mentality,

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<sup>7</sup>See Curran, *AmJCompL*.

<sup>8</sup> *See id.*

legal texts that do not fit into the pre-existing common-law grids and categories, in other words, legal texts that can not be decoded and deciphered by using the common law's habitual tools of interpretation:

The Treaty is quite unlike any of the enactments to which we [are] accustomed. The draftsmen of our statutes have striven to express themselves with the utmost exactness. They have tried to foresee all possible circumstances that may arise to provide for them. They have sacrificed style and simplicity. They have forgone brevity. They have become long and involved . . . How different is this Treaty! It lays down general principle. It expresses its aims and purposes . . . but it lacks precision. It uses words without defining what they mean. An English lawyer would look for an interpretation clause but would look in vain. There is none! . . . It is the European way. Seeing these differences, what are the English courts to do?<sup>9</sup>

Finally, Lord Denning answered his own question: "*We must follow the European pattern.*"<sup>10</sup>

It is not just the English who are obliged to embark on a foreign way. Although the homogenized European legal product has a stronger strain of civilian than of common-law mentality, and may be criticized as allowing the former to dominate the latter, civil-law methodology is not remaining unchanged in the European context. The very prevalence of the European Court of Justice as a source, if not, as many would say today, as the most important source, of legal authority in the European Union, has created a system with an increasingly common-law-like component of *stare decisis*. European judges, like their common-law brethren, and, unlike their civilian brethren (at least in the latter's official role), create law, fashioning it with each judicial decision, such that legal norms are judicially created for future application to

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<sup>9</sup>[cite]

<sup>10</sup>*Id.* (Emphasis added.)

similar future cases.<sup>11</sup> This phenomenon is not totally like the common-law's *stare decisis*, however, inasmuch as the ECJ's decisions have a civilian flavor in the style of their composition, such that the European judicial decision itself resonates with familiarity and significance to civilians in ways alien to their common-law counterparts.

The main thrust of the article I am writing is to suggest why the European Union should succeed in its objective of legal uniformity despite encompassing two highly distinct legal traditions. My theory is that the defining characteristics of the civil-law legal culture, although in stark and profound contrast with those of the common-law legal system, nevertheless appear prominently and pervasively in the *non-legal* spheres of common-law nations; and vice versa, such that common-law legal characteristics correspond closely to elements often excluded from civil-law legal cultures, but which are included in the non-legal domains of the civil-law European Union member States. Conversely, the defining characteristics of civil-law legal culture not only are largely absent from common-law legal systems, but, as Peter Goodrich has demonstrated, they consciously and repeatedly were rejected by England.<sup>12</sup> Nevertheless, they are prominently and pervasively present in the *non-legal* spheres of common-law European Union member States.

To those of us who believe that law is part and parcel of the larger society in which it emerges, develops and thrives, and which, in turn, it affects in a dynamic process of mutual

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<sup>11</sup>The European Court of Justice's preeminent role as the source of European Community legal authority has discomfited civilian member States, causing them to seek alternatives which would relegate the Court to an inferior status. See MINGOZZI, EUROPEAN COMMUNITY LAW 84-85 (1992).

<sup>12</sup>See PETER GOODRICH, *ÆDIPUS REX* (199-).

influence, the most likely situation one might imagine would be that, to the extent law reflects the larger society, common-law characteristics should permeate the larger society of nations with a common-law legal system. While that statement in and of itself is not inaccurate, the point I hope to develop is that its converse *is* inaccurate: namely, the larger cultures of common-law nations are not devoid of civilian attributes, and vice versa. Both common-law and civilian attributes abound in the larger social, political and intellectual cultures of all of the European Union's member States. Each State has myriad non-legal characteristics that correspond to the defining characteristics of both the common-law and civil-law mentalities.

Precisely because law is embedded in the larger society, and because the fundamentals of both mentalities are pervasive in all of the European Union's member States, lawyers come to the law with an understanding, an instinctive grasp, of both mentalities, and proceed to learn to "un-learn" one of those mentalities when dealing with legal analysis. Indeed, the process of becoming a lawyer involves repressing the "other" mode of thinking, "un-learning," when engaging in legal thought, its manner of reasoning, of perceiving and analyzing the world. The conception of the world, the method of reasoning, that lawyers are "un-learning" for the purposes of their legal training nevertheless remains valid for the non-legal domains of intellect and discourse. This formative process applies to lawyers trained in both the common and civil-law legal systems.

