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THE CASE FOR CASE LAW: RECOGNISING PRECEDENT IN CIVIL LAW SYSTEMS

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Abstract

This paper will outline the normative framework in support of a formal and systemic recognition of the use of precedential case law within civil law systems. It will begin by, first, delineating the historical developments the led to the modern, relative devaluation of case law in civil law systems — in particular, by looking to ancient Roman dispute resolution mechanisms and, subsequently, the specific political ideals of revolutionary France. Secondly, it will look to current usage of these practices on a de facto basis; focusing, in particular on the courts of the European Union (and, specifically, the European Court of Justice). Thirdly, it will posit that such usage is both unavoidable and appropriate in the exercise of any dispute resolution within a legislative legal order. Ultimately, it will argue that such usage is only likely to increase as civil law legal systems continue to develop and that it would be of benefit to do so on a principled, rather than ad hoc and reactionary basis.

Word length

The text of this paper (including footnotes but excluding the abstract, word length, subjects and topics, table of contents and bibliography) comprises 7,582 words.

Subjects and Topics

Case Law – Civil Law – Codification – Common Law – Comparative Law – Courts – Dispute Resolution – European Court of Justice – European Union Law – French Law – Italian Law – Jurisprudence – Legal History – Legal Systems – Precedent – Roman Law

I Introduction

The civil law and common law are widely accepted — despite various distinctions that may be pointed out within individual taxonomies — as the two key models on which contemporary western legal systems are based.[1] While a number of propositions has been put forward to explain the differences that divide these systems, it is clear that a primary point of divergence is found in the way in which these systems conceptualise the rightful role of case law.[2] Specifically, and at a high level, it may be said that, while the common law is "largely based on precedent, meaning the judicial decisions that have already been made in similar cases", the civil law is founded on legal codes and, therefore, treats judicial decisions in individual cases as "consequently less crucial".[3]

From a purely functional perspective, this amounts to a simple difference of approach in terms of the role to be played by dispute resolution mechanisms in the promulgation of law more widely. Nevertheless, outside mixed jurisdictions and those well versed in certain aspects of comparative law, both approaches are poorly understood by scholars and practitioners educated by the opposing camp. Although these concerns are often exaggerated, it is not wrong to say that the idea of a judicial decision as having no formal bearing on the determination of an identical dispute in future is worrisome to a common law mind — while the very thought of judge-made law offends civilian sensibilities.

Yet despite these reservations, it is clear that both legal systems — as well as various combinations of their constituent features — have been successfully used for centuries across multiple jurisdictions in similar political and socio-economic contexts. Despite the fundamentality of such a distinction, therefore, both conceptions of case law continue to be effective within the wider legal orders that the mechanisms producing such law serve.[4]

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1 While the term is capable of meaning several different things depending on the context in which it is used, the civil law as discussed in this research paper is the legal system as conceived of in opposition to the common law — rather than the areas of substantive law that are concerned with private, rather than criminal or administrative, law. See Peter Spiller *New Zealand Law Dictionary* (8th ed, LexisNexis, Wellington, 2015) at 49, 54 and 55; and see Bryan A Garner (ed) *Black's Law Dictionary* (9th ed, Thomson Reuters, St Paul (Minnesota), 2009) at 280 and 313.

2 See Caslav Pejovic "Civil Law and Common Law: Two Different Paths Leading to the Same Goal" (2001) 32 VUWLR 817 at 818–821.

3 The Robbins Religious and Civil Law Collection "The Common Law and Civil Law Traditions" School of Law, University of California at Berkeley <www.law.berkeley.edu>.

4 By way of example, the jurisdictions with the most robust assessments of the rule of law — both in general terms as well as in the specific context of civil and criminal justice and, thus, dispute

As such, any normative discussion about the role of case law is limited to looking at the ways in which any legal order, regardless of the broader system it is based in, may benefit by adopting aspects that are founded in the other.

This research paper proposes to do just that — namely, it will make the argument that it would be of benefit to civilian legal systems to formalise the role of its case law. Specifically, it would be beneficial to afford this case law an appropriate, formal precedential value (along the lines of its role, broadly speaking, within the modern common law). The key propositions supporting this argument — as is implicit from this summary — include that its role in civilian systems already contains a de facto and informal precedential element.[5] As a corollary, the author contends that recourse to precedent in this way is both a natural and appropriate consequence of the differing roles played by different legal mechanisms (such as legislative and dispute resolution mechanisms). Further, it is argued that it is only this formal lack of recognition afforded to case law that is a historico-legal vestige and that is founded in specific social exigencies at various points in time — as distinct from any principled limitation of (or opposition to) the role of a modern judiciary.

This research paper will, first, outline two key historical conditions that are said to have given rise to this relative devaluation of the role of case law in civilian systems — namely, the particularities of ancient Roman dispute resolution and, more recently, French revolutionary political ideals. Secondly, despite such origins, the de facto use of precedent will be examined, focusing on its role in the courts of the European Union. Thirdly, and finally, this paper will look at the reasons why this use is not only inevitable, but proper and only likely to increase as civil law systems continue to develop.

