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DIVERGENCE AND CONVERGENCE IN THE COMMON LAW – LESSONS FROM THE *IUS COMMUNE*

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I. Introduction

Common lawyers all over the world have recently begun to ask questions about the factors which make their different yet related legal systems cohere and about the conditions under which divergences between them are not only sustainable, but may actually function as a catalyst for further development. Such questions are not unique to the Anglo-American common law. For centuries, the continent of Europe literally had a "common law" of its own, the so-called *ius commune*. Its break-up has left today's civilian systems as cousins belonging to the same legal family where once they were more like siblings. This article seeks to explore what lessons modern-day common lawyers can learn from the experience of the European *ius commune*.

In attempting to extract such lessons from legal history and observing what patterns recur in the common law world, it is important not to overstate the basis upon which the comparison rests. The *ius commune* owes its establishment, spread and eventual demise to very different conditions to those which formed and continue to shape the common law. What follows should therefore be understood as a broad-brush impressionistic sketch rather than a systematic and comprehensive juxtaposition. Its aim is to draw attention to the European *ius commune*, to highlight a limited number of key factors which tend to favour the convergence or divergence of legal systems, and thus to create a general awareness for where the common law stands and where it might be heading.

For present purposes, the word "common law" is used the wide sense (unless otherwise indicated), encompassing both judge-made law and statute. It refers to legal systems deriving from the English as opposed to those of civilian origin. While the discussion will focus

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specifically on core private law, the constitutional framework and similar background determinants cannot and should not be removed from sight.

The article is structured as follows. After setting the scene by briefly outlining the history of the *ius commune* (II) and depicting the current state of the common law world (III), it seeks to identify—by reference to both traditions—the main factors that tend to favour a convergence or divergence of different legal systems (IV). It then explores the ways in which divergence can operate as a stabilising mechanism and as a catalyst for further development (V), while also charting certain minimum conditions which need to be met in order to prevent related legal systems drifting too far apart (VI). In this context, common lawyers should be alert to the effect of private law convergence in Europe and to the potential impact that the enactment of a European Civil Code might have on the coherence of the common law family (VII).

II. Rise and Fall of the European *Ius Commune*: An Overview

The European *ius commune* was, in essence, the learned law that unfurled, took shape and spread during the late medieval and early modern period. Its origins are inextricably linked to the history of European universities. The rediscovery in the 11th century of the Justinianic Digest, a sixth century compilation of classical legal texts, prompted vivid scholarly interest in Roman law.[1] At the newly established Northern Italian universities, especially in Bologna and Pavia, the study of Roman texts (the *Corpus Iuris Civilis*, as the whole body of the Justinianic collection came to be called)[2] using contemporary exegetic and scholastic methods flourished. The revival of Roman law was an integral part of the "renaissance of the twelfth century".[3] The old texts were initially annotated by means of glosses written on the margins or between the lines. From the late 13th century onwards, more detailed commentaries and legal opinions began to be published. The academic reception of Roman law was flanked by a comparable process in the study and elaboration of medieval canon law (itself partly rooted in Roman law) as applied by the ecclesiastical courts of the Roman Catholic Church.[4] Roman and canon sources were gradually moulded into a system of law suitable for the conditions of its time. To be adapted for practical use, the *ius commune* had to make allowance for the then prevalent feudal structures, and it did so by incorporating feudal elements as well.[5]

[1] See H. Lange, *Römisches Recht im Mittelalter I: Die Glossatoren* (München: C.H. Beck, 1997), at pp.28–34, 60–71.

[2] Besides the Digest, the *Corpus Iuris Civilis* encompassed the *Institutiones* (a sort of introductory textbook), the *Codex Iustinianus* and the *Novellae* (both collections of imperial constitutions).

[3] C.H. Haskins, *The Renaissance of the Twelfth Century* (Cambridge/Massachusetts: Harvard University Press, 1927), esp. ch.7. See also S. Kuttner, "The Revival of Jurisprudence" in R.L. Benson and G. Constable (eds), *Renaissance and Renewal in the Twelfth Century* (Oxford: Clarendon Press, 1982), pp.299–323.

[4] In allusion to the Roman *Corpus Iuris Civilis*, the body of canon law came to be known as the *Corpus Iuris Canonici*. On the relationship between Roman and canon law see, e.g., R.H. Helmholz, "Canon Law and Roman Law" in D. Johnston (ed.), *The Cambridge Companion to Roman Law* (Cambridge: Cambridge University Press, 2015), ch.19.

[5] The main source of feudal law was the 12th century collection of Lombard custom known as the *Libri Feudorum*.

What accounts for the spread of the *ius commune* beyond Italy and its entry into legal practice is the fact that scholars from all over Europe flocked to the Northern Italian law schools[6] and upon returning to their home countries often entered into the service of either Church or State. They shared the same approach to the law, were steeped in the concepts, methods and values which had informed their education. It is unsurprising that they should have drawn on this knowledge and brought it to bear in administering ecclesiastical or secular law. The "social group"[7] of university-trained lawyers quickly expanded as new universities were founded in rapid succession.[8] Some of them achieved high office, became Bishop, Chancellor to the Holy Roman Emperor, or even Pope.[9]

The process, speed and intensity of reception differed from place to place (largely due to Europe's political fragmentation), but roughly by the late 15th or early 16th century, the *ius commune* had established itself throughout the Continent. Yet rather than ousting customary local law or enactments by territorial rulers, it supplemented these sources and actually began to exert a subtle structuring influence on them.[10] There was hence never a uniform legal system based exclusively on the *ius commune*. Instead, the *ius commune* remained a subsidiary source of law, filling in gaps and shaping legal thought and argument. It was more of a "secure point of reference in the tumultuous variety of particular systems of law"[11] than a genuinely common law. In theory local law always took precedence, but in practice its existence and content had to be alleged and—if necessary—proved in court,[12] while there was a presumption favouring the applicability of the *ius commune*.[13] As far as he Holy Roman Empire was concerned, an important milestone was the foundation of the Imperial Chamber Court (*Reichskammergericht*) as a top-level court in 1495,[14] a court whose jurisdiction ran

[6] In the 1150s, there was already a sufficiently large group of foreign law students in Bologna to warrant the Emperor Barbarossa intervening to grant them certain privileges, and the number of *ultramontanes* (those from "beyond the mountains") continued to grow rapidly: see, e.g., P. Denley, "Academic Migration to Italy before 1500: Institutional Perspectives" in S. Andresen and R.C. Schwinges (eds), *Über Mobilität von Studenten und Gelehrten zwischen dem Reich und Italien (1400–1600)* (Zürich: vdf Hochschulverlag, 2011), esp. at pp.26–30.

[7] H. Coing, *Europäisches Privatrecht I: 1500–1800* (München: C.H. Beck, 1985), at pp. 11, 37.

[8] A list of universities founded before 1500 is provided by J. Verger, "Patterns" in W. Rüegg (gen. ed.), *A History of the University in Europe I: Universities in the Middle Ages* (Cambridge: Cambridge University Press, 1991), at pp.62–65. An impression of the number of students studying civil or canon law may be gleaned from A. García y García, "The Faculties of Law", ch.12 in the same book, at pp.400–401.

[9] García y García (fn.8), at p.403.

[10] Where attempts were made to record and expound local law, scholars would quite naturally have recourse to the structural framework provided by the *ius commune*, without necessarily distorting the content of local law. Common lawyers need only think of Bracton's *De legibus et consuetudinibus Angliae* (ca. 1235).

[11] M. Bellomo, *The Common Legal Past of Europe, 1000–1800*, tr. by L.G. Cochrane (Washington D.C.: Catholic University of America Press, 1995), at p.32.

[12] This was extremely difficult for unwritten customary law. Customary law effectively had to be recorded in writing (a process which encouraged its "Romanisation": see fn.10) in order to be taken into account. And in the case of statutory enactments, the maxim that *statuta sunt stricte interpretanda* meant that lawyers adopted a very restrictive approach to construction. On the so-called "theory of statutes" see R. Zimmermann, "*Statuta Sunt Stricte Interpretanda?* Statutes and the Common Law: A Continental Perspective" [1997] C.L.J. 315 at 316–318.

[13] On the so-called *fundata intentio* see W. Wiegand, "Zur Herkunft und Ausbreitung der Formel 'habere fundatam intentionem'" in S. Gagnér, H. Schlosser and W. Wiegand (eds), *Festschrift für Hermann Krause* (Köln: Böhlau, 1975), at pp.126–170.

[14] Competing with the *Reichskammergericht* was another supreme imperial court, the *Reichshofrat* (Aulic Council), whose concurrent jurisdiction to an extent weakened the former.

throughout the realm,[15] which was largely emancipated from the emperor himself,[16] and whose judges were sworn to adjudicate under the Romano-canonical procedure in accordance with "the laws common to all the realm" (i.e. the *ius commune*) as well as those "just and equitable ordinances, statutes and customs" of principalities and other dominions which had been "brought before them".[17]

The 16th to 18th centuries were a period of consolidation and adjustment. The reception of Roman law via the *ius commune* was for the most part complete. French humanism brought forth a new scholarly approach (*mos gallicus*) which distanced itself from the scholastic methods of medieval Italian jurists (*mos italicus*), but legal practice was more interested in the day-to-day administration of law and in the challenges created through the blossoming of trade and commerce. In the wake of early absolutism, territorial rulers arranged for local customary law to be collected and published. The various French *coutumes* are good examples[18]. Particularly in the regions that later became Germany, there gradually emerged a "modern use" of Roman law, one which adapted the old rules to contemporary conditions, the so-called *usus modernus pandectarum*.[19] It interwove the *ius commune* with local rules and customs, thereby modifying and to some extent regionalising it. The story according to which Roman law derived its validity from an act of formal imperial adoption in the twelfth century was exposed as a myth.[20] This allowed local law to be treated on a par with the *ius commune*, with both ultimately resting on established usage. Legal literature now abounded, as may be seen from the fact alone that the number of dissertations dating from the 17th and 18th centuries is allegedly around 100,000.[21]

A development of major importance for European legal thought was the advent of rationalism during the age of enlightenment.[22] System-building was the order of the day. Natural law theorists attempted to derive general rules governing all social interaction from human nature or divine order. Sometimes this led them into direct conflict with the received *ius commune*,[23]

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[15] Except where the ruler of a particular territory had a *privilegium de non appellando*.
[16] Its predecessor, the *Königliches Kammergericht*, had been much more in the nature of the monarch's personal court.
[17] § 3 *Reichskammergerichtsordnung* (Ordinance of the Imperial Chamber Court).
[18] For an overview see, e.g., P. Stein, *Roman Law in European History* (Cambridge: Cambridge University Press, 1999), at pp.83–85.
[19] The term can be traced to a commentary by one of the epoch's leading figures: S. Stryk, *Specimen usus moderni pandectarum* (1690–1692).
[20] The so-called "Lotharian legend", according to which Emperor Lothar III of Supplinburg had prescribed the Digest as authoritative, was refuted by H. Conring, *De origine iuris Germanici* (1643).
[21] G. Köbler, *Deutsche Rechtsgeschichte. Ein systematischer Grundriss*, 6th edn (München: Vahlen, 2005), at p.146. This figure, for which no source is identified, looks plausible in the light of the digital collection of early modern dissertations put together by the Max Planck Institute for European Legal History (available via http://www.rg.mpg.de/library/dissertations, last accessed 27.02.2015).
[22] See, e.g., F. Wieacker, *A History of Private Law in Europe*, tr. by T. Weir (Oxford: Clarendon Press, 1995), at pp.199–256.
[23] Christian Thomasius, for example, argued that the delictual action *de damno dato*, as applied by his contemporaries, had little to do with the original Roman *lex Aquilia*: C. Thomasius, *Larva Legis Aquiliae: The Mask of the Lex Aquilia Torn Off the Action for Damage Done*, ed. and tr. by M. Hewett (Oxford: Hart Publishing, 2000). Thomasius also rejected doctrines such as that of *laesio enormis*: T. Ahnert, "Roman Law in Early Enlightenment Germany: the Case of Christian Thomasius' *De Aequitate Cerebrina Legis Secundae Codicis de Rescindenda Venditione* (1706)" (1997) 24 Ius Commune 153.

but equally often natural justice could be perceived as underpinning the existing rules, effectively providing "a supra-positive justification of positive law".[24] The integrative force of the *ius commune* as a universal order, already unsettled by humanism and the adjustments of the *usus modernus*, waned further as it became possible to accommodate "policy" concerns within legal discourse.[25]

The desire to make the law more rational and transparent also drove a number of codification projects that came into fashion from the mid-18th century onwards.[26] Codification went hand-in-hand with the rise of the modern nation state. No longer were rulers content to enact haphazard compilations of pre-existing rules and to accept the *ius commune* as an underlying current; they wanted to control and shape the law into a seamless web governing all aspects of social life. For the law to reign supreme in a well-constituted state, it needed to be made easily accessible to the citizens. The best-known products of this movement were the Prussian General Code (*Preußisches Allgemeines Landrecht*) of 1794, the French *Code civil* of 1804,[27] and the Austrian Civil Code of 1811 (*Allgemeines Bürgerliches Gesetzbuch*). Under somewhat different conditions—in a more historically-minded intellectual environment and with a delay of almost a century—the German Civil Code of 1896 (*Bürgerliches Gesetzbuch*, abbreviated BGB) came into force in 1900.[28] Inevitably, national codification cemented legal fragmentation. From then on, scholars and judges would look primarily to their Code when seeking answers and/or propounding ideas, not to the tradition of which it was born. In that sense, the 19th century dealt the death blow to the European *ius commune*.