I propose to support this thesis by signaling the striking resemblances between the common-law mentality and Romanticism; and between the civil-law mentality and the Enlightenment. Because all of the European Union's member States were influenced by both Romanticism and the Enlightenment, lawyers from both the common-law and civil-law legal systems are adept at both conceptions of the world and of life that underly the legal systems.



Thus, the process of Europeanization is reduced to *re-learning* to apply the "other," "un-learned" system's tenets and methodology to the legal sphere of reasoning, thinking, arguing and conceptualizing. This process of skill re-acquisition for European lawyers and judges is greatly facilitated by their preexisting intimacy of acquaintance with the "other" perspective in the non-legal domains of their lives.

Thus, for example, because of the profound influence of Romanticism in Germany, a German lawyer has the capacity to understand the common-law mentality. Its foreignness will reside in its application to the legal domain. The extent to which Romanticism has been an influence in a civil-law nation's general culture should correlate with the degree of ease its lawyers and judges face in adapting common-law concepts and conceptions in the sphere of law. Consequently, the penetration of common-law attributes should be easier, quicker and deeper in Germany than in France, a country in which the Enlightenment played a more dominant role in intellectual discourse and development than did Romanticism.

Before I proceed with this analysis, I want to be very clear that I am not suggesting that Romanticism was itself a cause of the common-law legal system, or the Enlightenment a cause of the civil-law legal system. Both legal systems predate Romanticism and the Enlightenment by many centuries. Rather, Romanticism and the Enlightenment are useful to my argument to the extent that they are emblematic of different modes of intellectual discourse, outlook, thought and focus that have long coexisted in western society. For myriad complex reasons, one or the other of those discourses dominates the legal institutions of Europe's member States.

The influences of the Enlightenment and Romanticism in Europe are the subject of countless commentaries, and have been amply documented. Because Romanticism is kindred to

the common-law mentality in many ways, and because the Enlightenment is kindred to the civil-law mentality in many ways, examining Romanticism and the Enlightenment makes *visible* the presence of the common-law perspective in the general cultures of Europe's civil-law States, and the presence of the civil-law perspective in the general cultures of Europe's common-law States. My use of Romanticism and the Enlightenment are thus as tools to demonstrate my thesis, thanks to dual phenomena: (1) the widespread nature of scholarly work documenting both Romanticism and the Enlightenment; and (2) their identifiable commonalities with defining attributes of common and civil law. To the extent that my thesis is justified, there should be many areas beyond the residues of the Enlightenment and Romanticism that evidence the admixture of common-law and civilian attributes in the non-legal spheres of the European Union States' cultures.

My categories and correspondences are not impregnable. Romanticism and the Enlightenment have considerable overlap. Although often contrasted with each other, each also is indebted to the other. Moreover, as Isaiah Berlin has put it, today "[w]e are children of both worlds."<sup>13</sup> Similarly, the legal sphere of societies is not distinct and separable from the rest of society: on the contrary, each exists in a dynamic interrelation of mutual influence with the other. Nevertheless, it still is possible to discern attributes characteristic of legal culture that are not equally characteristic of the larger culture. My theory is sustainable to the extent that one can distinguish certain attributes as characteristic of Romanticism, but uncharacteristic of the Enlightenment, and vice versa; that one can distinguish some attributes as characteristic of legal institutions, but uncharacteristic of non-legal institutions, and vice versa; and that one can

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<sup>13</sup>ISAIAH BERLIN, THE ROOTS OF ROMANTICISM, 141 (ed., Henry Hardy 1999).

distinguish some attributes as characteristic of common-law legal systems, but uncharacteristic of civil-law legal systems, and vice versa. Each of these binary oppositions is far from absolute in validity, however. A helpful way to envision them is as elements in mathematical sets, where the sets overlap, such that their intersection covers some area, but where there is not a union of sets, and the areas of complement, the non-intersecting areas of the sets, also are appreciable.

The homogenization of law and legal methodology in Europe increasingly will effect an expansion of the area covered by the intersection of the two sets representing the common law and the civil law. If one were to imagine the set representing the common law as a circle of red paint, and the set representing the civil law as a circle of white paint, European legal homogenization would be the pink area of overlap, with its dimensions increasing in jagged lines and a range of shades from white to red, as paint seeps unevenly beyond the circles' circumferences.