II Historico-Legal Origins of Civil Law Judicial Decision-Making

All law is said to have a "threefold social function" — in that (first) it "carries the structures and systems of society through time", (secondly) it "inserts the common interest of society into the behaviour of society-members" and (thirdly) it "establishes

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resolution — are include both civil law and common law systems. See Mark D Agrast and others *Rule of Law Index 2015* (World Justice Project, 2015) at 20, 30 and 31.

5 See Vincy Fon and Francesco Parisi "Judicial precedents in civil law systems: A dynamic analysis" (2006) 26 Intl Rev L & Econ 519 at 522.

possible futures for society, in accordance with [its] theories, values and purposes".[6] Put differently:[7]

> Law is a presence of the social past. Law is an organizing of the social present. Law is a conditioning of the social future.

Without a proper recognition of the particularities of the social past within the context of specific laws (or aspects thereof) that this law carries, therefore, we are limited in our ability to best organise a social present — let alone most effectively condition any social future. In other words, to maximise the utility of any legal order, an understanding of the circumstances in which such an order developed is required. Without this understanding, it is difficult to effectively differentiate legal doctrines that are soundly founded and reasoned (and may, as such, be said to represent best legal practice) and those that are simply historical remnants without greater rational or normative weight.

Opposition to the precedential value of case law in civilian legal systems, consequently, may be argued to fall firmly within the latter group. An examination of the history underpinning the development of this (generic) form of civilian dispute resolution mechanisms shows how specific aspects of the societies in which these were developed are, more than any other identifiable factors, responsible for these systems' current understandings of the role of case law. The concern here, for lack of a better term, is that these understandings have been imported over the intervening centuries into markedly different social orders and legal structures.

This is most apparent with the procedural law of ancient Rome, as the limited value of case law in civil law systems can be traced back to its particularities. Further, and more recently, it is then the specific political climate of revolutionary France that appears to have brought this relative devaluation into the modern era. While it is clear that neither of these origins is an argument against the continued use of such a conception, it is questionable whether (or to what extent) such social requirements survive into the present and, if not, therefore, whether differing conceptions may better serve current purposes.

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6 Philip Allott "The Concept of International Law" (1999) 10 EJIL 31 at 31.

7 Allott, above n 6, at 32.

A Ancient Rome

It is often noted that, effectively, "the civil law, in all of its variations, has as its bedrock the written law and legal institutions of Rome" — as even its "very name derives from the *jus civile*, the civil law of the Roman Republic and the Roman Empire".[8] In fact, and while it may be difficult to overstate the extent to which Roman law has influenced all western legal systems, it is "in civil law nations … [that] the influence of Roman civil law is much more pervasive, direct, and concrete than it is in the common law world".[9]

It serves, therefore, as a useful counterpoint for considering the extent to which modern systems may be needlessly carrying structures developed by this particular historical society. Arguably, it is in the illustrations of this offered by ancient Roman dispute resolution mechanisms — and the complete independence of their features and underpinnings from any subsequent form of legal codification — that the scope for modernisation is best demonstrated.

1 Particularities of dispute resolution

The characteristics of ancient Rome's dispute resolution mechanisms may, more than any other aspect of its legal order, be attributed with the modern lack of a principled and precedent-based case law in civil law systems. In particular, two key characteristics exist in this respect. First, two separate judges were appointed to dispose of each dispute — a magistrate (or *praetor*) who would effectively hold pre-trial hearings, and a judge (or *judex*) who would then preside over the trial.[10] (Notably, a praetor and judex were also

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8 James G Apple and Robert P Deyling "A Primer on the Civil-Law System" (Federal Judicial Center, 1995) at 3.

9 John Henry Merryman and Rogelio Pérez-Perdomo *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (3rd ed, Stanford University Press, Stanford (California), 2007) at 10–11. However, it is also noted that the disparity between the extent to which Roman law has influenced civil law and common law systems may itself be traditionally overstated. Specifically, it has also been said that "it must be owned that the principles of our [English] law are borrowed from the [Roman] Civil Law, [and] therefore grounded upon the same reason in many things" and, further, that "though few English lawyers dare make such an acknowledgement, [Roman law] is the true source of nearly all our English laws that are not of feudal origin", per William L Burdick *The Principles of Roman Law and Their Relation to Modern Law* (Lawyers Co-operative Pub Co, Rochester (New York), 1938) at 5 (footnotes omitted).