III. The Common Law Position

The starting point of the common law tradition is entirely different. Its long history shall not be rehearsed here. Suffice it to note that, unlike the *ius commune*, the English common law managed within a relatively short period to supplant more or less completely customary practices at local level.[29] There was thus, at least from the 15th century onwards, a centrally administered uniform system of law throughout the realm, albeit that the division of competences between the Royal Courts and the Court of Chancery generated a different kind of structural dualism. All modern-day common law systems ultimately go back to this composite body of common law and equity jurisprudence interspersed with statute. It is the

[24] H. Thieme, "Die Zeit des späten Naturrechts. Eine privatrechtsgeschichtliche Studie" (1936) 56 Z.R.G. (G.A.) 202 at 228.
[25] See Coing (fn 7), at p.74.
[26] For details see see Wieacker (fn 22), at pp.257–275.
[27] Though the French code was, in the words of Wieacker (fn.22), at p.269, "not so much an act of enlightened absolutism as the product of both the revolutionary nation itself and of its great tribune, First Consul Bonaparte".
[28] An account of the "codification dispute" which caused the delay and of the so-called "Historical School of Jurisprudence" is provided by Stein (fn.18), at pp.115–123. More details in Wieacker (fn.22), at pp.279–379.
[29] J.H. Baker, *An Introduction to English Legal History*, 4th edn (London: Butterworths, 2002), at pp.13–14, writes of the repression of local custom that "Glanvill and his fellow councillors under Henry II produced a coherent system of English law deriving ultimate authority from the king. Against that uniform system, local custom would thereafter be seen at best as exceptional and at worst as exceptionable".

legal tradition which England exported to the colonies during the heyday of British Imperialism.[30]

As will be the case with children, they eventually grow up and make efforts to emancipate themselves from their parent. The United States were the first to break away in the wake of the American Revolution. Although all but one of the states within the growing federation received English law,[31] each ended up with its own body of statutes and cases.[32] From the outside, these sub-systems could nevertheless be perceived as a group set apart from those that stayed within the British Empire and subsequently became part of the Commonwealth. Lord Cooke of Thorndon wrote that, when he was born in New Zealand in 1926, he "imbibed [from the cradle] the dogma that there were only three kinds of common law: English common law, United States common law, and Scottish common law", adding that he did not know what the Scots made of this description of their legal system,[33] which is in fact mixed. At around the same time, Viscount Dunedin said in an appeal to the Judicial Committee of the Privy Council from the Supreme Court of Ontario that a "colonial court" was strictly bound by English House of Lords authority,[34] even though Canada had already been a self-governing dominion since 1867.[35] Divergences from English law were, broadly speaking, only acceptable as far as statute law was concerned,[36] and even then many post-reception local statutes were closely modelled on Westminster statutes (think only of the various pieces of sale of goods legislation mirroring the English Sale of Goods Act 1893).[37]

By the end of the 20th century, the picture looked entirely different. Canadian Appeals to the Privy Council were abolished in 1949. A strong constitutional influence has since shaped legal thought at both federal and provincial level. Under the aegis of a Supreme Court attaining self-confidence, there developed a "distinctively Canadian jurisprudence",[38] though perhaps more gradually and less noticeably in the field of private than in public law.[39] Australia set itself free soon afterwards. The High Court having already convinced the Judicial Committee of the Privy Council during the 1960s that it did not inevitably need to

[30] The way this export was conceived differed as between different types of colonies. For a detailed study see B.H. McPherson, *The Reception of English Law Abroad* (Brisbane: Supreme Court of Queensland Library, 2007), esp. at pp.10–29.
[31] Louisiana is special in that its private law is based on the civilian tradition, with only a limited amount of common law influence.
[32] Specifically on US reception history: F.W. Hall, "The Common Law: An Account of its Reception in the United States" (1951) 4 Vanderbilt L.Rev. 791; W.B. Stoebuck, "Reception of English Common Law in the American Colonies" (1968) William and Mary L.Rev. 393.
[33] Lord Cooke of Thorndon, "The Common Law through Commonwealth Eyes" (1998) 2 Inter Alia 45.
[34] *Robins v National Trust Co Ltd* [1927] A.C. 515 at 519.
[35] This is why Lord Cooke (fn.33), at 45, describes the view as "anachronistic even by 1927 standards".
[36] After the date of formal reception, legislation was in theory local, but Imperial Statutes applied uniformly throughout the Empire: for details see McPherson (fn.30), at pp. 326–329, 350–353, 360–361, 381–382.
[37] The Sale of Goods Act 1893 was itself essentially a mini-codification of the relevant common law rules.
[38] One of the main protagonists of this movement was Brian Dickson C.J., whose particular concern lay with the 1982 Charter of Rights and Freedoms: R.J. Sharpe and K. Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press, 2003), at pp.317–320.
[39] In private law, there has arguably been a seepage of civilian thinking inspired by Quebec's Civil Code.

follow House of Lords decisions,[40] appeals from it to the Privy Council ended in 1975.[41] In 1988, s.80 of the Judiciary Act 1903 (Cth) was amended to make clear that all courts exercising federal jurisdiction had to apply "the common law in Australia" (as modified by the Constitution and any relevant statute of the State or Territory affected) instead of "the common law of England". Sometime between the 1960s and the late 1980s, therefore, the Australian case law began to diverge from the English.[42] There is, in fact, already a debate about the extent to which the common law in Australia should be seen as a variety of different state laws rather than as a unitary body.[43] With respect to New Zealand, although Privy Council appeals remained in place until the new Supreme Court was established in 2004, it was clear from at least the late 1990s that New Zealand jurisprudence could go its own way.[44] In the seminal decision of *Invercargill City Council v Hamlin*, the Privy Council acknowledged that "the Court of Appeal of New Zealand should not be deflected from developing the common law of New Zealand ... by the consideration that the House of Lords … have not regarded an identical development as appropriate in the English setting".[45]

It is impossible within the confines of this article to trace the various different jurisdictions, but it is fair to say that other legal systems have, on the whole, undergone a similar process of emancipation. Even where appeals to the Privy Council are still in place, they now allow for local nuances and show great sensitivity in dealing with them. Whereas it used to be thought that all courts in territories under the overseas jurisdiction of the Privy Council were bound by its opinions (no matter whence the appeal originated),[46] the Judicial Committee is increasingly seen as merely the apex of the local appeals pyramid, so that its decisions are binding only within the legal system to which they relate.[47]

All in all, the picture of the common law world today *in some respects* resembles that of continental Europe round about the late 17th or early 18th century. It consists of a family of more or less closely related legal systems which share a strong common heritage and legal

[40] See *Parker v The Queen* (1963) 111 C.L.R. 610 at 632–633; *Skelton v Collins* (1966) 115 C.L.R. 94 at 134–135; recognised by the Privy Council in *Australian Consolidated Press Ltd v Uren* (1967) 117 C.L.R. 221; [1969] 1 A.C. 590.

[41] Privy Council (Appeals from the High Court) Act 1975. Appeals from State Supreme Courts to the Privy Council were ended by the Australia Act 1986 (Cth and UK).

[42] M. Leeming, "Common Law Within Three Federations" (2007) 18 Public L.Rev. 186 at 190 writes that "although it is problematic to say precisely when", it was "certainly no later than 1988".

[43] Contrast L.J. Priestley, "A Federal Common Law in Australia?" (1995) 6 Public L.Rev. 221, with the statement in *Lange v Australian Broadcasting Corporation* (1997) 189 C.L.R. 510 at 563 that "[t]here is but one common law in Australia which is declared by this Court as the final court of appeal".

[44] Tracing this development: K. Glover, "Severing the Ties that Bind? The Development of a Distinctive New Zealand Jurisprudence" (2000) 8 Waikato L.Rev. 25.

[45] [1996] A.C. 624 at 640. A decade earlier, the then President of the New Zealand Court of Appeal, Sir Robin Cooke (later Lord Cooke of Thorndon), had already argued that "New Zealand law … has now evolved into a truly distinctive body of principles and practices, reflecting a truly distinctive outlook": "The New Zealand National Legal Identity" (1987) 3 Cantabury L.Rev. 171 at 182.

[46] *Bakhshuwen v Bakhshuwen* [1952] A.C. 1 (PC), esp. at 14. Still tending in this direction: H.H. Marshall, "The Binding Effect of Decisions of the Judicial Committee of the Privy Council" (1968) 17 I.C.L.Q. 743.

[47] An early reflection of this view is to be found in *Negro v Pietro's Bread Co Ltd* [1933] 1 D.L.R. 490 at 494–496. See also the critical case note on *Bakhshuwen v Bakhshuwen* (n 46) by G.W Bartholomew in (1952) 1 I.C.L.Q. 392, esp. at 394–395; J.W. Harris, "The Privy Council and the Common Law" (1990) 106 L.Q.R. 574, esp. at 582–583.

culture and are yet clearly distinct and independent. By and large, they still enshrine the same core of substantive rules and to some degree still evolve along similar lines, while at the same time cherishing and consolidating their own specificities. Each has developed a sort of "national common law". For a brief period between the point of first divergence and the confident assertion of full-fledged independence, it could perhaps be said that English (case) law in its contemporary shape functioned as a subsidiary source of law for progeny systems. Where there were gaps to fill, it was natural to look first to England for an answer, much like continental lawyers would look to Roman law via the *ius commune*. However, although English law is still widely seen as a reference point and source of inspiration, it is today typically only one of several. Canadian judges, for example, have in the past drawn more heavily on US than on English material in the realm of fundamental rights,[48] the New Zealand Court of Appeal in *Hosking v Runting* similarly found the US lead in developing a separate tort of invasion of privacy more inspirational than the English model of protecting privacy via an extension of the action for breach of confidence,[49] and the Federal Court of Malaysia has rejected the English *Bolam* test of medical negligence in favour of the Australian approach.[50] As the Hon. Justice Michael Kirby put it in a contribution marking the end of the judicial function of the House of Lords and the establishment of a new UK Supreme Court, "[t]he link is now one of rational persuasion in a context of substantially shared basic legal doctrine. It is no longer a relationship of obedience or subservience".[51]

IV. Convergence Factors and Divergence Factors

What, then, can the experience of the *ius commune* teach us about the factors which tend to make a group of legal systems converge[52] or lead to their divergence? And to what extent do we find these factors reflected in the common law world? For exposition purposes, it is convenient to sort them into four groups: political and economic factors, institutional and procedural factors, factors relating to the sources of substantive law, and jurisprudential factors.