### *Romantic Common Law; Enlightened Civil Law*

The common law is a law defined in terms of past judicial decisions. The resulting methodology is such that the common law perpetually is in flux, always in a process of further becoming, developing, transforming, as it cloaks itself with the habits of past decisions, tailored to the lines of the pending situation. The common law evolves with the ongoing derivation of legal standards from prior judicial decisions, but it is defined by continuous motion. This means that the common law is that which cannot be crystallized, frozen or ever entirely captured. It is fluid, with a suppleness that resides in its inseparability from each discrete, concrete set of facts, the facts of the lived experiences which formed the basis of the litigation that led to the prior

relevant court adjudications.<sup>14</sup>

The common law is the analysis of the particular because common-law legal rules derive from the series of unique life experiences, by definition not amenable to exact repetition. The common law signifies by way of the courts' assessments of the legal significance attributable to unique events, to facts in the unicity of their particular life contexts.<sup>15</sup> By virtue of their inextricable connection to the factual life scenarios that lead to litigation, common-law legal issues also must be unique. It is thus clear that reasoning by analogy from a prior adjudicated case to a pending case never can attain scientific precision. The comparison must at best remain simile; it never can reach the exact equivalence of metaphor.

The common law's analogical reasoning is defined in terms of the pending case's outcome – in other words, common-law legal reasoning consists of arguments, some of which succeed in practice, and others of which fail. Those arguments destined for success join the ranks of a hierarchy of legal axioms, the springboard for future analogies to meet the needs of future arguably similar cases. Thus, each legal standard is linked irreducibly to the factual context from which it emerged, rendering both legal standard and legal argument inextricably bound to factual

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<sup>14</sup>See Curran, ..., CAHIERS DE MÉTHODOLOGIE JURIDIQUE, -- (1998).

<sup>15</sup>For a skillful and nuanced rendition of the common law's focus on the factual and contextual, see Pierre Legrand, [...] *Are Not Converging*, [...] (199-) (concluding that convergence of the common and civil law traditions within the European union is a virtual impossibility). For an analysis of the common law's defining legal issues in terms of associated facts, and the inextricability of the common-law legal issue from its defining facts, see Curran, [...] (unpublished manuscript originally written in 1991 for students in legal writing at the University of Pittsburgh School of Law; slightly revised in 1998 for civil-law lawyers pursuing an LL.M. degree at the University of Pittsburgh School of Law. This manuscript represented my attempt to implement the "un-learning" of civil-law thought processes and perceptions that common-law law students must undergo in order to grasp common-law legal methodology. A not dissimilar process is necessary for lawyers trained in civil-law legal systems).

context.<sup>16</sup>

The common-law twin concepts of holding and dictum illustrate the inseparability of fact from law. A common-law court's holding is defined as that part of the judicial opinion consisting of the court's resolution of the precise legal issues in their factual context that the parties asked the court to resolve. Under the doctrine of *stare decisis*, only the holding has binding precedential authority on future similar cases. By contrast, dictum is any other pronouncement contained in the court's opinion. Prototypical dictum is a court's expression of how it would have resolved the case had one or more of the facts been different from what they were. Dictum is particularly instructive in revealing which facts were influential in and dispositive of the court's final resolution of the legal issues. Dictum legitimately may be persuasive authority to a future court dealing with the hypothetical situation the earlier court discussed, but even then, technically, it does not have binding precedential effect.

Common-law lawyers therefore fashion their arguments from a close study of prior cases. Their success as lawyers depends on persuading the judge in each case of the accuracy of the analogies they suggest between their client's situation and that of the precedents they cite. Similarly, common-law lawyers must persuade the judge that their client's situation is different from situations that arose in the precedents they hope to distinguish.

The common-law lawyer's task also is to persuade the judge that the lawyer's interpretation of existing case law accurately reflects prevailing contemporaneous legal standards, and that the accumulated body of relevant precedents obliges the judge to rule in favor of the lawyer's client. The lawyer's reasoning does not consist merely in bringing to the judge's

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<sup>16</sup>*See id.* See also LLEWELLYN, THE BRAMBLE BUSH (19-).

attention precedents favorable to the lawyer's client. It is equally important for the common-law lawyer to show the judge why unfavorable cases are irrelevant to the pending case. Thus, common-law lawyers engage in complex factual triages, distinguishing as factually different and distant those cases whose outcomes would militate against their client's interests; and, conversely, presenting as analogous the facts of cases whose outcomes militate in favor of their clients.