10 Apple and Deyling, above n 8, at 3 and 4; and see also Martin Shapiro *Courts: A Comparative and Political Analysis* (University of Chicago Press, Chicago, 1981) at 126–156.

both appointed to limited terms of one-year or on an ad hoc basis, respectively.[11]) Secondly, despite this relative proliferation, both judges were nonprofessional and both often had no legal training (this being the domain of professional jurists).[12]

Arguably, it is this "short-term, nonprofessional character of the Roman judiciary and its method of case disposal [that] produced … the lack of regard for the value of decisions in individual cases" seen in modern civil law systems.[13] More specifically:[14]

> Since the [Roman] praetor was appointed for only one year and played a limited role in the resolution of cases, his decisions and rulings in particular cases were not accorded any particular weight or significance. Likewise, there was little respect accorded the decisions of the judex. The judex was appointed to decide only a particular case. The practice of having, in effect, two judges in every case, with the judex selected only for the particular case, represented a split in the judicial process. There was no continuity in litigation, and no chance for the development of legal principles among the various cases presented for resolution. A judicial decision — involving actions by two separate judicial officials — resolved an individual case, and that was the end of the matter.

In sum, therefore, and rather than a considered approach as to the rightful role of any case law, the earliest origins of this feature lie in pragmatism in response to conditions that are (in large party) arguably inapplicable today.

2 Functional antecedence of codification

While (necessarily) somewhat reductive, the streamlining of modern judicial functions and inevitable legal training of modern judiciaries mean that, as a starting point, valid Roman concerns about the proper value of any individual decisions are, at the very least, significantly allayed in modern legal systems. In modern contexts, however, the argument that is unavoidably relied upon as now being logically prior is that such

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11 Apple and Deyling, above n 8, at 4; and see also James Gordley and Arthur Taylor von Mehren *An Introduction to the Comparative Study of Private Law: Readings, Cases, Materials* (Cambridge University Press, Cambridge, 2006) at 18–24.

12 Apple and Deyling, above n 8, at 4; and see also Joseph Dainow "The Civil Law and the Common Law: Some Points of Comparison" (1966–1967) 15 Am J Comp L 419 at 420–423.

13 Apple and Deyling, above n 8, at 4 and 5.

14 Apple and Deyling, above n 8, at 5.

systems are codified. As a result, legislation covers all possible disputes and, as such, it is for the judiciary to apply law — not make it — in its determination of these, because:[15]

> The task of the [civil law] judge is simply to select the appropriate rule from among those pre-existing in the code and apply it to the case at bar.

Notwithstanding that such a characterisation has been described as "fundamentally incorrect",[16] it is important that this relative devaluation of individual decisions in fact pre-dates the comprehensive codification of any legal system.[17] That is, it is important not to conflate the concepts of judicial precedent (and its lack) with the concept of systemic codification (or its absence) in a given jurisdiction,[18] as these concepts need assessment on their own merits.

B Revolutionary France

Given the proliferation of statutes in common law systems,[19] it is clear that the relative extent of legislation in any one jurisdiction does not prohibit an effective system of precedent-based decision-making. Albeit that this was not effectively demonstrated until significantly more recently, it is for this reason that the decision to preclude the possibility of judicial precedent in the wake of the French Revolution should not be seen as a *fait accompli* of the French Civil Code.[20]

1 Alternative possibilities

While Ancient Rome may have initially instituted this conception, it is the modern French Republic that firmly established its role in the recent era. It must be noted at the outset that, by this point in time, the common law was established in England and had

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15 See Shapiro, above n 10, at 126.

16 Shapiro, above n 10, at 126.

17 The *Corpus Juris Civilis* of Justinian I was not issued until cca. 534 AD: see HF Jolowicz and Barry Nicholas *Historical Introduction to the Study of Roman Law* (3rd ed, Cambridge University Press, Cambridge, 1972) at 479.

18 See William Tetley QC "Mixed jurisdictions : common law vs civil law (codified and uncodified) (Part I)" (1999) 3 Rev dr unif 591 at 599.

19 See John Burrows "Common Law Among the Statutes: The Lord Cooke Lecture 2007" (2008) 39 VUWLR 401.

20 Code civil des Français (1804).

been received in its colonies,[21] presenting a viable alternative with respect to the treatment of case law.

The common law's own development — as well as its traditional resistance to codification — was itself historically specific.[22] Self-evidently, it arose from the systematic efforts of persons trained largely in Roman law.[23] The universality of its character, further, arose only because of the emergence of a central political authority with the ability to do so.[24]

Arguably, therefore, it may be said that the institution of a common law throughout England and the subsequent codification of law in France were but two differing means to the same end — namely, the harmonisation and standardisation of an unacceptably variable collection of regional laws.[25] Further illustrating the possibility of either course eventuating is the fact that the period leading up to this systemic codification of law through Europe is noted as not being particularly conducive to it, as the applicable Roman law at the time "consisted of a body of academic commentary" that was "imposed on the judges not by statute but by education" — that is, there was no (and arguably little possibility for a) system of a "code enacted by a sovereign legislator and applied by a judge".[26]

Consequently, the lack of a precedent-based approach to case law that emerged from the French Revolution should not be viewed as a foregone conclusion. Rather, and as another historically specific outcome-based approach (as is discussed further below), it is again subject to on-going reappraisals.