1. Political and Economic Factors

At the macro level, political and economic circumstances are always background factors against which any legal development takes place. It is thus interesting to observe in passing that while the initial establishment of the English common law owed much to reforms by

[48] See G.V. La Forest, "The Use of American Precedents in Canadian Courts" (1994) 46 Maine L.Rev. 211 at 213–216.
[49] [2004] NZCA 34; [2005] 1 N.Z.L.R. 1.
[50] *Foo Fio Na v Dr Soo Fook Mun* [2007] 1 M.L.J. 593.
[51] M. Kirby, "The Old Commonwealth: (a) Australia and New Zealand" in L. Blom-Cooper, B. Dickson and G. Drewry (eds), *The Judicial House of Lords, 1876–2009* (Oxford: Oxford University Press, 2009), at p.345.
[52] "Convergence factors" must here be understood in a broad sense as factors favouring synchronisation. In respect of the *ius commune*, they include all those factors which played a key role in the initial reception and proliferation of the underlying (mainly) Roman rules and principles

rulers keen to overhaul the administration of justice and to centralise government,[53] the *ius commune* emerged and spread across the Continent despite—or perhaps precisely because of—Europe's fragmentation into a myriad of small entities, spanning all sorts of political and other boundaries. In some ways, it has been suggested, the hierarchical undertones of the Justinianic *Corpus Iuris* suited European rulers trying to set up a well-organised bureaucracy of executive decision-making and judicial administration,[54] which may have helped further to engrain the Roman legacy in common legal thought. Yet when the idea of the nation statehood became a powerful synonym for political legitimacy and sovereignty from about the mid-17th century onwards, a process which culminated in the enactment of national codes, this undoubtedly eroded the overall coherence of the *ius commune*. That wholesale codification of "national" law by a sovereign state is almost bound to accelerate the break-up of a bigger unity is an issue which will be pursued further below.[55]

For present purposes, it is worth noting that a not dissimilar process of building up a politically-motivated national legal identity (though not in the form of a code) is responsible for US law beginning to diverging quite consciously from English law at an early stage. As Roscoe Pound remarked, after the Revolution and the Declaration of Independence 1776,

> "[p]olitical conditions gave rise to distrust of English law. Naturally the public was extremely hostile to England and to all that was English; and it was impossible for the common law to escape the odium of its English origin. Judges and legislators were influenced largely by the popular feeling, and the bar was not strong enough to resist it."[56]

In another place, he writes: "The books are full of illustrations of the hostility toward English law simply because it was English which prevailed at the end of the eighteenth and in the earlier years of the nineteenth century."[57] A New Hampshire judge is reputed to have said: "They would govern us by the common law of England. Common sense is a much safer guide", and "It is our duty to do justice between the parties! Not by any quirks out of Coke and Blackstone,—books that I never read and never will."[58] At one time, several States even adopted legislation expressly prohibiting the citation of English authorities.[59] What is perhaps most remarkable in the light of all this is for how long US lawyers nevertheless continued to monitor and follow developments in England, despite their clearly asserted independence and the huge chasm in constitutional and social terms.[60]

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[53] The reign of Henry II is generally regarded as a crucial formative period: P. Brand, *The Making of the Common Law* (London: Hambledon Press, 1992), at pp.77–102.
[54] R.C. van Caenegem, *European Law in the Past and the Future* (Cambridge: Cambridge University Press, 2002), at pp.75–79.
[55] See text following fn.102.
[56] R. Pound, "The Place of Judge Story in the Making of American Law" (1914) 48 Am.L.Rev. 676 at 681–82.
[57] R. Pound, *The Formative Era of American Law* (Boston: Little Brown & Co, 1938), at p.7. See also C. Warren, *A History of the American Bar* (Boston: Little Brown & Co, 1911), at pp.224–228.
[58] Pound (fn.56), at 686. Pound does not give a reference for this quote, but other sources ascribe it to John Dudley, a farmer who became Justice of the New Hampshire Superior Court of Judicature in 1785.
[59] More details in Warren (fn.57), at pp.232–233.
[60] See the text to fn.188 below. E.N. Griswold, *Law and Lawyers in the Unites States* (London: Stevens & Sons 1964), at p.14, observed that Blackstone's writings, such as his *Commentaries on the Laws of England* (1765–1769), were "for many years the chief link with English law. It was fortunate, indeed, that his lectures were

Economic circumstances, too, influence the evolution of legal systems. Common economic interests generally tend to promote uniformity or assimilation. It is no coincidence that the reception of Roman law started in Northern Italy just as commerce there began to blossom.[61] That it spread more as an adjunct or complement to canon law[62] and not primarily along the ever-expanding trade routes is probably down to the fact that the *lex mercatoria* was already firmly established as customary law merchant governing European trade practice.[63] Economic factors did, however, play an important role later on in developing and adjusting the *ius commune* for the needs of its time, as will emerge from the discussion of the processes by which direct agency and contracts for the benefits of third parties came to be recognised.[64]

On the common law side, the momentum which economic factors may exert towards convergence has been openly acknowledged on various occasions. Just consider the following quote from *Australian Consolidated Press Ltd v Uren*:

> "The gain that uniformity of approach may yield is … far less marked in some branches of the law than in others. In trade between countries and nations the sphere where common acceptance of view is desirable may be wide. Thus in *Monarch Steamship Co Ltd v Karlshamns Oljefabriker (A/B)* Lord Wright in his speech expressed the view that it is desirable that as far as possible there should be uniformity between the law merchant as administered in the United States and in Britain.[65] To a similar effect were the words of Viscount Simonds in his speech in *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd* when rejecting a view which involved a departure from 'the prevailing harmony' of the law of England and the United States in relation to the carriage of goods by sea.[66] But in matters which may considerably be of domestic or internal significance the need for uniformity is not compelling."[67]

2. Institutional and Procedural Factors

Of greater significance for the convergence or divergence of legal systems are institutional and procedural factors operating more immediately at the micro level, especially that of legal training, court setup and everyday judicial practice.

The brief historical sketch of the *ius commune* will already have made abundantly clear that it owed its very existence and lasting success to the universities and to the legal education provided there. All universities provided more or less the same legal education, and all

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delivered just prior to the revolutionary period [cf. fn.69], so that they escaped the worst of the Anglophobic restrictions." See also R. Pound, "The Development of American Law and its Deviation from English Law" (1951) 67 L.Q.R. 49 at 51, writing that "*Blackstone* was the beginner's law book in America till well into the twentieth century".

[61] F. Wieacker, "The Importance of Roman Law for Western Civilization and Western Legal Thought" (1981) 4 B.C. Int'l & Comp. L.Rev. 257 at 276; van Caenegem (fn.54), at pp.80–81.

[62] See fn.4 and text thereto.

[63] See van Caenegem (fn.54), at pp.81–82.

[64] See text to fnn.138–142 below.

[65] [1949] A.C. 196 at 231.

[66] [1961] A.C. 807 at 840–841.

[67] [1969] 1 A.C. 590 (PC) at 641, *per* Lord Morris of Borth-y-Gest.

practitioners were university-trained. This gave birth to a pan-European scholarship using Latin as a *lingua franca* of communication and sharing not merely basic concepts but a whole body of rules. Ideas were able to spread quickly, and they readily entered practice.

Although the English common law was never a learned law in the same sense[68] and universities for a long time played virtually no role in its establishment or dissemination,[69] it is no less shaped by legal education, and its coherence, too, depends on lawyers being steeped in common concepts, values and methods. The Inns of Court, where legal education was centralised during the 14th century, have actually become known as England's "Third University".[70] Rather than learning and expounding the law by reference to Roman texts, common lawyers were primarily "reared on a diet of case law".[71] In the colonies, it was customary or at any rate desirable for practising lawyers to be trained and admitted in England first.[72] The whole "apprenticeship model" of training was exported as part and parcel of the common law.[73]

It is hence perhaps to be expected that we find divergences of approach and substantive rules often going hand-in-hand with divergences in legal education. On the Continent, state governments increasingly sought to influence and regulate the way universities were organised, the curriculum they taught and the examination process, and they began to introduce additional entrance requirements for the legal profession.[74] The result was a more specialised and inward-looking breed of lawyers. As far as the common law world is concerned, one of the most far-reaching developments in post-Revolutionary legal America was the establishment of academic law schools (the first was founded in Litchfield, Connecticut, in 1784) and the emergence of the so-called "case method" of study,[75] paving

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[68] F.W. Maitland, "Growth of Statute and Common Law and Rise of the Court of Chancery, 1307-1600" in F.W. Maitland and F.C. Montague, *A Sketch of Legal English History*, ed. by J.F. Colby (New York and London: G.P. Putnam's Sons, 1915), at p.111, refers to the instructors teaching in the Inns of Court as "the most unlearned kind of most learned men".

[69] William Blackstone was the first person ever to lecture on the common law, at the University of Oxford in 1753. Until then, and for some time thereafter, English universities taught essentially the same curriculum as their continental counterparts.

[70] J.H. Baker, "The Third University of England: The Inns of Court and the Common-Law Tradition" (London: Selden Society, 1990).

[71] Lord Goff of Chieveley, "The Future of the Common Law" (1997) 46 I.C.L.Q. 745 at 753.

[72] See, e.g., A.Z. Reed, *Training for the Public Profession of the Law* (New York: Carnegie Foundation, 1921), at p.68, writing with respect to pre-Revolutionary America: "In all of the colonies, … English-trained barristers seem to have been recognized as the best educated type of practitioner, and to have been accorded, either in theory or in practice, privileges not possessed by the … ordinary admitted attorney." Admission to the profession in Great Britain or Ireland was also a way into the local profession in, e.g., the Australian and Canadian colonies, in parts of the West Indies, in New Zealand and the South African Cape.

[73] McPherson (fn.30), at p.479.

[74] See T. Rüfner, "Historischer Überblick: Studium, Prüfungen, Berufszwang der Juristen in der geschichtlichen Entwicklung" in C. Baldus, T. Finkenauer and T. Rüfner (eds), *Bologna und das Rechtsstudium* (Tübingen: Mohr Siebeck, 2011), at pp.18–21, 27–31, tracing the development of legal education for France and Germany.

[75] R.M. Stein "The Path of Legal Education from Edward I to Langdell: A History of Insular Reaction" (1981) 57 Chicago-Kent L.Rev. 429 at 440–444. The case method was first introduced by Christopher Columbus Langdell, Dean at Harvard Law School 1870–1895, in his seminal case book on contract: *Selection of Cases on the Law of Contracts* (Boston: Little Brown & Co, 1871).

the way for "legal scientism".[76] This all happened before English universities had carved out for themselves a significant role in educating practitioners, which was not until well into the 20th century.[77] It may be of no small relevance to the history and topography of Australian scholarship that when its law schools, mostly established between the 1850s and 1930s and initially dominated by the profession, turned into more academic institutions after World War II, they looked to the United States rather than England for inspiration.[78]

"[T]aught law is tough law",[79] Maitland once remarked referring to its durability, and this is borne out by the common law experience as much as by the civilian one. In the South African Cape Colony, for example, where the old Roman-Dutch law had come under pressure from the rival common law during the 19th century, such that it was about to be submerged, the "tide could not really turn in favour of the Roman-Dutch law … until a sound local tradition of tuition in its basic principles was built up".[80] Empirical surveys in Singapore have shown just how strongly the development of a genuinely local jurisprudence is linked to judges and lawyers being locally trained, using local educational resources.[81] On the other hand, the English influence is likely to last for a while yet, as a good number of young lawyers from all over the Commonwealth still come to England for a post-graduate degree, and chances are that those who do not will have been taught by someone at least partly educated there.