Facts thus are central to the very meaning or concept of law in the common-law legal system. This centrality of the particular facts to the common-law legal system is conveyed to United States law students through the casebook method of education. From their first day of studies, law students read series of cases that provide the data from which they are to deduce governing legal norms. The task of formulating legal principles by extracting them from individual cases is a task never achievable to the extent that the factual baggage is a constant and necessary companion to common-law legal principles. The difficulty beginning law students frequently experience and express is the difficulty inherent in adjusting to common-law lawyers' freedom and room for leverage, to their room for interpretive creativity. It also reflects the uncertainty embedded in the common law. Along with the freedom and adventure of crafting innovative new legal arguments derived from prior court decisions, common-law lawyers may hope, not just to win their case, but also to forge new legal standards by persuading the judge to adopt their arguments, however novel and original. The more ingenious lawyer at seeing how prior case law can be analogized and distinguished according to the needs of the client's case may make law by dint of presenting the more persuasive of the two conflicting interpretations of precedents that the adversaries argue to the court.

This very freedom implies an absence a priori of any single correct result in an absolute sense. At the heart of the common law lies an exaltation of methodology, of argumentation that rivals substantive law. The common law's methodology may be said to be its "grammar," in the sense that semioticians speak of grammar as the underlying network of signs creating significance.<sup>17</sup> Consequently, common-law legal education emphasizes to students how to formulate argument. It seeks to transmit its methodology as much or more than positive law, conveying the doubtful status of positive law in a system whose self-understanding is one of flux.<sup>18</sup> The case law method also highlights the procedural, allowing students to observe the manifold ways in which substance is linked to procedure, in which facts are subject to the court's optic or prism of perception, and in which the procedural context is a primordial, defining aspect of the judicial optic or prism of perception.

Perhaps the most commonly expressed complaint on the part of beginning law students in the United States is that their professors don't tell them what the law is. This discomfort stems from their not yet having "un-learned" their still civilian mentality, from their still equating law with immutable governing principles that, once learned, should, they believe, serve to solve and resolve all questions of law. They enter law school committed to the concept that law school will teach them the discrete guiding principles that resolve all legal disputes. This conception of law does not tally with the common law, however. Common-law legal education in the United States thus begins the process of teaching law students to "un-learn" this approach when thinking of legal issues, to re-conceptualize law as a process of argumentation, as a body of cases which form

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<sup>17</sup>See BERNARD JACKSON, [—]

a point of departure for reasoning by analogy and distinction.

Even where a statute governs an issue, such that one might think that deductive reasoning is required, common-law reasoning retains the need for analogizing, because, as Justice Frankfurter put it, "the final rendering of the meaning of a statute is an act of judgment," and "[w]hoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the law-giver to all intents and purposes, and not the person who first wrote and spoke them."<sup>19</sup> The common law thus is a law of almost boundless potential for both judge and lawyer, but the measure of its potential, of the opportunities for ingenious creativity, is also the measure of its inherent uncertainty, fluidity and capacity for transformation.

Romanticism as a movement has been defined in endless, often mutually contradictory ways. Yet, as Henry Hardy, editor of *The Roots of Romanticism*, Isaiah Berlin's posthumous book, as well as other of Berlin's writing, and the author of Berlin's intellectual biography, suggested, "[t]o say of someone that he is a romantic thinker is not to say nothing."<sup>20</sup> Over the course of his life's work, Isaiah Berlin himself gave what is probably the most nuanced, subtle and penetrating rendition of Romanticism in existence in the English language. One sees through Berlin's portrayal and commentary the fissures Romanticism wrought in the masonry of the Enlightenment, as well as the rich diversity in thoughts that has influenced and enriched Romanticism and the Enlightenment, and the peripatetic paths those influences followed through the history of ideas.

Describing the young Goethe in his early Romantic period, Berlin cites Hammann as a

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<sup>19</sup>47Columb.LRev 527,531,533 (1947).