2 Revolutionary ideals

In effect, the eventual prohibition on any possible systemic use of precedent appears to be the outcome of the specific republican revolutionary ideals that shaped the political

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21 For example, see Constitution of New York (10 April 1777), art 35.

22 Theodore FT Plucknett *A Concise History of the Common Law* (3rd ed, Little, Brown and Co, Boston, 1956) at 11–19.

23 See Thomas McSweeney "English Judges and Roman Jurists: The Civilian Learning Behind England's First Case Law" (2012) 4 Temple L Rev 827.

24 Shapiro, above n 10, at 131.

25 See Burdick, above n 9, at 10–11.

26 Shapiro, above n 10, at 133.

environment of the period. It is this period, and these ideals, that developed the French Civil Code in its particular form, which in turn introduced this proscription into the modern legal era.

This is best demonstrated by an address to the then French legislature, shortly after the start of the Revolution, by Maximilien de Robespierre — who unequivocally declared that:[27]

> The word "jurisprudence" [meaning judge-made law] must be expunged from our language. In a country with a constitution and legislation, tribunals' jurisprudence is nothing more than law-making.

On this point, it is noted that the initial efficacy of the French Civil Code that resulted from this environment has been attributed to its destruction of aristocratic classes' legal privileges and the "displacement of customary law" rather than "its positive virtues".[28] Similarly, it is posited, the prevention of a coherent body of case law is itself viewed as a particular political destructive, rather than constructive, decision made in a specific socio-historical context as distinct from any principled consideration of the function that tribunals should properly serve in the context of law-making.

That is, the decision is better characterised as one of removing the possibility of — likely aristocratic, but at the very least bourgeois — judges from influencing the legal order of a society founded on the ideals of these classes' overthrow. Such a decision is conceptually distinct from any principled consideration of the functions for tribunals and their decisions to properly serve in the context of law-making and, consequently, it is argued, should be afforded less deference by modern assessments of the matter.

Despite this, because the French Civil Code was the initial model on which other modern civil law jurisdictions came to be based,[29] this conception of the judiciary's role has been disseminated throughout Europe (and, subsequently, further afield).[30] In this way, and it can be seen how this particular political, rather than jurisprudential, viewpoint has come to ostensibly bifurcate modern western legal systems with respect to the roles fulfilled by their judiciaries.

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27 Ministère de la Justice "Histoire de la Cour de cassation" <www.justice.gouv.fr>.

28 Shapiro, above n 10, at 133.

29 See TT Arvind and Lindsay Stirton "Explaining the reception of the Code Napoleon in Germany: A fuzzy-set qualitative comparative analysis" (2010) 30 LS 1.

30 Apple and Deyling, above n 8, at 15–19.

Consequently, what remains to be answered is whether such a distinction is the questions that remain to be answered are whether such a distinction is still justifiable and, as a corollary, whether such a distinction necessarily even still exists. It is to these matters that this research paper now turns.

III Existing Acceptance of Precedent at Civil Law

Over the course of the intervening centuries, the vast majority of European legal systems (as well as legal systems more globally) have come to adopt the above views and conceptions in various forms within their domestic legal orders.[31] Formally, therefore, it is only the Anglosphere that is said to be predominantly at odds in terms of its continuing formal use of precedent in the creation of case law.[32] Notwithstanding these disparate origins, however, it is contended that precedent nevertheless plays a de facto role within the decision-making of civilian legal systems.

It is debatable that this role is seen in the use of *jurisprudence constante*,[33] a functionally analogous civilian alternative to the common law's precedent. However, individual uses of precedent illustrate — as is discussed below in the specific context of the courts of the European Union — that its application is conceptually wider than this would acknowledge. Ultimately, and as will also be discussed, the discrepancy between the admitted usages and the purposes served by these is most clearly seen in the alternative explanations proffered for these practices — none of which can provide a complete answer within the conceptual, self-imposed limitations of civilian uses of case law.

A Jurisprudence Constante

The respective uses of *jurisprudence constante* and of stare decisis have long been noted to "look much alike".[34] As its name suggests, the former is the civilian recognition of consistency in judicial reasoning — as where there "exists a constituent line of cases that

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31 See Apple and Deyling, above n 8, at 12–18.

32 See "The Common Law and Civil Law Traditions", above n 3.

33 French term meaning "constant jurisprudence".

34 Robert L Henry "Jurisprudence Constante and Stare Decisis Contrasted" (1929) 15 ABAJ 11 at 11.

arrive at the same legal conclusions using sound logical reasoning, then the previous rulings are highly persuasive".[35]

As is apparent, the first key difference is the necessity for *jurisprudence constante* to be founded in a series of decisions, rather than possibly only one. No functional difference is apparent, however, in that it is immaterial whether early (but not initial) decisions are expressly or implicitly decided in accordance with previous ones. To the extent that the logical reasoning leading to those decisions was sound, it is difficult to see how different outcomes could arise. Equally, to the extent that the reasoning was not, it is difficult to see how the common law would afford them vastly greater authority.