The structure of the court system, the setup of judicial bodies and the procedures they follow, are further tremendously important factors capable of promoting convergence or divergence. With regard to the *ius commune*, it is widely agreed that the introduction of the Romano-canonical procedure, initially in the ecclesiastical sphere and gradually also into secular courts, proved to be a key stepping stone in the reception of Roman law, particularly in the Holy Roman Empire.[82] In secular court, however, the adoption and operation of this procedure was far less uniform than in the ecclesiastical sphere.[83] A monograph by Professor Peter Oestmann has impressively demonstrated how variations in German court practice (at local level as well as on appeal to the *Reichskammergericht*) directly influenced the substantive reception process by determining the specific relationship between the *ius*

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[76] As C.C. Langdell himself later pointed out, he had already in 1870 called "attention to the anomalous condition of legal education in English-speaking countries, the anomaly consisting in the fact that in those countries a knowledge of law had been acquired, as a rule, only or in connection with its practice and administration, while in all the rest of Christendom law has always been taught and studied in universities": "The Harvard Law School" (1887) 3 L.Q.R. 118 at 123.

[77] Although Oxford and Cambridge had by the 1870s reformed their law faculties, a university education for practising lawyers did not become common in England until the second half of the 20th century, and it is still not a prerequisite for admission to the profession.

[78] See N.J. James, "A Brief History of Critique in Australian Legal Education" (2000) 24 M.U.L.Rev. 965 at 966–969, who emphasises, however, that Australia never embraced legal realism.

[79] F.W. Maitland, *English Law and the Renaissance* (Cambridge: Cambridge University Press 1901), at p.18.

[80] D.V. Cowen, "The History of the Faculty of Law in the University of Cape Town, 1859–1959" (1959) 2 Acta Juridica 1 at 6.

[81] Y. Goh and P. Tan, "An Empirical Study on the Development of Singapore Law" (2011) 23 S.Ac.L.J. 176. See already K.K. Lau and others, "Legal Crossroads: Towards a Singaporean Jurisprudence" (1987) 8 Sing. L.Rev. 1 at 7–10, 23–27.

[82] See, e.g., Stein (fn.18), at pp.89–91

[83] C.H. van Rhee, "Civil Procedure: A European *Ius Commune*?" (2000) 4 E.R.P.L. 589 at 595–596.

commune and the law peculiar to a given city, region or territory.[84] And since—due to the political landscape—no single court had the ultimate say on Europe's "common law", what resulted was a patchwork of different practices and approaches.

As far as the modern common law is concerned, the two-way link between the declining role of the Privy Council and the drifting apart of common law systems has already been mentioned.[85] Another striking procedure-driven example pertaining to the divergence of Australian from English law was recently pointed out by the Hon. Justice Paul Finn.[86] He puts the development of so distinctive an Australian equity jurisprudence ultimately down to the fact that New South Wales did not implement the procedural fusion of common law and equity—which in England was entailed by the Judicature Acts 1873/1875—until the 1970s. He also notes that the New South Wales Equity Division had by then firmly established a commercial jurisdiction, so that Australian equity lawyers would occupy themselves with questions which in 20th century England were the preserve of hard-nosed commercial lawyers. "The failure to adopt a Judicature Act system for so long", he concludes, "had large consequences for the orientation, preoccupations and methodologies of Australian law".[87]

On a more fundamental level, it is worth remembering that the emphasis on case law and precedent, a central tenet of the common law tradition, derives from a procedural convention to the effect that the interpretation of law is a matter of professional debate between judges and (often senior) practitioners pleading their clients' cases. It is not a matter of the court simply "knowing" the law, as in civilian systems.[88] The less homogenous this common law interpretative framework becomes, the more the outcomes of debates will of necessity vary. Jurisdictions whose court structures and procedures closely resemble one another tend to find each other's case law more accessible and practically useful than decisions emanating from jurisdictions with a different microclimate and institutional outlook. This is one of the reasons why courts in traditional Commonwealth countries often cross-refer to precedents emanating from closely related "sibling" systems. It may, incidentally, also be one of the reasons why US decisions can occasionally be difficult for them to digest. In their seminal comparative study of legal institutions and legal reasoning, Professors Patrick Atiyah and Robert Summers have shown that judges in the US are on the whole much more substance-orientated and overtly "political" than their English counterparts on account of the fact that courts there are considered to be legitimate and appropriate fora for instigating law reform, whereas in England Parliament retains its traditional dominance over public policy.[89] In the words of

[84] P. Oestmann, *Rechtsvielfalt vor Gericht: Rechtsvielfalt und Partikularrecht im Alten Reich* (Frankfurt/Main: Klostermann, 2002).
[85] See text following fn.37 above.
[86] P. Finn, "Common Law Divergences" (2013) 37 M.U.L.Rev. 509 at 515–517.
[87] Finn (fn.86), at 517.
[88] The appropriate maxim is *iura novit curia*, though note that the distinction between the civilian and the common law tradition is not as stark in practice as in theory.
[89] P.S. Atiyah and R.S. Summers, *Form and Substance in Anglo-American Law* (Oxford: Clarendon Press, 1987).

Judge Richard Posner, "[r]ealistically, American judges are legislators … as well as adjudicators in a narrow sense".[90]

3. Factors Relating to the Sources of Substantive Law

Naturally, the sources of substantive law, their character and number as well as the the extent to which they are shared or differ, have an immediate bearing on the degree of overlap between legal systems.

The *ius commune* originated in the texts of the Roman *Corpus Iuris Civilis*. Everything revolved around them. They were explained and interpreted by the glossators and commentators, whose writings (before the invention of the printing press necessarily in manuscript copy) were regarded as authoritative. These basic texts and scholarly treatises were known, read and discussed throughout Europe. One voice became particularly powerful. It was the Italian commentator Bartolus of Saxoferrato, with reference to whom it was said that no-one was a good jurist unless he was a follower of Bartolus (*nemo bonus iurista nisi bartolista*).[91] In Spain and Portugal Bartolus' opinions were even accorded the force of law.[92] A hallmark of the pan-European *ius commune* was that its legal literature was uniform or at any rate homogenous, written in Latin, and that its shared basic "grammar" provided a convenient primer for anyone producing a scholarly work or deciding an important case.

The subsequent fragmentation of the *ius commune* went hand-in-hand with a fragmentation of the legal literature.[93] Not only was it easier to produce books more quickly and in greater number, but scholarly works became more specialised. The body of national legal literature grew steadily, and by the late 17th century the citation habits had changed, with cross-references between authors of the same country clearly outweighing references to foreign authors.[94] A by-product of the wealth of literature available and constantly generated during the 17th and 18th centuries was thus an increasing degree of introspection.

Just as a shared collection of basic texts were the foundation of the *ius commune*, so a shared body of case (and to a smaller extent statute) law was—and in many respects still is—the bedrock of the common law tradition. That this joint heritage is a strong unifying factor explains why US States seeking to sever their ties with England in a radical fashion proscribed the citation of English precedents.[95] By now, of course, most common law jurisdictions have over the years accumulated their own body of national case law which tends to be referred to instead of or alongside older English authorities, even where there is no

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90 R.A. Posner, "What Books on Law Should Be" (2014) 112 Mich L.Rev. 859 at 863.

91 On Bartolus' life, work and influence generally see A.P. Miceli, "Forum Juridicum: Bartolus of Sassoferrato" (1977) 37 Louisiana L.Rev. 1027; H. Lange and M. Kriechbaum, *Römisches Recht im Mittelalter II: Die Kommentatoren* (München: C.H. Beck, 2007), at pp.682–733.

92 Miceli (n 91), at 1029.

93 See the discussion by K. Luig, "The Institutes of National Law in the Seventeenth and Eighteenth Centuries" (1972) 17 Jur. Rev. 193.

94 H. Coing, "Die europäische Rechtsgeschichte der neueren Zeit als einheitliches Forschungsgebiet" (1967) 1 Ius Commune 1 at 20.

95 See text to fn.59 above.

difference in substance.[96] While there is still an awareness of what is going on elsewhere, the sheer volume of decisions makes it expedient to concentrate, first and foremost, on maintaining and fostering the incremental development of law within one's own country.

Subtle differences in the legal matrix surrounding a specific question can make foreign precedent less persuasive and useful than it might otherwise be.[97] In the recent English case of *Marley v Rawlings*, for instance, the question was whether it was possible to give effect to a husband's will who had mistakenly signed the draft prepared for his wife. Both the first instance judge and the Court of Appeal spent a great deal of effort considering similar "crossed wills" cases from other jurisdictions, such as New Zealand, Canada, Jersey, Australia, South Africa, and the United States.[98] The Supreme Court—allowing rectification of the husband's will under section 20(1)(a) of the Administration of Justice Act 1982—did not even mention these judgments,[99] presumably because it was felt that they could not illuminate the particular statutory context of English law.

Judicial decisions were at one point also a significant source of law within the sphere of the *ius commune*, being collected and reported,[100] but they could never achieve the same prominent status as in the common law world.[101] This has various causes, mainly rooted in the wider legal culture. Yet it was at least partly due to the fact that—notwithstanding the importance of bodies like the *Reichskammergericht* for the Holy Roman Empire or the *Rota Romana* for the Roman Catholic Church—continental Europe never had a common court structure with a supreme judicial body at the apex. Forensic customs and practices differed. It has been suggested that this accounted for and at the same time weakened the force of scholarly law, in that there was no mechanism by which bitter academic disputes could be reined in, leaving controversies unsettled and the *ius commune* ultimately poised for self-destruction and well en route to be replaced by national codes.[102]

The role of codes and statutes is the final aspect to be addressed in connection with the sources of substantive law. One of the main lessons the experience of the *ius commune* can teach the common law is that while legislative intervention *per se*, confined to specific areas, need not distract from the overarching conceptual framework shared by different legal systems, wholesale isolated codification at the national level is likely to accelerate the group's

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[96] In Singapore, interestingly, the citation of local authorities has been positively encouraged since the passing of the Application of English Law Act 1993, specifically with a view to establishing a genuinely Singaporean body of case law: Goh and Tan (n 81), at 190–191, referring to Practice Direction No. 1 of 2008 by the Singapore Supreme Court.

[97] This was already highlighted by Lord Wright in *Monarch Steamship Co Ltd v Karlshamns Oljefabriker (A/B)* [1949] A.C. 196 at 231: "I am not disparaging or discouraging the fullest possible interchange and reciprocity between American and British lawyers, but I cannot help recognizing how difficult and perhaps dangerous it may be to ask a British judge to rely on a particular United States decision torn from its setting in the totality of United States case law and statutes, simply because of some partial similarity in the facts."

[98] See [2011] EWHC 161 (Ch); [2011] 1 W.L.R. 2146, at [10]–[17], as well as [2012] EWCA Civ 61; [2013] Ch. 271, at [63]–[93].

[99] [2014] UKSC 2; [2014] 2 W.L.R. 213, noted by B. Häcker, "Thy Will Be Done" (2014) 130 L.Q.R. 360.

[100] Stein (n 18), at pp.92–94..

[101] For a comparative study see P. Stein, *The Character and Influence of the Roman Civil Law* (London and Ronceverte: Hambledon Press, 1988), at pp.115–125.

[102] Coing (n 7), at p.38.

breakup. For centuries, the *ius commune* had quite happily existed alongside and interacted with statutes enacted by territorial rulers, be it in the form of specific decrees or written collections of customary law. However, the advent of the age of enlightenment boosted the perception that statutes were the best or only possible sources of law, and codification at the same time promised to satisfy the desire for a national legal identity. Nowhere is this sentiment more poignantly expressed than in a famous statement ascribed to a 19th century French scholar: "Je ne connais pas le droit civil, je n'enseigne que le Code Napoléon".[103]

Although the great European codes were born of the *ius commune*, and although they are in detail perhaps less of a monument to national legal and cultural heritage that one might assume,[104] Professor Reinhard Zimmermann has rightly observed that

> "once the codifications had entered into force, they came to be regarded as comprehensive and closed systems of legal rules, constituting autonomous interpretational spaces. […] This was to lead, eventually, to the *horizontal* isolation of the national legal doctrines developing around the national legal codifications, and thus to the national fragmentation also on the level of legal scholarship, that was characteristic for large parts of the 20th century."[105]

It is a too little-known fact that there were at one point also powerful voices calling for a wholesale codification of the English common law, Jeremy Bentham being the most prominent protagonist of this movement.[106] Had he had his way, today's common law world would in all likelihood look very different.[107] We can glean this from the Indian experience, where many of the most important areas of law[108] were codified following the Indian Charter Act of 1833 and the establishment of a Law Commission for India under the chairmanship of Thomas Macaulay.[109] While the style and character of Indian law, its basic premises and methodology, the court system and procedures, survived Indian Independence in 1947 and are still recognisably those of the common law,[110] codification seems to have stifled the dialogue of Indian scholars and judges with their foreign counterparts in core private law areas such as contract, property and trusts, except where the codes themselves are replicated in other

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[103] "I do not know the civil law; I only teach the Napoleonic Code [ie the *Code civil* of 1804]".The statement is conventionally ascribed to Jean-Joseph Bugnet, one of the founders of the so-called *École de l'exégèse*. While this may have been an exaggeration, even at the time, it does illustrate a particular conception of the law.