<sup>20</sup> Berlin, *supra* note – [Rts Rm'm], at xii.



major influence on Goethe's Romantic

reaction [against]. . . the tendency on the part of the French [Enlightenment] to generalise, to classify, to pin down, to arrange in albums, try to produce some kind of rational ordering of human experience, leaving out the *élan vital*, the flow, the individuality, the desire to create, the desire, even, to struggle, that element in human beings which produced a creative clash of opinion between people of different views, instead of that dead harmony and peace which, according to Hammann and his followers, the French were after.<sup>21</sup>

Berlin proceeds from Hammann, whom he characterizes as "the first person to declare war on the Enlightenment", to discuss Herder, one of the fathers of Romanticism.<sup>22</sup> Berlin focuses on Herder's view that the particular is significant as the expression of the general.<sup>23</sup> In this we see an important attribute that Romanticism shares with the common law. As we noted above, it is from the particular case, from each decision of each court, that the common law is derived. The common law's focus on the particular tallies with Romanticism's focus on "the irreducible variety of human self-expression . . ." <sup>24</sup>, and its rejection of purely scientific aspirations and methodology: "We have recourse to purely scientific methods of displacement only when communication breaks down . . ." <sup>25</sup>. The common law espouses Vico's method of "imaginative

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<sup>21</sup> *Id.*, at 46.

<sup>22</sup>*Id.*

<sup>23</sup>*See id.*, at 58. Berlin's rendition of Herder's thought is in my opinion without comparison. Also very illuminating and thought-provoking is Charles Taylor's presentation of Herder in [...]. For an application of Herder's views in the context of comparative law, see Curran [Alberta U.Press].

<sup>24</sup>ISAIAH BERLIN, *THE CROOKED TIMBER OF HUMANITY: CHAPTERS IN THE HISTORY OF IDEAS*, 61 (Henry Hardy, ed., 1992) (1<sup>st</sup> ed., 1959).

<sup>25</sup>*Id.* In this passage, Berlin is explaining the thought of Vico as a generative force in Romanticism.

insight,"<sup>26</sup> and Herder's idea of empathy through immersion in the "other's" world and standards, what he called "*sich einföhlen*," for common-law courts assess legal issues in the context of the parties, the parties' lives, and of the parties' experiences as situated in the particular society in which they live.

This does not mean that common-law courts are adept at capturing and representing the lived experience. Indeed, the rules of evidence and the variety of factors that determine the court record may result in a narrative of the case events that ultimately bears no more than a remote resemblance to the lived experiences of the parties that the court's rendition purports to recount. Yet even a wildly inaccurate common-law court account of facts reflects the court's attention to the parties in their own environment, since the court is situating legal significance in the context of what the court has defined as constituting the lived experience. Whether the facts as transmogrified by common-law judicial institutions are close to, or distant from, the facts as the parties experienced them, the common law remains focused on concrete, temporal facts, and this is in contrast to the isolated, timeless, acontextual abstraction of rules that civil-law societies apply to govern the lived experiences of parties. The common law is a formalized undertaking to institute Herder's idea of understanding the general by listening to the particular, by listening to the individual, and by trying to feel as the "other" does in the environment in which the "other" dwells.

In this context, Marianne Constable's work on the history of English jury trials is most instructive.<sup>27</sup> Constable notes that the original jury of peers was designed to bring to the court

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<sup>26</sup>*Id.* at 62.

<sup>27</sup>See MARIANNE CONSTABLE, *THE LAW OF THE OTHER* (199-)

people who spoke the defendant's language, at a time when the dwellers of different English counties generally spoke mutually incomprehensible languages. Language in the Romanticist doctrine is the expression of myriad intangibles that characterize its speakers' world view and mode of thought, sensation and reaction.<sup>28</sup> At a time when England encompassed a multitude of languages, the common-law juror was the person entitled to assess the significance of the defendant's act, because that act, in tandem with the defendant's words, came from a world whose distinctive attributes were comprehensible to the juror who "spoke the same language," in the broader sense in which that phrase is used today. Thus, historically, the common law has been receptive institutionally to the particular as the key to unlocking the meaning of the general.

Perhaps most importantly of all, Romanticism represents a reaction against the absolute, against the belief that truth is perpetual and of the same form throughout time. As Berlin puts it, the Romanticist, unlike the Enlightenment thinker, was the

opponent of unhistorical doctrines of natural law, of timeless authority, of the assumption made by, for example, Spinoza, that any truth could have been discovered by anyone, at any time, and that it is just bad luck that men have stumbled for so long in darkness because they did not or could not employ their reason correctly.<sup>29</sup>

In contrast to this ahistoricity embedded in the civil-law mentality, Romanticism and the

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<sup>28</sup>Herder and Humboldt were among the most influential Romantic thinkers to capture and convey the significance of language as the expression of a distinctive world view. In our time, the contemporary philosopher of language, George Steiner, has best captured the multivalent richness and significances of language. For the particular understanding of law as language, see BERNHARD GROßFELD, *THE STRENGTHS AND WEAKNESSES OF COMPARATIVE LAW* (19--); BERNHARD GROßFELD, *KERNFRAGEN DER RECHTSVERGLEICHUNG* (199-). For the semiotic applications of law as a language or as a system or network of signs, see, *e.g.*, BERNARD JACKSON, [—].