Further, the second key difference is that, at most, *jurisprudence constante* is said to have "considerable persuasive authority" only.[36] That is, it can only ever amount to a secondary source of law.[37] However, this is not itself necessarily an operative distinction in light of, first, the doctrine of Parliamentary sovereignty in common law jurisdictions; secondly, the primary source of law implicit in this qualification being legislative; and, thirdly, the points discussed above regarding the logical application of the doctrine in any individual proceeding.

As such, it is argued that it is not clear that there is, in substance, any functional difference between the accepted doctrines regarding existing case law as between civil and common law systems. Conversely, what is clear is that the orthodox limits with respect to the civil law's uses of such case law are increasingly disregarded.

B Precedent in the Courts of the European Union

Such developments are best exemplified by their use in the courts of the European Union and, specifically, the Court of Justice.[38] As an overarching, supranational judiciary for the majority of Europe, and despite the inclusion of common law jurisdictions within its

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35 Jason Edwin Dunahoe "'*Jurisprudence Désorientée*:' The Louisiana Supreme Court's Theory of Jurisprudential Valuation, *Doerr v Mobil Oil* and *Louisiana Electorate of Gays and Lesbians v State*" (2004) 64 LLR 679 at 679.

36 *Doerr v Mobil Oil Corp* 774 So 2d 119 (La 2000) at 14 as cited in *Willis-Knighton Medical Center v Caddo-Shreveport Sales and Use Tax Commission* 903 So 2d 1071 (La 2005) at 25.

37 See *Royal v Cook* 984 So 2d 156 (La Ct App 2008) n 6.

38 Unless otherwise stated, references in this research paper to the Court of Justice are to the European Court of Justice (as distinct from the wider Court of Justice of the European Union).

ambit, the Court of Justice represents a distillation of modern civil law systems.[39] Consequently, its developing — albeit arguably still informal — usage of precedent-based reasoning aptly encapsulates, at the highest level, what is described as the long-standing and increasing tendency of common law reasoning in civil law courts.[40]

1 Analogous civilian existence of binding precedent

The first point of note in this respect is the existence of precedent in the courts that functions analogously to that found at common law. Specifically, and relatively quickly after its establishment, the Court of Justice extended its determinations to have effect beyond the parties to the particular dispute before it.

Under the governing Treaty of the European Union, domestic courts of member states are to refer questions on matters of European Union law to the Court of Justice for preliminary ruling.[41] Determining a reference from the Supreme Court of Cassation of Italy in *Srl CILFIT v Ministry of Health*, the Court of Justice held that its previous decisions would remove the need for different courts in future to refer such questions to it for determination.[42] Specifically, the Court of Justice found that this extended to circumstances where a previous decision had already dealt with the point of law at issue even though the putative questions for reference were not "strictly identical".[43]

Notably, there is no directive in the European Union's founding documents for its courts to or not to apply previous decisions of its courts. (It may be presumed, however, that the matter was taken as read in light of the civilian nature of all members' legal orders at the time of these documents' creation.) However, in extending its decisions' effects beyond the parties subject to the decision, the Court of Justice confirmed that its determinations

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39 See Nial Fennelly "Legal Interpretation at the European Court of Justice" (1996) 20 Fordham Intl LJ 656.

40 Henry, above n 34, at 11.

41 Treaty Establishing the European Economic Community (opened for signature 25 March 1957, entered into force 1 January 1958), art 177; and see the analogous provision in the since-instituted and consolidated Treaty on the Functioning of the European Union, art 267 (as effected by the Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community (opened for signature 13 December 2007, entered into force 1 December 2009)).

42 Case C-283/81 *Srl CILFIT v Ministry of Health* [1982] ECR 3415.

43 *Srl CILFIT v Ministry of Health*, above n 42, at [14] as cited in Gunnar Beck *Legal Reasoning of the Court of Justice of the EU* (Hart Publishing, Portland (Oregon), 2012) at 182.

functioned akin to those in common law jurisdictions (as opposed to being limited in the way that decisions of civil jurisdictions are understood to be).

2 Analogous civilian usage of binding precedent

Beyond its mere existence, however, the courts of the European Union have also confirmed that this precedential doctrine operates on the same implicit basis as in common law jurisdiction.

Specifically, in *Cristina v Commission*, the European Union Civil Service Tribunal — a specialist, lower court in the judicial hierarchy of the European Union — effectively distinguished earlier reasoning of the Court of Justice (that would nominally bind it).[44] The reasoning of the lower court, in effect, mirrored common law usage; finding that the differing policy considerations and issues underpinning the ratio decidendi (for lack of a better term) in the Court of Justice had no application to the case before it as this concerned "factual and legal situations which are significantly different".[45]

3 Incongruent civilian effects of binding precedent

Ultimately, while the examples illustrated above may be said to demonstrate a lesser need for a systematic and formalised doctrine of precedent, it is precisely this lack of formal applicability that has unfortunately led to incongruities in other decision-making on this basis.