[104] See R. Zimmermann, "Codification: The Civilian Experience Reconsidered on the Eve of a Common European Sales Law" (2012) 8 E.R.C.L. 367 at 379–380.

[105] Zimmermann (fn.104), at 380–381.

[106] See, e.g., A. Braun, "The English Codification Debate and the Role of Jurists in the Development of Legal Doctrines" in M. Lobban and J. Moses (eds), *The Impact of Ideas on Legal Development* (Cambridge: Cambridge University Press, 2012), ch.10, esp. at pp.205–219.

[107] It is, of course, a matter of speculation whether and to what extent English codes would have been "exported" to the (remaining) colonies and whether they would have been retained following their independence.

[108] With the notable exception of tort law, where statute law is patchy and governs only certain aspects.

[109] An early account of "Indian Codification" by C.P. Ilbert featured in (1889) 5 L.Q.R. 347.

[110] Not long after Independence, M.C. Setalvad, *The Common Law in India* (London: Stevens & Sons, 1960), at p.225, wrote: "Though the political ties have altered, the Indian legal system based on English law still endures." O. Mendelson, *Law and Social Transformation in India* (New Delhi: Oxford University Press, 2014), at p.47, answers the question whether contemporary Indian law is still "basically the common law" thus: "Yes, but there are important differences in the way it works." Note that there are also civilian influences via Goa and Pondicherry.

jurisdictions (making Indian case law a potential source of inspiration there).[111] Internally, the other hand, the extensive statutory framework has proved to be an invaluable unifying mechanism[112]—so much so that the idea of a Uniform Civil Code (intended to promote "national integration" by replacing the variety of personal religious laws still applicable in the areas of family law and succession) has been controversially debated for decades.

In the United States, where codification was also floated and seriously considered during the 19th century, but ultimately (for the most part) rejected,[113] a wave of "large-scale—though piecemeal" projects has since the early 20th century gradually and often imperceptibly transformed the legal landscape.[114] A study tracing this phenomenon purports to demonstrate how "codes have constrained legal development in ways unanticipated by codification opponents and unnoticed by recent commentators" and concludes that

> "the very benefit of codification pointed to by [Oliver Wendell] Holmes … has become codification's most significant danger: by 'philosophically arrang[ing] the *corpus juris*' and providing lawyers a ready picture of what constitutes distinct legal fields and how they interrelate, codification threatens to freeze the current conceptual schemes under which lawyers make sense of the morass of the law."[115]

How effectively codes and statutes are at any rate capable of shaping a distinct approach and of creating wholly new platforms for debate becomes evident when one contemplates the impact of the Uniform Commercial Code. While substantially harmonising the law as between the fifty American states, it has led or contributed to a certain estrangement between US and English commercial/contract lawyers.[116]

Even for common law systems that retain closer ties with England and with one another, it has been remarked that the statutory context is "probably the most significant catalyst" of divergence.[117] Leaving aside instances where legislative provisions resemble each other for historical reasons (as is the case in respect of various countries' sale of goods legislation),[118] statutes tend to be more country-specific than judicial precedent, though it occasionally

[111] A number of countries have private law statutes which are effectively (amended) copies of the Indian codes. The Indian Contract Act 1872, for example, is to this day replicated not only in Pakistan and Bangladesh, but also in Myanmar, Malaysia and Brunei.

[112] See K.G. Balakrishnan, "An Overview of the Indian Justice Delivery Mechanism", available via http://www.supremecourtofindia.nic.in/speeches/speeches_2008/abu_dhabi__as_delivered.pdf (last accessed 27.02.2015): "Codification of laws made the law uniform throughout the country and fostered a kind of legal unity in fundamental laws. The Codes apply uniformly throughout the nation. The great value of this achievement of maintaining a basic unity in the area of fundamental laws has been recognized by the present Constitution and it seeks to maintain the same even in the face of a federal structure."

[113] See, e.g., C.M. Cook, *The American Codification Movement* (Westport/Connecticut: Greenwood Press, 1981); A.P. Morriss "Codification and Right Answers" (1999) 74 Chicago-Kent L.Rev. 355.

[114] M.S. Rosen, "What has Happened to the Common Law?" [1994] Wisconsin L.Rev. 1119 at 1123.

[115] Rosen (fn.114), at 1125 and 1253 respectively.

[116] See L.A. DiMatteo, Q. Zhou and S. Saintier, "Transatlantic Perspectives: Fundamental Themes and Debates" in L.A. DiMatteo and others (eds), *Commercial Contract Law: Transatlantic Perspectives* (New York: Cambridge University Press, 2013), ch.1, at pp.4–6.

[117] Finn (fn.86), at 534, speaking of Australian law.

[118] See text to fn.37 above.

happens that jurisdictions copy a successful model operated elsewhere.[119] This is because the legislature is able to start with a clean slate and to depart quite radically from the legal status quo ante, where a judge would be constrained to operate within a pre-defined matrix. A system such as the New Zealand no-fault accident compensation scheme[120] could quite simply not have been built up incrementally by the courts. Moreover, given that judges within a legal system are increasingly called upon to develop the case law by reference or analogy to Parliamentary enactments,[121] the diverging force of statutes affects the traditional common law as well.

4. Jurisprudential Factors

That jurisprudential aspects—especially the methodology applied in analysing and deciding cases—also have a role to play in the convergence or divergence of legal systems, may be illustrated by reference to just two examples.

The first concerns the so-called "right answer thesis". One factor in the reception of Roman law and the evolution of a European *ius commune* was an unquestioned belief on the part of the glossators and their followers that the large Justinianic *Corpus Iuris Civilis* contained no contradictions which a fine mind could not reconcile.[122] They therefore "took … for granted that the compilation as a whole contained all that was necessary to answer any conceivable legal problem"[123] and made it their task to impose a mental order onto the texts and to extract from them the answers to the problems thrown up by contemporary practice. Given the vast array of texts and their less-than-perfect arrangement, this was a very fruitful exercise. Under the guise of mere exegesis, it allowed scholars to find appropriate solutions to new problems, and these to be portrayed as authoritative.[124] It was only when humanism and the proponents of the *mos gallicus* exposed the inadequacies and the historical contingencies of the Justinianic compilation that the universal validity of *ius commune* came to be called into question.

A not dissimilar development can be made out with respect to the common law. Having noted that early 20th century jurisprudence recognised the distinctness of US and Scots law, Lord Cooke of Thorndon recalls that

> "the concession went no further; the assumption was that in all the rest of the common law world there was only one true common law. Local courts might be more or less

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[119] It happened with, e.g., the New Zealand family provision legislation or the Australian Torrens system of title registration: see text to fnn.157, 205 below.
[120] On which see fn.166 and text thereto.
[121] See, e.g., J. Beatson, "The Role of Statute in the Development of Common Law Doctrine" (2001) 117 L.Q.R. 247; E. Bant, "Statute and Common Law: Interaction and Influence in Light of the Principle of Coherence" (2015) 38 U.N.S.W.L.J. 362.
[122] This belief was inspired by a statement of the Emperor Justinian himself in § 15 of the *Constitutio Tanta*, an official law accompanying the introduction of the Digest in A.D. 533.
[123] Stein (fn.18), at p.46.
[124] H. Kantorowicz, *Bractonian Problems* (Glasgow: Jackson Son & Co, 1941), at p.126, famously described Roman law as a "treasure house in which the solution of almost any legal problem could be found ready made for all who might care to enter".

> successful in deducing what it was on any given point. The premise that there was but one right answer remained, however, scarcely questioned. Often it was an unspoken premise."[125]

As a theory, the "right answer thesis" and the Herculean task of determining what the right answer is, was—of course—only fully developed and controversially debated during the later 20th century.[126] But it is clear that judicial divergences are more likely to occur and will be easier to stomach where the underlying sentiment allows for the social, economic and political conditions prevailing in a particular time and place to be openly taken into account.

The second example relates to taxonomy and methodology more generally. Since the *ius commune* depended for its very existence on the efforts of legal scholarship, it is unsurprising that pan-European scholarly methods and means of systematisation were key in establishing and maintaining its coherence. On the common law side, such factors did not matter as much while legal academia remained relegated to the ivory towers and coherence was ensured by a supreme judicial body.[127] The doctrine of precedent did most of the work. However, under 20th and 21st century conditions, methodology and taxonomy have clearly gained importance as convergence or divergence factors.

In the United States, where English positivism with its attendant "source-orientation" and formal style of reasoning was remarkably well-received during the 19th century,[128] legal realism, the critical legal studies movement and the economic analysis of law have exerted a momentous and lasting influence on how American judges and commentators think.[129] Whether or not one agrees with the criticism that "[t]he realists and post-realists have done a good job of debunking legal science",[130] it is hard to escape the conclusion that the resulting intellectual chasm is in some measure responsible for the fact that private law discourse between the US and other common law jurisdictions has all but died down in many core areas.

Amongst these other jurisdictions, particularly England, Ireland, Australia, Canada and New Zealand, but also places like Hong Kong, Singapore, the dialogue and intellectual exchange is still vibrant. But even here we are seeing methodologically determined signs of divergence. For example, the frosty reception with which the taxonomy advocated by the late Professor

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125 Cooke (fn.33), at p.45.

126 See esp. Ronald Dworkin's writings: *Taking Rights Seriously* (London: Duckworth, 1977), at pp.81–130; *Law's Empire* (London: Fontana Press, 1986), esp. pp. 225–75, 313–54, 400–13.

127 Since their 19th century inception, the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council were staffed by the same judges.

128 Atiyah and Summers (fn.89), at pp.240–251.

129 See, e.g., J.W. Singer, "Legal Realism Now" (1988) Calif. L.Rev. 465; N. Duxbury, "Jerome Frank and the Legacy of Legal Realism" (1991) 18 J.L. & Soc'y 175; M.J. Horwitz, *The Transformation of American Law, 1870-1960* (New York and Oxford: Oxford University Press, 1992), at pp.169–272; G Minda, *Postmodern Legal Movements* (New York and London: New York University Press, 1995), esp. at pp.83–127.

130 P. Birks, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 U.W.A.L.Rev. 1 at 4.

Peter Birks met in the Australian High Court[131] has profoundly affected the way unjust enrichment is conceived and continues to develop in that country.

V. Variance as a Stabilising Factor and Motor of Development

The quote set out above from *Australian Consolidated Press Ltd v Uren*[132] explains the advantages that a uniformity of approach and substantive rules may have for cross-border trade, while at the same time recognising that there is less need for uniformity in other areas. Yet it is possible to go further and to argue that there are actually positive benefits to a measure of divergence between related legal systems.