<sup>29</sup>In this passage, Berlin is explaining the thought of Vico.

common law share a profoundly historical nature. The common law is historical inasmuch as it privileges the present – the particular set of facts surrounding the case at bar, in the context of the present, the actual (in French "*l'actuel*" connotes both of these concepts), connected to the current situation of the people who are the parties, with differences in facts sufficient to allow the court to determine that a prior case is not a valid "precedent" if it is distinguishable *on its facts*. But what are the "facts" if not historically bound, if not part of the living context of the parties who arrive in court from an evolving, ever-changing society? This stands in stark contrast to the civil-law focus on codes, written texts designed to govern throughout time, designed to embody the immutably true, to embody principles so reliable that they supersede the vicissitudes of the particular, of the temporal, of the myriad contextual elements that connect human beings to the legal issues they ask courts to adjudicate.

Herder wrote that "[t]here is not a man, a country, a national history, a state which resemble each other, hence truth, goodness and beauty differ from one another . . ." <sup>30</sup> This Romanticist view is at the core of common-law legal methodology which seeks truth and justice for particular individuals in the context of their own events, fashioning from those events, as the court filters and defines them, a new legal rule. The common-law legal standard, then, derives from the scrutiny of particulars. Conversely, the civilian court applies the general, universal legal norm to the particulars. While both systems observe particular humans in the context of their problems, the common law exalts the particulars, which, as the court encodes them in its narrative, are the set of axioms enabling the formation of the legal standard or proposition for which the pending case will stand in the future, for others to claim as legal precedent.

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<sup>30</sup>*Id.*, at 84, n.3.

The civil law, on the other hand, scrutinizes that which is above the factual context. It embodies the Enlightenment perspective of truth as univocal and absolute. This view does not suppose that every judge will identify the correct resolution to every case, will be right in the solution to the legal issues and dilemmas presented. In other words, Enlightenment ideology would not suggest that judicial decisions necessarily are correct. Enlightenment ideology suggests, rather, a concept also embedded in civil-law mentality: namely, that a correct answer exists if only the judge is clever enough to find it, and that it is deducible from the applicable legal authority, whether that authority is the Code or another governing textual source of law. The civilian approach thus corresponds to the Enlightenment tenet that "a true answer must be discoverable *in principle*, though I may not happen to know it . . ." <sup>31</sup>

The other great bedrock of Enlightenment thinking that Berlin attributes to western thought from the time of classical antiquity until the advent of Romanticism is the belief that all truths are mutually reconcilable, that no two truths can be contradictory. <sup>32</sup> The civil-law mentality also mirrors this view inasmuch as it presents its Code as a coherent and complete representation of law. What it lacks in specificity it provides in spirit. The codified embodiment of the national law is of a piece, whole and harmonious. <sup>33</sup> The task of civilian judges who search for the correct resolution to pending legal issues is to seek an expression of that consistent body of law, a manifestation of it, one that confirms, strengthens and represents the harmony of the whole, eschewing any interpretation that might undermine its cohesive, all-inclusive spirit.

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<sup>31</sup>*Id.*, at 181. (Emphasis added).

<sup>32</sup>See *id.* at 184-185.

<sup>33</sup>See René David [...]

Romanticism represents the converse. It suggests pluralism, the concept that there are many truths.<sup>34</sup> Value pluralism also is an attribute of common-law legal culture inasmuch as the common-law court's vision is primed on the mosaic of facts and circumstances presented in their unicity with each case.