That is, the principle-based reasoning of the common law that underpins the application of its precedent has not invariably been adopted in civilian systems relying on its effects. An example can be found in the Court of Justice's unwillingness to depart from its long-established lines of interpretation, solely on the basis of their being long-established, and despite the Court's inclination that such interpretation may be unduly rigid in the circumstances. Specifically, in *Merck & Co Inc v Primecrown Ltd*, this led to the

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44 Case F-66/11 *Cristina v Commission* (20 June 2012) as cited in Kieran Bradley "Vertical Precedent at the European Court of Justice: When Push Comes to Shove" in Kieran Bradley, Noel Travers and Anthony Whelan (eds) *Of Courts and Constitutions: Liber Amicorum in Honour of Nial Fennelly* (Hart Publishing, Oxford, 2014) 47 at 62.

45 *Cristina v Commission*, above n 44, as cited in Bradley, above n 44, at 62 and 63.

renowned Irish Advocate General,[46] Nial Fennelly, urging the Court of Justice to depart from this an interpretation on the (notably ironic) basis that the final appellate courts of common law jurisdictions would be prepared to do so:[47]

> [W]here it appears to be clearly wrong … However desirable certainty, stability and predictability of law may be … [where] too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law.

It is in this tension that the need for a systematic approach to this use of precedent is most keenly felt. That is, with the almost inescapable precedential force of case law in a "hierarchical judicial structure" with an appellate function,[48] it is argued that it does not suffice to adopt the effects of such principle-based reasoning without the corresponding practice of evaluating such reasoning for its applicability in the determination of disputes and — consequently — in law-making.

C Interpretative Precedent

The justification given for the above usages is that their function is interpretative, rather than law-making, in its nature. That is, civilian jurists argue that the use of precedent in this way is not a formal source of law but, rather, an interpretation of the law — albeit a definitive one.[49]

Beyond the most ardent approaches to legal positivism, however, it is difficult to see what the effect of such a distinction is. That is, other than the appreciable cause for concern stemming from arguments surrounding the relative weighting of substance and form, it is hard to differentiate at any level between a rule that is applicable, certain and determinative on the basis that it arose in the European Court of Justice rather than the

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46 The key role of Advocates General in the Court of Justice being to offer to its justices independent and often persuasive opinions; see Noreen Burrows and Rosa Greaves *The Advocate General and EC Law* (Oxford University Press, Oxford, 2007).

47 Joined cases C-267/95 and C-268/95 *Merck & Co Inc v Primecrown Ltd* [1996] ECR I-6285 at [138]–[146] as cited in Bradley, above n 44, at 47 and 48.

48 See Case T-85/09 *Kadi v European Commission* [2010] ECR II-5177 at [112] and [121]–[123].

49 Julie Dickson and Pavlos Eleftheriadis (eds) *Philosophical Foundations of European Union Law* (Oxford University Press, Oxford, 2012) at 328 and 329; and see also Beck, above n 43.

European Commission. Any distinction that can be made here will, necessarily, be political rather than legal in nature.

It is tautologous (and jurisprudentially unsound) to argue that a rule functioning in the manner of law in every appreciable respect does not amount to law by virtue of its origin on the basis only of a definition of law that is itself based upon reference to certain origins. Put differently, it is primarily this act of conceiving of law in a way that excludes case law from its ambit that subsequently results in case law that functions as law being considered as not having the status of law.

As has been noted above, it is not a sufficient answer to say that precedential usage in civil law systems is limited to orthodox understandings of *jurisprudence constante*. Equally, and as such, it is insufficient to argue that characterisation of such precedent as interpretative precludes any need for its formalisation in light of its law-making functions. Rather, such need is particularly evident in that — regardless of how these practices are called or described — their existence is a logical near-certainty in any dispute resolution system founded on the application of legislation. Consequently, modern practice would be best served by systematisation of such practices so as to maximise, rather than baselessly undermine, the propriety of their role in law-making.

IV Inevitability and Propriety of Precedent

It is hoped that the above — being the existing usage and the argument for its wider recognition — will not be understood as a failure of nerve in the execution of what would otherwise amount to a sound, principled basis for both limitations on law-making (and subsequent dispute resolution on its basis). Rather, such a development should be properly understood in light of its particular origins as having a positive net-effect for the purposes of broader legal reasoning and wider law-making.

In fact, it is of interest that such developments were not anticipated at the outset of modern civil legal systems (if not quite formalised). This is because the application of any legislation, whether characterised as code- or statute-based, will necessarily require recourse to principle-based reasoning. As such, in the interests of legal certainty (and its role within upholding the effective rule of law), an acceptance of the role of precedent can be seen to outweigh any political concerns regarding proper democratic origins of law. Ultimately, and in future, as civilian systems approach the limits of the proper

functioning of codification, such a development may be a foregone conclusion — one that would be best served by a principled, formal approach to its use.