One relates to stability. Where a basic legal framework can be flexibly adapted to suit the cultural, social and economic needs of a particular time and place, tensions are reduced, and there will be less cause to call for its replacement or for it to sever its roots. It was the fact that the *ius commune* was able to operate alongside and to some extent absorb local customary law that partly accounts for its longevity. Certainly by the time of the *usus modernus*[133] it was only really sustainable in the "nationalised" forms of Roman-Dutch law, the *Ius Romano-Germanicum*, specific composite systems bearing the French, Spanish or (to a lesser degree) Italian imprints, and there was even a distinct "Roman-Swedish" civil law.[134]

That the common law world is well-advised to handle its heritage with similar flexibility was always accepted in the statutory context,[135] and is now also openly recognised in judicial decisions. An elegant early manifestation can be found in *Skelton v Collins*:

> "[H]ow far the reasoning of judgments in a particular case in England accords with common law principles that are Australia's inheritance is a matter that this Court may have sometimes to consider for itself. ... [O]ur inheritance of the law of England does not consist of a number of specific legacies selected from time to time for us by English courts. We have inherited a body of law. We take it as a universal legatee. We take its method and its spirit as well as its particular rules. A narrower view than this would put a sad strain upon allegiance. Here, as it is in England, the common law is a body of principles capable of application to new situations, and in some degree of change by development."[136]

In Singapore, which is in the process of developing its own autochthonous legal system, s.3(2) of the Application of English Law Act 1993 expressly provides that the common law of England continues to be in force (only) "so far as it is applicable to the circumstances of

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[131] See, e.g., *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; (2007) 230 C.L.R. 89, at [130]–[158]; *Bofinger v Kingsway Group Limited* [2009] HCA 44; 239 C.L.R. 269, at [85]–[98].

[132] See text to fn.67.

[133] The term *usus modernus* must here be understood in a broad sense. In the narrow sense, it describes German legal thought and practice between the mid-17th and the end of the 18th century.

[134] See, e.g., the overview provided by Stein (fn.18), at pp.104–107. A detailed analysis of these nationalised forms, with particular reference to the relevant legal literature, is provided by Luig (fn. 93).

[135] See fn.36 and text thereto.

[136] (1966) 115 C.L.R. 94 (HCA), at 134–135, *per* Windeyer J.

Singapore and its inhabitants and subject to such modifications as those circumstances may require".

A second aspect is connected. Not only can divergences ensure greater stability, but they may actually function as a motor of further development. As Lord Lloyd of Berwick acknowledged in the Privy Council's *Invercargill* decision:

> "The ability of the common law to adapt itself to the differing circumstances of the countries in which it has taken root, is not a weakness, but one of its great strengths. Were it not so, the common law would not have flourished as it has, with all the common law countries learning from each other."[137]

Some of the most important developments of both the *ius commune* and today's common law are due to such processes of cross-fertilisation. For example, the venerable Roman principle that *alteri stipulari nemo potest*[138] was long thought to preclude anyone obtaining a contractual right who was not privy to the contract creating it. Rather inconveniently by the standards of late medieval and early modern trade practice, it stood in the way of contracts being concluded for the benefit of third parties, and it also militated against the recognition of direct agency.[139] However, this was set to change. Inspired by 16th century Spanish writers, members of the so-called Dutch "Elegant School"—most notably the natural lawyer Hugo Grotius—overcame the privity restriction and thus provided a model on which continental codifiers and/or courts could later draw to justify the introduction or recognition of contracts for the benefit of third parties.[140] With respect to agency, the commercial need to accommodate direct representation had already led some of the Northern Italian city states to abrogate the Roman rule by statute,[141] and once 17th century Dutch scholars rationalised and explained why stipulations on behalf of others should generally be allowed, the development of fully blown theories of agency was only a stone's throw away.[142]

An early product of common law cross-fertilisation is arguably the birth of the modern tort of negligence in *Donoghue v Stevenson*.[143] Lord Atkin's "neighbour principle" was inspired not only by the biblical parable of the Good Samaritan, but also by dicta of Brett M.R. (later Lord Esher) in the late 19th century Court of Appeal case of *Heaven v Pender*.[144] Brett M.R.'s rather sweeping statements had, however, not been well-received in England.[145] Matthew Chapman in his monograph on *Donoghue v Stevenson* notes that lawyers in England were on

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[137] *Invercargill City Council v Hamlin* [1996] A.C. 624 at 640.
[138] "No-one can stipulate for another".
[139] For an overview see R. Zimmermann*, The Law of Obligations. Roman Foundations of the Civilian Tradition* (Oxford: Clarendon Press, 1996), at pp.34–58. Closely connected was the idea that an obligation was a strictly personal *vinculum iuris* (legal bond or fetter) which was incapable of being assigned: see ibid. at pp.58–67.
[140] Further details in Zimmermann (fn.139), at pp.41–45; W. Bayer, *Der Vertrag zugunsten Dritter* (Tübingen: Mohr Siebeck, 1995), at pp.27–128.
[141] U. Müller, *Die Entwicklung der direkten Stellvertretung und des Vertrages zugunsten Dritter* (Stuttgart: Kohlhammer, 1969), at pp.55–60.
[142] Further details in Zimmermann (fn.139), at pp.54–58.
[143] [1932] A.C. 562 (HL).
[144] (1883) 11 Q.B.D. 503, esp. at 507, 509–510.
[145] The majority in *Heaven v Pender* distanced itself from them and based their decision on narrower, more conventional, grounds.

the whole extremely dismissive and indeed positively "rude" about them.[146] Yet in the United States, Brett M.R.'s formula about the liability of manufacturers towards ultimate consumers was "resuscitat[ed]"[147] by Benjamin Cardozo J. in the 1916 New York Court of Appeals decision of *MacPherson v Buick Motor Co* on the basis that "[p]recedents drawn from the days of travel by stage coach do not fit the conditions of travel to-day".[148] With early 20th century technological conditions rapidly transforming the country, Cardozo J.'s statement of New York law relating to what we would nowadays call "product liability" was quickly accepted into other US jurisdictions.[149] While *MacPherson v Buick Motor Co* does not appear to have been cited in argument before the House of Lords in *Donoghue v Stevenson*, it seems that Lord Macmillan had actually met Cardozo J. on one occasion, and it is likely that the judges were aware of the decision on account of an 1929 L.Q.R. case note.[150] Lord Buckmaster, dissenting in *Donoghue v Stevenson*, was unpersuaded by US precedents, saying:

> "That such cases can have no close application and no authority is clear, for though the source of the law in the two countries may be the same, its current may well flow in different channels."[151]

Lord Atkin, on the other hand, seized on *MacPherson v Buick* in support of his judgment:

> "It is always a satisfaction to an English lawyer to be able to test his application of fundamental principles of the common law by the development of the same doctrines by the lawyers of the Courts of the United States. In that country I find that the law appears to be well established in the sense in which I have indicated. The mouse had emerged from the ginger-beer bottle in the United States before it appeared in Scotland,[152] but there it brought a liability upon the manufacturer.[153] I must not in this long judgment do more than refer to the illuminating judgment of Cardozo J. in *MacPherson* v. *Buick Motor Co.* in the New York Court of Appeals[…], in which he states the principles of the law as I should desire to state them and reviews the authorities in other States than his own. Whether the principle he affirms would apply to the particular facts of that case in this country would be a question for consideration if the case arose. […] But the American decision would undoubtedly lead to a decision in favour of the pursuer in the present case."[154]

[146] M. Chapman, *The Snail and the Ginger Beer* (London: Wildy Simmons & Hill, 2010), at p.96.
[147] Chapman (fn.146), at p.106.
[148] 217 N.Y. 382 at 391; 111 N.E. 1150 at 1053 (1916).
[149] A.L. Kaufman, *Cardozo* (Cambridge/Massachusetts: Harvard University Press, Cambridge, 1998), at pp.274–275.
[150] Chapman (fn.146), at p.110. See F.H. Bohlen, "Liability of Manufacturers to Persons other than their Immediate Vendees" (1929) 45 L.Q.R. 343.
[151] [1932] A.C. 562 at 576.
[152] See *Mullen v AG Barr & Co Ltd* (1929) S.C. 461.
[153] There had in fact been a whole series of US decisions concerned with the liability of drinks manufacturers, some in connection with decomposed mice, e.g., *Jackson Coca-Cola Bottling Co v Chapman* 106 Miss. 864; 64 So. 791 (1914); *Crigger v Coca-Cola Bottling Co* 132 Tenn. 545; 179 S.W. 155 (1915); *Roddy Mfg. Co v Cox* 7 Tenn.App. 147 (1927); *Tate v Mauldin* 157 S.C. 392; 154 S.E. 431 (1930).
[154] [1932] A.C. 562 at 598–599.

The decision of *Donoghue v Stevenson* was soon discussed all over the Commonwealth, as can be gleaned from a letter written by Evatt J. of the Australian High Court to Lord Atkin within a year of it being handed down:

> "The snail case has been the subject of the keenest interest and debate at the Bar and in the Sydney and Melbourne law schools; on all sides there is profound satisfaction that, in substance, your judgments and the opinion of Cardozo J of the USA coincide, and that the common law is again shown to be capable of meeting modern conditions of industrialisation."[155]

There are other instances of more direct or overt reception processes amongst common law jurisdictions. Suffice it to draw attention to just a few prominent examples, namely the English recognition of the change of position defence in *Lipkin Gorman v Karpnale Ltd*,[156] the lasting influence which New Zealand family provision legislation and accompanying case law has had in Australia, Canada and England,[157] the establishment practically throughout the common law world of the principle that a solicitor can be liable to disappointed beneficiaries for negligently not helping to carry the testator's intentions into effect,[158] the adoption by the House of Lords in *Lister v Hesley Hall Ltd* of the Canadian "close connection" test for vicarious liability,[159] or the reception of the English *Woolwich*-type claim to recover overpaid tax[160] in the Republic of Ireland.[161]

In *FHR European Ventures LLP v Cedar Capital Partners LLC*, where the UK Supreme Court recently decided that a bribe or secret commission accepted by an agent was held on constructive trust for the principal (thereby overruling a number of influential earlier authorities[162] and aligning English law with other common law jurisdictions[163]), Lord Neuberger observed:

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155 Letter of 6 March 1933, Atkin archive at Gray's Inn, ref. ATK1/JUD/1/1, quoted after Chapman (fn.146), at p.108.

156 [1991] 2 A.C. 548 (HL) at 179–180, drawing on s.142 of the US *Restatement of the Law of Restitution* (1937), *Rural Municipality of Storthoaks v Mobil Oil Canada Ltd* [1976] 2 S.C.R. 147; (1975) 55 D.L.R.(3d) 1, s.94B of the Judicature Act 1908 (NZ), as well as on various Australian statutes and cases.

157 See, e.g., J. Dainow, "Restricted Testation in New Zealand, Australia and Canada" (1938) 36 Mich LRev. 1107; idem, "Limitations on Testamentary Freedom in England" (1940) 25 Cornell L.Rev. 337. A modern example from the case law is *Vigolo v Bostin* [2005] HCA 1, 221 C.L.R. 191.

158 See esp. *Whittingham v Crease & Company* (1978) 88 D.L.R.(3d) 353 (BCSC); *Gartside v Sheffield, Young & Ellis* [1983] N.Z.L.R. 37 (NZCA); *White v Jones* [1995] 2 A.C. 207 (HL); *Hill v van Erp* (1997) 188 C.L.R. 159 (HCA); *Earl v Wilhelm* (2000) 183 D.L.R.(4th) 45 (Sask. CA).

159 [2001] UKHL 22; [2002] 1 A.C. 215, drawing on *Bazley v Curry* [1999] 2 S.C.R. 534; (1999) 174 D.L.R.(4th) 45.

160 *Woolwich Building Society v Inland Revenue Commissioners* [1993] A.C. 70 (HL).

161 *O'Rourke v Revenue Commissioners* [1996] 2 I.R. 1 (SC); *Harris v Quigley* [2005] I.R. 165 (SC).

162 Including *Lister & Co v Stubbs* (1890) L.R. 45 Ch.D. 1 (CA) and *Sinclair Investments (UK) Ltd v Versailles Trade Finance Limited* [2011] EWCA Civ 347, [2012] Ch. 453.

163 See, e.g., *United States v Carter* 217 U .S. 286; 30 S.Ct. 515 (1910); *Sumitomo Bank Ltd v Kartika Ratna Thahir* [1993] 1 S.L.R. 735, aff'd [1994] 3 S.L.R.(R.) 312; *Attorney-General for Hong Kong v Reid* [1994] 1 A.C. 324 (PC); *Insurance Corporation of British Columbia v Lo* (2006) 278 D.L.R.(4th) 148 (BCCA); *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6; 200 F.C.R. 296; 287 A.L.R. 22, though note that some of these treat the constructive trust as remedial in nature (cf. text to fn.182).