The Romantic deēphasis of rational justification and universal objectivity is not compatible with the stated objective of most civil-law scholars.<sup>35</sup> Holmes' famous statement that the life of the law has been experience rather than logic<sup>36</sup> is illustrative of the common law's perspective, just as the reaction of the eminent French legal scholar André Tunc is illustrative of the civil law's perspective. Commenting that the Holmesian point is anathema to the civilian lawyer, Tunc makes clear that this is not because of Holmes' emphasis on the importance of experience.<sup>37</sup> As Tunc points out, Portalis, one of the drafters of the *Code Napoléon*, also stressed the importance of life experience, fully realizing that the success of the French Civil Code depended on its consisting of guidelines sufficiently general as to provide the necessary flexibility to accomodate the inevitable significant changes French society would undergo with the passage of time. According to Tunc, the civilian's problem resides, rather, in Holmes' disdain for logic. Tunc takes the position that logic, albeit wedded to experience, is the very heart of the

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<sup>34</sup>One of Isaiah Berlin's greatest contributions to the analysis of Romanticism is his compelling distinction between pluralism and relativism. Although modern relativism may be seen as a later outgrowth of Romanticism, it is value pluralism rather than relativism that characterized the Romantic movement. *See id.*; *see also* ---.

<sup>35</sup>*See Id.*, at 214.

<sup>36</sup>HOLMES, THE COMMON LAW

<sup>37</sup>*See* André Tunc,...[AmJCompL]

civilian's understanding of law.<sup>38</sup>

To the extent that we can connect Romanticism to the Holmesian rendition of the common law, to the examination of the lived before the examination of the law, it is interesting to note that the German legal theorist Jhering, from a civil-law legal system, said precisely what Holmes did:

[quote].

While this would suggest, as I in fact would predict, that German jurists will be more adept than their French counterparts at making the mental leap towards grasping common-law methodology, this conclusion would be undermined by the recent discovery of a Canadian legal scholar that such French legal luminaries as Saleilles and Géný made statements about law as being experience rather than logic, mirroring Holmes' statement as closely as Jhering.<sup>39</sup> In a remarkable article on the French *juristes inquiets* (anxious jurists), Marie-Claire Belleau describes her extensive research, revealing the considerable pluralism that evidently existed in French legal theory at the turn of the century. Her work has been further confirmed and strengthened by the research of Mitchel de S.-O.-l'E. Lasser, who has documented the unofficial and invisible, but significant, role of case law and particularized, fact-oriented legal reasoning that occurs behind the scenes in French judicial methodology.<sup>40</sup>

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<sup>38</sup>*See id.*

<sup>39</sup>*See Marie-Claire Belleau, The Juristes Inquiets: Legal Classicism and Criticism in Early Twentieth-Century France, UTAH L.REV. 379 (1997).*

<sup>40</sup>*See Mitchel de S.-O.-l'E. Lasser, Comparative Law and Comparative Literature: A Lesson in Progress, - UTAH L.REV. 471 (1997); and Mitchel de S.-O.-l'E. Lasser, - YALE L.J. (19-).*

The similarity of the statements made by Holmes, Jhering, Saleilles and Géný are instructive in suggesting the admixture of common-law and civilian attributes in both *legal* systems. Within the common-law legal system, for example, by virtue of the courts' crafting legal principles, each precedent stands for a legal norm from which applications to future pending cases can be deduced. Common-law reasoning thus clearly contains a deductive component that is as intrinsic to its nature as the analogical reasoning by similarity and dissimilarity which dominates the comparative process of evaluating the legal significance of a pending case by weighing it against prior case law. Moreover, Patrick Atiyah makes the case quite compellingly that English judges are far less likely than their United States counterparts to decide a pending case for the sake of justice of outcome if it means ignoring established precedent. According to Atiyah, British more than United States judicial methodology treats precedents as establishing binding norms.<sup>41</sup> This would suggest that a considerable measure of deductive reasoning in English legal methodology, the common-law methodology operating within the European Union.

The difference persists, however, as to how abstract such common-law norms are. Any norm derived from case law inevitably will be a function of the facts that gave rise to the norm. The civil-law norm, by contrast, is loosened from factual specificity by virtue of its generality of expression and anonymity of origin. Although arguably no norm can be so general as to be completely free of factual baggage, at least implicitly, nevertheless one sees the disconnectedness between civilian norm and fact in the four articles of the French Civil Code whose link to the entire field of French tort law they spawned is at best highly elusive if not utterly mysterious and

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<sup>41</sup>Patrick Atiyah, — [S.W.L.J. (19-).]



elliptical.<sup>42</sup>

### *Conclusions*

The leap from civil-law conceptions of law to common-law conceptions, and vice versa, is not small. A melding of the two signifies profound alteration of each. The question remains as to what consequences will result from the homogenization of European legal culture, and whether, ultimately, a single legal culture is desirable. [This question does not address the fairness of the relative strengths of common-law versus civil-law components. The Europeanization of legal cultures appears to be resulting in the relative domination of civil-law culture to the detriment of common-law culture, but I intentionally do not address that concern.]