A Necessity of Principle-Based Reasoning

As a corollary to the limitation on judges' roles in early civil law systems described above, it was seen as insufficient that judges' decisions be limited to the dispute before them. Rather, it was deemed necessary in certain instances to expressly limit them to applying the law as enacted — including by precluding them from determining disputes in accordance with the principles underlying such law.

To this end, the initial French Civil Code stipulated in its initial provisions that:[50]

> A judge who refuses to give judgment on the pretext of the silence, obscurity or insufficiency of the law may be prosecuted for being guilty of denial of justice.

However — in the very next article — the same Code also provided that:[51]

> Judges are forbidden from providing general or abstract rulings in deciding the cases before them.

Self-evidently, there is a tension in the prohibition on a judicial failure to apply the law as enacted as well as on doing so in accordance with general or abstract rulings. Specifically, as nobly intentioned as early French codification may have been, the respective natures of language, law and human activity mean that law cannot capture the full possible extent of the latter through a limited set of the former. There will necessarily be instances where matters fall for consideration where the law as legislated is, if not entirely silent, certainly insufficiently clear. To compel a decision in such circumstances is, therefore, to compel a decision based on the general principles underpinning such law. (It is assumed, for reasons discussed above, that the alternative — of compelling a decision on the basis of the decision-maker's own views, untethered to any law as may have been enacted — was not reasonably contemplated.)

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50 Code civil des Français (1804), art 4.

51 Code civil des Français (1804), art 5.

Notably, the existence of these contradictory imperatives was clearly acknowledged in the codes of other legal systems that would come to be based on the French Civil Code. By way of example, the subsequent Italian Civil Code expressly provided that:[52]

> If a dispute cannot be decided under a specific provision, recourse is to be had to provisions regarding similar situations or analogous matters; if the situation remains doubtful, it is to be decided according to the general principles of the legal system of the State.

Such differences in approach remain, for example, in French judicial decisions being notoriously brief, and containing a relative dearth of reasoning, to this day.[53] Nevertheless, whether or not such reasoning is articulated, the extent to which principle-based reasoning is intra- or extrapolated from legislative provisions depends only on the content of those provisions and its relationship to the matters for determination — not on directions such as the above to the decision-maker. That is, reliance on principle has not been removed wholesale from French dispute resolution because linguistic limitations make such an exercise impossible. Consequently, any political ramifications of such practices are best served by the proper regulation of these in the context of — rather than the outright denial of their existence within — the legal order.

B Propriety of Precedent-Based Reasoning

In light of the above — that is, in recognition of the unavoidability of precedent-based reasoning — legal certainty, as a foundational principle of the rule of law, requires like cases to be treated alike.[54] The equation can be conversely posited as — faced with the inevitability of judicial reasoning and decision-making having a law-making aspect — whether it is better to formally systematise this to uphold the rule of law or to deny its existence.

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52 Codice civile italiano del 1942, art 12(2).

53 See Apple and Deyling, above n 8, at 20 and 21.

54 HLA Hart "Positivism and the Separation of Law and Morals" (1958) 71 Harv L Rev 593 at 623 and 624 as cited in Kenneth I Winston "On Treating Like Cases Alike" (1974) 62 CLR 1 at 3.

It is the arguable characterisation of the issue in these terms that has led to the Court of Justice developing:[55]

> [A]t least in a de facto sense, a doctrine of *stare decisis*, although employing a continental methodology and style that focuses on the rules and principles articulated in the cases, rather than on the cases themselves in their factual settings …

Regardless of its ultimate, substantive form, therefore, the primary area of focus in light of the above ought properly to be a principled approach to its use. The key considerations, rather, should focus on how it can best be utilised to serve its legitimate purposes, as opposed to on legal contortions that seek to deny its application in the furtherance of arguably outdated (or, at least, misguided) political ideologies. The problem, however, is that the recognition that is occurring is predominantly located within the ranks of the judiciary — with the question remaining as to whether this will eventually spread to legislative and executive branches of government also.

C Legislative Limits

Ultimately, the decision in this respect may already have been made — albeit again implicitly. It is contended that, first, codification as a complete encapsulation of primary law is reaching its logical limits and, secondly, the consequence of such a realisation may well result in a formalised role for principle- and precedent-based reasoning in civil law systems that will resemble those found at common law.

1 Proliferation of codification

The ideal of legal codification, being the complete encapsulation of the law, may in fact be misguided in principle. Evidencing this is the fact that, after centuries (if not millennia) of attempts, no such system has been achieved to date.

By way of example, and despite such intentions, the French Civil Code was at no point in time "a complete and exclusive body" of law.[56] Rather, it was a subset of the civil law of

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55 JJ Barceló "Precedent in European Community Law" in D Neil MacCormick and Robert S Summers (eds) *Interpreting Precedents - A Comparative Study* (Ashgate/Dartmouth, Brookfield (Vermont), 1997) 407 at 433 as cited in Bradley, above n 44, at 49.