> "As overseas countries secede from the jurisdiction of the Privy Council, it is inevitable that inconsistencies in the common law will develop between different jurisdictions. However, it seems to us highly desirable for all those jurisdictions to learn from each other, and at least to lean in favour of harmonising the development of the common law round the world."[164]

VI. The Minimum Conditions of Coherence

The reason why Lord Neuberger calls on judges to "lean in favour of harmonising the development of the common law round the world" is surely to prevent variance between common law systems becoming so great that the centrifugal force of divergence eventually breaks up the bigger unity. This leads to the question of what, in the light of the foregoing observations, the experience of the *ius commune* can teach modern common lawyers about the minimum conditions of coherence. It is submitted that three elements are essential: (1) a common core of rules, (2) a shared legal "language" and methodology, and (3) a sufficient level of mutual awareness and intellectual exchange.

1. A Common Core of Rules

The first condition of coherence is that there should be a common core of rules between the group members. This does not preclude divergence—even wholesale divergence—in specific areas, but there must remain a critical mass of substantive legal rules and principles to which all (or in any given case a critical mass of) group members subscribe. If one system steps out of line with respect to a fundamental issue, it is necessary that a sufficient number of other group members do not,[165] and it is also necessary that the legal system affected should have a sufficient degree of overlap with the group in respect of other fundamental issues.

To make this statement more concrete, take the example of the no-fault accident compensation scheme in New Zealand, under which accident cover is provided by a state-administered fund, and where recourse to a private law damages action is to that extent barred.[166] Although the scheme's introduction did not prove to be the end of tort law,[167] it does mean that New Zealand is cut off from large parts of the common law debate and practice relating to negligently (and even intentionally) inflicted personal injuries.[168] For instance, judges there have not had squarely to face the question of whether to accept the controversial "*Fairchild* exception" to the ordinary but-for test of causation,[169] as Australian

[164] [2014] UKSC 45; [2014] 3 W.L.R. 535, at [45]. He reiterated this desideratum in *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] UKSC 58;[2014] 3 W.L.R. 1367, at [121].
[165] Alternatively, of course, they may choose to follow the example, prompting a new convergence.
[166] The scheme was first introduced by the Accident Compensation Act 1972. It is now governed by the Accident Compensation Act 2001.
[167] As provocatively suggested by the title of G.W.R. Palmer and E.J. Lemons, "Towards the Disappearance of Tort Law—New Zealand's New Compensation Plan" (1972) 4 U.Ill.L.F. 694.
[168] As S. Todd, "Forty Years of Accident Compensation in New Zealand" (2012) 28 T.M.Cooley L.Rev. 189 notes, "personal injury litigation in New Zealand has virtually disappeared".
[169] See *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 A.C. 32.

and other courts have had to.[170] In New Zealand, the matter is instead primarily one of statutory construction.[171] The existence of the accident compensation scheme does not, of course, take New Zealand out of the larger common law family, but the more areas of law a country decides to subject to a wholesale review and/or legislative reform process, the less scope there is for continuous interaction with related legal systems. As the history of codification in civilian jurisdictions shows, while there is often a willingness to take account of other countries' solutions to legal problems at the stage of *travaux préparatoires*,[172] the long-term effect tends to promote national isolation.

The above observations should not be taken to suggest that the hurdle for a common core of rules is necessarily very high. It is, indeed, perfectly possible to maintain with good reasons that the various continental systems which are descended from or shaped by the *ius commune* (still) share a sufficient quantity of substantive legal rules to satisfy the criterion examined here, despite all their differences in detail and sometimes major deviations.[173] Yet the common core criterion is only one of three. It is not in and of itself enough to secure coherence. Two further sets of criteria have to be met to achieve this aim.

2. Shared Language and Methodology

A shared language requirement can and should be understood in two different senses. First, it means the actual language that is used to describe and discuss the law. In that respect, the common law world is fortunate to have English as a well-established tongue understood and spoken by all. While Latin was the *lingua franca* of the *ius commune*, it was ultimately a foreign language to those who used it, and was mastered by fewer and fewer people. It did not withstand the test of time. Unlike Latin, the English language will in all likelihood be able to serve and tie different jurisdictions together long-term.

The second aspect is that of a shared "legal language". To a lawyer, words such as "contract", "sale", "negligence" or "damage" mean more than they do in ordinary everyday parlance. They import legal concepts and connotations. These concepts and connotations differ between different legal traditions. In the mind of German lawyers, for instance, a "contract" (*Vertrag*) is any agreement by means of which two or more parties can bring about specific legal

[170] See, e.g., *Amaca Pty Ltd v Ellis* [2010] HCA 5; *Tabet v Gett* [2010] HCA 12.

[171] In *Atkinson v Accident Rehabilitation Compensation and Insurance Corporation* [2001] NZCA 335; [2002] 1 N.Z.L.R. 374, decided shortly before the *Fairchild* decision was handed down, Richardson P. said: "The statute … focuses on outcomes, not on risk of injury or potential for injury. The risk, the potential, must be realised. To accept a lesser statutory test of increased risk or to adopt a reversed onus approach would be inconsistent with the statutory language and scheme." In *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 N.Z.L.R. 340, at [34]–[35], Glazebrook J. observed that although there could conceivably be special situations where *Fairchild* might be relevant in the statutory context, such a case had not yet arisen.

[172] Suffice it to draw attention to the extensive comparative research undertaken by the compilers of the German Civil Code, recorded in *Die Vorentwürfe der Redaktoren zum BGB* (15 volumes, 1876–1888); *Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich* (Berlin: Guttentag, 1888); *Protokolle der Kommission für die zweite Lesung des Entwurfs des Bürgerlichen Gesetzbuchs* (Berlin: Guttentag, 1897–1899).

[173] Forcefully argued by R. Zimmermann, e.g., "The Civil Law in European Codes" in H.L. MacQueen, A. Vaquer and S. Espiau Espiau (eds), *Regional Private Laws and Codification in Europe* (Cambridge: Cambridge University Press, 2003), ch.1, esp. at pp.56–58.

consequences (the agreement may be obligatory in nature or have purely proprietary effects), while common lawyers automatically associate the term with an exchange transaction, where each party's promise or performance constitutes the consideration for the other's promise or performance. Again, the English word "damage" does not wholly capture the meaning of the French term *dommage*, the Italian *danno* or the German word *Schaden*.[174] The more closely the "legal language" employed within two or more systems aligns, the easier it is to cultivate links between them.

Connected is the issue of methodology, and here similar considerations apply. Take the example of equity in modern common law jurisdictions. In India, the Specific Relief Act 1963, preceded by 19th century legislation in the same field,[175] lays down in some detail the conditions under which equitable relief may be granted (such as specific performance of a contract or rectification of a written instrument), thereby guiding and to an extent bridling or curtailing judicial discretion, though without abrogating it.[176] Quite the opposite starting point pertains in Australia. As the Hon. Justice Finn puts it with respect to High Court decisions from the 1980s like *Commercial Bank of Australia v Amadio*[177]:

> "[I]n revealing their mastery of equity jurisprudence, Justices Mason and Deane took us back far more explicitly to 'unconscionable conduct'. They were using language more than half forgotten in England, but not so in Australia or the United States."[178]

An emphasis on the concept of "unconscionability" coupled with a clear accentuation of judicial discretion, are today the distinctive hallmarks of Australian equity jurisprudence. Although English courts have occasionally been attracted by the degree of flexibility this approach affords (for instance the Supreme Court in *Pitt v Holt*)[179], on the whole there has been a methodological divergence between England and Australia, with English lawyers warning against "discretionary remedialism",[180] and their Australian counterparts feeling misunderstood or defending it.[181] Thus, in *FHR European Ventures v Cedar Capital Partners* the UK Supreme Court consciously declined the opportunity to seek a cautious rapprochement with Australia over the so-called "remedial constructive trust".[182]

The methodological divergence between England and Australia is at the moment probably still an ordinary part of different common law systems striving to find the solution that best

[174] See, e.g., C. von Bar and U. Drobnig, *The Interaction of Contract Law and Tort and Property Law in Europe: A Comparative Study* (München: Sellier, 2004) para.455.
[175] The Specific Relief Act 1877 was, in turn, inspired by the draft New York Civil Code of 1862.
[176] The First Law Commission of India, in its Ninth Report, "Specific Relief Act, 1877" (1958), at pp.2–3, was conscious of this effect and regarded it as an unavoidable side-product of codification. This is one of the reasons why it recommended that the illustrations used in the 1877 Act should be dropped from the new legislation. The Indian Supreme Court in *Satya Jain v Anis Ahmed Rushdie* (2013) 8 S.C.C. 131, at [28], recently noted that "[t]he parameters for the exercise of discretion … cannot be entrapped within any precise expression of language".
[177] (1983) 151 C.L.R. 447.
[178] Finn (fn.86), at 518.
[179] *Pitt v Holt* [2013] UKSC 26, [2013] 2 A.C. 108, esp. at [124]–[128]. For a critical analysis see B. Häcker, "Mistaken Gifts after *Pitt v Holt*" (2014) 67 C.L.P. 333.
[180] See, e.g., P. Birks, "Three Kinds of Objection to Discretionary Remedialism" (2000) 29 U.W.A.L.Rev. 1.
[181] See, e.g., Finn (fn.86), at 518; S. Evans, "Defending Discretionary Remedialism" (2001) 23 Syd. L.Rev. 463
[182] [2014] UKSC 45; [2014] 3 W.L.R. 535, esp. at [47].

fits their needs, and the competing models they produce are valuable contributions to the market of legal ideas. Nevertheless, in the long run it is possible that the basic assumptions underlying the "unconscionability" debate—about how a common law system does or ought to operate in the 21st century—will eventually drive a wedge between England and Australia, in the same way as legal realism, critical legal studies and the law and economics movement drove a wedge between England and the US during the 20th century. If this is to be avoided, then it is important that strong links be maintained with respect to the final aspect of coherence.

3. *Mutual Awareness and Intellectual Exchange*

The third and probably most important condition of coherence between related legal systems is that their respective protagonists (judges, practitioners and academics) preserve and foster a climate of mutual awareness and intellectual exchange, in which a common legal consciousness can thrive. The *ius commune* owed its success primarily to the efforts and effects of pan-European scholarship: lawyers working from the same texts and reading each other's books, universities disseminating the fruits of this learning throughout the continent, and courts regularly engaging with academic *consilia* and the so-called *communis opinio doctorum* in order to justify and explain decisions.[183] Even at a time when the *usus modernus* had consolidated regional or national peculiarities and when specialised literature abounded, fragmentation did not stop scholars based in different countries taking note of each other's work and citing one another.[184] That only changed when codification, at a time when nationalism was rampant and relations between European states tense, made discourse about the law almost entirely introspective and isolated.[185]

What it means for lawyers of different jurisdictions to be mutually aware and to foster intellectual exchange may be illustrated by the following observation. If a modern-day German lawyer takes an interest in how French or Italian contract or tort law operate, exploring this by reference to the corresponding provisions of the BGB, he or she will be described (and would probably describe themselves) as a "comparative lawyer". Comparative law is seen as a discipline in its own right with its own methodology, in short: as a field somewhat off the beaten track. By contrast, any English lawyer would be mildly surprised if they found that a textbook or course on contract law did not routinely alert students to the fact that in Australia promissory estoppel can be used not only as a "shield", but also as a "sword".[186] And no-one asking whether England was right to retreat from *Anns v Merton*

[183] A *consilium* was a jurist's written opinion occasioned by an actual case. In their published form, *consilia* became a special genre of legal literature. The so-called *communis opinio doctrorum*, the "common opinion of the doctors", was the learned jurists' shared understanding on a particular point or question. There were times when the *communis opinio* itself was regarded as tantamount to a source of law.
[184] Coing (fn.7), at p.39. Cf. also text to fn.94 above.
[185] A notable exception is Austria, whose Civil Code of 1811 was to some extent "reinterpreted" in the light of 19th century German pandectist jurisprudence: C. Wendehorst, "Zum Einfluss pandektistischer Dogmatik auf das ABGB" in C. Fischer-Czermak and others (eds), *Festschrift 200 Jahre ABGB* (Wien: Manz, 2011), at pp.75–98.
[186] See *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 C.L.R. 387 (HCA).