On the one hand, as Professor Stein has pointed out in his article on the assimilation of national laws as a function of European integration, the feasibility of a coherent European economic system inevitably depends on a coherent European legal order.<sup>43</sup> To this end, the European Court has articulated explicitly its goal of legal uniformity.<sup>44</sup>

The achievement of uniformity necessarily involves loss of diversity, of pluralism. A loss in difference between the legal systems, cultures and traditions of the common and civil law

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<sup>42</sup>For a fascinating depiction of another example of disconnectedness of legal norm from factual circumstance in French law, see John Dawson [article on *astreintes*: U.Mich.L.Rev.] See also ZWEIGERT & KÖTZ (3D ED., 1998) [discussion of French tort law's relation to Code.]

<sup>43</sup>See Eric Stein, *Assimilation of National Laws as a Function of European Integration*, 58 AM.J.INT.L. 1, 29 (1964).

<sup>44</sup>See *id.*, at 5 (discussing the use of terms such as "harmonization" and "coordination" in the European treaties, and the European Court of Justice as initiating the use of the term "uniformity").

militates against another goal of the European Union: namely, cultural autonomy. A growing literature is analyzing the European Court of Justice's encroachment on cultural autonomy as it purports to adjudicate economic issues. The word "purports" may seem to suggest a disingenuousness on the part of the Court of Justice that I do not mean to convey. Rather, the nature of economic, political, legal and social issues is such that they are too intertwined to be capable of the sort of separation and isolation that would allow the Court to adjudicate one sort of issue without affecting the others. Thus, whether or not the European Court of Justice intends to adjudicate issues beyond its sphere of competence, we are seeing that such issues are inextricable from those legitimately falling within European competence; consequently, they too are subject to European homogenization.

I have used the word "homogenization" because it implies an admixture resulting in a single, new product or byproduct, what we visualized earlier as the intersection of two sets. This means that the resulting admixture does not preserve its constitutive parts in their original composition. If the insights of Romanticism can be applied to law, they surely teach us that the loss of the common-law and civil-law perspectives, as they have existed for centuries and millennia, is the loss of two perspectives of the world, of universes perceived, experienced and developed along different paths.

The differentiations that human societies have developed, and, still more, the will to differentiate, often are blamed for the extremism of virulent nationalism, with attendant exclusion and persecution of minorities. But the twin attributes of differentiation and belonging also have resulted in the infinite richness that the multitude of human cultures provides. Both Isaiah Berlin and George Steiner agree that the human need for differentiation has been a constant throughout

human history. In analyzing the mystery of language multiplicity, Steiner has questioned the phenomenon's seemingly dubious connection to the "Darwinian paradigm . . . of evolutionary benefit."<sup>45</sup> Here is how he attributes evolutionary benefit to the seemingly inexplicably un-Darwinian proliferation of mutually comprehensible languages on earth:

Even when it is spoken by a handful of the harried remnants of destroyed communities, a language contains within itself the boundless potential of discovery, of re-composition of reality, of articulated dreams, which are known to us as myths, as poetry, as metaphysical conjecture and the discourse of law.<sup>46</sup>

The European Union has recognized the vital importance of cultural autonomy and diversity from its beginnings, and, thus, it also recognizes the corresponding immensity of loss that would ensue if diversity were to succumb to uniformity. The paradox of Europe, and perhaps the greatest challenge it faces today, may be that these two goals are mutually incompatible. History teaches that monolithism leads to absolutism, to the idea of truth rather than truths, and to the denial of value pluralism, including the denial both of the *validity* of different paths leading to different answers, and of *value* in the survival of difference. Vigilant attention should be given to ensure that the European Union does not sacrifice one of its objectives to the needs of the other. Conscious recognition and assessment of the incompatibility and irreconcilability of Europe's twin goals of economic uniformity and cultural pluralism are the first steps towards formulating lucid compromises that might allow for both goals to be realized at least partially, before either is sacrificed irretrievably.

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<sup>45</sup>GEORGE STEINER, *AFTER BABEL: ASPECTS OF LANGUAGE AND TRANSLATION*, xiii (2d.ed., 1992).

<sup>46</sup>*Id.* at xiv.