56 Shapiro, above n 10, at 133.

the period — notably omitting to include not only procedural law, as codified in the separate French Code of Civil Procedure,[57] but also substantive law, such as the subsequent French Commercial Code.[58]

In fact, at the time that complete codification in one enactment would have arguably been simplest to effect, French law was comprised of eight codes.[59] Over time, and as at present, this number has increased to an approximate 74 codes which are currently in force.[60] (Notably, added to this is the fact that such a system is no longer said to function as a code per se, in that it functions through yearly amendments, reprints, consolidations and appendices of case law and commentary — such that it has been described as being closer in nature to a database than a code.[61])

2 Limits of codification

More telling than the number (whether as between individual codes or within their provisions), though, is that proliferation is necessary at all. Rather, this demonstrates that an overarching and complete systematisation of law, being effectively a system to govern human conduct, is most likely impossible by virtue of the inability to tidily delineate conduct in this way.

Such an acknowledgement has, in fact, been made by the French Superior Codification Commission — being, arguably, the governmental body with the longest experience with codification in the modern era. The Commission recently expressly stated that:[62]

> [T]he age of drawing up new codes is probably reaching its end. [Further, the] aim of a nearly complete codification of the law is no longer pursued …

Shortly thereafter, the Commission noted that it regarded codes that had yet to reach a certain level of development as having been definitively abandoned.[63]

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57 Code de procédure civile français (1806).

58 Code de commerce français (1807).

59 See Burdick, above n 9, at 13.

60 See "Legifrance, le service public de la diffusion du droit" <www.legifrance.gouv.fr>.

61 See Iain Stewart "Mors Codicis: End of the Age of Codification?" (2012) 27 Tul Eur & Civ LF 17.

62 Commission supérieure de codification *Rapport annuel 2010* at 13.

63 Commission supérieure de codification *Rapport annuel 2011* at 21; and see Stewart, above n 61.

3 Function of codification

The reasons for this seeming about-face included two crucial concessions. First, the Commission noted that the proliferation of codes complicates their on-going development in terms of the difficulty of definitively determining which codes should contain which provision.[64] Secondly — and most importantly —the Commission recognised that "certain kinds of provision … are unsuitable for codification, since codification makes sense only when it involves sufficiently generic provisions".[65]

It is here that official confirmation can be found of the crux of the matter. Specifically, law-making through legislation is appropriate where the laws reflect a certain level of generality. At a higher degree of specificity, attempts at codification will be futile and it is precisely at this degree of specificity that there exists both a role for judicial law-making (however defined or jurisprudentially conceived) as well as for a systematic, precedential approach to this. Such a conclusion, ultimately, is inescapable because of nothing more than generic, linguistic limitations.[66]

V Conclusion

It is often said that a "language is a dialect with an army and a navy".[67] In light of the above, it is posited that the common law is civilian jurisprudence with a Latin (rather than a French) imprimatur. That is, the differences between both legal systems' approaches to case law are closer in practice and in principle than is often argued to be the case.

While the above may, at first, read like little more than a revisionist history of the development of these legal systems, it is hoped that a contextual understanding of these origins will — rather — highlight the distortionary revisionism inherent in the principles commonly cited to justify the limits imposed (at least nominally) on case law in civilian systems. The various quoted ideals amount, in large part, to unprincipled and ex post facto rationalisations stemming from specific political and legal eras. To this end, a substantive reconsideration of how to best formally incorporate already present approaches is warranted.

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64 See Commission supérieure de codification *Rapport annuel 2010* at 13.

65 Commission supérieure de codification *Rapport annuel 2010* at 13.

66 See Shapiro, above n 10, at 126.

67 Max Weinreich "The YIVO and the Problems of Our Time" (5 January 1945).

Ultimately, such reconsideration is not limited to civilian case law — as its basis is equally (if not more so) applicable to common law legislation. The difference, it must be said, is that the common law has come closer to appropriately developing its legislation than the civil law has come to appropriately developing its case law. Nevertheless, viewed on a different scale, it must equally be noted that the common law has had a longer amount of time (than the modern civil law) to reach for the limits of the proper scope of its primary law-making. As such, for a long time, the common law had a minimal legislative function. As has been noted:[68]

> Common law and statute law were conceived as two distinct and separate branches of the legal system even though jurists observed many important ways in which their histories and functions were intertwined. … [T]his might suggest a unified and integrated legal order of unwritten and written sources, common law and statute law, operating through the authority of several legal institutions and functioning to refine and advance the law through a steady process of incremental growth and adjustment. Yet, ironically, such a benign vision of the relationship between common law and statute [in England] was all but submerged by a professional orthodoxy that celebrated the achievements of the common law by measuring them against the failures of statute.

It is hoped that civilian systems — and their impending developments — will, to great benefit, surface from the obverse orthodoxy and soon.

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[68] David Lieberman "The Challenge of Codification in English Legal History" (Presentation to Research Institute of Economy, Trade and Industry (Japan), 12 July 2009) at 3 and 4.

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