London Borough Council[187] and for this purpose considering the Canadian, Australian, Singaporean and New Zealand case law and experience would therefore treat their research as being out-of-the-ordinary and separate from mainstream tort law discourse.

Relations with the US are more tenuous. Writing in 1956, Professor Samuel Stoljar expressed the hope that there would not be "too radical an Anglo-American divergence" in the realm of contract law, despite the impact of legal realism:

> "For it is a curious fact that while English lawyers, practical and academic, have virtually shut their eyes to the American experience, the Americans have not allowed English law to pass by unattended. In the contractual as indeed in other fields, they have included English developments within their scholarly province. They have tended to regard England as just another jurisdiction, as a relatively small addition to their own growing mass of decisions from forty-eight states and a further hierarchy of federal courts. And confronted by this staggering material, it was perhaps easier for American lawyers to take all the proffered riches in their stride and to digest even the English menu."[188]

At the beginning of the 21st century, his vision that "some lasting bond" may be preserved in this way looks set to be disappointed. The rift continues to widen. English lawyers still remarkably rarely look towards the US, and US lawyers have increasingly shifted their attentions and preoccupations elsewhere. Securing internal coherence amongst the various States (e.g. through the American Law Institute's Restatements) is a task large enough in itself.

Whether it is already too late to salvage a common consciousness in private law matters across the entire common law world—and whether that would even be desirable—is hard to say with certainty. Yet the upshot is this: so long as common lawyers simply "do" comparative law on a routine basis, without regarding themselves as thereby becoming a special breed of "comparative lawyers", the critical minimum level of coherence can probably be maintained, at least between those jurisdictions wishing to remain part of a larger group. It is aided by journals like the Law Quarterly Review with an international contributor- and readership, by common law conferences such as the biannual "Obligations" series, and by platforms for discussion like the ODG or the RDG.[189] Courts also pay a vital role, referring to and considering precedents from other countries almost as a matter of course,[190] whether or not these are in the end deemed persuasive enough to be replicated at home. Regular meetings of senior judiciary (the importance of which was specifically highlighted in the 2014 Lord

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187 [1978] A.C. 72 (HL), overruled in *Murphy v Brentwood District Council* [1991] 1 A.C. 398 (HL).

188 S.J. Stoljar, "Of American and English Caw-Law of Contract" (1956) 2 Syd. L.Rev. 98.

189 For the "Obligations Discussion Group" see http://law.uwo.ca/research/tort_law_research_group/mailing_lists.html. For the "Restitution Discussion Group" see http://www.ucc.ie/law/restitution/disc.htm. (Websites last accessed 27.02.2015).

190 See, e.g., the survey by A. Burrows, "The Influence of Comparative Law on the Law of Obligations", forthcoming in A. Robertson and M. Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (Oxford: Hart Publishing, 2015), which analyses private law decisions of the UK House of Lords / Supreme Court over the past 25 years.

Chief Justice's Report for England and Wales)[191] or the practice in the Hong Kong Court of Final Appeal of involving "non-permanent judges" from other common law jurisdictions ensure that those at the apex of a legal system's court pyramid are kept abreast of important developments elsewhere and can exchange views about them.

VII. Impact of Private Law Convergence in Europe on Common Law Systems

National legal systems are inevitably influenced by the larger context enveloping them, such as international treaties which they have ratified and by multi- or supra-national organisations to which they belong. This is an ordinary process which may bring two or more legal systems closer together or lead them to drift further apart. Before concluding, however, it is worth pondering for a moment specifically over what the ever-increasing trend towards private law convergence in Europe actually means for the common law world.

The UK and Republic of Ireland are members of the EU. English, Scottish and Irish law are hence affected by legislative measures aimed at optimising the functioning of the internal market. Already, directly applicable Regulations and Directives transposed at the national level have left their mark on certain fields. With respect to English private law, for example, mention need only be made of product liability provisions contained in Part 1 of the Consumer Protection Act 1986,[192] the Unfair Terms in Consumer Contracts Regulations 1994 and 1999,[193] and the amendments to the Sale of Goods Act 1979 dealing with sales to consumers.[194] Moreover, it is clear that the European *acquis communautaire* has the potential to exert a strong indirect influence on domestic decisions generally, as recently happened with respect to the recognition in England of an implied duty of good faith in (certain) commercial contracts.[195]

Flanking the scope of assimilation that has already been achieved, there is a forceful politically and academically-driven impetus to promote a much further-reaching harmonisation of European private law in the medium to long term. The "Principles of European Contract Law" (PECL), the "Draft Common Frame of Reference" (DCFR) and the proposal for a "Common European Sales Law" (CESL) are perhaps the best-known products of the impressive range of projects. For the time being, they are aimed at "soft" harmonisation. Yet ultimately some protagonists envisage or openly advocate the enactment of a European Civil Code, as has indeed been called for by the European Parliament since 1989,[196] with the express or implied aim of establishing a common European legal identity.[197]

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[191] Available via http://www.judiciary.gov.uk/wp-content/uploads/2014/12/lcj_report_2014-final.pdf (last accessed 27.02.2015), at p.31: "It is particularly important that the judiciary maintains its links with other common law jurisdictions so that the development of the common law … proceeds with the best understanding of what is being done in other States."
[192] Implementing Directive 1985/374/EEC.
[193] Implementing Directive 1993/13/EEC.
[194] Part 5A (ss.48A–48F), implementing Directive 1999/44/EC.
[195] *Yam Seng Pte Limited v International Trade Corp Ltd* [2013] EWHC 111 (QB); [2013] 1 All E.R. (Comm) 1321; *Bristol Groundschool Ltd v Intelligent Data Capture Ltd* [2014] EWHC 2145 (Ch).
[196] Resolution A2–157/89 of 26 May 1989, O.J.E.C. 1989 C 158/400.

It is debatable whether the wholesale codification of European private law is at all a realistic scenario and how long it might take for a "new *ius commune*"[198] to emerge which would be capable of underpinning such a construct—and of capturing the imagination of the bulk of national lawyers who have not hitherto thought of themselves as "comparatists".[199] Subtler forms than complete unification may in any case be a better way of forging a "transnational civil society".[200] What is, at all rates, reasonably evident is that the EU at current (still) lacks the competence to bring any fully-comprehensive undertaking to fruition in the near future.[201]

Nevertheless, assuming that the UK remains a member state of the Union post the envisaged 2017 referendum, developments in this area will affect not only English, Scottish and Irish lawyers, but indirectly the entire common law world. On the one hand, a common law input at the European level could help bring the two legal traditions—the civilian and the common law tradition—closer together. Any "new *ius commune*" ought to be built around the shared legal heritage of Europe as a whole, including the British Isles, and that requires allowing for cross-fertilisation between civilian systems and the common law.[202] If, on the other hand, codification were precipitated without a corresponding adjustment of the legal culture on all sides, there is a real prospect of the common law losing England as an anchor. Given how far the process of emancipation from the historical "mother" legal order has already progressed,[203] this may no longer leave its progeny "orphaned", but it would in all likelihood lead to a greater alienation between English private law and the rest of the common law world than currently exists with any other member of the family.

Against this background, it is possible to be more or less optimistic about common law coherence in the long run. The Hon. Justice James Douglas, emphasising the need for mutual awareness and intellectual exchange, writes with respect to Australia that even

> "[i]f the rules of English law change beyond recognition, which is doubtful, we in Australia are … still likely to keep the method and spirit of the common law. That method and spirit apply as much to our legal institutions and courts as well as to the rules of law. […] The pragmatism which marks the development of the common law is

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[197] Questioning this motive: J.M. Smits, "Convergence of Private Law in Europe: Towards a New Ius Commune?" in E. Örücü and D. Nelken (eds), *Comparative Law: A Handbook* (Oxford: Hart Publishing, 2007), at p.223; Zimmermann (fn.104), at pp. 390–391.

[198] See, e.g., R. Zimmermann, "Roman Law and the Harmonization of Private Law in Europe" in A.S. Hartkamp and others (eds), *Towards a European Civil Code*, 4th edn (Alphen aan den Rijn: Kluwer Law Int., 2011), at pp.51–53.

[199] Zimmermann (fn.173), at p.59: "[T]he essential prerequisite for a truly European private law would appear to be the emergence of an 'organically progressive' legal science,[…] which would have to transcend the national boundaries and revitalise a common tradition."

[200] H. Collins, "Why Europe Needs a Civil Code" (2013) E.R.P.L. 907.

[201] Formally, art.114 TFEU confines the competence of the EU to measures "which have as their object the establishment and functioning of the internal market". Substantively, scholarly efforts have so far concentrated primarily on contract law. Not nearly enough comparative groundwork has yet been done in other areas (especially in property law, unjust enrichment, family or succession law) to provide us with a solid understanding of how the different legal traditions relate to one another. Zimmermann (fn.104), at 96, concludes that, all in all, "the auspices for a European Code of Contract Law, let alone a Civil Code, are far from ideal".

[202] The civilian and the common law tradition were never wholly divorced in the first place: see, e.g., Stein (fn.101) at pp.151–157, 209–229.

[203] See text to fnn.31–51 above.

> part of a culture which we share with the English and which marks out our judicial method. I do not expect that culture to change significantly in the near or long term. Even if the English or our common law is eventually replaced by codes or statutes we are also still likely to apply the rules of statutory interpretation developed by the common law… On those assumptions we will need to keep an eye on developments in English law indefinitely.'[204]

Whether or not English law would actually be able to escape the superimposition of a more civilian judicial methodology by a European Court of Justice known for its activism and staunch integrationist agenda remains to be seen. What could instead prove important is that contemporary English law has already lost its gap-filling role. It is no longer the crucial reference point and guarantor of unity it once was. The success of the Torrens title registration system,[205] which originated in Australia and is also operated in New Zealand, Singapore, Malaysia, and large parts of Canada, shows that common law systems are perfectly capable of maintaining coherence without or alongside England, even in the statutory context.[206] Depending on how things develop in Europe, this is what they will increasingly have to do in future. Just like the long-dead system of Roman law for centuries bound continental Europe together and provided it with a *ius commune*, so it may be that the old English system will continue to hold together the common law family long after England itself has moved on, leaving its legal legacy behind.

VIII. Conclusion

This article has been about the factors which tend to make a group of closely related legal systems converge or diverge, and above all about the factors which make them cohere. It tried to answer these questions by drawing on the experience of the European *ius commune* and reflecting on that experience in the light of conditions in the modern common law world.

The picture which emerged was that—with the possible exception of post-realist US scholarship and practice—a shared tradition and discourse still firmly connected many common law jurisdictions in the realm of private law. A degree of variance between them is not merely tolerable, but positively desirable, provided that certain minimum conditions securing overall coherence are met. To avoid a break-up such as befell the *ius commune* from the late 18th century onwards, plunging continental legal systems into national isolation (which they are now trying to overcome), it is essential that common lawyers maintain and nurture a climate where one jurisdiction takes cognisance of developments in another and where intellectual exchange can thrive. In this way, modern common law systems can continue to evolve as a group, while at the same time each cultivating its own mix of case law and statute.

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[204] J. Douglas, "England as a Source of Australian Law: For How Long?" (2012) 86 A.L.J. 333 at 349–350.
[205] The hallmark of this system is the indefeasibility of registered title. As observed by Barwick C.J. in *Breskvar v Wall* (1971) 126 C.L.R. 376 at 385, it "is not a system of registration of title but a system of title by registration".
[206] Note that the adoption of the English Land Registration Act 2002 entailed a certain assimilation.

The historical European experience also shows that wholesale codification of the law is much more likely than its incremental evolution to accelerate the dissociation of a legal system from others not taking part in the same process. This is why calls for the enactment of a European Civil Code should be a matter of interest not only for English lawyers, but should command the attention of the entire common law world.